

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT
(Commercial Division)

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

IN THE MATTER OF THE PLAN OF
COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER
LIMITED, QUINTO MINING CORPORATION,
8568391 CANADA LIMITED, CLIFFS QUEBEC IRON
MINING ULC, WABUSH IRON CO. LIMITED,
WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE
LIMITED PARTNERSHIP, BLOOM LAKE
RAILWAY COMPANY LIMITED, WABUSH
MINES, ARNAUD RAILWAY COMPANY,
WABUSH LAKE RAILWAY COMPANY
LIMITED

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT, DAMIEN
LEBEL, and NEIL JOHNSON

Petitioners-Mises-en-cause

**FACTUM RE: MOTION FOR AN ORDER APPOINTING THE PETITIONERS-
MISES-EN-CAUSE AS REPRESENTATIVES OF SALARIED/NON-UNION AND
RETIRED EMPLOYEES OF THE WABUSH CCAA PARTIES,
RETURNABLE JUNE 22, 2015
(Sections 11 and 11.52 of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36 ("CCAA"))**

TO THE HONOURABLE MR. JUSTICE STEPHEN W. HAMILTON, J.S.C., OR TO ONE OF THE HONOURABLE JUDGES SITTING IN THE COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE PETITIONERS-MISES-EN-CAUSE RESPECTFULLY SUBMIT THE FOLLOWING:

PART I - OVERVIEW

1. On May 20, 2015, the Wabush CCAA Parties applied for and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. c. C-36, as amended (the "CCAA").
2. The Petitioners, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson (hereinafter referred to as the "**Representatives**") hereby request that this Honourable Court exercise its discretion under section 11 of the CCAA to appoint them to represent, in these proceedings, all salaried/non-union employees and retirees of the Wabush CCAA Parties (namely, Wabush Iron Co. Limited, Wabush Resources Inc., Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited), or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a pension, or group or class of them (collectively the "**Salaried Members**") and to appoint Koskie Minsky LLP and Nicholas Scheib as representative counsel ("**Representative Counsel**").

PART II – THE FACTS

A. The Bloom Lake CCAA Proceedings

3. On January 27, 2015, Bloom Lake General Partner Limited and certain of its affiliates (collectively, the “**Bloom Lake CCAA Parties**”) filed for and obtained protection from their creditors under the CCAA pursuant to a court order from the Québec Superior Court, Commercial Division (the “**Court**”) (the “**Bloom Lake Initial CCAA Order**”).

4. Since the Bloom Lake Initial CCAA Order, a number of steps have been taken, including the approval of a Sale and Investor Solicitation Process (the “**SISP**”) on April 17, 2015.

B. The Wabush CCAA Proceedings

5. On May 20, 2015, a motion (the “**First Day Motion**”) was brought to extend the CCAA protection granted to the Bloom Lake CCAA parties to five additional entities, including Wabush Iron Co. Limited, Wabush Resources Inc. and certain of their affiliates, including Wabush Mines JC, Amaud Railway Corporation and Wabush Lake Railway Company Limited (collectively the “**Wabush CCAA Parties**”) and together with the Bloom Lake CCAA Parties, the “**CCAA Parties**”) to facilitate the reorganization of each of their business and operations (the “**Wabush Initial CCAA Order**” ; all terms used by but not expressly defined herein have the meaning ascribed thereto in the Wabush Initial CCAA Order).

6. The Wabush CCAA Parties and Bloom Lake CCAA Parties (except Bloom Lake GP and Bloom Lake LP) are indirect wholly-owned subsidiaries of Cliffs Natural Resources Inc., a

Delaware company. The assets of the Wabush CCAA Parties are included in the SISIP that is currently being conducted.

C. The Need for the appointment of Representatives and Representative Counsel

7. The Salaried Members are, as a group, a major stakeholder in these proceedings. There are believed to be approximately 1,000 affected Salaried Members, however, the total figure remains to be confirmed. The Wabush pension plans are significantly underfunded. The Salaried Members hold statutory priority pension claims and have entitlements to other important employment and post-employment entitlements, as described further below.

8. Of immediate importance, the Company has brought motions before the court seeking suspensions of pension contributions and the termination of health benefits and supplemental pension benefits which directly impact all Salaried Members. Without a representation order, the Salaried Members will not have a voice before this court yet they are directly affected by those proposed suspensions and non-payments.

i. Employee Entitlements, Pension Plans and OPEB Benefits

9. Wabush provides various pension plans and employee and retiree plans:

(a) The Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing agent (CRA registration No. 0343558) (the “**Salaried Plan**”) is reportedly only 85% funded;

(b) The CCAA Parties currently provide other post-retirement employee benefits (“**Health Benefits**”), including life insurance and health care, to former salaried

employees hired before January 1, 2013. On a consolidated basis, the premiums required for the OPEB's of the salaried and union employees is \$182,000 a month. As of December 31, 2014, the Wabush CCAA Parties advise that the accumulated benefits obligations for post-retirement benefits ("ABO") totaled approximately \$52.1 million; and

(c) In addition, there is believed to be a group retirement savings plan (the "Group RRSP") and a supplementary retirement arrangement plan (the "SRA") for certain current and former salaried employees of Wabush Mines JV. The obligations under the SRA are approximately \$1.01 million.

10. Notwithstanding the need to ensure that the underfunding of the Salaried Plan is addressed in these proceedings and that the statutory pension priority claims are properly taken into account in any resulting Plan of Compromise or sale negotiations, there is no actual independent plan administrator currently in place. The company has admitted the conflict of interest, but no measures have been put in place to resolve the conflict and ensure that the Salaried Plan is properly managed and its beneficiaries' interests protected.

ii. Motion to Suspend Pension Amortization Payments, OPEBs and SRA benefits

11. In a letter from Wabush Mines dated May 29, 2015, members and beneficiaries of the various benefit and pension plans were informed that the Wabush CCAA Parties would be seeking the approval of this Court to terminate benefits and rights under the Benefit Plans including to suspend the following payments to the pension plans, cease paying SRA monthly benefits and cease retiree health benefit coverage:

- (a) suspension of any payment of Wabush Group of any amortization payments in respect of the Salaried Plan, which are intended to fund the current deficiency in the Salaried Plan during the CCAA proceedings;
- (b) suspension of catch-up pension amortization payments to the Salaried Plan during the CCAA proceedings; and
- (c) suspension of payment by the Wabush Group of other retirement benefits to former hourly and salaried employees of the Wabush Group, including without limitation, payments for life insurance premiums, Health Benefits, the Group RRSP and the SRA.

12. The relief sought by Wabush directly and detrimentally impacts the Non-union Employees and Retirees. The proposed suspensions directly and immediately cause losses to the Retirees, and will worsen the underfunding in the above-noted Wabush pension plans.

iii. Objection on behalf of Salaried Members

13. On June 8, 2015, Koskie Minsky LLP was contacted by a group of retirees and filed a formal objection to the motion of Wabush on behalf of the Petitioners and as proposed representatives of all Non-union Employees and Retirees across Canada of the Wabush CCAA Parties (the “**Objection**”).

14. The Objection raises concerns that the relief sought by Wabush will directly and detrimentally impact Salaried Members. Further submissions are being made with respect to the Objection and will not be further discussed in this Motion.

15. Representative Counsel also has raised concerns in its Objection with respect to how and why the company intends to continue to administer the pension plans despite it having admitted that the company is in a conflict of interest with respect to its role as a plan sponsor and administrator of the pension plans, and the remedies to address the conflict.

iv. Representation of Salaried Members is required

16. Given the direction of the proceedings, the Salaried Members, the Wabush CCAA Parties and other creditors would benefit immensely if Representative Counsel is appointed for the following reasons:

- (a) current and former employees of a debtor company are a vulnerable group and require assistance to be able to participate in the restructuring process;
- (b) Representative Counsel would provide assistance in evaluating their claims as required in a cost-efficient and timely manner; and
- (c) the Representatives and Representative Counsel representing all Salaried Members allows representation to be carried out efficiently and in a cost effective manner which will benefit the Wabush CCAA Parties and other creditors by streamlining the contact for the group.

PART III – THE ISSUES

17. The issue before this Court is the appointment of Representatives and Representative Counsel in the CCAA proceedings (collectively herein, “**Representative Counsel**”) for the Salaried Members, and the payment of legal costs of the Salaried Members.

PART IV – THE LAW

18. The CCAA Court’s authority to appoint Representatives and Representative Counsel in CCAA proceedings is clear from the broad discretionary power granted to the court in section 11 of the CCAA.¹

19. In *Nortel Networks Corporation*, Mr. Justice Morawetz (as he then was) held that representative counsel should be appointed to enable vulnerable stakeholders (in that case, employees and retirees) to meaningfully participate in CCAA proceedings that directly affect them:

[13] [I]t is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel’s insolvency

[14] I am in agreement with these general submissions.²

20. Representation Orders have been issued for employees and retirees in many CCAA proceedings across Canada, including the following:

¹ CCAA at s. 11, Schedule B. See also *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166 at para 12 [“*Nortel*”], Book of Authorities at Tab 1; *Fraser Papers Inc. (Re)*, [2009] O.J. No. 4287 at para 7 [“*Fraser Papers*”], Book of Authorities at Tab 2; *Cash Store Financial Services (Re)*, 2014 ONSC 4567 at para 12 [“*Cash Store*”], Book of Authorities at Tab 3.

² *Nortel*, *supra* note 1 at paras. 13-14 and 16, Book of Authorities at Tab 1.

- (a) *Target Canada Co.*: representative counsel was appointed for terminated employees;³
- (b) *U.S. Steel Canada Inc.*: representative counsel was appointed for non-union active and retired employees in the current CCAA proceedings, and in the 2004-2006 CCAA proceedings of Stelco (now, U.S. Steel Canada);⁴
- (c) *Nortel Networks Corp.*: representative counsel was appointed for all former employees and pensioners⁵ and on a subsequent motion, for former employees in receipt of long-term disability benefits⁶ and for continuing active employees;⁷
- (d) *Catalyst Paper Corp.*: representative counsel was appointed for pension plan members, beneficiaries, survivors and former members;⁸
- (e) *Fraser Papers Inc.*: representative counsel was appointed for former unionized members and non-unionized active and retired members;⁹
- (f) *Canwest*: representative counsel was appointed for non-union salaried employees and retirees;¹⁰
- (g) *Hollinger Canadian Publishing Holdings Co.*: representative counsel was appointed for all members and beneficiaries of the post-employment and post-retirement benefits other than registered pension plan benefits¹¹ and on a subsequent motion, for members of the pension plans;¹²
- (h) *Eaton's*: representative counsel was appointed for all former employees and retirees; and

³ [2015] O.J. No. 247 at paras. 60-61, Book of Authorities at Tab 4.

⁴ [2014] O.J. No. 5547 at 34-42, Book of Authorities at Tab 5.

⁵ *Nortel*, *supra* note 1, Book of Authorities at Tab 1.

⁶ (July 30, 2009) No. 09-CL-7950 (Ont. SCJ) Morawetz, J., unreported, Book of Authorities at Tab 6.

⁷ [2009] O.J. No. 3149, Book of Authorities at Tab 7.

⁸ [2012] B.C.J. No. 615 [*"Catalyst"*], Book of Authorities at Tab 8.

⁹ *Fraser Paper*, *supra* note 1, Book of Authorities at Tab 2.

¹⁰ [2010] O.J. No. 943 [*"Canwest"*], Book of Authorities at Tab 9.

¹¹ (December 10, 2009) No. 09-8503-00CL (Ont. SCJ), Campbell, J., unreported, Book of Authorities at Tab 10.

¹² [2010] O.J. No. 3494 at para. 5, Book of Authorities at Tab 11.

- (i) *Confederation Life*: representative counsel was appointed for all former employees and retirees.

21. In addition to employees and retirees, representative counsel has been ordered by CCAA courts for other groups of affected stakeholders:

- (a) In *Homburg Invest Inc. (Arrangement relative à)*: the Honourable Mark Schragger J.S.C. of the Quebec Superior Court (Commercial Division) (as he then was) appointed representative counsel to a group of bondholders;¹³
- (b) *Target Canada Co.*: representative counsel was appointed for pharmacists and franchisees of closed Target stores; and¹⁴
- (c) *Cash Store Financial Services*: representative counsel was appointed to all borrowers of Cash Store who entered into “payday loan” transactions in Ontario;¹⁵
- (d) *Muscletech Research and Development Inc.*: representative counsel was appointed for class action members; and¹⁶
- (e) *League Assets Corp.*: representative counsel was ordered to represent a group of investors;¹⁷

22. In *Canwest*, Madam Justice Pepall held that it is preferable for the court to issue a representation order *early* in the CCAA proceedings, both for the parties to be represented and for the benefit of the CCAA Applicants. The court added that such orders for employees and retirees should be issued despite a possibility “that the individuals in issue may be unsecured

¹³ (February 17, 2012) No. 500-11-041305-117 (QCSC), Schragger, J.S.C., unreported [*“Homburg”*], Book of Authorities at Tab 12.

¹⁴ [2015] O.J. No. 1205 at paras. 34-35 [*“Target”*], Book of Authorities at Tab 13.

¹⁵ *Cash Store*, *supra* note 1, Book of Authorities at Tab 3.

¹⁶ [2006] O.J. No. 3300 at para. 11, Book of Authorities at Tab 14.

¹⁷ [2013] B.C.J. No. 2458 at paras. 63-77, Book of Authorities at Tab 15.

creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them”:

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

[24] *In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants.* I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. *That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time.* The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. *It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.*¹⁸ [emphasis added]

¹⁸ *Canwest*, supra note 10 at paras. 23-24, Book of Authorities at Tab 9; See also *Cash Store*, supra note 1 at para. 14, Book of Authorities at Tab 3.

23. As one Canadian insolvency practitioner summarized in a recent article:

In the U.S. system, creditors' committees are commonplace. Although creditor's committees are sometimes used in Canada – and sometimes U.S. creditors' committees in ancillary U.S. proceedings are formally recognized in Canada – they are not required in the Canadian insolvency system. In that regard, one distinctive Canadian approach that has been used in a number of cases, particularly in the last 15 years, is that of a court-appointed representative counsel.¹⁹

24. In *Canwest*, Madam Justice Pepall summarized the factors considered by Canadian courts when issuing representative counsel orders in insolvency proceedings (hereinafter referred to as the “**Canwest Factors**”):

- (a) the vulnerability and resources of the group sought to be represented;
- (b) any benefit of the representation to the debtor company;
- (c) any social benefit to the companies under CCAA protection;
- (d) avoidance of multiplicity in legal retainers;
- (e) the facilitating and administration of the proceeding and efficiencies;
- (f) the balance of convenience and whether it is fair and just, including creditors of the estate;
- (g) whether representative counsel has already been appointed for those who have similar interest to the group seeking the order; and
- (h) the position of other stakeholders and the Monitor.²⁰

The *Canwest* factors are addressed below with respect to this case.

¹⁹ “The Role of Representative Counsel in Canadian Insolvency Proceedings”, Jeffrey Carhart, *National Insolvency Review*, February 2013, Vol. 30, No. 1, Book of Authorities at Tab 16.

²⁰ *Canwest*, *supra* note 10 at para. 21, Book of Authorities at Tab 9; See also *Nortel*, *supra* note 1 at paras 7, 13-15, 36, Book of Authorities at Tab 1; *Cash Store*, *supra* note 1 at para 13, Book of Authorities at Tab 3; *Fraser Papers*, *supra* note 1 at para 12, Book of Authorities at Tab 2.

a) ***The Wabush Salaried Members are a vulnerable group who need representation in the CCAA proceedings***

25. The Wabush employees and retirees who are individually located across Canada and have little means to protect their pension and benefits rights and entitlements in this complex CCAA proceeding.²¹ They are not in the same position as commercial creditors. They are a vulnerable group of creditors in the CCAA proceeding who require group representation.

26. The appointment of representative counsel will ensure that the Salaried Members receive necessary legal representation that they require to protect and advance their rights. The role of representative counsel in this CCAA proceeding will include:

- (a) informing the Salaried Members, both as a whole and with regard to each person's particular situation, of their rights and of the progress of the Wabush CCAA Parties' sale transaction pursuant to the SISP;
- (b) providing advice needed by the Salaried Members with respect to any Wabush CCAA Parties' sale transaction pursuant to the SISP;
- (c) representing the interests of Salaried Members for the purpose of all decisions which might affect their rights in the course of these CCAA proceedings and, if necessary, bring issues before the Court for resolution;
- (d) advising the Salaried Members on matters related to a plan of compromise or arrangement that may be put forward by the Wabush CCAA Parties;

²¹ *Nortel*, *supra* note 1 at paras. 13-14, Book of Authorities at Tab 1; *Fraser Papers*, *supra* note 1 at para 7, Book of Authorities at Tab 2.

- (e) assisting the Salaried Members in evaluating their claims as required. Claims of the Salaried Members will need to be valued based on actuarial assumptions and methodologies and it is likely they will require the assistance of actuarial and/or benefit experts to confirm these calculations. Most individual Salaried Members likely do not have the means to obtain and instruct such expert advice in a cost-efficient and timely manner; and
- (f) providing a reliable source of information about the CCAA process to Salaried Members and providing access to justice for the Salaried Members.

b) Representative Counsel will benefit the debtor company

27. The appointment of Representative Counsel will resolve the existing conflict of interest that the company has acknowledged. Although the company has alerted the employees and retirees of the conflict of interest, the company has not provided any resolution to the conflict.

The Wabush letter dated May 29, 2015 states:

Wabush Group's Dual Role

Wabush Group acts as both "employer" and "administrator" (or performs administrator duties) in respect of the DB Registered Pension Plans and the Group RRSP. For the time being, Wabush Group will continue to act in both capacities during the CCAA Proceedings. ***Conflicts can arise between employer and administrator responsibilities.*** The purpose of this Notice is to advise you of these potential conflicts.

We encourage you to obtain legal and/or financial advice so that you can better understand any potential impact of the CCAA Proceedings and upcoming Court heading on your legal rights.

28. The majority of the Supreme Court of Canada held in *Indalex*:²²

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. **As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected.** It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4) PBA).

29. As expressly encouraged by Wabush, the retirees sought legal counsel. The appointment of Representative Counsel will eliminate the conflict of interest by providing the Salaried Members with their own counsel to protect their interests. The appointment of Representative Counsel will thereby benefit the Wabush CCAA Parties.

30. Representative Counsel will also contribute to overall CCAA costs savings and a streamlining of the CCAA process by being the single point of contact for active and retired employees, and as such provide consistent representation for a variety of employee and retiree claims and issues in the CCAA proceeding.

c) Representative Counsel will provide a social benefit

31. The appointment of Representative Counsel provides access to justice for the Salaried Members in a complex CCAA proceeding, and thereby provides a social benefit for the company who will have its employees and retirees properly represented in its CCAA proceeding. This also enhances the integrity and public perception of the Canadian insolvency system.

²² *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [*“Indalex”*], Book of Authorities at Tab 17.

d) *The appointment of Representative Counsel will avoid a multiplicity of legal retainers*

32. Without Representative Counsel, there can be a multiplicity of retainers for Wabush employees and retirees across Canada which can lead to inconsistent positions and processes, and contribute to delay and increased cost for the company's reorganization (or liquidation) efforts. Representative Counsel will be the single point of contact for all Salaried Members and be able to prevent a multiplicity of legal retainers and the conflicts and costs that can arise from such multiple retainers.

33. With respect to the scope of the group to be represented, the Salaried Members are composed of both current and former employees and their beneficiaries who are not represented by the Union. There is a commonality of interest between these current and former employees, such that the representation of both groups (employees and retirees) by Representative Counsel is appropriate at this time.

34. In the *Nortel CCAA*, Mr. Justice Morawetz (as he then was) cited the Ontario Court of Appeal decisions in *Re Stelco Inc.* and *Re Canadian Airlines Corp.* which established the following principles applicable to assessing commonality of interest:

- i) Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
- ii) The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
- iii) The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.

- iv) In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
- v) Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
- vi) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.²³

35. Mr. Justice Morawetz held that it was appropriate for former employees and retirees of Nortel to be represented by the same representative counsel.²⁴ In this case, proposed Representative Counsel believes at this time that the active and retired members of the Salaried Members have a common interest in the CCAA Proceedings in relation to the pension and health benefits provided to them under the Wabush pension and retirement plans and/or Health Benefits and any matters pertaining to recovery, compromise of rights or entitlements to such benefits.

36. Further, the proposed process by Representative Counsel provides for notice to be sent to Salaried Members and the ability for any person to opt out if a person does not wish to be represented by Representative Counsel.

37. The proposed Representative Counsel, Koskie Minsky LLP (“KM”) has extensive experience representing employees and retirees in insolvency proceedings, for example, *Ivaco*

²³ *Nortel*, *supra* note 1 para. 62, Book of Authorities at Tab 1; citing *Stelco Inc. (Re)*, [2005] O.J. No. 4883 (ONCA) at paras 21-23, Book of Authorities at Tab 18; and *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1693 at para. 31, Book of Authorities at Tab 19; See also *Fraser Papers*, *supra* note 1 at para 11, Book of Authorities at Tab 2.

²⁴ *Nortel*, *supra* note 1 para. 62-66, Book of Authorities at Tab 1; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2529 at para 23-24, Book of Authorities at Tab 20; See also *Fraser Papers*, *supra* note 1 at para 14, Book of Authorities at Tab 2.

(representing the Quebec Pension Committee), *Smurfit Stone* (representing many Quebec retirees), *Stelco* (2004-2006) and the current CCAA proceedings of *U.S. Steel Canada Inc.*, *Air Canada*, *Nortel*, *Hollinger Canadian Publishing Holdings*, *Domgroup Ltd.*, *Catalyst Paper* (British Columbia), *Eaton's*, and *Confederate Life*. In *Nortel*, the court selected KM to represent 6,000 current employees and 11,700 former employees and beneficiaries over other competing firms. The court stated:

As to which counsel should be appointed, all firms have established their credentials. However, [Koskie Minsky LLP] is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of [Koskie Minsky LLP] is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and specialty practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.²⁵

38. In this case, the proposed Representation Order would appoint four representatives for all active and retired Salaried Members and KM together with Québec counsel Nicholas Scheib as Representative Counsel.

e) Representative Counsel would facilitate the administration of the CCAA proceeding and increase efficiency

39. Representative Counsel will facilitate the efficient administration of the company's reorganization (or liquidation) in an efficient manner and thus contain the overall costs of the CCAA proceeding.

²⁵ *Nortel*, *supra* note 1 at para. 64, Book of Authorities at Tab 1.

f) The balance of convenience favours the appointment of Representative Counsel

40. In *Dugal v. Research in Motion*, the court issued a representation order and referred to the “balance of convenience” factor described in *Police Retirees of Ontario v. Ontario Municipal Employees' Retirement Board*, a leading case on representation orders in Ontario:

...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 test, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.²⁶ [emphasis added]

41. The balance of convenience strongly favours granting a representation order in this case. As noted above, the company has acknowledged a conflict of interest with respect to the pension plan members and has encouraged the members to obtain independent legal advice. Four individual retirees have objected to proposed action by the Wabush CCAA Parties with respect to non-payment of pension contributions and Health Benefits which is an immediate urgent issue. If the Representation Order is issued, this objection will extend to all Salaried Members who are affected by the company’s motions yet do not have their voice before the court.

42. No stakeholder in the CCAA proceeding will be prejudiced by the appointment of a Representative Counsel. On the other hand, if the representation order is not granted, the conflict of interest will continue and substantial prejudice will result to the Salaried Members who will

²⁶ *Dugal v. Research in Motion*, (2007), 87 O.R. (3d) 721, para. 21, Book of Authorities at Tab 21; *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), [1997] O.J. No. 3086, para. 18, Book of Authorities at Tab 22.

not have meaningful representation in the CCAA proceeding. The balance of convenience favours the appointment of Representative Counsel.

g) *No other Representative Counsel has already been appointed*

43. No other representation order has been issued in these proceedings in respect of the Non-union Employees and Retirees.

h) *The Monitor supports the appointment of Representative Counsel*

44. In paragraph 22(a) of the Monitor's 7th Report dated June 19, 2015, the Monitor supports the appointment of Representative Counsel.

The legal costs of the Non-union Employees and Retirees should be paid by the company

45. As noted above, the appointment of representative counsel will resolve the company's acknowledged conflict of interest and also provide necessary representation for the Salaried Members in these proceedings. In these circumstances, the reasonable legal costs for representative counsel to the Salaried Members should be paid by the Wabush CCAA Parties.

46. Section 11.52(1)(c) of the CCAA contemplates that the CCAA court can issue an order declaring that all or part of the property of the debtor company is subject to a security or charge in respect of the fees and expenses of any "financial, legal or other experts" engaged by an "interested person" if the court is satisfied that the security or charge is necessary for their "effective participation in proceedings under this Act".²⁷ Section 11.52 (1)(c) states:

²⁷ CCAA at 11.52(1)(c), Schedule A. See also *Nortel*, *supra* note 1 at para. 12 and 65, Book of Authorities at Tab 1; *Canwest*, *supra* note 10 at paras. 25-27, Book of Authorities at Tab 9; *Fraser Papers*, *supra* note 1 at para. 1, Book of Authorities at Tab 2; *Catalyst*, *supra* note 9, Book of Authorities at Tab 8.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of:

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

47. In *Homburg*, Mr. Justice Schragger ordered the payment of legal costs of bondholders for whom His Honour also ordered representative counsel:²⁸

[18] In the circumstances described above there is a combination of geographic, linguistic and financial barriers impeding the bondholders from proper representation by the appropriate professionals in this CCAA file. ***Though nothing might stop individual bondholders from engaging their own counsel, this is clearly unrealistic for the most part, in the circumstances. Without funding this important group of creditors will be denied appropriate representation.*** [emphasis added]

...

[22] The advance of fees sought herein is not strictly provided on a literal reading of the CCAA. Section 11.52(1)(c) provides for the possibility of granting a security or charge over the assets of the Debtor to secure the payment of fees. The rationale is to allow the effective participation of a class of creditors that might otherwise be denied the possibility of representation when such class of creditors is a significant stakeholder³.

[23] It appears to the Court that the rationale for the payment here is the same as the underpinning of Section 11.52(1)(c). ***If the Court has the power to grant a charge to secure payment by the Debtor, surely the general jurisdiction under Section 11 allows for an order of payment*** of such amounts. This is a fortiori when the payments to be made will be advances subject to reimbursement.

[24] As stated, the circumstances described above justify the making of such an advance. The group of creditors is significant, if not the most significant group of creditors. ***Because of the factors enumerated above the group requires professional representation and it is impractical to canvass 9,500 members to contribute to a fund for the payment of the professional fees.***

[25] The jurisdiction to order the payment of fees in such circumstances has been recognized by the courts. In *Nortel*, the Court ordered the CCAA Debtor to pay the fees of the lawyer of three thousand

²⁸ *Homburg*, *supra* note 13, Book of Authorities at Tab 12.

five hundred employees. In the *ABCP Commercial Paper* case, the CCAA Debtor was ordered to pay the fees of counsel to retail purchasers of asset-backed commercial paper. Equally, in *Edgeworth6*, the Debtor was ordered to pay counsel representing four thousand Asian investors.

[26]... In the present case, it has been demonstrated to the undersigned that because of the large number of relatively small denomination of bonds held by foreign individuals, the advances for the fees of professionals appointed to represent such bondholders is essential to their effective participation in the present CCAA process.

48. In *Canwest*, the court directed the payment of costs for non-union employees despite certain contractual funding restrictions relied on by the opposing parties. The court held that fees for Representative Counsel for former salaried employees and retirees were to be paid despite those restrictions. Justice Pepall (as she then was) stated:

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

27 In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of \$25,000 may be more appropriate.

49. In ordering the appointment of Representative Counsel to pharmacists of closed Target stores, the court also ordered payment of their legal costs:²⁹

²⁹ *Target*, *supra* note 4, Book of Authorities at Tab 13.

34 [T]here would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

35 The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

36 ... The Applicants are to make available up to \$100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings.

PART V – RELIEF SOUGHT

50. The Petitioners respectfully request that this Court issue the requested Representation Order and approve the payment of legal costs of the Salaried Members by the debtors.

Montreal and Toronto, this 19th day of June, 2015



KOSKIE MINSKY LLP & NICHOLAS SCHEIB,
*Attorneys for the Petitioners-Mises-en-cause Michael
Keeper, Terence Watt, Damien Lebel and Neil Johnson*

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166.
2. *Fraser Papers Inc. (Re)*, [2009] O.J. No. 4287.
3. *Cash Store Financial Services (Re)*, 2014 ONSC 4567.
4. *Target Canada Co. (Re)*, [2015] O.J. No. 247.
5. *U.S. Steel Canada Inc. (Re)*, [2014] O.J. No. 5547.
6. *Nortel Network Corp. (Re)*, (July 30, 2009) No. 09-CL-7950 (Ont. SCJ) Morawetz, J., unreported.
7. *Nortel Network Corp. (Re)*, [2009] O.J. No. 3149.
8. *Catalyst Paper Corp. (Re)*, [2012] B.C.J. No. 615.
9. *Canwest Publishing Inc. (Re)*, [2010] O.J. No. 943.
10. *Hollinger Canadian Publishing Holdings Co. (Re)*, (December 10, 2009) No. 09-8503-00CL (Ont. SCJ), Campbell, J., unreported.
11. *Hollinger Canadian Publishing Holdings Co. (Re)*, [2010] O.J. No. 3494.
12. *Homburg Invest Inc. (Arrangement relative à)*, (February 17, 2012) No. 500-11-041305-117 (QCSC), Schrager, J.S.C., unreported.
13. *Target Canada Co. (Re)*, 2015] O.J. No. 1205.
14. *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 3300.
15. *League Assets Corp. (Re)*, [2013] B.C.J. No. 2458.
16. “The Role of Representative Counsel in Canadian Insolvency Proceedings”, Jeffrey Carhart, *National Insolvency Review*, February 2013, Vol. 30, No. 1.
17. *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271.
18. *Stelco Inc. (Re)*, [2005] O.J. No. 4883.
19. *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1693.

20. *Nortel Network Corp. (Re)*, [2009] O.J. No. 2529.
21. *Dugal v. Research in Motion*, (2007), 87 O.R. (3d) 721.
22. *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), [1997] O.J. No. 3086.

SCHEDULE "B"

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

General Power of Court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

N° / No.: 500-11-048114-157

SUPERIOR COURT
(COMMERCIAL DIVISION)

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

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING
CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING
ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.,

Petitioners

- and -

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM
LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD
RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

- and -

FTI CONSULTING CANADA INC.

Monitor

- and -

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL & NEIL JOHNSON

Petitioners-Mises-en-cause

*Factum of the Petitioners-Mises-en-cause as Representatives of
Non-Union and Retired Employees of the Wabush CCAA Parties*

M^{es} NICHOLAS SCHEIB, ANDREW HATNAY AND ARI KAPLAN

Co-Attorneys for the Petitioners-Mises-en-cause Michael Keeper, Terence
Watt, Damien Lebel and Neil Johnson

AS-0G41

Scheib Legal | Étude Légale
600 de Maisonnette O. | W., #1700
Montréal, Québec H3A 3J2
T: 514.297.2631 | F: 514.360.2790
nick@scheib.ca

Koskie Minsky LLP/ SENCRL
20 Queen O. | W., #900
Toronto, Ontario M5H3R3
T: 416-595-2083 +416-595-2087 | F: 416-204-
2872
ahatnay@kmlaw.ca | akaplan@kmlaw.ca

ORIGINAL