Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

Applicants

BOOK OF AUTHORITIES OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

(Motion Returnable February 2, 2010)

January 29, 2010

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TAB 1

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

87 O.R. (3d) 721

Ontario Superior Court of Justice (Commercial List),

C. Campbell J.

November 15, 2007

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

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

Held, the application should be granted.

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

Cases referred to

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

Other cases referred to

Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc., [2006] O.J. No. 4520, 152 A.C.W.S. (3d) 601, 2006 CarswellOnt 7072 (S.C.J.); Muscletech Research and Development Inc. (Re), [2006] O.J. No. 3300, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131 (S.C.J.); Ontario New Home

Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245, 37 C.P.C. (4th) 175 (S.C.J.); Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board (1997), 35 O.R. (3d) 177, [1997] O.J. No. 3086 (Gen. Div.); Ryan v. Ontario (Municipal Employees Retirement Board), [2006] O.J. No. 618, 29 C.P.C. (6th) 24, 51 C.C.P.B. 237 (S.C.J.)

Statutes referred to

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

Rules and regulations referred to

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

APPLICATION for a court approval of a settlement agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) RIM has agreed to pay legal fees and disbursements, inclusive of GST, to Ironworkers' counsel in the total amount of $1.09 million, and also to pay the costs of disseminating the notice of the settlement and the settlement approval hearing; and

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

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

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

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

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

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

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

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

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

[15] Two lines of cases were put forward as setting the test for shareholder approval. The first test is found in Sparling v. Southam Inc.,[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 [page726] claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement; and (viii) the court should also consider the nature of the risks involved in establishing the liability claimed.

[16] The second line adopts the test enunciated by Winkler J. (as he then was) in Ontario New Home Warranty Program v. Chevron Chemical Co.[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 . . .". [page727] Rule 10 is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [Class Proceedings Act, 1992, S.O. 1992, c. 6] order". As such, a number of Rule 10 orders have been issued since the advent of the Class Proceedings Act.[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.

Application granted. [page728]

Notes

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

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

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

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

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

TAB 2

Police Retirees of Ontario Incorporated v. Ontario Municipal Employees' Retirement Board et al. [Indexed as: Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board]

35 O.R. (3d) 177

[1997] O.J. No. 3086

Court File No. 1443/96

Ontario Court (General Division),

Kiteley J.

July 23, 1997

Civil procedure -- Representative actions -- Corporation concerned with advancement and protection of retired police officers appointed as representative of retired members of police force for purposes of bringing motion to establish entitlement of members to share in excess funds in pension fund -- Representative plaintiff not required to be natural person -- Test to be applied in considering request for representation order being not whether individual members of group can be found or ascertained but rather whether balance of convenience favours granting of representation order instead of individual service upon each member of group and individual participation in proceedings -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 10.01(1)(f).

The Police Retirees of Ontario Inc. ("PRO") was a corporation which was primarily concerned with the advancement and protection of retired police personnel. In an action to determine whether certain police retirees were entitled to a share in excess funds in a pension fund, PRO sought a representation order under rule 10.01(1)(f) of the Rules of Civil Procedure authorizing it to represent the police retirees.

Held, the motion should be granted.

There is no compelling reason why a corporation, as opposed to a natural person, cannot be granted a representation order.

While the Ontario Municipal Employees' Retirement Board ("OMERS Board") could create a list of all retirees potentially affected by the action, so that the proposed class constituted a group which could readily be ascertained, found or served, 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. To require that an individual police retiree assume financial responsibility for all of the police retirees for the purpose of resolving the issue of entitlement would impose a prohibitive burden. OMERS was in favour of granting the representation order. The issue was an important one which OMERS wished to have determined as quickly and efficiently as possible. There was no evidence to suggest that individual

members would experience inconvenience in the event that a representation order was granted. The balance of convenience favoured the issuance of a representation order and it was in the interests of justice to make the order. PRO was appointed as representative of the affected retirees for the purpose of bringing a motion to establish entitlement only.

Bathgate v. National Hockey League Pension Society, Ont. Gen. Div., No. RE 785/91, June 26, 1991 (unreported); Bruce (Township) v. Thornburn (1986), 57 O.R. (2d) 77, 17 O.A.C. 127 (Div. Ct.); Qit-Fer et Titane Inc. v. Dorr-Oliver Canada Ltd., Ont. Gen. Div., Cameron J., No. B177/96, January 9, 1997; Toronto Fire Department Pensioners' Assn. v. Fitzsimmons (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.), consd

Other cases referred to

Hardy v. Clancy, [1993] O.J. No. 1737 (Gen. Div.)

Statutes referred to

Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O.20
Pension Benefits Act, R.S.O. 1990, c. P.8

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 10.01, 12, 22

MOTION for a representation order.

Donna E. Campbell, for plaintiff.
David Stamp, for defendant, Ontario Municipal Employees' Retirement Board.
Steven L. Moate, for defendant, Waterloo Regional Police Services Board.
Martin J. Doane, for defendants, Waterloo Regional Police Association and Waterloo Regional Senior Officers' Association.

KITELEY J.: -- 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, R.R.O. 1990, Reg. 194.

Factual Background

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.

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.

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 ten 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.

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 (i.e., employer contribution holidays).

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.

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

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.

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

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

> 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.
>
> (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.

(Emphasis added)

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

In para. 15 of her factum, counsel for the plaintiff identified five possible subclasses within the class of retirees. Suffice it to say that not all those subclasses 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.

As indicated below, counsel for the Police Associations raise the conflict between and among the

subclasses. I agree with the plaintiff and OMERS that the issue of conflict between and among the subclasses 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 subclasses need not be considered. If the court does find entitlement, the potential for conflict between the subclasses will need to be addressed.

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

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.

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 at p. 301 (Ont. Gen. Div.), 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

The onus is on the plaintiff to satisfy the court that this is a proper case for a representation order: see Hardy v. Clancy, [1993] O.J. No. 1737 (Gen. Div.), per McNeely J.

The wording of rule 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 rule 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. National Hockey League Pension Society (June 26, 1991), Toronto RE 785/91 (Ont. Gen. Div.), 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.

Similarly, in Qit-Fer et Titane Inc. v. Dorr-Oliver Canada Ltd. (January 9, 1997), Toronto B177/96 (Ont. Gen. Div.), 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.

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 analyzing 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 rule 10.01(f) of the Rules of Civil Procedure

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, 17 O.A.C. 127 (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.

Similarly, in Toronto Fire Department Pensioners' Assn. v. Fitzsimmons, supra, 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

In contrast to the proposed representative plaintiffs in Township of Bruce, 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 6,000

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 while local retirees' associations pay fees of $25. 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.

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.

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.

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 its mandate. It is respected and consulted by OMERS.

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.

I do not accept the submission that since P.R.O. earns 95 per cent of its revenue from running circuses for children, 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 its solvency.

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.

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.

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.

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 is 70 of the P.R.O. members) to recover the benefits.

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 subclasses summarized at para. 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.

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 bases upon which OMERS supports the request are summarized in para. 31 of its factum.

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.

(6) Conclusion

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 paras. 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 subclasses in para. 15 while Mr. Doane opposed others. If I circumscribed the time frame, I would indirectly restrict the subclasses. I am confident that counsel will be able to agree on which of the subclasses are unaffected by such conflict. If they are unable to agree, I will hear further submissions.

Security for Costs

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, 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

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.

TAB 3

Indexed as:

Ontario (Director, Mortgage Brokers Act) v. Coulter

IN THE MATTER OF The Trustee Act R.S.O. 1980 c. 512
AND IN THE MATTER OF the receivership of 433616 Ontario Inc., Kiminco Acceptance Company Ltd. and Coulter Financial Corporation
AND IN THE MATTER OF ss. 26 and 30 of the Mortgage Brokers Act R.S.O. 1980 c. 295
Between
Bernard Webber, the Director under the Mortgage Brokers Act, Applicant, and
Glen Coulter, Diane Coulter, Coulter Investments Services Limited, G.L.C. Investments Corporation, Coulter Realty Corporation, Kirkfield Fundings Corporation, Stone Fence Investments Limited, 760592 Ontario Inc., Jorkim Investments Limited, Orleans (Pine Ridge) Promotion Inc., 675951 Ontario Limited, 670685 Ontario Inc. 743150 Ontario Limited, 724530 Ontario Limited, Gate Development Corporation, Colonade Financing Company Limited, Carson Plaza Corporation, 659967 Ontario Limited, Pond Street Holdings Inc., 608560 Ontario Limited, Accurate Tax Planning Inc., Respondents

[1990] O.J. No. 1334

Action Nos. 13801/89 and 13794/89

Ontario Supreme Court - High Court of Justice
Toronto, Ontario

Chadwick J.

July 24, 1990

Barristers and solicitors -- Compensation -- Taxation or assessment of accounts -- Receivers -- Accounts -- Approval of -- Compensation -- Measure of.

Assessment of fees and disbursements of receivers, trustees and solicitors in respect of the receivership and bankruptcy of the Coulter group of companies. Liquidation and distribution were accomplished in about four months by several firms working in a team approach.

Held: The court concluded that the total billings and hourly rates charged by Thorne Ernst & Whinney and Ginsberg, Gingras & Associates were reasonable and realistic in the ordinary commercial context. In considering requests for variation, the court noted the expertise and achievement involved in bringing a complex and chaotic situation under control in four months. As the accountants involved had recovered 100 per cent of time docketed, the court concluded that they had accomplished what was

expected of them as professionals. Variation, which would be at the investors' expense, was therefore not approved. The accounts of Osler Hoskin, Scott & Aylen, Nelligan Power and Pearl & Radnoff were approved with some deductions. Application for premium was dismissed. Soloway Wright's team approach led to a certain amount of duplication and the court arbitrarily reduced the number of hours docketed by 25 per cent and the hourly rate of one of the solicitors from $250 to $225. Variance was not approved for this account.

Statutes, Regulations and Rules Considered:

Ontario Rules of Civil Procedure, Rule 58.

Hyman Soloway, Q.C., Lawrence Soloway, B. Gerald Morin, Q.C., on behalf of the trustee, Thorne Ernst Whinney Inc.
H. Barry Starr, Q.C., and Donald P. Rasmussen, on behalf of the receiver, Thorne Ernst Whinney Inc.
Peter Genzel, on behalf of Thorne Ernst Whinney Inc. and Ginsberg, Gingras & Associates, co-trustees of the Estate of Glen Leslie Coulter.
Kenneth L.W. Boland, on behalf of Coopers & Lybrand, Receiver.
W. Houston, on behalf of a group of investors.
John J. Cardill, appointed by the Court.
Stephen Victor, Q.C., on behalf of a group of investors.

CHADWICK J.:-- This is an assessment of the professional fees and disbursements of the receivers and trustees, as well as the solicitors acting on behalf of the receivers and trustees. Also included are solicitors acting on behalf of the investors and specific groups of investors. Application heard on February 7th and 8th, 1990.

BACKGROUND

Glen Coulter was the principal shareholder and founder of most of the companies referred to in the style of cause.

In 1975 after a career in banking, Glen Coulter set up a mortgage brokerage business under the name of Kiminco Acceptance Co. Ltd. The business was successful primarily due to the energetic approach of Glen Coulter in providing quick mortgage approvals and easy accessibility by lenders and borrowers. The mortgage brokerage business developed into a company known as Coulter Financial Corporation which by 1987 was placing approximately 5,800 mortgages per year with a value of $480,000,000.

Coulter's operations broadened from that of a mortgage broker to the establishment of Kiminco Acceptance Co. Ltd. which was essentially mortgage placing and administration. It received funds from investors and placed them in mortgages, earning a fee on the spread between the interest received from the mortgagors and interest paid to the mortgagees. At the time of this application, Kiminco was administering over 1,300 mortgages representing approximately $76,000,000.

Coulter Financial Corporation provided Kiminco Acceptance Co. Ltd. with a steady supply of mortgages in which to place investors' funds and Kiminco Acceptance provided a service to the brokers with a convenient way of funding clients, particularly those seeking second mortgages above the limits of traditional lenders.

Coulter Investment Services was established in 1979 to place investments in GIC's and RRSP's. It

advertised and promoted itself as being able to obtain the best rates possible for the investors.

Glen Coulter also established a series of companies, which are referred to in the style of cause, to handle a variety of real estate or investment projects in which he or his family members were participants. They were established to limit liability to other partners in the project. Four of these companies were later merged to form Coulter Realty Corporation which holds a number of real estate investments, but many others continued to operate as before.

In 1984, the Coulter group of companies acquired head offices at O'Connor and Somerset Streets in the City of Ottawa and also established branch offices in the Ottawa region and later on in other parts of Ontario.

The year 1986 was the best year of operation for the Coulter group with profits in excess of $4,000,000. In part, these results came from the increasing significance of real estate development projects, and large commercial loan placements producing large brokerage and administration fees. However, in 1987, the company started to realize significant losses on some of these large loans and development projects and in 1988, the group as a whole, lost money.

By the spring of 1989, the company's cash flow problem had increased but notwithstanding that, the company continued to pay its investors interest on non-performing mortgages.

The Canadian Imperial Bank of Commerce was the major lender to the Coulter group and pursuant to their security documentation, they intervened in the early part of July, 1989 by the appointment of a receiver.

The receiver was unable to effectively control the companies under the security agreement and application was made to the court on the 17th of July, 1989 for the appointment of Thorne Ernst & Whinney as receiver/manager of 433616 Ontario Inc., Kiminco Acceptance Company Limited, and Coulter Financial Corporation.

At the same time the Ministry of Financial Institutions pursuant to the Mortgage Brokers Act R.S.O. 1980 c. 295 issued a "freeze order" with reference to these companies. In addition, they initiated an investigation of Coulter Financial Corporation and Kiminco Acceptance and other related companies and persons.

A further order was made on the 21st of July, 1989 appointing Thorne Ernst & Whinney as trustees of 433616, Coulter Financial Corporation, and Kiminco Acceptance under the Trustee Act R.S.O. 1980 c. 512.

The original order of July 17, 1989 was varied to allow the processing of mortgage discharges and to direct that all monies owing to Kiminco Acceptance and Coulter Financial Corporation be provided directly to the receiver.

The law firm of Scott & Aylen was appointed to represent the general interests of all of the more than 1,400 investors.

The purpose of appointing Scott & Aylen to represent the general interests of all investors was to avoid multiplicity of representations on behalf of the numerous investors and groups of investors. At the time of the appointment of Scott & Aylen, I warned all of the parties that I wanted some control over the legal fees and disbursements and that I was not going to appoint numerous solicitors to represent investors or groups with costs being paid out of the estate or assets.

In their report dated August 8, 1989, Thorne Ernst & Whinney Inc., trustees, summarized the reasons for failure of Kiminco Acceptance Company as follows:

1. Payments were made to investors which they were not entitled to receive under their contract with Kiminco Acceptance Company Limited.
2. Mortgage renewals did not always reflect current rates. Investors were always paid current rates.
3. Delay in placing or advancing mortgages after commitment made resulted in several situations where the spread between the investors' rates and mortgagors' rates deteriorated.
4. Several large loans were made to land developers who agreed to pay significant brokerage and administration fees but had no apparent equity in the project. The majority of the cost's of the project, including these fees were financed by Kiminco.
5. There appears to have been inadequate management supervision of large construction or development loans.
6. The company often may have failed to recognize collection problems early enough to recover investment funds.
7. In addition, business orientation - Coulter ran a successful, profitable business for a decade based on finding home buyers and small investors' financing for the real estate purchases, and taking relatively small sums from investors and placing them in small, high ratio loans on homes and small investment properties. Problems commenced when the companies; (a) started lending large amounts on individual loans; (b) started providing interim financing for construction projects; (c) started collecting disportionate fees for the placement of loans. These fees provided a strong incentive for brokers, and for Mr. Coulter to ignore or discount the risk element and in particular deals to the investors whose moneys were the source of funding.
8. Management style - The Coulter operation was a hands-on, centrally controlled organization, with all key decisions made by Glen Coulter. The diversification and expansion into so many deals and so many businesses outgrew the style, and no effective control or delegation of authority was implemented to help the organization to cope.
9. The Coulters Group accounting and reporting system, and the way transactions were recorded, did not provide an accurate record of the various businesses. The lack of an accrual system for interest receivable at Kiminco and the treatment of fees income are central issues. The treatment of mortgage maintenance expenses (creating an asset in Coulter Financial Corporation and not recording the cost in Kiminco records) and the lack of time and recording of a bad debt allowance were other situations where the statement of each entity were inaccurate.
10. The failure to have an independent loan review/approval system at Kiminco meant that brokers within the Coulter Group, who stood to make money if a loan was placed, seemed to have had far more input to loan decisions than the loan administration/collection people at Kiminco. Offering brokerage fees to selected Kiminco employees may have limited an objective review of mortgage applications.
11. The opening of too many offices over a short period, when the company's resources were being strained by the commercial loans and development losses contributed to the cash flow shortfall.

During the period July 17 to July 20, 1989, Thorne Ernst Whinney as receiver/manager of Kiminco took over the operation of the company and secured the premises, keeping key employees and attempting to maintain operations.

On the 21st of July, 1989, the trustee assumed control of the operations of Kiminco.

At the same time Coopers & Lybrand Limited, monitors pursuant to the provisions of the Mortgage Brokers Act R.S.O. 1980 c. 295 had identified the various corporate structures which are summarized in the first report to the court as follows:

[See paper copy for illustration]

At the same time Coopers & Lybrand were attempting to identify and trace the various assets.

Coulter had various ownership arrangements which were as follows:

(a) a direct 100% ownership in specific real property;

(b) a percentage ownership with third parties in real property;

(c) co-tenancy arrangements;

(d) limited partnership units;

(e) undivided interests in real property;

(f) divided interests in real property.

The law firm of Soloway Wright was retained by the trustees to act on their behalf.

The law firm of Rasmussen & Starr was retained by the receiver/manager to act on their behalf.

The law firm of Osler Harcourt was retained by the director of the Mortgage Brokers Act on behalf of Coopers & Lybrand.

At the time of the initial appointments on July 17, 1989 and throughout the fall, the various parties attempted to wind up the operations of the company and to identify assets, mortgages and other interests.

There were numerous applications to the court along with reports filed by the various parties outlining the status and progress to date.

With over 1,400 investors, some of them small investors, a great deal of communication was required between the trustees and receivers with these investors. A number of investors had their life savings invested with Coulter and were demanding to know the status of the operation.

It also became obvious that there was going to be a dispute relating to the priority of investors between the note holders, those holding valid mortgages and those holding mortgages which were in default.

In addition there were a number of claims and cross-claims between the various companies, individuals and other related companies. There was also an allegation that the director of the Mortgage

Brokers Act had failed to carry out his duties and responsibilties as required by the statute. As a result, leave was granted to commence action against the Ministry of Financial Institutions of the Province of Ontario.

In addition to the numerous court attendances, the parties and their legal counsels were meeting on a regular and extensive basis in attempting to resolve the potential conflicts which were developing.

The parties and their counsel were also attempting to work out a proposed distribution scheme which would resolve all of these conflicts without the necessity of litigation.

It was recognized very early that if a consensus could not be reached amongst all the parties, protracted litigation could seriously deplete the assets of the estate and companies.

The structure and inter-relationship between the various companies and individuals was precarious. One could easily describe it as a "house of cards" wherein if one of the cards was removed, then the whole house would collapse.

As a result of the conflict which arose between the various groups of investors, Fraser & Beatty was appointed to act on behalf of one group of investors and Nelligan/Power on behalf of another. The balance of the investors were represented by Scott & Aylen.

After numerous meetings, a proposed distribution scheme was prepared and mailed to the 1,474 investors. Included in the proposed scheme was a detailed explanation along with recommendations for approval and a ballot to be completed by the investors. As of December 4, 1989, 1,467 of the investors had returned their ballots voting in favour of a compromised distribution scheme and cross-claim resolution plan. This represented 99.5% of the mortgage investors holding 99.84% of the total mortgage portfolio.

At the time of the hearing on December 6, 1989, in order to approve the compromised distribution scheme, the trustees had received 1,474 affirmative votes from the investors and there were three abstainers who held a total investment of $66,500. Of these three investors, one could not be located and two had abstained.

The summary of the compromised distribution scheme and cross-claims resolution plan which was sent to all investors and subsequently approved by the court was as follows:

SUMMARY
OF THE COMPROMISE DISTRIBUTION SCHEME
AND
CROSS-CLAIMS RESOLUTION PLAN

I. Compromise Distribution Scheme

1. All components of the Compromise Distribution Scheme are set out in the attached Chart.

2. The Trustee considered both specific distribution and pooling and found both deficient. It developed the Compromise Distribution Scheme, which combines elements of both.

3. Investors will receive 80% of all monies collected under their mortgages, after a holdback of 6.5% for costs. This is a modified form of specific distribution.

4. The other 20% of the mortgage proceeds after costs will be paid quarterly to investors in

proportion to the unrecovered amount of their investments. This represents a modified form of pooling.

5. In distributing mortgage proceeds, no investor will be paid more than 85.5% of his principal until all investors receive 85.5% of their principal. This 85.5% limit is calculated after deduction of costs and excludes interest payments made to investors after December 31, 1989.

6. As monies are received from sources other than mortgage proceeds, such as the contribution from the Province of Ontario and payments under the Cross-Claims Resolution Plan, these monies will first be used to bring the lowest level of recovery by investors of their principal to 75%. These funds will then be distributed rateably until investors with good mortgages have recovered 90% of their principal. Any remaining funds will be used to bring the level of principal recovery of all other investors up to 90%, if possible.

7. The Province of Ontario has agreed to contribute $1,500,000.00 to the cost of the trusteeship. This will be used to ensure that investors with the poorest mortgages recover at least 75% of their principal. Investors with good mortgages can expect 85% to 90% of their principal and will be paid approximately 75% of their interest. The government's contribution is a term of the Compromise Distribution Scheme.

II Cross-Claims Resolution Plan

1. "Cross-Claims" refers to the lawsuits which might arise between mortgage investors and creditors of Kiminco Acceptance Co. Ltd. ("Kiminco"), Coulter Financial Corporation ("CFC"), GLC Investment Corporation ("GLCI") and Glen Coulter.

2. There are numerous cross-claims involving substantial amounts of money. The Trustee had 2 main objectives. On the one hand, it claimed damages for mortgage investors against Kiminco, CFC and Glen Coulter. On the other hand, it resisted claims of the GLCI promissory noteholders and of the Receiver of Kiminco and CFC to share in the mortgage proceeds.

3. With certain exceptions, the Resolution Plan eliminates all cross-claims. There will be no claims between the mortgage investors and Kiminco or CFC. The total amount of money which the Trustee will recover from Kiminco and CFC is expected to be approximately $1,500,000.00.

4. All claims between the GLCI noteholders and mortgage investors will be resolved by applying certain assets to be received from Diane Coulter and other family members to ensure the GLCI noteholders recover 75% of their principal. The assets contributed by Diane Coulter and other family members, after GLCI noteholders recover that 75% of principal, will then be used to ensure that mortgage investors recover at least 75% of their principal. Any balance will be distributed rateably between noteholders and mortgage investors.

5. The Trustee will assert a claim in Glen Coulter's bankruptcy on behalf of all mortgage investors for damages arising from breach of trust. This claim has not been resolved and may require legal proceedings.

6. There are 2 other claims which may require legal proceedings. Glen Coulter was one of the

3 co-guarantors of the debt of the Coulter companies to the Canadian Imperial Bank of Commerce. The Trustee seeks a contribution of one-third of that debt from the bankrupt estate. This has been resisted. Shareholders of Ottawa Mortgage Investment Corporation may bring a claim against Glen Coulter in bankruptcy for their damages arising from breach of trust.

7. Litigation between investors or between investors and classes of creditors in insolvencies of this nature typically require 3 to 5 years for resolution. The Cross-Claims Resolution Plan is an attempt to eliminate the costs, delay and uncertainty associated with litigation.

[See paper copy for illustration]

As I had been designated by Chief Justice Parker to hear all of the motions involving this matter, I also agreed to assess all of the accounts and disbursements of the various trustees, receivers, managers, monitors, and solicitors.

The various parties prepared detailed and itemized accounts prior to the hearing on February 7th and 8th, 1990.

In order to assist the court in the assessment of these accounts, I appointed John Cardill, Barrister and Solicitor, to review all of the solicitors' accounts and disbursements and to make recommendations to the court regarding the hourly rates and the propriety of the various accounts.

In conjunction with Mr. Cardill's appointment, I also appointed Joseph Bones, senior partner of Ward Mallette in Ottawa, and former president of the Institute of Chartered Accountants for Ontario. Mr. Bones' mandate was to review the accounts of the chartered accountants and to make recommendations to the court regarding their hourly rates and the propriety of their accounts.

GENERAL PRINCIPLES

There are some general principles relating to assessment of solicitor accounts which have equal application to the assessment of the trustee receiver/manager accounts.

As all professional fees are being paid from the assets of the various companies including the spread which represents investors' monies, the court must be extremely vigilant and cautious in approving the various accounts.

In the very early stages of the application for the appointment of receiver/manager and appointment of counsel, I expressed my concern that I did not want numerous fees generated at the expense of the investors.

In assessing various accounts, I have applied a quantum merit approach looking at both the hourly rates charged for various professionals as well as the time input and the nature of the work performed.

I rejected a suggestion that the trustee/receiver/manager's account should be assessed on a percentage of assets. I found this to be unrealistic and to have no bearing whatsoever upon the amount of work performed.

I advised all parties that I would apply the principles set out in Re Solicitors 1968 1 O.R. 45 and now incorporated into the Rules of Civil Procedure.

I have also applied a modified version of Re Solicitor in dealing with the trustee/receiver/manager

accounts.

It has been recognized, not only by the professionals who had a personal involvement in these proceedings, but also by the investors and the public, that these matters were handled in a very expeditious and professional manner. This resulted in a very successful conclusion in relation to distribution to the investors.

Considering the magnitude of the assets, the number of investors and the state of turmoil that the business operations were in, a great deal of credit must be given to the professionals and their staff who managed to bring about this result.

Arriving at a distribution and cross-claim resolution by the end of November of 1989, some four months after the first orders, is an incredible achievement.

Counsel on behalf of some of the chartered accounting firms and solicitors have requested that their firms be allowed an upward variance over and above their assessed accounts to recognize the achievement in bringing this matter to a successful conclusion.

In dealing with their application for a variance, I have taken into consideration all of these factors and have applied the principles in Re Solicitor where applicable.

APPLICATION FOR PAYMENT OF ACCOUNTS

In the first proceedings in late July and early August of 1989, it became apparent as a result of the various interested parties, that many of these parties would wish to have their various interests represented by counsel. As would be expected, all of the counsel would wish to be paid from the assets of the estate.

As a result of my concern for the depletion of the assets in legal fees and administration fees and also recognizing that numerous counsel representing various interests could result in prolonged litigation, I was reluctant to appoint counsel.

Initially, the law firm of Scott & Aylen was appointed to represent all of the investors. It became obvious that within the group of investors there was a conflict between those investors who held good and valid mortgages and those investors who held mortgages in default and those investors who held promissory notes. In addition to that, there were also large groups of investors who had various arrangements with Coulter and his companies.

Some counsel appeared on behalf of selected groups of investors and made representations to the court and assisted in resolving the comprised distribution scheme.

Some of these have not requested payment of their accounts and have looked directly to their investor clients for compensation.

As the conflict widened between the various groups of investors, it was necessary to appoint other counsel to represent these interests. William Houston was appointed to represent one group and John Nelligan another group.

Stephen Victor represented a group of some 45 investors and made representations on their behalf during the many motions and also took an active part in representing their interests as it related to the general distribution scheme.

Mr. Victor incurred 62 hours of time in acting for his clients in these matters and is seeking compensation from the estate for 32 hours or $18,500.

I am unable to say whether the interests of Mr. Victor's clients could have been adequately represented by either Scott & Aylen, William Houston or John Nelligan and that is not really the issue. The fact is that these investors wished Mr. Victor to represent their interests and to make representations on their behalf.

I have not changed my initial view and as a result, I am not prepared to approve the payment of Mr. Victor's account from the assets notwithstanding that I recognize the valuable contribution Mr. Victor made on behalf of his clients in resolving these matters.

Mr. Houston, on behalf of the group of investors which held good and valid mortgages appeared in the proceedings in August of 1989. At that time, he brought forward a number of motions which, after hearing submissions, I adjourned despite his objection. The purpose of adjourning the motions was to give all of the counsel and parties time to deal with Mr. Houston's concerns and to see if they could be resolved without the necessity of proceeding with the motions. The effect of proceeding with the motions could have been disastrous on the final resolution of the compromised distribution scheme and, in fact, would have placed other companies in bankruptcy and started the process of protracted litigation dealing with priorities.

On September 22, 1989, I appointed Mr. Houston to represent this group of investors and recognized that his accounts would be paid from November, 1989.

Mr. Houston has brought an application for me to recognize his involvement from August of 1989 and to allow his accounts to be assessed from that period forward rather than from November.

Under the circumstances in this case, and considering the fact that the group that he represented was a very distinct group and could not be represented properly by Scott & Aylen, I am prepared to allow his request and to authorize payment of his accounts from August, 1989.

HOURLY RATES

The hourly rate charged by the professionals varied both as to the amounts charged and how the hourly rate was arrived at. More will be said about the hourly rates as I deal with the various accounts.

BILLABLE HOURS

Both Mr. Cardill and Mr. Bones reviewed all of the accounts to check as to duplication of billable hours. As a result of meetings of the various parties, any areas where there was duplication were removed by the firms prior to their presentation of the final accounts for approval.

In considering the billable hours submitted by all of the professionals, one has to be cognizant of the methods used to arrive at billable hours.

In this modern day of commercialism which has affected both the chartered accounting and the legal profession, there is pressure placed on both employed professionals and partners to maintain a certain number of billable hours per year.

Ten years ago, in the legal profession, 1000 to 1200 billable hours was considered to be acceptable.

At this point in time, some firms expect their employed solicitors and partners to bill in excess of 2500 billable hours.

Chartered accounting firms also have similar pressures placed upon them.

There are only a few ways in which professionals can achieve these high billable hours. One is by working night and day seven days a week. The other method used is known as "power billing" which reduces the number of minutes in an hour so that a person bills on a unit basis rather than on a basis of time for a task performed.

Because the person is a professional, there is a certain trust which must be maintained by the client in relation to the recording of time by the professional.

It is extremely difficult, especially in a case such as this, to go through each and every task performed by the professional to ascertain whether, in fact, the time charged actually represents the time input. One has to accept that it does in absence of evidence to the contrary.

Thorne, Ernst & Whinney Inc.,
Trustees of Kiminco Acceptance Company Limited

Remuneration

In addition to the viva voce evidence given by Brian P. Doyle, chartered accountant and executive vice president of the applicant, Thorne, Ernst & Whinney Inc., there was also filed affidavit material by Mr. Doyle and by David A. Nicol, chartered accountant and senior manager of Thorne, Ernst & Whinney Inc.

Both the oral evidence and the affidavit material addressed the breakdown of personnel and time spent in relation to the Kiminco Acceptance Company Limited receivership and their duties as trustees.

The material accounts on an hourly basis for all key personnel employed by the firm of Thorne, Ernst & Whinney along with their hourly rates charged on this matter.

In addition, the affidavit material reiterates the numerous tasks performed by the staff and partners and also a number of the difficulties encountered by them in carrying out their duties and responsibilities.

Hours

The total hours expended by members of the firm amounted to 9,152.2 hours and is broken down in the affidavit material.

The hours worked have been scrutinized by Mr. Cardill and Mr. Bones and there is really no evidence to challenge the time as set forth in the documentation.

All employees and partners appear to have kept a very accurate record of not only the time spent on the assignment but also the functions performed.

On that basis there is no challenge to the hours as set forth in the affidavit material and confirmed by the evidence.

Hourly Rates

The hourly rates for various partners and employees of Thorne, Ernst & Whinney Inc. have been broken down into the following categories: partners $247; senior managers $165; managers $98; technicians $47.

The secretarial staff is absorbed in the hourly rates of the various categories.

Mr. Doyle in his evidence sets out that the hourly rates are rates established by Thorne, Ernst & Whinney Inc. on an annual basis. These rates are competitive with the top six chartered accounting firms carrying on practice in the Regional Municipality of Ottawa-Carleton.

Bernard R. Wilson, F.C.A., the national managing partner of Price Waterhouse also confirmed that the rates charged by Thorne, Ernst & Whinney were in the competitive area charged by the other large chartered accounting firms in this region.

Unlike law firms. the chartered accounting firms' partners all charge at a fixed rate depending upon their status in the partnership as opposed to the number of years that they have carried on practice.

I am satisfied from the evidence that the hourly rates charged by the firm are reasonable and competitive.

In the early stages of the proceedings, I questioned whether the rates charged on this assignment would have been the same if it had been open to competitive bidding such as providing services to the federal government.

I was advised during the course of the hearing that the firms do compete with each other at a lower rate than their normal hourly rates on specific assignments with the federal government and other public bodies.

In order for these rates to be charged at a lower rate, it requires the utilization of staff at a period when they are not busy on other assignments.

Because of the magnitude and complexity of this file, it was apparent and also admitted by all those involved in this matter that only one of the large six accounting firms could have carried out this assignment.

The rates charged for this assignment are the normal rates charged by the firm to their clients. They have not been varied upward or downward for this particular assignment.

During the evidence of Mr. Doyle, he was cross-examined as to whether these rates did in effect represent a recovery rate by the firm.

In other words, although the firm may charge $247 an hour for a partner's work, what in effect was the net recovery at the end of the year.

Mr. Doyle in addressing this question indicated that in the last 18 months their recovery rate was in excess of 92% of their standard billing and that with reference to the insolvency practice in 1989 that the recovery rate was 98%.

From this evidence one would conclude that the hourly rate charged is in fact a realistic rate.

I know that some of the 1,400 investors will be shocked and amazed at the hourly rates charged by the chartered accounting firms and by the legal firms.

When one considers the current overhead cost needed in order to operate and maintain firms of this magnitude, then the hourly rates do not stand out as being extraordinary in such commercial matters.

The hourly rate here also reflects the training and ability of the chartered accountants and their staff to carry out the tasks which were accomplished in this assignment. The hourly rate must reflect their training, education and expertise in the area. Having said that, I would approve the hourly rates as indicated above.

The total account for the Kiminco trusteeship is $1,087,575.

As a result of review by Mr. Cardill and Mr. Bones regarding duplication and other matters, it was agreed that that amount would be reduced by $29,106 leaving a net rate of $1,058,469.

The applicants, Thorne, Ernst & Whinney Inc., also seek a variation or upward adjustment of their account by $108,000 to reflect the accomplishments in this file.

I will deal with the variation application on the completion of all of their accounts.

Thorne, Ernst & Whinney Inc. - Receivers/Managers of Kiminco Acceptance Company Limited

The applicant, Thorne, Ernst & Whinney Inc., were originally appointed as receivers/managers of Kiminco Acceptance Company Limited. However, because of the problems which developed, they were shortly thereafter appointed as trustees of Kiminco as well.

This dual relationship allowed them to carry out their court appointment in a much more efficient and organized fashion.

The fact that they were both receivers/managers and trustees also made the whole administration much more efficient and avoided duplication by having another firm appointed in that capacity.

The receivers/managers' duties were primarily carried out by David A. Nicol, the senior manager with Thorne, Ernst & Whinney Inc. and dealt with the administration of approximately $9,000,000 of Kiminco assets.

In carrying out their duties and services, they had to perform a number of various functions in locating and administering assets.

Hours

In carrying out their appointment, they expended 822.5 hours. These hours were calculated and maintained in a similar fashion to the hours relating to the trustee's operation.

A review of the backup documentation outlines the duty and responsibility carried out by the various partners and employees of the applicant company.

There is no evidence to challenge these hours. It would appear from the records filed that they are reasonable under the circumstances.

Remuneration

The hourly rates set forth by the receiver/manager are as follows: partners $241; senior managers $183; managers $94; technicians $65.

This averages out to an hourly rate of $116 per hour. This can be compared and if one compares it to the trustee's accounts, whose average hourly rate is $119.

The same principle or breakdown of hourly rates applies to the receiver/manager as well as the trustee.

Under the circumstances, these hourly rates appear to be reasonable.

Total Account

The total account for the receiver/manager is $95,200. As a result of meetings with Mr. Cardill and Mr. Bones, this account has been reduced by $2,548 leaving a net account of $92,652 of which I approve.

Under this portion of the assignment, they also seek a variation of $9,500 which I will deal with at the conclusion.

Thorne, Ernst & Whinney Inc.,
Receiver/Manager of Coulter Financial Corporation

The applicants were also appointed as receiver/manager of Coulter Financial Corporation which had approximately $4,000,000 of assets.

David A. Nicol carried out the duties and responsibilities on behalf of Thorne, Ernst & Whinney Inc. as receiver/manager. In addition, the applicants kept separate time and docket recordings relating to these functions in order to separate them from the receiver/manager responsibility of Kiminco.

They carried out various functions as set forth in the affidavit material as well as an administration of Coulter Financial Corporation and indemnification of assets.

Hours

The total hours expended by the firm on this portion of the assignment was 2,952.2 hours.

Once again a review of the supporting documentation confirms the type of work carried out by the partners and employees and this appears to be reasonable.

Remuneration

The hourly rates for the personnel involved in this administration was as follows: partners $221; senior managers $180; managers $92; technicians $48.

The average hourly rate is $106 as compared to $116 for the receiver/manager's function in Kiminco and $119 for the trustee's duties relating to Kiminco.

My comments with reference to the hourly rates that I have already referred to apply equally to this account.

Total Account

The total account amounts to $311,857 and after a review by Mr. Cardill and Mr. Bones, it has been reduced on agreement by $8,346 leaving a net account of $303,511 of which I approve.

Likewise there is an application for variation here seeking variation in the amount of $31,000 which I will deal with at the conclusion.

Thorne, Ernst & Whinney Inc.,
Trustee in Bankruptcy of Glen Leslie Coulter

Likewise with Thorne, Ernst & Whinney Inc.'s appointment as trustee and receivers/managers of Kiminco and Coulter Financial Services, it was also appointed trustee of Glen Leslie Coulter, the principal shareholder of the various companies.

This bankruptcy was described by Mr. Doyle and other witnesses as one of the most complex insolvency matters to take place in the City of Ottawa.

The fact that many of the assets were held in various provinces, the United States and Bahamas made the administration far more difficult. In addition, the assets included not only the interest in Kiminco and Coulter Financial Services, but a number of other companies including substantial real estate holdings, limited partnership interests, publicly traded stock portfolio and numerous shareholdings in private corporations.

The principal resident of the bankrupt had been transferred to his wife just prior to the bankruptcy and that had to be set aside.

There were many tax implications as a result of realization and disposal of assets.

In addition the trustee had negotiated with members of the Coulter family which resulted in a sizeable contribution to the comprised distribution scheme and resolution framework which was advanced to the investors.

Hours and Remuneration

The hours and remuneration performed by the trustee and his staff have been broken down in detail as follows:

Personnel Level	Total Hours	Hourly Rate	Total Time	Average Rate/ Hour
Partners				
K.C.Stonley	131.4	190	24,966	
B.P.Doyle	86.3	250	11,575	
J.Wright (See note)	22.9	250	5,725	
B.D.Fish	3.6	225	810	
R.Harris (See note)	.5	285	143	
P. Dickson				

(See note)	1.0	315	315	
	245.7		53,534	218

Senior Manager

P.H.Gennis	250.5	188	47,094	
R. Chesser	123.4	165	20,361	
P.E.Salewski	25.5	188	4,794	
D.Nicol	6.5	188	1,222	
P.Lothrop	7.1	115	817	
C.Murphy (See note)	1.9	175	332	
	414.9		74,620	180

Managers/Senior Associates

M. Franko (See note)	87.0	135	11,745	
B.Bourne	25.5	100	2,550	
P.Bergeron	33.0	70	2,310	
E.W.Caton	23.0	90	2,070	
	168.5		18,675	111

Technicians

T.Nigro	264.8	50	16,682	
A.Brzezinska	13.2	50	660	
M. Scott	7.5	58	435	
S. Caton	4.6	70	322	
Y. McDonald	4.9	50	309	
D.S. Mathieu	7.0	40	280	
S.K. Dempsey (See note)	2.5	55	138	
N.Beggs	2.5	40	100	
J.M.Proszowski (See note)	2.0	62.5	125	
S. Coutu	1.4	40	88	

J.F. Ritari	1.3	57	82	
C.Labbe	.8	40	32	
	312.5		19,253	62

Total Hours: 1,142

Total Time Value $166,081

In addition, the trustee has also claimed a reserve in order to conclude the bankrupt estate of $12,311.

As in other areas of performance, the trustee is also seeking a variation of $16,608.

The trustee's final statement of receipts and disbursements as set out here has been approved by the inspectors of the estate on January 16, 1990 and by the official receiver on January 22, 1990.

It is to be noted that the inspectors have also approved the variation or premium of $16,608.

With reference to both the hours claimed and the hourly rates charged, my comments regarding other matters apply equally to these and they appear to be in order.

I would therefore approve the total fee and reserve of $178,392.

Summary

A summary of the Thorne, Ernst and Whinney Inc. accounts is as follows:

Kiminco Trustee	Kiminco C.F.C.	Rec. & Mgr.	Rec. & Mgr.	Bankruptcy	Total
$1,087,575	$ 95,200	$311,857	$178,392		$1,673,024
29,106	2,548	8,346	$ 0		$ 40,000
$1,058,469	$ 92,652	$303,311	$178,392		$1,633,024
108,000	9,500	31,000	16,608		165,108
$1,166,469	$102,152	$334,311	$195,000		$1,798,132

Ginsberg, Ginfras & Associates Inc.,
Co-Trustees of the bankruptcy of Glen Leslie Coulter

As a result of a conflict which arose, the firm of Ginsberg, Gingras & Associates Inc. were appointed

by me as co-trustees of the Glen Coulter bankruptcy on October 27, 1989.

This firm has submitted their account for 15.5 hours at $150 per hour for a total of $2,325.

This account has been approved by the inspectors and I would also approve it.

Coopers Lybrand Limited,
Re Coulter Group of Companies,
Accounts July 21, 1989 to December 6, 1989

Further to the appointment of a receiver on July 21, 1989, the firm of Coopers & Lybrand Limited had been retained by the Ministry of Financial Institutions for the Province of Ontario to investigate and act on their behalf to monitor a number of companies operated by the Coulter Group.

Their primary responsibility was to conserve and protect the assets of some 20 companies while various investigations were carried out.

The Province of Ontario has agreed to pay to Coopers & Lybrand up to the sum of $350,000 for services rendered in carrying out this function.

These accounts are not the subject matter of assessment by the court in view of the private arrangement between Coopers & Lybrand Limited and the Province of Ontario.

In addition, Coopers & Lybrand Limited, is not seeking a variance of their accounts.

Coopers & Lybrand in carrying out their duties as monitors of the various companies gained an insight into the operation of these companies and the whole Coulter structure.

As a result, they became actively involved in the managing and operating of these companies and in attempts to trace and identify assets.

They reported to the court from time to time and eventually they were appointed as receivers/managers of approximately 14 companies. The appointment of receiver/manager gave them broader powers to carry out their mandate and to be able to realize assets and resolve disputes between the various companies.

One of the main companies in which Coopers & Lybrand was appointed as monitor was G.L.C. Investments Corporation, a company which borrowed funds directly from the public and secured the same by promissory notes. A large number of these noteholders had held mortgages with Kiminco.

In addition, they worked as agents of the trustee relating to the Glen Coulter bankruptcy because of the inter-relationship between that bankruptcy and the various companies which were either being monitored, managed or under receivership by Coopers & Lybrand.

A summary of the account presented by Coopers & Lybrand Limited under their various headings and capacities are as follows:

Coopers & Lybrand Limited,
Coulter Group of Companies,
Summary of Fees and Disbursements
for the period from July 21 to December 6, 1989

	As Monitor		As Management	
	Hours	$	Hours	$
Professional Fees	1,409.25	241,837.75	214.00	29,015.35
Disbursements		14,032.48		60.00
Total Professional Fees and Disbursements		255,870.23		29,075.35

	As Receiver Manager		As Agent of Trustee	
	Hours	$	Hours	$
Professional Fees	732.25	113,916.25	96.00	20,993.75
Disbursements		5,990.43		-
Total Professional Fees and Disbursements		119,906.68		20,993.75

	Total	
	Hours	$
Professional Fees	2,451.50	405,763.10
Disbursements		20,082.91
Total Professional Fees and Disbursements		425,846.01

Hours

Ronald Jackson, the partner and vice president of Coopers & Lybrand Limited, gave evidence relating to both the hourly rate and the hours performed by the partners and employees of his firm.

The rates charged by Coopers & Lybrand Limited are competitive and comparable to the rates charged by Thorne, Ernst & Whinney Ltd. and also within the range charged by the other four major chartered accounting firms in Ottawa.

For example, Mr. Jackson's hourly rate is shown at $250 an hour which is comparable to the rate charged by Brian Doyle.

Filed as exhibits 9 and 10 in these proceedings was first a breakdown of all of the time and disbursements incurred under the various headings which I have already referred to and secondly, a breakdown of all of the senior personnel involved in the various assignments relating to these companies.

I have reviewed the time inventory and it would appear to be in order.

The hourly rates also appear to be competitive and reasonable and under the circumstances I would approve the accounts for Coopers & Lybrand Limited as submitted in the amount of $159,725.35 excluding the amounts attributed to the Ministry of Financial Institutions.

Performance Allowance or Variation

In considering the requests by the chartered accounting firm for a performance allowance or variation of their accounts submitted in their capacity as trustee/receiver managers, I have considered the affidavit evidence filed in support of it along with the viva voce evidence of Messrs. Doyle, Wilson, Jackson and submissions of counsel.

As has been repeated many times both in these reasons and also in the various hearings that were conducted into these matters, there is no doubt that this whole matter was completed in an exceptional professional manner.

The complexity of the various companies and the disarray of their affairs at the time of the appointment in July of 1989 required that tremendous professional expertise be applied im order to identify and resolve the problems.

The comprised distribution scheme in itself was a masterpiece which resolved the actual and potential conflicts. It was a testimony to the professional skills of both the chartered accounting and legal firms involved in this matter.

The retaining of financial contribution by both the Province of Ontario and members of the Coulter family helped to generate sufficient assets in order to fund the distribution scheme.

The anticipated recovery by the investors should exceed the recovery of any other similar type of insolvency in this country.

The speed in which all of these matters has been resolved is also unique and is unheard of in insolvency matters and this also is a tribute to the professional ability of the various people involved in this matter.

I accept the evidence of all of the various witnesses and because I have been involved from the

beginning with these matters, I truly appreciate what has been accomplished.

I know that the investors would prefer to have received 100 cents on the dollar but under the circumstances, this is not practical or possible.

Notwithstanding all the investors have lost money in this matter, the fact that they accepted the comprised distribution scheme shows that they recognized and understood what was at stake in this matter.

The fact that almost all of the investors approved the distribution scheme reflects the ability of the professional people to communicate the necessary information to these investors in order that they could make an educated and informed decision. That also is commendable.

Having said all of that, it now becomes a question of deciding whether the chartered accounting firms that have so requested should obtain an upward variance of their accounts or a performance bonus.

Mr. Doyle and Mr. Wilson in their evidence indicated that it was common in the practice and industry for commercial institutions and other parties who retained their services to pay a performance bonus upon the successful completion or conclusion of a matter.

There is no set rate or rule as to how much this performance bonus should be but it normally represents a percentage of the accounts submitted.

In this case, the client is the court or the 1,400 investors who are affected by the orders of this court. I noted that the inspectors in the Glen Coulter bankruptcy had approved the variance as requested by Thorne, Ernst & Whinney Inc.

Notwithstanding their approval, the court is not required to follow that approval. As the court has a responsibility to the public and to the investors, one would have to look at how the public would react or perceive such a variation in the accounts.

As indicated, the investors are appreciative of the hard work and efforts that have gone into this matter by both the chartered accountants and the solicitors.

In reviewing the hourly rates set forth in the accounts, they reflect a rate which has been identified as recognizing the expertise, experience and position of the person within their professional community. In addition in this particular file, there was 100% recovery of all of the time submitted by the various parties.

I am sure that with many commercial clients they also recover 100% of the time docketed. However, there are many occasions when professionals do not enjoy full recovery.

Considering the amount of the hourly rates charged and the 100% recovery of the time, in my view, it acknowledges and reflects the expertise of the individuals involved in these assignments. Another way of putting it would be that they have done what it is expected of them as professionals in achieving the excellent results this matter.

Considering it in that light and also considering the fact that the variation would represent a payment by all of the investors, I am of the view that the accounts as approved represent adequate and proper compensation, and I would therefore not approve a variance.

SOLICITORS' ACCOUNTS

General Principles

In assessing the solicitors' accounts, Mr. Cardill prepared a grid outlining the hourly rates to be charged by solicitors in the Ottawa area according to their expertise and their years at the bar.

In compiling the grid formula, Mr. Cardill consulted with Masters Gary Schreider, the local assessment officer, and reviewed a number of decisions assessing solicitors' accounts.

As a result he developed the following grid formula relating to solicitors' hourly rates:

> 1 - 5 years' experience - $90 to $120 per hour 5 - 10 years' experience - $130 to $150 per hour 10 - 15 years' experience - $150 to $175 per hour 15 - 20 years' experience - $175 to $200 per hour 20 and over - $225 to $275 per hour

He acknowledged that solicitors with particular expertise who have been established and recognized would demand and receive fees in excess of the range for their years of experience.

He also acknowledges that the range in some cases is exceeded as a result of private arrangements with clients.

The general public and in particular, the investors in this case, will have difficulty understanding how the ranges are arrived at since the approach is not very scientific.

Basically the hourly rates established are developed over the years based upon a supply and demand approach.

Just as we looked at the recovery rate for the chartered accountants, the hourly rates for solicitors is dictated by what the public will pay.

A solicitor may very well feel that he or she is worth $300 to $400 per hour but if no one will pay the rate, this becomes academic and artificial.

The true test on the solicitors' accounts is what they are generally charging and what they are recovering.

When the Ontario Legal Aid tariff was established in 1967, it was always feared that this tariff would become the benchmark for solicitors' hourly rates in the Province of Ontario. Over the years, this did not develop and even in 1985 and 1986 when the Legal Aid rates were brought more in line with private practice, it still did not become a benchmark.

The Legal Aid rates acknowledge experience and are adjusted accordingly but does not represent the normal hourly rate charged by the solicitors who take on Legal Aid matters. There is still a large margin of pro bono work performed by solicitors who take on Legal Aid matters at a reduced fee.

Likewise where a solicitor has developed an expertise in a certain field, that solicitor may demand and receive an hourly rate outside of the grid for solicitors with the same amount of experience.

Applying the hourly rates as set out in the grid, Mr. Cardill met with members of the various solicitors firms who had submitted accounts for assessment and reviewed their accounts. This related both to the hourly rate and the time billed.

In a number of cases, the solicitors adjusted their accounts to bring them within the grid and Mr.

Cardill has recommended the approval and payment of these accounts.

In addition, he also reviewed the accounts and time dockets to determine whether there was any duplication. Where he found duplication, he discussed the matter with the solicitors and in a number of cases, the accounts were reduced accordingly.

It has been recognized that in some cases due to the complexity of these matters, that duplication was a necessity as since it was impossible for one solicitor to carry out these responsibilities.

Also, because of the time short period of time required to complete these complicated tasks, it did require some duplication of time.

The motions which were conducted in these matters were conducted on a regular basis with time deadlines being placed upon all parties to perform certain tasks. It has not gone unnoticed that the solicitors and the chartered accountants were working many weekends in order to meet the court imposed deadlines.

Some of the firms have agreed upon their accounts being approved at an amount recommended by Mr. Cardill which takes into consideration the reduction of the hourly rates and the time dockets.

Other solicitors have not agreed to the application of the time grid and seek a higher hourly rate and in some cases, a variance or performance allowance similar to that requested by the trustee.

Osler, Hoskin & Harcourt

The account of Osler, Hoskin & Harcourt is broken down into two parts.

The first part of the account deals with the retainer of the firm by the Ministry of Financial Institutions which represents the bulk of the work performed for the monitor in that capacity.

The balance of the account represents their solicitor-client account for services performed for Coopers Lybrand in their capacity as receiver/managers.

The first part of the account has not been assessed as this is a private retainer with the Ministry and Osler, Hoskin & Harcourt.

The second part of the account has been reviewed by Mr. Cardill and Mr. Boland on behalf of Oslers has agreed to the reduction of their account by $2,500 to bring it in line with the recommendations of Mr. Cardill.

They have reduced the solicitors' hourly rates, in particular some members of their Toronto firm who had charged the Toronto rates.

The account submitted is for the amount of $14,312.25 which includes the reduction. The account is approved at this amount.

Scott & Aylen

When the initial accounts of Scott & Aylen were submitted prior to Christmas 1989, they had applied their own internal reduction or discount to the account.

Mr. Cardill reviewed the original accounts and applied his grid to the original accounts without the application of the discount.

Interestingly enough, using the grid prepared by Mr. Cardill, they was only $1 000 difference between the internal reduction by Scott & Aylen and the grid.

All of the accounts from Scott & Aylen were reviewed applying the principles as already described resulting in approximately $33,000 reduction of the account. The account is submitted in the amount of $209,972.09 which represents fees and disbursements and is approved at that amount.

Scott & Aylen acted for the majority of the investors in this matter.

Nelligan/Power

Nelligan/Power acted for a specific group of investors after it became apparent there was a conflict between this group and the general investors.

The firm's accounts were reviewed and a reduction was made in some of the hourly rates and as a result, the total account recommended for approval is $19,408.90 including fees and disbursements. The account is approved in this amount.

Pearl & Radnoff

This firm acted as solicitors for the co-trustee in the Glen Coulter bankruptcy matter and have submitted a series of accounts. These accounts are as follows:

Account	October 16, 1989	$20,622.25
	November 28, 1989	11,508.35
		3,245.87
		1,061.00
		4,500.00

Mr. Cardill reviewed all of these accounts and recommended the approval of the interim accounts in the amount of $20,622.25 and $11,508.35 as falling within the grid.

The other accounts contained a variance. This variance is based upon two factors.

There is a small percentage of premium or variance billing and in addition, Mr. Ginsall's hourly rate has been increased by $15 per hour. Mr. Ginsall's hourly rate would fall within the $150 per hour range. Mr. Ginsall has practiced 8 years and seeks an increase in his hourly rate from $150 per hour to $165 per hour.

In addition, the solicitors seek a small premium or variance of their accounts to recognize the accomplishment performed by them.

As Mr. Ginsall pointed out in his able submissions, the inspectors of the bankruptcy have approved their accounts as submitted.

First dealing with the variance or premium, I would apply the same principles and comments that I applied to the chartered accountants.

I recognize that Mr. Ginsall acting in the Coulter bankruptcy had some very difficult negotiations relating to some of the creditors in that bankruptcy.

In addition, I recognize that there were some very complex problems in the Coulter bankruptcy. These required a great deal of negotiating skill in resolving these matters and obtaining the contributions which were eventually applied to the distribution scheme.

I also recognize that Mr. Ginsall's involvement in the overall scheme and the resolutions of dispute was invaluable.

Having said all of that, I am not prepared to allow the variance or performance bonus notwithstanding it has been approved by the inspectors.

I am not bound by the inspectors' approval and I think this case differs from some of the decisions referred to me by Mr. Ginsall in that the bankruptcy was interwoven with the receivership, monitors and various other matters.

For the same reasons which I applied to the trustees' and receivers' accounts relating to variance, I apply with reference to Mr. Ginsall's application for a performance allowance.

The second matter deals with Mr. Ginsall's hourly rate and requests an upward adjustment from $150 per hour to $165 per hour.

We cannot be chained to our grid and certain consideration must be given to the development of an expertise which has been recognized and developed outside of the grid.

Mr. Ginsall indicates that approximately one-third of his practice is related to bankruptcy matters and as such in these proceedings, his rate should be increased.

I acknowledge this expertise which has been developed by Mr. Ginsall. He is very knowledgeable and has demonstrated his expertise in the handling of the Coulter matter. He has been very helpful to the court in attempting to resolve these very complex and complicated issues.

Although he has only been called to the bar for a period of 8 years, he does have the knowledge and expertise of someone who has practiced much longer in this field. Under the circumstances, I would approve the increase of the hourly rate to $165.

In conclusion therefore the Pearl & Radnoff accounts will be approved as follows:

October 16, 1989	$20,622.24
November 28, 1989	11,508.36
January 12, 1990	2,856.87
January 12, 1990	926.00
January 12, 1990	4,500.00

Rasmussen, Starr, Ruddy

This firm and in particular, Mr. Rasmussen, acted as solicitors for the receiver/manager of Thorne, Ernst & Whinney.

They have submitted an account which has been rounded out at $57,000 plus disbursements in the amount of $1,177.65.

This account has been reviewed by Mr. Cardill and he recommends the approval of the account at this amount. The account falls within the grid and Mr. Cardill has reviewed the account for duplication.

I would approve the account in the amount of $57,000 plus disbursements of $1,177.65.

Mr. Rasmussen appeared and requested a variance or performance allowance of 10% or approximately $6,000.

Without repeating my comments that I have already made regarding variances and once again recognizing the valuable contribution Mr. Rasmussen has made to the overall completion of this matter, I am still not prepared to vary the accounts for the reasons that I have already expressed.

Soloway Wright

Soloway, Wright acted as solicitors for the trustee, Thorne, Ernst & Whinney, and were the solicitors that had actual carriage of this matter.

The account submitted by the firm is for the sum of $373,428 and is broken down at tab 3 of exhibit 15 filed in these proceedings.

The work performed by the Soloway, Wright firm was extensive involving many staff members.

Mr. Cardill has reviewed the accounts and hourly rates and has recommended the approval of the majority of the matters set out in the detailed statements which were filed in exhibit 15.

The issue to be determined now is whether a premium or variance will be allowed and in addition whether there will be an increase in the hourly rate of Lawrence Soloway and Susan Gibson.

Mr. Morin, counsel for the solicitors, called a number of witnesses to support their position.

Mr. Donald Rasmussen, senior partner of Rasmussen, Starr, Ruddy, was called to give evidence relating to the involvement of Lawrence Soloway in this overall matter.

Lawrence Soloway was called to the bar in 1976 and has charged an hourly rate of $220 with reference to these matters. Mr. Rasmussen's conclusion was that in view of the extensive involvement by Lawrence Soloway in these proceedings that to apply the grid to him would cause a serious injustice.

As part of Mr. Morin's submissions, he filed with the court a survey carried out by his law firm relating people comparable to Susan Gibson and Lawrence Soloway who are practising with 11 other firms in the City of Ottawa.

The survey is as follows:

1972 Year of Call Real Estate Partner (Susan Gibson)	1976 Year of Call Business Law Partner (Lawrence Soloway)
$200 - $225 $250	$180 - $225 $250

$250	$200
$225	$225
n/a	n/a
$220 - $240	$180 - $200
$170	$160
$185 - $200	$180 - $185
$160 - $200	$160 - $200
n/a	$210
$250	$220

Average	
$191 - $223	$175 - $208

Media	
$225	$205

With these figures, there is some variance as some of the comparative solicitors were not actually called the same year but were within the same period.

The average shows $191 at the low end of the scale for Susan Gibson and $223 at the high end of the scale.

For Lawrence Soloway, the average shows $175 per hour at the low end of the scale and $208 at the high end.

The media for Susan Gibson is $225 and $205 for Lawrence Soloway.

Mr. Morin in his submission urged that these accounts be assessed on a quantum merit basis and referred to Black's Law Dictionary for the definition of quantum merit which is defined as "as much as he deserves".

In my view that definition is too broad and provides no limit upon the amount assessed on solicitors accounts.

Perhaps all of the solicitors involved in this complicated matter feel that they deserve even more than that set out in their accounts.

The solicitors deserve to be properly compensated considering the circumstances. The principles in Re Solicitor, suprs, had been adopted into the rules of civil procedure in 1984. Rule 58.07 sets out some of the matters to be taken into consideration.

I have acknowledged the amounts involved, the complexity of the proceedings, the importance of these matters to the investors and other parties and the shortening of the complicated process by the establishment of the comprised distribution scheme.

Hyman Soloway is the senior member of the Soloway, Wright firm and has been in practice for over 50 years. In the last 20 to 25 years he has devoted himself primarily to commercial development work and insolvency.

Mr. Soloway in his testimony related some of the complicated problems that developed in the first stages of the receivership and bankruptcy.

He indicated that the only way to properly deal with this matter was to establish a team approach with three or four people prepared to devote as much time as necessary to complete the task at hand.

Two of the team members were Susan Gibson and Lawrence Soloway. Susan Gibson was assigned the responsibility of solicitors' work involved in the Kiminco problems.

Lawrence Soloway was assigned to advise the trustee on a day to day basis and to deal with the other legal issues arising from the administration. In addition he and Mr. Soloway Sr. were the lead counsels at all motions which took place in these matters.

At the time that Susan Gibson was assigned to the Soloway team she was charging her time at $250 per hour and it would appear that she was receiving 100% recovery for time charged.

Brian Doyle, the trustee, from Thorne, Ernst & Whinney also gave evidence in support of the Soloway, Wright position.

He described how Susan Gibson was on site virtually all of the time and worked with his people in attempting to resolve the legal issues relating to discharges and title.

He was questioned by Mr. Morin as to the hourly rate and he stated:

> I have no difficulty with the rate. You know, I would expect -- I cannot really assess her rate at a given amount, but within the range I find it fair? Q. What kind of range you as a client, as a purchaser of services expect? A. It could be from $200 to $275.

He also commented upon the involvement of Lawrence Soloway in these proceedings and acknowledged he was a vital person in bringing this matter to a conclusion. He was questioned about the reasonableness of the rate of $225 an hour and responded as follows:

> People in Lawrence Soloway's position are high-rate people. They have to have had the experience that I have mentioned. I rarely see someone of that experience below $200. Often we are forced to draw on Toronto counsel for this kind of experience, depending on what is available in the marketplace in combination with who is being recommended.

In conclusion he stated that he had no difficulty with the hourly rate of $220.

Lawrence Soloway gave evidence in support of his $220 an hour fee charge along with a detailed breakdown of the services that were actually performed.

As I have indicated many times before, there is no doubt that Mr. Soloway's contribution was invaluable and it was one of the factors leading to the resolution of this problem.

He was literally involved night and day at various stages of this matter and was at the beck and call of Mr. Doyle to deal with crisis which appeared to arise almost hourly.

The hourly rate of $220 was not established for the purpose of the Coulter matter but was an hourly rate that had been in effect prior to the application before the court. It would also appear that he has a

high recovery of this hourly rate.

Gordon Henderson, Q.C., senior partner of Gowling, Strathy & Henderson in Ottawa, reviewed the hourly rates charged by Susan Gibson and Lawrence Soloway. He also reviewed the reports filed by the trustee and receiver in the various motions before the court and the grid prepared by Mr. Cardill.

Mr. Henderson was of the view that the grid prepared by Mr. Cardill was low as it related to the hourly rates for the various groups.

He was of the opinion that the larger law firms in Ottawa were charging and receiving a higher hourly rate than those set out in the grid.

With reference to Mr. Lawrence Soloway's rate, he felt that $220 an hour was a reasonable rate considering his experience and expertise and in particular the complicated task which he had to deal with in the Coulter matter.

With reference to Susan Gibson, he felt that her rate was reasonable considering the complications and problems she also had to deal with.

However in cross-examination by Mr. Cardill, Mr. Cardill reviewed the grid with Mr. Henderson as it related to Susan Gibson. In response to questions put to him, he stated as follows:

> Q. If you are going into the 15 to 20 range, which we have used the figures of 175 to 200? 15 and up.
> A. Could you give me the year again. It is easier for me to do quickly.
>
> Q. '70 to "75.
>
> A. 1970 to 1975. I would think that you're into $200 --you're into the $200 range. I say $180 but that is very low. I would think that's exceptional. Basically, you are in the $200 to $225.

Q. That's the 15 to 20 year range?

A. Yes.

Mr. Henderson went on to share his experience in the Atlantic Acceptance case where he acted for a number of unsecured creditors and eventually for some secured creditors relating to the compounding of interest.

He pointed out that if matters could not be resolved as a result of compromise and agreement, then the litigation process could be extremely lengthy and costly.

Mr. Henderson also felt that the variance or performance bonus requested by the applicants' solicitors in the amount of approximately 10% was reasonable under all the circumstances of this case.

Victor Duret, the senior manager of Thorne, Ernst & Whinney who was involved in the day to day responsibility for the operation of Kiminco, gave evidence in support of the hourly rate of $250 an hour for Susan Gibson.

As operation manager, he was involved in the day to day operations and worked closely with Susan Gibson who was at the Kiminco office for approximately one month.

He went on to give evidence as to all of the matters which had to be dealt with by Susan Gibson in her capacity as a solicitor. He felt that her experience at the bar was an asset in resolving the conflicts with the various solicitors representing the parties.

In describing her professional responsibility, he stated as follows:

Duplication

Mr. Cardill examined the solicitors' accounts to determine whether there was any duplication. He defined duplication as being the case where two or more solicitors put in time chits for the same period.

He concluded that there was duplication as follows:

Lawrence Soloway 80.65 hours
Donna Crabtree 47.9 hours

In cross-examination, Lawrence Soloway responded by setting forth the team approach which was used in attempting to resolve this complex conflict.

He felt that duplication was necessary in order that everyone be fully informed and apprised as to what was developing.

The team approach was necessary and it was one of the factors which brought about the final results.

Based upon that evidence, it is difficult to actually assess what hours were not really required. I have taken an arbitrary approach and reduced the 80 hours of Lawrence Soloway by 25% and the 48 hours of Donna Crabtree by the same amount.

Conclusion - Hourly Rates With Reference to Lawrence Soloway's Hourly Rate of $220 which takes him outside of the Grid prepared by Mr. Cardill

I am in a much better position to assess Lawrence Soloway's participation because he appeared on all of the motions before me.

The $220 an hour brings him within the averages charged by other firms in the community, and is an appropriate hourly rate in these proceedings.

With reference to Susan Gibson, I feel the $250 an hour is excessive both according to the standard set forth in the grid by Mr. Cardill and even according to the standard prepared by the Soloway survey themselves.

Mr. Henderson in his evidence also felt that it was in the high end of the range but did not feel it was unreasonable.

Under the circumstances, I would allow her hourly rate at $225 per hour.

Variance

The applicants' solicitors have requested a variance of approximately 10% which would bring the accounts from $373,428 to $410,000.

Once again I have expressed my views on the question of variance as it related to the trustee's and

receiver's accounts and I would apply the same principles to these accounts.

I appreciate when you apply the test in both Re Solicitor and in Rule 58, that they meet all of the positive requirements of that test.

However once again, the hourly rates have been moved up to the high end of the scale to reflect the expertise of the professionals involved.

Under those circumstances, I am not prepared to allow the variance.

For those reasons, the solicitors' accounts will be approved in the amount of $373,428. I understand that some monies have been paid on these accounts.

In conclusion I would like to thank all counsel for their assistance and contribution in this difficult and delicate matter.

CHADWICK J.

TAB 4

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20090917

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

BEFORE: PEPALL J.

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

Pepall J.

ENDORSEMENT

Relief Requested

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

Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

[2] The motions are brought by the following moving parties:

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

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

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

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

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

Discussion

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

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

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

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

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

(a) USW and CEP Motions

[8] Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[2]. The evidence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the

[2] 29 U.S.C.

bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

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

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

(b) Nelligan/Shibley and Davies

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

> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

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

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[3] [2009] O.J. No. 2166.
[4] 15 C.B.R. (5th) 307 (Ont. C.A.)
[5] (2000) 19 C.B.R. (4th) 12 Alta Q.B.

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

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

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

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

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

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

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

Summary

[20] In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

S.B. Pepall, J.

Pepall J.

Released: September 17, 2009

TAB 5

Case Name:

Nortel Networks Corp. (Re)

IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Applicants
Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 2166

75 C.C.P.B. 206

2009 CarswellOnt 3028

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 20, 2009.
Judgment: May 27, 2009.

(67 paras.)

Bankruptcy and Insolvency Law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.

Civil Litigation -- Civil Procedure -- Parties -- Representation of -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees

and had experience and expertise.

Motions by various factions of Nortel's current and former employees to appoint various representative counsel. In January 2009, Nortel filed for Companies' Creditors Arrangement Act protection. At the time of the filing, the Nortel group of companies ("Nortel") employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by Nortel. Nortel continued to honour substantially all of the obligations to current employees, but upon commencement of the CCAA proceedings, they ceased making all payments to former employees of amounts that would constitute unsecured claims, including termination, severance and amounts under various retirement and retirement transition programs. The opinion of the Monitor was that it was appropriate that there be representative counsel in light of the large number of former employees and that the financial burden of multiple representative counsel would further increased the financial pressure faced by Nortel. The former employees of Nortel had an interest in the CCAA proceedings in respect of severance, termination pay, retirement allowances and other amounts owed in respect of contractual obligations and employment standards legislation. In addition, most former employees and survivors of former employees had basic entitlement to receive payment from the Nortel pension plan and some might have also been entitled to a payment from certain non-registered retirement plans, health benefits and other retirement allowances. Both the Monitor and Nortel recognized the benefits of representative counsel and Nortel consented to the appointment of one of the proposed representative counsel, but opposed the appointment of any additional representatives. The representative whose appointment Nortel consented to represented a cross-section of all former employees who were entitled to severance and termination pay and payments under some or all of the various other plans.

HELD: Motions allowed in part. Koskie Minsky appointed as representative counsel and motions of all other proposed representative counsel dismissed. It was appropriate to exercise discretion pursuant to s. 11 of the Companies' Creditors Arrangement Act to make a Rule 10 representation order. There was no real or direct conflict of interest between various employee groups and the former employees had a commonality of interest in that they all had unsecured claims against Nortel for some form of deferred compensation. The appointment of a single representative counsel was the most time efficient and cost effective way to ensure that the arguments of the employees were placed before the Court. The appointment of Koskie Minsky as representative counsel was a logical choice as they indicated a willingness to act on behalf of all former employees, they received a broad mandate from the employees, they had experience in representing large groups of retirees and employees in large scale restructurings and specialty practice in relevant areas of law.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, s. 11

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.),

Ontario Pension Benefits Act,

Rules of Civil Procedure, Rule 10.01, Rule 12.07

Counsel:

Janice Payne, Steven Levitt and Arthur O. Jacques for the Steering Committee of Recently Severed Canadian Nortel Employees.

Barry Wadsworth for the CAW-Canada and George Borosh and Debra Connor.

Lyndon Barnes and Adam Hirsh for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

Alan Mersky and Derrick Tay for the Applicants.

Henry Juroviesky, Eli Karp, Kevin Caspersz and Aaron Hershtal for the Steering Committee for The Nortel Terminated Canadian Employees Owed Termination and Severance Pay.

M. Starnino for the Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund.

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini and Chris Armstrong for Ernst & Young Inc., Monitor.

Gail Misra for the Communication, Energy and Paperworkers Union of Canada.

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services.

Mark Zigler and S. Philpott for Certain Former Employees of Nortel.

G.H. Finlayson for Informal Nortel Noteholders Group.

(A) Kauffman for Export Development Canada.

Alex MacFarlane for the Unsecured Creditors' Committee (U.S.).

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

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

3 The proposed representative counsel are:

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

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the

Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

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

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

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

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

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

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

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

9 These motions give rise to the following issues:

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

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

Issue 1 - Representative Counsel and Funding Orders

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

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

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

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

14 I am in agreement with these general submissions.

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

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

Issue 2 - Who Should be Appointed as Representative Counsel?

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

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

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

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

"RSCNE Group").

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

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

(a) unpaid termination pay;
(b) unpaid severance pay;
(c) unpaid expense reimbursements; and
(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

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

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

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

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

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

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

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

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

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

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

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");
(b) Retirement Allowance Payment ("RAP"); and
(c) Layoff and Severance Payments

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

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;
(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;
(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and
(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

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

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

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;
(b) the Health Care Plan;
(c) the Pension Plan and Health Care Plan as a survivor of a former employee;
(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;
(e) severance and termination pay ; and

(f) TRA payments.

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

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

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

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

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

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

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

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

(a) TRA;
(b) 2008 bonuses; and
(c) amendments to the Nortel Pension Plan

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

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

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

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

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

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

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000

members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

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

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

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

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

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

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

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

employer's failure to pay the deferred wages owing to former employees.

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

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

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

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

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

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

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

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

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

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

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

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

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

G.B. MORAWETZ J.

cp/e/qlrpv/qlpxm/qlmxl/qlaxw/qlaxr

TAB 6

Public Service Alliance of Canada v. Attorney General of Canada*
Professional Institute of the Public Service of Canada v. Attorney General of Canada
Halayko v. Attorney General of Canada
[Indexed as: Public Service Alliance of Canada v. Canada (Attorney General)]

62 O.R. (3d) 682

[2002] O.J. No. 4831

Docket Nos. C37096, C37166 and C37158

Court of Appeal for Ontario,

Goudge, Simmons and Gillese JJ.A.

December 17, 2002

*Vous trouverez la traduction française de la décision ci-dessous à 62 O.R. (3d) 695.

Civil procedure -- Parties -- Legal capacity -- Three trade unions certified pursuant to Public Staff Relations Act and other employee organizations which were not certified trade unions bringing actions challenging federal legislation which authorized federal government to deal as it wished with surpluses in pension plans covering federal government employees -- Section 3(2) of Rights of Labour Act not preventing plaintiffs from bringing action in their own names -- Public Service Staff Relations Act, R.S.C. 1985, c. P-35 -- Rights of Labour Act, R.S.O. 1990, c. R.33, s. 3(2). [page683]

Civil procedure -- Parties -- Standing -- Trade unions having standing to bring actions challenging federal legislation which authorized federal government to deal as it wished with surpluses in pension plans covering federal government employees.

The plaintiffs were trade unions. Three of the plaintiffs were certified under the Public Service Staff Relations Act. The others were not certified trade unions but represented the interests of their members in employment matters. The plaintiffs brought actions challenging federal legislation which authorized the federal government to deal as it wished with the surpluses in the pension plans covering employees of the federal government and the R.C.M.P. The defendant successfully moved for an order striking the plaintiffs from the title of the actions. The motions judge held that s. 3(2) of the Rights of Labour Act prevented the plaintiffs from suing in their own names in the Ontario courts. Section 3(2) states, "A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of this Act or the Labour Relations Act." The plaintiffs appealed.

Held, the appeal should be allowed.

Absent clear contrary legislation, the legal status of trade unions to assert their rights in court, including common law rights, is now beyond question, at least in matters relating to their labour relations function and operations. While that legal status is founded in each case on the relevant provincial or federal legislation governing the union, it does not depend on any provision specific to that legislation. While variations exist among jurisdictions, the legal status accorded to trade unions derives not from specific provisions in any particular piece of legislation but from the reality that, throughout Canada, the world of labour relations is governed by sophisticated statutory machinery that requires unions to have sufficient legal personality to discharge their role in that world. Thus, legislatures must be taken to have impliedly conferred on unions the legal status necessary for them to do so. This recognition of the broadening legal status accorded to trade unions is a reflection of the extraordinary evolution over the last half century of both their role and the complex labour relations regimes which now govern them and their activities. In order that unions be able to properly fulfill the functions now expected of them, courts must treat them as juridical entities. The plaintiffs in this case had the legal status to bring the actions in their own names. Respecting the three plaintiffs which were certified under the Public Service Staff Relations Act, their status was derived from the PSSRA not from any provisions in the Rights of Labour Act or the Ontario Labour Relations Act, R.S.O. 1980, c. 228. Hence, irrespective of the latter two Acts, these plaintiffs had the status to be parties to these actions. The other three plaintiffs were incorporated pursuant to the laws of their particular provinces. Corporations are entitled to sue in their own names. While these plaintiffs were not certified trade unions and had not been accorded a legislative framework for collective bargaining on behalf of their members, they did in fact represent the interests of those members in employment matters. It was unnecessary to decide whether they had the legal status to bring these actions in their own name based on the modern approach to trade unions as juridical entities outlined, since they clearly had the right to do so as corporations, and that right existed irrespective of the Rights of Labour Act or the Ontario Labour Relations Act.

The plaintiffs had standing to bring these actions as they had a sufficient private or special interest in the federal pension legislation. The terms and conditions of employment of the plaintiffs' members included the pension benefits owed to employees, the contribution made by employers and the employees' [page684] rights, if any, to the surplus in those pension plans. While the plaintiffs could not compel the employers to bargain collectively about pensions, the impugned pension legislation would change important conditions of employment for the plaintiffs' members. Challenging the legality of such a change on behalf of their members came within the core function expected of unions in representing their members and their interests. Viewed in this way, the plaintiffs' representational role requires them to be directly interested in the legislation in a way that goes well beyond the interest a member of the general public might have.

Berry v. Pulley, 2002 SCC 40, (2002), 211 D.L.R. (4th) 651, 287 N.R. 303, 82 C.L.R.B.R. (2d) 161, 2002 C.L.L.C. 220-022, 11 C.C.L.T. (3d) 157, 20 C.P.C. (5th) 205, apld

Other cases referred to

Canada (Deputy Attorney General) v. Delisle, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513, 244 N.R. 33, 66 C.R.R. (2d) 14, 99 C.L.L.C. 220-066; Canada (Minister of Finance) v. Finlay, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, 71 N.R. 338, [1987] 1 W.W.R. 603, 17 C.P.C. (2d) 289 (sub nom. Finlay v. Canada); Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, 3 O.R. (3d) 511n, 48 O.A.C. 241, 81 D.L.R. (4th) 545, 126 N.R. 161, 4 C.R.R. (2d) 193, 91 C.L.L.C. 14,029; Nipissing Hotel Ltd. v. Hotel & Restaurant Employees Union, [1963] 2 O.R. 169, 38 D.L.R. (2d) 675, 63 C.L.L.C. 15,475 (H.C.J.); Orchard v. Tunney, [1957] S.C.R. 436, 8 D.L.R. (2d) 273, 57 C.L.L.C. 15,319 (sub nom. Tunney v. Orchard); Seafarers International Union v. Lawrence (1979), 24 O.R. (2d) 257, 97 D.L.R. (3d) 324, 13 C.P.C. 281 (C.A.) [Leave to appeal to S.C.C. refused (1979), 24 O.R. (2d) 275n, 97

D.L.R. (3d) 324n], revg (1978), 21 O.R. (2d) 819, 92 D.L.R. (3d) 116, 8 C.P.C. 172 (Div. Ct.), affg (1977), 15 O.R. (2d) 226, 75 D.L.R. (3d) 357, 3 C.P.C. 1 (H.C.J.); Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, 70 L.J.K.B. 905, 85 L.T. 147, 65 J.P. 596, 50 W.R. 44, 17 L.T.R. 698, 45 Sol. Jo. 690 (H.L.)

Statutes referred to

Canada Labour Code, R.S.C. 1985, c. L-2.
Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III
Canadian Charter of Rights and Freedoms
Labour Relations Act, R.S.O. 1980, c. 228
Public Service Staff Relations Act, R.S.C. 1985, c. P-35
Public Service Superannuation Act, R.S.C. 1985, c. P-36
Rights of Labour Act, R.S.O. 1990, c. R.33, s. 3
Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11

Authorities referred to

Cromwell, T.A., Locus Standi: A Commentary on the Law of Standing in Canada (Toronto: Carswell, 1986)
Fudge, J., and E. Tucker, Labour Before the Law: The Regulation of Workers' Collective Action in Ontario, 1900 to 1948 (Don Mills: Oxford University Press, 2001)

APPEAL from an order striking the appellants from the title of actions.

Andrew Raven, for appellant Public Service Alliance of Canada.
Fiona Campbell, for appellants Translator's Group Canadian Union of Professional and Technical Employees, and the Social [page685] Science Employees Association, and for appellants L'Association des Membres de la Police Montée du Québec, The B.C. Mounted Police Professional Association and The Mounted Police of Ontario.
Melanie Aitken and Donald Rennie, for respondent Attorney General of Canada.

The judgment of the court was delivered by

[1] **GOUDGE J.A.**: -- The appellants in this appeal are the Public Service Alliance of Canada ("PSAC"), the Translator's Group Canadian Union of Professional and Technical Employees ("CUPTE"), the Social Science Employees Association ("SSEA"), L'Association des Membres de la Police Montée du Québec ("AMPMQ"), the B.C. Mounted Police Professional Association ("BCMPPA"), and the Mounted Police Association of Ontario ("MPAO"). They are all acknowledged to be trade unions, but none are certified under the Ontario Labour Relations Act, R.S.O. 1980, c. 228 (the "OLRA").

[2] The appeal deals with three actions, in each of which one or more of the appellants is a plaintiff. The primary question raised is whether s. 3(2) of the Rights of Labour Act, R.S.O. 1990, c. R.33 (the "RLA") prevents the appellants from suing in their own names in the courts of this province.

[3] At first instance, Morin J. answered this question in the affirmative and ordered that the appellants be struck from the actions.

[4] The respondent sought this result not just on the basis of s. 3(2) of the RLA, but on the basis that, in any event, the appellants do not have sufficient direct interest in the litigation to bring these actions nor do they meet the criteria necessary to give them the public interest standing to do so. Morin J. dismissed both standing arguments. In this court, the respondent argues that he erred in doing so and offers these arguments as a separate basis for reaching the result arrived at below.

[5] For the reasons that follow, I have concluded that s. 3(2) of the RLA does not bar the appellants from bringing these actions and that they have a sufficient direct interest to have standing to do so. I would therefore allow the appeal.

The Facts

[6] This appeal involves three parallel actions which have been ordered to be tried together. Broadly put, the actions all seek to challenge federal legislation which authorizes the federal government to deal as it wishes with the surpluses in the pension plans [page686] covering employees of the federal government and the Royal Canadian Mounted Police.

[7] The appellant PSAC is a plaintiff, together with three individuals, in the first action. It is an unincorporated association which is certified pursuant to the Public Service Staff Relations Act, R.S.C. 1985, c. P-35 (the "PSSRA") as the bargaining agent for most employees in the federal public service. With certain specified exceptions, these employees are members of the pension plan created by the Public Service Superannuation Act, R.S.C. 1985, c. P-36 (the "PSSA"). The PSSRA expressly excludes the pension plan from the scope of subjects about which PSAC is entitled to bargain.

[8] The appellants CUPTE and SSEA are plaintiffs in the second action along with several other similar organizations and individuals. Both are trade unions certified under the PSSRA as bargaining agents for particular groups of federal government employees and both are unincorporated associations. Their members are covered by the same pension plan as those of PSAC and, in the same way, the PSSRA excludes the plan from the subjects about which these appellants are entitled to bargain.

[9] The other three appellants, AMPMQ, BCMPPA and MPAO, are plaintiffs in the third action. There are a number of individual plaintiffs as well. These three appellants are each incorporated pursuant to the laws of their respective provinces. Their members are present and former employees of the RCMP. All such employees are members of a pension plan established pursuant to the Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11 (the "RCMPSA"). Each of these appellants represents the interests of its members in employment-related matters, including their interests with respect to the RCMPSA. However, they are not certified trade unions and, indeed, are expressly excluded from the application of the PSSRA and Part 1 of the Canada Labour Code, R.S.C. 1985, c. L-2. As a result, they are not empowered to engage in compulsory collective bargaining.

[10] The federal legislation impugned in these actions came into force on September 14, 1999 and gave the respondent explicit legislative authority to take, for its own purposes, actuarial surpluses existing from time to time in these pension plans. The actions assert that the legislation violates the plaintiffs' legal rights and seek a series of declarations that the legislation contravenes the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, and various of the respondent's common law obligations, and that it amounts to an unlawful seizure of the [page687] interest of the appellants' members in the surpluses in the pension plans.

[11] The respondent successfully moved for the order appealed from on the basis that the appellants lack capacity to commence or maintain these actions. The order was also sought and obtained against 12 other similar organizations who have chosen not to appeal. Apart from these organizations and the six

appellants, there are individual plaintiffs in each of these actions who remain able to proceed with them.

[12] In granting the order, the motion judge concluded that s. 3(2) of the RLA, particularly as applied by Osler J. in Seafarers International Union of Canada v. Lawrence (1977), 15 O.R. (2d) 226, 75 D.L.R. (3d) 357 (H.C.J.), compelled the result he reached. As I have said, in the course of his decision, he rejected the respondent's argument that the appellants should be struck from the proceedings because they are not directly affected by the legislation in issue and fail to meet the criteria for public interest standing.

[13] Two broad issues are presented on this appeal. The principal issue is whether the motion judge was correct in concluding that s. 3(2) of the RLA prohibits the appellants from being named as plaintiffs in these actions. The second issue is whether he was correct in finding that, aside from s. 3(2), the appellants have standing to bring these actions. I will deal with each of these in turn.

The Section 3(2) Issue

[14] Section 3(2) of the RLA reads as follows:

> 3(2) A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of this Act or of the Labour Relations Act.

[15] The RLA was first passed in 1944. It was, and remains, a terse piece of legislation comprising only three sections on a single page of the Revised Statutes of Ontario. Over the intervening 58 years since 1944, the world of labour relations and the legal framework within which it operates has undergone enormous evolution. However, s. 3(2) remains in substance exactly as it was when first enacted. In this light, it is something of an archaic legislative provision.

[16] Nonetheless, given the historical context which gave rise to the RLA, its provisions are understandable. Trade unions had only begun to emerge as important institutions in Ontario society. Provincial legislation providing them with rights to compulsory collective bargaining was relatively new. The House of Lords [page688] had held in Taff Vale Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, 70 L.J.K.B. 905 (H.L.) that similar statutory rights accorded to unions in the United Kingdom brought with them corresponding common law obligations for those unions.

[17] In this context, the RLA offered some protection to trade unions and the fledgling system of labour relations of which they were a part. Section 2 declared that unions were not unlawful simply because they were in restraint of trade. Section 3(1) diminished their liability for civil conspiracy. Section 3(2) set limits on making a trade union a party to civil litigation in Ontario. Section 3(3) provided, in effect, that collective agreements were not legally enforceable in the ordinary courts leaving this task to the new dispute resolution mechanism of labour arbitration. This history is well described in J. Fudge and E. Tucker, Labour Before the Law: The Regulation of Workers' Collective Action in Ontario, 1900 to 1948 (Don Mills: Oxford University Press, 2001) at p. 296.

[18] The jurisprudence surrounding s. 3(2), though limited, is exemplified by Nipissing Hotel Ltd. v. Hotel & Restaurant Employees & Bartenders International Union, [1963] 2 O.R. 169, 38 D.L.R. (2d) 675 (H.C.J.). In that case, Spence J. concluded that s. 3(2) was a bar to naming a trade union as a party to an action for an injunction after he had determined that the OLRA had created the union as a juridical person which, without that bar, could have been named as a party.

[19] In Seafarers International Union of Canada, supra, Osler J. extended the reach of s. 3(2) to a trade union regulated not by the OLRA, but by federal labour legislation. He said this at p. 229 O.R.:

> I find, therefore, that Seafarers International Union of Canada is not an entity capable of bringing suit in this Province, in its own name.
>
> In so holding, I have not lost sight of the submissions of counsel for the respondent union that it is somehow governed by the Trade-unions Act of Canada and that it escapes the provisions of the Rights of Labour Act of Ontario.
>
> . . . . .
>
> . . . To say that the respondent union is somehow governed by the Trade-unions Act of Canada is to advance the matter no further. The matter is, in my view, analogous to the position of a corporation enjoying a federally granted charter which must, nevertheless, submit to Ontario procedural law when it wishes to litigate within this Province.

[20] Though other aspects of his decision were appealed, there was no appeal from Osler J.'s broad assertion that a trade union in Ontario was both unable to sue and was protected from being [page689] sued in its own name by virtue of s. 3(2). In his reasons, at p. 230 O.R., he followed this conclusion with a description of the cumbersome mechanism which had developed in an attempt to circumvent the difficulties created by s. 3(2):

> It has been the practice in this Province for some years that a trade union seeking to litigate an issue before our Courts brings its action in the name of two or more officers "on their own behalf and on behalf of all other members of the blank union".

[21] Implicit in the language of s. 3(2), and explicit in the jurisprudence surrounding it, is the idea that trade unions, once accorded statutory rights by labour legislation, acquire corresponding legal obligations and, at least to that extent, have a legal status or capacity. This idea, which goes back as far as Taff Vale, supra, remained relatively unelaborated until Berry v. Pulley, 2002 SCC 40, 211 D.L.R. (4th) 651.

[22] In Berry v. Pulley, the Supreme Court reviewed the historical development of the legal status of trade unions beginning with the general rule at common law that, as unincorporated associations, unions had no legal status. It then surveyed the relevant jurisprudence from Taff Vale, supra, and the early Canadian case of Orchard v. Tunney, [1957] S.C.R. 436, 8 D.L.R. (2d) 273, which declined to fully adopt the reasoning in Taff Vale, to later cases which did use the Taff Vale approach, such as the Nipissing case I have referred to. The Supreme Court went on to canvass the legislation that, over time, has progressively accorded greater statutory rights to unions. It noted that every provincial legislature and the federal parliament have all passed labour legislation and, while these enactments differ in various respects, they all must be taken to acknowledge, in varying degrees, the legal status of trade unions. The Supreme Court concludes its general analysis, at para. 46 as follows:

> As the above cases and statutory provisions suggest, the world of labour relations in Canada has evolved considerably since the decision of this Court in Orchard, supra. We now have a sophisticated statutory regime under which trade unions are recognized as entities with significant rights and obligations. As part of this gradual evolution the view has emerged that, by conferring these rights and obligations on trade unions, legislatures have intended, absent express legislative provisions to the contrary, to bestow on these entities the legal status to sue and be sued in their own name. As such, unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations.

[23] The Supreme Court went on to address the specific dispute before it where the trade union was governed by federal labour legislation, namely the Canada Labour Code. The issue was whether the union had the legal status to contract with its [page690] members and to be sued at common law for the breach of that contract. In concluding that the union could be sued for this, the Supreme Court said the following at para. 47:

> In order for trade unions to fulfill their labour relations functions, it is essential for unions to control and regulate their internal affairs. Since the regulation of union membership is a fundamental part of the role of trade unions, it is only logical that it should fall within the sphere of activities for which unions have legal status. It follows that unions must have sufficient legal personality to enter into contracts of membership, and that this is an aspect of union affairs for which legislatures have impliedly conferred legal status on unions.

[24] I would take three propositions from the Supreme Court's discussion in this case.

[25] First, absent clear contrary legislation, the legal status of trade unions to assert their rights in court, including common law rights, is now beyond question, at least in matters relating to their labour relations function and operations.

[26] Second, while that legal status is founded in each case on the relevant provincial or federal labour legislation governing the union, it does not depend on any provision specific to that legislation. While variations exist among jurisdictions, the legal status accorded to trade unions derives not from specific provisions in any particular piece of legislation, but from the reality that, throughout Canada, the world of labour relations is governed by sophisticated statutory machinery which requires that unions have sufficient legal personality to play their role in that world. Thus legislatures must be taken to have impliedly conferred on unions the legal status necessary for them to do so.

[27] Third, this recognition of the broadening legal status accorded to trade unions is a reflection of the extraordinary evolution over the last half century of both their role and the complex labour relations regimes which now govern them and their activities. In order that unions be able to properly fulfill the functions now expected of them, courts must treat them as juridical entities.

[28] It is against this jurisprudential backdrop that the first issue in this appeal must be addressed: does s. 3(2) of the RLA prohibit the appellants from being named as plaintiffs in these actions?

[29] To reiterate, that subsection reads as follows:

> A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of this Act or of the Labour Relations Act.

[30] None of the appellants contest the respondent's assertion that they all are trade unions for the purposes of this subsection. The question is simply whether, irrespective of the RLA or the OLRA, the appellants may be parties to an action in court. [page691]

[31] The appellants PSAC, CUPTE, and SSEA are all unions certified pursuant to the PSSRA. That legislation, though it contains its own special features, is the generic counterpart for the federal public service of other federal and provincial labour legislation. It provides for such things as certification, collective bargaining and arbitration, as does most other labour legislation. In the language of Berry, supra, it is an example of the kind of sophisticated statutory regime governing labour relations which now exists across Canada and provides the modern foundation for the legal status of trade unions. Following the reasoning in that case, these appellants must therefore be taken to have been implicitly

accorded the legal status to sue in their own names at least for the purpose of discharging their functions in performing their roles in the field of labour relations.

[32] There is no need to test the outer limits of the legal status thus accorded to these appellants since, in my view, it easily includes the bringing of these actions. While the PSSRA prohibits these appellants from negotiating collective agreement provisions which alter the terms of the pension plan established by the PSSA, these terms (including the employer's obligation to make contributions to the employees' pension benefits and their rights, if any, to any surplus) are part of the terms and conditions of employment of these appellants' members. Challenging the legality of changes to these employment rights which adversely affect their members is important both to protect the interests of those members vis-à-vis their employer, and to define the legal context in which these unions must bargain on their behalf. Such a court challenge is appropriately the role of these unions in modern labour relations and they must have sufficient legal personality to do so. This conclusion accords with the recognition of the broadening legal status to be granted unions found in Berry, supra.

[33] Therefore, I conclude that these three appellants have the legal status to bring these actions in their own names. They derive that status from the PSSRA, not from any provisions in the RLA or the OLRA. Hence, irrespective of the latter two acts, these appellants have the status to be parties to these actions.

[34] I reach the same conclusion for the other three appellants, but on a much simpler basis. All three are incorporated pursuant to the laws of their particular provinces. Corporations, like natural persons, have long been recognized by the common law as entitled to sue in their own names. See Taff Vale, supra, at p. 429 A.C. It is true that these appellants are not certified trade unions and have not been accorded a legislative framework for collective bargaining on behalf of their members. However, as the respondent acknowledges, they do in fact represent the interests of those members in employment matters. I need not decide whether they [page692] have the legal status to bring this litigation in their own names based on the modern approach to trade unions as juridical entities. As corporations they have the right to do so -- a right which exists irrespective of the RLA or the OLRA.

[35] The respondent argues, however, that regardless of the appellants' legal status to sue in their own names, s. 3(2) denies them the standing to do so. The respondent says that s. 3(2) constitutes a general prohibition against trade unions having standing in the courts of Ontario, unless, apart from the RLA or the OLRA, the legislature has expressly accorded them standing.

[36] I disagree with this position. The distinction between legal status or capacity on the one hand and standing on the other, while not always observed in the jurisprudence, has been carefully described in Thomas A. Cromwell (now Cromwell J.A.), Locus Standi: A Commentary on the Law of Standing in Canada (Toronto: Carswell, 1986). At p. 3, he says this:

> [Legal status] concerns the right to initiate or defend legal proceedings generally. Standing is concerned with the appropriateness of the court's dealing with the particular issue presented at the instance of the particular plaintiff.

[37] In my view, in addressing the right of trade unions to be a party to any court action whatsoever, the language of s. 3(2) does not deal with standing but with legal status, and requires that that status exist independent of the two pieces of legislation it recites. As I have said, the appellants all meet this test.

[38] However, even if s. 3(2) were construed as dealing only with standing, the appellants qualify. Read this way, the section requires only that their standing not depend on the RLA or the OLRA. Nothing in s. 3(2) demands an express grant of standing from the legislature. The standing of these

appellants to bring these actions flows directly from their legal status to do so. Given their legal status to sue in the courts in their own names they have the same standing to do so as a natural person would in the same circumstances. Their standing is no more dependent on the RLA or the OLRA than is their legal status.

[39] Finally the respondent urges this court to follow the reasons of Osler J. in Seafarers Union of Canada, supra, which I have quoted above. It argues that these reasons stand for the proposition that even unions governed by federal labour legislation are prohibited from suing in their own names in Ontario by s. 3(2) of the RLA.

[40] I would offer two responses to this submission.

[41] First, it appears to me from his reasons that the argument made to Osler J. was that a union governed by federal labour legislation somehow escapes the reach of the RLA altogether. [page693] This is implicit in his finding that such a union can no more be insulated from the application of the RLA than a federally incorporated company can avoid Ontario procedural law when it litigates here. I agree with him. But that is not the argument made by the appellants in this case. Thus his conclusion should not be taken as a clear rejection of the appellants' position.

[42] Second, the argument made here is that when the RLA is applied to unions governed by federal labour legislation, s. 3(2) does not prohibit them from suing in their own names in the courts of Ontario. To the extent that Osler J. can be read to find against this argument, I would respectfully disagree for the reasons I have given. He did not have the benefit of the analysis of the legal status of trade unions developed in Berry, supra, and was therefore unable to apply it in interpreting the language of s. 3(2).

[43] However, whether he was faced with the argument made by the appellants in this case or not, Osler J. clearly concluded that a union governed by federal labour legislation was prohibited from suing in its own name in Ontario by s. 3(2). That finding was not appealed to this court. As my responses indicate, I disagree with that conclusion and would decline to follow it.

[44] In summary, I conclude that Morin J. erred in finding that s. 3(2) of the RLA prohibits the appellants from being named as plaintiffs in these actions. Hence this ground of appeal succeeds.

[45] Before moving to the second issue in this appeal, one further comment may be useful. Although it is not necessary to decide in this case, the answer I have given to the application of s. 3(2) of the RLA might well be different for unions governed by the OLRA, something which could force them to attempt to access the courts using the antiquated and uncertain vehicle of the representative action described by Osler J. in Seafarers, supra. Such a result would seem inconsistent with the broad, principled approach to the legal status of unions found in Berry. That approach reflects the reality that, across the country, unions share a common history and, speaking generically, perform common functions, and are governed by common legislative provisions. Viewed against this commonality, if s. 3(2) creates an anomalous result for some unions in a single province, it may be time, after more than 50 years, that it be revisited for possible revision.

The Standing Issue

[46] As I have said, Morin J. found that, apart from s. 3(2) of the RLA, the appellants have standing to bring these actions both because they are directly affected by the legislation challenged in the actions and because, in any event, they meet the criteria for public interest standing. The respondent challenges both findings. [page694]

[47] It is common ground in this appeal that to have standing to challenge the federal pension

legislation, as the appellants seek to in these actions, they must have a sufficient private or special interest in the legislation which is the subject matter of the proceedings. See Canada (Minister of Finance) v. Finlay, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, at pp. 617-18 S.C.R., p. 329 D.L.R.

[48] There is no doubt that the terms and conditions of employment of the appellants' members include the pension benefits owed to employees, the contributions made by employers, and the employees' rights, if any, to the surplus in these pension plans.

[49] The respondent acknowledges that the appellants are all trade unions whose objects include, in each case, regulating relations between its members and their employer. As with all unions, the appellants' raison d'être is to represent the interests of their members in matters that affect their employment circumstances. The courts have long recognized that this may take them well beyond the strict limits of contract negotiation and administration. See, for example, Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545, at p. 288 S.C.R. per Wilson J.; Canada (Deputy Attorney General) v. Delisle, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513, at p. 1021 S.C.R. This recognition reflects the reality that the modern workplace is the product of many forces and, if a union is to do its job, it must try to influence those forces on behalf of its members.

[50] Here it is true that the appellants cannot compel the employers to bargain collectively about pensions. However, the pension legislation attacked in these actions would change important conditions of employment for the appellants' members. Challenging the legality of such a change on behalf of their members comes within the core function we expect of unions in representing their members and their interests. Viewed in this way, the appellants' representational role requires them to be directly interested in this legislation in a way that goes well beyond the interest a member of the general public might have.

[51] Thus I conclude that the motions judge was right to find that the appellants have a sufficient private or special interest in the legislation that is the subject matter of this litigation. This direct interest gives them the standing required to bring these actions.

[52] Having reached this conclusion, I need not address the issue of whether the appellants also meet the criteria for public interest standing to bring these actions. However, I am dubious about whether the motion judge was correct in finding these criteria to be met. He did so without reasons. In particular he did not explain how one of the criteria is met here, namely how it could be said that if the appellants are not given standing, there is no [page695] other reasonable and effective manner in which this issue could be brought to court given that there are individual plaintiffs able to proceed with these actions.

[53] In summary therefore, I would allow the appeal, set aside the order below striking the appellants from the title of these actions and order that the respondent's motion seeking this relief be dismissed.

[54] The appellants are entitled to their costs of the appeal and the motions fixed on a partial indemnity basis. For the appellant PSAC, I would fix these at $5,000 for the motion and $10,000 for the appeal, inclusive of disbursements and GST. The appellants CUPTE and SSEA are together entitled to the same amounts. The remaining appellants are together entitled to $5,000 for the motion and $5,000 for the appeal, including disbursements and GST, given that they were represented on the hearing of the appeal by counsel acting for CUPTE and SSEA.

Appeal allowed.

TAB 7

COURT FILE NO.: CV-09-8396-OOCL
DATE: 20091027

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes and Shawn Irving* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett for the Ad Hoc Committee of Noteholders
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.
Hugh O'Reilly and Amanda Darrach for the CHCH Retirees
Douglas Wray and *Jesse Kugler* for Communications, Energy and Paperworkers Union of Canada
Deborah McPhail for FSCO

Endorsement

Relief Requested

[1] The CMI Entities seek an order appointing David Cremasco, Rose Stricker and Lawrence Schnurr as representatives of certain retirees ("Retirees"). The Retirees are all former employees of the CMI Entities (or their predecessors) or their surviving spouses who receive or are entitled to receive a pension from a pension plan sponsored by a CMI Entity or who, prior to October 6, 2009, were entitled to receive non-pension benefits from a CMI Entity. The proposed order would encompass former members of the Communications, Energy and Paper-workers Union of Canada ("CEP") who are entitled to benefits under the Global Communications Limited Retirement Plan for CH Employees (the "CH Employees Plan") but not otherwise. They are referred to as the CH Employees. Put differently, the proposed representatives do not plan to represent former

unionized employees (or their surviving spouses) who were represented by CEP when they were active employees other than those who were entitled to benefits under the CH Employees Plan, namely the CH Employees. The CMI Entities also request an order appointing the law firm of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP as representative counsel for the Retirees. It is proposed that the CMI Entities provide funding for this representation.

[2] The CEP seeks an order appointing it and the law firm of CaleyWray to represent current and former members of the CEP who are employed or who were formerly employed by the CMI Entities[1] but not including the aforementioned CH Employees. It also requests funding by the CMI Entities and a charge over their property for this representation. It further requests that the claims bar date established in my order of October 14, 2009 be extended from November 19, 2009.

Brief Outline of Facts

[3] Since the date of the Initial Order, the CMI Entities have paid and intend to continue to pay: (a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current service and special payments with respect to the active defined benefit pension plans; and

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

[4] That said, certain former employees are affected by the CMI Entities' discontinuance or proposed discontinuance of employee related obligations and it is intended that they be assisted by the granting of the order requested by the CMI Entities. Approximately 81 former non-unionized employees have been advised that the CMI Entities propose to cease making all post-employment and post-retirement benefit payments in relation to claims incurred after November 13, 2009. There are also 2 out of 15 beneficiaries of the Canwest Global Communications Corp. and Related Companies Retirement

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

Compensation Arrangement Plan who will not have received the entire present value of their entitlement under that plan.

[5] In addition, the CMI Entities purported to terminate the CH Employees Plan when they sold CHCH TV effective August 31, 2009. 120 former employees or spouses received a pension or were entitled to receive a deferred vested pension under this plan. OSFI has directed CMI to prepare without delay a valuation report for the CH Employees Plan effective as of December 31, 2008 to establish additional amounts to accrue from January 1, 2009 which may need to be funded through special payments. The CMI Entities anticipate that the valuation will identify an unfunded liability. Currently, special payments are not contemplated in the cash flow projections for that unfunded liability and a shortfall is anticipated to exist on the filing of the termination report for the plan.

[6] Some former employees of CHCH TV have established a committee representing union and non-unionized former employees. Committee members include the proposed representatives. Rose Stricker is a non-unionized deferred vested member of the CH Plan. David Cremasco is a formerly unionized retiree with entitlement to post-retirement benefits and Lawrence Schnurr is a formerly salaried employee with entitlement to post-retirement benefits. If appointed, they will seek to form a broader committee with a member from each of the major population centres in which the Retirees reside and with at least one additional formerly unionized member.

[7] Cavalluzzo LLP acts for about 100 retired participants in the CH Employees Plan, 30 to 40 of whom were not previously represented by a union and 60 to 70 of whom were. Other than those 100, most other Retirees are not represented by counsel in this CCAA proceeding.

[8] The CMI Entities request that Cavalluzzo LLP be appointed as representative counsel to assist the Retirees.

[9] CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current and former

members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been impacted by the state of the economy. CEP states that the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent on receipt of funding. In the past 6 months, CEP has spent about $250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.

[10] CEP requests that CaleyWray be appointed as representative counsel. It also requests a charge or security over the property of the CMI Entities to cover the costs of CEP and its counsel although it did not press this point on learning that no such charge is proposed for the Cavaluzzo representation order.

[11] Lastly, CEP requests that the claims bar date be extended to provide it with additional time to identify, value and process claims.

Issues

[12] The issues to consider are:

(a) Should the representatives and Cavalluzzo LLP be appointed to represent the interests of the Retirees and should Cavalluzzo LLP be provided with funding for such representation?

(b) Should CEP and Caley Wray be appointed on behalf of CEP's current and former members (not including the CH Employees) and provided with funding and a charge over the property of the CMI Entities for such representation?

(c) Should the claims bar date be extended as requested by CEP?

Discussion

(a) Cavalluzzo LLP

[13] No one opposes the motion of the CMI Entities. The Monitor and the Ad Hoc Committee of 8% Noteholders support the request and others are unopposed to the relief requested. CIT has agreed to a variation of the cash flow in this regard as well.

[14] Dealing firstly with the representation component of the order, in my view, the order requested should be granted. I have jurisdiction under Rule 10 of the Rules of Civil Procedure and section 11 of the CCAA. The balance of convenience favours the granting of the order and it is in the interests of justice to do so. The Retirees are a particularly vulnerable group and without professional and legal resources, they are likely at risk of being unable to understand and protect their interests in the restructuring. Clearly there is a social benefit associated with them being represented. The appointment of a single representative counsel will facilitate the administration of the proceedings and provide for efficiency. Cavalluzzo LLP is experienced in this area, has a considerable reputation, and is fully qualified to act.

[15] As for funding, the CMI Entities propose that, subject to fee arrangements agreed to by the CMI Entities and Cavalluzzo LLP, reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements be paid by the CMI Entities on a monthly basis. Funding for such representation should be provided by the CMI Entities. I am satisfied that the moving parties have established that such an order is beneficial. I accept the evidence before me to the effect that most individual Retirees likely do not have the means to obtain actuarial and/or benefit experts and would benefit from the assistance offered by representative counsel and its pension expert. Absent such an order, there would likely be a multiplicity of lawyers acting for various Retirees, stress and inconvenience for those who could ill afford such representation, no representation for some, and the disorganization and inefficiency associated with multiple representation

of substantially similar interests. A single counsel diminishes the likelihood of "overlawyering" and funding of such representation is a recognition of that desirable objective. It is fair and just to grant such an order.

(b) CEP and CaleyWray

[16] CEP requests a separate representation order for all current and former CEP members other than the CH Employees and an order that CaleyWray be appointed as representative counsel funded by the CMI Entities.

[17] Again, there is no issue that CaleyWray is experienced and well equipped to act for these individuals. Similarly, the union may appropriately represent its members and former members.

[18] CEP intends to facilitate and advance the interests of both its members and former members. It is of the view that it has no conflict of interest as all of the aforementioned may ultimately have unsecured claims. It clearly already represents its current members and plans to represent its former members. In that sense, they are not vulnerable. I do not see the need for a representation order particularly with respect to current members. To the extent, if any, that it is necessary to do so, and given that no one opposes the request, it and CaleyWray are authorized to represent CEP's current and former members (but not including the CH Employees).

[19] As for funding, as I indicated in the *Fraser Papers* case, it should only be provided for the benefit of those former employees who otherwise would have no legal representation. Here, CEP intends to represent its current and former members (except for the CH Employees). But for this desire and subject to the agreement of Cavalluzzo LLP to act, there is no principled reason for separate representation. It arises by choice not out of necessity. Furthermore, this is an insolvency. Absent a clear and compelling reason such as the existence of an obvious conflict of interest, the general rule should be that funding by applicant debtors should only be available for one representative counsel. Even if one disagrees with that proposition, in this case, the CMI Entities have paid and intend to continue to pay, amongst other things, salaries, current service and special payments with respect to the defined benefit pension plans and post-employment and post-retirement

benefit payments. Based on the materials before me, there are approximately 9 CEP members who were recently terminated and who have been advised that they will no longer receive salary continuance. In essence, the evidentiary support that might merit a funding request is absent. As noted in the factum of the CMI Entities, if they should change their position with respect to employee related obligations, the need for funding could be addressed at that time. I am also not persuaded that funding should be granted to pay for CEP's costs for outstanding grievances. No one else including the Monitor supports the requested order and I do not believe that it should be granted.

[20] As mentioned, no charge is being requested or granted with respect to the Cavalluzzo representation order and none should be given here. In addition, the Term Sheet as described in the materials restricts the granting of a charge absent the agreement of others including the Ad Hoc Committee.

(c) Claims Bar Extension

[21] The last issue to consider is whether the claims bar date contained in my order of October 14, 2009, should be extended as requested by CEP. Based on the evidence before me, I am not persuaded that such an extension is necessary at this time.

Conclusion

[22] In conclusion, the CMI Entities' motion is granted except that the third and last sentences of paragraph 2 are to be subject to any further or other order. The CEP motion is dismissed although authorization to represent current and former members (excluding the CH Employees) is granted.

Pepall J.

Released: October 27, 2009

On a last unrelated issue, I would like counsel to give some thought to the following suggestion. For future time sensitive motions brought by the CMI Entities, it would be helpful in situations where interested parties do not have time to file a factum if, before the return date, those opposing filed with the court a 1 to 2 page memo (maximum) outlining their respective positions. Interested parties are not obliged to do so but the court would consider this to be of assistance.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC., ET AL.

Applicant

Court File No. CV-10-8533-00CL

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