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 APPLICANTS
(CSER Group Representative Counsel Motion)

February 18, 2010

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APPLICANTS

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TAB 1

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.

TAB 2

Indexed as:

Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.

Between
Eron Mortgage Corporation, in its capacity as Trustee, and others, petitioners, and
Eron Mortgage Corporation, Her Majesty the Queen in Right of the Province of British Columbia, Eron Financial Services Limited and all investors as set out in schedule "A" attached to the petition, respondents

[1998] B.C.J. No. 282

53 B.C.L.R. (3d) 24

2 C.B.R. (4th) 184

77 A.C.W.S. (3d) 95

Vancouver Registry No. A972569

British Columbia Supreme Court
Vancouver, British Columbia

Tysoe J.

Heard: January 23, 1998.
Judgment: filed January 29, 1998.

(17 pp.)

Trusts -- Administration -- Remedies of beneficiaries and others -- Compensation of trustee -- Encroachment on capital - - Judicial approval -- Jurisdiction.

The Applicants, the Eron Lenders Committee, requested an order granting the Committee a charge against Eron Mortgage Corp.'s assets for the remuneration and expenses of the Committee. Eron's business involved pooling funds from 4000 investors and providing syndicated loans to commercial developers. The Registrar of Mortgage Brokers suspended Eron's license. A Judicial Trustee and

Receiver were appointed. The Eron Lenders Committee, organized by several investors, was an elected committee representing the interests of the investors. The committee issued a ballot whereby a majority of voters approved the remuneration of the committee members from Eron's trust assets. The Application for a charge against the assets was opposed by several lenders and development projects on the basis that the votes were from only 25 per cent of the lenders. They also opposed the remuneration as too high.

HELD: Application dismissed. The Court had jurisdiction to charge the trust assets with the Committee's remuneration if the work done was of benefit to the trust property or was necessary for the management and preservation of the trust assets. Therefore, the Court had jurisdiction to create a charge for the committee's work with respect to communications to the lenders and working with the Judicial Trustee and the Court. The Court did not have jurisdiction to charge the assets with the cost of litigation that the committee intended to pursue. That work did not benefit the trust assets. Notwithstanding that the Court had jurisdiction, it declined to create the charge because it was premature to ascertain what efforts of the committee would be of benefit to the trust assets and what was an overlap of the powers of the Judicial trustee.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 19985, c. C-36. Judicial Trustee Act, R.S.B.C. 1996, c. 464, s. 97(1), 97(4). Law and Equity Act, R.S.B.C. 1996, c. 253. Mortgage Brokers Act, R.S.B.C. 1996, c. 313, s. 7.

Counsel:

Gordon R. Johnson, for Barbara Mayer and the Eron Lenders Committee.
Michael A. Fitch and John F. Grieve, for the Price Waterhouse Limited, Judicial Trustee.
Paul A. Cote, for Galaxy Trading Ltd.
David G. Fredrickson, for David and Phyllis Patriquin.
Various investors on their own behalf and on behalf of project committees.

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1 **TYSOE J.**:-- Barbara Mayer and the self-styled Eron Lenders Committee apply for two types of relief. The first is for an Order that Price Waterhouse Limited, as judicial trustee, be authorized to provide all reasonable co-operation with and all reasonable assistance to the Eron Lenders Committee and that there be liberty to apply to this Court if the Committee requests co-operation or assistance which Price Waterhouse Limited considers unreasonable. This aspect of the application is not controversial and I grant the requested Order.

2 The second type of relief is controversial. The request is for an Order that the Eron Lenders

Committee have a charge against assets in respect of which Price Waterhouse Limited has been appointed judicial trustee for remuneration and expenses of the Committee. The remuneration and expenses would both be subject to approval of this Court. It is suggested that members of the Committee would charge $33 an hour for up to a maximum number of hours a year (ranging from 606 to 1670 hours a year for the five members of the Committee). The expenses would include the costs of obtaining legal and other professional advice and assistance.

BACKGROUND FACTS

3 Eron Mortgage Corporation ("Eron") carried on the business of a mortgage broker but there was an aspect of its business which was different from most other mortgage brokers. Normally, a mortgage broker will match up one borrower with one lender and the security is granted by the borrower to the lender (in some cases, the mortgage broker will initially fund the loan and take the security in its own name, and will subsequently assign the security when a lender is located).

4 Eron's concept involved the pooling of funds into what are sometimes referred to as syndicated loans. Numerous investors would give their money to Eron which would pool or consolidate the funds and make a single loan to one borrower, usually in respect of a commercial development. The loan would be funded by Eron or one of the numbered companies which it incorporated and which are the other Petitioners in this proceeding (e.g., 475634 B.C. Ltd.). The mortgage or other security would be taken in the name of Eron or the numbered company which would sign a declaration of trust in favour of the investors. Approximately 4,000 people invested monies through Eron in this fashion and they advanced an aggregate of approximately $250 million.

5 This proceeding was commenced by Eron and its numbered companies on October 3, 1997 and an ex parte hearing was arranged for the afternoon of that day. On the morning of October 3 the Registrar of Mortgage Brokers suspended Eron's mortgage broker's licence, effectively putting its business into abeyance.

6 At the October 3 hearing Eron and its numbered companies requested that they be replaced as trustee by Price Waterhouse Limited with respect to the security which they were holding in trust for the investors. Two principal reasons were given for the request. First, some of the loans made by Eron on behalf of investors were to borrowers who were owned, in whole or in part, by the principals of Eron. This created a conflict of interest and had been a matter of concern expressed by the Registrar of Mortgage Brokers. Second, some of the loans made by Eron on behalf of investors had gone into default and it was necessary to take proceedings to enforce the security held for the investors. However, Eron's lawyers were concerned that the declarations of trust signed by Eron and the numbered companies might be inadequate to allow the trustee to make decisions with respect to the enforcement proceedings.

7 I heard the application and I agreed that it was in the best interests of the investors to have Eron and its numbered companies replaced as trustees for the investors. I appointed Price Waterhouse Limited as Judicial Trustee pursuant to s. 97(1) of the Trustee Act[1] in substitution of Eron and the

numbered companies. I ordered that the trust assets be charged with the payment of the fees and expenses of Price Waterhouse Limited (subject to an allocation amongst the various trust assets which I have subsequently made in general terms).

8 Although the application was technically made on an ex parte basis, Eron's counsel had advised counsel for the Attorney General of the application and the Attorney General's counsel appeared at the hearing on behalf of Her Majesty the Queen. In addition to supporting the application for the appointment of the Judicial Trustee, the Attorney General's counsel made an oral application to have Price Waterhouse Limited appointed as Receiver of Eron and its related company, Eron Financial Services Limited, for a period of 14 days pursuant to s. 7 of the Mortgage Brokers Act.[2] This was an unorthodox application but it was not opposed by Eron's counsel. I joined Her Majesty the Queen and Eron Financial Services Limited as Respondents in the proceeding and I then appointed Price Waterhouse Limited as Receiver of the two companies for a period of 14 days. This appointment was subsequently extended for an indefinite period.

9 Price Waterhouse Limited was appointed Receiver over the assets belonging to Eron and Eron Financial Services Limited (which do include assets held in trust by them for the investors or any other party), but it was intended that the Receiver would generally investigate the affairs of Eron and that this would likely assist Price Waterhouse Limited, as Judicial Trustee, in administering the security on behalf of the investors.

10 Accordingly, this proceeding is hybrid in nature. Price Waterhouse Limited is acting as Judicial Trustee of the trust assets and as Receiver of Eron's non-trust assets. A receiver would normally be appointed in a separate proceeding but I was satisfied that the extingencies of the situation and the nature of Eron's business made it just and convenient to have a combined proceeding.

11 The investigations of Price Waterhouse Limited have revealed, among other things, that there was a commingling of monies by Eron and that trust funds were used for other than their intended purposes. For example, some of the loans were overfunded in the sense that more monies were provided by investors in respect of a particular project than were advanced to the borrower. Eron apparently used the excess funds for other purposes. Other problems exist in identifying which investors are entitled to which trust assets.

12 As would be expected, the suspension of Eron's mortgage broker's licence and the appointment of Price Waterhouse Limited as Judicial Trustee and Receiver caused concern among the investors. There was further reason for concern when it became apparent that a number of the loans made by Eron on behalf of investors were in jeopardy.

13 Although Price Waterhouse Limited was appointed to protect the interests of the investors, it was understandable that the investors would wish to take steps on their own behalf and they have organized into two different types of groups. The first type is a group of all of the Eron investors and this is the group which the Eron Lenders Committee represents. The second type of group

which has organized are groups of investors corresponding to the particular developments or projects against which the security for their funds are held and they are represented by what have become known as the project committees (which is a bit of a misnomer because the investors have an interest in the mortgages against the projects, not the projects themselves).

14 The Eron Lenders Committee became organized through the efforts of several investors who called themselves the Eron Lenders Recovery Coalition. They were permitted to send a written communication to all of the investors in a mailing done by Price Waterhouse Limited on about October 20. The communication gave notice of an organizational meeting of all of the Eron investors to be held on November 2 for the purpose of creating a lender committee to speak for all of the investors on common issues. I understand that between 1,000 and 2,000 investors attended the meeting.

15 A voting ballot was given to each of the investors who attended the organizational meeting and the ballot was mailed to all of the other investors. The voting closed on November 14.

16 There were four questions on the ballot. The first was for the creation of the Eron Lenders Committee and it was approved by 1,415 of the 1,454 votes cast (a majority of 97%). The last question related to the election of the seven people who would be on the Committee.

17 The second and third questions on the ballot related to the payment of remuneration and expenses for the Committee. The second question asked whether the costs of the Committee, including the costs for obtaining legal and other professional advice and assistance, should be paid from Eron's assets and the trust assets and loan assets of the Eron Lenders. Of the 1,452 votes cast on the question, 1,313 (90%) voted in favour. The third question asked whether it was fair that the members of the Committee "be paid a reasonable amount, to be approved by the Supreme Court of British Columbia, for the time which they devote to the services of the lenders committee", with any such amounts to be paid from the same source as the costs of the Committee. Of the 1,440 votes cast on the question, 1,060 (74%) voted in favour.

18 The mandate of the Committee was set out in the ballot form. In general terms, the mandate of the Committee is to represent the Eron lenders on matters of common concern, including the following:

(a) to provide an organization structure for the communication of information;
(b) to investigate legal claims available to lenders;
(c) to facilitate the commencement of litigation where there are common interests and justifying circumstances;
(d) to negotiate settlements of legal claims of lenders;
(e) to monitor Price Waterhouse Limited to encourage the prompt provision of service without unreasonable cost;
(f) to represent the lenders as a group in court where the interests of the lenders are perceived as differing from those of the judicial trustee or

where legal representation would be of assistance to the judicial trustee.

19 Since its creation, the Eron Lenders Committee has appointed legal counsel (who has appeared in Court on its behalf) and has met with representatives of Price Waterhouse Limited, the Financial Institutions Commission and their respective solicitors. The Committee has held meetings once a week and also attends the meetings of the representatives of all of the project committees.

20 Two of the members of the Committee have resigned. One resigned for health reasons. The other person to resign was the only one of the remaining six members of the Committee who had said that he did not want to be compensated for his time. He resigned on January 19, 1998 because he felt that the original mandate of the Committee had been achieved. He believes that the Committee should be dissolved and that there should be a new committee existing of one Eron investor and a law firm, with the investor being remunerated out of the proceeds of the litigation that is anticipated to be undertaken.

21 In addition to legal counsel speaking to the Committee's application, several investors spoke in support of the Committee members being remunerated and the remuneration and expenses of the Committee being a charge against the trust assets. However, two counsel acting for investors and seven individual investors spoke in opposition to the application. Of these nine investors, five were on the committees of investors in respect of particular developments or projects.

22 Both of the counsel acting for investors questioned the jurisdiction of the Court to make the Order being sought by the Committee. Some investors thought that the application was premature and that there should have been prior discussion with the project committees. Some of the opposing investors agreed that the Committee members should be remunerated but felt that $33 an hour was too high - they pointed out that the question on the ballot only made reference to a reasonable amount and there was no evidence that the majority of the Eron investors agreed to remuneration at a rate of $33 an hour. It was noted that while the number of the Eron investors who voted in favour of remuneration for the Committee members may have constituted 74% of the ballots cast, they only represented approximately 25% of the total number of investors. Finally, it was submitted that it was not fair to create a charge against the "good projects" because the investors who will be fully repaid from their security would be financing the efforts of the Committee but would not be receiving any benefit from those efforts.

DISCUSSION

23 It is my opinion that the Eron Lenders Committee performs valuable functions on behalf of the Eron investors and that it should be encouraged to continue in some form. I view the enumerated aspects of the Committee's mandate as falling into three basic functions. The first is communication between Price Waterhouse Limited and the investors. Counsel for Price Waterhouse Limited indicated that this function is the most significant in its view. The second function is working with Price Waterhouse Limited and the Court in furtherance of the best interests of the Eron investors as a whole. I anticipate that I will probably find submissions on behalf of the

Committee to be useful on future applications. The third function is pursuing litigation in an attempt to offset some or all of the shortfalls on the Eron loans.

24 I certainly share the view of the majority of the investors who cast ballots that it is fair for the members of the Committee to be paid a reasonable amount for their efforts. It is also appropriate for the Committee's professional advisors to be paid. The more difficult question is who should pay for the Committee's remuneration and expenses. This question involves the threshold issue of whether the Court has jurisdiction to create a charge against the trust assets.

25 The jurisdiction relied upon by the Notice of Motion filed by the Eron Lenders Committee was the Trustee Act, the Law and Equity Act[3] and the inherent jurisdiction of the Court. During his submissions, counsel for the Committee only made reference to the Trustee Act and the inherent jurisdiction of the Court. No mention was made of any particular section in the Law and Equity Act and I infer the abandonment of that source of jurisdiction.

26 The relevant provision of the Trustee Act is subsection 97(4) which reads as follows:

> The court may, either on request or without request, give a judicial trustee general or special directions in regard to the trust or its administration.

As I indicated during the course of the oral submissions, this provision does not give the Court jurisdiction to make the requested Order. I am not being requested to give any directions to the Judicial Trustee. The Court is being asked to create a charge against the trust assets.

27 My initial reaction was that the Court has inherent jurisdiction to create a charge against the trust assets for the remuneration and expenses of the Committee. My reaction was based on my experience with the Companies Creditors Arrangement Act.[4] Counsel for the Committee referred to my decision Re Woodward's Limited[5], Woodward's Ltd. (Re) [1993] B.C.J. No. 115, where I implicitly relied on the Court's inherent jurisdiction to order that the debtor company pay 50% of the costs of three creditors' committees. Leave to appeal my decision regarding the creation of the creditors' committees was refused by the Court of Appeal.[6]

28 Another example under the Companies Creditors Arrangement Act is Re Westar Mining Ltd.[7] where Macdonald J. created a first charge against the assets of the debtor company to secure the accounts of suppliers which were providing goods and services to the debtor company during the period of attempted reorganization. Macdonald J. relied on the Court's inherent jurisdiction to create the charge:

> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., vol. 37, para 14) as:

> ... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so ...
>
> Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects. (p. 12)

Macdonald J. distinguished the decision of Lochson Holdings Ltd. v. Eaton Mechanical Inc.,[8] a case involving a receiver-manager, on the basis that receiver-manager cases involve the Court safeguarding property while the concern of the Court in C.C.A.A. proceedings is the survival of the company owning the property for long enough to present a plan of reorganization. Two other reasons justify a more liberal use of the Court's inherent jurisdiction in C.C.A.A. proceedings to create charges against the assets of the debtor company. First, it is the debtor company which has come to the Court for protection and assistance in connection with its reorganizational efforts. Second, the Court should be given flexibility in order to achieve the goal of the legislation to facilitate successful reorganizations.

29 The decision of Lochson Holdings referred to by Macdonald J. had followed the earlier decision of the Ontario Court of Appeal in Kowal Investments Ltd. v. Deeder Electric Ltd.[9] In that case, the Court held that, as a general rule, a court has no power to authorize receivership expenses at the expense of prior mortgagees or lienholders without their approval. There are recognized exceptions to this general rule and, while acknowledging that it was not an exhaustive list, the Court referred to the following three exceptions:

1. The receiver's expenses will be given priority over the security pursuant to which the receiver was appointed;
2. The receiver's expenses to preserve and realize assets for the benefit of all interested parties, including secured parties, will be given priority over the secured parties, provided that, at least in the case of borrowings by the receiver, there must be compelling and urgent reasons for the obligations of the receiver to be given such priority if there is opposition from the secured creditors;
3. Expenditures made by a receiver for the necessary preservation or improvement of the property may be given priority over secured creditors.

30 I have made reference to the Kowal decision in view of another decision of the Ontario Court of Appeal in the case of Ontario (Securities Commission) v. Consortium Construction Inc.[10] In that case, Consortium Construction Inc. and related companies sold units in real estate projects. The units were held in trust by the Consortium companies for the investors. A receiver of the

Consortium companies was appointed at the instance of the Ontario Securities Commission. The Ontario Court of Appeal upheld the decision of the trial judge that receivership costs could be paid from the trust assets which were beneficially owned by the investors.

31 Two of the appellate judges provided concurring reasons and it is not stated in the report whether the third judge participated in the judgment and, if so, with whom he agreed. Galligan J.A. found the jurisdiction of the Court in the wording of the Ontario Securities Act and his reasons do not provide any assistance to the present case.

32 Carthy J.A. found the jurisdiction by analogy to the receivership cases. After quoting the passage from Kowal setting out the second exception to the general rule, he stated that if the jurisdiction of the Court is coincident and extends to trust funds, it is subject to the limitations referred to in the Kowal decision. He then quoted the following passage from Re Berkeley Applegate (Investment Consultants) Ltd.,[11] which also involved trust assets:

> The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in In re Marine Mansions Co (1867) LR 4 Eq 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in Scott v. Nesbitt (1808)14 Ves 438), and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in Boardman v. Phipps [1966] 3 ER 721). In my judgment this is a case in which the jurisdiction can properly be exercised. (p. 83 of [1988] 3 All E.R. and quoted at p 10 of 14 C.B.R. (3d))

After citing four other authorities where receiver's costs had been imposed against trust assets, Carthy J.A. stated that there was jurisdiction for such an Order but that the discretion to grant the Order should be sparingly exercised. He concluded that the trial judge's discretion had not been improperly exercised because there had been a commingling of monies and it would have been necessary for some person to identify the various assets and funds.

33 The principal case relied upon by Carthy J.A., Berkeley Applegate, involved a liquidator of a company which held investors' funds in trust awaiting investment in mortgages. The Court held that the liquidator's remuneration and costs in administering the trust property could be paid out of the trust property in view of the facts that the liquidator's work benefitted the trust and the work would

have had to be done by the investors or a receiver if it was not done by the liquidator.

34 The issue was re-visited by the Ontario Court of Appeal in Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.[12] The underlying facts were fairly similar to the present case. Matrix was a mortgage broker and it held mortgages in trust for individual investors. Complaints were made about Matrix and a receiver was appointed on the application of the Registrar of Mortgage Brokers. The Order appointing the receiver created a charge against the trust assets for the fees and disbursements of the receiver. On a subsequent application Farley J. held that the applicable statute did not authorize the appointment of a receiver and that the receiver was not entitled to any compensation from the trust assets.

35 The Ontario Court of Appeal held that the receiver was entitled to recover a portion of its fees and disbursements because it was under a legal obligation to comply with the Order as long as it remained in force. After commenting that Farley J. should have inquired into the propriety of fixing the trust assets with the obligation to compensate the receiver in accordance with the principles referred to in the Consortium decision, the Court continued as follows: As Farley J. regarded the absence of statutory authority for the initial application to appoint Peat Marwick as a trustee/receiver as dispositive of the investors' obligation to pay the fees and expenses of Peat Marwick, he made no effort to determine what part of the work done by Peat Marwick was properly attributable to the management and preservation of the trust assets. In my view, some part of Peat Marwick's efforts, as detailed in its reports, was expended in connection with the preservation and management of the trust assets. Those efforts were necessary given the state of affairs left by Matrix and had to be performed by or on behalf of the investors. According to the principles referred to in Ontario (Securities Commission) v. Consortium Construction, supra, those fees and expenditures necessary to the management and preservation of trust assets were properly chargeable against the trust assets. (p 137)

36 The general principle which I extract from these authorities is that the Court does have the jurisdiction to order that trust assets be charged with the remuneration and expenses of a third party if the work done by the third party is of benefit to the trust property or is necessary for the management and preservation of the trust assets. Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it. Two of the cases say that the Court should exercise its discretion sparingly, which I interpret to mean that the Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.

37 With this principle in mind, I return to the three aspects of the Committee's mandate:

1. Communication - it appears to me that the Committee has undertaken part of the Judicial Trustee's function in the sense that it has simplified communications and that less time will be required of the Judicial Trustee

in this regard. As the fees and expenses of the Judicial Trustee form a charge against the trust assets, it is equitable in my view to pay out of the trust assets the remuneration and expenses of the Committee in connection with communications which would otherwise been done by the Judicial Trustee. The Judicial Trustee feels this is the most significant aspect of the Committee's work and I infer the reason is that it has assisted the Judicial Trustee in the performance of its duties as they relate to communications with the Eron investors.

2. Working with the Judicial Trustee and the Court - to the extent that the Committee's remuneration and expenses in this regard are beneficial to the trust assets by increasing their value or by reducing the amount of the Judicial Trustee's costs charged against them, it is appropriate that they be paid out of the trust assets.
3. Litigation - the litigation which the Committee intends to pursue is not aimed at benefitting the trust assets, nor does it relate to the administration of the trust assets. Rather, the goal is to attempt to make up shortfalls between the funds advanced by the investors and the amounts recovered from the trust assets.

Accordingly, the Court has jurisdiction to charge the trust assets with some or all of the Committee's remuneration and expenses in connection with the first two aspects (but not the third aspect). However, I face difficulties which preclude me from creating a charge at this time.

38 The difficulty I encounter with respect to the first aspect is that I cannot determine on the evidence before me as to what extent the communication function undertaken by the Committee has relieved the Judicial Trustee from tasks that it would otherwise have been required to perform. The difficulty I face with respect to the second aspect is that it is premature at this stage to ascertain what efforts of the Committee, if any, will be of benefit to the trust assets. My view at present is that it will probably be necessary to deal with this aspect on an instance-by-instance basis.

39 In the circumstances, I dismiss the Committee's application for a charge against the trust assets in respect of all of its remuneration and expenses but I grant liberty to re-apply on a more limited basis in accordance with these Reasons for Judgment.

40 I would note that it is open to the Judicial Trustee and the Committee to enter into an arrangement whereby the Judicial Trustee could agree to compensate the Committee for its assistance in communicating with the Eron investors. As the expenses of the Judicial Trustee form a charge against the trust assets, the Committee would be assured of payment of its compensation. It may be that the Judicial Trustee would want to seek directions from the Court under s. 97(4) of the Trustee Act approving any such arrangement.

41 As I am not creating a charge against the trust assets at this stage, I need not deal with the

level of remuneration being sought by the Committee members. I will say, however, that there was merit in the submission that the answers to the questions on the ballot do not support a conclusion that the Eron investors are generally in agreement with the proposed amount of remuneration. I think it would be helpful on any future application to know the views of the investors with respect to the amount of the remuneration, which could be learned either from a general canvassing of the investors or from discussions between the Committee and the project committees.

42 I make no order of costs with respect to this application.

TYSOE J.

cp/d/sfr/DRS/DRS

1 Trustee Act, R.S.B.C. 1996, c. 464.

2 Mortgage Brokers Act, R.S.B.C. 1996, c. 313.

3 Law and Equity Act, R.S.B.C. 1996, c. 253.

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

5 Re Woodward's Limited (January 21, 1993), Vancouver Docket No. A924791 (B.C.S.C.).

6 Re Woodward's Limited (1993), 105 D.L.R. (4th) 517 (B.C.C.A.).

7 Re Westar Mining Ltd. (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

8 Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630 (B.C.C.A.).

9 Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84 (Ont. C.A.).

10 Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321 (Ont. C.A.).

11 Re Berkeley Applegate (Investment Consultants)Ltd.; Harris v. Conway, [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71 (Eng. H.C.).

12 Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp. (1993), 106 D.L.R. (4th) 132 (Ont. C.A.).

TAB 3

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").

[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

[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.
[2] 29 U.S.C.

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

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.

Pepall J.

Released: September 17, 2009

TAB 4

COURT FILE NO.: CV-09-8122-00CL
DATE: 20090724

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADIAN INC. AND NOVAR INC.

Applicants

BEFORE: MORAWETZ J.

COUNSEL: Linc Rogers, Katherine McEachern and Jackie Moher, for the Applicants

Ashley Taylor and Lesley Mercer, for FTI Consulting Canada ULC, Monitor

Paul Macdonald and Jeff Levine, for JPMorgan (DIP Lender)

Kenneth D. Kraft, for SAPA Holding AB

Andrew Hatnay and Demetrios Yiokaris and Andrew Mckinnon, for Keith Carruthers and SERP Retirees

B. Empey, for Sun Indalex Finance LLC

John D. Leslie, for the U.S. Unsecured Creditors' Committee

G. Finlayson, for U.S. Bank as Trustee for the Noteholders

HEARD & DECIDED: JULY 2, 2009

ENDORSEMENT

[1] I heard argument in this matter on July 2, 2009 at the conclusion of which I dismissed the motion with reasons to follow. These are those reasons.

[2] Members of the Indalex Supplemental Executive Retirement Plan or "SERP", (referred to collectively as the "SERP Group") brought this motion for an order requiring the Indalex Applicants to reinstate payment of supplemental pension benefits retroactive to April 2009.

[3] The motion is opposed by the Indalex Applicants, the Noteholders and by the DIP Lender. Counsel to the DIP Lender submits that if these payments are made, they would constitute an event of default under the DIP Agreement. Such payments would need the consent or waiver from the DIP Lender which counsel submits, is not forthcoming.

[4] The SERP Group have a contractual entitlement to pension benefits under the Supplemental Retirement Plan for executive employees of Indalex Limited and associated companies (the "Supplemental Plan").

[5] The Supplemental Plan is an unfunded and non-registered supplemental pension plan. Benefits under the Supplemental Plan are paid out of the general revenues of the Indalex Applicants.

[6] Immediately after filing for CCAA protection on April 3, 2009, the Indalex Applicants informed the SERP Group that their supplemental pension benefits were being stopped.

[7] The situation confronting members of the SERP Group is very similar to that faced by certain former employees of Nortel Networks ("Former Nortel Employees") who recently brought a motion requesting an order requiring the Applicants in Nortel's CCAA proceedings (the "Nortel Applicants") to make payments which the Nortel Applicants were contractually obligated to pay to Former Nortel Employees, relating to the Transitional Retirement Allowance and any pension benefit payments Former Nortel Employees were entitled to receive in excess of the pension plan. The motion was dismissed. (See *Nortel Networks Corp., Re 2009* CarswellOnt. 3583).

[8] The reasons provided for the dismissal of the motion of the Former Nortel Employees are applicable to this case.

[9] SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.

[10] The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.

[11] The Amended and Restated Order authorizes the Indalex Applicants to pay all reasonable expenses incurred by the Indalex Applicants in carrying on their business in the ordinary course. SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized to pay the monthly SERP payments.

[12] In certain CCAA proceedings, the court has granted relief to permit payment of pre-filing unsecured debt. However, in these cases, such payments have for the most part, been considered to be crucial to the ongoing business of the debtor company. In this case, the Indalex Applicants are seeking a going concern solution for the benefit of all stakeholders and their resources should be used for such purposes. I have not been persuaded that the SERP payments are crucial to the ongoing business of the Indalex Applicants and such payments offer no apparent benefit to the Indalex Applicants. (*Re Nortel, supra,* at paragraphs 80 and 86.)

[13] The SERP Group submits that there are hardship issues that should be taken into account. In Nortel, a hardship exception was made. However, the Nortel exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the Former Nortel Employees. The Nortel hardship exception recognizes that any distribution would represent an advance on the general distribution. The situation facing the Indalex Applicants is different. The Indalex Applicants have significant secured creditors and unlike the situation in Nortel, it is premature to comment on the prospects of any meaningful distribution to unsecured creditors.

[14] Counsel to SERP Group also submitted that CCAA protection in this case had been obtained for a company that was liquidating its assets. Counsel for the SERP Group submitted that Indalex had put itself up for sale and commenced a "marketing process" and as such it was not restructuring, rather, it was selling itself. This led to the submission that the cutting of benefits payable to the SERP Group was not necessary or justified for the sale of the company under the CCAA.

[15] I fail to see the relevance of this submission. At the present time, the Applicants are properly under CCAA protection. No motion has been brought to challenge the appropriateness of the CCAA proceedings and, in my view, nothing in the CCAA precludes the ability of a debtor applicant to sell its assets. See *Re Nortel Networks Corporation* – endorsement released July 23, 2009 on this point.

[16] Finally, counsel to SERP Group placed emphasis on the fact that the amount required to satisfy the obligations to SERP Group is not significant. While this submission may be attractive on the surface, to give effect to this argument would violate a fundamental tenet of insolvency law, namely, that all unsecured creditors receive equal treatment. In my view, there is no basis to prefer the SERP Group or, indeed, any retired executive who is entitled to SERP payments in priority to other unsecured creditors.

[17] Counsel to SERP Group also relied upon *Doman Industries et al* (2004) B.C.S.C. 7333 for the proposition that, the fact that a company can reduce its costs if it can terminate contracts, is not sufficient for a CCAA court to authorize the termination of the contract. In *Doman, supra,*

the point at issue concerned licences under the *Forest Act* which created the concept of replaceable contracts. Doman held certain licences. As noted by Tysoe J. (as he then was), at paragraph 7, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the licence holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. That is not the situation in this case. The contractual situation in *Doman, supra,* is not, in my view, comparable to this case. *Doman* is clearly distinguishable on the facts.

[18] For the forgoing reasons, the motion of SERP Group for reinstatement of SERP benefits is dismissed.

MORAWETZ J.

Heard and Decided: **July 2, 2009**

Typed Version Released: **July 24, 2009**

TAB 5

COURT FILE NO.: 09-CL-7950
DATE: 20090527

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF 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

BEFORE: MORAWETZ J.

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.)

HEARD: **April 20, 2009**

ENDORSEMENT

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

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

[3] The proposed representative counsel are:

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

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate

motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

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

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

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

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

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

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

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

[9] These motions give rise to the following issues:

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

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

Issue 1 – Representative Counsel and Funding Orders

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

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

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

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

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

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

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

Issue 2 – Who Should be Appointed as Representative Counsel?

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

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

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:

(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

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

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

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

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

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

[23] The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay,

retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

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

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

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

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

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

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

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

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

[32] Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

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

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

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

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

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

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

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

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

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

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

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

date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

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

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

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

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

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

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

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

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

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

[50] KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

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

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

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

accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

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

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

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

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

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

[59] Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be

charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

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

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

[62] Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *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.

MORAWETZ J.

DATE: May 27, 2009

TAB 6

Indexed as:
Westar Mining Ltd. (Re)

IN THE MATTER OF the bankruptcy of Westar Mining Ltd.

[1999] B.C.J. No. 2169

13 C.B.R. (4th) 289

91 A.C.W.S. (3d) 346

Vancouver Registry No. 143440/92

British Columbia Supreme Court
(In Bankruptcy)
Vancouver, British Columbia

Sinclair Prowse J.

Heard: September 14, 1999.
Judgment: September 29, 1999.

(43 paras.)

Bankruptcy -- Administration of estate -- Application to court for directions -- Practice -- Legal costs.

Application by a law firm for an order appointing it as counsel to a group of creditors, and for its costs to be paid from the estate. The trustee in bankruptcy applied for directions regarding notice to creditors. Westar Mining owned a mine that had gone into bankruptcy. The trustee was holding money that had been paid by Westar's joint venture partner in the mine. A number of creditors sought to have this fund set apart from Westar's estate and paid to them directly.

HELD: Applications allowed in part. The law firm was appointed representative counsel for a group of the creditors. The order would not prevent any creditors from retaining different counsel if they so desired. Any creditors represented by the firm would share proportionally in any money recovered by the firm. It was not appropriate to make an order that Westar's estate pay the firm's legal costs. The firm's work would not have benefitted the estate, and if successful, it would have depleted the estate. It would have been inequitable and unfair to have the owners of the estate bear the costs of an action that they opposed. If the firm were successful in its claim, it would have been en-

titled to seek costs against the estate. All of the creditors were to be notified by letter sent by ordinary mail of the upcoming application.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 38.

Counsel:

L.C. Donaldson, for Arthur Anderson Inc., the trustee in Bankruptcy of the Estate of Westar Mining Ltd.
B.J. Ingram, for some of the secured and unsecured creditors of Westar Mining Ltd.
C. Bird and C. Shaley, for the law firm of Ladner Downs and for various unsecured Creditors of Westar Mining Ltd.

SINCLAIR PROWSE J.:--

I) NATURE OF PROCEEDING AND RELIEF SOUGHT

1 In this bankruptcy action hearing, there were three applications made.

2 The first application, by the law firm of Ladner Downs, was a request to be appointed as the representative of a group of unsecured creditors of the bankrupt Westar Mining Ltd. ("Westar").

3 The second application, also by Ladner Downs, was that the cost of these legal services be borne by Westar's Estate.

4 The third application was made by Arthur Anderson Inc. who is the Trustee in Bankruptcy of the Westar Estate (the "Trustee"). Counsel for the Trustee requested directions on the procedure for giving notice to a particular group of creditors regarding an upcoming application.

II) BACKGROUND

5 To put these applications in context, prior to going bankrupt Westar operated two coal mines, the Greenhills Mine and the Balmer Mine. Both of these are situated in the east Kootenay area of British Columbia. These applications pertain to the Greenhills Mine.

6 Westar owned 80% of the Greenhills Mine. The other 20% was owned by Westar's joint venture partner. This joint venture partner, under the terms of the joint venture agreement, paid 20% of the operating expenses of the Greenhills Mine in return for 20% of its coal production. Westar was responsible for managing the mine.

7 At the time of bankruptcy, Westar was owed approximately $8.5 million (the "Trust Money") by its joint venture partner, as its share of the operating expenses of the Greenhills Mine. This money has now been paid and is being held in trust by the Trustee.

8 In an upcoming application, a number of the unsecured creditors of Westar will be seeking an order that a portion of the "Trust Money" be excluded from the Westar Estate and be paid to them directly. Included in this group of unsecured creditors are former employees of the Greenhills Mine

and 166 suppliers of goods and services for that mine. (The 166 supply creditors will hereinafter be referred to as the "Greenhills Mine Suppliers Group" in this judgment).

9 In this upcoming application, both of the former employees of the Greenhills Mine and the Greenhills Mine Suppliers Group intend to argue that $1.6 million of the Trust Money that was owed by the joint venture partner for goods and services supplied to that mine prior to the Companies Creditors Arrangement Act, R.S.C. 1985, C-36 (the "CCAA") is impressed with a trust and is payable directly to them rather than to the Westar Estate.

10 That is, these unsecured creditors contend that these monies were only payable to Westar if it had already paid the operating expenses and therefore was entitled to be reimbursed. Otherwise, Westar held these monies in trust for the suppliers of goods and services to whom these monies were owed. As Westar had not paid these expenses, it was not entitled to be reimbursed for them. The monies are therefore held in trust for these creditors.

11 This "purpose trust" issue is to be determined at an upcoming hearing.

12 In the present hearing, the orders and directions sought pertain to the Greenhills Mine Suppliers Group and the upcoming "purpose trust" hearing only. (The former employees of the Greenhills Mine will be participating in this upcoming hearing and have their own counsel).

13 Some direction has already been given regarding the Greenhills Mine Suppliers Group and the upcoming hearing. Specifically, on April 21, 1999, the Court ordered that the Trustee send a letter to the 13 largest creditors of the Greenhills Mine Suppliers Group for the purpose of apprising them of the "purpose trust" issue. Eighty percent of the money owed to Greenhills Mine Suppliers Group is owed to these 13 creditors. (Exhibit B of the affidavit of Jerry P. Zuk sworn on September 3, 1999, sets out the names and the amounts owing to each of these creditors). These creditors, in turn, were to advise the Trustee within 15 to 20 days, as to whether they were going to participate in the determination of the "purpose trust" issue.

14 Since the making of the April 21, 1999 order, the thirteen creditors have been notified. To date 6 of these 13 creditors have contacted Ladner Downs to represent them. Moreover, Ladner Downs has been advised that some of the remaining seven creditors may also be contacting them to act as counsel.

III) DISCUSSION AND DECISION

A) Application By Ladner Downs To Act As Representative of The Greenhills Mine Suppliers Group

15 As mentioned at the beginning of these reasons for judgment, Ladner Downs is seeking an order that it be appointed to represent the Greenhills Mine Suppliers Group. This order would not preclude any of the creditors in the Greenhills Mine Suppliers Group from retaining a different counsel should they choose to do so. Moreover, unless they agree otherwise, all of the creditors would participate proportionately in any money recovered by Ladner Downs on behalf of that group.

16 All of the participants in this hearing agreed that the Court had the jurisdiction to make such a representative order. In addition, earlier in this action this Court made a similar representative appointment for the employees of the Greenhills Mine.

17 The purpose of appointing representative counsel is that it would simplify the process for both the Trustee and the creditors in the Greenhills Mine Suppliers Group.

18 This application is unopposed.

19 Given that this appointment would simplify the process and that there is no apparent prejudice to anyone, Ladner Downs is appointed to represent the Greenhills Mine Suppliers Group.

20 As was touched on earlier, the creditors in the Greenhills Mine Suppliers Group are at liberty to retain another counsel should they choose to do so. Moreover, Ladner Downs may, upon application to this Court, seek to have their appointment as representative set aside should it be unable for whatever reason to arrange a mutually agreeable working relationship with the Greenhills Mine Suppliers Group.

B) Application By Ladner Downs That Their Legal Fees Be Paid From The Westar Estate

21 As was set out above, I have appointed Ladner Downs to act as a representative of the Greenhills Mine Suppliers Group.

22 In their second application in this hearing, Ladner Downs, as the representative of this group of creditors, sought to have its legal fees paid from the Westar Estate.

23 As was recognized in Eron Mortgage Corp. (Trustee of) v. Eron Mortgage [Q.L. [1998] B.C.J. No. 282] (B.C.S.C.) at para. 36, to succeed in this application Ladner Downs must establish that the legal work it is doing for the Greenhills Mine Suppliers Group is work that will either benefit the Westar Estate or is work that is necessary for the management and preservation of the assets of that Estate. Eron, supra, also recognized that:

> Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not done it.
>
> The Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.

24 In the present case, the work that is being undertaken by Ladner Downs will not benefit the Westar Estate. Ladner Downs will be contending, on behalf of the Greenhills Mine Suppliers Group, that $1.6 million should be excluded from the Westar Estate. Therefore, if successful, the work done by Ladner Downs will reduce the Westar Estate, not enhance it.

25 Similarly, the work to be done by Ladner Downs on behalf of the Greenhills Mine Suppliers Group is not work that would have to be undertaken by someone because it is necessary for the preservation or management of the Westar Estate. Instead, the work undertaken by Ladner Downs is directed at depleting, rather than preserving, the assets of the Westar Estate.

26 Furthermore, to permit these legal expenses to be paid from the Westar Estate would be neither fair nor equitable to the owners, that is the creditors, of the Westar Estate

27 During the proceedings, counsel for Ladner Downs argued that this claim for legal fees should be treated as being analogous to the application that a creditor might make when the Trustee

has refused to act pursuant to s. 38 of Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3. Under s. 38, with leave of the Court, a creditor may be permitted to commence an action on behalf of the bankrupt after the trustee has refused to commence the action. The creditor, if successful, will benefit to the extent of his/her claim with the remainder belonging to the estate.

28 In the present situation, Counsel for Ladner Downs argued that as the Trustee had refused to take up this claim on behalf of the Greenhills Mine Suppliers Group, and as Ladner Downs had taken it up, its costs should be recoverable from the Estate.

29 In my view, the present situation is not analogous to situations covered by s. 38 of the Bankruptcy and Insolvency Act, supra. In this case, as was set out earlier, the claim is not a claim belonging to the Westar Estate, nor is it a claim that would benefit the Westar Estate.

30 If there are any analogies to be drawn, the present situation is more analogous to the situation of a creditor whose claim has been disallowed by the Trustee. That is, the fact that the Trustee has refused to accept the claim of the Greenhills Mine Suppliers Group in respect of the money held in trust may be similar to the refusal of the Trustee to accept a claim made by a purported creditor. In challenging such a refusal in the Courts, the purported creditor bears his/her own legal costs.

31 In addition, during this hearing Ladner Downs argued that it would be unfair to the members of the Greenhills Mine Suppliers Group if their legal costs were not paid by the Westar Estate. Ladner Downs contended that the unfairness arises from the fact that they would have to bear their own legal costs, whereas the other creditors of the Westar Estate would be represented by counsel for the Trustee whose fees will be paid from the Westar Estate.

32 I did not find this argument persuasive. The fact that the legal fees of the Trustee are paid from the Westar Estate is entirely in keeping with the general principles as reflected in the Eron, supra, case. Counsel for the Trustee is working to benefit the Westar Estate; is doing work necessary to preserve and manage the trust; and is doing work for which it is fair and equitable that the owners of the Estate bear the costs.

33 In this application the onus is on Ladner Downs to establish that it is fair and just that the creditors of the Westar Estate, as the owners, bear the legal fees of the lawyers representing the Greenhills Mine Suppliers Group. Ladner Downs has failed to discharge this onus. The evidence shows that it would be inequitable and unfair for them to bear these costs. That is, the owners of the Westar Estate oppose the work to be undertaken by Ladner Downs because, if it is successful, it will reduce their asset - the Westar Estate.

34 For all of these reasons, I have concluded that Ladner Downs has failed to establish that it is entitled to be paid from the Westar Estate. This application is dismissed. This finding, of course, does not preclude an order for costs against the Westar Estate should Ladner Downs, on behalf of the Greenhills Mine Suppliers Group, be successful in proving the "purpose trust" claim.

C) Application of the Trustee For Directions Regarding The Notification of Balance of the Greenhills Mine Suppliers Group

35 In this application, the Trustee sought directions as to the procedure it ought to follow in giving notice of the "purpose trust" hearing to the remainder (153 creditors) of the Greenhills Mine Suppliers Group.

36 In particular, the Trustee is seeking a direction that it be required at this stage to only give notice to those creditors who have $2,500.00 or more at stake with respect to the "purpose trust" issue.

37 The order of April 21, 1999 provided that the Trustee could apply for further directions with respect to the procedure to be followed for determining the "purpose trust" issue. However, it would appear that the Court has already decided the issue regarding the notification of the remaining creditors.

38 The previous order includes the provision that the Trustee must notify the 13 largest unsecured creditors in the Greenhills Mine Suppliers Group. As well, if necessary, the Trustee can receive further directions on the procedure to be followed in respect of the "purpose trust" issue. Then the order states that, "[t]he balance of the unsecured creditors who filed proofs of claim in the Estate of Westar Ltd. in respect of the goods and services provided to the Greenhills Mine prior to the CCAA Order shall be notified of the purpose trust issue by letter after the hearing refereed to in paragraph (3) above and shall be given a limited time frame by which to indicate their desire to participate in that issue".

39 Given these circumstances, it appears to me that the Court has already determined this issue and decided that all of the creditors remaining are to be notified by letter. Therefore, given this conclusion I do not have jurisdiction to revisit this issue.

40 However, if I am wrong with respect to this conclusion I have decided that all of these creditors should be notified in writing in any event.

41 All of the members of the Greenhills Mine Suppliers Group should be given the opportunity to determine whether they want to participate in the upcoming "purpose trust" application particularly as they may be expected to contribute to the legal costs.

42 The contents of the letter and the procedure to be followed in drafting the letter will be similar to the procedure set out for the letter sent to the 13 creditors. That is, the letter will apprise these creditors of the "purpose trust" issue and that Ladner Downs has been appointed to represent that group. The letter should be sent by ordinary mail.

43 The creditors should be given 15 to 20 days to advise Ladner Downs whether they wish to avail themselves of its legal services, and whether they intend to participate in the hearing of the "purpose trust" issue. The form of the letter should be approved by Ladner Downs before the Trustee sends it to the creditors.

SINCLAIR PROWSE J.

cp/i/drk/jjl

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

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

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS
(CSER Group Representative Counsel Motion)

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