

**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)

**BOOK OF AUTHORITIES  
of the CanWest Salaried Employees and Retirees (CSER) Group**

Date: February 17, 2010

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**TAB 1**

**RULE 10 — REPRESENTATION ORDER***Highlights*

Situations can arise where the outcome of litigation (of the type described in rule 10.01) may have an impact on persons who are not before the court and who cannot be brought into the litigation because they are unborn or unascertained, or because they cannot be readily found or served. The former Rules dealt with this problem by providing that in certain circumstances the court could appoint someone to represent these absent persons. Those Rules further provided that in some situations the persons so represented were bound by the judgment and in other situations the represented persons were bound, except where the judgment was obtained by fraud or non-disclosure. Rule 10 deals with the underlying problem in the same way, but the circumstances in which the court may make a representation order are broadened: see rule 10.01. In addition, the Rule gives the court a more general power to determine when represented persons will not be bound by the resulting judgment: see rule 10.03.

*Former Rules:* Rules 76–79, 91.

**REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED***Proceedings in which Order May be Made***10.01 (1) In a proceeding concerning,**

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;**
- (b) the determination of a question arising in the administration of an estate or trust;**
- (c) the approval of a sale, purchase, settlement or other transaction;**
- (d) the approval of an arrangement under the *Variation of Trusts Act*;**
- (e) the administration of the estate of a deceased person; or**
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,**

**a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.**

*Order Binds Represented Persons*

**(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.**

*Settlement Affecting Persons who are not Parties*

**(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,**

- (a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or**

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement, the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

#### Case Law

*MacKinnon v. Ontario (Municipal Employees Retirement Board)* (2007), 88 O.R. (3d) 269, 2007 CarswellOnt 8041, 62 C.C.E.L. (3d) 191, 2008 C.E.B. & P.G.R. 8274, 64 C.C.P.B. 1, 232 O.A.C. 3, 2007 ONCA 874, 288 D.L.R. (4th) 688 (C.A.); additional reasons at 2008 CarswellOnt 787, 66 C.C.P.B. 317, 2008 ONCA 120, 68 C.C.E.L. (3d) 21 (C.A.)

Where a plaintiff, appointed under this rule to bring an action for maladministration of a pension fund, lost a motion, the court ordered costs payable out of the pension fund.

*Dugal v. Research in Motion Ltd.* (2007), 2007 CarswellOnt 7565, 37 B.L.R. (4th) 112, (sub nom. *Ironworkers Ontario Pension Fund (Trustees of) v. Research in Motion Ltd.*) 87 O.R. (3d) 721, 50 C.P.C. (6th) 398 (S.C.J. [Commercial List])

The court made a representation order to implement a settlement of a shareholders oppression claim.

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

In this breach of trust claim against a pension administrator, the court refused to appoint a person who was not part of the pension plan as a representative. The court appointed another plan member on condition he provide evidence he could satisfy any costs award made against him.

*Slate Falls Nation v. Canada (Attorney General)* (2004), 6 C.P.C. (6th) 260, [2004] O.J. No. 3860, 2004 CarswellOnt 3850, [2005] 1 C.N.L.R. 331 (S.C.J.); additional reasons at (October 6, 2004), Doc. 01-CV-213506CM, 2004 CarswellOnt 4040 (S.C.J.); additional reasons at (October 15, 2004), Doc. 01-CV-213506CM, 2004 CarswellOnt 8109 (S.C.J.); additional reasons at (December 14, 2004), Doc. 01-CV-213506CM, 2004 CarswellOnt 8115 (S.C.J.); additional reasons at (December 14, 2004), Doc. 01-CV-213506CM, 2004 CarswellOnt 8116 (S.C.J.)

The court appointed a representative plaintiff in this action by a first nation as a result of a flooding of reserve land.

*Attard v. Maple Leaf Foods Inc.* (1998), 20 C.P.C. (4th) 346 (Ont. Gen. Div. [Commercial List])

In this pension surplus dispute the court appointed a representative for certain employees not content to be represented by a union.

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

The court authorized the plaintiff to represent police retirees in their action claiming an entitlement to excess pension funds where the balance of convenience favoured granting a representation order instead of individual service upon each member of the group and individual participation in the proceedings.

**TAB 2**



order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

2005, c. 47, s. 127

### **N§60 — Commencement of Proceedings**

In Ontario, a notice of motion is a motion in a proceeding or in an intended proceeding. All proceedings are commenced by way of action with the issuance of a statement of claim or by notice of application. Since s. 10 contemplates that proceedings under the CCAA will be taken by way of originating summons and not by the commencement of an action, an application under the CCAA in Ontario will be commenced by notice of application. Section 10(2) creates an obligation on the debtor company to provide a projected cash-flow statement and other supporting financial documentation (2007, c. 36 proclaimed in force as of September 18, 2009).

### **N§61 — Materials to Accompany Application**

An initial application must be accompanied by a statement indicating, on a weekly basis, the projected cash flow of the debtor company; a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement (2007, c. 36 proclaimed in force as of September 18, 2009). The cash-flow statement provides the court with the information necessary to assess requests for interim financing. The supporting documents provide the court with assurance that the statement has been prepared properly, following standard accounting methods.

### **N§62 — Court Order Prohibiting Release of Information where Prejudice to Debtor Company**

Section 10(3) authorizes the court to make an order restricting the disclosure of the cash-flow statement or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice creditors. However, the court may direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate (2007, c. 36 proclaimed in force as of September 18, 2009). For businesses undergoing a restructuring, protecting the detailed information in a cash-flow statement may be vital to prevent it from providing an unfair advantage to competitors or from violating securities laws if the debtor company is publicly traded.

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

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

**TAB 3**

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.<sup>1</sup> 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”)<sup>2</sup>. The evidence filed by the USW suggests that a labour organization that

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<sup>1</sup> This is contrary to the contents of paragraph 24 of the Monitor’s 4<sup>th</sup> Report but, being more recent, I accept counsel’s oral representation as being accurate.

<sup>2</sup> 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)*<sup>3</sup>, Morawetz J. applied the Court of Appeal's decision in *Re Stelco*<sup>4</sup> and the decision of *Re Canadian Airlines Corp.*<sup>5</sup> 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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<sup>3</sup> [2009] O.J. No. 2166.

<sup>4</sup> 15 C.B.R. (5<sup>th</sup>) 307 (Ont. C.A.)

<sup>5</sup> (2000) 19 C.B.R. (4<sup>th</sup>) 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.

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Pepall J.

**Released:** September 17, 2009

**TAB 4**

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. 5<sup>th</sup> 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp.* (2000) 19 C.B.R. 4<sup>th</sup> 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.

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MORAWETZ J.

DATE: May 27, 2009

**TAB 5**

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 Notcholders  
*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

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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<sup>1</sup> 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

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<sup>1</sup> In its materials, CEP uses the term "Applicants" but for consistency, I have used the term "CMI Entities".

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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

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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?

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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

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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



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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.



Pcpall J.

Released: October 27, 2009

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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.

A handwritten signature in black ink, appearing to be 'J. J. J.', is located in the lower right quadrant of the page.

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.

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
[COMMERCIAL LIST]**

Proceeding commenced at Toronto

**BOOK OF AUTHORITIES**  
dated February 17, 2010

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