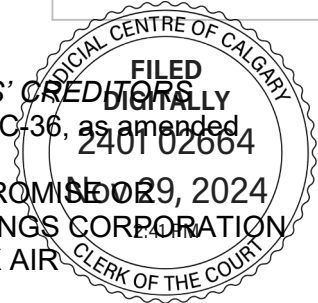


Clerk's Stamp

COURT FILE NUMBER 2401-02664
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended
2401 02664

AND IN THE MATTER OF THE COMPROMISE AND ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR



DOCUMENT **BENCH BRIEF OF LAW AND ARGUMENT**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

McCarthy Tétrault LLP
Barristers & Solicitors
4000, 421 – 7 Avenue SW
Calgary, AB T2P 4K9

Attention: Sean Collins, KC / Pantelis Kyriakakis / Justin Turc
Telephone: (403) 260-3531 / 3536 / 3565
Fax: (403) 260-3501
Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca
/ jturc@mccarthy.ca
File No.: 207091-585064

**BENCH BRIEF OF LAW AND ARGUMENT OF FTI CANADA CONSULTING INC., IN ITS
CAPACITY AS THE COURT-APPOINTED MONITOR OF LYNX AIR HOLDINGS
CORPORATION AND 1263343 ALBERTA INC.**

**WITH RESPECT TO THE APPLICATION BY CANADIAN UNION OF PUBLIC EMPLOYEES
TO BE HEARD BY
THE HONOURABLE JUSTICE R.W. ARMSTRONG**

December 4, 2024 at 2:00 p.m.

Clerk's Stamp

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I INTRODUCTION

1. This bench brief is submitted by FTI Consulting Canada Inc., in its capacity as court-appointed monitor (the “**Monitor**”) of Lynx Air Holdings Corporation (“**Lynx Holdco**”) and 1263343 Alberta Inc. dba Lynx Air (“**Lynx Opco**”, together with Lynx Holdco, “**Lynx Air**” or the “**Applicants**”) in response to the application of the Canadian Union of Public Employees (“**CUPE**”), returnable on December 4, 2024 (the “**Application**”) seeking an order (the “**Representation Order**”): (i) declaring that the 240 terminated cabin crew employees (the “**Cabin Crew Employees**”) are entitled to include 16 weeks’ pay in lieu of notice (the “**Group Termination Damages Claim**”), under section 212 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the “**Code**”), as part of their entitlements under the *Wage Earner Protection Program Act (Canada)*, S.C. 2005, c. 47, s.1 (“**WEPPA**”); and (ii) appointing CUPE as representative to the Cabin Crew Employees in these proceedings (the “**CCAA Proceedings**”) or any that may be commenced by the Applicants under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”).
2. The relief sought in CUPE’s Application is neither necessary nor appropriate, in the circumstances, as:
 - a) the Cabin Crew Employees’ entitlements under WEPPA: (i) are subject to the WEPPA appeal procedure; (ii) have been calculated by the Monitor, in accordance with the Cabin Crew Employees’ statutory entitlements, in consultation with WEPPA representatives and the Labour Affairs Officers from Employment and Social Development Canada; (iii) are limited to “eligible wages” (as defined in WEPPA), which any Group Termination Damages Claim does not fit into; and, (iv) have been provided to both the Cabin Crew Employees and to Service Canada (the “**Minister**”); and,

- b) the Representation Order is not appropriate or necessary, as: (i) the Representation Order will neither save expenses for, nor provide additional efficiencies or benefits to these CCAA Proceedings; (ii) the only dispute remaining to be resolved with respect to the Cabin Crew Employees, is the Group Termination Damages Claim, which will be addressed in the within Application; (iii) following the determination of the Group Termination Damages Claim, there will be no claims for CUPE to resolve, rendering any need for representative counsel moot; (iv) the within CCAA Proceedings are at an end and no claims process or distributions are contemplated with respect to unsecured creditors, including on account of any damages claims; and, (v) the balance of convenience does not favour appointing CUPE as representative.

II **FACTS**

A. CUPE's Pre-Filing Involvement with the Cabin Crew Employees

3. On November 22, 2023, CUPE filed an application with the Canadian Industrial Relations Board ("**CIRB**") to be certified as the Bargaining Agent of the Cabin Crew Employees, pursuant to section 24(1) of the Code.
4. CIRB issued an automatic certification on February 7, 2024, certifying CUPE as the Bargaining Agent for Cabin Crew Employees.
5. On February 15, 2024, CUPE served a notice to bargain on the interim CEO of Lynx Opco; to negotiate a collective agreement. No collective agreement was ever negotiated.

B. The CCAA Proceedings

6. On February 22, 2024 (the "**Filing Date**"), Lynx Air sought and obtained an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-

36, as amended (the “**CCAA**”). The Initial Order was subsequently amended and restated, pursuant to the Amended and Restated Initial Order, granted on March 1, 2024 (the “**ARIO**”).

7. Pursuant to the ARIO, WEPPA applies to the former employees of Lynx Air. Specifically, paragraph 12 of the ARIO states:

Pursuant to section 5(5) of the *Wage Earner Protection Program Act (Canada)*, S.C. 2005, c. 47, s.1 (“**WEPPA**”), the Applicants and their collective former employees meet the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations* SOR/2008-222 [the “**WEPP Regulations**”] and are individuals to whom the WEPPA applies as of the date of the Initial Order.

ARIO, at para. 12.

8. By June, 2024, the court-approved sales and investment solicitation process was complete. All related transactions have closed and all of Lynx Air’s operations have ceased.
9. Lynx Air sought and obtained an order (the “**Enhanced Powers Order**”), on June 28, 2024, granting the Monitor enhanced powers to efficiently wind down and complete the administration of Lynx Air.

Fifth Report of the Monitor, dated June 21, 2024, at paras. 25, 80-81.

10. Only three consultants currently remain to assist with the wind-down of the CCAA Proceedings.

**Seventh Report of the Monitor, dated November 29, 2024 [the “Seventh Report”],
at para. 39.**

11. The major remaining activities, to be completed by the Monitor in connection with these CCAA Proceedings, are as follows:
 - a) completing the claims process for the solicitation, determination, and resolution of certain claims against the current and former directors and officers of Lynx Air;

- b) addressing certain outstanding claims, including the claims of the Cabin Crew Employees, certain trust claims for unpaid Airport Improvement Fees (the “**Airport Trust Claims**”) currently under appeal, and certain trust claims asserted by the U.S. Government for unpaid fees (the “**US Trust Claims**”, the US Trust Claims and the Airport Trust Claims, are collectively referred to as, the “**Remaining Trust Claims**”); and,
- c) subject to the determination of the Remaining Trust Claims, completing the distribution of any remaining funds to the beneficiaries of the Remaining Trust Claims or to Indigo Northern Ventures LP (“**Indigo**”), Lynx Air’s senior secured creditor, as applicable,

(together, the “**Outstanding CCAA Administrative Matters**”).

Seventh Report, at paras. 35-41.

- 12. Indigo, Lynx Air’s senior secured creditor, will suffer a shortfall. As a result, no funds are available for distribution to subordinate creditors; including, unsecured creditors.

Seventh Report at paras. 42-43.

C. The Termination of the Cabin Crew Employees

- 13. The CCAA Proceedings are liquidating in nature. All operations were wound down. Approximately 435 employees were terminated, without notice, shortly after the granting of the Initial Order. This group of terminated employees includes all of the Cabin Crew Employees; subject to CUPE’s Application.
- 14. Employees that were terminated during the CCAA Proceedings were not paid statutory termination or statutory severance pay, or vacation pay that accrued prior to the Filing Date. These amounts form the basis of the Cabin Crew Employees’ WEPPA claims.

D. The WEPPA Claims and Monitor's Activities

15. Lynx Air, in consultation with the Monitor, determined that a total of approximately \$1.5 million was owed, to former employees, for unpaid vacation and \$1.5 million for statutory termination pay and statutory severance pay, of which \$314,000 and \$364,000, respectively, was owed to the Cabin Crew Employees (the "**WEPPA Claims**").

Seventh Report, at para. 18.

16. Since the commencement of the CCAA Proceedings, the Monitor has taken the following steps with respect to the WEPPA Claims:

- a) on February 27, 2024, the Monitor discussed the methodology for calculating the termination and severance claim amounts, for eligible employees, (the "**WEPPA Calculations**") with a WEPP representative, who verified the Monitor's methodology;

Seventh Report, at para. 15(a).

- b) on February 29, 2024, the WEPP representative provided further additional guidance on the definition of "eligible wages" (as defined in WEPPA);

Seventh Report, at para. 15(a).

- c) the Monitor proceeded to complete the WEPPA Calculations for severance and termination pay, in accordance with the Code and the directions received from the WEPP representative;

- d) on March 12, 2024, a Labour Affairs Officer from Employment and Social Development Canada confirmed the Monitor's view that there is no statutory entitlement to pay in lieu of notice of group termination for reasons including that

there is no express entitlement to pay in lieu of notice of group termination, in the Code;

Seventh Report, at para. 15(b).

- e) on March 13, 2024, within the 45 day timeline prescribed by s. 15(2) of the WEPP Regulations, the Monitor provided eligible employees with an instruction letter ("**WEPPA Instruction Letter**"), setting out the eligible employees' calculation of eligible wages owed under WEPPA and instructions on how to submit claims to the Minister;

Seventh Report, at para 19(a).

- f) 456 employees, including 201 Cabin Crew Employees, submitted a proof of claim ("**WEPPA Proofs of Claim**"), to the Monitor, in accordance with the WEPPA Instruction Letter and in accordance with the requirements under WEPPA;

Seventh Report, at para 19(c).

- g) the Monitor fielded numerous calls and emails from eligible employees concerning their WEPPA Calculation;

Seventh Report, at para. 19(e).

- h) in instances where employees disputed their WEPPA Calculation, the Monitor provided them with the supporting information used to calculate their WEPPA claim and in cases where the employee provided sufficient evidence to support the disputed amount, the Monitor worked with the Minister to file an amended proof of claim;

Seventh Report, at para. 19(f).

- i) the Monitor reviewed the WEPPA Proofs of Claim, received to date; and,
- j) has continued to communicate with employees and provide updates through the Monitor's website.

17. Relating to the Cabin Crew Employees, specifically:

a) 222 Cabin Crew Employees received a copy of the WEPP Instruction Letter;

Seventh Report, at para. 19(c).

b) of the Cabin Crew Employees who received a copy of the WEPP Instruction Letter, 201 Cabin Crew Employees submitted their WEPPA Proof of Claim to the Monitor for review, all of which were submitted to the Minister for processing;

Seventh Report, at para. 19(c).

c) all of the Cabin Crew Employees who submitted a WEPPA Proof of Claim have received a payment under WEPPA; and,

Seventh Report, at para. 19(d).

d) 25 Cabin Crew Employees are not eligible for individual statutory termination pay or statutory severance pay, as these 25 employees were hired on February 19, 2024, and were employed by Lynx Air for 3 days before being terminated.

Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit "L".

18. CUPE does not dispute the Monitor's calculations for individual statutory termination pay and statutory severance pay for the Cabin Crew Employees (the "**Individual Statutory Claims**").

19. The Monitor's WEPPA Calculations used the following formula:

| | |
|--|--|
| Unpaid vacation time | <i>based on unpaid vacation accumulated from August 22, 2023 until February 22, 2024</i> |
| + Individual statutory termination pay calculated based on week | <i>for employees with a tenure of at least 3 months, the calculation was the greater of: 2 weeks pay OR 1 week per year of service to a maximum of 8 weeks</i> |

| | |
|--|--|
| + Statutory severance pay calculated based on day | <i>for employees with tenure of at least 1 year, the calculation was the greater of:</i> <i>2 days x number of years worked</i> <i>OR</i> <i>5 days</i> |
| = Total Claim | |

Seventh Report, at para. 14.

20. On June 12, 2024, the Monitor received a statement from the Canada Revenue Agency outlining the amount of the subrogated super-priority (“**WEPP Priority Claim**”) to be approximately \$727,000.00.

Seventh Report, at para. 21.

21. The Monitor estimates the total WEPP Priority Claim to be approximately \$786,000.00, based on outstanding claims not yet received.

Seventh Report, at para. 21.

E. CUPE’s involvement in the CCAA Proceedings and Information Requests

22. On March 12, 2024, counsel for CUPE contacted counsel for the Monitor via email (the “**March 12 Email**”), requesting information related to the Cabin Crew Employees to verify the Monitor’s WEPPA Calculations. The March 12 Email specifically requested the Cabin Crew Employees’: (i) names; (ii) date of hire; (iii) rate of pay; and, (iv) position (collectively, the “**Requested Employee Information**”).

Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit “D”.

23. On March 13, 2024, counsel for the Monitor responded to counsel for CUPE, advising that the Monitor would send the WEPPA Instruction Letter to all eligible employees, without any further delay, as the Monitor had been contacted by several former employees of Lynx Air who had expressed concern with the delay in the WEPPA process.

Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit “G”.

24. On March 15, 2024, counsel for CUPE sent counsel for the Monitor a letter, again requesting the Requested Employee Information.

Seventh Report, at para. 28 and Appendix “D”.

25. On March 25, 2024, counsel for the Monitor advised counsel for CUPE that the Requested Employee Information could not be disclosed without Lynx Air’s consent.

Seventh Report, at para. 29 and Appendix “E”.

26. On April 2, 2024, the Monitor received a letter (the “**April 2 Letter**”) from Koskie Minsky LLP, counsel to CUPE, advising that CUPE: (i) disagreed with the calculation of WEPPA Claims, on the basis that the WEPPA Claims did not include pay in lieu of group termination notice; and, (ii) intended to bring a motion before the Court for an order lifting the Stay of Proceedings so that CUPE could bring a motion before the CIRB to determine the applicable law to apply to the Cabin Crew Employees’ mass termination entitlements.

Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit “K”.

27. On April 16, 2024, the Monitor replied to CUPE advising that: (i) no authority had been provided to support CUPE’s position that the Group Termination Damages Claim should be included in the WEPPA calculations; and, (ii) the jurisdiction of the CIRB with respect to the Monitor or in respect of the WEPPA Calculations was not apparent and it is more appropriate for any relief sought to be brought before the Court supervising the CCAA Proceedings.

Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit “L”.

28. On April 16, 2024, having received the consent of Lynx Air, the Monitor provided CUPE with a spreadsheet that included all of the Requested Employee Information, as well as specific termination dates, and unpaid vacation, statutory severance, and statutory termination pay calculations.

**Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit “L”;
Seventh Report, at paras. 30-31.**

29. On April 19, 2024, the Monitor received a further letter from CUPE (the “**April 19 Letter**”), wherein CUPE advised that it continued to disagree with the Monitor’s calculation of the termination and severance pay for the Cabin Crew Employees.

**Sixth Report of the Monitor, dated September 9, 2024, at para. 29 and Appendix “C”;
Affidavit of N. Lisun, sworn July 31, 2024, Exhibit “N”.**

III ISSUES

30. The issues to be determined on the within Application are:
- a) whether the Group Termination Damages Claim should be included in the determination of “eligible wages” under WEPPA; and,
 - b) whether to appoint CUPE as Representative of the Cabin Crew Employees.

IV LAW

A. WEPPA

i. Division of Duties in WEPPA

31. A Monitor appointed under the CCAA constitutes a “trustee” under WEPPA.

In this Act, trustee includes a monitor as defined in subsection 2(1) of the *Companies’ Creditors Arrangement Act*.

WEPPA, s. 2(1.2) [BOA at TAB 10].

32. The calculation of employee entitlements under WEPPA is delegated, by the Minister, to the Monitor:

21 (1) For the purposes of this Act, **a trustee** or a receiver, as the case may be, shall

- (a) identify each individual who is owed **eligible wages**;
- (b) determine the amount of **eligible wages** owing to each individual;
- (c) inform each individual other than one who is in a class prescribed by regulation of the existence of the program established by section 4 and of the conditions under which payments may be made under this Act;

(d) **provide the Minister and each individual other than one who is in a class prescribed by regulation with the amount of eligible wages owing to the individual and any other information prescribed by regulation;**

(e) inform the Minister of when the trustee is discharged or the receiver completes their duties, as the case may be. (*emphasis added*)

WEPPA, s. 21(1) [BOA at TAB 10].

33. Once an application is submitted by an employee under WEPPA, the Minister determines their eligibility for payment and informs both the applicant and the trustee of the Minister's decision:

8 To receive a payment, an individual is to apply to the Minister in the manner and during the period provided for in the regulations.

9 If the Minister determines that the applicant is eligible to receive a payment, the Minister shall make the payment.

10 (1) The Minister is to inform the applicant of their eligibility or ineligibility to receive a payment.

10 (2) The Minister is to inform the trustee or receiver of the applicant's eligibility or ineligibility to receive a payment.

WEPPA, ss. 8-10 [BOA at TAB 10].

ii. "Eligible Wages"

34. Entitlements under WEPPA are limited to the "eligible wages" owing to the individual, up to a maximum of seven times the maximum weekly insurable earnings under the *Employment Insurance Act*.

7 (1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of an amount equal to seven times the maximum weekly insurable earnings under the Employment Insurance Act.

WEPPA, s. 7(1) [BOA at TAB 10].

35. "Eligible wages" are defined as:

(a) **wages other than termination pay and severance pay** that were earned during the longer of the following periods:

(i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer,

(ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the Bankruptcy and Insolvency Act or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the Companies' Creditors Arrangement Act are commenced, and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the Bankruptcy and Insolvency Act or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the Companies' Creditors Arrangement Act are commenced; and

(b) **termination pay and severance pay** that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*emphasis added*)

WEPPA, s. 2(1) [BOA at TAB 10].

36. "Wages" are defined as:

salaries, commissions, compensation for services rendered, vacation pay, **termination pay, severance pay and any other amounts prescribed by regulation.** (*emphasis added*)

WEPPA, s. 2(1) [BOA at TAB 10].

B. Representation Orders

i. Representation Orders Under the Alberta Rules of Court

37. The Alberta Rules of Court permit for the appointment of a representative and state:

2.16 (2) In an action described in subrule (1), a person or class of persons who is or may be interested in or affected by a claim, whether presently or for a future, contingent or unascertained interest, must have a Court-appointed litigation representative to make a claim in or defend an action or to continue to participate in an action, or for a claim in an action to be made or an action to be continued against that person or class of persons, **if the person or class of persons meets one or more of the following conditions:**

(a) the person, the class or a member of the class cannot be readily ascertained, or is not yet born;

(b) the person, the class or a member of the class, though ascertained, cannot be found;

(c) the person, the class or the members of the class can be ascertained and found, but **the Court considers it expedient to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.**

2.16 (3) On application by an interested person, the Court may appoint a person as litigation representative for a person or class of persons to whom this rule applies on being satisfied that both the proposed appointee and the appointment are appropriate. (*emphasis added*)

Alberta Rules of Court, Alta Reg 124/2010, s. 2.16 [BOA at TAB 2].

ii. Representation Orders Under the CCAA

38. Representative counsel may be appointed in CCAA proceedings under the general jurisdiction of the court, as set out in s. 11 of the CCAA.

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

CCAA, s. 11 [BOA at TAB 4]; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 (CanLII), at para. 22 [“*Mountain Equipment Co-Op*”] [BOA at TAB 16].

39. In *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65, the Nova Scotia Supreme Court restated the purpose of representative counsel in CCAA proceedings:

Representative counsel can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders and avoiding a multiplicity of potentially conflicting retainers.
(emphasis added)

***Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65, at para. 6 [BOA at TAB 18].**

40. A non-exhaustive list of factors considered by CCAA courts when considering whether a representation order should be granted were set out in *Canwest*, where the Court stated:

Factors that have been considered by courts in granting these orders include:

- a) the vulnerability and resources of the group sought to be represented;
- b) any benefit to the companies under CCAA protection;
- c) any social benefit to be derived from representation of the group;
- d) the facilitation of the administration of the proceedings and efficiency;
- e) the avoidance of a multiplicity of legal retainers;
- f) the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- h) the position of other stakeholders and the Monitor.

***Canwest Publishing Inc.*, 2010 ONSC 1328 [“*Canwest*”], at para. 21 [BOA at TAB 14].**

41. These factors are “neither exhaustive nor mandatory” but are intended to guide a “holistic analysis informed by the particular circumstances of the case.”

***In the Matter of The Body Shop Canada Limited*, 2024 ONSC 3871, at para. 24 [“*Body Shop*”] [BOA at TAB 15].**

V ARGUMENT

A. The WEPPA Appeals Process Must be Followed

42. Any dispute regarding the determination of WEPPA payments must follow the statutory appeal process under WEPPA.

43. The Monitor's role in WEPPA is limited to providing information and calculations, including with respect to eligible wages, to the Minister and to individuals who are eligible under WEPPA.

WEPP Regulations, ss. 15-16 [BOA at TAB 10].

44. The Monitor provided all necessary information to both the Cabin Crew Employees and the Minister, within the timelines required under the WEPP Regulations.

45. Once the Monitor has calculated the amount of eligible wages and provided the requisite information to both the individuals and the Minister, individuals may apply to the Minister for payments.

46. The Minister has exclusive jurisdiction to determine an employee's eligibility for payments.

WEPPA, s. 8 [BOA at TAB 11].

47. The Minister delegated the responsibility for determining the amount of WEPPA payments to Service Canada:

The program will be delivered by Service Canada, in collaboration with trustees in bankruptcy and receivers. **The trustee or receiver will inform prospective claimants of eligibility** and will provide Service Canada, as well as the unpaid worker, with information on unpaid wages and vacation pay. **Service Canada will determine the amount and make the payment.** (*emphasis added*)

Debates of the Senate (Hansard), 2nd Session, 39th Parliament, Volume 144, Issue 12, at 1450 [BOA at TAB 26].

48. Service Canada's determinations may be reviewed by the Minister upon request. The Minister may then confirm, vary, or rescind the determination. **The Minister's**

confirmation, variation or rescission is final and may not be questioned or reviewed in any court.

WEPPA, ss. 11-13 [BOA at TAB 11].

49. Appeals of the Minister's determination can only be made on questions of law or jurisdiction to the CIRB.

WEPPA, s. 14 [BOA at TAB 11].

50. As such, any questions respecting the entitlements of the Cabin Crew Employees under WEPPA must first be directed to the Minister, under the appeals provisions of WEPPA.

51. Indeed, the Court of Appeal of Quebec recently found that while a CCAA court may determine whether WEPPA applies, the determination of eligibility of individuals to payments under WEPPA rests with the Minister, and the statutory appeals process must be respected:

[16] Again, **it is undisputed, and I agree, that it is for the Minister to decide if an applicant under the WEPPA is eligible to receive a payment.**

[17] Collier, J. never concluded that one or more of the employees is *eligible* to receive a payment under the WEPPA. The only declaratory conclusion is reproduced above, and it obviously does not speak to eligibility. Further, the applicant has failed to convince me that it does so indirectly.

[18] By declaring that the RVO Entities are former employers that meet the criteria prescribed by s. 3.2 of the WEPP Regulations, the judge stayed within the boundaries of the broad discretion conferred on him by law. Moreover, there is nothing wrong with the judge justifying his decision by using a time reference that is relevant to the specific realities of the case and pertinent for purposes of "determin[ing] whether the former employer is the former employer all of whose employees in Canada have been terminated", as s. 3.2 requires. Finally, since the judge came to this conclusion, it is quite evident that the terminated employees are individuals to whom the WEPPA applies. The judge's words to that effect seem somewhat superfluous, and in making that statement, the judge did not decide the question of *eligibility*, neither generally nor individually. (*italics in original, emphasis added*)

Attorney General of Canada c. Former Gestion Inc., 2024 QCCA 1441, at paras. 16-18 [BOA at TAB 12].

52. The stay of proceedings, as pronounced in the ARIO, limits proceedings against Lynx Air or the Monitor for the duration of the Stay Period (as defined in the ARIO), except with leave of the Court. It does not, limit the administrative appeal provisions under WEPPA, as these are brought between the affected employees and the Minister.
53. The correct process under WEPPA is to apply for a review of eligibility or ineligibility by the Minister, and any application brought to the Court prior to this process is premature.

B. The Group Termination Damages Claim is Not “Eligible Wages” Under WEPPA

54. Amounts relating to the Group Termination Damages Claim are not “eligible wages” owing under WEPPA, as there is no statutory entitlement to pay in lieu of same.
55. When federally-regulated employees are terminated, section 230(1) of the Code specifies the amount of notice or wages in lieu of notice that an individual employee is eligible to receive as a result of their termination (the “**Individual Notice Provision**”). Section 235(1) specifies the amount of wages the employee is eligible to receive as severance pay:

230 (1) An employer who terminates the employment of an employee must give the employee

- (a) **notice in writing** of the employer’s intention to terminate their employment on a date specified in the notice, at least the applicable number of weeks set out in subsection (1.1) before that date;
- (b) **wages in lieu of notice**, at their regular rate of wages for their regular hours of work, for at least the applicable number of weeks set out in subsection (1.1); or
- (c) **any combination of notice and amounts of wages in lieu of notice** so that the total of the number of weeks of notice in writing and the number of weeks for which wages are paid in lieu of notice is equivalent to at least the applicable number of weeks set out in subsection (1.1).

235 (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the

employer shall, except where the termination is by way of dismissal for just cause, **pay to the employee the greater of**

(a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, **and**

(b) five days wages at the employee's regular rate of wages for his regular hours of work. (*emphasis added*)

Code, s. 230(1) and 235(1) [BOA at TAB 3].

56. The Code also contains a group termination provision (the "**Group Notice Provision**").

Unlike the Individual Notice Provision, the Group Notice Provision does not provide that wages be paid in lieu of notice of group terminations:

212 (1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of 50 or more employees employed by the employer within a particular industrial establishment, or of such lesser number of employees as prescribed by regulations applicable to the employer made under paragraph 227(b), shall, **in addition to any notice required to be given under section 230, give notice to the Head, in writing, of his intention to so terminate at least 16 weeks before the date of termination of the employment of the employee in the group whose employment is first to be terminated.**

212 (2) **A copy of any notice** given to the Head under subsection (1) **must be given immediately by the employer** to the Minister of Employment and Social Development and the Canada Employment Insurance Commission **and any trade union representing a redundant employee**, and if any redundant employee is not represented by a trade union, **a copy of that notice must be given to the employee** or immediately posted by the employer in a conspicuous place within the industrial establishment in which that employee is employed. (*emphasis added*)

Code, s. 212(1) and (2) [BOA at TAB 3].

57. The lack of statutory entitlement to pay in lieu of notice under the Group Notice Provision, was underlined in *T.W.U. v British Columbia Telephone Co.* In *T.W.U.*, a group of terminated employees who had not received notice under the Group Notice Provision sought an injunction delaying their termination until they had received the 16-week notice. The Supreme Court of British Columbia dealt first with a preliminary objection, which was the remedy available to employees if an employer failed to provide the requisite group

termination notice under s. 212 of the Code and was subsequently convicted of an offence under s. 71(2) (now s. 258) of the Code. Following a review of the law, the Court determined that:

I am therefore of the opinion that a criminal court convicting an employer of that offence does not have the jurisdiction to order the offending employer to pay compensation for loss of employment or to reinstate an employee pursuant to the provisions of s 71(2)(a) or (b). Thus **no remedy is provided by the Canada Labour Code to an employee or class of employees who have been deprived of their statutory right to have the Minister notified and themselves to receive notice under the provisions of s. 60 [now s. 212] of the Act.**

***T.W.U. v British Columbia Telephone Co.*, 1982 CarswellBC 228, (1982) B.C.J. No. 81 (S.C.) (appeal allowed on other grounds: (1982) B.C.J. No. 33 (C.A.)), at para. 8 [BOA at TAB 21];
R. v. Servisair Inc., 2011 BCPC 142, at paras. 29-31 [BOA at TAB 19].**

58. While certain other jurisdictions, such as British Columbia, Manitoba, Ontario, Quebec, Nova Scotia, and New Brunswick, expressly provide for pay in lieu of group termination notice, no such entitlement exists under the Code (nor is there such a requirement in several other jurisdictions, such as Alberta).

***Employment Standards Act*, RSBC 1996, c 113 at s. 64 [BOA at TAB 6] (British Columbia);
The Employment Standards Code, CCSM c E110 at s. 77 [BOA at TAB 9] (Manitoba);
Employment Standards Act, 2000, SO 2000, c 41 at s. 61 [BOA at TAB 5] (Ontario);
Act respecting labour standards, CQLR c N-1.1 at s. 84.0.13 [BOA at TAB 1] (Quebec);
Labour Standards Code, RSNS 1989, c 246 at s. 72 [BOA at TAB 8] (Nova Scotia);
Employment Standards Act, SNB 1982, c E-7.2 at s. 34 [BOA at TAB 7] (New Brunswick).**

59. Further, unlike the Individual Notice Provision, the Group Notice Provision may be waived by the Minister:

228 On the submission of any person, the Minister may, by order and subject to any terms or conditions specified in the order, waive the application of this Division, or any provision thereof, in respect of any industrial establishment or of any class of employees therein specified in the order if it is shown to the satisfaction of the Minister that the application of this Division, or any provision thereof, as the case may be, in respect of any industrial establishment

(a) would be or is unduly prejudicial to the interests of the employees therein or to any class of employees therein;

(b) would be or is unduly prejudicial to the interests of the employer of those employees;

(c) would be or is seriously detrimental to the operation of the industrial establishment; or

(d) is not necessary, because measures for the assistance of redundant employees at that establishment that are substantially the same or to the same effect as the measures established by this Division or that provision, as the case may be, have been established by collective agreement or otherwise.

Code, s. 228 [BOA at TAB 3].

60. No authority advanced by CUPE addresses whether amounts in respect of the Group Termination Damages Claim are eligible wages under WEPPA. Rather, the labour arbitration authorities relied upon by CUPE are in respect of the breach of collective bargaining agreements and establishment of an Adjustment Program under the Code.
61. In *ATU, Local 1374 and Saskatchewan Transportation Co.* (“**ATU**”), the arbitrator found that the failure to abide by the Group Notice Provision constituted a breach of the applicable collective agreement between the union and the employer. As a result of the breach of the collective agreement, the arbitrator awarded compensatory damages.

ATU, Local 1374 and Saskatchewan Transportation Co. (Layoff of Bargaining Unit Employees), Re, 2018 CarswellNat 1948, at paras. 87-88, 177 [BOA at TAB 13].

62. Claims for compensatory damages are distinct from statutory severance and statutory termination under employment standards legislation in an insolvency context; even if those damages relate to wrongful termination or other employment-related claims. As elaborated by the court in *Windsor Machine & Stamping Limited (Re)*,

Counsel to the Union submitted that the recent case of *Re West Bay SonShip Yachts Ltd.* (2009) B.C.C.A. 31 stands for the proposition that claims for termination and severance pay becomes owing to the employees at the point where their employment was terminated during the post-filing period and therefore such claims are post-filing claims. In my view, this case can be distinguished. The claim in *West Bay* involved **a common law claim for damages for wrongful dismissal. This type of claim is distinct from a claim for severance pay or termination pay under employment standards legislation.** (*emphasis added*)

***Windsor Machine & Stamping Limited (Re)*, 2009 CanLII 39771 (ON SC), 55 CBR (5th) 241 at para. 38 [BOA at TAB 25].**

63. In *WestJet, an Alberta Partnership and Employees in the service of WestJet, an Alberta Partnership* (“**WestJet**”) the adjudicator was tasked with assessing the appropriate severance package and recall rights, further to an Adjustment Program under the Code. WestJet argued that it had provided 16 weeks’ notice of termination under the Group Termination Provision to support its position that it had provided generous severance offers to employees. The adjudicator found that it was appropriate for the employees to receive their full compensation during this period, instead of a lesser amount pursuant to the Government of Canada’s Canada Emergency Wage Subsidy Program, which was implemented during the Covid-19 pandemic.

WestJet, an Alberta Partnership and Employees in the service of WestJet, an Alberta Partnership, Re, 2021 CarswellNat 2450 [BOA at TAB 24].

64. Neither ATU nor WestJet found that there is any statutory entitlement to pay in lieu of notice of group termination.

65. As there is no entitlement to pay in lieu of the Group Notice Provision under the Code, amounts in respect of the Group Termination Damages Claim are not “eligible wages owing” under WEPPA, and are not included in the WEPPA Calculations.

C. CUPE Should Not Be Appointed as Representative to the Cabin Crew Employees

66. CUPE should not be appointed as Representative to the Cabin Crew Employees as (i) the *Canwest* factors are not met; (ii) a holistic analysis of the present circumstances does not support granting the Representation Order; and, (iii) the Representation Order should not be granted on the proposed terms.

i. The Canwest Factors Are Not Met.

67. The test for appointing representative counsel in CCAA-related proceedings requires consideration of the *Canwest* factors. In the circumstances, none of the *Canwest* factors are met. Specifically:

- a) **The Cabin Crew Employees are not a vulnerable group of stakeholders in the circumstances:** The Cabin Crew Employees are not vulnerable stakeholders in the circumstances, as they have been informed of their rights under WEPPA, have exercised their right to apply for WEPPA payments, and, following the determination of this Application, will have little or no interest in the remaining CCAA Proceedings. In *Nortel Networks*, the Court considered how the proposed represented stakeholders were vulnerable, in stating:

...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. ...

I am in agreement with these general submissions.

Nortel Networks Corporation (Re), 2009 CanLII 26603 [*"Nortel Networks"*], at paras. 13-14 [BOA at TAB 17].

The Cabin Crew Employees are not in the same position, as, they: (i) are not subject to a long, drawn out CCAA process in which there will be numerous applications affecting their interests, as only the Outstanding CCAA Administrative Matters remain; (ii) have been informed by and had discussions with the Monitor concerning their entitlements under WEPPA; (iii) the Monitor confirmed the WEPPA Calculation with a WEPP Representative and Labour Affairs Officer; (v) most of the Cabin Crew Employees with eligible claims under WEPPA filed

applications to the Minister for determinations of eligibility and received payments under WEPPA; and, (vi) do not have any additional complex entitlements, for further determination.

- b) **There is no benefit to Lynx Air if the Representation Order is granted:** Where representative counsel have been appointed, the benefit to the CCAA Applicants was clear; unlike in the present circumstances. For example, representative orders were issued in cases where multiple counsel had been engaged by various groups of stakeholders, or where the utility of appointing a single representative counsel would provide increased efficiency and communication.

***Nortel Networks* [BOA at TAB 17].**

In this case: (i) the Requested Employee Information has been provided to CUPE; (ii) the only remaining issue is whether the Group Termination Damages Claim should be included in the WEPPA Calculations (which is not even a determination that should be made in these CCAA Proceedings); and, (iii) no claims process or distributions are contemplated in connection with any unsecured claims. Instead, if the Representation Order is granted, it will only increase the complexity of the proceedings, as demonstrated by this Application, causing increased costs and delaying the conclusion of these CCAA Proceedings.

Affidavit #1 of N. Lisun, sworn July 31, 2024, Exhibit "L".

- c) **There is no social benefit to be derived from the Representation Order:** No social benefits will be derived as a result of the Representation Order. In *Nortel Networks*, the court, in describing the social benefit that would ensue, stated:

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. (*emphasis added*)

Nortel Networks, at para. 13 [BOA at TAB 17].

When representation orders are issued:

It is preferable that a representation order be issued early in the proceedings **for the benefit not only of the directly affected employees and retirees, but indeed for all stakeholders.** (*emphasis added*)

Body Shop, at para. 13 [BOA at TAB 15].

There is little, if any, social benefit to be gained if the Representation Order is granted, as: (i) the majority of the assistance to be provided has already been completed, as the WEPPA Calculations have been made; and, (ii) the CCAA Proceedings are winding down. Following the determination of the issues on this Application, there are no further applications anticipated that affect the rights of the Cabin Crew Employees. In this case, the Representation Order is being sought at the end of the CCAA Proceedings, and is in no way necessary or beneficial.

- d) **There is no efficiency to be gained by the Representation Order:** There is no evidence that there will be a material cost savings for either Lynx Air or the Cabin Crew Employees if the Representation Order is granted. A significant factor considered by the courts when granting a representation order in CCAA proceedings is whether the appointment of representative counsel will result in a material savings of cost or time.

Body Shop [BOA at TAB 15].

In *U.S. Steel Canada Inc.*, promotion of efficiency was discussed as follows:

Second, the contemplated representation will **enhance the efficiency of the proceedings under the CCAA in a number of ways.** It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to

the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required. (emphasis added)

U.S. Steel Canada Inc. (Re), 2014 ONSC 6145, at para. 38 [BOA at TAB 22].

The Representation Order will not improve efficiency in this case as: (i) the WEPPA Calculations for the Cabin Crew Employees are straightforward and calculated in accordance with the statutory requirements of the Code and with the assistance of the Monitor; and, (ii) as set out above, following the determination of CUPE's Application, there are no further issues affecting the Cabin Crew Employees rights or interests awaiting determination, due to the late stage of the CCAA Proceedings.

- e) **The Monitor opposes the Representation Order:** For the reasons set out above, the Monitor does not agree that the Representation Order is appropriate in the circumstances.

ii. The Balance of Convenience Weighs Against Granting the Representation Order

68. Considering the overall balance of convenience in these circumstances, including whether it is fair and just to all stakeholders, including creditors of the estate, the Representation Order is not appropriate in the circumstances.

69. In *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663, where the sales transaction completion was imminent and all that would remain was a claims process, the Court held that the appointment of representative counsel was inappropriate, as:

While the loss of a job by any person is devastating to that person, the remedies available to a terminated employee are defined in the law. **In the present case no money will be available for pre-filing unsecured claims.** The Monitor submitted that a bankruptcy will follow upon the completion of the transition of business operations to the purchaser, and WEPPA claims can be advanced at that time. **Given that WEPPA imposes duties on a trustee in respect of such claims, I have difficulty understanding what significant**

extra “value-added” representative counsel could bring to the employment-related claims process at this very late stage of this proceeding. (emphasis added)

TBS Acquireco Inc. (Re), 2013 ONSC 4663, at para. 37 [BOA at TAB 20].

70. A holistic analysis was carried out in *Mountain Equipment Co-Op*, in which the Supreme Court of British Columbia (the “BCSC”) dismissed an application for a representation order for former employees in a CCAA proceeding where substantially all of the company’s assets had been sold, but, the Monitor was running a claims process to deal with outstanding unsecured claims. One employee, Mr. Hoover, filed an application for the appointment of representative counsel for the terminated employees. Following a review of the case law in which representative counsel were appointed, the BCSC held that:

[31] The circumstances relating to MEC and this Claims Process represent a far different scenario than was addressed in [*Nortel Networks Corp. (Re)* (2009), *Fraser Papers Inc. (Re)*; *Target Canada Co. (Re)*, 1057863 B.C. Ltd. (*Re*), and *Canwest*]. **At present, what remains to be advanced is the distribution of the monies in the Monitor’s hands in accordance with the Claims Process.** Of particular note are the following factors in relation to the Employee Claimants:

- a) There is no reason to question the good faith efforts of MEC’s management to gather the applicable facts and documents and assess what MEC considers to be the termination entitlement of each employee. This effort is subject to the involvement and oversight of the Monitor;
- b) The majority of the 210 employees will be subject to the applicable provincial legislation, where the calculation of severance entitlement, including in the event of a group termination, is fairly straightforward;
- c) With respect to the former employees who have contracts or are entitled to common law notice, their entitlement will be based on the specific facts and circumstances unique to them, indicative of a unique analysis, as opposed to common issues to be advanced on behalf of all or most of them;
- d) It remains to be seen whether common issues arise with respect to the former employees that would justify joint representation on the contract or common law issues;
- e) Mr. Hoover argues that “information asymmetries” between employees would lead to obvious and manifest unfairness.

However, there is no evidence that the employees who are clearly not subject to the legislation could not band together to fund joint representation to present common or individual issues, whether through VSLO or another law firm;

f) It may be that VSLO's representation of all the employees would present a conflict, since advocating for one employee may increase his or her claim to the detriment of others who will share in the same pot of monies;

g) Mr. Hoover argues that many employees are or may be unaware of significant legal interests they have without representation. However, Mr. Gusikoski has already been in contact with 35 employees. In addition, copies of Mr. Hoover's application materials, which identify various legal issues, can be posted on the Facebook group or other social media; and

h) Mr. Hoover also argues that some employees may not be aware of common law severance rights, which could increase their claim significantly. Again, VSLO and/or Mr. Hoover can identify the issues for the Facebook group and identify sources of legal resources for use by them, just as many self-represented parties use in other litigation before the Court. (*emphasis added*)

Mountain Equipment Co-Op, at para. 30 (citations omitted) [BOA at TAB 16].

71. In examining the present circumstances with a holistic approach, the balance of convenience weighs against granting the Representation Order, as:

- a) Lynx Air and the Monitor calculated the WEPPA claims in good faith and in accordance with the statutory entitlements for each employee;
- b) other than the Group Termination Damages Claim, there is no evidence of any other common issues arising with respect to the Cabin Crew Employees and, if such claim is determined, there is no need for the Representation Order to be granted;
- c) there is no evidence that there are information asymmetries between the Cabin Crew Employees, nor evidence that the Cabin Crew Employees are unaware of

their legal rights with regards to the WEPPA calculation process, application process, or appeals process;

- d) there is no evidence that the Cabin Crew Employees are interested in a group representation order or will derive any benefits from same;
- e) there is no evidence of any value that the Representation Order would bring to the CCAA Proceedings, particularly at this stage;
- f) CUPE is seeking an order which has no provision for any Cabin Crew Employee to opt-out of the Representation Order. This is a small group of employees, the majority of whom have already filed applications under WEPPA, and there is no evidence provided by CUPE that a majority, or even a significant minority, of the Cabin Crew Employees dispute their WEPPA Calculation;
- g) there is no evidence that any of the Cabin Crew Employees would be prejudiced in the absence of the Representation Order;
- h) the Monitor is fulfilling, and has fulfilled, its duties as a court-appointed officer, including by communicating with Lynx Air's stakeholders through its website, confirming the WEPP Calculation with applicable representatives, and providing a single point of contact for employees and other stakeholders;
- i) the Cabin Crew Employees' claims to wages and termination pay are unsecured creditor claims and, there will be no claims process or no distribution for unsecured creditors; and,
- j) the Representation Order will burden the CCAA Proceedings as it will increase costs and delay.

72. Finally, appointing representative counsel under the Alberta Rules of Court requires that:

...the Court considers it expedient **to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.** (*emphasis added*)

Alberta Rules of the Court, Alta. Reg 124-2010, Rule 2.16(2)(c) [BOA at TAB 2].

73. As set out above, there is no expense to be saved by granting the Representation Order, in the circumstances, particularly as the WEPPA Calculations are not difficult and have already been completed. A holistic analysis does not support the granting of the Representation Order.

iii. The Specific Terms of the Representation Order Should Not Be Approved

74. Finally, even if the Representation Order is granted, the specific terms of the draft order as submitted should not be granted.

75. CUPE is seeking an order which would grant it broad immunity:

CUPE shall have no liability as a result of its appointment or the fulfilment of its duties in carrying out the provisions of this Order, save and except for any gross negligence and wilful misconduct on its part.

Draft Representation Order, s. 6.

76. While this scope of immunity is appropriate for court-appointed officers, it is excessive in the circumstances where the Representation Order is sought over a limited group of employees, all of whom have been identified, and none of whom are able to opt-out of the Representation Order. As stated by the court in *Body Shop*:

[49] They submit that such immunity is appropriate for Court officers, such as monitors, receivers, proposal trustees or representative counsel. Such immunity is common and well-founded for court officers such as monitors, receivers, and proposal trustees. Those officers of the Court have a mandate from, and report to, the Court. Monitors, for example, are often referred to as the “eyes and ears of the Court”. **While representative counsel clearly have duties to the Court (as indeed do all counsel), they are not Court officers in the same class as the other examples given. Their mandate flows, quite properly, from their retainer by their client group, and their principal**

fiduciary duty is owed to that group and includes acting in the best interests of its members.

[50] That is fundamentally different from the role of a Court officer, the duties of whom are owed to the Court, the process, and all of the stakeholders, to fulfil their mandate in a manner that is fair, reasonable and transparent. **It is also fundamentally different from the role of *amicus curiae*, and I do not accept the submission of the moving parties that the role of Representative Counsel is the same.** It is not. *Amicus curiae* may have a mandate to represent a particular interest or perspective, but they are appointed by the Court and owe their duty to the Court and its process. *(emphasis added)*

Body Shop, at paras. 49-51 [BOA at TAB 15].

77. The scope of immunity sought in this case is overly broad and should not be granted.

VI RELIEF SOUGHT

78. The Monitor respectfully requests that this Honourable Court dismiss the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2024.



Sean F. Collins / Pantelis Kyriakakis / Justin Turc
McCarthy Tétrault LLP
Counsel to FTI Consulting Canada Inc., in its
capacity as the court-appointed monitor of Lynx Air
Holdings Corporation and 1263343 Alberta Inc., and
not in its personal or corporate capacity

VII LIST OF AUTHORITIES

STATUTES

1. *Act respecting labour standards*, CQLR c N-1.1 at s. 84.0.13
2. *Alberta Rules of the Court*, Alta. Reg 124-2010, at section 2.16;
3. *Canada Labour Code*, R.S.C. 1985, c. L-2, at sections 212(1) and (2), 228, 230(1), and 235(1);
4. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, at section 11;
5. *Employment Standards Act*, 2000, SO 2000, c 41 at s. 61;
6. *Employment Standards Act*, RSBC 1996, c 113 at s. 64;
7. *Employment Standards Act*, SNB 1982, c E-7.2 at s. 34;
8. *Labour Standards Code*, RSNS 1989, c 246 at s. 72;
9. *The Employment Standards Code*, CCSM c E110 at s. 77;
10. *Wage Earner Protection Program Act (Canada)*, S.C. 2005, c. 47, at sections 2(1), 2(1.2), 7(1), 8, 9, 10, 11, 12, 13, 14(1), 17, 19, 20, and 21(1);
11. *Wage Earner Protection Program Regulations*, SOR/2008-222, at sections 2, 15(1), and 16;

CASE LAW

12. *Attorney General of Canada c. Former Gestion Inc.*, 2024 QCCA 1441;
13. *ATU, Local 1374 and Saskatchewan Transportation Co. (Layoff of Bargaining Unit Employees)*, Re, 2018 CarswellNat 1948;
14. *Canwest Publishing Inc.*, 2010 ONSC 1328;
15. *In the Matter of The Body Shop Canada Limited*, 2024 ONSC 3871;
16. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037;
17. *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (ON SC);
18. *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65;
19. *R. v. Servisair Inc.*, 2011 BCPC 142;

20. *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663;
21. *T.W.U. v British Columbia Telephone Co.*, 1982 CarswellBC 228, (1982) B.C.J. No. 81 (S.C.);
22. *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145;
23. *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426;
24. *WestJet, an Alberta Partnership and Employees in the service of WestJet, an Alberta Partnership, Re*, 2021 CarswellNat 2450;
25. *Windsor Machine & Stamping Limited (Re)*, 2009 CanLII 39771 (ON SC), 55 CBR (5th) 241;

OTHER AUTHORITIES

26. Debates of the Senate (Hansard), 2nd Session, 39th Parliament, Volume 144, Issue 12; and,
27. Government of Canada, "Wage Earner Protection Program for trustees or receivers: Eligibility", last modified June 28, 2024, online: < <https://www.canada.ca/en/employment-social-development/services/wage-earner-protection/trustee/eligibility.html>

SCHEDULE "A"

| Jurisdiction | Termination Pay in Lieu of Mass Termination Notice |
|---------------------------|--|
| Federal | Not addressed in legislation. |
| Alberta | Not addressed in legislation. |
| British Columbia | <p>Yes.</p> <p><i>Employment Standards Act</i> at s. 64.</p> <p>64(4) If an employee is not given notice as required by this section [the group termination notice provision], the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.</p> <p>64(5) The notice and termination pay requirements of this section are in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63 or under the collective agreement, as the case may be.</p> |
| Manitoba | <p>Yes.</p> <p><i>Employment Standards Code</i> at s. 77.</p> <p>77(1) The wage in lieu of notice payable under clause 61(1)(b) must not be less than the wage the employee would have earned during:</p> <p>(a) the applicable notice period under subsection 61(2) or 67(1) [the group termination notice provision]; or</p> <p>(b) if a termination notice was given for less than the applicable notice period, the portion of the notice period for which notice was not given; if the employee had worked his or her regular hours of work for the period.</p> |
| New Brunswick | <p>Yes.</p> <p><i>Employment Standards Act</i> at s. 34.</p> <p>34(1) Notwithstanding sections 30 and 32 [the group termination notice provision] an employer may terminate or layoff an employee without notice upon payment in lieu of notice of an amount equal to the pay the employee would have earned during the notice period provided under section 30 as though the employee were entitled to notice under that section.</p> |
| Newfoundland and Labrador | Not addressed in legislation. |
| Nova Scotia | <p>Yes.</p> <p><i>Labour Standards Code</i> at s. 72.</p> <p>72(4) Notwithstanding subsections (1), (2) [the group termination notice provision] and (3), but subject to Section 71, the employment of a person may be terminated forthwith where the employer gives to the person notice in writing to that effect and pays him an amount equal to all pay to which he would have been entitled for work that would have been performed by him at the regular rate in a normal, non-overtime work week</p> |

| Jurisdiction | Termination Pay in Lieu of Mass Termination Notice |
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| | for the period of notice prescribed under subsection (1) or (2), as the case may be. |
| Ontario | <p>Yes.</p> <p><i>Employment Standards Act</i> at s. 61.</p> <p>61 (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 [the group termination notice provision] if the employer,</p> <p>(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and</p> <p>(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.</p> |
| PEI | No distinction between group termination vs. individual. |
| Quebec | <p>Yes.</p> <p><i>Act Respecting Labour Standards</i> at s. 84.0.13</p> <p>84.0.13 An employer who does not give the notice prescribed by section 84.0.4 [the group termination notice provision] or who gives insufficient notice must pay to each dismissed employee an indemnity equal to the employee's regular wages, excluding overtime, for a period equal to the time period or remainder of the time period within which the employer was required to give notice.</p> <p>The indemnity must be paid at the time of the dismissal or at the end of a period of six months after a layoff of indeterminate length or a layoff expected to last less than six months but which exceeds that period.</p> <p>An employer who is in one of the situations described in section 84.0.5 is, however, not required to pay an indemnity.</p> |
| Saskatchewan | Not addressed in legislation. |