Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., AND TARGET CANADA PROPERTY LLC (the "Applicants")

BOOK OF AUTHORITIES OF THE MOVING PARTY

(Motion for Appointment of Employee Representatives, returnable February 11, 2015)

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TAB 1

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

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

Leanne Williams for Flextronics Telecom Systems Ltd.

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

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

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

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

G. H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

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

HEARD: **April 20, 2009**

ENDORSEMENT

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

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

[3] The proposed representative counsel are:

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

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

Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

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

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

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

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

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

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

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

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

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

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

Issue 1 – Representative Counsel and Funding Orders

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

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

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

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

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

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

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

Issue 2 – Who Should be Appointed as Representative Counsel?

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

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

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

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

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

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

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

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

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Layoff and Severance Payments

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

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

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

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

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

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

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

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

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

(b) the Health Care Plan;

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

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

(e) severance and termination pay ; and

(f) TRA payments.

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

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

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

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

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

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

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

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

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

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

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

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

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

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

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

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

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

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

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

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

[55] A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by

the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

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

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

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

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

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

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

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

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.
>
> *Re Stelco Inc.*, 15 C.B.R. 5th 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp.* (2000) 19 C.B.R. 4th 12 Alta. Q.B., para 31.

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

[64] As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have

received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

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

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

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

MORAWETZ J.

DATE: **May 27, 2009**

TAB 2

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

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 PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes and Alex Cobb* for the Canwest LP Entities
Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Hilary Clarke for the Bank of Nova Scotia, Administrative Agent for the Senior Secured Lenders' Syndicate
Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group
M. A. Church for the Communications, Energy and Paperworkers' Union
Anthony F. Dale for CAW-Canada
Deborah McPhail for the Financial Services Commission of Ontario

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried

employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

[2] On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

[3] On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

[4] There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former

employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

[5] Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately $14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

[6] Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current services and special payments in respect of the active registered pension plan; and

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

[7] The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA

proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

[8] All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

[9] No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

[10] Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

> "The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee."

[11] The LP Administrative Agent does not consent to the funding request at this time.

[12] On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

[13] Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

[14] The issues on this motion are as follows:

(1) Should the Representatives be appointed?

(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?

(3) If so, should the request for funding be granted?

Positions of Parties

[15] In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

[16] The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

[17] Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

[18] The LP Senior Lenders support the position of the LP Entities.

[19] In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

[20] No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

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

- the vulnerability and resources of the group sought to be represented;

- any benefit to the companies under CCAA protection;

- any social benefit to be derived from representation of the group;

- the facilitation of the administration of the proceedings and efficiency;

- the avoidance of a multiplicity of legal retainers;

- the balance of convenience and whether it is fair and just including to the creditors of the Estate;

- 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

- the position of other stakeholders and the Monitor.

[22] The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

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

[24] In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and

the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

[25] The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

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

[27] In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here

are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

[28] Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

Pepall J.

Released: March 5, 2010

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

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 PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

REASONS FOR DECISION

Pepall J.

Released: March 5, 2010

TAB 3

87 O.R. (3d) 721, 37 B.L.R. (4th) 112, 50 C.P.C. (6th) 398

Dugal v. Research in Motion Ltd.

Mark Dugal, Aaron Murphy, Doug Smees, John O'Malley, Gaetan Siguoin, William Jemison, Paul Mitchell, Steven Moffatt, David Thompstone and John Boote, as Trustees of **IRONWORKERS ONTARIO PENSION FUND** (Applicant) and **RESEARCH** IN **MOTION** LIMITED, JAMES L. BALSILLIE, MIKE LAZARIDIS, DOUGLAS E. FREGIN, DOUGLAS WRIGHT, JAMES ESTILL, E. KENDALL CORK, and JOHN RICHARDSON (Respondents)

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: November 5, 2007
Judgment: November 15, 2007
Docket: 07-CL-6844

Counsel: Michael D. Wright, A. Dimitri Lascaris for Applicant

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

Subject: Corporate and Commercial; Civil Practice and Procedure

Business associations — Legal proceedings involving business associations -- Practice and procedure in actions involving corporations -- Miscellaneous issues

Trustees of Pension Fund alleged improprieties in respect of option granting practices and accounting for same with respect to number of individuals -- Trustees sought various relief under oppression remedy section of Business Corporations Act, including leave to commence derivative action in name of R Ltd. against individuals for breach of fiduciary duty and negligence in administration and financial reporting regarding R Ltd.'s stock option program -- Parties negotiated settlement -- Parties asked court to approve settlement between Trustees, R Ltd. and individual respondents -- Parties also sought representative order under R. 10 of Rules of Civil Procedure in order to implement settlement -- Settlement approved -- Test for shareholder approval of settlement was met -- There was arm's length bargaining without suggestion of collusion -- Parties provided adequate notice of settlement hearing to all affected persons -- Representative order was granted -- Representative order was particularly appropriate given opt-out provision that had been exercised by very small minority of shareholders.

Cases considered by C. Campbell J.:

Hollinger International Inc. v. American Home Assurance Co. (2006), 34 C.C.L.I. (4th) 17, 2006 CarswellOnt 188 (Ont. S.C.J.) -- considered

Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc. (2006), 2006 CarswellOnt 7072 (Ont. S.C.J.) -- referred to

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) -- referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) -- considered

Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board) (1997), 35 O.R. (3d) 177, 1997 CarswellOnt 3084, 17 C.C.P.B. 49 (Ont. Gen. Div.) -- followed

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

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) -- considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 246(1) -- referred to

s. 249 -- referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 -- considered

REQUEST for court approval of settlement between parties and for representative order.

C. Campbell J.:

1 The Court has been asked to approve a settlement reached between the Applicant, Ironworkers Ontario Pension Fund, and Research In Motion Limited ("RIM") and other individual respondents.

2 The Applicant alleged improprieties in respect of option granting practices and accounting for the same with respect to a number of individuals. Among other remedies, the Applicant sought various relief under the oppression

remedy section of the *Business Corporations Act*, R.S.O. 1990 c. B. 16 (the "BCA"), s.247 (1). In addition, the relief sought leave to commence a derivative action in the name of RIM against certain individuals, including members of the audit committee, for breach of fiduciary duty and negligence in the administration of and financial reporting relating to RIM's stock option program.

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

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

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

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

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

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

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

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

> (a) Balsillie and Lazaridis have each agreed to pay $2.5 million to RIM in order to defray the costs of the Review -- this sum is in addition to the $5 million that each of them agreed to pay to RIM after the Application was commenced but before the Settlement Agreement was concluded;
>
> (b) RIM will not compensate the independent members of its Board with stock options;
>
> (c) RIM will retain Towers Perrin, a compensation consultant, to: (i) draft a new Compensation Committee Charter; and (ii) render an opinion to the Compensation Committee on whether it would constitute a material improvement to RIM's current corporate governance practices to assess the effectiveness of the Compensation Committee and its members;
>
> (d) In drafting the new Compensation Committee Charter, Towers Perrin will be required to consult in good faith with a leading corporate governance expert retained by the Applicant, Dr. Richard Leblanc of York University;

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

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

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

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

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

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

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

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

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

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

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

13 While an opt-out right is not necessary for a Rule 10 representation order, in order to ensure that any such order is binding outside of Ontario, the parties agreed to a 35-day opt-out period. That period began on October 15,

2007 (the date when newspaper ads ran and the long-form notices were mailed) and will expire on November 19, 2007. To date, 42 shareholders located throughout the U.S. and Canada, holding a combined 8,817 shares (0.0015% of the total issued and outstanding shares) have opted out. The fact that there have been opt-outs demonstrates that the notice has been effective in reaching shareholders. Some of the opt-outs appear to be motivated by a desire to have nothing to do with a lawsuit against RIM.

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

15 Two lines of cases were put forward as setting the test for shareholder approval. The first test is found in *Sparling v. Southam Inc.*,[FN1] a derivative settlement hearing under s. 249. The criteria include (i) there is an overriding public interest in favour of settlement; (ii) on a settlement approval motion, the Court should be satisfied that the proposal is fair and reasonable to all shareholders; (iii) in considering the settlement, the Court must recognize that settlements by their nature are compromises and may not satisfy every single concern of all affected parties; (iv) acceptable settlements may fall within a broad range of upper and lower limits; (v) it is not the Court's function to substitute its judgment for that of the parties who negotiate the settlement; (vi) while the Court does not simply rubber-stamp the settlement, it is not the Court's function on a settlement approval motion to litigate the merits of the action; (vii) the Court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement; and (viii) the Court should also consider the nature of the risks involved in establishing the liability claimed.

16 The second line adopts the test enunciated by Winkler J. (as he then was) in *Ontario New Home Warranty Program v. Chevron Chemical Co.*[FN2] (a class action settlement) and adopted in *Hollinger International Inc. v. American Home Assurance Co.*[FN3] (an insurance settlement and related derivative class action), which includes (i) likelihood of recovery or likelihood of success; (ii) amount and nature of discovery, evidence or investigation; (iii) settlement terms and conditions; (iv) recommendation and experience of counsel; (v) future expense and likely duration of the litigation; (vi) recommendation of neutral parties, if any; (vii) number of objectors and nature of objections; and (viii) the presence of arm's length bargaining and the absence of collusion.

17 In my view, there is nothing inconsistent with the two lists of factors; indeed, they are largely compatible. Some, such as the number of objectors, are clearly restricted to Class Proceedings. The lists referred to in *Chevron* and in *Hollinger* reflect the emphasis on time and cost associated with modern-day litigation and the need for parties to be mindful of the extent to which continued litigation may take inordinate time and undue cost. That would certainly occur in this action but for the settlement.

18 A Court in these circumstances should in my view be satisfied that there is likely merit in the claim and be aware that there are real risks that liability may not be established. As noted above, I am so satisfied and as well recognize that there was arm's length bargaining without any suggestion of collusion.

19 The settlement is therefore approved. To implement the settlement, the parties have sought a Representative Order under Rule 10 of the *Rules of Civil Procedure*, which gives the Court authority to appoint a person to represent others who may be affected by the proceeding.

20 The Rule is described as the "...'simplified procedure' version of proceeding under the *Class Proceedings Act*..." Rule 10 is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [*Class Proceedings Act*] order." As such, a number of Rule 10 orders have been issued since the advent of the *Class Proceedings Act*.[FN4]

21 The test for granting a Rule 10 representation order is a simple balance of convenience test. The court is to

consider the inconvenience that would be experienced by each party if the order were or were not granted:

> .... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted. [FN5]

22 I conclude that the Representative Order, which is hereby granted, is particularly appropriate given the opt-out provision that has been exercised by a very small minority of shareholders.

23 An Order will issue in terms of the draft Order filed as well as in the action in Court File No. 07-CL-6799. Once again, counsel are to be thanked for their effective efforts giving rise to this settlement.

Order accordingly.

FN1. *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.)

FN2. *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

FN3. *Hollinger International Inc. v. American Home Assurance Co.* (2006), 34 C.C.L.I. (4th) 17 (Ont. S.C.J.)

FN4. See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 190, R. 10; *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List]) at para. 42; *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.) at p. 183; *Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 29 C.P.C. (6th) 24 (Ont. S.C.J.); *Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.*, 2006 CarswellOnt 7072 (Ont. S.C.J.)

FN5. *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)*, *supra* at p. 183

END OF DOCUMENT

TAB 4

35 O.R. (3d) 177, 17 C.C.P.B. 49

Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board

Police Retirees of Ontario Incorporated, Plaintiff and The **Ontario Municipal Employees' Retirement Board**, The Waterloo Regional **Police** Services **Board**, The Waterloo Regional **Police** Association, and The Waterloo Regional **Police** Senior Officers' Association, Defendants

Ontario Court of Justice, General Division

Kiteley J.

Heard: March 20, 1997
Judgment: July 23, 1997
Docket: Toronto 1443/96

Counsel: Donna E. Campbell, counsel for the plaintiff.

David Stamp, counsel for OMERS.

Steven L. Moate, counsel for the Waterloo Regional Police Services Board.

Martin Doane, counsel for the Waterloo Regional Police Association and Waterloo Regional Senior Officers' Association.

Subject: Corporate and Commercial; Civil Practice and Procedure

Practice --- Parties -- Representative or class actions -- Procedural requirements

Under police pension benefits programs surplus of funds was created -- Allocation of funds was decided by police services board and police associations -- Retired members who contributed to fund and representative of local retiree's association were not consulted -- Organization of police retirees brought action for entitlement to share in excess funds and moved for representation order -- Defendant police associations objected on basis that organization was corporation rather than natural person -- Corporation was as entitled as natural person to representation order under Interpretation Act -- Balance of convenience favoured granting of representation order because of lack of financial resources of individual retirees and desire to end matter expeditiously -- Substantial information existed in regard to essential characteristics of members of retiree organization dedicated to their concerns -- Retiree organization had requisite solvency and authority to proceed with action -- Representation order granted -- Rules of Civil

35 O.R. (3d) 177, 17 C.C.P.B. 49

Procedure, R.R.O. 1990, Reg. 194 -- Interpretation Act, R.S.O. 1990, c. I.11, s. 29(1).

Under the police pension plan and the supplementary benefits plan, a surplus of funds was created. The police associations and the police services board came to an agreement with respect to the allocation of the excess funds. No representative from the plaintiff police retirees organization or retired members who had contributed to the funds were present when the decision on how to allocate the funds was made. Only active members of the police force were allowed to vote on the use of the funds. The organization of police retirees brought an action for the entitlement of the police retirees to a share of the excess funds. The police retirees organization made a motion for a representation order allowing them to represent the police retirees in the action. The defendant police associations objected to the motion on the basis that the retirees organization was a corporation rather than a natural person.

Held: The motion was granted.

The Rules of Civil Procedure provide no definition for the word "person". However, the Interpretation Act, s. 29(1), defines "person" to include a corporation. That definition applied to R. 10.01 governing representative actions. The plaintiff, as a corporation, was therefore as entitled as a natural person to a representation order.

The balance of convenience favoured the granting of the order. The lack of financial resources of the individual retirees was a prohibitive factor if they had to proceed on an individual basis. There was desire to end the matter expeditiously, which was more likely to result if a representation order was granted. Substantial information existed in regard to the essential characteristics of the members of the retiree organization, providing a clear definition of the class of persons to be represented. The plaintiff was an established and important organization dedicated to the concerns of its members. The retiree organization had the requisite solvency and authority of its members to proceed with the action. Although the plaintiff organization lacked the same characteristics as the members of the class it purported to represent, that requirement was not essential when the representative plaintiff was a corporation, as a corporation was never able to have the same characteristics as its individual members. The representation order was granted.

Cases considered by Kiteley J.:

> Bruce (Township) v. Thornburn (1986), 17 O.A.C. 127, 57 O.R. (2d) 77 (Ont. Div. Ct.) -- distinguished
>
> Hardy v. Clancy (June 30, 1993), Doc. 48355/90Q (Ont. Gen. Div.) -- referred to
>
> Toronto Fire Department Pensioners' Assn. v. Fitzsimmons (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.) -- distinguished

Statutes considered:

Interpretation Act, R.S.O. 1990, c. I.11

> s. 29(1) "person" -- considered

Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O.29

> Generally -- referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 -- referred to

R. 10.01 -- referred to

R. 10.01(1) -- referred to

R. 10.01(1)(f) -- considered

R. 10.01(2) -- referred to

R. 12 -- referred to

R. 22 -- referred to

Regulations considered:

Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O.29

General, R.R.O. 1980, Reg. 724

Generally

MOTION by plaintiff corporation for representation order.

***Kiteley J.*:**

1 The issue in this motion is the circumstances in which a representation order should be issued pursuant to Rule 10.01(1)(f) of the *Rules of Civil Procedure*.

Factual Background

2 The *Ontario Municipal Employees Retirement System Act*, R.S.O. 1990, c. O. 29 (the "*OMERS Act*") creates a multi-employer defined benefit pension plan for employees of local governments in Ontario. Participation in and contribution to the pension plan is obligatory on the part of the employee and the employer. Members of the Waterloo Regional Police Force participate in, contribute to and benefit from the OMERS pension plan which is subject to the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*Pension Benefits Act*"), and is administered by the OMERS Board, a corporation created by the *OMERS Act*. OMERS offers two categories of pension benefits to employees: (a) basic benefits, which are specified in the OMERS Regulations; and (b) supplementary benefits, which employees may receive if their employers enter into supplementary agreements with OMERS as provided under the OMERS Regulations.

3 In 1973 the Waterloo Regional Police Services Board (the "Police Board") entered into a supplementary benefit

agreement with OMERS (the "supplementary agreement") to provide a permanent partial disability supplementary benefit to its employee police officers. The supplementary agreement was amended on January 13, 1977, to provide an additional supplementary benefit which enabled police officers who were within ten years of normal retirement age to retire on a full unreduced pension after 30 years of service. The amendment made that benefit effective January 1, 1976. Although that benefit was initially paid for by contributions from both the Police Board and the police officers, an amendment to Regulation 724, R.[R.]O. 1980, effective January 1, 1983, eliminated direct contributions from employees who were covered by that benefit. Direct contributions that had been made by police officers from January 1, 1976, to December 31, 1982, were, on an optional basis, transferred to the contributor's R.R.S.P.'s or used to provide additional retirement benefits for the police officers who made such contributions. Employers continued to contribute. The amending regulation also provided that any supplementary agreement in force as of December 31, 1982, was deemed to be amended as of January 1, 1983, until it was amended in fact to accord with the form and content of any agreement as determined by the Board. In November 1983, the OMERS Board approved the form and content of a supplementary agreement to reflect the amendment. Although the agreement was approved, the Police Board and the OMERS Board never executed it.

4 In December 1991, the events began which led to this lawsuit. The supplementary benefit became part of the basic benefit package offered by OMERS, and was funded through employer contributions to the basic plan. All members became eligible to retire on an unreduced pension within 10 years of normal retirement date, after 30 years of qualifying service. This change to the OMERS basic plan removed the need to provide the supplementary benefit, funded by the supplementary pension plan. The money remaining in the fund, which had a value of $5,722,742.05 as of December 31, 1991, was declared "largely superfluous" by the OMERS Board. The funds required for the early retirement of those who retired after January 1, 1976, and before December 31, 1991, were transferred to the basic plan upon retirement of the member and are not reflected in the surplus fund.

5 In April 1992 the OMERS Board wrote to the contributing employers who had entered into a supplementary agreement and offered five options for use of the funds remaining in the supplementary benefit fund. It took the position that a clause which appears in the 1983 agreement, which characterized such monies as "excess funds on account", permitted the use of the funds in a manner to be agreed upon by the OMERS Board and the employer. The Police Board and the Police Associations elected to leave $2,000,000 in the account in anticipation of supplementary benefits yet to be introduced and to use the balance to offset the Police Board's basic plan contributions (ie employer contribution holidays).

6 Contrary to the plaintiff's initial understanding which is reflected in the Statement of Claim, the funds were not disbursed directly into the OMERS fund. Rather, the funds were applied to pay the employer's contribution to the basic pension plan. Although there was no direct payment out of the funds, the contribution holiday freed up monies which the Police Board had set aside for payment to the basic pension plan, and it is these funds to which the retired members claim a proportional entitlement. The employer contribution holiday ended in September 1995.

7 Around the time of the discussions concerning the surplus funds, the provincial government enacted legislation that required a social contract agreement to be entered into between the Police Board and the Police Associations to minimize the effect of an expenditure reduction programme. The Police Services Board and the Associations agreed to access the funds held by OMERS with respect to the members covered by the social contract agreement. It was agreed that $4,065,000 (the amount available because of the employer contribution holiday) would be used to fund, among other things, early retirement incentive payments and sick leave gratuities, and would also be allocated to achieve the social contract targets for the Board and the Associations. No representative of the local retirees' association or of the plaintiff was present during the negotiations between the Police Board and the Police Associations. None of the retired members who contributed to the fund were consulted either before or at the time the social contract agreement was negotiated and signed. Only active members of the force were permitted to vote on the use of the funds. On August 6, 1993, the date the social contract agreement was signed, the funds were valued at $6,343,628.97 (the "Excess Funds").

35 O.R. (3d) 177, 17 C.C.P.B. 49

The Issue

8 The issue in this *action* is whether the police retirees are entitled to a share in the Excess Funds. If the Court should determine that the police retirees are entitled to a share, the question then becomes the amount to which they are entitled.

9 The issue for determination on this *motion* is whether a representation order should be issued pursuant to Rule 10.01(1)(f) authorizing the Police Retirees of Ontario Incorporated ("P.R.O.") to represent the police retirees in their action claiming an entitlement to the Excess Funds.

Analysis

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

> 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 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.

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

11 In paragraph 15 of her factum, counsel for the plaintiff identified five possible sub-classes within the class of retirees. Suffice it to say that not all those sub-classes will be represented. For purposes of the motion for a representative order, I accepted the position advanced by counsel for the plaintiff, supported by counsel for OMERS, namely that the *liability* issue, that is, the entitlement of retired members to share in the monies, is a threshold issue. The order I make on the representative issue is for purposes only of progressing to and through the threshold issue.

12 As indicated below, counsel for the Police Associations raise the conflict between and among the sub-classes. I agree with the plaintiff and OMERS that the issue of conflict between and among the sub-classes does not need to be addressed at this time. Should the court find that no entitlement exists for any retired member, the possibility of conflicting entitlements of the sub-classes need not be considered. If the court does find entitlement, the potential for conflict between the sub-classes will need to be addressed.

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

13 Counsel for the Waterloo Regional Police Association and the Waterloo Regional Police Senior Officers' Association, submitted that the motion should fail on the basis that P.R.O. is a corporation rather than a natural person and thus may not represent the police retirees.

14 The *Rules of Civil Procedure* do not provide a definition of the word "person." However, s. 29(1) of the *Interpretation Act* R.S.O. 1990, c. I.11, contains the following definition: "person includes a corporation and the heirs, executors, administrators, or other legal representatives of a person to whom the context can apply according to law." That definition applies to Rule 10.01. In *Toronto Fire Department Pensioners' Assn. v. Fitzsimmons* (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.), at 301, Pitt J. held in an application pursuant to Rule 10 that he was not prepared to find, nor did he think it necessary to find, that "no corporation could be a 'person' contemplated by the rule". Accordingly, I find that there is no compelling reason why a corporation cannot be granted a representation order.

(3) The standard which the plaintiff must meet in order to be granted a representation order

15 The onus is on the plaintiff to satisfy the Court that this is a proper case for a representation order: see *Hardy v. Clancy* (June 30, 1993), Doc. 48355/90Q (Ont. Gen. Div.) per McNeely J.

16 The wording of R. 10.01(1)(f) indicates that a representation order will be granted where the group of persons affected by the order may not be "readily ascertained, found, or served". OMERS can create a list of all retirees potentially affected by this action. The respondents (other than OMERS) therefore suggest that since the proposed class constitutes a group which can be readily ascertained, found or served, the representation order ought not to be made. However, an analysis of the cases in which the wording of this provision has been considered suggests that a liberal interpretation of this requirement has been employed by the courts. In two recent decisions in which representation orders were made pursuant to s. 10.01(1)(f), the group of persons could be readily ascertained and/or found, but the court determined that it would be inconvenient for each member of the group to be individually served. In *Bathgate v. N.H.L. Pension Society*, (26 June 1991), Toronto RE 785/91, Potts J. granted a representation order to seven retired hockey players as representatives of the player participants in a pension plan. Potts J. mandated that a copy of the notice indicating that a representation order had been granted be sent by regular mail to all of the player participants as well as to the beneficiaries of deceased player participants under the plan. A representation order was made although the group of persons could be readily ascertained, found and served.

17 Similarly, in *Qit-Fer & Titane Inc. v. Dorr-Oliver Canada Ltd.* (9 January 1997), Toronto B177/96, Cameron J. granted a motion for a representation order to four natural persons to represent members of a pension plan for employees of Dorr Canada. As was the case in *Bathgate* supra, the individuals on whose behalf the representation order was made could be ascertained and found.

18 These cases suggest that the test to be applied in considering a request for a representation order is not whether the individual members of the group can be found or ascertained, but rather whether the balance of convenience favours the granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and

expense associated with a Rule 12 order. In analysing the balance of convenience, I must consider the inconvenience which would be experienced by each party if the representation order were or were not granted. There is no evidence of the financial resources of the members of P.R.O. But, by definition, retirees live on income less than previous wages. I assume that the individual police retirees are of modest means. To require that an individual police retiree assume financial responsibility for the representation of all of the police retirees for the purpose of resolving the threshold issue would impose an undue burden. It would be prohibitive. OMERS is in favour of the granting of a representation order, and, in fact, suggests that it would be "practical" to do so. Mr. Stamp has indicated that the issue is an important one which OMERS wishes to have determined as quickly and efficiently as possible. There are several other supplementary agreements being negotiated and progress will be hampered until this action is resolved. That resolution is likely to be more expeditious if a representation order is made. There is no evidence to suggest that individual members of the respondent Waterloo Regional Police Services Board, the Waterloo Regional Police Association, or the Waterloo Regional Police Senior Officers' Association would experience inconvenience in the event that a representation order is granted. As a result, I find that the balance of convenience favours the issuance of a representation order. Furthermore, as advocated by OMERS, it is in the interests of justice to make the order.

(4) Definition of the "class of persons" in s. 10.01[(1)](f) of the Rules of Civil Procedure

19 In order to obtain a representation order under Rule 10.01 of the *Rules of Civil Procedure*, the proposed plaintiff must provide a certain amount of information in regard to the essential characteristics of the group. In *Bruce (Township) v. Thornburn* (1986), 57 O.R. (2d) 77 (Ont. Div. Ct.), Southey J., writing for the Court, overturned a representation order which had been made in regard to subscribers of the Bruce Municipal Telephone System. Southey J. determined that the class of persons which the "Bryce group" had been appointed to represent was not an appropriate one for a representation order under rule 10.01 since no attempt had been made to describe the essential characteristics of the members of the "Bryce group "which would give them the claim to subscriber status which they asserted, nor was any attempt made to limit the class being represented to persons having the same characteristics.

20 Similarly, in *Toronto Fire Department Pensioners' Assn. v. Fitzsimmons* (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.), an application was made to appoint a corporation without share capital to represent all retired members of a fire department. The applicant had been incorporated by six retired firefighters for the purpose of "promoting and protecting the best interest of the Toronto Fire Department pensioners and their families." Nothing more of substance was known of the corporation. Pitt J. held that the applicant was not the appropriate representative for the purpose of this proceeding. At p. 301, he observed that it should not be difficult to find a small group of persons who could obtain leave of the court to institute representative proceedings after providing satisfactory evidence of their representative nature, their commonality of interest and their ability to satisfy costs awards or to provide a satisfactory mechanism for satisfying such awards.

(5) P.R.O. is the appropriate representative:

21 In contrast to the proposed representative plaintiffs in *Bruce (Township)* supra, and *Toronto Fire Department Pensioners' Assn., supra*, substantial information exists in regard to the essential characteristics of the members of P.R.O.. P.R.O. was incorporated on December 30, 1992. It is administered by an elected Board of Directors consisting of retired police personnel. Sydney Brown is the President and was one of the founding members. As of October 1996, P.R.O. had over 6000 members. Membership is restricted to retired police officers and spouses, retired police civilian employees and spouses, and the widows and widowers of both active and retired personnel. Police officers are automatically enrolled in the organization upon their retirement from the police force. Individuals pay annual dues of $5.00 while local retirees' associations pay fees of $25.00. A failure to pay dues does not result in removal from the membership list, but a written request for removal will. In other words membership is based on status, not on the member taking initiative to join. Mr. Doane and Mr. Moate describe the membership as "illusory". While it would be more comforting if membership were actively pursued rather than passively bestowed, the method of ascribing membership status does not mean that it is any the less representative.

22 P.R.O. is the only provincial organization which is primarily concerned with the advancement and protection of retired police personnel including assisting members in dealing with government boards and agencies. It has a written constitution and by-laws. It circulates a newsletter. It has a permanent office in Kitchener, Ontario. Members from the Waterloo Regional Police Force form part of the organization. The most recent address list compiled by P.R.O. of retired members in the Waterloo Regional Police Force lists approximately 176 retired police officers and/or their surviving spouses.

23 P.R.O. is recognized by OMERS. In his capacity as President of P.R.O., Sydney Brown has been invited by OMERS to attend consultation meetings held by the OMERS Board. Since September 1995, the OMERS Board has held four such consultation meetings, the purpose of which is to discuss with member representatives proposed changes to OMERS affecting the governance of that organization. As it is not possible to invite all members, the plaintiff asserts that the OMERS Board focuses on who they perceive to be representatives of those members, as a way of obtaining effective input. OMERS did not take issue with that assertion. Mr. Brown has attended each meeting and has been the only representative of the police retirees present. At the most recent meeting, two groups of retirees were represented: the Municipal Retirees of Ontario and P.R.O. No one from the Waterloo Regional Police Association or the Waterloo Regional Senior Officers Association attended.

24 Based on the foregoing. I find that P.R.O. is an established and important organization dedicated to the concerns of its members. This litigation is consistent with it's mandate. It is respected and consulted by OMERS.

25 The defendants have suggested that the plaintiff does not have the requisite solvency for the purpose of this representative action. During the year ending December 31, 1995, P.R.O. generated $1,771,104 in revenues as a result of ticket sales for the Garden Bros. Circus which it sponsors. Most of those funds are expended on the circus. The modest profit and very minor membership fees are used for administration expenses which for that year, totalled $162,173. P.R.O.'s net income on December 31, 1995, was $58,415. I conclude that P.R.O.'s financial statements as of December 31, 1995, reveal that it is a solvent corporation with the financial resources necessary to permit it to litigate this matter and to pay costs if necessary.

26 I do not accept the submission that since P.R.O. earns 95% of its revenue from running circuses for children, that if P.R.O. is ultimately ordered to pay costs, those costs would come from the children. The point is that P.R.O. generates significant revenue. I accept the evidence of Sydney Brown about it's solvency.

27 Mr. Doane submitted that P.R.O. is not an appropriate representative since it has not been given proper authority to bring this action by the Waterloo police retirees. On September 14, 1995, at a quarterly general meeting of the Waterloo Regional Police Retirees Association, a motion was passed which requested that P.R.O. provide the Association with a loan for legal assistance to obtain a portion of the Excess Funds. Sydney Brown was present.

28 Following that request, Sydney Brown reported the request to the P.R.O. board which decided to take the action on behalf of the Waterloo Regional Retirees. P.R.O. did not pass its own resolution authorizing the legal proceedings and accepting responsibility for the legal expenses incurred on behalf of P.R.O. and the legal expenses to which it would be exposed if costs were ordered against P.R.O. Mr. Doane is correct in raising this formal deficiency. But I accept the uncontradicted evidence of the President that he has the requisite authority.

29 Mr. Doane asserts that P.R.O. cannot be appointed because it does not have the same characteristics as the members of the class whom it purports to represent: P.R.O. isn't a retiree and P.R.O. doesn't have a claim against the Excess Funds. If the proposed plaintiff were a natural person, that argument would be attractive. But if a corporation has status as a person pursuant to Rule 10, it follows that there must be some leniency in considering the extent to which the representative plaintiff shares the characteristics of the class. Without that leniency, a corporation could never succeed as representative plaintiff. Accordingly, the lack of shared characteristics is not fatal.

30 Mr. Doane also asserts that P.R.O. cannot be appointed because of the potential for conflict. Some of the members of P.R.O. have received benefits attributed to the social contract agreement. Mr. Doane raised the prospect that his clients would counterclaim against all of those who received such benefits (which he calculated as 70 of the P.R.O. members) to recover the benefits.

31 Once the representation order is made, the "threshold issue" will be addressed. At that point, P.R.O. will specify which of the five possible sub-classes summarized at paragraph 15 of the plaintiff's factum will be pursued. Conflict may then arise. At this stage, however, the possibility of conflict among the members represented does not prevent P.R.O. from acting in a representative capacity for purposes of addressing the threshold issue.

32 The statement of claim includes allegations against all defendants of breach of fiduciary duty and unjust enrichment. There are other claims such as breach of statutory duty and breach of constitution. The three police associations opposed the representation order. But OMERS supported the request for the limited purpose of determining the threshold issue as a matter of law or on the basis of a special case under Rule 22. The basis upon which OMERS supports the request are summarized in paragraph 31 of its factum.

33 I am particularly influenced by the support from OMERS. It must deal with all OMERS recipients throughout Ontario. If OMERS is content with the representation order, the opposition by the Police Associations should not be determinative.

Conclusion

34 For purposes of bringing a motion to establish entitlement only, an order will issue pursuant to Rule 10 appointing P.R.O. as representative of the retired members of the Waterloo Regional Police Force who were employed when contributions were made to fund a Supplementary Early Retirement Benefit (the SERB) provided under a Supplementary Agreement between the Waterloo Regional Police Services Board and OMERS. I have not specified the period during which contributions were made. In paragraphs 14 and 15 of the Factum, Ms. Campbell enlarged the interval to cover the period 1976 to the present. Mr. Stamp opposed some of the sub-classes in paragraph 15 while Mr. Doane opposed others. If I circumscribed the time frame, I would indirectly restrict the sub-classes. I am confident that counsel will be able to agree on which of the sub-classes are unaffected by such conflict. If they are unable to agree, I will hear further submissions.

Security for Costs

35 In his submissions, Mr. Moate raised the prospect of the court making an order for security for costs as a condition of the representation order. He argues that since the granting of a representation order is discretionary, that the court could exercise the discretion but on conditions. I have found that P.R.O. has sufficient solvency to justify a representation order. An order compelling P.R.O. to post security for costs would be inconsistent with that finding.

Costs of this Motion

36 If counsel are unable to agree as to the costs of this motion, I will hear submissions. Toward that end, Ms. Campbell should attempt to elicit consensus. Failing such consensus, counsel should agree on a schedule for filing brief written submissions with Ms. Campbell and Mr. Stamp initiating and Mr. Moate and Mr. Doane responding. All submissions should be forwarded to me within 40 days unless the summer plans of counsel necessitate a more expanded timetable.

Motion granted.

35 O.R. (3d) 177, 17 C.C.P.B. 49

END OF DOCUMENT

TAB 5

ENHANCED ENFORCEMENT OF WAGE CLAIMS UNDER CANADIAN BANKRUPTCY AND RECEIVERSHIP LAW

Prepared for the Corporate Law Policy Directorate
by Ronald C.C. Cuming
College of Law - University of Saskatchewan

April 1998

Table of Contents

I. THE CONTEXT

Employees comprise the largest segment of those creditors of business organizations who have little capacity to protect themselves from the effects of insolvency of their debtors. This is due in large part to the fact that the circumstances surrounding the formation of employment contracts do not facilitate the use of protective measures. A prospective employee rarely has the bargaining power to demand some form of security interest in the property of a prospective employer to protect against the possibility that amounts owing under an employment contract are not paid. Even in the extremely unlikely event a security interest is given as part of the employment contract, there is no way to ensure that it would provide the desired protection for the employee or prospective employee. Without a special statutory priority rule, the security interest may be subject to extant security interests in the property of the employer.

Employees are disadvantaged in other respects. Unlike most other creditors, they have no capacity to assess the solvency of an employer or prospective employer. The do not have access to the private records of a business offering employment and generally do have the knowledge or resources to get information from commercial sources upon which an assessment of the risk involved in giving credit to the business can be made. Further, employees do not have the capacity to spread the loss resulting from non-payment over a large number of transactions. Nor can an employee "write-off" a loss from non-payment of wages against other income. By comparison, a commercial seller of goods to an employer has many customers. When employer does not pay, the seller can treat the loss as a cost of doing business which can be factored into the price charged generally for goods sold to all buyers. In any event, the non-payment is a business loss that can be taken into account when calculating the seller's income tax.

Historically, provincial legislators have been far more solicitous of the interests of employees than their federal counterparts. Extensive legislative measures have been implemented by provincial legislatures to address the problems that result from the very weak position that employee-creditors occupy under contract law and general debtor-creditor law. These measures are numerous and many of them are effective to the extent that they operate in the context of provincial (and other non-bankruptcy) law. However, only a few of them are effective in bankruptcy. An inordinately large number of proposals for change in bankruptcy law, including some contained in draft legislation, have been put forward to address this problem. But, to date, none has received the support of Parliament.

A wage claim made against a solvent employer[1] presents a very different set of issues than a wage claim made against an insolvent employer. By definition, a solvent employer has assets against which the wage claim can be enforced. Consequently, the principal issues that arise in this context are those related to speed and efficiency of enforcement. However, where the debtor-

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[1] In the balance of this study, the term "employer" includes a former employer and an "employee" includes a former employee.

employer is insolvent, an additional issue arises: the priority position of the wage claim. Insolvency by definition means that the employer does not have sufficient assets to meet the claims of all of the employer's creditors. This being the case, the proceeds from the available assets will either be allocated on a priority basis with the result that some creditors will receive payment while other will receive nothing, or will be shared on some basis among most or all of the creditors. All bankruptcy and insolvency systems embody policy choices that determine how the insolvent employer's assets are to be distributed. One of the policy choices which is now reflected in section 136(1)(d) of the *Bankruptcy and Insolvency Act* is that employees, because of the circumstances in which their claims arise and their inability to take protective measures, are to be given a position superior, at least for a portion of their claims, over the other unsecured creditors.

An entirely different set of considerations must be addressed where the value of the property that vests in the trustee is small or disproportionately small compared to the value of the provable claims of the unsecured creditors, including unpaid employees, because the greatest portion of the assets of the bankrupt employer is subject to one or more security interests. A secured creditor has an *in rem* interest in property of the bankrupt with the result that it need not look to any aspect of *in personam* debtor-creditor law, whether provincial judgment enforcement law or bankruptcy law, when it comes to recovering payment from the debtor. The secured creditor can simply enforce its *in rem* interest in the collateral and recover payment in that way. Through the operation of the common law principle of *nemo dat quod non habet* as reflected in section 71(2) of the *Bankruptcy and Insolvency Act*, the trustee has at best a residual claim to the collateral since only the property interest of the debtor vests in the trustee. This can only be an interest subject to the property interest of the secured party.

Since bankruptcy law is not the law of secured transactions, one might expect the *Bankruptcy and Insolvency Act* to say nothing about the rights of secured parties, other than to recognize expressly or inferentially the *nemo dat* principle, and leave to provincial law the regulation of all aspects of security interests, including the extent to which security interests are to be given priority over the claims of special types of unsecured creditors such as unpaid employees of a bankrupt employer. While this may have been the intention of Parliament, the Supreme Court of Canada has interpreted the *Act* in such a way to give it a very intrusive effect on relative priority positions of unpaid employees and secured creditors of a bankrupt employer. The result of the approach taken by the Court is to produce, in some cases, a "priority flip" when bankruptcy occurs. In other words, the effect of bankruptcy is to reverse the priority position of unpaid employees and the secured creditors under the law of some provinces.

The practical result of the approach taken by the Court is, in many cases, to deny recovery or any appreciable recovery of unpaid wages when the employer becomes a bankrupt. Ironically, provincial legislators have unwittingly exacerbated the problem by providing modern, efficient systems for taking security interests. In most provinces it is very easy and inexpensive to take a security interest in all or most of the present and future personal property of a business organization. This all-encompassing security interest can be put in place well before the

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., AND TARGET CANADA PROPERTY LLC

Court File No: CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES - MOVING PARTY (RETURNABLE FEBRUARY 11, 2015)

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