Court File No.: CV-25-00738613-00CL

***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 **HUDSON'S BAY COMPANY** ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.,

Applicants

# BOOK OF AUTHORITIES

**(For the appointment of an Independent Third Party (Douglas Cunningham, K.C.) to recommend representative counsel to the Court, or in the alternative, set a schedule for a contested motion to appoint representative counsel, returnable April 24, 2025)**

April 23, 2025

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Lawyers for Evan Marshall, Steven Karo, James Common, and 415 other HBC Employees and Retirees

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

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

**Leanne Williams for Flextronics Telecom Systems Ltd.**

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

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

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

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

**G. H. Finlayson for Informal Nortel Noteholders Group**

**A. Kauffman for Export Development Canada**

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



**HEARD:** **April 20, 2009**

## E N D O R S E M E N T

[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:** Ontario Securities Commission v. Bridging Finance Inc., 2021 ONSC 5700
**COURT FILE NO.:** Court File No. CV-21-00661458-00CL
**DATE:** 2021-08-26

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE: ONTARIO SECURITIES COMMISSION,** Applicant

**AND:**

**BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND,** Respondents

**BEFORE:** Chief Justice G.B. Morawetz

**COUNSEL:** *John Finnigan, Adam Driedger and Erin Pleet*, for the Receiver

*Adam Gotfried and Carlo Rossi*, for the Ontario Securities Commission

*David Bish*, for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

*Jeremy Dacks*, for BlackRock Financial Management, Inc.

*Steven Weisz*, for the University of Minnesota Foundation

*Steve Graff*, for Investors in Various Bridging Funds

*Sharon Kour, Pat Corney, Andrew Kent*, for the Ad-Hoc Group of Retail Investors

*David T. Ullmann*, for the Respondents, Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas, and 2190330 Ontario Ltd.

**HEARD:** August 23, 2021

## ENDORSEMENT

[1] PricewaterhouseCoopers Inc. (the "Receiver") brings this motion for an order, among other things:

(a) continuing the appointment of the limited partner advisory committee representing the Bridging Funds generally (the "LPAC") and the limited partner advisory committee representing the Bridging Indigenous Impact Fund (the "BIIF LPAC" and together with the LPAC, the "Committees") pending further order of the court;

(b) approving the process for the appointment of representative counsel for the Unitholders ("Representative Counsel") as set out in the Sixth Report of the Receiver dated August 16, 2021 (the "Sixth Report"); and

(c) approving the Sixth Report and the activities, decisions and conduct of the Receiver set out therein.

[2] Subject to certain modifications with respect to the process for the appointment of Representative Counsel, the requested relief was not opposed.

[3] Having reviewed the Sixth Report as well as the submissions of counsel for the Receiver and for the Ad Hoc Committee of Retail Investors (the "Ad Hoc Committee"), I am satisfied that it is appropriate to extend the appointment of the Committees until further order of the court.

[4] I am also satisfied that it is appropriate to approve the activities, decisions and conduct of the Receiver as set out in the Sixth Report.

[5] The Receiver is of the view that the conduct of the receivership will be aided by the appointment of Representative Counsel. The proposed scope of the Representative Counsel mandate will be to advise Unitholders on:

(a) assessing sale, investment, and/or hybrid proposals received during Phase 2 of the SISP and providing feedback to the Receiver;

(b) assessing interfund allocation issues which may arise as a result of the Receiver's report on these transfers, including the identification of conflicts which may arise between the Bridging Funds and the merits of any interfund claims which may arise; and

(c) analyzing claims that Unitholders may have against Bridging, its officers and directors and third parties arising out of the operation of the Bridging's business.

[6] A number of law firms have expressed interest in the Representative Counsel mandate. The Receiver proposes that the law firms provide written proposals to the Receiver within 10 business days (the "Proposal Deadline") and that the written proposal include details, among other things, of the qualifications of the candidate as well as any Unitholder support for the appointment of the candidate. The Receiver then proposes to interview each candidate and after consultation with the Committees, the Receiver will select one or more candidates to recommend to the court to be approved as Representative Counsel.

[7] Counsel for the Ad Hoc Committee submits that the Receiver's appointment process should be approved with certain modifications to ensure the independence of Representative Counsel. In addition, counsel submits that the process should also avoid parties involved in the marketing and sale of Bridging units (who, in certain respects material to the appointment of Representative Counsel, may be adverse in interest to the retail investors) exercising or appearing to exercise undue influence over the appointment process. Counsel proposes the following modifications:

(a) instead of the Receiver soliciting written proposals from interested law firms and interviewing each candidate, interested law firms who meet certain baseline criteria shall apply to the court for consideration;

(b) instead of having the Committees and Receiver select candidates to recommend to the court, the court will consider the applications of interested law firms and will make a judicial determination having regard to the varied competing interests of stakeholders, creditors, and retail investors; and

(c) following its appointment, Representative Counsel will call for applications from retail investors to form a five to seven member committee to instruct Representative Counsel (the "RIC" or "Retail Investors Committee").

[8] Counsel for the Ad Hoc Committee submits that the Retail Investors Committee's primary goal is recovery of their investments. As such, they require counsel who can provide frank advice on their rights and entitlements without concern about business or ethical conflicts that may arise *vis-à-vis* financial institutions and brokers. They submit that the Representative Counsel appointment process must take this reality into account. As currently proposed, counsel submits that the Receiver's Appointment Process does not provide the retail investors with any transparency or insight into their representative committees and does not offer the retail investors a clear vision of how their opinions will be presented to the court.

[9] In my view, the concerns raised by counsel for the Ad Hoc Committee are legitimate and need to be addressed. However, I also have to take into account that, given the ongoing SISP, time is of the essence in these proceedings. It is necessary that the selection of Representative Counsel be conducted on an expedited basis. In order to ensure that there are no delays in the selection process, the Receiver is to immediately commence the Appointment Process to obtain Written Proposals (both terms as defined in the Sixth Report).

[10] However, modifications are to be made to the Appointment Process. I will appoint an independent third party, immediately after the deadline for submissions of Written Proposals, to evaluate the Written Proposals and to recommend to the court the party to be approved as Representative Counsel. In formulating the process to evaluate the Written Proposals, the independent third party, in her or his sole discretion, can consult with the Receiver and counsel to the Ad Hoc Committee. The recommendation to the court is to be made within 10 business days of the Written Proposal deadline. I note that, during the hearing, counsel to the Ad Hoc Committee did not express any objection to my suggestion of this possible modified process.

[11] The independent third party is to be compensated at a reasonable hourly rate to be determined by the Receiver, after consultation with the independent third party, and is to be paid as a disbursement by the Receiver.

[12] With respect to the submissions by counsel to the Ad Hoc Committee concerning the Retail Investor Committee, it seems to me that this matter can be deferred until such time as Representative Counsel has been appointed and has had the opportunity to review the issue with the Receiver. If necessary, further directions may be sought on this point.

[13] An order shall issue to reflect the foregoing.

Chief Justice G.B. Morawetz

**Date:** August 26, 2021

# TAB 3

**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65

**Date:** 20190219
**Docket:** HFX484742
**Registry:** Halifax



**In the Matter of:**

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the *Companies' Creditors Arrangement Act*

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## REPRESENTATIVE COUNSEL DECISION

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|---|---|
| **Corrected Decision:** | The text of the original decision has been corrected according to the attached erratum dated **March 14, 2019**. |
| **Judge:** | The Honourable Justice Michael J. Wood |
| **Heard:** | February 14, 2019, in Halifax, Nova Scotia |
| **Counsel:** | Maurice Chiasson QC and Sara Scott, for the Applicants |
| | Elizabeth Pillon, Lee Nicholson, and Sharon Hamilton for the Monitor |
| | Raj Sahni, Ben Durnford and John Stringer, for an informal committee of users of the Quadriga platform |
| | Jeremy Dacks, Evan Thomas, Robert Purdy QC, and Michael Scott, for an informal committee of users of the Quadriga platform |
| | Gregory Azeff and Gavin MacDonald, for Parham Pakjou |
| | Brendan O'Neill, for Goodmans LLP |

By the Court:

[1] On February 5, 2019, the Court granted the application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. ("the Applicants") for an initial order and stay under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). Ernest & Young Inc. was appointed as Monitor.

[2] The Applicants operated a platform to facilitate the purchase and sale of cryptocurrencies. As set out in the materials filed in support of the initial application, users of the platform are owed approximately $250,000,000. The total number of users was estimated to be 115,000.

[3] The sole officer and director of the Applicants passed away in December 2018 and, as of the end of January 2019, the majority of the Applicants' cryptocurrency assets had not been located. The resulting insolvency lead to the granting of the initial order on February 5, 2019.

[4] The Court has received competing motions by or on behalf of users of the Applicants' platform. They all seek essentially the same relief, which is:

1. appointment of a representative creditors committee of users;
2. appointment of representative legal counsel to act on behalf of affected users on the instructions of the representative committee; and
3. providing access to the existing administrative charge over the assets of the Applicants to secure payment of the reasonable fees and disbursements of the representative counsel.

[5] Appointment of representative counsel and stakeholder representative committees are not unusual in complex *CCAA* proceedings. The authority for doing so is found in s. 11 of the Act which reads as follows:

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

[6] As stated in *Re Nortel Networks*, 2009 ONSC 3028, the Court has a wide discretion to appoint representatives under this provision. It is usually done where the affected group of stakeholders is large and, without representation, most members would be unable to effectively participate in the *CCAA* proceeding. Representative counsel can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders and avoiding a multiplicity of potentially conflicting retainers.

[7] In *Re Fraser Papers Inc.*, 2009 ONSC 6169, the Court described why it was prepared to appoint representative counsel for retirees and employees:

> 19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. ...

[8] In *Nortel Networks*, the Court appointed representative counsel for employees and retirees because that vulnerable group had little means to pursue a claim in the complex *CCAA* proceedings. The Court described the benefit of such an order as follows:

> 13 … 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.

[9] There are two primary rationales given for the appointment of representatives and representative counsel in *CCAA* proceedings. The first is to provide effective communication with stakeholders and ensure that their interests are brought to the attention of the Court and other *CCAA* participants. The second is to bring increased efficiency and cost effectiveness to the proceeding as a whole. This latter objective can be attainted by streamlining notification to stakeholders through their representatives and eliminating the need for multiple counsel to be retained by individual stakeholders to represent their interests. The following judicial comments illustrate these principles:

> 53 … 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.
>
> (*Nortel Networks*)

> 24 ... 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.
>
> (*Re Canwest Publishing Inc.*, 2010 ONSC 1328)

> 38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.
>
> (*Re U.S. Steel Canada Inc.*, 2014 ONSC 6145)

[10] Representatives and representative counsel should not have an open-ended retainer to undertake any inquiry or investigation they may wish, particularly where the fees are to be paid out of the assets of the applicant company. The appointment is specifically for purposes of the *CCAA* proceeding and to ensure that the stakeholders' interests are effectively taken into account by the decision makers. In some cases there are specific limitations placed on the scope of the representative counsel appointment. For example, in *Canwest Publishing* the funding approved for representative counsel excluded any investigation of claims against the corporate directors of the applicant company.

[11] In cases, such as here, where there are competing applications for appointment of representatives, the Court must evaluate the proposals to determine which will best achieve the objectives described above. In *Fraser Papers* the Court considered factors such as proposed breadth of representation, the extent of counsel's mandate to act, their legal expertise, jurisdiction of practice, facility in French and English and estimated costs (see para. 12).

[12] In this case all counsel are members of local and national law firms, with extensive insolvency experience. Each has been contacted by a significant number

of users who support their appointment as representative counsel. All seek to be appointed on behalf of all affected users. In my view, what will determine who should be appointed as representative counsel is the manner in which they propose to approach their role and how that accords with the objectives of effective communication and efficiency.

[13] The role of representative counsel will differ depending upon the nature of the applicant company and the characteristics of the group of stakeholders to be represented. For example, acting on behalf of employees and retirees for large manufacturers such as Fraser Papers or U.S. Steel, would be very different than the affected users in this case. The Applicants have no physical office, no employees and the trading platform was run by one individual who engaged a handful of third party contractors. The business is currently suspended, and may never resume, although that remains to be determined. The biggest task for the Monitor will be to locate and recover the Applicants' assets.

[14] There are more than 100,000 affected users. They range from small creditors who are owed $100, to others who are owed many millions. Privacy is a great concern and many users do not wish to be publicly identified in any fashion. If the affidavits filed in support of the representation motions are indicative, a number of users profess to have technical expertise in cryptocurrencies and are interested in offering their services to the Monitor to assist in the asset investigation process.

[15] Perhaps because of the nature of the cryptocurrency world, there has apparently been a great deal of discussion in various social media and online forums about the Applicants and their difficulties. The affidavits filed in this proceeding, refer to speculation about what may have happened with the Applicants' assets.

[16] All of this leads me to conclude that the most important role for representative counsel is to provide accurate information and advice about the *CCAA* proceeding to all users, and to ensure that their legitimate interests are taken into account throughout the proceeding. It is not to undertake their own investigation with respect to the Applicants and their assets, that is the responsibility of the court appointed Monitor, who is required to provide written reports on the results of their work.

**Nature of the Motions**

[17] The three motions were brought on behalf of affected users and supported by individual affidavits. I will identify the motions by the law firms they nominate to act as representative counsel.



Bennett Jones/McInnes Cooper

[18] Bennett Jones would act as lead counsel and McInnes Cooper as local counsel to the committee of affected users, the members of which are to be identified by representative counsel. The committee and counsel were proposed to act as a "check and balance" on the companies activities and provide a mechanism to "develop restructuring alternatives and solutions".

[19] The initial brief filed in support of the motion describes the role of representative counsel as follows:

> 34. The participation of the Representative Counsel will be critical to ensure that the interests of the Affected Users are represented in the Companies' *CCAA* proceedings, and as described previously, will facilitate the restructuring of the Companies under the *CCAA*. As descried in the Robertson Affidavit, there are several complex factual, legal and financial issues that must be addressed in order to successfully restructure the business of the Companies. The knowledge and the essential legal services provided by the proposed Representative Counsel and other professionals that are the beneficiaries of the Administration Charge will be necessary in order to, among other things, properly investigate the operation and current state of Companies' assets, verify relevant legal and financial information, adequately represent (without an unwarranted duplication of roles) the interests of the Affected Users, and otherwise navigate these *CCAA* proceedings to completion.

Miller Thomson/Cox & Palmer

[20] The motion proposes to appoint Miller Thomson as lead counsel with Cox & Palmer as local counsel, to represent the proposed representative committee of users. The membership of that committee would include the moving party, Mr. Pakjou and additional members selected by him and representative counsel.

[21] The motion brief proposes that representative counsel perform the following functions:

- managing communications with users;
- acting as user liaison for the Monitor;
- advocating for user interests before the Court;

- identify potential conflicting interest amongst users; and
- advocating for user privacy.



[22] With respect to the fees of representative counsel, the brief says:

> 30. The Moving Party proposes that Representative Counsel Fees be subject to approval by this Honourable Court, having regard to the reasonableness of same in the performance of the mandate prescribed by this Honourable Court. As such, it is respectfully submitted that the most effective manner in which to minimize Representative Counsel Fees will be for this Honourable Court to carefully prescribe the duties and responsibilities of representative counsel in an Order.

Osler, Hoskin & Harcourt/Patterson Law

[23] Osler, Hoskin & Harcourt LLP would be lead counsel with Patterson Law as local counsel acting on behalf of a representative committee of users. That committee would be composed of the three users who filed affidavits in the motion and two others selected by them in consultation with the Applicants and the Monitor.

[24] The initial brief describes their proposed approach to the case as follows:

> 30(d) Approach to Case
>
> (i) The proposed committee members emphasize the importance of communication with Affected Users to dispel misinformation, reduce anxiety, and permit the proceedings to advance in an orderly and efficient manner. They have identified communication channels most likely to reach the Affected Users, and Osler and Patterson have the resources to ensure that accurate information is disseminated effectively and that Affected Users can easily communicate their views. This emphasis on communication, combined with the committee's and Osler's knowledge of cryptocurrency and blockchain technology, would assist the Monitor in communicating complex technical information to a disparate group of individuals.
>
> (ii) The proposed committee members have considerable technical expertise and relationships that may be of assistance to the Monitor and the Applicants. There are many others who wish to help. The proposed committee and its representative counsel can organize and focus any such assistance to ensure it is provided efficiently.

**Positions of the Parties**

Bennett Jones/McInnes Cooper

[25] At the hearing counsel indicated that they were supported by 181 users, whose claims totaled approximately $22,000,000. Both firms have significant *CCAA* experience and have already been working to advance the interests of the affected users, including appearing at the initial hearing.

[26] They have experience in communicating with diverse groups of stakeholders and disagree with the approach of some other counsel who suggest that applications such as Reddit and Telegram, should be used to provide information to users. They propose to use web sites and third party communication firms as they have in other large insolvencies.

[27] Counsel suggests that members of the users committee be identified by representative counsel in consultation with the Monitor.

[28] They agree with avoiding duplication of work already being done by the Monitor. It would not be their role to act as an "armchair quarterback" overlooking the Monitor's activities. They do not think it is appropriate to have an initial cap on fees of representative counsel because the scope of work is uncertain and the costs of returning to amend the cap in the future would not be warranted. Representative counsel has accountability to the Court and members of the user group.

Miller Thomson/Cox & Palmer

[29] This group has the support of 252 creditors with claims of approximately $15,000,000. They believe that representative counsel should be selected based upon a role that reflects efficiency, collaboration and cost effectiveness.

[30] The two firms both have extensive insolvency experience and will divide work based upon expertise with Cox & Palmer taking the lead on civil procedure and court appearances, and Miller Thomson on project management, communication and cryptocurrencies. The work would be organized to minimize the number of lawyers and Toronto counsel would only appear in court in Halifax if their expertise were required.

[31] Counsel observed that all of the professional fees being incurred were likely coming out of funds that would otherwise be available to the affected users and as a result should be minimized to the extent possible.

[32] Their communication plan includes, posting information in chat rooms and on social media. The rationale is that users are already discussing the Quadriga

issue in those places, and it is important to have accurate information available to them. With respect to fees, they propose specific limits on the scope of representative counsel's mandate and an initial cap on fees of $250,000 with an ongoing budget process.



Osler, Hoskin & Harcourt/Patterson Law

[33] Osler, Hoskin & Harcourt would be the lead firm, with Patterson Law providing local input with respect to civil procedure and litigation in Nova Scotia. Osler has significant experience in legal issues related to cryptocurrency and blockchains. They are supported by 134 users with claims in excess of $19,000,000.

[34] Their approach would be complimentary to, and not duplicative of, the work done by the Monitor, recognizing that the users would ultimately be responsible for the expenses. They would have no objection to a defined mandate for representative counsel, nor a cap on fees with the ability to seek modification. With the firm's existing expertise in technical issues, there would be no need to incur costs in familiarizing themselves with those matters.

[35] They believe communication through social media is necessary because that is the location where members of the users group can be found. They would use their experience in communicating with large investor groups in other cases.

Goodmans LLP

[36] Goodmans did not bring forward a motion, although Mr. O'Neill, on their behalf, provided written submissions and appeared at the hearing. He proposed a mechanism whereby the representative committee be established by the Court and Monitor after soliciting expressions of interest in membership. That committee should then have the responsibility of selecting representative counsel. The theory is that the users ought to have a say in which law firm will represent them.

The Applicants

[37] Mr. Chiasson emphasized the importance of having representative counsel appointed quickly and prior to the comeback hearing on March 5, 2019. He believed it was important to have input from the affected users in that process and advocated for immediate appointment of the representative committee using the

individuals who had filed affidavits in support of the three motions before the Court. That committee could then have input into the selection of representative counsel.

[38] The Applicants' also emphasized the financial considerations and in particular, the importance of limiting expenses, which will ultimately be borne by users. They advocate a restriction on the scope of the representative counsel's mandate.



The Monitor

[39] Ms. Pillon pointed out that a number of firms had contacted her prior to the initial application, expressing interest in appointment as representative counsel. She asked them to delay those motions in order to allow the Applicants to bring the initial application before the Court. For this reason she did not believe there should be any consideration given to the fact that Bennett Jones/McInnes Cooper had been in attendance on February 5, 2019, seeking to be appointed as representative counsel and the other firms were not.

[40] The Monitor emphasized the importance of having a representative committee that reflects the diversity of users and that it may take some time to determine what this would require. They were not opposed to appointing a preliminary committee with the possibility of substitution of members at a future point in time. That preliminary group could make recommendations about representative counsel.

[41] The Monitor is concerned with ensuring that there is no duplication of work between representative counsel and counsel to the Monitor and Applicants. For this reason they recommend that consideration be given to a limited scope of mandate in the appointment order. It was suggested that there should be a cap on representative counsel fees of $100,000 to be applied to work going forward, but not in relation to the preparation of the appointment motion. The amount of the cap could be revisited as the *CCAA* process unfolds.

**Analysis**

[42] All counsel acknowledged that the three proposed counsel groups are well qualified and have the necessary experience to carry out the mandate of representative counsel. They each have the support of many users with millions of dollars in outstanding claims.

[43] This *CCAA* proceeding is unique in the sense that there is no operating business of any significant size in terms of physical assets, employees, third party suppliers or secured creditors. There is, however, a very large group of diverse users who have no access to many millions of dollars in assets which they had given to the Applicants. The anecdotal evidence at the hearing is that many people are extremely upset, angry and concerned about dishonest and fraudulent activity. There are reports of death threats being made to people associated with the Applicants. All parties agree that this user group needs representation as soon as possible. That representation will give them accurate information and the knowledge that their interests are being properly represented throughout this process.

[44] Another unusual feature is that the only creditors of any significance are the users. The one secured creditor agreed to advance $300,000 in order to get the *CCAA* process underway. The plan is to repay the money as soon as assets become available. The lack of any secured creditors means that the users' money is effectively funding all of the professional fees being incurred. It is extremely important to manage those, in order to maximize recovery for the users. This requires a commitment on all parties to have this issue front and centre while, at the same time, not compromising on the work necessary to advance the interests of the users and recover assets for their benefit.

[45] In my view, the criteria to be used in assessing which of the groups should be representative counsel, is somewhat subjective. It requires a consideration of their approach to the issues of efficiency, communication and cost effectiveness. I am satisfied that the submissions of counsel have allowed me to gain insight into the approaches which each group proposes to undertake. There are strengths and weaknesses in each and legitimate debates about which communication strategies might be most effective in the circumstances.

[46] A number of counsel suggested that the final selection of representative counsel should be deferred until the users committee is in place so that they can offer their opinion on the issue. Competing with that philosophy is the sense of urgency conveyed by all in having the committee and counsel appointed as soon as possible. I am not satisfied that delaying selection of representative counsel until the committee is in place is reasonable. I agree with the Monitor that the committee needs to reflect the diversity of the user group and should only be appointed after soliciting expressions of interest from the users. I also believe that having input from representative counsel on behalf of the users would be important in the selection of committee members. That decision should not be left to the Monitor and the Court alone.

[47] There are three legal teams, who are obviously qualified and capable of doing the work who are supported by many users, and I am not sure on what basis members of the representative committee could chose among them. It is unrealistic to think that these individuals would have a real appreciation of the issues of efficiency and cost effectiveness in a *CCAA* proceeding. At a minimum, it would seem that they would have to be educated about these matters before they could engage in a meaningful consideration of the somewhat subtle differences between the competing firms.

[48] When I consider all of these factors I believe it is in the best interests of all of the users that the issue of representative counsel be decided now and that I am in the best position to do so. Any of the proposed counsel teams have the capability of performing the work required.

[49] Having assessed all of the information provided on the motions and considering the issues of efficiency, communication and cost effectiveness I believe that the Miller Thomson/Cox & Palmer team is the best choice, and I would appoint them as representative counsel. My reasons for selecting them are as follows:

1. Both the local and national firms have extensive insolvency and *CCAA* experience. Miller Thomson has additional depth in certain areas, including larger *CCAA* proceedings and cryptocurrency.
2. The relationship between the two firms has been thought out carefully with a view to minimizing costs. Cox & Palmer will deal with their areas of expertise, including local litigation practice and court appearances. Miller Thomson will provide expertise in dealing with large creditor groups and cryptocurrency technology.
3. The communication strategy proposed is reasonable, including the idea that some presence in social media and online discussion groups is necessary in order to reach the user group members.
4. The understanding of the financial implications for users has permeated their submissions from the beginning. They propose a limited initial mandate and a cap on counsel fees in recognition of the reality that it is the users who will ultimately be paying.
5. They recognize the efficiency to be gained by working collaboratively with the Monitor and demonstrated this by respecting the request that they defer their motion for appointment as representative counsel until after the initial order was dealt with.

[50] Many of these same factors apply to one or more of the other legal teams, however, on balance, the combination of all of these characteristics in the Miller Thomson/Cox & Palmer presentation, makes them the best choice.

**Appointment of Representative Committee**

[51] With the selection of representative counsel, the appointment of members of the representative committee should proceed expeditiously. The Monitor suggested that notice be given inviting expressions of interest for membership to the user group and that, once received, the Monitor and representative counsel could review these with the view to making a recommendation on membership to the Court. I agree with that procedure, and would direct that it commence without delay.

**Conclusion**

[52] Having selected representative counsel and given directions for appointment of the representative committee, the formal order reflecting these decisions can be finalized. I would expect that representative counsel, the Monitor and the Applicants should be able to come to an agreement on most, if not all, of the terms of the order which could then be presented to the Court for consideration. In the event that there remains some disagreement between the parties, those matters can be dealt with by the Court at or before the comeback hearing on March 5, 2019.

Wood, J.

**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65

**Date:** 20190219
**Docket:** HFX484742
**Registry:** Halifax



**In the Matter of:**

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the *Companies' Creditors Arrangement Act*

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**ERRATUM Dated March 14, 2019**

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**Judge:** The Honourable Justice Michael J. Wood

**Heard:** February 14, 2019, in Halifax, Nova Scotia

**Counsel:** Maurice Chiasson QC and Sara Scott, for the Applicants

Elizabeth Pillon, Lee Nicholson, and Sharon Hamilton for the Monitor

Raj Sahni, Ben Durnford and John Stringer, for an informal committee of users of the Quadriga platform

Jeremy Dacks, Evan Thomas, Robert Purdy QC, and Michael Scott, for an informal committee of users of the Quadriga platform

Gregory Azeff and Gavin MacDonald, for Parham Pakjou

Brendan O'Neill, for Goodmans LLP

**Erratum**

Throughout the decision the spelling of the name of the firm, Miller Thompson, has been changed to Miller Thomson.

# TAB 4

**COURT FILE NO.:** CV-21-00661458-00CL

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE: ONTARIO SECURITIES COMMISSION,** Applicant

**AND:**

**BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND,** Respondents

## DIRECTION

[1] Following the endorsement of August 23, 2021, I appointed The Honourable Todd L. Archibald as the Independent Third Party with a mandate to provide the Court with a recommendation for the appointment of Representative Counsel in these proceedings. Mr. Archibald submitted his report on September 24, 2021 in which he recommended that Bennett Jones LLP be appointed as Representative Counsel.

[2] Mr. Archibald's report (without appendices) is attached as Schedule "A".

[3] I have reviewed Mr. Archibald's report and accept his recommendation.

[4] Bennett Jones LLP is appointed as Representative Counsel.

Chief Justice G.B. Morawetz

**Date:** September 27, 2021

Archibald
mediation & arbitration
solutions inc.

# Memorandum

**To:** The Honourable Geoffrey B. Morawetz, Chief Justice of the Superior Court of Justice of Ontario

**From:** The Honourable Todd L. Archibald

**Date:** September 24, 2021

**RE: Review of Applications for Representative Counsel for the Unitholders of Funds managed by Bridging Finance Inc. and Certain of its Affiliates: Court File: CV-21-00661458-00CL**

Dear Chief Justice Morawetz,

Thank you for the appointment as the independent third party ("ITP") to assess the proposals of the five law firms (two of which are consortiums), who have applied to be representative counsel for the unitholders of funds managed by Bridging Finance Inc. ("Bridging") and certain of its affiliates (CV-21-00661458-00CL). The scope of the Representative Counsel mandate is set out in the Sixth Report of PricewaterhouseCoopers Inc ("the Receiver") dated August 16, 2021, and is captured in the Court's endorsement of August 23, 2021, in paragraph five as follows:

The proposed scope of the Representative Counsel mandate will be to advise Unitholders on:

(a) assessing sale, investment, and/or hybrid proposals received during Phase 2 of the SISP and providing feedback to the Receiver;

(b) assessing interfund allocation issues which may arise as a result of the Receiver's report on these transfers, including the identification of conflicts which may arise between the Bridging Funds and the merits of any interfund claims which may arise; and

(c) analyzing claims that Unitholders may have against Bridging, its officers and directors and third parties arising out of the operation of the Bridging's business. [1]

1. OSC v. Bridging Finance Inc et al., 2021 ONSC 5700 at paragraph 5.

## A. PROCESS:

The Court has asked the ITP to make a recommendation on the appointment of Representative Counsel to act for the approximately 26,000 investors in Bridging. To assess the quality of the applications, the ITP carefully reviewed the written proposals on September 21, 2021. The ITP then conducted oral interviews with representatives from all of the candidates on September 22, 2021.

In each interview, the ITP asked the same series of questions. The questions explored potential issues which could arise from the Representative Counsel mandate. To be transparent and fair in the process, the candidates were all told in advance the identities of the other interviewees and were questioned about the advantages which they could bring over the competing firms. The questions are attached to this memorandum in Appendix "A".

As per Chief Justice Morawetz's August 23, 2021 endorsement, the ITP also consulted with the Receiver concerning the breadth and substance of the applications. The ITP did not, however, separately consult with counsel to the Ad Hoc Committee of Retail Investors since their counsel also participated as one of the applicants in this interview process. The ITP was apprised of their perspectives during the interview.

All five applicants were extremely well qualified and had significant commercial and insolvency expertise and experience. Every candidate submitted impressive and detailed proposals and provided thoughtful answers during the interviews. The decision to select one proposal out of five was difficult.

## B. RECOMMENDATION:

Following extensive deliberations, the ITP recommends to the Superior Court of Justice that **Bennett Jones LLP** should receive the appointment as Representative Counsel. Their written proposal is attached as "Appendix B" to this memorandum. The key factors involved in the assessment are as follows:

### *I. Independence:*

The successful representative counsel must be a fearless advocate for the investors. Unitholders must have confidence that they will be independently advised and fearlessly represented with an absence of any real or perceived conflicts.

Each of the firms were qualified; however, certain of the firms were burdened with problematic conflicts or have relationships with other entities such as investment advisor firms that could be the subject of the advice that Representative Counsel will be expected to give to the unitholders.

The unitholders' faith in this process requires that potential Representative Counsel be seen to be independent of Bridging. The ITP is satisfied that Bennett Jones LLP has sufficient independence, and that any conflicts that might be identified will be managed without compromising its independence.

The ITP very much appreciated each of the firm's candour in discussing actual and potential conflicts and independence.

***2. Targeted Expertise:***

As set out in the Court's August 23,2021 endorsement, a key aspect of this mandate is to represent the interests of the investors with respect to the sale and investor solicitation process (the "SISP"). This is a critical component of the mandate since the successful conclusion of that process will be crucial in maximizing value for the Bridging unitholders.

To discharge this function, counsel will require sophisticated financial and corporate law acumen, including a deep M&A capability in complex commercial transactions. It is important to underline that the SISP is already underway. The recommended firm must have existing knowledge to meaningfully participate and advocate in the unfolding process.

In its application and interview, counsel from Bennett Jones LLP demonstrated a thoughtful and sophisticated understanding of the present issues and raised possible avenues to address other issues which are expected to arise, with a view to maximizing recovery. The firm immediately provided "added value" and demonstrated a deep understanding and expertise with respect to the specific mandate. Their approach stood out in the interview process.

***3 Expertise in Indigenous Issues:***

There are pervasive and important Indigenous issues relating to Bridging. For example, Bridging has significant Indigenous borrowers, and it managed the Bridging Indigenous Impact Fund.

Bennett Jones LLP has given serious consideration to the Indigenous aspects of the file and have proposed to include the co-head of their aboriginal law group as a key member of this team. That is an important element in the ITP's assessment.

***4 Demonstrated Interest in Working with the Receiver:***

While Bridging's unitholders require and are entitled to zealous and independent representation, it is recognized that their interests will also be served by being represented by counsel who recognize the importance of cooperation with the Receiver to maximize value for the unitholders.

While they were certainly not the only firm to highlight this approach, Bennett Jones LLP emphasized their willingness and the importance of working with the Receiver.

**C. CONCLUSION:**

All of the applications from the five firms were excellent. Each candidate articulated a thoughtful case as to why it was best suited for the role, and it was a challenging decision to select one proposal; however, the ITP was tasked with recommending one firm to be appointed as Representative Counsel, and based upon the above considerations, the ITP respectfully recommends to the Superior Court of Justice the appointment of ***Bennett Jones LLP.***

Yours sincerely,

Todd L. Archibald

The Honourable Todd L. Archibald

CV-25-00738613-00CL

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 **HUDSON'S BAY COMPANY et. al.**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
Proceeding commenced at **TORONTO**

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