No. S0120712
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

AND

IN THE MATTER OF CATALYST PAPER CORPORATION AND THE PETITIONERS LISTED IN SCHEDULE "A"

PETITIONERS

WRITTEN ARGUMENT

(APPLICATION TO APPOINT REPRESENTATIVES AND COUNSEL)

HUNTER LITIGATION CHAMBERS
2100 – 1040 West Georgia Street
Vancouver, B.C.
V6E 4H1

Randy J. Kaardal
Tel: 604.647.4559
Fax: 604.647.4554

PART 1: BACKGROUND

1. The Catalyst TimberWest Retired Salaried Employees Association ("RSEA") has represented retirees of Catalyst Paper Corp. and its predecessor companies (collectively, "Catalyst") for almost twenty (20) years. Its members have given it a specific mandate to represent them in this proceeding. RSEA objects to a variation of February 7, 2012 Order appointing it as the representative of the Catalyst Salaried Retirees (as defined below).

2. RSEA submits that the real issue before this Court at the time the initial Representation Order was made was the effect of these CCAA proceedings on retiree rights. Consequently, the evidence demonstrates that it was retirees—not current employees—who took the initiative to seek to be represented in these proceedings, both through RSEA and the Ad Hoc Group.

3. In our submission, the broader group that the moving parties (the "Ad Hoc Group") now seek to represent, which includes retirees as well as all active employees of Catalyst, was actively solicited by the members of the Ad Hoc Group in an attempt to create a representative group different from RSEA's constituency so that the Ad Hoc Group could assert for the purposes of the present application that it is a more appropriate representative because it encompasses a broader range of affected individuals.

See Affidavit #1 of Andrew J. Hatnay at Ex. A, p. 4.

4. We submit, however, that at present, the active employees have very different interests in the proceedings, and will have different interests throughout these proceedings. Furthermore, in our submission, the inclusion of a broader range of interests in the Ad Hoc Group has created actual conflicts of interest today, and will create actual conflicts in the future, that undermine the ability of the Ad Hoc Group, and their counsel, to serve as effective representatives in these proceedings. This was the experience in the Nortel case, and will be the experience here.

5. Moreover, those conflicts, potential conflicts and the lack of ripeness of what are usually the main complaints of active or formerly active employees will undoubtedly cause "opt-outs", resulting in separate representation by various groups. As an example, RSEA and its

committed members will opt out of any representation by the Ad Hoc Group and Koskie Minsky due to the current real conflict of interest that exists between them and the Ad Hoc Group.

6. Given these certain "opt-outs" and conflicts of interest, there is no advantage to the Ad Hoc Group representation. When one focuses on the rights of retirees to their pensions, which is the real interest that is at stake at this stage of the CCAA proceedings, it is our submission that the RSEA is the appropriate representative and should remain the representative of the Catalyst retirees, with the benefit of its fees being paid pursuant to the February 7, 2012 Order.

PART 2: FACTS

7. The RSEA is an established organization, with a well-defined governance structure, and an almost twenty-year history of representing the interests of members of Catalyst Paper Corporation's Retirement Plan for Salaried Employees, B.C. Reg. No. 85400-1 (the "Salaried Pension Plan") in respect of pension-related issues.

8. Contrary to the Ad Hoc Group's assertion at para. 3 of their Notice of Application that the RSEA is an "unincorporated association", the RSEA was incorporated under the British Columbia *Society Act* on October 5, 1993. (It was originally incorporated under a different name, but adopted its current name in 2006.)

Affidavit #1 of Alan L. Statham at paras. 6-7.

9. The RSEA is open to any salaried retiree of Catalyst Paper Corp. or its various predecessor or related companies, and their subsidiaries, predecessors, or divisions, as well as to any persons claiming an interest under or on behalf of such salaried retirees including beneficiaries and surviving spouses (collectively, the "Catalyst Salaried Retirees"). The RSEA is also open to any salaried retiree of TimberWest Forest Corp. ("TimberWest"), as well as to any persons claiming an interest under or on behalf of such salaried retirees including beneficiaries and surviving spouses. Membership dues are currently $15 per year per person.

Affidavit #1 of Alan L. Statham at paras. 8, 14.

10. The RSEA has approximately 1497 members (1024 from Catalyst and 473 from TimberWest), out of an eligible group that according to the RSEA's calculations includes approximately 1883 retirees and beneficiaries (1340 from Catalyst and 543 from TimberWest). Thus, the vast majority (76%) of eligible Catalyst Salaried Retirees of whom the RSEA is aware are members of RSEA.

Affidavit #1 of Alan L. Statham at para. 11.

11. The RSEA membership includes a broad cross-section of former Catalyst employees, including retirees with entitlement under the defined benefit portion of the Salaried Pension Plan, retirees with entitlement under both the defined benefit and the defined contribution portions of the Salaried Pension Plan, surviving spouses of such retirees, and persons with deferred entitlement to benefits under the defined benefit portion of the Salaried Pension Plan (contrary to the Ad Hoc Group's suggestion at para. 5(2) of their written argument that the RSEA does not represent deferred pensioners or surviving spouses).

Affidavit #1 of Alan L. Statham at paras. 12-13.

12. The RSEA is governed by a Board of Directors (the "Board"), which at present consists of eleven members, representing a broad cross-section of former employees of Catalyst and TimberWest, including former senior executives. The Board is an accomplished and diverse group, and several of the members of the Board have direct experience with pension-related issues.

See Affidavit #1 of Alan L. Statham at paras. 15-29.

13. Six of the eleven directors have entitlement under the defined benefit portion of the Salaried Pension Plan, and two have entitlement under the defined contribution portion of the Salaried Pension Plan. Thus, eight of the eleven members of the Board have a direct interest in the current proceedings under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-44, s. 11 ("CCAA") to the extent these proceedings may affect their entitlement under the Salaried Pension Plan.

Affidavit #1 of Alan L. Statham at para. 30.

The Purposes and Activities of the RSEA

14. The purposes of the RSEA are to help protect its members from negative financial impact, to monitor Catalyst and TimberWest's pension funds and to keep members advised thereof, and to assist members in any aspect of their pension and retirement benefits which flowed from their employment with Catalyst or TimberWest.

Affidavit #1 of Alan L. Statham at para. 10.

15. Consistent with those purposes, the RSEA has been working for almost twenty years to represent the interests of members of the Salaried Pension Plan in respect of pension-related issues. The RSEA's activities have included working with Catalyst and others to obtain information about the Salaried Pension Plan and communicating that information to its members through regular meetings and mail-outs, as well as taking various steps to advocate for greater protections for the pensions and benefits of its members, including dealing with the Financial Institutions Commission of British Columbia ("FICOM"), which oversees the office of the British Columbia Superintendent of Pensions. The RSEA has also taken a number of steps to address concerns stemming from the underfunding of the Salaried Pension Plan.

Affidavit #1 of Alan L. Statham at paras. 32-68.

The CCAA Proceedings

16. In mid-January 2012, the Board met to discuss its concerns that Catalyst appeared to be on the verge of filing for bankruptcy, restructuring, or creditor protection under the CCAA. The Board resolved to retain counsel to advise the RSEA in relation to the ongoing developments at Catalyst as they related to pension plans and benefits of the Catalyst Salaried Retirees, and on or about January 24, 2012, retained Hunter Litigation Chambers for that purpose.

Affidavit #1 of Alan L. Statham at paras. 69-72.

17. On January 31st, Catalyst filed for creditor protection in the Supreme Court of British Columbia under the CCAA, and the court issued an Initial Order granting Catalyst protection under the CCAA (the "Initial Order").

Initial Order (January 31, 2012)

18. Since then, the Board has been working with lawyers from Hunter Litigation Chambers, led by Randal (Randy) Kaardal, to develop and implement a strategy to protect the interests of the Catalyst Salaried Retirees in the CCAA proceedings. The Board has been keeping those of its members with entitlement under the Salaried Pension Plan apprised of important developments in the CCAA proceedings by email and at times by regular mail.

Affidavit #1 of Alan L. Statham at para. 75, 77, 78, 79, 81, 82, 86, 87, 90, 94, 95.

19. Mr. Kaardal is being instructed in these proceedings by the Board of RSEA.

20. On February 3, 2012, the court issued an Amended and Restated Initial Order (the "Amended and Restated Initial Order"). The RSEA consented to the order going that day with a comeback date to deal with, among other issues, issues relating to the pensions. FICOM, the RSEA and Catalyst were to attempt to come to some agreement on the pension issues prior to the February 7, 2012 comeback date.

21. On February 6, 2012, Mr. Kaardal, on behalf of the RSEA and pursuant to instructions from the Board, reached an agreement with Catalyst and with FICOM relating to the Salaried Pension Plan (the "Compromise Agreement"). Under the Compromise Agreement, Catalyst agreed to pay $1.1 million toward the pension fund deficit between now and April 15, 2012, in two installments of $550,000 each on March 15th and April 15th. In return, Catalyst was given a two year extension (from 5 to 7 years) to repay the unfunded liability in the pension plan—an extension that would terminate if one of the $550,000 payments is not made.

February 7, 2012 Order

22. The RSEA consented to the language in paragraph 55 of the Amended and Restated Initial Order, and Catalyst had previously agreed to the inclusion of a requirement in section 12(c) of that order for better protection for normal cost contributions (as defined in the Amended and Restated Initial Order), which required Catalyst to make such contributions within four business days of each payroll date rather than within the normal period for making such contributions.

Amended and Restated Initial Order at paras. 12(c) and 55

23. The Board supported the Compromise Agreement because it determined that the Compromise Agreement was in the best interests of the Catalyst Salaried Retirees, as it would least impair the ability of Catalyst to successfully work through the CCAA process and emerge from financial restructuring as a viable entity, while providing tangible protection to the Catalyst Salaried Retirees through the advance payment.

Affidavit #1 of Alan L. Statham at para. 84.

24. The Compromise Agreement was approved by the court at a hearing on February 7, 2012, and was reflected in an order made February 7, 2012 (the "February 7, 2012 Order") (which was entered on February 14, 2012).

February 7, 2012 Order at para. 12(f)

25. In the February 7, 2012 Order, the court also ordered that:

> The Catalyst TimberWest Salaried Employees Association is, until further Order of this Court, entitled to make representations to the Court, and be, the authorized representative of the pension beneficiaries of the Company's Salaried Plan.

February 7, 2012 Order at para. 84(a)

26. The Ad Hoc Group contends, incorrectly, that the court in the February 7, 2012 Order also "appointed Mr. Kaardal as Representative Counsel".

Written Argument of the Ad Hoc Group at paras. 4, 17

Notice of Application of the Ad Hoc Group at para. 9.

27. In reality, the court made no such order. In the February 7, 2012 Order, the court ordered that:

> Counsel to the Catalyst TimberWest Retired Salaried Employees Association will be considered a "Assistant" pursuant to paragraph 8(c) of the Amended and Restated Initial Order.

February 7, 2012 Order at para. 84(b)

28. The effect of the February 7, 2012 Order was to make the fees and disbursements of *"counsel to RSEA"* in respect of the CCAA proceedings payable by Catalyst. The February 7, 2012 Order makes no mention whatsoever of Mr. Kaardal or of Hunter Litigation Chambers. Under the plain language of the February 7, 2012 Order, if the RSEA were to determine that it would be better represented by a different lawyer and were to retain that lawyer and terminate its retainer of Hunter Litigation Chambers, RSEA's new counsel would be considered an "Assistant" pursuant to paragraph 8(c) of the Amended and Restated Initial Order.

The Koskie Minsky Application

29. The Ad Hoc Group, and their counsel Koskie Minsky LLP ("Koskie Minsky") now bring the present application (the "Representation Application") seeking to overturn the February 7, 2012 Order and to have themselves appointed as representatives and representative counsel, respectively, for a class consisting not only of former employees of Catalyst with entitlement under the Salaried Pension Plan and their beneficiaries, but also all current employees of Catalyst.

30. At paragraph 26 of their written argument in support of the Representation Application, the Ad Hoc Group and Koskie Minsky suggest that one of the reasons for the present application is that "Mr. McCaig was unhappy with the answers he received from RSEA" in response to a letter that Mr. McCaig wrote to Mr. Sharkey, the President of the RSEA, and that he "decided to organized a grassroots group of interested people with common concerns."

Written Argument of the Ad Hoc Group, at para. 26.

31. There is no factual foundation in the record for the statement that Mr. McCaig was "unhappy with the answers he received from RSEA". Nowhere in Mr. McCaig's affidavit (and certainly not in the paragraphs of Mr. McCaig's affidavit that are cited as authority for this statement) does Mr. McCaig state that he was "unhappy" with the answers he received from RSEA in response to his inquiries in the CCAA proceedings.

32. The Board of the RSEA is opposed to being represented in these proceedings by Koskie Minsky and would like to continue working with Hunter Litigation Chambers, which has

both the personnel and the technological resources to capably represent the RSEA in these proceedings.

Affidavit #1 of Alan L. Statham at paras. 99-108.

Affidavit #1 of Andrea A. Glen at paras. 2-5.

33. Commencing on February 13, 2012, the Board sent notices to those of its members who have entitlement under the Salaried Pension Plan to confirm the RSEA's authority to represent them in the present proceedings. The notices were sent on February 13 and 19, 2012 by email, and on February 16, 2012 by regular mail.

Affidavit #1 of Alan L. Statham at paras. 90-91.

34. As of February 20, 2012, 437 RSEA members had responded to these notices by sending letters or emails authorizing the RSEA to continue to represent them in these proceedings and to retain and instruct Mr. Kaardal concerning pension and benefit matters, including matters that may pertain to their interests, in respect of the CCAA proceedings.

Affidavit #1 of Alan L. Statham at para. 92.

35. Since Mr. Statham swore his affidavit, the number of RSEA members who have submitted authorizations for RSEA to continue to represent them in these proceedings and to retain and instruct Mr. Kaardal has increased. As of February 22, 2012, counsel for the RSEA had been advised that over 500 individuals had submitted such authorizations.

36. If Koskie Minsky were appointed as representative counsel for all current and former Catalyst employees, the members of RSEA's Board would opt out of Koskie Minsky's representation, and it is likely that the RSEA members supporting the RSEA representation would do the same.

Affidavit #1 of Alan L. Statham at paras. 108-109.

PART 3: LEGAL ARGUMENT

Jurisdiction of the Court

37. Contrary to the Ad Hoc Group's submission, Rule 20-3 of the *Supreme Court Civil Rules* does not apply to the Ad Hoc Group's application. The alleged representative group sought to be represented does not fit the requirements for a representation action. In *Pasco, Oregon Jack Creek Indian Band v. Canadian National Railway* (1989) 34 BCLR (2d) 344 (BCCA), the British Columbia Court of Appeal held under the predecessor rule to Rule 20-3 that a representative proceeding is appropriate if the following criteria are met:

(a) the purported class is capable of clear and finite definition;

(b) the principle issues of fact and law are essentially the same as regards all members of the class; and

(c) a single measure of damages is applicable to all members.

Pasco (supra).

Supreme Court Civil Rule 20-3

38. As between the active members of Catalyst and the retired employees, the requirements of (b) and (c) set out above cannot be met. The active employees have employment contracts that create different rights, including for current wages, benefits, and vacation pay. If they become former employees during the CCAA, they will have claims for past wages and severance. They have protection under the *Wage Earner Protection Program Act*. The current retirees share none of these rights or claims. Furthermore, the measure of damages would be individual for each active employee and would not all relate to or benefit the pension plans. As a result the requirements of the test set out in *Pasco (supra)* cannot be met.

39. While we are not aware of any reported British Columbia decisions that discuss the appointment of representative groups of retirees, employees, or a combination of both in CCAA proceedings, it has been held in other jurisdictions, in particular in the *Nortel* case in Ontario, that section 11 of the CCAA can be utilized to appoint employee and pension representatives during a CCAA proceeding. We note, however, that in the *Nortel* decision, Rule 10.01 of the Ontario Rules of Civil Procedure was relied upon by the court as a basis for making the order.

Nortel Networks Corp. (Re) [2009] O.J. No. 2166 at paras. 10, 16.

Ontario Rules of Civil Procedure, Rule 10.01

40. British Columbia has no direct equivalent to Ontario Rule 10.01. While British Columbia Rule 20-3(6) is similar in effect to Ontario Rule 10.01, it is significantly more restrictive than Rule 10.01 in that it limits the situations in which a court may appoint a representative for persons who cannot be readily ascertained to specific types of proceedings. Further, Rule 20-3(1), the more general representative proceeding provision, places emphasis on the requirement for the parties to have "the same interest", a requirement that is not found in Ontario Rule 10.01.

41. In our respectful submission, when a court is exercising its discretion under section 11 of the CCAA to make a representation order, it should be mindful of the requirements of any rules of court in that jurisdiction for the making of representative orders. In our submission, the requirements for a representative proceeding in British Columbia, as reflected in Rule 20-3, reflect significant policy concerns related to conflicts, the right of each individual party to have conduct of their own individual claim, the necessary requirements for any efficiencies to be realized, and the rights of a defendant to a fair proceeding.

42. The fact that the representative proceeding rule in British Columbia is significantly more restrictive than that in Ontario is an important factor that ought to be considered by the court when it exercises its discretion under section 11 of the CCAA.

43. The Ad Hoc Group seeks to be appointed as representatives for retirees as well as active employees. However, as we have previously asserted, those groups do not have "same" interest in these proceedings under the CCAA. The active employee's source of their rights is different, the scope of their rights is different, and their interest in claiming current wages, past wages, vacation pay and/or severance in the future may outweigh any interest they have in their pensions. Indeed, Mr. Hatnay of Koskie Minsky appears to have acknowledged as much in his advice to Mr. McCaig, as evidence at page 95 of Exhibit A to his affidavit, in which Mr. McCaig notes in an email that "Andrew [Hatnay] suggested that he should only represent those who were no longer employees, as he wished to avoid compromising current employees interests in any way."

Affidavit #1 of Andrew J. Hatnay at Exhibit A, p. 95.

44. Even with the broader discretion afforded by Ontario Rule 10.01, the courts in Ontario have recognized that actual or even likely conflicts are an important factor to take into account in determining the representative group. This is best illustrated by a review of the various rulings made by the court with respect to the representative counsel motions in the *Nortel* CCAA proceedings.

45. In the Nortel proceeding, the court initially granted a representation order authorizing Koskie Minsky to represent all former employees of Nortel, with the exception of unionized employees, persons who had been the chief executive officer or chairman of the board of directors or any employees that were subject to an investigation by the Securities Commissions, and any former employee who chose to represent himself or herself as an independent individual party to the proceedings. The initial representation order did not extend to current Nortel employees.

Nortel Networks Corp. (Re) [2009] O.J. No. 2166 at para. 18.

46. We note that the representation order being sought by the Ad Hoc Group does not make an exemption for those that want to opt out or for certain senior executives, as was the case in Nortel.

47. Three weeks after appointing Koskie Minsky as the representative counsel for all former employees of Nortel (subject to the exceptions noted above), the Court issued supplemental reasons in response to a submission by counsel for Nortel Continuing Canadian Employees Committee ("Continuing Employees") requesting reasons why the court had dismissed their application for an order appointing themselves as representatives for all continuing employees of Nortel. A number of potential conflicts between the former employees and active employees were identified by the Continuing Employees, but the court found that Koskie Minsky could represent both the former employees of Nortel and the active employees. The court cautioned, however, that in the event that actual conflicts arose, it was open to any party to bring a motion for appropriate relief. Again, members who wished to opt out of the Koskie Minsky group were free to do so.

Nortel Networks Corp. (Re), [2009] O.J. No. 2529 at paras. 22, 24

48. Less than one month after that, a subsequent application was made on the basis that the situation had changed and now there were actual conflicts. The change that had occurred was that Nortel had announced that it was advancing its discussions with external parties to sell its other businesses and that Koskie Minsky, the representative counsel for all employees, had advised that "it has a conflict in representing continuing employees as well as former employees, particularly given Nortel's current efforts to sell its business". The conflict was that the manner in which the process of the sale was evolving was that some current employees would be offered employment by the purchasers of assets and some employees may not be offered employment. Accordingly, the court appointed separate counsel for the continuing employees, effectively overriding its previous order made just weeks earlier.

Nortel Networks Corp. (Re), [2009] O.J. No. 3149 at para. 12.

49. We note that the Amended and Restated Initial Order in these proceedings allows for downsizing and that there has been reference in these proceedings to the possibility of a sale within the CCAA. Thus, the conflicts that arose in Nortel between current and former employees may well materialize here. Yet despite Koskie Minsky's experience in Nortel of being appointed as representative counsel for both current and former employees only to realize within a matter of weeks that there were conflicts between these two groups, and even though Mr. Hatnay himself appears to have acknowledged prior to bringing the present application that current and former employees have different interests, Koskie Minsky seeks in the present application to be appointed to represent both current and former employees of Catalyst.

> Affidavit #1 of Andrew J. Hatnay, Ex. A at p. 95 ("Andrew suggested that he should only represent those who were no longer employees, as he wished to avoid compromising current employees interests in any way.")

50. We submit that it is not efficient to make a representation order that includes both current and former employees, as requested by the Ad Hoc Group, as it is likely that any future claim by the current employees would not be of the "same" interest as the claims of retired employees.

Conflicts of Interest

51. In addition to the difference in the types of claims that may arise as between the retirees and the current employees of Catalyst, there are at least two types of conflict of interest within the class that the Ad Hoc Group purports to represent.

Conflict of Interest Between Current Employees and Retirees (Duties of Loyalty)

52. First, we submit that there is an inherent conflict between the current employees and retirees that arises from the current employees' duties of loyalty to Catalyst. In our submission, the orders sought by Catalyst in the course of the CCAA proceedings must be presumed to be, in the opinion of the instructing persons for Catalyst, in the best interest of Catalyst. As such, it is not open to existing employees (including these same instructing persons) to object to the orders sought by Catalyst in order to pursue their own self interest.

53. In *McMahon v. TCG International Inc.*, 2007 BCSC 1003, the court considered an allegation that a senior sales person had commenced competing with the employer during his employment and as a result there was cause for his termination. In the course its reasons concerning the alleged wrongful dismissal, the court considered the scope of an employee's duty of fidelity towards his employer and held as follows:

> [69] Mr. Gibson submitted that this duty is not affected by an employee's concerns about the way in which he has been treated by his employer. He relied in cases where the employees, being concerned about the financial viability of their employer, or were aggrieved by things like salary freezes, while still employed, entered into discussions or plans with a competitor or established a competing business: *Empey v. Coastal Towing*, [1977] 1 W.W.R. 673 (B.C.S.C), aff'd [1978] B.C.J. No. 163 (C.A.); *Woodrow Log Scaling Ltd. V. Halls*, [1997] B.C.J. No. 140 (S.C.); *Bendix Home Systems Ltd. v. Clayton*, [1977] 5 W.W.R 10 (B.C.S.C.. In *Bendix Home Systems*, MacFarlane J. (as he then was) stated at para. 62:
>
> > What is objectionable is not that they intended to go into competition with the plaintiff, but that they put self interest before their duty of loyalty and good faith to their employer whose interests were, during their employment, to be regarded as paramount to the defendants' personal ambitions.

> [70] None of the cases to which I was referred involved employees who felt aggrieved in similar circumstances to that of Mr. McMahon. Nevertheless, I agree with Mr. Gibson that, regardless of the employee's concerns, he is still obliged to act in his employer's best interests while continuing his employment. If Mr. McMahon was unhappy about the way he had been treated, and in particular by his demotion in March 2003, he had other remedies. He could have elected not to accept the demotion and treat his employment contract at an end at that time. He did not do so, but continued in the employment relationship. Having done so, his duty of fidelity remained intact. I appreciate the stress he was under, and that he had good reason to feel undermined by his employer. I have taken that context into account in assessing whether TCG had cause to dismiss Mr. McMahon and whether he breached his duty to TCG.
>
> (emphasis added).
>
> *McMahon v. TCG International Inc. (supra),* at paras. 69-70.

54. We submit the duty of fidelity, as described above, applies to all of the current employees of Catalyst and most certainly, to those employees who are fiduciaries of Catalyst. In our submission it would be impossible for those employees with a fiduciary duty to Catalyst to object to the very applications or orders brought in these proceedings by Catalyst. We submit the case law supports the proposition that all employees would owe a similar duty of loyalty. That duty does not apply to the retired employees and as a result we submit that it is impossible for one counsel to represent both current employees and retirees given this active conflict.

55. It is apparent from the submissions of the Ad Hoc Group that its application is based on the premise that appointing one representative counsel would create a unified voice for employee creditors and streamline the process for all parties involved in Catalyst's insolvency by preventing employee creditors from filing inconsistent claims and ensuring that claims are advanced by all employee creditors in a timely and efficient manner. With respect, we submit that in all representative actions, those employee creditors who do not wish representative counsel or the representative to represent them ought to be permitted to opt out. Such was the case in the Nortel representative orders.

56. Furthermore, as we have seen there would be a requirement for certain groups to obtain separate counsel if actual conflicts occur in the course of representation. Appointing representative counsel for a class of persons that later has to splinter into multiple groups can

cause significant problems for counsel with respect to the use of confidential information gathered while the group was together, and might even require counsel to resign from representing anyone in the proceedings.

Conflict Between RSEA Members and the Ad Hoc Group

57. Second, there is an active conflict at present between the RSEA retirees and the Ad Hoc Group members. Specifically, there is a clear difference of opinion as to the manner in which the interest of the retirees should be represented, most notably evidenced by the Ad Hoc Group's objection to the Amended and Restated Initial Order and the February 7, 2012 Order. RSEA actively participated in the negotiations leading to those orders, including the addition of paragraphs 12(f) and 84(a) and (b) to the February 7, 2012 Order, and supports those orders. In our submission it would be improper for counsel to represent both RSEA, which upports the Amended and Restated Initial Order and the February 7, 2012 Order, and the Ad Hoc Group, which opposes those Orders.

58. In our submission, it is not possible for a single law firm to represent both RSEA and the Ad Hoc Group in these circumstances, a result that is mandated by the Law Society of British Columbia's *Professional Conduct Handbook* (the "*Handook*"). Chapter 6, Rule 4 of the *Handbook* provides that a lawyer can act for two (2) or more clients jointly if certain conditions are met, as follows:

> 4. A lawyer may jointly represent two or more client if, at the commencement of the retainer, the lawyer:
>
> (a) explains to each client the principle of undivided loyalty,
>
> (b) advises each client that no information received from one of then as a part of the joint representation can be treated as confidential as between them,
>
> (c) receives from all clients the fully informed consent to one of the following courses of action to be followed in the event the lawyer received from one client, in the lawyer's separate representation of that client, information relevant to the joint representation:
>
> (i) the information must not be disclosed to the other jointly represented clients, and the lawyer must withdraw from the joint representation;

(ii) the information must be disclosed to all other jointly represented clients, and the lawyer may continue to act for the clients jointly, and

(d) secures the informed consent of each (with independent legal advice, if necessary) as to the course of action that will be followed if a conflict arises between them.

5. If a lawyer jointly represents two or more clients, and a conflict arises between any of them, the lawyer must cease representing all the clients, unless all of the clients:

(a) consented, under paragraph 4(d), to the lawyer continuing to represent one of them or a group of clients that have an identity of interests, or

(b) give informed consent to the lawyer assisting all of them to resolve the conflict.

6. A lawyer who ceased joint representation under Rule 5 or who continued to represent one or more clients under paragraph 5(a) may, with the informed consent of all the clients, resume representation of all of them after the conflict ahs been resolved.

6.01 Appendix 6 to this *Handbook* sets out two precedent letters that lawyers may use as the basis for compliance with Rules 4 to 6.

Handbook, Chapter 6, Rules 4 to 6.01.

59. It is not apparent from the Ad Hoc Group's materials that any of these requirements have been complied with. Certainly the precedent letters provided for in Appendix 6, which specify the risks of joint representation and the consents required for such representation, do not appear to have been utilized.

60. In contrast, the RSEA group is a single client, with a governance structure that allows the board to provide instructions. A conflict of interest is far less likely to occur in the circumstances of RSEA being the single client.

61. In light of the above, it is apparent that an order appointing the Ad Hoc Group and Koskie Minsky as representatives of all former employees of Catalyst will necessarily result in at least two groups representing former employees. As a result of the current conflicts of interest between RSEA members and members of the Ad Hoc Group, if the court were to appoint the Ad Hoc Group as representatives of all former employees, the RSEA group, representing a greater

share of the retirees of the Salaried Pension Plan, would opt out of the Ad Hoc Group's representation and continue to make representations in these proceedings through Hunter Litigation Chambers. In such circumstances, it is difficult to see how a Representative Order for the Ad Hoc Group will lead to any efficiencies or commonality of interests being represented in the proceedings.

RSEA's Capacity

62. The Ad Hoc Group makes much of RSEA's alleged lack of capacity to represent the retirees in this matter. They devote a considerable portion of their affidavits and submissions to justifying their belief that RSEA would not represent the retirees in these proceedings under the CCAA. Their submission, however, fails to acknowledge that the Ad Hoc Group as a group has no history or legal capacity to represent anyone other than themselves. More importantly, unlike RSEA, the Ad Hoc Group has no track record of working collaboratively to protect the interests of Catalyst retirees and RSEA members, as opposed to individually protecting their own interests.

63. We submit that the conduct of RSEA to this point in the CCAA proceedings is ample evidence of its capacity to take action and to fairly represent the interests of its members and other retirees in these proceedings.

64. As noted above, RSEA retained Hunter Litigation Chambers on or about January 24, 2012, prior to the CCAA filing. RSEA, through counsel at Hunter Litigation Chambers, attended the February 3, 2012 hearing and participated in the dealings that led to the Amended and Restated Initial Order. Further, RSEA, through counsel at Hunter Litigation Chambers, also participated in the negotiations that led to the Compromise Agreement, as reflected in the February 7, 2012 Order, which obtained tangible protections for the pension benefits of RSEA's members. Thus, RSEA has been diligently and actively representing the interests of its members from the outset and at all important junctures in these proceedings. Throughout, RSEA has kept its members informed of its activities and of important developments in the proceedings.

See Affidavit #1 of Alan L. Statham at paras. 69-87, 90-91, 94-95.

65. Mr. McCaig, on the other hand, was aware that Catalyst was heading for proceedings under the CCAA weeks before Catalyst actually filed for CCAA protection and had begun building an email network of people who might be worried about their pension plans, but does not appear to have reached out to Koskie Minsky about possible legal representation until February 1st, 2012 after Catalyst had filed for creditor protection under the CCAA. It appears that Mr. McCaig had a conference call with Koskie Minsky on February 3rd, 2012, formally retained Koskie Minsky on February 6th, 2012, and began to put together a steering committee sometime thereafter.

Affidavit #1 of Andrew J. Hatnay at Ex. A, pp. 93, 94-95, 97, 118.

Affidavit #2 of Ronald Gary McCaig at paras. 27, 34.

66. Once retained, Koskie Minsky appeared at the February 7, 2012 hearing in the CCAA proceedings and objected to the representation order (paragraph 84), but did not object to paragraph 55 of the Amended and Restated Initial Order or to any of the other substantive provisions with respect to the charges or priorities.

67. The RSEA represents a much larger number of retirees than the Ad Hoc Group. As of February 21st, 2012, the RSEA had received formal authorizations from 437 former Catalyst employees to continue to represent the former employees in these proceedings. By February 23rd, 2012, that number had grown to over 500. The Ad Hoc Group, in contrast, purport to represent no more than 137 former employees or their beneficiaries, as the remainder of their group consists of current employees.

Affidavit #1 of Alan L. Statham at para. 103.

Affidavit #1 of Ronald Gary McCaig at Ex. O.

68. Moreover, it appears that the Ad Hoc Group also takes issue with the conduct of RSEA and contends that Catalyst retirees are now more vulnerable as a result of the Amended and Restated Initial Order and the February 7, 2012 Order. In our submission, however, those orders and the Compromise Agreement reflected the practical realities of the circumstances, as revealed by Catalyst's cash flow position, current financial circumstances, and the dire situation

that pensioners would have found themselves in had the DIP lending not been secured by Catalyst.

69. In two decisions of the Ontario Superior Court, considering very similar circumstances faced by retirees, Morawetz J. approved similar orders granting priority to the DIP lender and other charges. In the first of these decisions, Morawetz J. approved a priority for various charges, including directors and officers charges and administration charges, noting that:

> [61] The evidence established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.
>
> . . .
>
> [67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested is not granted.

Timminco Limited (Re), 2012 ONSC 506, at paras. 61 and 67

A few days later, Morawetz J. approved a super-priority for a DIP loan, noting that:

> [46] It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.
>
> [47] The alternative proposed by CEP – of a DIP Charge without super priority – is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.
>
> [48] This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (Timminco Limited (Re) 2012 ONSC 506 (CanLII), 2012 ONSC 506). The situation has not changed. The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect,

> as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.
>
> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.

Timminco Limited (Re), 2012 ONSC 948, at paras. 46-49.

70. In our submission, these decisions provide support for the proposition that RSEA's representation of the Salaried Retirees to date has been pragmatic and reasonable in light of the circumstances faced by Catalyst. In addition, their participation has been constructive and consistent with the purposes of the CCAA, which is to provide the petitioner with a reasonable opportunity to work through its cash crisis and emerge as a viable, going concern.

71. If a Representation Order is to be continued, as we submit it should be, that Order should be in respect of former Catalyst employees only—not current employees—as they are the only group whose members share the same interest in these proceedings as required by Rule 20-3 of the *Supreme Court Civil Rule.* RSEA, the group that has represented those interests for almost twenty years and has the support of a significant proportion of the Salaried Retirees, should continue to be the representative group. To the extent that the members of the Ad Hoc Group or others do not wish to be represented by the RSEA, or to the extent that they continue to have a conflict of interest as identified above, these individuals may of course opt out and retain their own counsel in these proceedings.

72. For the reasons expressed above, we submit that the Representation Order sought by the Ad Hoc Group should be denied.

All of which is respectfully submitted.

Hunter Litigation Chambers
per:

Randy J. Kaardal