

CANADA / JUDGMENT

1057863 B.C. Ltd. (Re)

2020 BCSC 1359

COURT

Supreme Court of British Columbia

DECIDED

14 September 2020

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2020 BCSC 1359 1057863 B.C. Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1057863 B.C. Ltd. (Re),

2020 BCSC 1359

Date: 20200914

Docket: S206189

Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C- 36

and

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

and

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:

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Counsel for Atlas Holdings LLC and Blue Wolf Capital Management, LLC:

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Counsel for Envirosystems Inc., dba Terrapure Environmental:

H. P. Whiteley

Counsel for Pictou Landing First Nation:

B. Hebert

Counsel for Nova Scotia Superintendent of Pensions:

S. Choo

Place and Date of Hearing:

Vancouver, B.C.

July 31 and August 5, 2020

Place and Date of Ruling with Written Reasons to Follow:

Vancouver, B.C.

August 6, 2020

Place and Date of Written Reasons:

Vancouver, B.C.

September 14, 2020

INTRODUCTION

- [1] On June 17, 2020, the petitioners filed these proceedings seeking a restructuring solution to their financial problems, pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA").
- [2] The petitioner, 1057863 B.C. Ltd., a British Columbia company, is the parent company of the other petitioners. The corporate group also includes various limited partnerships that are not named petitioners. Together, the group operates a pulp mill in Pictou County, Nova Scotia (the "Pulp Mill"). They also conduct related forestry activities in the Province of Nova Scotia to support those operations. I will refer to the group collectively as the "Petitioners".
- [3] On January 31, 2020, the Petitioners were required to shut down the Pulp Mill, resulting in a complete cessation of its business activities. At the centre of the reasons for the shut down is an Effluent Treatment Facility ("ETF") that became inoperable after that date. The ETF is source of considerable controversy with certain of the stakeholders.
- [4] Without the ability to use the ETF, the Pulp Mill could not operate.
- [5] The Petitioners describe that the shut down of the Pulp Mill had a "devastating effect" on them and their partners. Indeed, most employees were laid off after the shut down.
- [6] On June 19, 2020, the Petitioners sought and the Court granted an initial order under the CCAA (the "Initial Order"). The Petitioners' stated intention at that time was to continue to ensure the orderly hibernation, care and maintenance of the Pulp Mill while they investigated and assessed various restructuring options. The Initial Order granted was what is colloquially termed a "skinny" order, particularly in light of new strictures under s. 11.001 of the CCAA that limit the initial relief to what is reasonably necessary during the initial stay period.
- [7] In the Initial Order, I appointed Ernst & Young Inc. as Monitor. I granted a Director's Charge limited to \$500,000. I extended the stay of proceedings to the limited partnerships, as appropriate in these circumstances: 4519922 Canada Inc. (Re), 2015 ONSC 124 at para. 37. Finally, I granted an Administration Charge of \$500,000. At the time of the initial hearing, the Petitioners indicated that it was their intention to come back to the Court to seek approval of interim financing and other relief, including approval of a Key Employee Retention Plan ("KERP") and authority to pay certain pre-filing amounts.

- [8] Since June 19, 2020, I have extended the stay a number of times to allow further discussions between the Petitioners and their stakeholders toward a possible resolution, including with the Province of Nova Scotia ("Nova Scotia"), their major secured creditor. The Monitor supported those extensions, as set out in its first report to the Court dated July 2, 2020 (the "First Report").
- [9] Unfortunately, considerable disagreement remains as to whether this proceeding should continue and if so, on what terms.
- [10] This hearing was essentially the comeback hearing. The Petitioners sought an Amended and Restated Initial Order ("ARIO") to incorporate the original relief in the Initial Order, with some amendments; significantly, they sought approval for interim financing that would allow their restructuring activities to continue.
- [11] On August 6, 2020, I granted an ARIO that incorporated much of the relief sought. In addition, I granted the order sought by Unifor, Local 440 ("Unifor") for representative status in this proceeding. These reasons follow from my decisions at that time.

BACKGROUND

- [12] The Pulp Mill has a considerable history leading to the current and fraught relationship between the owners of the Pulp Mill and other stakeholders, being Nova Scotia in particular. I will only provide a very high-level description of that history as is relevant to this application.
- [13] The Pulp Mill has been in operation since 1967. It is located on Abercrombie Point in Pictou County, NS. The process of producing pulp at the Pulp Mill creates wastewater, and it is necessary to treat that wastewater before discharge. Since 1972, the treatment of the wastewater was done at the ETF, which is located near "Boat Harbour". Nova Scotia owns the ETF and has leased it to the Pulp Mill's owners over the years. As stated, the Pulp Mill cannot operate without treating the wastewater at the ETF.
- [14] The Pulp Mill is adjacent to reserve lands of the Pictou Landing First Nation ("PLFN"), a Mi'kmaq First Nation.
- [15] In 2011, Paper Excellence Canada Holdings Corporation ("PEC") directly or indirectly acquired ownership of the Petitioners. PEC describes having spent more than \$118 million in respect of the operations of the Pulp Mill and related activities.
- [16] Events leading to the Petitioners' financial difficulties include:
- a) In 2014, there was an effluent leak in the pipeline from the Pulp Mill to the ETF; that event led to PLFN members blockading the area;

- b) In 2015, Nova Scotia passed the Boat Harbour Act, S.N.S. 2015, c. 4 (the "BHAct"). The BHAct required the Petitioners cease using the ETF for the reception and treatment of effluent from the Pulp Mill by January 31, 2020. The deadline set in this legislation was contrary to the terms of the lease between Nova Scotia and the Pulp Mill (entered into prior to PEC's involvement) that contemplated use of the ETF until December 31, 2030;
 - c) The Petitioners set about planning for a replacement ETF ("RETF") that would allow the Pulp Mill's operations to continue past January 2020. The Petitioners have spent considerable monies to advance the project, with financial and other contributions by Nova Scotia;
 - d) The Petitioners' efforts to establish the RETF involved, understandably, considerable input and agreement from Nova Scotia under its environmental and regulatory process and requirements;
 - e) The RETF approval process did not go smoothly, at least from the Petitioners' point of view. In part, the process took place in the face of litigation between Nova Scotia and PLFN relating to Nova Scotia's decisions in relation to the Petitioners and the Pulp Mill;
 - f) The Petitioners say that they told Nova Scotia that it was not possible to complete the RETF by January 2020. Nova Scotia says that they never gave the Petitioners any inkling that a possible extension would be afforded to them;
 - g) Matters came to a head somewhat in late December 2019. Nova Scotia's Minister of Environment ("MOE") determined that a further environmental assessment report ("EAR") was required for the RETF. Almost immediately thereafter, Nova Scotia gave formal notice to the Petitioners that no extension under the BHAct was forthcoming;
 - h) In January 2020, the Petitioners filed a judicial review proceeding challenging the MOE's requirement to file a further EAR (the "Judicial Review");
 - i) The Pulp Mill ceased operations on January 12, 2020;
 - j) Commencing January 29, 2020, the MOE issued various orders to the Petitioners in respect of the orderly shutdown of the Pulp Mill. The MOE's May 14, 2020 order was appealed to the Supreme Court of Nova Scotia (the "Appeal"); and
 - k) The Petitioners have clearly signalled to Nova Scotia that they are seeking financial redress from the Province arising from the passage and implementation of the BHAct (the "BH Claim"). As matters stand, the Judicial Review and Appeal are in abeyance, along with the Petitioners' consideration of the BH Claim against Nova Scotia.
- [17] The primary debt owed by the Petitioners is to PEC and Nova Scotia. The Petitioners owe PEC approximately \$213 million; \$30 million of that amount is secured against the Petitioners' assets. The Petitioners owe Nova Scotia approximately \$85 million, which has a first ranking secured position against the assets. The Petitioners also owe Nova Scotia \$1.3 million on an unsecured basis.

- [18] In addition to unsecured amounts owed to PEC, Nova Scotia and employees, the Petitioners owe approximately \$4.3 million to trade creditors and owners of the timberlands that they harvested.
- [19] Before the shutdown of the Pulp Mill, the Petitioners employed approximately 200 unionized persons, represented by Unifor. In addition, there were approximately 135 other full-time employees, including salaried personnel. The Petitioners also retained approximately 600 contractors on a full or part-time basis.
- [20] As of June 2020, approximately 32 employees and 18 seasonal part-time employees remained. The rest of the employees were laid off or terminated.
- [21] Considered more broadly, the impact of the shutdown of the Pulp Mill has had far-reaching and considerable negative consequences for the stakeholders.
- [22] The Monitor confirms in the First Report that the Petitioners contributed more than \$279 million annually to the Nova Scotia economy, arising from purchases of goods and services. The Petitioners maintained a supply chain of approximately 1,379 companies who supported the operations of the Pulp Mill. Finally, the Pulp Mill provided employment for an estimated 2,679 full-time equivalent jobs, generating an estimated \$38 million annually in provincial and federal taxes.

INTERIM FINANCING

- [23] The Petitioners seek court approval of an interim financing term sheet (the "Term Sheet") for a financing facility (the "Interim Lending Facility") between the Petitioners, as borrowers, PEC, as arranger and agent, and PEC together with Pacific Harbor North American Resources Ltd., as lenders (collectively, the "Interim Lenders").
- [24] The Interim Lending Facility contemplates a maximum principal amount of \$50 million. However, the Petitioners presently only seek approval of an initial advance of \$15 million and a corresponding charge in favour of the Interim Lenders over the Petitioners' assets in first ranking priority (the "Interim Financing Charge"). The stated purpose for these initial funds is to allow payment of the Petitioners' expenses to December 2020. If the Term Sheet is approved, the Petitioners intend to make later applications for court approval to access further draws.
- [25] In support of their request, the Petitioners prepared a budget to detail the uses of the \$50 million (the "Financing Budget"). The Financing Budget indicates the projected financing requirements of the Petitioners to June 2022. As stated by Bruce Chapman, the general manager of the Petitioners and PEC, those projections were based on a "successful outcome" of these proceedings, said to include: the successful shutdown of the ETF; hibernation of the Pulp Mill; identifying, designing, and obtaining approvals for the RETF; and, negotiating contributions and financing associated with those activities.

[26] After the Petitioners' introduced the Financing Budget as part of this application, Nova Scotia raised a variety of objections. Nova Scotia's response at para. 2, filed in opposition to the application, sets out those objections:

- (a) there is no restructuring plan being pursued by the Applicants;
- (b) the DIP financing will be used to fund the Applicants' pre-filing obligations;
- (c) the DIP financing will be an inappropriate re-prioritization of security;
- (d) the cash flow statements are not supported by appropriate documentation; and
- (e) the Applicants have not engaged the Province in any meaningful way, other than to continue to pursue their agenda for obtaining the DIP financing to fund existing obligations.

[27] The Monitor has brought considerable balance and objectivity forward in terms of assisting the stakeholders in understanding the Financing Budget. In particular, the Monitor has sought to address Nova Scotia's concerns in the face of significant disputes between the Petitioners and Nova Scotia.

[28] In the Monitor's second report dated July 23, 2020 (the "Second Report"), the Monitor introduced the concept of milestones. The milestones set out categories of work or activities required to move the overall restructuring toward the anticipated "success" date of June 2022. Target Completion Dates are identified in the "Milestones Schedule" at Appendix C to the Second Report, along with Evaluation Dates and the Cumulative DIP Draw required by the respective dates. This "Milestones Schedule" provides, in my view, considerable structure to the approval process and it will allow, in the future, the Court, the Monitor and the stakeholders (particularly Nova Scotia) to gauge the ongoing progress of the Petitioners' efforts.

[29] In addition, the Monitor assisted in the development of an interim budget to December 2020 (the "Interim Budget"). That document, discussed in the Monitor's Second Report and its Supplemental Report dated July 30, 2020, provides a detailed breakdown of the activities and the estimated cost of those activities under the initial draw of \$15 million. Those activities and costs are:

Activity

Activity Costs

Boat Harbour operations and de-commissioning costs and environmental costs

\$6,846,698

Mill operating costs

\$1,231,650

Financing and administration costs

\$407,734

Employee costs

\$1,161,104

Severance and salary continuations

\$2,646,498

Professional fees (includes approx. \$575,000 for the Judicial Review and Appeal)

\$3,481,625

TOTAL

\$15,775,308

[30] The Monitor anticipates that, with cash on hand of approximately \$4.8 million, the Petitioners will have sufficient funding through to the end of 2020 with this interim financing.

[31] Section 11.2(1) and (2) of the CCAA confirms the Court's jurisdiction to approve interim financing and approve a charge in priority to existing secured creditors:

- (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge - in an amount that the court considers appropriate - in favour of a person specified in the order who agrees to lend the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[32] The Supreme Court of Canada recently commented on the importance of the relief available under s. 11.2, including the granting of an interim lenders' charge. In 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10 at para. 85-86, the Court confirmed that a court may exercise its discretion to approve such financing to achieve the important statutory objective under the CCAA of not only providing working capital, but also enabling the "preservation and realization of the value of a debtor's assets".

[33] The Court in Callidus also acknowledged that a court's ability to grant a charge in favour of an interim financier is often necessarily and practically the only way to secure this benefit:

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies. As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by

taking a security interest in the borrower's assets. However, debtor companies under CCAA protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors. Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's -- a result that was controversial at common law -- Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].

[34] Section 11.2(4) of the CCAA sets out certain non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report

[35] No one factor set out in s. 11.2(4) governs or limits the Court's consideration. The exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the "breathing room" said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court: *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176, at para. 33 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49.

[36] I will discuss the factors in turn.

[37] These proceedings were filed in mid-June 2020. Despite the Petitioners' initial intentions to undertake a restructuring process to mid-2022 under the Interim Lending Facility, their ambitions have been significantly curtailed, at least in the short term. Under the present proposal, the Petitioners seek only to extend these proceedings to December 2020, when hopefully there will be further clarity about how the restructuring may proceed. This shortened period will allow the Court, the Monitor and the stakeholders to get a sense of the Petitioners' progress toward assessing whether any further extension of the proceedings is justified.

- [38] Nova Scotia submitted that, if the Court approved the interim financing and extended the stay, that stay period should only be to October 2020, when the Court could assess matters then.
- [39] I would not accede to this submission. There is considerable cost and energy to bring matters forward to the Court, which may not necessarily be justified depending on the status of matters in October 2020. Rather, I accept that the financing is justified in order to allow further operations to December 2020. I have specifically ordered the Monitor to provide oversight with respect to the Petitioners' expenditures to ensure that they are consistent with the Interim Budget. In addition, I ordered that the Monitor file a formal report with the Court by no later than October 31, 2020 as to the status of the Petitioners' restructuring efforts and spending under the Interim Budget. That information will of course be available to the stakeholders. If anything arises from that report, the Monitor or any stakeholder may apply to the Court.
- [40] Nova Scotia has raised, however obliquely, concerns regarding how the Petitioners' business and financial affairs will be managed during the proceedings. In my view, this largely arises from the great degree of mistrust and suspicion, if not downright animosity, that exists in the chasm that separates Nova Scotia and the Petitioners.
- [41] Nova Scotia filed various affidavits in support of its opposition to this application, being those of Duff MacKay Montgomerie, Paul Bradley and Kenneth Swain. All of these affidavits were intended to provide Nova Scotia's side of the "story" and respond to Mr. Chapman's various affidavits. Mr. Chapman replied to the points raised in Nova Scotia's affidavits.
- [42] Clearly, the disagreements between the Petitioners and Nova Scotia are many, and some long-standing. Two major issues relate to (a) payments made by the Petitioners to PEC as a shareholder some years ago when monies were owed to Nova Scotia, and (b) the use of monies advanced by Nova Scotia to the Petitioners for environmental expenses under a Contribution Agreement. I only note the existence of those disputes; in my view, there is no need at this time and in these proceedings to resolve those disputes. Whether those disputes need to be resolved in the fullness of time remains to be seen.
- [43] I accept that Nova Scotia's concerns give rise to some question as to the future conduct of these proceedings. However, this question is largely answered by the Monitor, who raises no concerns regarding the conduct of the Petitioners' management from the time of the Initial Order. As stated in *Pacific Shores* at para. 31, the good faith requirement to support the relief on this application relates to conduct within the proceeding, not conduct pre-existing the filing. The Monitor continues to provide oversight with respect to the Petitioners' activities.
- [44] One of the major factors is whether the loan would enhance the prospect of the Petitioners making a viable compromise or arrangement with their creditors.

- [45] The result of not approving this financing is stark. The shutdown of the Pulp Mill has resulted in a complete cessation of any revenue. Both Mr. Chapman and the Monitor confirm that, without the financing, the Petitioners cannot continue any restructuring efforts or even the continued hibernation of the Pulp Mill. The Monitor confirms that a lack of funding would likely result in a receivership or bankruptcy, with the usual dire result of yielding nothing for the majority of the stakeholders.
- [46] A large portion of the \$15 million interim financing is earmarked for what Mr. Chapman calls "critical expenses" relating to the direct and indirect expenses of the hibernation of the Pulp Mill. In its opposition, Nova Scotia does not address what would happen in the event that PEC walked away from its investment in the Petitioners and the Pulp Mill. As best I can tell, Nova Scotia seems to be ready to test PEC's resolve to determine if PEC will, as the shareholder, fund the ongoing costs itself without any interim financing and related charge.
- [47] In my view, given the sensitive nature of the assets, and the potential and negative consequences particular to the environment and local population arising on a liquidation, I do not consider it is reasonable to allow a "game of chicken" to take place between Nova Scotia and PEC. It appears to be the case that even if a receivership takes place (perhaps at the behest of Nova Scotia), many of these costs would be incurred in any event: Pacific Shores at para. 49(f).
- [48] Nova Scotia also takes issue with payment of pre-filing unsecured amounts, including amounts owed to employees and former employees, which the Petitioners seek to fund under the Financing Budget and the Interim Budget. I will address that issue separately below.
- [49] Finally, Nova Scotia takes great umbrage in having an Interim Financing Charge placed ahead of its own charge when some of the funds under the Financing and Interim Budgets are to be used to some extent to advance litigation (or potential litigation) against it. Paragraph 10 of the Term Sheet provides that the purpose of the facility is in part to fund expenses associated with:

the evaluation, settlement or progression of claims and other legal remedies that may be available to the Borrowers and to pay transaction costs, fees and expenses [including all reasonable fees and expenses in connection with any other proceeding pursued or defended by the Borrowers relating to the Northern Pulp facility and business]

- [50] It is common ground that the "claims and other legal remedies" include the Judicial Review, the Appeal and the potential BH Claim against Nova Scotia. The estimated cost in the Interim Budget of professional fees toward those matters is approximately \$575,000. Nova Scotia questions whether the Interim Financing Facility is simply to improve the Petitioners' negotiating position with Nova Scotia.

- [51] The Petitioners state that they remain committed to pursuing the re-start of the Pulp Mill in an environmentally responsible manner by ultimately constructing the RETF and resuming operations. The Petitioners believe that a re-start of operations affords Nova Scotia the best opportunity to recover its secured claims for money advanced. Nova Scotia disagrees and appears to have considered the consequences of a complete and permanent shutdown of the Pulp Mill.
- [52] The Petitioners say that they have continued the litigation - and are still considering the BH Claim - against Nova Scotia only as a backstop if they are not able to resolve their outstanding claims against Nova Scotia through negotiation and settlement. As noted by the Petitioners' counsel, the rights of the Petitioners under the Judicial Review, the Appeal and the BH Claim are choses in action and part of the Petitioners' assets. In *Callidus* at para. 96, the Court recognized that funding to preserve a "litigation asset" may be appropriate if it is intended to preserve and realize upon that asset for the benefit of the stakeholders.
- [53] In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.
- [54] Another factor is the nature and value of the Petitioners' property. The Monitor sets out in the First Report that the 2019 unaudited consolidated assets of the Petitioners (at book value) was approximately \$343 million. The estimated liabilities as of mid-June 2020 were approximately \$311 million. By any measure, most of the value of the Petitioners' assets, particularly the Pulp Mill, will only be realized if the Pulp Mill begins operations again. That necessarily involves the establishment of the RETF.
- [55] The Interim Financing Facility, as limited by the initial draw under the Interim Budget, will allow the Petitioners a short period (some five months) to show real progress toward that objective of enhancing the value of their assets. I do not agree with Nova Scotia that the Petitioners have failed to identify any restructuring plan or that the Interim Financing Facility is the plan. The materials before the Court clearly show a "kernel of a plan" - namely the restart of the Pulp Mill and the Petitioners' operations, all intended to alleviate the dire financial circumstances here and allow the Petitioners to fashion a way forward with the support of their creditors. The Petitioners should be allowed some opportunity to advance their efforts to that end, if possible.
- [56] Another significant factor here is whether any creditor would be materially prejudiced if the Interim Financing Charge is granted. Clearly, Nova Scotia, as the major and presently first ranking secured creditor thinks so. It is not difficult to discern that Nova Scotia faces a myriad of concerns with respect to the Petitioners and the Pulp Mill, including relating to the environment, employment of its citizens, the general welfare of the employees, obligations to the PLFN and the state of its economy.

- [57] It is not my role on this application to judge how Nova Scotia has seen fit to balance its duties and obligations in this complex situation. Nova Scotia is clearly frustrated with the Petitioners, noting in particular that it has already contributed significant amounts of public money and other benefits to assist them in meeting their environmental obligations.
- [58] I agree that Nova Scotia faces prejudice, although not to the degree submitted by its counsel. As stated above, it remains the case that, if a receivership occurs, a receiver would incur some of these expenses anyway. This is particularly so, with respect to the expenses (both direct and indirect) intended to protect the environment and the citizens of Pictou County in the Pulp Mill hibernation process.
- [59] I have no concerns that Nova Scotia is anything but committed to the well-being of the environment and its citizens, particularly those living near the Pulp Mill, such as members of the PLFN. I acknowledge Nova Scotia's concerns, but they must be balanced against other stakeholder interests and prejudice faced by those stakeholders if the financing is not approved: Pacific Shores at para. 49.
- [60] The final factor is whether the monitor supports the financing. That is clearly the case here. As stated above, the Monitor has attempt to bridge the gap between Nova Scotia's concerns and the objectives of the Petitioners. It has succeeded to some degree.
- [61] The Monitor has carefully analyzed the proposed financing terms. In its various reports, the Monitor has provided a detailed summary of the key elements of the Term Sheet, including specific terms that Nova Scotia questioned (including those provisions relating to payment-in-kind terms, change of control, right of first refusal and right to match, a prohibition on voluntary provisions and certain default terms). In light of submissions made by the Petitioners, and comments of the Monitor, I have no concerns regarding those matters.
- [62] Nova Scotia also raised an issue with respect to possible action by the Interim Lenders if there is an Event of Default (para. 23 of the Term Sheet). Again, I had no concerns in that respect as those were normal terms. I ordered an amendment to the draft ARIO to ensure that it was consistent with the provisions in the Term Sheet.
- [63] The Monitor recommends approval of the Interim Financing Facility, limited to the initial draw under the Interim Budget. I expect that the Monitor will work closely with the Petitioners in the next few months to ensure that proper expenditures are made in accordance with the Interim Budget. Such oversight will allow adequate protection to the stakeholders in this critical interim period while the Petitioners explore what options are available to them in the future with or without certain stakeholder support.

- [64] I conclude that the Interim Financing Facility is reasonable and appropriate in the circumstances. I approve the interim draw of \$15 million, as sought. This financing will provide a viable short term path forward to allow the Petitioners to explore restructuring options, all for the benefit of the entire large stakeholder group, including Nova Scotia, the employees (both past and present) and members of the PLFN, all of whom were represented on this application.
- [65] As noted by Petitioners' counsel, no other viable alternatives are available to avoid the significant and negative social, economic and environmental consequences if the Petitioners do not receive the funding they need to advance their restructuring plan.

SEVERANCE / SALARY CONTINUATION PAYMENTS

- [66] The Initial Order provided that the Petitioners could pay certain employee expenses incurred prior to that date:
4. The Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:
 - (a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred
- [67] The pre-filing unsecured employee obligations fall into two categories:
- a) 191 unionized employees were terminated before filing (or expect to be terminated shortly), triggering severance obligations under Unifor's collective bargaining agreements (the "Severance Obligations"). Before the filing, approximately half of that amount (\$1.65 million) was paid, leaving approximately \$1.94 million to be paid (some already due and the rest to be funded into July 2021); and
 - b) Between January and June 2020, 45 salaried employees were terminated. In that event, their employment agreements require payment of salary continuance (the "Salary Continuance"). Before the filing, \$3.3 million of Salary Continuance was paid. Under the terms of the Initial Order, \$370,000 was paid to these employees. The remaining estimated amount of Salary Continuance budgeted to be paid from August 2020 to September 2024 is approximately \$3.5 million.
- [68] The Interim Budget provides for payment of the Severance Obligations and the Salary Continuance, together with benefits to retired employees. The Petitioners seek an order allowing them to make such payments, estimated in total at \$2.9 million to December 2020.
- [69] Unifor understandably supports the Petitioners' request to make pre-filing payments of the Severance Obligations in accordance with the Interim Budget.

- [70] There is no dispute between the parties that I have the jurisdiction to authorize payment of pre-filing unsecured obligations. Section 11 of the CCAA provides a broad discretion to the Court to make any order as may be "appropriate in the circumstances". The more difficult question is whether I should exercise my discretion to allow such payments here.
- [71] Nova Scotia disputes that these payments are appropriate in the circumstances. The Monitor presents, appropriately, a neutral exposition of the relevant circumstances, without recommendation.
- [72] The Petitioners refer to *Cinram International Inc. (Re)*, 2012 ONSC 3767. In *Cinram*, the Court authorized payments to certain employees, including any obligations that arose prior to the filing. However, as noted at paras. 23 and 43, the Court did so in the context of *Cinram's* "ongoing business operations" and with respect to the "active employment of employees in the ordinary course".
- [73] In this case, there are no ongoing business operations as discussed in *Cinram*; in addition, the payments are to be made to former employees who were terminated before the filing.
- [74] The circumstances considered in *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 are also unhelpful to the Petitioners. At paras. 24-25, the Court's discussion of payment of pre-filing employee claims took place within the context of "critical suppliers" and the need to ensure continued delivery of necessary goods and services for the debtor's operations and to support the restructuring. The Court accepted the recommendation of the proposed monitor that pre and post-filing "payroll and benefits" be paid. The monitor's reasons included that many of the relevant payments would have priority status and/or give rise to director liability if not paid. Further, in the proposed monitor's experience, it is common to pay pre-filing and post-filing obligations to employees in the normal course, to ensure continued and uninterrupted service by employees. Importantly, the debtor had sufficient cash on hand to pay these expenses, which is not the case here.
- [75] The reasons advanced by the Petitioners in asserting that these payments are "critical" are much more ephemeral than the reasons advanced in *JTI-Macdonald*. The Petitioners argue that allowing payment of the pre-filing unsecured employee amounts (in addition to ongoing employee expenses) is necessary to:
- a) preserve the Petitioners' going concern value;
 - b) ensure that the other activities provided for in the Interim Financing Budget can be carried out by the Petitioners' remaining employees;
 - c) mitigate the adverse effects of the Pulp Mill's closure in the communities in which the Petitioners operate. The Petitioners emphasize the significant negative consequences suffered by the lay-offs and terminations, particularly in the face of the COVID-19 pandemic;

- d) preserve their relationships with the employees who are no longer working, many of whom are expected to be called upon to return to employment at the Pulp Mill in the future if the construction of the RETF is undertaken; and
 - e) preserve their relationship with Unifor. The Petitioners state that unions as a whole will inevitably be present in some form if the Petitioners resume operations. They say that preserving an effective working relationship with Unifor, consistent with Unifor's collective bargaining agreements, will provide an additional benefit to them, both during and after these proceedings.
- [76] The Petitioners also reiterate that payment of these pre-filing employee amounts will signal their commitment to the stakeholders to develop and implement a plan to recommence the Pulp Mill's operations and in doing so, alleviate financial hardship within what they describe is a critical stakeholder group.
- [77] I appreciate that court approval to allow payment to employees, even for pre-filing unsecured amounts, is often granted. When a debtor is conducting ongoing operations during a proceeding, it will often be necessary to ensure that employment relationships are not disrupted so as to hinder the restructuring efforts.
- [78] However, the starting point for this discussion continues to be that all pre-filing unsecured amounts are not to be paid in a CCAA proceeding, even if owed to employees. All pre-filing creditors are covered under the general stay of proceedings; any payment is the exception to the general rule. That starting point is intended to preserve the status quo between creditors of the debtor pending the debtor advancing a fair and equitable proposal at the end of the day in respect of all of its obligations.
- [79] At that later stage, it is generally anticipated that unsecured creditors will be treated fairly and equitably in any plan of arrangement, usually by way of a pro rata payment, subject to certain minimum requirements with respect to employee claims, as set out in s. 6(5) of the CCAA.
- [80] Two Ontario decisions, cited by Nova Scotia, are of assistance.
- [81] The first decision is *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558 (Ont. S.C.J.) aff'd *Sproule v. Nortel Networks Corp.*, 2009 ONCA 833. In the lower court, Justice Morawetz (as he then was) was addressing requests from the union and former employees for payment of their pre-filing claims for retirement allowance payments, voluntary retirement options, vacation pay, benefit options and termination and severance pay.

- [82] At para. 51 of Nortel, Morawetz J. noted that it was necessary to take into account the overall financial picture of the applicants, who opposed the applications. There, as here, the debtor was not in a position to pay their obligations to all creditors and a number of defaults were present, including those relating to the unionized and former employees. At para. 57, Morawetz J. described that Nortel was not carrying on "business as usual", which is also the case here. The Court dismissed the application stating:
- [60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.
- ...
- [80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.
- [83] In Sproule, the Court of Appeal agreed that the stay applied to these types of claims:
- [39] The CCAA stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.
- [84] The Court in Nortel asked the monitor to investigate whether an interim payment might be made to the employees in any event. That request was made, however, in very different circumstances where there were no significant secured creditors and a distribution to the unsecured creditors seemed likely in any event:
- [87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.
- [85] In Windsor Machine & Stamping Ltd. (Re), [2009] O.J. No. 3195 (Ont. S.C.J.), the union brought an application to require the debtors to pay termination and severance pay owing as a result of post-filing terminations. The major secured creditor objected. Justice Morawetz similarly rejected this application, citing the priority of that secured creditor:

- [43] First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.
- [44] Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.
- [45] Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

- [46] In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank *pari passu* with other unsecured creditors and subordinate to the interests of the secured creditors. (See also *Indalex Limited*, [2009] O.J. No. 3165, CV-09-8122-00CL - July 24, 2009 on this point.)
- [47] I acknowledge that the situation facing the employees is unfortunate and that in *Nortel*, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.
- [86] The circumstances here are more resonant with the facts discussed in *Nortel* and *Windsor Machine*. Given that this proceeding is very much in its early days, I cannot conclude that a distribution to pre-filing unsecured claims (including to the employees) is likely at the end of the day. There are no ongoing operations; there is no cash with which to pay these amounts.
- [87] Significantly, *Nova Scotia*, the major secured creditor, whose security would be primed by these payments, objects. In the absence of any objection by *Nova Scotia*, and with the general support of the Petitioners and the stakeholders appearing on this application, I might have come to a different conclusion.
- [88] The Petitioners also argue that the Severance Obligations constitute inchoate priority charges under provisions of the *Nova Scotia Labour Standards Code*, R.S.N.S. 1989, c. 246 (the "Code"). They argue that these provisions would be triggered if an employee makes a successful claim to the *Nova Scotia Labour Board* (the "Board") and the Board issues an order. They refer to s. 88 of the Code that provides that amounts in an order are a debt due to the Board secured by a lien or mortgage that has priority over all other liens, charges, or mortgages. They also refer to ss. 90 and 90A of the Code with respect to potential actions by the Board. However, any such actions are currently stayed under the Initial Order, just as they are with respect to any action that might have been taken by *Nova Scotia* as a secured creditor.
- [89] This is an unpersuasive argument by the Petitioners in any event. It is well taken that a province cannot create priorities that alter the federal scheme of distribution in the event of a bankruptcy: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 86-87, 136; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Given that these proceedings are in their nascent days, it is anyone's guess on the outcome. A bankruptcy remains a possibility, however slight in the Petitioners' minds.

- [90] I accept, without hesitation, that these hard working and dedicated employees will meet my decision with a great deal of disappointment, if not dismay. The reasons for the closure and shutdown are completely divorced from their commitment to their jobs. I also appreciate that this vulnerable group of stakeholders will suffer arising from my decision. I say this knowing that the Petitioners represented - or at least previously represented - a significant employer in the province and in Pictou County, particularly. I expect that many of these lost jobs, no doubt some with expertise involving work at pulp mills, cannot be easily replaced, if at all.
- [91] The Petitioners have emphasized the need to maintain the goodwill of their workforce in the event that the RETF is constructed and operations recommence. Whether or not the Petitioners will achieve that objective is simply unknown at this time.
- [92] Unfortunately, I conclude that there is no principled basis upon which I could exercise my discretion to grant this relief. The Petitioners have not advanced a persuasive case toward authorizing such payments in such nebulous circumstances, particularly when it would amount to prioritizing those unsecured creditors over the existing security of Nova Scotia and where Nova Scotia objects.

TERRAPURE

- [93] Before and after the CCAA filing, Envirosystems Inc., dba Terrapure Environmental ("Terrapure") provided services to the Petitioners relating to the removal of wastewater. The pre-filing debt owed to Terrapure for its services is approximately \$1.1 million.
- [94] The Petitioners do not seek any relief in favour of Terrapure, such as a declaration that it is a "critical supplier". Indeed, by the date of this application, the Petitioners had found an alternate means to remove the wastewater and they advised that it is unlikely they will need any further services from Terrapure.
- [95] Terrapure's position on this application is to support the approval of the Interim Financing Facility and the payment of the unsecured pre-filing claims of the employees, but only if Terrapure is similarly paid its pre-filing unsecured claim.
- [96] The general discussion above regarding the general application of the stay of proceedings with respect to unsecured creditors equally applies to Terrapure. Nova Scotia similarly objects to any payment to Terrapure, since the means to make any such payment could only arise from the Interim Financing Facility.
- [97] In my view, there is no basis to prefer Terrapure in this case by allowing payment of its pre-filing unsecured claim. All claims by unsecured creditors are equally covered by the stay under the Initial Order, including the claims by employees, as discussed above, and Terrapure.

[98] In the event that the Court did not approve payment of its pre-filing debt, Terrapure requested the addition of a term in the ARIO to confirm that it has no further obligation to provide services to the Petitioners. No one raised any objections to that provision and I grant that relief.

KEY EMPLOYEE RETENTION PLAN (KERP)

[99] The Petitioners seek approval of a KERP and the granting of a Court ordered KERP charge to a maximum of \$342,207 (the "KERP Charge"). They say that the KERP is for a select group of key employees to incentivize their continued retention, which is necessary if there is to be any viable prospect for the Petitioners to pursue their restructuring strategy.

[100] They propose that the KERP Charge rank directly below the Directors' Charge.

[101] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the CCAA to approve a KERP and grant a KERP Charge: U.S. Steel Canada Inc. (Re), 2014 ONSC 6145 at para. 27.

[102] As the Petitioners note, courts across Canada have approved key employee incentive plans in numerous CCAA proceedings: for example, Nortel Networks Corp. (Re), [2009] O.J. No. 1044 (Ont. S.C.J.) and U.S. Steel Canada.

[103] In Walter Energy Canada Holdings, Inc. (Re), 2016 BCSC 107, this Court stated:

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, Grant Forest Products Inc. (Re) (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and U.S. Steel Canada at paras. 28-33.

[104] In Walter Energy at para. 59, I discussed the Grant Forest Products factors, as follows:

- Is this employee important to the restructuring process?
- Does the employee have specialized knowledge that cannot be easily replaced?
- Will the employee consider other employment options if the KERP is not approved?
- Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
- Does the Monitor support the KERP and a charge?

[105] More recently, in Aralez Pharmaceuticals Inc. (Re), 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: arm's length safeguards, necessity and reasonableness of design.

- [106] As Mr. Chapman describes, the KERP has been designed to facilitate and encourage the continued participation of select key employees of the Petitioners who are contemplated to either (a) provide necessary services up to the expiry of the stay period (to December 2020); or (b) guide the business through the restructuring and preserve value for stakeholders over the length of the case.
- [107] The KERP consists of two independent programs: the Key Management Employee Retention Plan (the "Management KERP") and the Key Technical Employee Retention Plan (the "Technical KERP"). These plans would apply to a small number of employees: five under the Management KERP; two under the Technical KERP. Payments under the Technical KERP are conditional on the proceedings continuing on the date that each payment is to be made and do not amount to a long-term payment commitment if the restructuring fails.
- [108] The Petitioners' evidence on this application fully supports an affirmative answer to all of the above questions set out in Walter Energy. These employees are important to the restructuring process; the Monitor describes a "knowledge and operational void" if their employment is not further secured in some fashion. Given the nature of the assets in question, I agree that these employees, both management and technical, have specialized knowledge that cannot be easily replaced.
- [109] There is no evidence on this application that any of these employees are considering other employment options if the KERP is not approved. However, that lack of evidence is not fatal to approval of the KERP since that very scenario is intended to be avoided by approval of the KERP.
- [110] The KERP was developed through a consultative process involving the Monitor. The Monitor supports the KERP and the KERP Charge, noting that without securing this "human capital", the ability of the Petitioners to restructure their affairs will be greatly impaired.
- [111] The Monitor notes in particular that Mr. Chapman, a PEC employee and general manager of the Pulp Mill, is included in the KERP. The Monitor describes Mr. Chapman as a "key resource" and provides that his continued support is "critical" toward achieving a successful restructuring. Mr. Chapman has been the person providing significant evidence in support of the Petitioners in this proceeding to date, which speaks to that fact.
- [112] No stakeholder opposes this relief. In my view, such relief is appropriate. I approve the KERP and I grant the KERP Charge on the terms sought.

ADMINISTRATION / DIRECTORS' CHARGES

- [113] The Petitioners have not sought an increase of the Administration Charge on this application. The Petitioners seek the continuation of the Administration Charge in its previously approved amount (not to exceed \$500,000) to secure professional fees and disbursements of the Monitor, counsel to the Monitor and the Petitioners' counsel.

[114] The Petitioners have also determined that they do not require an increase of the Directors' Charge at this time. The Petitioners seek the continuation of the Directors' Charge in its previously approved amount (not to exceed \$500,000) to secure the indemnity provided for in the Initial Order.

[115] Again, no opposition arises. In my view, continuing this relief from the Initial Order is appropriate and I grant it.

STAY EXTENSION

[116] The Petitioners seek an extension of the stay to December 31, 2020.

[117] Under s. 11.02(2) of the CCAA, the Court has broad jurisdiction to extend a stay of proceedings where the circumstances warrant and for any period the Court considers necessary. Baseline considerations include those set out in s. 11.02(3) of the CCAA, including confirmation that the debtor is acting with due diligence and in good faith and that the relief sought is appropriate.

[118] The comments of court in *Timminco Limited (Re)*, 2012 ONSC 2515 aptly set out the statutory objectives intended to be achieved by the stay:

[15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the [debtors] with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the status quo and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[119] Throughout this proceeding, and to this time, the Monitor confirms its view that the Petitioners have been working in good faith and with due diligence. The Monitor recommends the extension of the stay to December 31, 2020.

[120] It will be more than apparent from the discussion above and the orders I have granted, particularly as to the Interim Financing Facility, that I have concluded that an extension of the stay to December 31, 2020 is appropriate in the circumstances. As discussed above, there is somewhat of a "check" on the proceedings arising from the Monitor's report that will be filed before the end of October 2020.

[121] The stay period to December 2020 will allow the Petitioners to advance their objective of securing a restructuring option for the benefit of the stakeholders. I conclude that they should be afforded the opportunity to do so here.

UNIFOR APPLICATION

[122] Unifor seeks an order authorizing it to represent the current and former union members of the local, including pensioners, retirees, deferred vested participants, and their surviving spouses and dependants, employed or formerly employed by the Petitioners, in these proceedings. Unifor does not seek any court ordered funding to secure its participation or that of Pink Larkin, its counsel.

[123] The Petitioners support this relief and no stakeholder objects.

[124] As with much of the above relief, the Court has jurisdiction to exercise its discretion to grant the order sought under its broad statutory jurisdiction found in s. 11 of the CCAA.

[125] In *Canwest Publishing Inc.*, 2010 ONSC 1328, the Court discussed the factors typically considered in granting such relief. Justice Pepall (as she then was) set those out as follows:

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

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

See also *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 61.

[126] I agree that these employees presently have a commonality of interest that is best represented in this proceeding as an entire group. Wanda Skinner is the president of the Unifor local. Ms. Skinner's affidavit #2 sworn July 28, 2020 supports the vulnerability of the unionized employees arising from the disastrous economic consequences to them of losing their jobs and benefits.

- [127] Unifor clearly has a relationship with this cohort and is in the best position to advance the entire group's interests, at least at this time. That representation will be a benefit to the Petitioners in advancing this restructuring by facilitating discussions between them. The estate will incur no cost by reason of Unifor's representation, welcome news given the lack of cash resources available to the Petitioners.
- [128] The order sought by Unifor is consistent with the order granted in the Fraser Papers Inc. restructuring: see Fraser Papers Inc. (Re), 2009 CanLII 55115 and 2009 CanLII 63589 (Ont. S.C.J.).
- [129] I am satisfied that the terms of the order sought are appropriate, with one exception. In para. 3 of the draft order, Unifor seeks authority to "determine, file, advance or compromise" any claims of its current or former employees. The only change I would make to that provision is to amend it to provide that any compromise proposed to be made by Unifor will be subject to court approval. This will ensure some oversight in respect of any decisions that Unifor seeks to make for the employee group they will represent.

"Fitzpatrick J."

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Prepared on 28 October 2026 · Esheria