Introduction

The Canadian system for reorganizing large insolvent companies is significantly less codified than Chapter 11 of the US Bankruptcy Code. Although a substantial number of new provisions have recently been added to the Companies’ Creditors Arrangement Act,1 this statute continues to have just 63 sections. Accordingly, while significant aspects of the Canadian insolvency process are now the subject of codified standard procedures, the jurisprudence and other established practices represent many aspects of the Canadian “system.” One example is the extent to which large groups of similarly placed stakeholders may be represented in large Canadian insolvencies. In the U.S. system, creditors’ committees are commonplace.2 Although creditors’ committees are sometimes used in Canada3—and sometimes U.S. creditors’ committees in ancillary U.S. proceedings are formally recognized in Canada4—they are not required in the Canadian insolvency system.5 In that regard, one distinctive Canadian approach that has been used in a number of cases,6 particularly in the last 15 years, is that of a court-appointed representative counsel. I have been involved with a number of cases where representative counsel orders have been made—many of which will be familiar to U.S. lawyers. The largest case was the approximately
In this article, I will briefly discuss some of the main insolvency/restructuring cases in which the representative counsel approach has been followed and the jurisprudence that has emerged with respect to such core issues as
- the jurisdiction for making the orders,
- the factors that the courts will consider when determining whether a representative counsel order should be made,
- the considerations that apply when the court is asked to appoint multiple representative counsel, and
- the terms of the orders.

In conclusion, I will offer some thoughts as to where the process may be headed.

Major Cases Utilizing the Representative Counsel Approach

A brief history of the making of representative counsel orders in Canada includes the following major cases:

The Canadian Red Cross Society

The Canadian Red Cross Society was forced to seek CCAA protection in the late 1990s as a result of the tainted blood scandal, and the roots of the Canadian representative counsel approach in the insolvency context can be traced to this case. Early on in the proceedings, an order was made appointing representative counsel with respect to several different categories of tainted blood victims. For example, one counsel was appointed to represent “1986–1990 Haemophiliacs” and another counsel was appointed to represent “Pre-1986/Post-1990 Hepatitis C [victims].”
More than five such representative counsel were ultimately appointed. All of the representative counsel participated actively in this historic CCAA case, which, among other things, saw the administration of the Canadian blood program transferred to the newly created Canadian Blood Services and Hema Quebec who we represented in that case.

*Muscletech Research and Development Inc.*

*Muscletech* was an interesting CCAA case, which arose from the troubles associated with the sale of the drug ephedra. After a period in which a lot of ephedra product was sold, the drug was banned by government regulators and a number of U.S.-based companies that had sold the drug filed for Chapter 11 protection. By the time that three of those Chapter 11 cases were fairly well advanced, Muscletech Research and Development Inc. (“Muscletech”)—which had also sold ephedra products from its headquarters in Toronto—filed for CCAA protection in January 2006. Much of the litigation against Muscletech was U.S.-based and many of the U.S. counsel pursuing litigation against Muscletech were also heavily involved in the existing Chapter 11 cases. Accordingly, Muscletech also initiated what was then the first full proceeding for a company under Chapter 15 of the U.S. Bankruptcy Code.

We worked closely with U.S. counsel representing plaintiff groups who had a track record of success in helping to design the approach taken in some of the big Chapter 11 ephedra cases. On February 8, 2006, we were appointed along with U.S. counsel “to represent [an] Ad Hoc committee … on behalf of [certain] personal injury and wrongful death tort plaintiffs … and any such further plain-
tiffs with claims against Muscletech … and … [related entities] … as may choose to become members of the Ad Hoc committee.”

We were subsequently heavily involved in the negotiation of an innovative CCAA plan, which was approved by Muscletech’s creditors and the court. One of the fundamental (and innovative) features of the *Muscletech* case was the conferring of “third-party releases” on various parties—including solvent parties—who were affected by the plan. Reference may be made to the detailed discussion of this interesting issue in the articles cited in endnotes 7 and 8.

*SAAN Stores*

SAAN stores were a retail chain that sold army navy surplus supplies and other products across Canada. After many decades of business, it ended up in receivership in the 2000s. In March 2009, an order was made, appointing representative counsel with respect to certain employees, but only in connection with some very specific motions that the Receiver wished to make pertaining to the employees.

*Asset-Backed Commercial Paper*

This massive case arose out of the freezing of the Canadian market for non-bank-sponsored, asset-backed commercial paper (“ABCP”) in August 2007 when the credit/liquidity crisis really began to make its effect felt. A committee of major industry stakeholders—known colloquially as the “Crawford Committee”—put forward a complex restructuring plan with substantial input from JP Morgan. We represented a major group of ABCP holders with approximately $1.2 billion worth of ABCP, and when the CCAA filing began in March 2008,
we were appointed as representative counsel on behalf of our Ad Hoc Committee and “any holders of ABCP who … chose to become members of the Ad Hoc Committee.” It is noteworthy that PricewaterhouseCoopers Inc. was also appointed as financial advisor to the Ad Hoc Committee pursuant to the same order. As the article referred to in endnote 7 discusses in detail, the membership of the ABCP Ad Hoc Committee grew substantially over the course of the case and our committee represented approximately $2 billion worth of ABCP holders by the successful conclusion of the restructuring. The decisions in this case record the importance placed by the court on our role in developing and ultimately supporting the final terms of the CCAA plan in that case.

Red Leaves JW Marriott Resort

The Red Leaves JW Marriott Resort is a picturesque hotel condominium complex on Lake Rosseau in the Muskoka area to the north of Toronto. Unfortunately, when construction of the project was nearing completion, the assets of one of the companies involved in the project—The Rosseau Resort Development Inc. (“RRDI”)—were placed into a court-ordered receivership by an order dated May 22, 2012. The application for that receivership appointment order was sought by a bank that held security over the assets of RRDI. The Receiver was faced with a number of challenging issues early in the receivership, including a need to restructure some of the hotel management and other arrangements that had proven to be unsustainable. In September 2009, we were appointed as representative counsel on behalf of condominium unit owners who had entered into various agreements relating to the acquisition of units and various hotel management arrangements. We were able to play an integral role in a series of steps taken to expand the court-based receivership—including by way of the appointment of a receiver with respect to assets of a different company: Rosseau Resort Management Services Inc. (“RRMSI”)—and reorganize the hotel arrangements. It may be noted that the Bank that sought the appointment of the receiver with respect to RRDI did not also hold security over the assets of RRMSI.

Canwest

Canwest was a large Canadian media company. By the time it entered CCAA protection in 2009, it owned, among other assets, major television networks and newspaper chains. Representative counsel was appointed to represent a group of employees in that case.

Nortel

The massive international insolvency proceedings of the Nortel Networks group of companies (collectively “Nortel”) began with a CCAA filing in Toronto in January 2009. Although the Nortel case has since evolved into a liquidation and an international dispute has arisen over the entitlement to the substantial proceeds that were realized from the sale of Nortel’s assets—including some very significant sales as a “going concern”—in the early period of the CCAA case, Nortel maintained substantial operations and held out the prospect of a true reorganization of the Nortel operations. In those circumstances, representative counsel was appointed for certain groups of both current and former Nortel employees. As discussed below, in a May 2009 decision, Justice Morawetz rendered
substantial written reasons for appointing representative counsel in the *Nortel* case.

The representative counsel in *Nortel* has played an important role in advocating for the employees. For example, representative counsel advanced an argument to the effect that (post-filing) Nortel should continue to pay termination and severance pay relating to the pre-CCAA filing period. In an important CCAA decision, the Ontario Court of Appeal held that an Initial Order under the CCAA may serve to stay such payments to former employees.13

**MF Global**

MF Global Canada Co. was placed into bankruptcy in late 2011 when the U.S. MF Global business failed.

Early on in that case, representative counsel was appointed “to represent all ‘customers’ (as such term is defined in the [Bankruptcy and Insolvency Act]) … of MF Global Canada as at November 4, 2011, other than MF Global Inc. … in all matters relating to MF Global Canada’s proceedings under the BIA ….” Interestingly, in that case, two particular corporate customers were identified and designated as “Customer Representatives” for the representative counsel to work with. Specifically, the order provided that the representative counsel “shall have no obligation to consult with or seek instructions from the Customers other than the Customer Representative[s].” In a number of other cases, the Orders did not contemplate the designation of “representative clients” and, instead, the orders were more flexible concerning the manner in which representative counsel could take directions from its client group.

**The Developing Jurisprudence**

Justice Morawetz’s decision from a relatively early period in the *Nortel* case14 addressed several important issues surrounding the making of representative counsel orders:

- He confirmed that the Canadian courts have authority to make these orders under Rules 10.01 and 12.07 of the *Rules of Civil Procedure*,15 as well as s. 11 of the *CCAA*.
- He held that representative Counsel Orders can provide a mechanism to allow particularly vulnerable stakeholders in insolvency proceedings to participate in the proceeding.

Of course, at the time of its *CCAA* filing, Nortel had an enormous number of continuing and former employees.16 Some of the former employees were receiving pensions, some had recently been terminated, and, indeed, there were various other categories of employees, including people receiving disability and other health care plan benefits and people with claims for termination pay and severance pay.

In making their submissions as to why a number of different representative counsel should be appointed for various discrete categories of current and former employees, the counsel seeking the different appointments identified a number of potential points of contention or conflict as between the different employee groups. However, in making his decision to appoint just “one representative counsel”17 for employees at the outset of the *Nortel CCAA* case, Morawetz J. was of the view that there was no actual conflict among the employees. Accordingly, he held, in part, that “at this point in the proceedings, the former employees have a ‘commonality of interest,’” ordered the appointment of one
firm that had strong credentials and “indicated a willingness to act on behalf of all former employees.” In rejecting the argument that multiple representative counsel appointment orders should be made, Morawetz J. held that “the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.”

Interestingly, as the Nortel case evolved, other representative counsel were subsequently appointed to represent such groups as (i) current employees and (ii) employees on long-term disability. By the time of such appointments, actual conflicts of interest, as among the employees, were more apparent. Justice Pepall advanced the jurisprudence concerning representative counsel orders in two subsequent cases—Fraser Papers and Canwest. Both of these cases also dealt with the appointment of representative counsel on behalf of employees.

In Fraser Papers, Pepall J. discussed the need to show “commonality of interest” in establishing that representative counsel for a particular stakeholder group is appropriate. In that case, she applied the following considerations in appointing a particular law firm as representative counsel for “all unrepresented employees, be they active or retired, and their successors” where another firm had sought appointment as representative counsel for the narrower category of “all non-unionized retirees and their successors” (which request was denied):

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.

2. The interests to be considered are the legal interests that a creditor holds \textit{qua} creditor in relationship to the debtor company prior to and under the plan, as well as on liquidation.

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the \textit{CCAA)—namely, to facilitate reorganizations if possible.

4. In placing a broad and purposive interpretation on the \textit{CCAA}, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement \textit{as creditors} before or after the plan in a similar manner.

Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include the proposed breadth of representation, evidence of a mandate to act, legal expertise, jurisdiction of practice, the need for facility in both official languages, and estimated costs.

In Canwest, Pepall J. listed these factors as having been considered by Canadian courts in granting representative counsel orders:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under \textit{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.

The Form of Orders

Generally speaking, the representative counsel orders used in these cases have been similar. The common features of the orders include provisions dealing with the following matters:

• the scope of the mandate and any specific limitations on that mandate,\(^2\)
• a protection against liability for any act or omission as a result of the appointment or the fulfillment of the duties contemplated in the appointment—save for gross negligence or wilful misconduct,
• provision for representative counsel to seek advice and directions, and
• provision for funding (sometimes with a cap, subject to increase only by further order of the court).

Sometimes the orders go on to provide for treatment of more unusual “case-specific” matters. In Red Leaves, for example, the order provided that the Receiver would provide representative counsel with “the last known email addresses for each Represented Unit Owner.” The order went on to provide for a stipulated notification of the appointment in that manner.

Other cases have provided for more specific terms governing the publicizing of the fact that representative counsel have been appointed.

It may also be noted that, as a practical matter, many of these orders have been made after the representative counsel had already spent time working with the debtor or its representatives on behalf of a particular important stakeholder group. Accordingly, by the time the Representative Counsel Order was sought, such counsel was in a position to demonstrate the value that it could bring to the process.

Conclusion

The jurisprudence surrounding the use of representative counsel in Canadian insolvency proceedings continues to develop. I can foresee a time when the appropriate judicial committee\(^2\) will develop a standard form of order for the appointment of representative counsel in a manner similar to the way in which standard initial orders under the CCAA and standard orders for the appointment of a receiver and the sale (or vesting) of assets in insolvency-based sales have been developed. That kind of development will reflect the extent to which the recognition of “representative counsel” will have become part of the standard procedure, where appropriate, in Canadian insolvency proceedings.

[Editor’s note: Jeffrey Carhart is one of Miller Thomson’s senior partners in the firm’s insolvency practice group. He has been designated as a specialist in bankruptcy and insolvency law by the Law Society of Upper Canada.]

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2. See, for example, the United States Bankruptcy Code, 11 U.S.C. §§ 1102(a)(1) and (2) (1978).
3. The Canadian Red Cross Society CCAA case discussed in this article is one such example. However, in the Canwest case discussed ahead, Justice Pepall noted that “[d]esirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings.” Canwest Publishing Inc. (Re), [2010] O.J. No. 943 (Ont. Sup. Ct.) at para. 24.
The Nortel CCAA, [2009] O.J. No. 3280 (Ont. Sup. Ct.—Commercial List), case is an example where such recognition was accorded.

As noted in Jason Harris, “Enhancing the Role of Creditors’ Committees in Corporate Rescue Laws,” ANN. REV. INSOLVENCY L. (2011): 688, the distinctive role of the Monitor in Canadian CCAA proceedings—a role that is not found in Chapter 11 proceedings—has been seen as one of the reasons why “creditors’ committees are not as necessary in CCAA proceedings as they are in U.S. Chapter 11 proceedings.” Under such provisions as ss. 11.7 and 35 of the CCAA, Monitors are empowered and responsible for monitoring the business and financial affairs of the debtor company or group of companies in a comprehensive, even-handed manner—they have been described as the eyes and ears of the Court—and they take on additional tasks from time to time as ordered by the court. Although it is relatively rare, there have been CCAA cases where the Monitor has taken a substantive position that clashes with that of the debtor companies.

It may be noted that, in Canada, there are important procedures—outside the CCAA process—used to operate insolvent Canadian companies in structures where the debtor is no longer in possession. These additional, common Canadian structures include court-appointed receiverships and bankruptcies under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended [BIA]. As discussed in this article, sometimes, representative counsel are also appointed in these types of cases.


The Committee’s formal name was The Pan-Canadian Investors Committee for Third-Party-Structured, Asset-Backed Commercial Paper. Purdy Crawford was Chairman of the Committee.

In the Red Cross case, a Financial Advisor was also appointed for certain blood victims.

As the article referred to in endnote 7 discussed in depth, we were heavily involved in the process whereby, among other things, a limited “carve-out” to the third-party releases was designed.


Nortel Networks Corp. (Re), [2009] O.J. No. 4967 (Ont. C.A.). The Court of Appeal held that the Initial CCAA Order, made under the federal CCAA, effectively takes priority over the requirements of the provincial employment standards statute that otherwise requires speedy payment of those amounts to former employees. Leave to appeal this decision to the Supreme Court of Canada was denied (although, again with the participation of representative counsel, a global settlement agreement was reached shortly before that decision to deny leave was made).

Nortel Networks Corp. (Re) [Appointment of Representative Counsel], [2009] O.J. No. 2166 (Ont. Sup. Ct.—Commercial List).


As the proceedings began, the Nortel group of companies employed about 30,000 people and had approximately double that number of former employees. Reference may be made to the article cited in endnote 20.

Supra note 14 at para. 63.

Ibid. at paras. 63–64.

Ibid. at para. 64. Justice Morawetz also put weight on the fact that appointing multiple counsel would increase the financial pressure on the CCAA debtors. In that regard, Pepall J. also held in the Canwest case that only one representative counsel should be appointed where more than one such appointment was sought. Justice Pepall stated, “[T]his is an insolvency. Absent a clear and compelling reason such as the existence of an obvious conflict of interest, the general rule should be that funding by applicant debtors should only be available for one representative counsel.” Canwest Global Communications Corp. (Re), [2009] O.J. No. 6437, at para. 19.


Fraser Papers Inc. (Re), [2009] O.J. No. 4287 at paras. 2 and 11. Interestingly, it may be noted that the Fraser Papers case also dealt with the issue of the role of unions in representing employees in CCAA proceedings. In Fraser Papers, Pepall J. recognized the representative status of unions on behalf of members but without funding from the debtor companies. (Justice Pepall ordered funding for the other “non-union” representative counsel who she appointed.) As Amanda Darrach commented in her article, “Who is Paid to Do What When? Representative Counsel in Insolvency Proceedings.” Paper delivered at the 2011 OBA Institute—Pensions and Benefits, February 3–5, 2011, it is both a “live issue in labour law” and beyond the scope of a discussion of representative counsel orders as to “whether unions continue to represent their retirees after their retirement.” In the context of representative counsel orders, it seems to be the case that the Canadian courts are “of the view that representation in insolvency proceedings is part of a union’s mandate in the representation of the bargaining unit [i.e., such as it may be comprised] and no further funding should be necessary.” In that regard, it may be noted that union counsel also participated in the Nortel CCAA case. Finally, it may also be noted that as the Fraser Papers case unfolded against the backdrop of grim conditions in the paper industry, the representative counsel needed to confront a conflict of interest that emerged in connection with a sales transaction designed to preserve the viable part of the business.

Canwest Publishing Inc., supra note 3 at para. 21. It may be noted that, in Canwest, the lending agent and the Monitor opposed the appointment of representative counsel for the employees. See Andrew J. Hatnay and Jody Brown, “Employee Representation Orders in Insolvency Proceedings—Recent Ontario Developments.” Paper presented at the Sixth Annual Pan-Canadian Insolvency and Restructuring Law
Conference, September 13, 2012. In that case, the lending agent argued that the appointment of representative counsel for employees was premature at the outset. Justice Pepall held (at para. 24), "[i]n my view it is a false economy to watch and wait ... [t]he appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency." In making her decision to appoint representative counsel with court-ordered funding, in the circumstances, Pepall J. overrode a provision in the Lenders’ Support Agreement. It may also be noted that one of the 2009 amendments to the CCAA, referred to at the outset of this article, was to introduce a new s. 11.52(1)(c) that allows the CCAA Court to order a charge over the debtors’ assets so as to cover the fees and expenses of a financial legal or other expert engaged by any other interested person if the court is satisfied that the charge is necessary.

For example, in Nortel, the Orders specifically stipulated that the mandate of representative counsel did not include negotiating with potential purchasers of Nortel’s assets. See generally Reyes & Stam, supra note 20.

In Ontario, this work has been pursued by the Ontario Superior Court–Commercial List Users Committee.