

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*,  
R.S.O. 1990, c. C-43, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF  
NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF  
NURSES FOR CANADA – WESTERN REGION**

---

---

**FACTUM OF THE ONTARIO NURSES' ASSOCIATION  
(Motion Returnable August 30, 2016)**

---

---

**GOWLING WLG (CANADA) LLP**  
Barristers & Solicitors  
1 First Canadian Place,  
100 King Street West, Suite 1600  
Toronto ON M5X 1G5

**Clifton P. Prophet / Frank Lamie**  
(LSUC #34845K / 54035S)  
Tel: (416) 862-3509 / (416) 862-3609  
Fax: (416) 862-7661

**Lawyers for the Ontario Nurses' Association**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*,  
R.S.O. 1990, c. C-43, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF  
NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF  
NURSES FOR CANADA – WESTERN REGION**

---

---

**FACTUM OF THE ONTARIO NURSES' ASSOCIATION  
(Returnable August 30, 2016)**

---

---

**PART I – OVERVIEW**

1. This factum is filed by the Ontario Nurses' Association ("ONA") in support of a motion by ONA in the *Companies' Creditors Arrangement Act* R.S.C. 1985. C C-36 ("CCAA") proceedings of the Victorian Order of Nurses for Canada ("VON Canada"), the Victorian Order of Nurses for Canada – Eastern Region ("VON East"), and the Victorian Order of Nurses for Canada – Western Region ("VON West", together with VON Canada and VON East, the "Applicants"), for an Order substantially in the form attached as Schedule "A" to ONA's Notice of Motion (the "Transfer Restructuring Order"), *inter alia*:

- (a) authorizing and directing VON Canada to take certain steps pursuant to section 81 of the *Pension Benefits Act (Ontario)* R.S.O. 1990, c. P.8 (the "PBA") or analogous provisions in other provinces to the extent applicable, to restructure (the "Transfer Restructuring") the pension plan it administers (the "VON Canada Pension Plan") for employees of the

Applicants and employees of the Victorian Order of Nurses for Canada – Ontario Branch (“**VON Ontario**”) and the Victorian Order of Nurses for Canada Nova Scotia Branch (“**VON Nova Scotia**”); and

- (b) declaring that VON Ontario is not jointly and severally liable for funding any solvency deficiency or funding shortfall that has or may arise as a result of VON East, VON West, VON Canada, or VON Nova Scotia failing to meet their contribution obligations under the VON Canada Pension Plan.

2. On November 25, 2015 (the “**Filing Date**”), Court-supervised restructuring proceedings pursuant to the CCAA were initiated by VON Canada, VON East, and VON West in the Ontario Superior Court of Justice (Commercial List) (the “**Court**”). Neither VON Ontario nor VON Nova Scotia are Applicants in these CCAA proceedings or subject to any other formal insolvency proceedings.

**Affidavit of Marie Kelly sworn July 25, 2016 (the “Kelly Affidavit”), at paras. 10 and 12, Motion Record of the ONA Tab 2.**

3. Shortly after the commencement of the Applicants’ CCAA proceedings, VON East and VON West ceased operating and all of their employees were terminated as of the Filing Date. VON East and VON West are no longer contributing to the VON Canada Pension Plan. The fate of VON Canada - the sponsor and administrator of the VON Canada Pension Plan - is uncertain. As a result, there remains a very real possibility that VON Canada will be replaced as administrator of the VON Canada Pension Plan and / or that the VON Canada Pension Plan will be affected by VON Canada’s insolvency proceedings.

**Kelly Affidavit, at paras. 11, 16 and 18, Motion Record of the ONA Tab 2.**

4. In light of the shutdown of VON East and VON West and the uncertainty surrounding whether or not VON Canada will be able to implement a compromise or arrangement with the its creditors, it is possible that the pension entitlements of the Transferring Pension Claimants (as defined below) will be adversely effected by the outcome of these CCAA proceedings. ONA submits that the Transfer Restructuring, which is consistent with applicable provincial pension legislation, be pursued in order to ensure that: (a) the pension benefits and accrued entitlements of the Transferring Pension Claimants are protected; (b) the costs associated with any wind-up of the VON Canada Pension Plan are not unfairly imposed on the Transferring Pension Claimants; and (c) provision is made for the continuing accrual of pensions for the Transferring Pension Claimants in the near and long term.

**Kelly Affidavit, at paras. 25 and 30. Motion Record of the ONA Tab 2.**

## PART II – FACTS

5. The facts with respect to this Motion are more fully set out in the Affidavit of Marie Kelly (the “**Kelly Affidavit**”), sworn on July 25, 2016. Capitalized terms used in this factum and not otherwise defined have the same meanings as set out in the Kelly Affidavit.

### ONA

6. ONA is a trade union and the certified bargaining agent for approximately 62,000 registered nurses working in the healthcare sector in the Province of Ontario. ONA is the certified bargaining agent for and party to collective agreements with VON Ontario.

**Kelly Affidavit, at para. 4. Motion Record of the ONA Tab 2.**

7. ONA currently represents approximately 292 active employees of VON Ontario. ONA members are not employed by VON Canada or any of the other VON entities and ONA does not have any collective agreements with these other VON entities.

**Kelly Affidavit, at para. 5. Motion Record of the ONA Tab 2.**

### THE VON CANADA PENSION PLAN

8. The VON Canada Pension Plan is a multi-jurisdictional, defined benefit, single-employer pension plan (“**SEPP**”) registered in Ontario. Membership of the VON Canada Pension Plan is not confined to employees and/or former employees of the Applicants. As of June 1, 2015, there are approximately 5,900 members of the VON Canada Pension Plan including 2,945 active members. The majority of these members are employed or were formerly employed by VON Ontario and VON Nova Scotia (in the approximate amounts of 3,300 members and 1,500 members, respectively).

**Affidavit of Jo-Anne Poirier sworn May 30, 2016, (the “Poirier Affidavit”)  
at paras. 14 and 18. Motion Record of the Applicants Tab 2.**

**Kelly Affidavit, at paras. 7-8. Motion Record of the ONA Tab 2.**

9. The most recent valuations of the VON Canada Pension Plan reflect that it is in a wind-up deficit position. Estimates as of January 1, 2016 are said to reveal a wind-up deficiency of approximately \$20 million or 6% of the total assets of the VON Canada Pension Plan.

**Kelly Affidavit, at para. 19. Motion Record of the ONA Tab 2.**

10. Since the Filing Date, the CCAA proceedings and corresponding stays in respect of the Applicants have been extended to November 25, 2016. No formal plan or proposal concerning a compromise or arrangement with the Applicants' creditors has yet been put forward and it remains a possibility that VON Canada, the administrator of the VON Canada Pension Plan, will be liquidated under the CCAA and / or assigned into bankruptcy under the *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3.

**Kelly Affidavit, at para. 16. Motion Record of the ONA Tab 2.**

11. The Applicants as part of these CCAA proceedings, previously proposed a restructuring of the VON Canada Pension Plan (the "**Partial Wind-up Restructuring**"), which would have:

- (a) divided members of the VON Canada Pension Plan into different categories depending upon their specific situations, effectively into three groups – (i) members who are or were employed by VON Canada, VON Ontario and VON Nova Scotia, (ii) members employed by VON Canada but terminated by VON Canada, and (iii) members who were terminated by VON East and VON West ("**VON East and VON West Terminated Members**");
- (b) split the pension plan assets between the assets relating to the VON East and VON West Terminated Members and the assets relating to the balance of the plan membership;
- (c) determined aggregate wind-up liabilities for the VON East and VON West Terminated Members;
- (d) provided that the VON Canada Pension Plan would be partially wound-up in respect of the VON East and VON West Terminating Members and that the benefits of VON East and VON West Terminating Members would be reduced to reflect the wind-up funding deficiency existing in the VON Canada Pension Plan; and,
- (e) provided for the required regulatory applications and implementing steps.

**Kelly Affidavit, at para. 21. Motion Record of the ONA Tab 2.**

12. In the face of opposition by certain stakeholders, including the Superintendent of Financial Services for the Province of Ontario (the "**Superintendent**"), to the Partial Wind-up Restructuring on the basis that a partial wind-up of a pension plan is not allowed under certain applicable provincial pension

legislation, the Applicants withdrew their motion for approval of the Partial Wind-up Restructuring on August 8, 2016.

**Kelly Affidavit, at paras. 27-28. Motion Record of the ONA Tab 2.**

### **THE TRANSFER RESTRUCTURING**

13. If sanctioned by the Court, the Transfer Restructuring will proceed by way of an application under section 81 of the *PBA*, or analogous provisions in other provinces to the extent applicable. This application will provide for a transfer of assets and liabilities from the VON Canada Pension Plan to a new pension plan (the “**New VON Pension Plan**”) to be established in respect of the pension entitlements of current / former employees of VON Ontario, VON Nova Scotia (to the extent such members elect to participate), and VON Canada (to the extent such members elect to participate and subject to the outcome for VON Canada in its CCAA proceedings) (collectively, the “**Transferring Pension Claimants**”). VON Ontario will serve as administrator with respect to the New VON Pension Plan.

**Kelly Affidavit, at para. 25. Motion Record of the ONA Tab 2.**

14. Subject to the views of other members and to the outcome for VON Canada in its CCAA proceedings, the New VON Pension Plan would provide benefit continuity and continuing benefit accruals on substantially the same terms as the existing plan, for employees and former employees of VON Ontario, VON Nova Scotia and potentially VON Canada.

**Kelly Affidavit, at para. 25. Motion Record of the ONA Tab 2.**

15. The benefits and entitlements of those former employees of VON East and VON West who are members in the VON Canada Pension Plan would be dealt with following the transfer of the appropriate assets and liabilities of the Transferring Pension Claimants to the New VON Pension Plan, probably by a full wind-up of the VON Canada Pension Plan after transfer of the assets and liabilities in respect of the Transferring Pension Claimants.

**Kelly Affidavit, at para. 26. Motion Record of the ONA Tab 2.**

### **PART III - ISSUES**

16. The issues to be determined by this Court are:

- (a) Should this Court authorize and direct VON Canada to apply for approval to transfer assets and liabilities under section 81 of the PBA or analogous provisions in other provinces to the extent applicable, from the VON Canada Pension Plan to the New VON Pension Plan?; and
- (b) Are multiple participating employers in a SEPP jointly and severally liable for pension solvency deficiencies or funding shortfalls?

#### **PART IV – LAW AND ARGUMENT**

### **A. VON CANADA SHOULD BE ORDERED TO APPLY FOR APPROVAL TO IMPLEMENT THE TRANSFER RESTRUCTURING**

#### **I. The Transfer Restructuring is Consistent with the Purpose and Policy of CCAA**

17. The CCAA is remedial legislation, designed to “permit the debtor to continue to carry on business, and, where possible, avoid the social and economic cost of liquidating its assets”. A hallmark of CCAA proceedings, is their “flexibility and creativity” to ensure this underlying objective is met.

*Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at paras. 15, 19 and 58-59, Brief of Authorities of the ONA, Tab 11 [“*Century Services*”].

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652 at paras. 43-44, aff’d 2008 ONCA 587, Brief of Authorities of the ONA, Tab 1.

*Nortel Networks Corporation (Re)*, 2015 ONCA 681 at para. 41, Brief of Authorities of the ONA, Tab 8.

18. Section 11 of the CCAA is the conduit to this “flexibility and creativity”, providing a CCAA Court with the broad and liberal power to, subject to the restrictions set out in the CCAA itself, make any Order that it considers appropriate in the circumstances.

CCAA, s. 11.

*Re Sulphur Corporation of Canada Ltd.*, 2002 ABQB 682, AJ No 918 (OL) at para 35 [cited to AJ], Brief of Authorities of the ONA, Tab 9.

*Century Services* at paras. 68, Brief of Authorities of the ONA, Tab 11.



19. Here, there are no restrictions in the CCAA that would prevent the Court from granting the requested relief with respect to the Transfer Restructuring. CCAA Courts are routinely called upon to address matters concerning a debtor's pension plan.

*In the Matter of a Plan or Compromise or Arrangement of Grant Forrest Products Inc. et al. (CV-09-8247-00CL)*, order granted August 26, 2011, Brief of Authorities of the ONA, Tab 4.

*Nortel Networks Corp., Re* 2010 ONSC 1708 (S.C.J. [Commercial List]), Brief of Authorities of the ONA, Tab 7.

*Canwest Global Communications Corp., Re* 2009 CarswellOnt 7169 [S.C.J. Commercial List]) at paras, 12-13 and 42. Brief of Authorities of the ONA, Tab 2.

*Essar Steel Algoma Inc., Re* 2016 ONSC 595 [S.C.J. Commercial List]. at paras. 27-28. Brief of Authorities of the ONA, Tab 3.

20. Whether an Order sought under the CCAA is appropriate in any given scenario is to be determined by reviewing whether the Order sought advances the policy objectives underlying the CCAA, including as highlighted above to facilitate the restructuring of a debtor while avoiding the social and economic losses resulting from the liquidation of an insolvent company.

*Century Services* at para. 70, Brief of Authorities of the ONA, Tab 11.

21. Contrary to the spirit of the CCAA, the Transferring Pension Claimants will be faced with preventable economic loss if the Transfer Restructuring is not implemented and VON Canada is unable to successfully make a plan of compromise or arrangement with its creditors. Section 17.2 of the VON Canada Pension Plan provides that the plan shall be automatically discontinued in the event that VON Canada is assigned into bankruptcy under the BIA and / or liquidated under the CCAA. In that regard, section 17.2 of the VON Canada Pension Plan provides:

#### *17.2 PLAN WIND-UP*

The *Plan* may be discontinued by *VON* at any time and shall be automatically discontinued in the event of bankruptcy, liquidation or a sale of assets by *VON*.

**Amended and Restated VON Canada Pension Plan, Effective January 1 2014, at section 17.2, Poirier Affidavit, Exhibit "F". Motion Record of the Applicants, Tab F.**

22. Unintended consequences of CCAA proceedings must be avoided wherever appropriate and possible. With minimal prejudice to other stakeholders in these proceedings, the Transfer Restructuring



will safeguard the pension benefits and accrued entitlements of the Transferring Pension Claimants and shelter the Transferring Pension Claimants from costs associated with a potential wind-up of the VON Canada Pension Plan or the replacement of VON Canada as administrator.

## **II. The Transfer Restructuring Is Consistent with Provincial Pension Legislation**

23. In the ordinary course, outside of the context of CCAA proceedings, the applicable pension legislation in the provinces that the VON entities operate, with the exception of Manitoba (where such an approach is not explicitly barred) and PEI (which as of the date hereof does not have provincial pension legislation) specifically contemplate that the administrator of a defined benefit pension plan may transfer assets to a successor pension plan subject to certain conditions being met.

*PBA, s. 81.*

*Pension Benefits Act, 1997, SNL 1996 c.P-4.01 s. 58.*

*Pension Benefits Act, SNB 1987, SNL 1996 c.P-4.01 s. 70.*

*Pension Benefits Act, 1992, SS 1992, c P-6.001 s. 20.*

*Pension Benefits Standards Act, SBC 2012, c 30, s. 72.*

*Employment Pension Plans Act, SA 2012, c E-8.1 s. 74.*

*Pension Benefits Act, SNS 2011, c 41 ss. 106.*

*Pension Benefits Act, RSM 1987, c P32.*

24. In Ontario, where the VON Canada Pension Plan is registered, the only requirement in respect of a transfer of assets and liabilities between defined benefit pension plans is that the administrator must obtain the consent of the Superintendent prior to the transfer. In accordance with section 81(5) of the PBA, the Superintendent shall approve a transfer of assets in Ontario if the follow criteria are satisfied:

- (a) The administrators of the two pension plans must have agreed upon the manner of determining the amount of assets to be transferred, and the applicant must give the Superintendent notice of their agreement;
- (b) If the pension benefits and other benefits to be provided under the successor pension plan for the transferred members are not the same as the pension benefits and other benefits provided for them under the original pension plan, the commuted value of the benefits

provided for the transferred members under the successor pension plan must not be less than the commuted value of the benefits provided for them under the original pension plan; and

- (c) If the original pension plan has a surplus as of the effective date of the transfer of assets, the amount of assets to be transferred must include a portion of the surplus determined in accordance with the regulations.

**PBA, s. 81(5).**

**Poirier Affidavit, at para. 14. Motion Record of the Applicants Tab 2.**

- 25. In the context of the Transfer Restructuring, the criteria above can be reasonably met, as:
  - (a) the Superintendent has been provided notice with respect to this motion and will be served notice of any transfer application by VON Canada in keeping with the terms of the Transfer Restructuring Order;
  - (b) the pension benefits and other benefits to be provided for under the New VON Pension Plan will be substantially the same as the pension benefits and other benefits provided for under the VON Canada Pension Plan;
  - (c) any issues with respect to the commuted value of the transferred benefits may be addressed; and
  - (d) the VON Canada Pension Plan is not in a surplus position.

**Kelly Affidavit, at paras. 19 and 25. Motion Record of the ONA Tab 2.**

**Draft Transfer Restructuring Order. Appendix "A", at para. (e). Motion Record of the ONA Tab 1A.**

**B. MULTIPLE PARTICIPATING EMPLOYERS ARE NOT JOINTLY AND SEVERALLY LIABLE FOR PENSION LIABILITIES**

- 26. The fundamental purpose of provincial pension legislation is to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system.

*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*  
2004 SCC 54, at para. 14. Brief of Authorities of the ONA, Tab 6.

27. Section 5.3 of the VON Canada Pension outlines the contribution requirements of the various employers participating in the VON Canada Pension Plan. It is clear based on the wording of this section that VON Ontario is only liable for its proportionate share of any solvency deficiency or funding shortfall that may arise in connection with the VON Canada Pension Plan, to be determined in accordance with the ratio of its annual service contributions to the total annual service contributions of all participating employers in the plan.

### 5.3 VON CONTRIBUTIONS

Subject to the requirements of the *Pension Benefits Act* and of the *Income Tax Act*, VON, along with participating provincial and local branches authorized to carry on the objects of VON, shall remit to the Plan amounts equal to contributions remitted by members in accordance with clauses 5.2.1(a), (b), (c) and (d). In addition VON, along with participating provincial and local branches authorized to carry on the objects of VON, shall remit contributions which in the opinion of the Actuary are required to amortize any unfunded liability or solvency deficiency, determined in accordance with the provisions of the *Pension Benefits Act*, that may arise from time to time. VON, along with each participating provincial and local branches shall pay a proportionate share of such special payment contributions based on the ratio of their annual current service contributions to the total annual current service contribution of VON and the participating provincial and local branches. Emphasis added].

**Amended and Restated VON Canada Pension Plan, Effective January 1 2014, at section 5.3, Motion Record of the Applicants, Tab F.**

28. Sections 55(2) and 75(1) of the PBA and sections 4(2) and 31(1) of the General Regulation to the PBA impose an obligation on an "employer" to ensure that a pension plan is adequately funded, both on an ongoing basis and on the wind-up of a plan. Section 1(1) of the PBA defines "employer" to mean "the person or persons from whom or the organization from which the member or former members receives or received remuneration to which the pension plan is related". In accordance with this definition, the payment of remuneration is the definitive factor in identifying who is an "employer" under the PBA and in turn allocating liability in a SEPP with multiple participating employers.

**PBA, ss. 1(1), 55(2), and 75(1).**

**Regulations to the PBA, R.R.O. 1990, Reg. 909, at ss. 4(2) and 31(1).**

*Victoria Order of Nurses for Canada v. Ontario (Superintendent of Financial Services)*, 2009 ONFST 11, at paras. 40-45, Brief of Authorities of the ONA, Tab 12 [*“Victoria Order of Nurses v. Ontario”*].

*St. Mary's Paper Inc., Re*, [1994] O.J. No. 1426, 116 D.L.R. (4th) 448 (ONCA), at paras. 30-31, Brief of Authorities of the ONA, Tab 10.

*Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S.T.), at para 32, Brief of Authorities of the ONA, Tab 5.

29. In the context of a prior restructuring of the VON Canada Pension Plan, in *Victoria Order of Nurses for Canada v. Ontario*, VON Canada sought an Order declaring that it was not liable for funding any deficiency accrued in respect of employees of certain insolvent branches (the “**Insolvent Branches**”). The Financial Services Tribunal, in granting such an Order found that as VON Canada had not historically, and was not obliged to, remunerate payment to these employees, it was not responsible for any deficiency in respect of these members of the plan on a joint and several basis with its “employer”, despite its status as a participating employer in the SEPP. A “spread the pain approach” is not to be applied in a multiple participating employer SEPP and plan members are not able to count on the security of all participating employers in respect of pension liabilities.

*Victoria Order of Nurses v. Ontario*, at paras. 31-45, 81-91, Brief of Authorities of the ONA, Tab 12.

30. An Order declaring that VON Ontario is not jointly and severally liable for funding any solvency deficiency or funding shortfall in respect of VON East, VON West, VON Canada, or VON Nova Scotia is appropriate in the circumstances as:

- (a) The VON Canada Pension Plan limits VON Ontario’s liability for such amounts to its proportionate share to be determined in accordance with the ratio of its annual service contributions to the total annual service contributions of all of the participating employers in the plan;
- (b) VON East, VON West, VON Canada, and VON Nova Scotia are distinct and separate entities from VON Ontario. These entities are each separately registered non profit corporations with their own employer numbers issued by the CRA;
- (c) VON Ontario was not responsible for and did not remunerate payment to any employees or former employees of VON East, VON West, VON Canada, or VON Nova Scotia. VON East, VON West, VON Canada, and VON Nova Scotia paid all remuneration to their respective employees independent of VON Ontario; and

- (d) VON East, VON West, VON Canada, and VON Nova Scotia were each solely responsible for all required contributions to the VON Canada Pension Plan in respect of their employees and former employees.

**Kelly Affidavit, at paras. 14-15. Motion Record of the ONA Tab 2.**

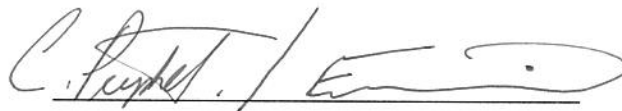
**Poirier Affidavit, at para. 10, Motion Record of the Applicants Tab 2.**

**Amended and Restated VON Canada Pension Plan, Effective January 1 2014, at section 5.3, Motion Record of the Applicants, Tab F.**

### **PART V – ORDER REQUESTED**

31. For the reasons set out above, the ONA respectfully requests that this Honourable Court issue:
- (a) The Transfer Restructuring Order, authorizing and directing VON Canada to take certain steps pursuant to section 81 of PBA or analogous provisions in other provinces to the extent applicable, to restructure the VON Canada Pension Plan; and
  - (b) an Order declaring that VON Ontario is not jointly and severally liable for funding any solvency deficiency or funding shortfall that has or may arise as a result of VON East, VON West, VON Canada, or VON Nova Scotia failing to meet their contribution obligations under the VON Canada Pension Plan.

**ALL OF WHICH IS RESPECTIVELY SUBMITTED** this 23<sup>rd</sup> day of August, 2016.



**GOWLING WLG Canada LLP**

Barristers and Solicitors

1 First Canadian Place, 100 King Street West, Suite 1600,  
Toronto, ON M5X 1G5

**Clifton P. Prophet / Frank Lamie**

**(LSUC #34845K / 54035S)**

Tel: (416) 862-3509 / (416) 862-3609

Fax: (416) 862-7661

**Lawyers for the Ontario Nurses' Association**

## SCHEDULE "A"

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 2652, aff'd 2008 ONCA 587.
2. *Canwest Global Communications Corp., Re.* 2009 CarswellOnt 7169 ([S.C.J. Commercial List]).
3. *Essar Steel Algoma Inc., Re.* 2016 ONSC 595 ([S.C.J. Commercial List]).
4. *In the Matter of a Plan or Compromise or Arrangement of Grant Forrest Products Inc. et al.* (CV-09-8247-00CL), Order granted August 26, 2011.
5. *Locals 1144 & 1590 v. Ontario (Superintendent of Pensions)* (1998), 20 C.C.P.B. 312 (F.S.T.).
6. *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* 2004 SCC 54.
7. *Nortel Networks Corp., (Re)* 2010 ONSC 1708 (S.C.J. [Commercial List]).
8. *Nortel Networks Corporation (Re)*, 2015 ONCA 681.
9. *Re Sulphur Corporation of Canada Ltd.*, 2002 ABQB 682, AJ No 918 (OL) [cited to AJ].
10. *St. Mary's Paper Inc., Re.*, [1994] O.J. No. 1426, 116 D.L.R. (4th) 448 (ONCA).
11. *Ted Leroy Trucking [Century Services] Ltd., Re.*, 2010 SCC 60.
12. *Victoria Order of Nurses for Canada v. Ontario (Superintendent of Financial Services)*, 2009 ONFST 11.

## SCHEDULE "B"

### Companies' Creditors Arrangement Act R.S.C., 1985, c. C-36

#### **11. General power of court**

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

### Pension Benefits Act (Ontario) R.S.O. 1990, c. P.8

#### **1(1). Definitions**

In this Act,

"employer" means, in relation to a member, former member or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member or retired member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning;

#### **55(2). Payment by employers, etc.**

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

- (a) to the pension fund; or
- (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

#### **75(1). Liability of employer on wind up**

Where a pension plan is wound up, the employer shall pay into the pension fund,

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
  - i. the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
  - ii. the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
  - iii. the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,



exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

**75(2). Payment**

The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

**75(3). Exception, jointly sponsored pension plans**

This section does not apply with respect to jointly sponsored pension plans.

**75(4) Same**

This section does not apply with respect to a single employer pension plan that has transferred assets under section 80.4 to a jointly sponsored pension plan.

**81(1) Adoption of successor pension plan**

Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original pension plan, the original pension plan shall be deemed not to be wound up and the successor pension plan shall be deemed to be a continuation of the original pension plan.

**81(1.1) Same, multi-employer pension plans**

Where a multi-employer pension plan established pursuant to a collective agreement or trust agreement is amended to be a successor to an existing multi-employer pension plan established pursuant to a collective agreement or trust agreement and the participating employers cease to make contributions to the original multi-employer pension plan, the original pension plan shall be deemed not to be wound up and the successor pension plan shall be deemed to be a continuation of the original pension plan.

**81(2) Continuation of benefits**

The benefits under the original pension plan in respect of employment and membership before the establishment of the successor pension plan are deemed to be benefits under the successor pension plan.

**81(2.1) Same**

Subsection (2) does not require the successor pension plan to provide the same pension benefits and other benefits for the transferred members that were provided for them under the original pension plan.

**81(3) Application of subs. (2)**

Subsection (2) applies whether or not the assets and liabilities of the original pension plan are consolidated with those of the successor pension plan.

#### **81(4) Requirement for Superintendent's consent**

The Superintendent's prior consent is required to authorize the transfer of assets from the original pension plan to the successor pension plan.

#### **81(5) Application**

The administrator of either pension plan or such other persons as may be prescribed may apply for the Superintendent's consent to the transfer of assets from the original pension plan to the successor pension plan.

#### **81(6) Statutory criteria for Superintendent's consent**

The Superintendent shall consent to the transfer of assets in accordance with the application if all of the following criteria, and such other criteria as may be prescribed, are satisfied:

1. The administrators of the two pension plans must have agreed upon the manner of determining the amount of assets to be transferred, and the applicant must give the Superintendent notice of their agreement.
2. If the pension benefits and other benefits to be provided under the successor pension plan for the transferred members are not the same as the pension benefits and other benefits provided for them under the original pension plan, the commuted value of the benefits provided for the transferred members under the successor pension plan must not be less than the commuted value of the benefits provided for them under the original pension plan, as adjusted for any payments made from the original pension plan to a prescribed retirement savings arrangement or directly to the transferred members in connection with the transfer of the assets.
3. The commuted value of the benefits referred to in paragraph 2 is determined as of the effective date of the transfer of the assets.
4. If the original pension plan has a surplus as of the effective date of the transfer of assets, the amount of assets to be transferred must include a portion of the surplus determined in accordance with the regulations.

#### **81(7) Waiver of conditions**

The Superintendent may waive one or more of the conditions referred to in subsections 79.2(5) and (6) in the prescribed circumstances.

#### **General Regulation to the Pension Benefit Act, R.R.O. 1990, Reg. 909**

#### **4. Payments — General**

(2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan or, if a person or entity is required to make contributions under the pension plan on behalf of the employer, that person or entity and, if applicable, the members of the pension plan or their representative shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

- (a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
- (b) all contributions required to pay the normal cost;
- (c) all special payments determined in accordance with section 5;
- (c.1) all special payments determined in accordance with sections 5.6, 5.6.1 and 5.6.2; and
- (d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.

### **31. Liability on Wind up**

- (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund
- (2) The special payments under subsection (1) for each year shall be at least equal to the greater of,
  - (a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and
  - (b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c).
- (3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

### **Pension Benefits Act, 1997, SNL 1996 c.P-4.01 s. 58.**

#### **58. Transfer of plan assets**

A transfer of assets of a pension plan shall not be made from the pension fund of the plan to the pension fund of another pension plan unless

- (a) the contract or trust agreement of the receiving fundholder is filed with the superintendent and the receiving plan is registered under this Act; and
- (b) the superintendent has approved the transfer in writing.

### **Pension Benefits Act, SNB 1987, SNL 1996 c.P-4.01 ss. 70**

#### **70. New Plans**

- (1) A pension plan shall not be wound up for the reason only that a new pension plan is established and the employer has ceased to make contributions to the original pension plan.
- 2) The benefits under the original pension plan in respect of employment before the establishment of the new pension plan shall be deemed to be benefits under the new pension plan.
- (3) Subsection (2) applies whether or not the assets and liabilities of the original pension plan are consolidated with those of the new pension plan.

(4) No transfer of assets shall be made from the pension fund of the original pension plan to the pension fund of the new pension plan without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan and of any other person entitled to benefits or payments under the plan or that does not meet the prescribed requirements and qualifications.

**Pension Benefits Act, 1992, SS 1992, c P-6.001 s. 20.**

**20. Transfer agreements**

(1) In this section, "transfer agreement" means an agreement between the administrators of two or more plans respecting the transfer between them of moneys or benefits with respect to individual members or former members.

2) No administrator shall enter into, or transfer moneys or benefits pursuant to, a transfer agreement that contains any provision relating to a benefit that a plan is prohibited by this Act from containing.

**Pension Benefits Standards Act, SBC 2012, c 30, s. 72.**

**72. Restrictions on transfer of assets**

(1) Assets of a pension plan must not be transferred from the plan to another plan unless

- (a) the transfer is made under section 57(4) or 79(1) or (3), under Division 7 of this Part or under Part 9,
- (b) the transfer is effected under an agreement referred to in section 35(6)(c), or
- (c) the written consent of the superintendent is obtained.

(2) Assets of a pension plan must not be transferred from one fundholder of the plan to another fundholder of the plan, other than by way of providing benefits under the plan, unless

- (a) the insurance contract, under section 50(2)(a), or trust agreement, under section 50(2)(b), of the fundholder who is receiving the transfer is filed and the plan and any relevant amendment providing for the transfer are registered, or
- (b) the written consent of the superintendent is obtained.

(3) Despite subsection (1), an administrator of a pension plan must not, without the consent of, or without being directed to do so by, the superintendent, transfer assets out of the pension fund under section 79(1) or (3), under Division 7 of this Part or under Part 9 if the transfer would impair the solvency of the plan.

(4) The superintendent may, in writing, consent to or direct a transfer referred to in subsection (3) on terms and conditions the superintendent considers appropriate in the circumstances.

**Employment Pension Plans Act, SA 2012, c E-8.1 s. 74.**

#### **74. Restrictions on transfer of assets**

- (1) Assets of a pension plan must not be transferred from the plan to another plan unless
  - (a) the transfer is made under section 57(4) or 89(1) or (3), under Division 8 or under Part 9,
  - (b) the transfer is effected under an agreement referred to in section 35(6)(c), or
  - (c) the written consent of the Superintendent is obtained.
- (2) Assets of a pension plan must not be transferred from one fundholder of the plan to another fundholder of the plan, other than by way of providing benefits under the plan, unless
  - (a) the insurance contract under section 50(2)(a) or trust agreement under section 50(2)(b) of the fundholder who is receiving the transfer is filed and the plan and any relevant amendment providing for the transfer are registered, or
  - (b) the written consent of the Superintendent is obtained.
- (3) Despite subsection (1), an administrator of a pension plan must not, without the consent of, or without being directed to do so by, the Superintendent, transfer assets out of the pension fund under section 89(1) or (3), under Division 8 or under Part 9 if the transfer would impair the solvency of the plan.
- (4) The Superintendent may, in writing, consent to or direct a transfer referred to in subsection (3) on terms and conditions the Superintendent considers appropriate in the circumstances.

#### **Pension Benefits Act SNS 2011, c 41**

#### **106. Prohibition on asset transfers**

- (1) No person shall transfer assets between pension plans if the transferred assets relate to the provision of defined benefits unless
  - (a) the transfer is authorized under Section 32, 61, 108, 109 or 110; or
  - (b) the transfer satisfies the prescribed requirements and the Superintendent has consented in advance to the transfer.
- (2) No person shall transfer assets between pension plans that provide only defined contribution benefits unless the transfer satisfies the prescribed requirements and the Superintendent consents to the transfer.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN  
ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION  
Applicants

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
**(PROCEEDING COMMENCED AT TORONTO)**

**FACTUM OF THE**  
**ONTARIO NURSES' ASSOCIATION**  
**(Motion Returnable August 30, 2016)**

**GOWLING WLG (CANADA) LLP**  
Barristers & Solicitors  
1 First Canadian Place,  
100 King Street West, Suite 1600  
Toronto ON M5X 1G5

**Clifton P. Prophet (#34845K)**  
Tel: 416-862-3509  
Fax: 416-862-7661

**Frank Lamie (#54035S)**  
Tel: 416-862-3609  
Fax: 416-862-7661

**Lawyers for the Ontario Nurses' Association**