

**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

Applicants

FACTUM OF VICTORIAN ORDER OF NURSES FOR CANADA

(Pension Plan Restructuring)

June 30, 2016

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FACTUM OF VICTORIAN ORDER OF NURSES FOR CANADA

PART I - OVERVIEW

1. Prior to the commencement of this proceeding several separate legal entities provided home or community care services under the Victorian Order Of Nurses name to clients in Canada.
2. The four primary operating entities providing such services were:
 - (a) Victorian Order Of Nurses For Canada – Eastern Region (“**VON East**”);
 - (b) Victorian Order Of Nurses For Canada – Western Region (“**VON West**”);

(c) Victorian Order Of Nurses For Canada – Ontario Branch (“**VON Ontario**”); and

(d) Victorian Order Of Nurses For Canada Nova Scotia Branch (“**VON Nova Scotia**”)

(collectively, the “**VON Operating Entities**”).

3. A fifth entity, Victorian Order Of Nurses For Canada (“**VON Canada**”), does not provide home or community care services, but has provided, and continues to provide, certain overhead functions to the VON Operating Entities.
4. VON East and VON West were not financially viable. A key goal of these proceedings under the *Companies’ Creditors Arrangement Act* (“**CCAA**”) has been to wind down the VON East and VON West operations. VON East and VON West have now been shut down and all VON East and VON West employees have been terminated.
5. Employees and former employees of the VON Operating Entities and VON Canada are members of the VON Canada Pension Plan (the “**Pension Plan**”), which is a defined benefit plan. The most recent estimates suggest the wind-up deficiency in the plan is approximately 6% of total plan assets. VON Canada is the sponsor and administrator of the Pension Plan.
6. As a result of the shut-down of VON East and VON West, neither VON East nor VON West nor their former employees are continuing to contribute to the Pension Plan.

7. Unless steps are taken to remove the VON East and VON West members from the Pension Plan, VON Ontario, VON Nova Scotia and VON Canada could be caused to effectively subsidize VON East's and VON West's participation in the Pension Plan going forward, including their share of any deficits.
8. In order to achieve the most equitable result for all Pension Plan members and in furtherance of the overall restructuring goals in this proceeding, VON Canada must move forward with a Pension Plan restructuring that in simple terms:
 - (a) segregates all of the assets and liabilities attributable to Pension Plan members who were employed by VON East and VON West from the remaining assets of the Pension Plan; and
 - (b) makes those assets available to pay liabilities to Pension Plan members who were employed by VON East and VON West.
9. In VON Canada's view, no Pension Plan member is prejudiced by this approach. Each Pension Plan member retains their rateable share of the assets of the Pension Plan at this time and their rateable share of any wind-up deficiency.
10. VON Canada requests that the Court approve this integral step in the overall restructuring process for VON Canada and the VON Operating Entities.

PART II - THE FACTS

A. VON East and VON West

11. Prior to 2000, over 60 separately incorporated local entities provided health care under the Victorian Order Of Nurses name throughout Canada. In 2000,

VON Canada began consolidating all of these local entities through an initiative known as "One VON". As a result, the operations and employees and certain assets and liabilities of these local entities were transferred to the applicable VON Operating Entity that would service the broader geographic region in which the former local entity operated. As part of the One VON initiative, many of the overhead functions of the various local entities were consolidated at VON Canada and VON Canada provides those overhead functions today.¹

12. Of the regional operating entities, VON East and VON West were by far the smallest.²
13. VON East and VON West have ceased operating at this time. When they did operate, their operations were distinct and separate from the other entities in the VON group:
 - (a) VON East and VON West paid all remuneration to their respective employees independent of the other entities in the VON Group. At no time did VON Canada, VON Ontario or VON Nova Scotia pay any such remuneration;
 - (b) VON East and VON West each had their own employer number as issued by Canada Revenue Agency ("**CRA**");
 - (c) VON East and VON West also made all required contributions to the Pension Plan by matching the contributions of their respective employees who were members in the Pension Plan;

¹ Affidavit of Jo-Anne Poirier, sworn May 30, 2016 (the "**Poirier Affidavit**") at para. 9.

² Poirier Affidavit at para. 29 and 31.

(d) VON East and VON West each received revenues directly from government funding agencies, private contracts and/or donations from funders in their regions and used those revenues to fund their activities; and

(e) VON East and VON West were also the counterparties to the various leases of real property that they used in connection with carrying on their businesses and owned or leased the assets that were used in the performance of their employees' duties.³

14. While VON Canada did provide certain overhead functions to VON East and VON West, VON East and VON West each paid VON Canada fees to cover the costs of those services.⁴

15. VON East and VON West were entirely shut down shortly after the commencement of this proceeding on November 25, 2015 (the "**Filing Date**"). All employees of VON East and VON West were terminated on the Filing Date, though some personnel were re-engaged on a contract basis to perform critical wind down functions.⁵

B. The Pension Plan

16. The Pension Plan is a defined benefit pension plan, registered in Ontario. All of the VON Operating Entities and VON Canada are employers under the Pension

³ Poirier Affidavit at para. 10.

⁴ Poirier Affidavit at para. 11.

⁵ Poirier Affidavit at para. 12.

Plan. Their employees and former employees are members of the Pension Plan.⁶

17. Subject to the terms and limitations contained in the Pension Plan, active members of the Pension Plan currently contribute, by payroll deduction.⁷
18. Subject to the terms and limitations contained in the Pension Plan, the employer of a particular Pension Plan member shall match the member's contribution.⁸
19. Each employer must also pay its proportionate share of contributions which in the opinion of the Pension Plan actuary are required to amortize any unfunded liability or solvency deficiency determined in accordance with the provisions of the *Pension Benefits Act* (Ontario) that may arise from time to time.⁹
20. If any obligation to amortize any solvency deficiency were to exist and a particular employer under the Pension Plan ceased to make contributions to the Pension Plan, the inevitable result would be that a portion of the contributions of other employers and employees in the Pension Plan would go to fund that non-contributing employer's share of the solvency deficiency.
21. The Pension Plan has over 5000 active members that are or were employed by VON East, VON West, VON Canada, VON Nova Scotia, VON Ontario and

⁶ Poirier Affidavit at para. 14 and 18.

⁷ Poirier Affidavit at para. 22.

⁸ Poirier Affidavit at para. 23.

⁹ Poirier Affidavit at para. 23.

certain other participating employers. Approximately 550 of these members are former employees of VON East and VON West.¹⁰

22. Approximately 75% of Pension Plan members receive less than \$9,000 annually from the Pension Plan.¹¹

C. Pension Plan Funding

23. The most recent actuarial valuation report for funding purposes regarding the Pension Plan, as of June 1, 2015, showed that the estimated wind-up deficiency for the Pension Plan was \$15 million. The most recent estimates suggest that as of January 1, 2016, the wind-up deficiency was \$20 million. This represents a deficit of approximately 6% of total assets of the Pension Plan.¹²

24. The portion of the wind-up deficit attributable to VON East and VON West was estimated to be approximately \$2 million as of January 1, 2016.¹³ This amounts, on average, to approximately \$3,600 per member.

25. The wind-up deficit fluctuates from time to time based upon a number of factors outside of the control of VON Canada and the VON Operating Entities including, without limitation, applicable interest rates and financial market conditions.¹⁴

¹⁰ Poirier Affidavit at para. 29.

¹¹ Poirier Affidavit at para. 30.

¹² Poirier Affidavit at para. 33.

¹³ Poirier Affidavit at para. 42.

¹⁴ Poirier Affidavit at para. 34.

26. No portion of the current wind-up deficit is attributable to a failure to make required ordinary course payments.¹⁵

D. Restructuring of the VON East and VON West Portions of the Pension Plan

27. As a result of the shutdown of operations of VON East and VON West, neither VON East nor VON West will be in a position to make any contributions to the Pension Plan going forward. VON East and VON West contributed to the Pension Plan for service of their employees up to November 25, 2015.¹⁶

28. VON Canada has considered, with the assistance of its legal and pension advisors, options to most appropriately address the fact that former VON East and VON West employees have entitlements under the Pension Plan while: (i) VON East and VON West are no longer contributing to the Pension Plan; and (ii) as VON East and VON West no longer have employees, no such employees are contributing to the Pension Plan.¹⁷

29. The VON Canada board of directors, in consultation with VON Canada's advisors and the board's advisors, determined that the appropriate approach in the circumstances would be to implement a Pension Plan restructuring (the "**Pension Plan Restructuring**") whereby the assets and liabilities related to VON East and VON West members would be separated from the remainder of the Pension Plan and dealt with for the benefit of the VON East and VON West members. This approach would have the effect of segregating the VON East and VON West portions of the Pension Plan and would ensure that the

¹⁵ Poirier Affidavit at para. 36.

¹⁶ Poirier Affidavit at para. 38.

¹⁷ Poirier Affidavit at para. 39.

continuing VON Canada, VON Ontario and VON Nova Scotia entities do not subsidize Pension Plan costs that are properly payable by VON East or VON West.¹⁸

30. This proposed course of action was determined to treat the stakeholders of the various VON group entities as fairly as possible in the circumstances and is consistent with the overall restructuring goal of this proceeding, which is to separate the core VON Ontario and VON Nova Scotia operating entities and VON Canada from the assets and liabilities associated with the non-continuing entities. The proposed Pension Plan Restructuring achieves substantially the same result for VON East and VON West members as a full wind-up of the Pension Plan would at this time but avoids the additional cost and administrative complication of a wind-up of the entire Pension Plan. A full wind-up of the Pension Plan would provide no additional benefit to any stakeholder.¹⁹

31. As a result of the proposed Pension Plan restructuring:

(a) The Pension Plan benefits to over 5000 Pension Plan members that are employees or former employees of VON Canada, VON Nova Scotia and VON Ontario will continue to accrue and be paid in the ordinary course. These employers and their employees will continue to contribute to the Pension Plan. While the wind-up deficit that exists in the VON Ontario, VON Canada and VON Nova Scotia portions of the Pension Plan will remain in this portion of the Pension Plan, that wind-up deficit will not have crystallized as this portion of the Pension Plan will not be wound up.

¹⁸ Poirier Affidavit at para. 43.

¹⁹ Poirier Affidavit at para. 43.

(b) The approximately 460 members who are former employees of VON East and VON West in provinces where applicable law expressly provides for a partial wind-up of the Pension Plan will have their benefits reduced to reflect the wind-up deficit in their portion of the Pension Plan, which cannot continue as a going concern. No further contributions will be made to this portion of the Pension Plan by either VON East or VON West or their respective former employees.

(c) The approximately 85 members who are former employees of VON East and VON West in provinces where applicable law does not expressly contemplate a partial wind-up will be treated in a manner substantially the same as the members described in (b) above.²⁰

32. VON Canada expects the above process will require between 12 and 24 months to complete.²¹

33. It must be emphasized that under the Pension Plan Restructuring, VON East and VON West Pension Plan members would not absorb any more than their fair share of the current wind-up deficit. The remainder of that wind-up deficit will reside with VON Ontario, VON Nova Scotia and VON Canada. The only difference between the treatment of VON East and VON West and the treatment of VON Ontario, VON Nova Scotia and VON Canada is the crystallization of the VON East and VON West portion of the deficit at a fixed amount. The portion of the deficit attributable to VON Ontario, VON Nova

²⁰ Poirier Affidavit at para. 46.

²¹ Poirier Affidavit at para. 48.

Scotia and VON Canada may fluctuate upward or downward in the future, and there is no way to know whether an upward or downward fluctuation will occur.

PART III - ISSUES AND THE LAW

34. VON Canada's motion to approve the proposed Pension Plan Restructuring raises the following questions for the Court's consideration:

(a) Does the Court have jurisdiction to authorize and direct VON Canada to proceed with the proposed Pension Plan Restructuring?

(b) If so, is the order sought by VON Canada appropriate in the circumstances?

35. It is submitted that the Court does have jurisdiction to grant the Order sought by VON Canada and that such an Order is appropriate in this circumstance where a restructuring of the Pension Plan is an integral part of this CCAA restructuring process and is, in VON Canada's submission, the only equitable way to deal with two employers within the Pension Plan that are Applicants in this proceeding and have ceased operating. The proposed approach also minimizes disruption and cost for the Pension Plan as a whole by leaving the remainder of the Pension Plan intact.

36. VON Canada recognizes that the Pension Plan Restructuring crystallizes a wind-up deficit that currently exists for members who were former employees of VON East and VON West. VON Canada's proposed approach to the Pension Plan restructuring would be the same irrespective of the solvency position of the Pension Plan, which is a factor outside of VON Canada's control in this

case. It is necessary to remove VON East and VON West, as inactive entities, from the Pension Plan at this time to avoid the possibility of future subsidization by the other continuing entities. The current solvency position of the Pension Plan, and the impact of that solvency position on Pension Plan members, is not relevant to the decision that VON Canada has made in this case.

Jurisdiction Of The Court To Grant The Requested Order

37. Section 11 of the CCAA provides that:

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.²²

38. Section 11 provides very broad jurisdiction for the Court to grant orders that it considers appropriate in the circumstances.

39. Notice of this motion has been provided to all interested parties in this matter. All Pension Plan members were sent letters on multiple occasions advising that this motion was moving forward and advising of the steps to be taken to receive additional information about this motion. All unions that represent employees of any of the VON Operating Entities or VON Canada were notified of this motion. The Financial Services Commission of Ontario ("FSCO") was advised several months ago of the proposed Pension Plan Restructuring and has been served

²² *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended at s. 11.

with notice of this motion. All reasonable steps have been taken to ensure stakeholders have been informed of this motion.

40. The CCAA does not contain any restrictions that would prevent the court from granting the proposed order in this case.
41. This Court has, in prior cases, granted orders that it deemed appropriate in respect of the wind-up of a debtor company's pension plan. In *Grant Forest Products Inc. (Re)*²³ this Court granted an order that a debtor company was authorized to take steps required to initiate a wind-up of one of its pension plans.
42. The Court clearly has jurisdiction to grant the order approving the Pension Plan Restructuring, which has been sought on application by VON Canada, as Pension Plan administrator and as an interested party in this matter.

The Requested Order Should Be Granted

43. The broad jurisdiction provided to the Court under Section 11 must be exercised only where appropriate in the circumstances, as explained by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*:

Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA -- avoiding the social and economic losses

²³ *In the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc. et al.* (CV-09-8247-00CL), order granted August 26, 2011 at para. 2.

resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.²⁴

The Purpose Of The Proposed Order

44. The purpose of the proposed order is to resolve a clear and valid concern for the future of the Pension Plan. This is an appropriate purpose in the circumstances:

(a) The Pension Plan Restructuring will further the overall efforts to restructure the remaining operations of the VON Operating Entities by eliminating the potential exposure of those entities to additional liabilities and expenditures in connection with the VON East and VON West portions of the Pension Plan.

(b) If this restructuring process concludes without resolving matters in respect of the VON East and VON West portions of the Pension Plan, the success of this restructuring proceeding would be materially impaired. This restructuring was undertaken largely to segregate the assets and liabilities of VON East and VON West so that the core remaining operations of VON Nova Scotia and VON Ontario and VON Canada could move forward without overhanging legacy issues and so that the assets available to VON East and VON West would be distributed in an orderly manner to creditors, including

²⁴ *Century Services Inc. v. Canada (Attorney General)* [2010], 3 S.C.R. 379 at para. 70.

pensioners. If the proposed order is not granted, this key objective of the restructuring proceeding will not be achieved.

(c) Completing this process within the CCAA proceeding is also essential because any claims that may arise in connection with the Pension Plan Restructuring must be identified at this time and dealt with on an expedited basis under the provisions of the CCAA, providing closure on this issue for VON East, VON West and VON Canada, as Pension Plan administrator.

The Means Employed By The Proposed Order

45. The means that the proposed order employs are also appropriate in the circumstances.
46. VON Canada is doing nothing more than seeking that the Court authorize and direct it to take steps with respect to the Pension Plan that, in most applicable jurisdictions, are specifically contemplated in applicable pension legislation and, in remaining jurisdictions, are not prohibited by any applicable pension legislation.
47. It is submitted that the Court's jurisdiction to make the proposed order under Section 11 of the CCAA would exist irrespective of the terms of a particular provincial jurisdiction's legislation. However, the fact that applicable provincial legislation would in the ordinary course facilitate the type of pension plan restructuring that VON Canada proposes in this case is of assistance in illustrating that the means employed by the proposed order are appropriate.

48. Pursuant to the 2016 Agreement Respecting Multi-Jurisdictional Pension Plans, which will become effective on July 1, 2016, the governments of British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan have agreed, among other things, that pension plan wind-up matters are to be governed separately by the laws of each province in which the pension plan operates.²⁵ An analogous agreement entered into in 1968 remains in place for the other provinces where VON East and VON West operated other than Prince Edward Island, which does not have its own provincial pension legislation.²⁶
49. Applicable provincial legislation specifically provides for the pension plan administrator or employer to undertake a partial wind-up in the following jurisdictions relevant to VON East and VON West: Newfoundland²⁷; New Brunswick²⁸ and Saskatchewan²⁹.
50. In Alberta and British Columbia, applicable legislation does not specifically provide for a partial wind-up. However, the legislation does specifically provide for an employer withdrawal mechanism whereby a participating employer in a non-collectively bargained pension plan that includes multiple employers can elect to withdraw from that pension plan. If such an employer withdrawal mechanism is engaged, the provisions of the legislation that would apply to a

²⁵ 2016 Agreement Respecting Multi-Jurisdictional Pension Plans at Schedule "B", s. 6.

²⁶ Provincial Memorandum of Reciprocal Agreement at s. 2.

²⁷ *Pension Benefits Act, 1997*, SNL 1996 c P-4.01 at s. 60.

²⁸ *Pension Benefits Act*, SNB 1987, c P-5.1 at s. 60(1)

²⁹ *Pension Benefits Act, 1992*, SS 1992, c P-6.001 at s. 53.

full wind-up of the pension plan effectively apply *mutatis mutandis* to the individual withdrawing employer's portion of the pension plan.³⁰

51. Prince Edward Island and Manitoba are the two remaining provinces where (i) VON East or VON West operated; and (ii) applicable legislation does not specifically provide for an employer initiated partial wind-up or employer withdrawal mechanism. In the case of Prince Edward Island, no applicable pension legislation exists and, as such, there is no reason to suggest a partial wind-up or analogous process is prohibited by applicable law. In the case of Manitoba, no provisions of applicable legislation expressly prohibit an employer or administrator initiated partial wind-up or employer withdrawal and the legislation does expressly permit the pension regulator to terminate a pension plan in whole or in part when it is of the opinion that an employer has discontinued a part or all of its business operations.³¹

52. Overall, no aspect of the legislation applicable in any relevant province suggests this Court cannot or should not assist in this Pension Plan Restructuring process as proposed by VON Canada. With the exception of Manitoba and Prince Edward Island, all applicable legislation expressly permits steps similar to the Pension Plan Restructuring and nothing in the legislation of Manitoba or Prince Edward Island purports to limit this Court's jurisdiction to facilitate a similar restructuring in those provinces.

³⁰ *Employment Pension Plans Act*, CSA 2012, c E-8.1 at s. 114; and *Pension Benefits Standards Act*, SBC 2012 c 30, s 94 at s. 93.

³¹ *Pension Benefits Act*, RSM 1987, c P32, at s. 33(1).

53. When completing this type of partial wind-up, applicable legislation in Newfoundland,³² New Brunswick,³³ Manitoba³⁴ and Saskatchewan,³⁵ where VON East and VON West operated, all impose liability for any wind-up deficits on the applicable “employer” of the employees to which the deficit relates and not on any other employer under the applicable pension plan. Similarly, in British Columbia and Alberta, applicable legislation imposes liability for such deficits upon the ‘participating employers,’³⁶ which, in the case of an employer withdrawal is deemed to be only the withdrawing employer. In each of the relevant provinces, other than Prince Edward Island where no applicable legislation exists, the applicable employer liable for the portion of the wind-up deficiency attributable to its employees is the entity that pays remuneration to the relevant employees or, in the case of New Brunswick, the employer required to make contributions to the pension plan in respect of a particular member. This is exactly the result the Pension Plan Restructuring seeks to achieve for VON East and VON West. Under the Pension Plan Restructuring, the applicable employers liable for any wind-up deficiencies are in all cases VON East and VON West.

Victorian Order of Nurses for Canada v. Ontario (Superintendent Financial Services)
2009 ONFST 11 (the “**2009 FST Decision**”)

54. The approach to the partial wind-up in the current case is analogous to the approach taken by VON Canada in prior partial wind-ups outside of a CCAA

³² *Pension Benefits Act*, 1997, SNL 1996 c P-4.01, s. 2(m) and s. 61.

³³ *Pension Benefits Act*, SNB 1987, c P-5.1, s. 1(1), s. 65(1) and s. 65(1.1).

³⁴ *The Pension Benefits Act*, RSM 1987, c P32, s. 1(1) and s. 26(3).

³⁵ *The Pension Benefits Act*, 1992, SS 1992, c P-6.001, s. 2(1)(n) and s. 54(1).

³⁶ *Pension Benefits Standards Act*, SBC 2012 c 30, at s. 1(1), s 94 at s. 101; and *Employment Pension Plans Act*, SA 2012, c E-8.1 at s. 1(t) , s. 114 and s. 121.

context. Between 2003 and 2004, VON Canada declared partial wind ups of the Pension Plan in respect of four separately incorporated entities operating under the Victorian Order Of Nurses name in Ontario that became insolvent or bankrupt.³⁷ The Pension Plan was in a wind-up deficit position and VON Canada, as Pension Plan administrator, proposed an arrangement whereby the portion of the Pension Plan attributable to the four insolvent entities would be wound up and those four entities would bear their own respective shares of the wind-up deficiency.

55. The partial wind-ups were permitted to move forward. The FST found that each insolvent branch was an “employer” of those employees for which the insolvent branch paid remuneration. As a result, each insolvent branch, and not VON Canada, was found to be responsible for the portion of the wind-up deficit attributable to its employees.³⁸
56. The process approved in the 2009 FST Decision should also apply to the current proposed Pension Plan Restructuring, which should proceed in the same manner as set out in the 2009 FST Decision.

Other Alternatives to the Pension Plan Restructuring

57. In addition to the Pension Plan Restructuring that is currently being pursued, VON Canada also considered the following other options:
- (a) Continuing the entire Pension Plan without any wind-up; and

³⁷ *Victorian Order of Nurses for Canada v. Ontario (Superintendent Financial Services)*, 2009 ONFST 11 (“FST Decision”) at page 2.

³⁸ FST Decision at pages 21 – 22 and 36.

(b) Maintaining the status quo, with the exception of suspension of contributions to the Pension Plan by VON East and VON West, for a limited period of time to determine if market conditions may improve and the existing wind-up deficit may reverse. This would provide an opportunity for a future partial wind-up of the VON East and VON West portions of the Pension Plan without any wind-up deficiency.³⁹

Each of the above options were carefully considered and rejected.

58. Continuation of the entire Pension Plan was determined to be unfair to the members of the Pension Plan from VON Ontario, VON Nova Scotia and VON Canada who would bear the risk that the wind-up deficiency may expand and the resources of VON Ontario, VON Nova Scotia and VON Canada would need to be used to fund the deficits attributable to VON East and VON West for which none of VON Ontario, VON Nova Scotia or VON Canada should be responsible at law or under the terms of the Pension Plan itself.⁴⁰

59. It is also not clear that maintaining the status quo temporarily to see if the existing wind-up deficit may reverse would provide any expected net benefit to any Pension Plan member once all risks associated with this approach are considered. There is no guarantee that the existing wind-up deficit will shrink over time. In fact, the wind-up deficit may increase over time and leave the former employees of VON East and VON West worse off than they would be under an immediate partial wind-up. VON Canada can do nothing to control this variation in the wind-up deficit. VON Canada determined that a strategy

³⁹ Poirier Affidavit at para. 40.

⁴⁰ Poirier Affidavit at para. 41.

which amounts to a gamble on the future fluctuations in the wind-up deficit would not be a prudent approach.⁴¹

60. After full consideration, the Pension Plan Restructuring that is now proposed was determined to be the only viable means of proceeding.

61. While theoretically a full wind-up of the Pension Plan is also an option, this was not considered in significant detail as there is no needed to engage in the increased complexity and administrative cost of dismantling the entire Pension Plan, particularly when the vast majority of Pension Plan members will remain unaffected under the propose Pension Plan Restructuring. The Pension Plan will continue to serve the members from VON Ontario, VON Nova Scotia and VON Canada as it has in the past. No prejudice exists for those members that a full wind-up would rectify. No benefit would accrue to the Applicants as a result of such a full wind-up.

PART IV - CONCLUSION

62. For the foregoing reasons, and after review of all potentially viable alternative options, VON Canada concluded that the partial wind-up was the only way to appropriately respond to the impact of the shutdown of VON East and VON West upon the Pension Plan.

63. The proposed partial wind-up represents an objectively fair allocation of assets and liabilities among the Pension Plan members. No Pension Plan member

⁴¹ Poirier Affidavit at para. 41.

receives greater than their fair share of the assets or greater than their fair share of the liabilities of the Pension Plan.

64. The remainder of the Pension Plan will continue to serve its over 5000 members.
65. While it is true that the partial wind-up leads to certain Pension Plan members receiving less than their full pension entitlements at this time, that is simply the unavoidable result of the current solvency position of the Pension Plan and the fact that VON East and VON West no longer operate and cannot contribute to their share of the solvency deficit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June, 2016.



Norton Rose Fulbright Canada LLP
Lawyers for the Applicants, Victorian Order Of
Nurses For Canada

Tab "A"

SCHEDULE "A"
LIST OF AUTHORITIES

1. *In the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc. et al.* (CV-09-8247-00CL), order granted August 26, 2011
2. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379
3. *Victorian Order of Nurses for Canada v. Ontario (Superintendent Financial Services)*, 2009 ONFST 11
4. 2016 Agreement Respecting Multi-Jurisdictional Pension Plans
5. Provincial Memorandum of Reciprocal Agreement

Tab "B"

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

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

Pension Benefits Act, 1997, SNL 1996 c P-4.01 [Newfoundland]

2. In this Act:

(m) "employer" in relation to an employee, means the person or organization whether incorporated or unincorporated, carrying on business or established in the province, from whom the employee receives remuneration, and includes the successors or assigns of the person or organization

60. (1) An employer, or, in the case of a multi-employer pension plan, the administrator, who intends to terminate the whole or part of a pension plan shall notify in writing the superintendent and any other person or body who is affected of that intention at least 60 days before the date of the intended termination.

61. (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including

(a) an amount equal to the aggregate of (i) the normal actuarial cost, and (ii) special payments prescribed by the regulations, that have accrued to the date of termination; and

(b) all (i) amounts deducted by the employer from members' remuneration, and (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination.

(2) Where, on the termination, after April 1, 2008, of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

Pension Benefits Act, SNB 1987, c P-5.1 [New Brunswick]

1(1) In this Act:

"employer" , in relation to a pension plan, to a member of a pension plan or a former member of a pension plan, means the employer required to make contributions under the pension plan;(employeur)

60(1) An employer or, the case of a multi-employer plan, the administrator, may wind up a pension plan in whole or in part.

65. (1) Upon wind-up of a pension plan, in whole or in part, an employer required to make contributions to the pension fund shall pay into the fund

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan have accrued to and including the date of the wind-up, whether or not payment of such money is due on that date, and

(b) an amount equal to all payments that under this Act, the regulations and the plan are due from the employer to the pension fund but that have not been paid at the date of wind-up.

65. (1.1) For the purpose of paragraph (1)(a), if a pension plan is wound up, in whole or in part, and as of the date of the wind-up the market value of the investments held by the plan does not equal or exceed its solvency liabilities, the employer shall pay into the fund in accordance with subsection (4), an amount so that

(a) where the plan is wholly wound up, the market value of investments held by the plan equals its solvency liabilities, or

(b) where the plan is wound up in part, the market value of the investments held by the plan attributable to that portion of the plan being wound up equals its solvency liabilities for that part,

and such amount required to be paid shall be deemed to have accrued as of the effective date of the wind-up.

The Pension Benefits Act, RSM 1987, c P32 [Manitoba]

1(1) In this Act

"employer" means a person or organization, whether incorporated or not, from whom an employee is receiving or entitled to receive, or has received, remuneration; (« employeur »)

26. (3) Upon the termination or winding up of a pension plan filed or required to be filed for registration under section 18, the employer is liable to pay all amounts that would otherwise have been required to be paid, up to the date of the termination or winding up, to meet the prescribed tests for solvency.

33(1) The commission, when it is of the opinion that an employer has discontinued or is in the process of discontinuing a part or all of his business operations in which a substantial number of his employees who are members of a pension plan are employed, may declare the pension plan terminated in whole or in part for the purposes of this Act on such date as the commission in its discretion considers such business operations are discontinued.

Pension Benefits Act, 1992, SS 1992, c P-6.001 [Saskatchewan]

2. (1) In this Act:

(n) "employer" means the person or the organization, whether incorporated or not, from whom an employee receives remuneration, and includes any or all of the employers that are required to contribute to a specified multi-employer plan in whose employment that employee has been;

53. An administrator who decides to terminate all or part of a plan shall notify the superintendent in writing of the decision immediately after making the decision.

54. (1) Within 30 days after the termination of a plan, the employer: (a) shall pay into the plan all amounts whose payment is required by the terms of the plan or this Act; and (b) without limiting the generality of clause (a), shall make all payments that, by the terms of the plan or this Act: (i) are due from the employer to the plan but have not been made at the date of the termination; or (ii) have accrued to that date but are not yet due.

(2) Notwithstanding any provision of the plan, where a plan is terminated, no part of the assets of the plan shall revert to the benefit of the employer until provision has been made for the funding or purchase of all pensions and other benefits pursuant to the plan.

Employment Pension Plans Act, CSA c E-8.1 [Alberta]

1(1) In this Act

(t) "employer" means a person or organization, whether incorporated or not, from whom an employee receives or received remuneration

(ll) "non-collectively bargained multi-employer plan" means a multi-employer plan established other than through a collective agreement, unless under section 28 the Superintendent designates the plan as a collectively bargained multi-employer plan or as a single employer plan, and includes any plan the Superintendent designates as a non-collectively bargained multi-employer plan under section 28;

114 If a participating employer withdraws from a non-collectively bargained multi-employer plan and does not join or establish a successor plan that assumes responsibility for the employer's liabilities under the non-collectively bargained multi-employer plan,

a) the prescribed provisions of Part 10 apply to that employer as if

- i. the employer were the only participating employer in the plan, and
 - ii. the employer were terminating that plan, and
- b) the rules prescribed for the purposes of this section apply.

121 If a pension plan, other than a negotiated cost plan, a jointly sponsored plan or a pension plan of which the plan text document contains a target benefit provision, has a solvency deficiency on the effective date of the termination of the plan,

- a) the participating employers must eliminate the solvency deficiency as prescribed, and
- b) the administrator must continue to file information returns as required by section 38(1)(a) until the solvency deficiency has been eliminated.

Pension Benefits Standards Act, SBC 2012 c 30 [British Columbia]

1 (1) In this Act:

"employer" means a person or organization, whether incorporated or not, from whom an employee receives or received remuneration;

94. If a participating employer withdraws from a non-collectively bargained multi-employer plan and does not join or establish a successor plan that assumes responsibility for the employer's liabilities under the non-collectively bargained multi-employer plan,

- a) the prescribed provisions of Part 10 apply to that employer as if
 - i. the employer were the only participating employer in the plan, and
 - ii. the employer were terminating that plan, and
- b) the rules prescribed for the purposes of this section apply.

101. If a pension plan, other than a negotiated cost plan, a jointly sponsored plan or a pension plan of which the plan text document contains a target benefit provision, has a solvency deficiency on the effective date of the termination of the plan,

- a) the participating employers must eliminate the solvency deficiency as prescribed, and
- b) the administrator must continue to file information returns as required by section 38 (1) (a) until the solvency deficiency has been eliminated.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
VICTORIAN ORDER OF NURSES FOR CANADA

Court File No: CV-15-11192-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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