

**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 A PLAN OF COMPROMISE OR ARRANGEMENT OF  
HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC  
CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY  
HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC  
CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP  
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.**

(Applicants)

**SUPPLEMENTARY FACTUM OF THE APPLICANTS  
(Returnable April 24, 2025)**

April 23, 2025

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**TO: THE SERVICE LIST**

## **PART I – OVERVIEW<sup>1</sup>**

1. This supplementary factum is filed in support of the Applicants' motion seeking issuance of the Employee Representative Counsel Order and in response to: (a) the cross-motion of Evan Marshall, Steven Karo, and James Common; and (b) the letter dated April 22, 2025, from Clifton Prophet of Gowling WLG (Canada) LLP addressed to the Honourable Justice Osborne.

2. The jurisprudence is clear that the "commonality of interest" test applies when determining whether one represented counsel should be appointed for a group of stakeholders. In this case, fragmentation of the Represented Employees is undesirable. All Represented employees have a common legal position as unsecured creditors of the Company in that their claims all arise out of the terms and conditions of their employment with the Company.

3. The appointment of Ursel Phillips as Employee Representative Counsel will ensure that the arguments and interests of the Represented Employees are placed before the Court in the most time efficient and cost-effective manner possible, by a single, knowledgeable, and experienced counsel.

4. There is no need for the Court to appoint an independent third party to make a recommendation to the Court as to the selection of Employee Representative Counsel. Courts have consistently appointed representative counsel without the need for a third-party's recommendation.

## **PART II – THE FACTS**

5. The facts with respect to this motion are set out in the Third Bewley Affidavit and the Affidavit of Philip Yang sworn April 23, 2025.

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<sup>1</sup> Capitalized terms used in this factum that are not otherwise defined have the meanings given to them in the Affidavits of Jennifer Bewley sworn April 17, 2025 (the "**Third Bewley Affidavit**").

### PART III – ISSUES

6. The issues to be determined on this motion are whether:
- (a) there is a need for more than one representative counsel in the CCAA Proceedings; and
  - (b) the Court should appoint a third-party to provide the Court with its recommendation on the appointment of representative counsel.

### PART IV – LAW & ARGUMENT

#### A. Applicable Legal Framework

7. In *Nortel*,<sup>2</sup> Justice Morawetz (as he then was) addressed the relevant issue of whether various representative counsel should be appointed for the current and former employees of Nortel. Parties in that case had raised the issue that there may be a divergence of interests between the groups of current and former employees, for example, between pension-based claims and terminated-employee claims. Justice Morawetz found that such distinctions were hypothetical, and that:

“[T]he primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost-effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims...

It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.”<sup>3</sup>

8. In *Nortel*, Justice Morawetz also held that notwithstanding creditor classification was not proposed in that CCAA proceeding, the well-known “commonality of interest” test articulated in

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<sup>2</sup> *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (ONSC). [*“Nortel”*]

<sup>3</sup> *Nortel* at paras. 53-54.

*Re Canadian Airlines Corp.* should be used when determining whether a group of stakeholders can be best served by the appointment of one representative counsel.<sup>4</sup>

9. The principles of classification under the CCAA as summarized in *Re Canadian Airlines Corp.* have been well-accepted by courts across Canada.<sup>5</sup> These principles are set out below:

- (a) commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
- (b) the interests to be considered are the legal interests the creditor holds qua creditor in relationship to the company, prior to and under the plan as well as on liquidation;
- (c) the commonality of these interests is to be viewed purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if at all possible;
- (d) absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant; and
- (e) the requirements of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

## **B. The Appointment of One Employee Representative Counsel is Appropriate**

10. In the motion to appoint Representative Counsel in *Nortel*, heard and determined by the supervising Judge, (in which case Koskie Minsky was appointed as representative counsel), the Court agreed with Koskie Minsky's submission in support of one representative counsel being appointed, and that each former employee, whether or not entitled to an interest in the pension plan, had a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered pension plan and that classifying former employees

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<sup>4</sup> *Nortel* at [para. 62](#).

<sup>5</sup> *Stelco Inc., Re* [2005] O.J. No. 4883 (ON CA) at [para 23](#).

as one group of creditors would improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company.<sup>6</sup>

11. The Court also held that in the event of a liquidation of Nortel, each former employee would seek to recover deferred compensation claims as an unsecured creditor, and that:

“Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.”<sup>7</sup>

12. The Court concluded that the former employees had a “commonality of interest” and that the process was best served by the appointment of one representative counsel.<sup>8</sup>

13. Similarly, in these CCAA Proceedings, while the SERP retirees referenced in Mr. Prophet's April 22<sup>nd</sup> letter may have different interests than certain other groups of current and former employees of the Company, such differences are of the same nature described in *Nortel* and not sufficient grounds to fragment the proposed group of Represented Employees in this case.

14. Similar to *Nortel*, the SERP retirees have a common legal position as unsecured creditors of the Company in that their claims all arise out of the terms and conditions of their former employment with the Company.

15. The appointment of Ursel Phillips as Employee Representative Counsel will ensure that the arguments and interests of the Represented Employees are placed before the Court in the most time efficient and cost-effective manner possible, by a single, knowledgeable, and

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<sup>6</sup> *Nortel* at [para. 56](#).

<sup>7</sup> *Nortel* at [para. 56](#).

<sup>8</sup> *Nortel* at [para. 63](#).

experienced counsel.

### **C. No Third-Party Should Select Employee Representative Counsel**

16. As outlined in the Applicants' factum filed on April 22, 2025, the Court has broad jurisdiction to appoint representative counsel and has previously done so in several other CCAA proceedings without the need to appoint a third-party to determine the selection of Employee Representative Counsel.<sup>9</sup>

17. Counsel relies on *Bridging Finance*<sup>10</sup> in support of its position that a third-party should be appointed to determine the selection of Employee Representative Counsel.

18. However, the facts in *Bridging Finance* are distinguishable to the circumstances of this case and the other above-referenced CCAA proceedings where the Court appointed representative counsel. Amongst other distinguishing factors, *Bridging* involved a Receivership proceeding; an adversarial process which contemplated Rep Counsel dealing with potential commercial litigation; potential significant recoveries being available to the represented class through such litigation.

19. As noted in the Report of the Honourable Mr. Archibald, the independent third-party making the recommendation to the Court in *Bridging* as to the selection of representative counsel, a key aspect of the mandate was that representative counsel required targeted expertise including the need for sophisticated financial and corporate law acumen, including a deep M&A capability in complex commercial transactions, and expertise in Indigenous issues related to the debtor. This made the selection process more complex and the Court therefore agreed that an independent third party would be utilized for the selection process to confirm it had selected a firm

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<sup>9</sup> *Target Canada Co.*, (January 15, 2015) Ont SCJ [Commercial List], Court File No CV-15-10832-00CL ([Initial Order](#)); *Nordstrom Canada* (March 2, 2023) Ont SCJ [Commercial List] Court File No CV-23-00695619-00CL ([Initial Order](#)); *Sears Canada* (July 13, 2017) Ont SCJ [Commercial List] Court File No. CV-17-11846-00CL ([Employee Representative Counsel Order](#)); *Nortel Networks Corp. (Re)*, (July 22, 2009) Ont SCJ [Commercial List] Court File No. 09-CL-7950 ([Order](#)); and *Canwest, Publishing Inc. (Re)*, (March 5, 2010) Ont SCJ [Commercial List] Court File No.CV-10-8533-00CL ([Representative Counsel Order](#)).

<sup>10</sup> [2021 ONSC 5700](#).

with capabilities in these areas of the law.<sup>11</sup>

20. In the Hudson's Bay circumstances, as with a number of other Employee or Retiree Representative Counsel, the Court Officer has been involved in the review of potential proposals, and the Courts have in a number of cases directly considered and reviewed the necessary qualifications of such mandates. The Court does not require an independent third party to assist with such a determination.

21. In addition, in *Bridging*, while the Court-appointed Receiver initially indicated that it would be making the selection or recommendation to the Court, it did not object to the appointment of an independent third party to make such recommendation to the Court. In these circumstances, Company's counsel, in consultation with the Monitor, have conducted a fair and reasonable process to select the Employee Representative Counsel, which has made an informed recommendation to the Court based on that process.<sup>12</sup>

22. In considering the potential appointment of Representative Counsel, the Company notes the comments of Justice Archibald in his Report in *Bridging* which recognized that factors to be considered in the appointment included potential conflicts as well as the importance of cooperation with the (Receiver in that case) to maximize value for the Represented Group.

## **PART V – ORDER SOUGHT**

23. The Applicants therefore request that the Court grant the Employee Representative Counsel Order substantially in the form included at Tab 4 of the Motion Record.

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<sup>11</sup> Report of the Honourable Todd L. Archibald dated September 24, 2021, a copy of which is available at "Appendix A" to this factum.

<sup>12</sup> Second Report of the Monitor dated April 22, 2025, at paras. 3.18 to 3.19.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of April 2025.

*Stikeman Elliott LLP*

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**Stikeman Elliott LLP**  
Lawyers for the Applicants



## LIST OF AUTHORITIES

1. Bridging Finance, 2021 ONSC 5700.
2. Nortel Networks Corporation (Re), 2009 CanLII 26603 (ONSC).
3. *Target Canada Co.*, (January 15, 2015) Ont SCJ [Commercial List], Court File No CV-15-10832-00CL (Initial Order).
4. *Nordstrom Canada* (March 2, 2023) Ont SCJ [Commercial List] Court File No CV-23-00695619-00CL (Initial Order).
5. *Sears Canada* (July 13, 2017) Ont SCJ [Commercial List] Court File No. CV-17-11846-00CL (Employee Representative Counsel Order).
6. *Nortel Networks Corp. (Re)*, (July 22, 2009) Ont SCJ [Commercial List] Court File No. 09-CL-7950 (Order).
7. *Canwest, Publishing Inc. (Re)*, (March 5, 2010) Ont SCJ [Commercial List] Court File No.CV-10-8533-00CL (Representative Counsel Order).

## **Appendix “A”**

**[Attached]**

## Memorandum

**To:** The Honourable Geoffrey B. Morawetz, Chief Justice of the Superior Court of Justice of Ontario

**From:** The Honourable Todd L. Archibald

**Date:** September 24, 2021

**RE: Review of Applications for Representative Counsel for the Unitholders of Funds managed by Bridging Finance Inc. and Certain of its Affiliates: Court File: CV-21-00661458-00CL**

Dear Chief Justice Morawetz,

Thank you for the appointment as the independent third party ("ITP") to assess the proposals of the five law firms (two of which are consortiums), who have applied to be representative counsel for the unitholders of funds managed by Bridging Finance Inc. ("Bridging") and certain of its affiliates (CV-21-00661458-00CL). The scope of the Representative Counsel mandate is set out in the Sixth Report of PricewaterhouseCoopers Inc ("the Receiver") dated August 16, 2021, and is captured in the Court's endorsement of August 23, 2021, in paragraph five as follows:

The proposed scope of the Representative Counsel mandate will be to advise Unitholders on:

(a) assessing sale, investment, and/or hybrid proposals received during Phase 2 of the SISP and providing feedback to the Receiver;

(b) assessing interfund allocation issues which may arise as a result of the Receiver's report on these transfers, including the identification of conflicts which may arise between the Bridging Funds and the merits of any interfund claims which may arise; and

(c) analyzing claims that Unitholders may have against Bridging, its officers and directors and third parties arising out of the operation of the Bridging's business. <sup>1</sup>

1. OSC v. Bridging Finance Inc et al., 2021 ONSC 5700 at paragraph 5.

## **A. PROCESS:**

The Court has asked the ITP to make a recommendation on the appointment of Representative Counsel to act for the approximately 26,000 investors in Bridging. To assess the quality of the applications, the ITP carefully reviewed the written proposals on September 21, 2021. The ITP then conducted oral interviews with representatives from all of the candidates on September 22, 2021.

In each interview, the ITP asked the same series of questions. The questions explored potential issues which could arise from the Representative Counsel mandate. To be transparent and fair in the process, the candidates were all told in advance the identities of the other interviewees and were questioned about the advantages which they could bring over the competing firms. The questions are attached to this memorandum in Appendix "A".

As per Chief Justice Morawetz's August 23, 2021 endorsement, the ITP also consulted with the Receiver concerning the breadth and substance of the applications. The ITP did not, however, separately consult with counsel to the Ad Hoc Committee of Retail Investors since their counsel also participated as one of the applicants in this interview process. The ITP was apprised of their perspectives during the interview.

All five applicants were extremely well qualified and had significant commercial and insolvency expertise and experience. Every candidate submitted impressive and detailed proposals and provided thoughtful answers during the interviews. The decision to select one proposal out of five was difficult.

## **B. RECOMMENDATION:**

Following extensive deliberations, the ITP recommends to the Superior Court of Justice that **Bennett Jones LLP** should receive the appointment as Representative Counsel. Their written proposal is attached as "Appendix B" to this memorandum. The key factors involved in the assessment are as follows:

### ***I. Independence:***

The successful representative counsel must be a fearless advocate for the investors. Unitholders must have confidence that they will be independently advised and fearlessly represented with an absence of any real or perceived conflicts.

Each of the firms were qualified; however, certain of the firms were burdened with problematic conflicts or have relationships with other entities such as investment advisor firms that could be the subject of the advice that Representative Counsel will be expected to give to the unitholders.

The unitholders' faith in this process requires that potential Representative Counsel be seen to be independent of Bridging. The ITP is satisfied that Bennett Jones LLP has sufficient independence, and that any conflicts that might be identified will be managed without compromising its independence.

The ITP very much appreciated each of the firm's candour in discussing actual and potential conflicts and independence.

## ***2. Targeted Expertise:***

As set out in the Court's August 23, 2021 endorsement, a key aspect of this mandate is to represent the interests of the investors with respect to the sale and investor solicitation process (the "SISP"). This is a critical component of the mandate since the successful conclusion of that process will be crucial in maximizing value for the Bridging unitholders.

To discharge this function, counsel will require sophisticated financial and corporate law acumen, including a deep M&A capability in complex commercial transactions. It is important to underline that the SISP is already underway. The recommended firm must have existing knowledge to meaningfully participate and advocate in the unfolding process.

In its application and interview, counsel from Bennett Jones LLP demonstrated a thoughtful and sophisticated understanding of the present issues and raised possible avenues to address other issues which are expected to arise, with a view to maximizing recovery. The firm immediately provided "added value" and demonstrated a deep understanding and expertise with respect to the specific mandate. Their approach stood out in the interview process.

## ***3 Expertise in Indigenous Issues:***

There are pervasive and important Indigenous issues relating to Bridging. For example, Bridging has significant Indigenous borrowers, and it managed the Bridging Indigenous Impact Fund.

Bennett Jones LLP has given serious consideration to the Indigenous aspects of the file and have proposed to include the co-head of their aboriginal law group as a key member of this team. That is an important element in the ITP's assessment.

## ***4 Demonstrated Interest in Working with the Receiver:***

While Bridging's unitholders require and are entitled to zealous and independent representation, it is recognized that their interests will also be served by being represented by counsel who recognize the importance of cooperation with the Receiver to maximize value for the unitholders.

While they were certainly not the only firm to highlight this approach, Bennett Jones LLP emphasized their willingness and the importance of working with the Receiver.

**C. CONCLUSION:**

All of the applications from the five firms were excellent. Each candidate articulated a thoughtful case as to why it was best suited for the role, and it was a challenging decision to select one proposal; however, the ITP was tasked with recommending one firm to be appointed as Representative Counsel, and based upon the above considerations, the ITP respectfully recommends to the Superior Court of Justice the appointment of ***Bennett Jones LLP***.

Yours sincerely,

A handwritten signature in black ink, reading "Todd L. Archibald". The signature is written in a cursive, flowing style.

The Honourable Todd L. Archibald

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.  
1985, c. C-36, AS AMENDED, AND IN THE MATTER OF HUDSON'S BAY COMPANY  
ULC et al.

Court File No: Court File No. CV-25-738613-00CL

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

Proceeding commenced at Toronto

**SUPPLEMENTARY FACTUM OF THE APPLICANTS  
(RE: Appointing Employee Representative Counsel)**

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