

**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

(Motion of Ontario Nurses Association)

August 24, 2016

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Matthew Halpin LSUC#26208F
Tel: 613.780.8654
Fax: 613.230.5459
Email:
matthew.halpin@nortonrosefulbright.com

Evan Cobb LSUC #55787N
Tel: 416.216.1929
Fax: 416.216.3930
Email: evan.cobb@nortonrosefulbright.com

Lawyers for Victorian Order Of Nurses For
Canada

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FACTUM OF VICTORIAN ORDER OF NURSES FOR CANADA

PART I - OVERVIEW

1. Victorian Order Of Nurses For Canada ("**VON Canada**") previously proposed a pension plan restructuring as part of this proceeding. However, VON Canada subsequently concluded for a variety of reasons to withdraw that pension plan restructuring proposal.
2. VON Canada was motivated to withdraw its pension plan restructuring proposal due to significant concerns that proceeding with such a proposal would impose material delay and cost without certainty of a successful outcome, which ultimately could result in the failure of the restructuring process.

3. The Ontario Nurses Association (the “**ONA**”) now seeks to compel VON Canada to move forward with a pension plan restructuring, and incur the cost and delay that VON Canada decided to avoid.
4. In VON Canada’s submission, it is neither beneficial nor appropriate for a third party that is not a creditor of an Applicant and having a very limited connection to this proceeding to compel material and potentially prejudicial changes in the course of VON Canada’s restructuring process against VON Canada’s wishes. Accordingly, the ONA motion should be dismissed.
5. VON Canada does not disregard the concerns raised by the ONA in its motion. However, VON Canada believes these concerns are speculative at this time and, if VON Canada’s restructuring process is permitted to continue under the appropriate control of VON Canada, any such concerns will either never surface or will be resolved.

PART II - THE FACTS

6. Before this proceeding commenced, several separate legal entities provided home or community care services under the Victorian Order Of Nurses name to clients in Canada.
7. 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**”).¹

8. A fifth entity, 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.²
9. 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.³
10. 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.⁴ The most recent estimates suggest the wind-up deficiency in the plan is approximately 6% of total plan assets.⁵ However, the

¹ Affidavit of Jo-Anne Poirier, sworn May 30, 2016 (the “Poirier Affidavit”) at para. 1.

² Poirier Affidavit at para. 2.

³ Poirier Affidavit at para. 12.

⁴ Poirier Affidavit at para. 14 and 18-20.

⁵ Poirier Affidavit at para. 33.

Pension Plan is solvent on a going concern basis.⁶ VON Canada is the sponsor and administrator of the Pension Plan.⁷

11. 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.⁸
12. In late May of this year, VON Canada brought a motion (the "**VON Pension Motion**") to:
 - (a) segregate 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.
13. After considering the responses to the VON Pension Motion, and in particular the response of the Financial Services Commission of Ontario, on behalf of itself and the other provincial pension regulators who had positions on this matter, VON Canada elected to withdraw the VON Pension Motion.
14. The VON Pension Motion was withdrawn for the following reasons:
 - (a) **Impact upon VON Ontario and VON Nova Scotia**: A goal of the VON Pension Motion was to insulate VON Ontario, VON Nova Scotia and VON

⁶ Poirier Affidavit at para. 32.

⁷ Poirier Affidavit at para. 15.

⁸ Poirier Affidavit at para. 39.

Canada from any liability for the portions of the wind up deficit in the Pension Plan attributable to VON East and VON West.⁹ It was clear from the responses received that certain of the provincial regulators strongly opposed any request by VON Canada for an order that would confirm that there is no joint and several liability of VON Ontario, VON Nova Scotia and VON Canada for the entire wind up deficit in the Pension Plan.¹⁰ VON Canada believed this issue would be the subject of extensive litigation. The ONA now seeks to force this issue before the court in a circumstance where the applicable regulators have made clear that they will diligently contest the issue of joint and several liability.

(b) **Timing**: These CCAA proceedings have been ongoing for approximately nine months. The VON Pension Motion was intended to allow for an expedited procedure to: (i) approve the restructuring of the VON Pension Plan; (ii) provide VON Canada with information necessary to determine the claims, if any, of creditors of the Applicants that may arise from the proposed VON Pension Motion; and (iii) allow VON Canada to move forward with a Plan of Compromise and Arrangement and complete these proceedings after the administrative steps necessary to complete the Pension Plan restructuring had been put in motion. The degree and type of opposition to the VON Pension Motion clearly suggested that, even if VON Canada was successful on its motion, the matter would not proceed in on an expedited basis and would significantly delay the restructuring process in a manner that would be prejudicial to VON Canada and the continuing operations of the VON Operating Entities; and

⁹ Poirier Affidavit at para. 43.

¹⁰ Affidavit of Marie Kelly, sworn July 25, 2016 (the "Kelly Affidavit") at para. 27 and 28.

(c) **Cost:** VON Canada's current financial resources are not sufficient to fund a further extended CCAA process while contentious pension issues are fully and finally determined by the Ontario Superior Court of Justice and through any appeal process that those opposing the VON Pension Motion would appear likely to take given the issues involved and the positions of the applicable regulators. Further, any use of financial resources to fund litigation will reduce recoveries available to creditors.

15. In summary, VON Canada initiated the VON Pension Motion because it was considered to be the optimal approach to the pension matters if VON Canada's proposed resolution could be implemented (i) quickly; (ii) in a cost-effective manner with minimal opposition; and (iii) with minimal disruption and potential claims against the continuing VON group entities. When it appeared that would not be possible, VON Canada withdrew its motion.
16. The ONA now seeks to have this Court order a pension restructuring proposal analogous to the VON Pension Motion. The VON Pension Motion sought to move out the assets and liabilities, including wind up liabilities, attributable to VON East and VON West former employees, thereby segregating and insulating VON Ontario, VON Nova Scotia and VON Canada. The ONA motion seeks to move out the assets and liabilities attributable to VON Ontario, VON Nova Scotia and VON Canada, leaving behind VON East and VON West, and similarly segregating and insulating VON Ontario, VON Nova Scotia and VON Canada.¹¹

¹¹ Kelly Affidavit at para. 25 and 26.

17. VON Canada is not aware of any other stakeholder group that supports the ONA motion. The ONA represents 292 active employees of VON Ontario, 112 of which are active members of the Pension Plan. The Pension Plan has approximately 5,900 members overall and approximately 2,900 active members. Approximately 3,300 of the Pension Plan members are current or former employees of VON Ontario.¹² Therefore, the ONA motion, which could have a significant impact upon the path and eventual success of this restructuring, speaks for less than 5% of the aggregate membership of the Pension Plan that will be affected by the ONA proposal and a small fraction of the current employees of the VON Operating Entities and VON Canada.
18. At this time, VON Canada has no reason to conclude that the ONA motion will not face the same opposition as the VON Pension Motion. Therefore, the exact same concerns of timing, cost, and impact on the continuing VON group entities are expected to arise under the ONA motion. The ONA's proposal appears to also require the consent of the Superintendent, which VON Canada expects will not be given for the same reasons that the VON Pension Motion was opposed by the applicable pension regulators.¹³ Accordingly, for the same reasons that VON Canada withdrew the VON Pension Motion, it must oppose the ONA motion.

PART III - ISSUES AND THE LAW

19. The ONA motion raises the following questions for the Court's consideration:

¹² Kelly Affidavit at paras. 6-8.

¹³ *Pension Benefits Act*, R.S.O. 1990, c. P.8 at s. 81(5).

- (a) Does the Court have jurisdiction to direct VON Canada to proceed with the pension restructuring proposed by the ONA and clearly opposed by VON Canada itself?
- (b) If so, is the order sought by the ONA appropriate in the circumstances?
20. It is submitted that the Court does not have jurisdiction to grant the Order sought by the ONA.
21. It is further submitted that, even if the Court did have jurisdiction to grant the Order sought by the ONA, the Court should not do so.

Jurisdiction Of The Court To Grant The Requested Order

22. The ONA brings forward this motion relying upon section 11 of the CCAA.
23. 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.¹⁴

24. An Order under Section 11 of the CCAA can only be made on a motion by an interested person in this CCAA proceeding in respect of a debtor company.

¹⁴ *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended at s. 11.

25. In the context of its motion, the ONA is not an interested person in this proceeding in respect of any debtor company. VON Ontario is not a debtor company in this proceeding, but it is the only VON group entity in which the ONA has any material interest:

(a) VON Ontario is the only entity in the VON group that employs any members of the ONA.¹⁵

(b) All contributions to the Pension Plan on behalf of ONA members are made by VON Ontario.

(c) In VON Canada's view, the only entity responsible for any portion of the current wind-up deficit in the Pension Plan attributable to VON Ontario employees, including the ONA members, is VON Ontario itself.

(d) Finally, if VON Canada's proposal to maintain the status quo in respect of the Pension Plan is permitted to proceed, there is no evidence that any ONA members would experience any change to their current Pension Plan entitlements or any prejudice.

26. The fact that ONA members are interested in the Pension Plan and VON Canada administers the Pension Plan is not a sufficient connection to make the ONA an interested party in respect of a debtor company in this proceeding in the context of the pension motion.

¹⁵ Kelly Affidavit at para 5.

The Requested Order Should Not Be Granted

27. Even if the ONA is an interested person such that an order could be sought by the ONA pursuant to Section 11 of the CCAA, the order sought by the ONA would not be appropriate. Such an order would be inconsistent with the policy objectives of the CCAA, which orders under Section 11 are intended to support. Such an order would also be an improper infringement on the rights of the debtor companies to determine, in their business judgment, what material steps they will take in furtherance of *their* restructuring.

The Proposed Order Does Not Advance The Policy Objectives of the CCAA

28. Orders under Section 11 are appropriate only where the orders sought advance the policy objectives underlying the CCAA by usefully furthering the efforts to achieve the remedial purpose of the CCAA -- avoiding the social and economic losses resulting from liquidation of an insolvent company.¹⁶
29. When VON Canada brought forward the VON Pension Motion it did so because it believed that motion would allow VON Canada to move forward from this restructuring as a going concern without the legacy issues associated with the VON East and VON West aspects of the Pension Plan.
30. When VON Canada withdrew the VON Pension Motion, it did so because of significant concerns that the VON Pension Motion may have jeopardized any going concern restructuring opportunities as very limited remaining resources, that would otherwise be available for distribution to VON Canada creditors,

¹⁶ *Century Services Inc. v. Canada (Attorney General)* [2010], 3 S.C.R. 379 at para. 70.

would need to be expended to extensively litigate the disputed VON Pension Motion and the restructuring process could be materially delayed. While VON Canada does believe it would have been successful on the VON Pension Motion, it could not risk protracted litigation on the issue. VON Canada dropped the VON Pension Motion with the intention of moving forward with the next best option – maintaining the status quo in the Pension Plan and completing a going concern restructuring for VON Canada, in accordance with the policy objectives of the CCAA. This decision was an exercise of the business judgment of VON Canada and, as will be discussed below, the Court should be reluctant to interfere with that business judgment.

31. The ONA motion would force VON Canada back into the costly, time consuming and litigious situation that creates material risk for the going concern restructuring process in this case and is the risk that VON Canada sought to avoid by withdrawing its motion. For the same reasons that VON Canada dropped the VON Pension Motion, the continuation of the ONA's proposed pension restructuring process is not appropriate in the circumstances of this case. The potential prejudice to VON Canada and the risk it poses to VON Canada's going concern restructuring efforts is not consistent with the policy objectives of the CCAA.
32. The ONA motion could also create substantial additional claims against the Applicants. To the extent any such claims arise, a process would need to be established to quantify and resolve those claims. At best, this would result in additional claims, confusion among potential creditors regarding the filing of

those claims, additional administrative cost, and further dilution of recoveries for existing creditors.

Interference With The Rights Of VON Canada To Direct Its Restructuring

33. The ONA's requested order is also not appropriate as it represents an improper attempt by a third party, in this case representing only a very small portion of the Pension Plan members, to compel VON Canada to implement a very material commercial step in a circumstance where VON Canada itself has considered this step and rejected it.
34. The CCAA is not intended to provide a framework for the Court to direct the commercial steps a debtor company will take and to impose its business judgment in place of the debtor company's own business judgment. However, this is exactly what the ONA asks the Court to do in this case at significant cost, including wind up and valuation costs that would be absorbed by all members of the Pension Plan including (but not limited to) members from VON Ontario. The current VON Canada proposal maintains the status quo with no incremental cost.
35. The business judgment rule remains applicable in a CCAA proceeding and should rarely be ignored by the CCAA Court.¹⁷ Courts supervising a restructuring proceeding will generally be very hesitant to second-guess the business decisions of directors and management.¹⁸

¹⁷ *Crystallex International Corp. (Re)* (2012), 91 C.B.R. (5th) 169 at para. 112 (Ont. S.C.J.)

¹⁸ *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 65 (Ont. C.A.)

36. The CCAA is intended to be a statutory framework that protects a debtor company while it attempts to undertake its own restructuring. The Court must establish the boundaries of the playing field and act as a referee in the restructuring process but not direct the commercial decisions that the debtor company makes in a restructuring.¹⁹ Commercial decisions are clearly left to the debtor company itself, and then (in appropriate circumstances) brought to the Court for approval.²⁰ The Court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.²¹
37. In this case, VON Canada and its board of directors have carefully considered whether to proceed with a restructuring of the Pension Plan and have concluded, in their business judgment, not to do so. That business decision should be accepted and VON Canada should be permitted to move on with its restructuring after having made that decision.
38. Consistent with the principle that a court exercising its jurisdiction under the CCAA should not impose its business judgment upon a debtor company, courts have recognized that it is inappropriate for the Court to attempt to draw up an agreement for the parties contrary to their respective wishes.²² However, the ONA proposal would require the Court to impose an agreement on VON Canada in this case. One of the requirements to allow an asset transfer pursuant to Section 81(6) of the *Pension Benefits Act* (Ontario) is the agreement of the administrators of the transferor and transferee plans on the

¹⁹ *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 44 (Ont. C.A.)

²⁰ *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 44 (Ont. C.A.)

²¹ *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 68 (Ont. C.A.).

²² *AbitibiBowater inc. (Arrangement relatif a)*, [2010] Q.J. No. 31186 at para. 110 (Que. S.C.).

value of assets to be transferred.²³ VON Canada, as administrator of the proposed transferor Pension Plan, has not agreed to any such transfer value and does not intend to do so. This Court cannot impose such an agreement upon an unwilling debtor company.

39. For all of the above reasons, the order requested by the ONA is not appropriate in this case.

PART IV - CONCLUSION

40. VON Canada's opposition to the ONA motion is supported by both legal principles and commercial concerns. VON Canada must be permitted at this time to move toward completion of its restructuring process.
41. There are significant commercial reasons why the ONA proposal cannot proceed. While the pension plan restructuring proposed by VON Canada was intended to be part of this overall restructuring process, VON Canada determined in its business judgment that a pension plan restructuring would not be feasible at this time. From a practical perspective, any such pension restructuring, whether advanced by VON Canada or the ONA would lead to litigation, cost and delay that would most likely lead to the failure of this restructuring process given the limited resources available to the Applicants.
42. Even if there were no such practical impediments to any pension plan restructuring, the law is clear that deference must be given to business judgment of VON Canada and that Section 11 of the CCAA does not provide a

²³ *Pension Benefits Act*, R.S.O. 1990, c. P.8 at s. 81(6)

basis for a single stakeholder with a very narrow connection to the overall restructuring process to impose its own path for this restructuring upon VON Canada and all other stakeholders.

43. VON Canada does not ignore the concerns and potential prejudice identified by the ONA. The primary concern appears to be the risk that VON Canada's restructuring may fail, leading to a replacement of VON Canada as administrator of the Pension Plan or a wind up of the Pension Plan, which may be prejudicial to the ONA members. However, there is no reason to conclude that the ONA's concerns are likely to become a reality in this case. VON Canada is currently finalizing a Plan of Compromise or Arrangement to present to its creditors. If that Plan of Compromise or Arrangement were to fail, perhaps VON Canada would take a different approach to the Pension Plan. However, if the Plan of Compromise or Arrangement succeeds and VON Canada emerges as a solvent and viable entity as intended, the concerns raised by the ONA would be resolved. VON Canada would move forward as the administrator of the Pension Plan. The Pension Plan should remain in a going concern solvency position. Benefits would continue to be paid and contributions would continue to be made in the ordinary course.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of August, 2016.


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

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379
2. *Crystallex International Corp. (Re)* (2012), 91 C.B.R. (5th) 169 (Ont. S.C.J.)
3. *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.).
4. *AbitibiBowater inc. (Arrangement relatif a)*, [2010] Q.J. No. 31186 (Que. S.C.)

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, R.S.O. 1990, c. P.8

81(5) 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) 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.

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
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SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

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Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Matthew Halpin LSUC#26208F
Tel: 613.780.8654
Email:
matthew.halpin@nortonrosefulbright.com

Evan Cobb LSUC #55787N
Tel: 416.216.1929
Fax: 416.216.3930
Email: evan.cobb@nortonrosefulbright.com

Lawyers for Victorian Order of Nurses for
Canada