SUPREME COURT OF NOVA SCOTIA
Citation: *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65

Date: 20190219
Docket: HFX484742
Registry: Halifax

In the Matter of:

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the *Companies' Creditors Arrangement Act*

REPRESENTATIVE COUNSEL DECISION

Judge: The Honourable Justice Michael J. Wood

Heard: February 14, 2019, in Halifax, Nova Scotia

Counsel: Maurice Chiasson QC and Sara Scott, for the Applicants

Elizabeth Pillon, Lee Nicholson, and Sharon Hamilton for the Monitor

Raj Sahni, Ben Durnford and John Stringer, for an informal committee of users of the Quadriga platform

Jeremy Dacks, Evan Thomas, Robert Purdy QC, and Michael Scott, for an informal committee of users of the Quadriga platform

Gregory Azeff and Gavin MacDonald, for Parham Pakjou

Brendan O'Neill, for Goodmans LLP

By the Court:

[1] On February 5, 2019, the Court granted the application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. ("the Applicants") for an initial order and stay under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). Ernest & Young Inc. was appointed as Monitor.

[2] The Applicants operated a platform to facilitate the purchase and sale of cryptocurrencies. As set out in the materials filed in support of the initial application, users of the platform are owed approximately $250,000,000. The total number of users was estimated to be 115,000.

[3] The sole officer and director of the Applicants passed away in December 2018 and, as of the end of January 2019, the majority of the Applicants' cryptocurrency assets had not been located. The resulting insolvency lead to the granting of the initial order on February 5, 2019.

[4] The Court has received competing motions by or on behalf of users of the Applicants' platform. They all seek essentially the same relief, which is:

1. appointment of a representative creditors committee of users;
2. appointment of representative legal counsel to act on behalf of affected users on the instructions of the representative committee; and
3. providing access to the existing administrative charge over the assets of the Applicants to secure payment of the reasonable fees and disbursements of the representative counsel.

[5] Appointment of representative counsel and stakeholder representative committees are not unusual in complex *CCAA* proceedings. The authority for doing so is found in s. 11 of the Act which reads as follows:

> **General power of court**
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> 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.

[6] As stated in *Re Nortel Networks*, 2009 ONSC 3028, the Court has a wide discretion to appoint representatives under this provision. It is usually done where the affected group of stakeholders is large and, without representation, most members would be unable to effectively participate in the *CCAA* proceeding. Representative counsel can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders and avoiding a multiplicity of potentially conflicting retainers.

[7] In *Re Fraser Papers Inc.*, 2009 ONSC 6169, the Court described why it was prepared to appoint representative counsel for retirees and employees:

> 19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. ...

[8] In *Nortel Networks*, the Court appointed representative counsel for employees and retirees because that vulnerable group had little means to pursue a claim in the complex *CCAA* proceedings. The Court described the benefit of such an order as follows:

> 13 … In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

[9] There are two primary rationales given for the appointment of representatives and representative counsel in *CCAA* proceedings. The first is to provide effective communication with stakeholders and ensure that their interests are brought to the attention of the Court and other *CCAA* participants. The second is to bring increased efficiency and cost effectiveness to the proceeding as a whole. This latter objective can be attainted by streamlining notification to stakeholders through their representatives and eliminating the need for multiple counsel to be retained by individual stakeholders to represent their interests. The following judicial comments illustrate these principles:

> 53 … It seems to me that the 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.
>
> (*Nortel Networks*)

> 24 ... It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.
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> (*Re Canwest Publishing Inc.*, 2010 ONSC 1328)

> 38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.
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> (*Re U.S. Steel Canada Inc.*, 2014 ONSC 6145)

[10] Representatives and representative counsel should not have an open-ended retainer to undertake any inquiry or investigation they may wish, particularly where the fees are to be paid out of the assets of the applicant company. The appointment is specifically for purposes of the *CCAA* proceeding and to ensure that the stakeholders' interests are effectively taken into account by the decision makers. In some cases there are specific limitations placed on the scope of the representative counsel appointment. For example, in *Canwest Publishing* the funding approved for representative counsel excluded any investigation of claims against the corporate directors of the applicant company.

[11] In cases, such as here, where there are competing applications for appointment of representatives, the Court must evaluate the proposals to determine which will best achieve the objectives described above. In *Fraser Papers* the Court considered factors such as proposed breadth of representation, the extent of counsel's mandate to act, their legal expertise, jurisdiction of practice, facility in French and English and estimated costs (see para. 12).

[12] In this case all counsel are members of local and national law firms, with extensive insolvency experience. Each has been contacted by a significant number of users who support their appointment as representative counsel. All seek to be

appointed on behalf of all affected users. In my view, what will determine who should be appointed as representative counsel is the manner in which they propose to approach their role and how that accords with the objectives of effective communication and efficiency.

[13] The role of representative counsel will differ depending upon the nature of the applicant company and the characteristics of the group of stakeholders to be represented. For example, acting on behalf of employees and retirees for large manufacturers such as Fraser Papers or U.S. Steel, would be very different than the affected users in this case. The Applicants have no physical office, no employees and the trading platform was run by one individual who engaged a handful of third party contractors. The business is currently suspended, and may never resume, although that remains to be determined. The biggest task for the Monitor will be to locate and recover the Applicants' assets.

[14] There are more than 100,000 affected users. They range from small creditors who are owed $100, to others who are owed many millions. Privacy is a great concern and many users do not wish to be publicly identified in any fashion. If the affidavits filed in support of the representation motions are indicative, a number of users profess to have technical expertise in cryptocurrencies and are interested in offering their services to the Monitor to assist in the asset investigation process.

[15] Perhaps because of the nature of the cryptocurrency world, there has apparently been a great deal of discussion in various social media and online forums about the Applicants and their difficulties. The affidavits filed in this proceeding, refer to speculation about what may have happened with the Applicants' assets.

[16] All of this leads me to conclude that the most important role for representative counsel is to provide accurate information and advice about the *CCAA* proceeding to all users, and to ensure that their legitimate interests are taken into account throughout the proceeding. It is not to undertake their own investigation with respect to the Applicants and their assets, that is the responsibility of the court appointed Monitor, who is required to provide written reports on the results of their work.

Nature of the Motions

[17] The three motions were brought on behalf of affected users and supported by individual affidavits. I will identify the motions by the law firms they nominate to act as representative counsel.

Bennett Jones/McInnes Cooper

[18] Bennett Jones would act as lead counsel and McInnes Cooper as local counsel to the committee of affected users, the members of which are to be identified by representative counsel. The committee and counsel were proposed to act as a "check and balance" on the companies activities and provide a mechanism to "develop restructuring alternatives and solutions".

[19] The initial brief filed in support of the motion describes the role of representative counsel as follows:

> 34. The participation of the Representative Counsel will be critical to ensure that the interests of the Affected Users are represented in the Companies' *CCAA* proceedings, and as described previously, will facilitate the restructuring of the Companies under the *CCAA*. As descried in the Robertson Affidavit, there are several complex factual, legal and financial issues that must be addressed in order to successfully restructure the business of the Companies. The knowledge and the essential legal services provided by the proposed Representative Counsel and other professionals that are the beneficiaries of the Administration Charge will be necessary in order to, among other things, properly investigate the operation and current state of Companies' assets, verify relevant legal and financial information, adequately represent (without an unwarranted duplication of roles) the interests of the Affected Users, and otherwise navigate these *CCAA* proceedings to completion.

Miller Thompson/Cox & Palmer

[20] The motion proposes to appoint Miller Thompson as lead counsel with Cox & Palmer as local counsel, to represent the proposed representative committee of users. The membership of that committee would include the moving party, Mr. Pakjou and additional members selected by him and representative counsel.

[21] The motion brief proposes that representative counsel perform the following functions:

- managing communications with users;
- acting as user liaison for the Monitor;
- advocating for user interests before the Court;
- identify potential conflicting interest amongst users; and
- advocating for user privacy.

[22] With respect to the fees of representative counsel, the brief says:

> 30. The Moving Party proposes that Representative Counsel Fees be subject to approval by this Honourable Court, having regard to the reasonableness of same in the performance of the mandate prescribed by this Honourable Court. As such, it is respectfully submitted that the most effective manner in which to minimize Representative Counsel Fees will be for this Honourable Court to carefully prescribe the duties and responsibilities of representative counsel in an Order.

Osler, Hoskin & Harcourt/Patterson Law

[23] Osler, Hoskin & Harcourt LLP would be lead counsel with Patterson Law as local counsel acting on behalf of a representative committee of users. That committee would be composed of the three users who filed affidavits in the motion and two others selected by them in consultation with the Applicants and the Monitor.

[24] The initial brief describes their proposed approach to the case as follows:

> 30(d) Approach to Case
>
> (i) The proposed committee members emphasize the importance of communication with Affected Users to dispel misinformation, reduce anxiety, and permit the proceedings to advance in an orderly and efficient manner. They have identified communication channels most likely to reach the Affected Users, and Osler and Patterson have the resources to ensure that accurate information is disseminated effectively and that Affected Users can easily communicate their views. This emphasis on communication, combined with the committee's and Osler's knowledge of cryptocurrency and blockchain technology, would assist the Monitor in communicating complex technical information to a disparate group of individuals.
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> (ii) The proposed committee members have considerable technical expertise and relationships that may be of assistance to the Monitor and the Applicants. There are many others who wish to help. The proposed committee and its representative counsel can organize and focus any such assistance to ensure it is provided efficiently.

Positions of the Parties

Bennett Jones/McInnes Cooper

[25] At the hearing counsel indicated that they were supported by 181 users, whose claims totaled approximately $22,000,000. Both firms have significant *CCAA* experience and have already been working to advance the interests of the affected users, including appearing at the initial hearing.

[26] They have experience in communicating with diverse groups of stakeholders and disagree with the approach of some other counsel who suggest that applications such as Reddit and Telegram, should be used to provide information to users. They propose to use web sites and third party communication firms as they have in other large insolvencies.

[27] Counsel suggests that members of the users committee be identified by representative counsel in consultation with the Monitor.

[28] They agree with avoiding duplication of work already being done by the Monitor. It would not be their role to act as an "armchair quarterback" overlooking the Monitor's activities. They do not think it is appropriate to have an initial cap on fees of representative counsel because the scope of work is uncertain and the costs of returning to amend the cap in the future would not be warranted. Representative counsel has accountability to the Court and members of the user group.

Miller Thompson/Cox & Palmer

[29] This group has the support of 252 creditors with claims of approximately $15,000,000. They believe that representative counsel should be selected based upon a role that reflects efficiency, collaboration and cost effectiveness.

[30] The two firms both have extensive insolvency experience and will divide work based upon expertise with Cox & Palmer taking the lead on civil procedure and court appearances, and Miller Thompson on project management, communication and cryptocurrencies. The work would be organized to minimize the number of lawyers and Toronto counsel would only appear in court in Halifax if their expertise were required.

[31] Counsel observed that all of the professional fees being incurred were likely coming out of funds that would otherwise be available to the affected users and as a result should be minimized to the extent possible.

[32] Their communication plan includes, posting information in chat rooms and on social media. The rationale is that users are already discussing the Quadriga issue in those places, and it is important to have accurate information available to them. With respect to fees, they propose specific limits on the scope of representative counsel's mandate and an initial cap on fees of $250,000 with an ongoing budget process.

Osler, Hoskin & Harcourt/Patterson Law

[33] Osler, Hoskin & Harcourt would be the lead firm, with Patterson Law providing local input with respect to civil procedure and litigation in Nova Scotia. Osler has significant experience in legal issues related to cryptocurrency and blockchains. They are supported by 134 users with claims in excess of $19,000,000.

[34] Their approach would be complimentary to, and not duplicative of, the work done by the Monitor, recognizing that the users would ultimately be responsible for the expenses. They would have no objection to a defined mandate for representative counsel, nor a cap on fees with the ability to seek modification. With the firm's existing expertise in technical issues, there would be no need to incur costs in familiarizing themselves with those matters.

[35] They believe communication through social media is necessary because that is the location where members of the users group can be found. They would use their experience in communicating with large investor groups in other cases.

Goodmans LLP

[36] Goodmans did not bring forward a motion, although Mr. O'Neill, on their behalf, provided written submissions and appeared at the hearing. He proposed a mechanism whereby the representative committee be established by the Court and Monitor after soliciting expressions of interest in membership. That committee should then have the responsibility of selecting representative counsel. The theory is that the users ought to have a say in which law firm will represent them.

The Applicants

[37] Mr. Chiasson emphasized the importance of having representative counsel appointed quickly and prior to the comeback hearing on March 5, 2019. He believed it was important to have input from the affected users in that process and advocated for immediate appointment of the representative committee using the individuals who had filed affidavits in support of the three motions before the Court. That committee could then have input into the selection of representative counsel.

[38] The Applicants' also emphasized the financial considerations and in particular, the importance of limiting expenses, which will ultimately be borne by users. They advocate a restriction on the scope of the representative counsel's mandate.

The Monitor

[39] Ms. Pillon pointed out that a number of firms had contacted her prior to the initial application, expressing interest in appointment as representative counsel. She asked them to delay those motions in order to allow the Applicants to bring the initial application before the Court. For this reason she did not believe there should be any consideration given to the fact that Bennett Jones/McInnes Cooper had been in attendance on February 5, 2019, seeking to be appointed as representative counsel and the other firms were not.

[40] The Monitor emphasized the importance of having a representative committee that reflects the diversity of users and that it may take some time to determine what this would require. They were not opposed to appointing a preliminary committee with the possibility of substitution of members at a future point in time. That preliminary group could make recommendations about representative counsel.

[41] The Monitor is concerned with ensuring that there is no duplication of work between representative counsel and counsel to the Monitor and Applicants. For this reason they recommend that consideration be given to a limited scope of mandate in the appointment order. It was suggested that there should be a cap on representative counsel fees of $100,000 to be applied to work going forward, but not in relation to the preparation of the appointment motion. The amount of the cap could be revisited as the *CCAA* process unfolds.

Analysis

[42] All counsel acknowledged that the three proposed counsel groups are well qualified and have the necessary experience to carry out the mandate of representative counsel. They each have the support of many users with millions of dollars in outstanding claims.

[43] This *CCAA* proceeding is unique in the sense that there is no operating business of any significant size in terms of physical assets, employees, third party suppliers or secured creditors. There is, however, a very large group of diverse users who have no access to many millions of dollars in assets which they had given to the Applicants. The anecdotal evidence at the hearing is that many people are extremely upset, angry and concerned about dishonest and fraudulent activity. There are reports of death threats being made to people associated with the Applicants. All parties agree that this user group needs representation as soon as possible. That representation will give them accurate information and the knowledge that their interests are being properly represented throughout this process.

[44] Another unusual feature is that the only creditors of any significance are the users. The one secured creditor agreed to advance $300,000 in order to get the *CCAA* process underway. The plan is to repay the money as soon as assets become available. The lack of any secured creditors means that the users' money is effectively funding all of the professional fees being incurred. It is extremely important to manage those, in order to maximize recovery for the users. This requires a commitment on all parties to have this issue front and centre while, at the same time, not compromising on the work necessary to advance the interests of the users and recover assets for their benefit.

[45] In my view, the criteria to be used in assessing which of the groups should be representative counsel, is somewhat subjective. It requires a consideration of their approach to the issues of efficiency, communication and cost effectiveness. I am satisfied that the submissions of counsel have allowed me to gain insight into the approaches which each group proposes to undertake. There are strengths and weaknesses in each and legitimate debates about which communication strategies might be most effective in the circumstances.

[46] A number of counsel suggested that the final selection of representative counsel should be deferred until the users committee is in place so that they can offer their opinion on the issue. Competing with that philosophy is the sense of urgency conveyed by all in having the committee and counsel appointed as soon as possible. I am not satisfied that delaying selection of representative counsel until the committee is in place is reasonable. I agree with the Monitor that the committee needs to reflect the diversity of the user group and should only be appointed after soliciting expressions of interest from the users. I also believe that having input from representative counsel on behalf of the users would be important in the selection of committee members. That decision should not be left to the Monitor and the Court alone.

[47] There are three legal teams, who are obviously qualified and capable of doing the work who are supported by many users, and I am not sure on what basis members of the representative committee could chose among them. It is unrealistic to think that these individuals would have a real appreciation of the issues of efficiency and cost effectiveness in a *CCAA* proceeding. At a minimum, it would seem that they would have to be educated about these matters before they could engage in a meaningful consideration of the somewhat subtle differences between the competing firms.

[48] When I consider all of these factors I believe it is in the best interests of all of the users that the issue of representative counsel be decided now and that I am in the

best position to do so. Any of the proposed counsel teams have the capability of performing the work required.

[49] Having assessed all of the information provided on the motions and considering the issues of efficiency, communication and cost effectiveness I believe that the Miller Thompson/Cox & Palmer team is the best choice, and I would appoint them as representative counsel. My reasons for selecting them are as follows:

1. Both the local and national firms have extensive insolvency and *CCAA* experience. Miller Thompson has additional depth in certain areas, including larger *CCAA* proceedings and cryptocurrency.
2. The relationship between the two firms has been thought out carefully with a view to minimizing costs. Cox & Palmer will deal with their areas of expertise, including local litigation practice and court appearances. Miller Thompson will provide expertise in dealing with large creditor groups and cryptocurrency technology.
3. The communication strategy proposed is reasonable, including the idea that some presence in social media and online discussion groups is necessary in order to reach the user group members.
4. The understanding of the financial implications for users has permeated their submissions from the beginning. They propose a limited initial mandate and a cap on counsel fees in recognition of the reality that it is the users who will ultimately be paying.
5. They recognize the efficiency to be gained by working collaboratively with the Monitor and demonstrated this by respecting the request that they defer their motion for appointment as representative counsel until after the initial order was dealt with.

[50] Many of these same factors apply to one or more of the other legal teams, however, on balance, the combination of all of these characteristics in the Miller Thompson/Cox & Palmer presentation, makes them the best choice.

Appointment of Representative Committee

[51] With the selection of representative counsel, the appointment of members of the representative committee should proceed expeditiously. The Monitor suggested that notice be given inviting expressions of interest for membership to the user group and that, once received, the Monitor and representative counsel could review these with the view to making a recommendation on membership to the Court. I agree with that procedure, and would direct that it commence without delay.

Conclusion

[52] Having selected representative counsel and given directions for appointment of the representative committee, the formal order reflecting these decisions can be finalized. I would expect that representative counsel, the Monitor and the Applicants should be able to come to an agreement on most, if not all, of the terms of the order which could then be presented to the Court for consideration. In the event that there remains some disagreement between the parties, those matters can be dealt with by the Court at or before the comeback hearing on March 5, 2019.

Wood, J.