

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

B E T W E E N:

PEOPLES TRUST COMPANY

Applicant

- and -

ROSE OF SHARON (ONTARIO) RETIREMENT COMMUNITY

Respondent

**APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, as amended and under Section 101 of the
Courts of Justice Act, R.S.O. 1990, c. C.43**

**MEMORANDUM OF LAW
(Representative Counsel Motion Returnable April 11, 2013)**

April 5, 2013

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capacity as court appointed receiver and
manager of Rose of Sharon (Ontario)
Retirement Community

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APPOINTMENT OF REPRESENTATIVE COUNSEL**

1. Deloitte & Touche Inc. ("**Deloitte**") in its capacity as receiver and manager (the "**Receiver**") of Rose of Sharon (Ontario) Retirement Community ("**Rose**") seeks the direction of the Court with respect to determining the quantum and priority of claims and interests of Unit-holders and any tenants of Unit-holders at the Rose Life-Lease Residence, and whether their claims and interests are subordinate in priority to the Construction Mortgage of Peoples Trust Company (the "**Priority Issue**"). The Receiver has been advised that Peoples Trust Company ("**Peoples**") will be bringing a motion seeking an Order for priority of its Construction Mortgage over these claims and interests, terminating the Right to Occupy Agreements of Unit-holders, and seeking vacant possession of these Life-Lease Units upon written demand from the Receiver.

2. The Receiver has categorized the 90 Life-Lease Units in the Rose Life-Lease Residence (individually, each a “Unit”). As of March 11, 2013, the Receiver estimated that 28 Units can be categorized as “Arm’s Length Units”, being Units subject to Right To Occupy Agreements that were executed by individuals of Korean heritage. The Arm’s Length Units are distinguishable from the category of Director Units (16 Units), which are also Units subject to Right To Occupy Agreements that were executed by individuals of Korean heritage. The category of Director Units was intended to include those individuals (or their related family members) who had direct involvement in the Rose Project (the Life-Lease Residence and Nursing Home), who were aware or should have been aware of Rose’s financial circumstances and, as a result, who may have had a duty to Arm’s Length Unit-holders regarding their actions and decisions as Rose board members.

3. The Receiver has also established categories for Units characterized as “Non Arm’s Length Units” (18 Units), released and vacant Units (16 Units), Units in which creditors of Rose are claiming an interest (13 Units), unsold and vacant units (1 Unit) and 2 Units purchased by Mugungwha Homes (a charitable organization that appears to be related to John Yoon, the CEO of Rose).¹

¹ While there are only 90 Units, there are 4 Units that are subject to the interests of more than one party, which brings the number of Units in the Receiver’s classification to 94.

4. The Receiver recognizes that the holders of the Arm's Length Units (the "**Arm's Length Unit-holders**"), and any tenants of those units and all other units of the Rose Life-Lease Residence (collectively, the "**Arm's Length Claimants**") may wish to make submissions to the Court on the issue of priority and their claims and interests in those Life-Lease Units. The Receiver has therefore brought a motion seeking an Order that Kronis, Rotsztain, Margles, Cappel LLP ("**KRMC**") be appointed as representative counsel for the Arm's Length Claimants with respect to the issue of priority between the Construction Mortgage and the claims and interests of the Arm's Length Claimants (the "**Arm's Length Claims**"), and that KRMC's fees and costs in that role be funded from the receivership.

5. However, the Receiver is not seeking that representative counsel be appointed for the holders of Units in any other categories (*i.e.* other than the Arm's Length Unit-holders). There is the potential for a conflict of interest between the Arm's Length Unit-holders and the Rose Directors. Further, the factors and reasons discussed below for appointing representative counsel for the Arm's Length Claimants are not as applicable, or applicable at all, when it comes to the other categories of Unit-holders.

6. That being said, the Receiver's view is that the tenants of all Units (not just the tenants of the Arm's Length Units) can be represented by KRMC as well, as their interests should be identical to the interests of the tenants of the Arm's Length Units.

7. In *Nortel Networks Corp. (Re)* (“**Nortel**”), The Honourable Mr. Justice Morawetz appointed representative counsel to act for various groups of Nortel’s then current and former employees. In making a representative counsel Order in *Nortel*, Justice Morawetz noted that the employees were a vulnerable group of creditors with little means to pursue their claims. His Honour further recognized the social benefit involved with assisting former employees, and that the appointment of representative counsel would provide a reliable resource for the group for information about the process. Finally, Justice Morawetz noted that appointing representative counsel would have the benefit of streamlining and introducing efficiency to the process.

Nortel Networks Corp. (Re) [2009] O.J. No. 2166, at para 13 and 14.

The Canwest Publishing Factors

8. In *Canwest Publishing Inc. (Re)* (“**Canwest Publishing**”), The Honourable Madam Justice Pepall listed eight factors to be considered when determining whether to make a representation order:

- (1) the vulnerability and resources of the group sought to be represented;
- (2) any benefit to the companies under CCAA protection;
- (3) any social benefit to be derived from representation of the group;
- (4) the facilitation of the administration of the proceedings and efficiency;
- (5) the avoidance of a multiplicity of legal retainers;
- (6) the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- (7) whether representative counsel has already been appointed for those who have similar interest to the group seeking representation and who is also prepared to act for the group seeking the order; and
- (8) the position of other stakeholders and the Monitor.

Canwest Publishing Inc. (Re), [2010] O.J. No. 943, at para 21.

9. Although *Nortel* and *Canwest Publishing* (both proceedings before this Court) were decided in the context of CCAA proceedings, orders appointing representative counsel have also been made in bankruptcy proceedings and in receivership applications.

MF Global Canada (Re), 2011 ONSC 7100.

Ontario Securities Commission v. Portus Alternative Asset Management Inc., Court File No. 05-CL-5792
Order of The Honourable Mr. Justice C.L. Campbell dated March 9, 2004 [sic] (unreported).

Ontario Securities Commission v. Norshield Asset Management (Canada) Ltd., Court File No. 05-CL-5695
Order of The Honourable Mr. Justice C.L. Campbell dated February 7, 2006 (unreported).

WestLB AG v Rosseau Resort Developments Inc., Court File No. CV-09-8201-00CL
Order of The Honourable Madam Justice Pepall dated August 20, 2009 (unreported).

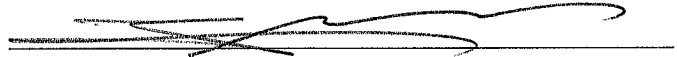
10. The Receiver submits that an analysis of *Nortel* and the *Canwest Publishing* factors supports representative counsel being appointed for the Arm's Length Claimants. The majority of Arm's Length Claimants appear to be of Korean heritage, and many are elderly. Most of the Arm's Length Claimants will have difficulty communicating with the Court in the English language unless they have legal representation or are otherwise represented. It is anticipated that either individually or as a group, the Arm's Length Claimants would find it onerous to pay for separate legal representation. KRMC's reasonable fees and disbursements relating to the mandate will be paid out of the receivership. One of the two lawyers at KRMC who will have main carriage of the proposed retainer is of Korean heritage and speaks Korean.

11. Since appointing representative counsel for the Arm's Length Claimants will afford them an opportunity to have their position on the Priority Issue put before the court, the Arm's Length Claimants will derive a concomitant social benefit from this access to justice.

12. As set out above, the Receiver has categorized the 90 Units into groups. The Arm's Length Claimants are by far the largest group (as they consist of the Arm's Length Unit-holders, and tenants of all Unit-holders). Appointing one firm to represent the Arm's Length Claimants will facilitate the efficient administration of the receivership (vis-à-vis the Priority Issue), and by definition will avoid multiple legal retainers by the Arm's Length Claimants, all of whom will (it is expected) advance substantially similar positions. Having one representative counsel that the Receiver can communicate with on behalf of all Arm's Length Claimants will save on administration costs for the receivership, which is a benefit to the Respondent and to the creditors of Rose.

13. Although KRMC has not yet been retained by any of the individual Arm's Length Claimants, it has confirmed that it is prepared to act as representative counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Eric Golden, lawyer for the Receiver

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Proceeding Commenced at **TORONTO**

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