

**CITATION:** Economical Mutual Insurance Company (Re), 2016 ONSC 5935  
**COURT FILE NO.:** CV-16-11425-00CL  
**DATE:** 20160922

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:** IN THE MATTER OF THE *INSURANCE COMPANIES ACT*, S.C. 1991, c. 47,  
AS AMENDED, AND THE *MUTUAL PROPERTY AND CASUALTY  
INSURANCE COMPANY WITH NON-MUTUAL POLICYHOLDERS  
CONVERSION REGULATIONS*, SOR/2015-168

IN THE MATTER OF A PLAN OF CONVERSION OF ECONOMICAL  
MUTUAL INSURANCE COMPANY

**BEFORE:** HAINEY J.

**COUNSEL:** *Paul Bates, Michael Robb and Ronald Podolny*, for Siskinds LLP, Applicant

*Geoff R. Hall*, for McCarthy Tétrault LLP, Applicant

*John Finnigan*, for Thornton Grout Finnigan LLP, Applicant

*Sheila Block*, for Torys LLP, Applicant

*Clifton Prophet*, for Gowling WLG, Applicant

*Mark A. Gelowitz and Laura K. Fric*, for Economical Mutual Insurance Company,  
Respondent

**HEARD:** September 19, 2016

**ENDORSEMENT**

**BACKGROUND**

[1] Economical Mutual Insurance Company (“Economical”) has initiated a demutualization process pursuant to the *Mutual Property and Casualty Insurance Company with Non-Mutual Policyholders Conversion Regulations*, SOR/2015-168 (the “*Conversion Regulations*”).

[2] According to Economical, demutualization will result in financial benefits for its policyholders. In particular, if demutualization succeeds, there will be a distribution of newly created shares arising from the demutualization to Economical’s eligible policyholders. Given Economical’s book value of \$1.80 billion as of March 31, 2016, the financial benefits to the eligible policyholders from Economical’s demutualization are substantial.

[3] The *Conversion Regulations* provide that the two classes of eligible policyholders – mutual and non-mutual – are to negotiate, by committees acting on their behalf, to determine the allocation of any such financial benefits between the two groups (the “Allocation”). The court must appoint counsel to represent each of these classes of eligible policyholders to negotiate the Allocation.

[4] Pursuant to the Initial Order issued by me on July 15, 2016, counsel seeking appointment to represent either group of eligible policyholders had to bring a Counsel Appointment Motion, returnable September 19, 2016. Six law firms have brought Counsel Appointment Motions. Thornton Grout Finnigan LLP seeks to represent either class of policyholders; McCarthy Tétrault LLP seeks to represent the mutual policyholders; and three law firms, Gowling WLG (Canada) LLP, Siskinds LLP, and Torys LLP, seek to represent the non-mutual policyholders. (the “Counsel Applicants”) Goodmans LLP, the sixth law firm, abandoned its motion.

[5] The *Conversion Regulations* and my Initial Order provide an opportunity for eligible policyholders to deliver written objections to the appointment of any of the Counsel Applicants. Seven objections from eight eligible policyholders were received. They are reviewed in more detail below.

[6] Economical does not take a position with respect to the appointment of counsel for either class of its policyholders.

[7] According to Economical, the demutualization process under the *Conversion Regulations* is lengthy and complex, involving participation by multiple stakeholders, regulatory reviews at key stages, and three policyholder votes. The *Conversion Regulations* prescribe four specific phases.

[8] Phase one of the demutualization process required Economical’s board of directors to pass a resolution recommending demutualization in order to initiate the process. Economical’s board passed this resolution on November 3, 2015.

[9] Phase two required a meeting of eligible mutual policyholders to vote on whether to proceed to the current phase of the process (which is to negotiate with eligible non-mutual policyholders on the Allocation). The first policyholder meeting occurred on December 14, 2015, and the eligible mutual policyholders voted overwhelmingly in favour of proceeding to the current phase.

[10] Phase three is the process to determine the Allocation among policyholders and for Economical to prepare the conversion proposal, opinions and other required materials for submission to the Office of the Superintendent of Financial Institutions.

[11] The fourth and final phase of the demutualization process involves the final court approvals of the conversion proposal and the demutualization.

## THE ALLOCATION PROCESS

[12] The demutualization process is currently in phase three, during which the eligible policyholders (through committees acting on their behalf) are to negotiate to determine the Allocation of the demutualization benefits among them.

[13] Once counsel has been appointed by the court, eligible policyholders will apply to the appointed counsel to be members of the policyholder committees. In accordance with my Initial Order, the court will then appoint three to nine eligible mutual policyholders to form the eligible mutual policyholder committee and three to nine eligible non-mutual policyholders to form the eligible non-mutual policyholder committee.

[14] Appointed counsel's role will be to represent each of the policyholder committees and to negotiate the Allocation on behalf of each group of eligible policyholders.

[15] Counsel Applicants' motion records were required by my Initial Order to include an affidavit that set out:

- (a) The Counsel Applicant's actual or potential conflicts;
- (b) Current relationships between the Counsel Applicant and Economical, or any other property and casualty insurer;
- (c) Engagements of any kind between the Counsel Applicant and any person adverse in interest to Economical;
- (d) The experience of the Counsel Applicant in financial law, corporate law, securities law, mediation, arbitration and in major corporate transactions and restructurings such as plans of arrangement; and
- (e) The Counsel Applicant's proposed fee arrangements.

[16] Each of the five Counsel Applicants has provided a motion record containing this information. This material establishes that each of the Counsel Applicants is very well-qualified to represent the eligible policyholders. The Counsel Applicants are all highly-respected and experienced law firms, which, in my view, have the necessary experience and expertise to effectively carry out the role of counsel to Economical's eligible policyholders.

## ANALYSIS

[17] Section 8(6) of the *Conversion Regulations* states:

### **Appointment**

8 (6) The court must appoint counsel for each of the two classes of policyholders and must notify the converting company of its decision following a hearing at which the court assesses the ability of each applicant to fairly and adequately represent the interests of the class of policyholders in question, including by taking into account their experience in financial law, corporate law, securities law or mediation and arbitration and by having regard to any objections filed under subsection (5).

[18] I am, therefore, required to assess each Counsel Applicant's ability to fairly and adequately represent the policyholders by taking into account their experience in financial, corporate and securities law, as well as mediation and arbitration, and by considering any policyholder objections.

[19] Section 11(1) of the *Conversion Regulations* requires Economical to pay the legal fees of the Counsel Applicants appointed by the court. My Initial Order required Counsel Applicants to include in their motion material a proposed fee arrangement, including an estimate of the total fees and any proposed alternative fee arrangements such as fee caps.

[20] Economical submits that each Counsel Applicant's proposed fee arrangement is another factor that I should consider in appointing counsel. However, as Economical observed in its factum, it appears that each Counsel Applicant used different assumptions about the scope, nature and requirements of the role of counsel for the eligible policyholders. This makes it very difficult to fairly compare the different proposed fee arrangements. Since the final fee arrangements for counsel must be approved by the court, and each Counsel Applicant indicated during argument that they would be prepared to accept whatever fee arrangement I consider appropriate, I do not intend to consider this criterion in selecting counsel to be appointed.

[21] As I have already indicated, I am satisfied that each of the five Counsel Applicants has sufficient experience and expertise in financial, corporate and securities law as well as mediation and arbitration to effectively carry out the role of counsel to Economical's eligible policyholders. I have difficulty choosing among the five Counsel Applicants on these criteria for this reason.

[22] In accordance with s. 8(6) of the *Conversion Regulations* I must also consider any objections filed by eligible policyholders. In my view, this is an important criterion since the objections are from the Counsel Applicants' prospective clients. It is of fundamental importance that clients have faith in the competency and independence of their legal counsel. A lack of confidence by clients in their legal counsel, whether reasonably justified or not, seriously undermines the client/lawyer relationship. I have concluded, for this reason, that I should not appoint counsel to represent policyholders under circumstances where certain of the policyholders question that Counsel Applicant's ability to properly represent their interests. The selection and retention of legal counsel involves a very personal choice on the part of a client. In my view, I must respect this aspect of the client/lawyer relationship in appointing counsel to represent the eligible policyholders.

[23] The objections filed under s. 8(5) of the *Conversion Regulations* can be summarized as follows:

*TORYS LLP*

[24] Five eligible policyholders objected to Torys LLP being appointed counsel because the firm previously represented Gore Mutual Insurance Company in connection with a possible demutualization. The objecting policyholders believe that Gore Mutual opposed the enactment of the regulations that permitted Economical to apply for demutualization and took other positions contrary to Economical's best interests. These eligible policyholders believe that Torys LLP has a conflict of interest because of the firm's previous representation of Gore Mutual. The

responding material filed by Torys LLP denies that there is any conflict of interest and clarifies the position taken by Gore Mutual while Torys LLP was representing it. I am satisfied on this evidence that Torys LLP does not have an actual legal conflict of interest. However, there is still a perception on the part of these five eligible policyholders that Torys LLP is in a conflict of interest. In my view, these policyholders' concerns about a conflict of interest could prevent Torys LLP from gaining the trust required of its prospective clients. For this reason I decline to appoint Torys LLP to represent either group of eligible policyholders.

*SISKINDS LLP*

[25] Three eligible policyholders objected to Siskinds LLP being appointed counsel primarily because the firm has proposed that Mr. Claude Gingras will be part of its team. According to two of these objectors, Mr. Gingras, an insurance executive, is a known opponent of demutualization who opposed Economical's demutualization. These prospective clients believe that Siskinds is, therefore, in a conflict of interest because Mr. Gingras' perceived negative views about Economical's demutualization could interfere with that firm's ability to effectively represent the interests of the eligible policyholders in the Allocation process. Again, although I am satisfied on the evidence that Siskinds LLP does not have an actual legal conflict of interest, I am concerned that these eligible policyholders' views could prevent Siskinds LLP from gaining the trust required of its prospective clients. For this reason, I decline to appoint Siskinds LLP to represent either group of eligible policyholders.

*GOWLING WLG (CANADA) LLP*

[26] Although there were no objections by eligible policyholders filed in respect of Gowling WLG, I am concerned that certain of the Gowling's partners who are proposed to represent the eligible policyholders are also currently representing Economical. According to its factum, Gowling WLG is currently "counsel to ... Economical in connection with its proposed acquisition of Western Financial Insurance Company". Further, "Gowling WLG, including Ms. Frisina and Mr. Koch, are acting for Economical in respect of: claims litigation, the transaction referred to under paragraph 11(i), and as agent of record for various trademark matters, including domain name registrations."

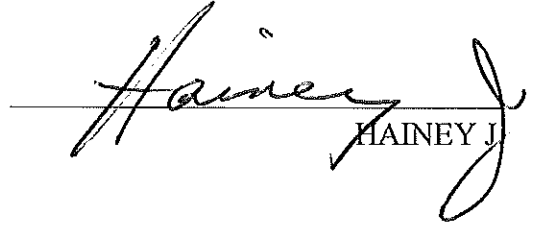
[27] Although I am satisfied that Gowling WLG does not have an actual legal conflict of interest, its representation of Economical in respect of these other legal matters may raise an appearance of a conflict of interest in the minds of certain of the prospective clients. For this reason, I decline to appoint Gowling WLG to represent either group of eligible policyholders.

**CONCLUSION**

[28] The two remaining Counsel Applicants, McCarthy Tétrault LLP and Thornton Grout Finnigan LLP, are both highly qualified to act as counsel to the policyholders, had no objections from eligible policyholders and do not have any appearances of a conflict of interest. I am, therefore, of the view that these two firms should be appointed counsel pursuant to the *Conversion Regulations*. In view of McCarthy Tétrault LLP's request to be appointed to represent the mutual policyholders, I appoint McCarthy Tétrault LLP to represent the eligible mutual policyholders.

[29] I appoint Thornton Grout Finnigan LLP to represent the eligible non-mutual policyholders.

[30] There will be no order as to costs of the motion.

  
HAINEY J.

**Date:** September 22, 2016