Court File No. CV-09-8396-00CL

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 CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

FACTUM OF THE APPLICANTS
(Re CEP Severance/Hardship Motion)

February 26, 2010

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AND TO: **THE SERVICE LIST**

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APPLICANTS

FACTUM OF THE APPLICANTS

PART I – NATURE OF THIS APPLICATION

1. On October 6, 2009, Canwest Global Communications Corp. and the other Applicants listed on Schedule "A" hereto (the "**Applicants**"), and together with the Partnerships listed on Schedule "B" hereto (the "**CMI Entities**") applied for and were granted protection under the *Companies' Creditors Arrangement Act* ("**CCAA**") pursuant to an Order of this Court (the "**Initial Order**").

2. This factum is filed in response to a motion by the Communications, Energy and Paperworkers Union of Canada (the "**Union**") seeking immediate payment in full of certain severance amounts. These severance obligations are provided for under the applicable collective agreements in force between the CMI Entities and the Union.

3. The Union has identified two categories of former Union members who have claims for unpaid severance amounts (together, the "**Union Claimants**"). In the first category

are certain former unionized employees who received notices of layoff with an effective date occurring prior to the date of the Initial Order, thereby crystallizing the severance payment obligations prior to the filing. This category of former employees is referred to in this factum as the "**Pre-Filing Claimants**". The second category consists of former unionized employees who received notices of layoff either prior to or after the date of the Initial Order with an effective date occurring after the date of the Initial Order. These former employees therefore continued to work for some period of time following the Initial Order. They are referred to as the "**Post-Filing Claimants**".

4. The Union essentially claims that, by virtue of the fact that the Post-Filing Claimants worked for some period of time following the date of the Initial Order, all of the monetary entitlements of these Claimants including, in particular, severance payments under the applicable collective agreement – not just those amounts that were paid by the CMI Entities relating to wages for the actual services provided – are immediately due and payable by the CMI Entities. In other words, the Union asserts that the Post-Filing Claimants are exempt from the stay of proceedings (the "**Stay**") imposed under the Initial Order.

5. The CMI Entities submit that the Union's request for payment in full of these severance amounts cannot be sustained at law, either as a matter of general CCAA law, or in light of very recent case law of this Honourable Court and the Ontario Court of Appeal in the Nortel CCAA proceeding and in other CCAA proceedings. As further discussed below, the CMI Entities submit that:

(a) The claims of the Pre-Filing Claimants are for pre-filing debts. Payment of all pre-filing debts is currently stayed under the terms of the Initial Order. In this regard, the Pre-Filing Claimants are in no worse position than any other creditors

of the CMI Entities who are owed pre-filing amounts but are precluded from enforcing payment due to the Stay. The fact that the CMI Entities determined that these amounts could be satisfied by means of periodic payments (described as "salary continuance") instead of a lump sum does not change their character.

(b) In relation to the Post-Filing Claimants, the CMI Entities properly paid the ordinary wages and benefits of those Claimants until the effective date of their lay-off, based on the fact that these Post-Filing Claimants remained at work until that date and that payment of their salary for such service was required by section 11.01 of the CCAA. The fact that the Post-Filing Claimants provided services following the date of the Initial Order does not, however, convert their severance entitlements – which take effect upon the termination of their services and are calculated based on tenure of past service – into post-filing obligations. Such a determination would not only be contrary to recent CCAA jurisprudence, but could have wide-spread and unprecedented implications generally for the application of a CCAA stay to pre-filing obligations owed to post-filing suppliers.

6. The CMI Entities therefore submit that the Union's request for an order requiring immediate payment of the severance entitlements to the Post-Filing Claimants should be denied.

PART II – FACTS

7. The CMI Entities generally accept many of the factual assertions put forward by the Union in its factum. However, the CMI Entities wish to highlight or clarify the following facts.

8. The CMI Entities agree that they determined that the severance entitlements of the Union Claimants could be satisfied by means of a series of periodic "salary continuance" payments rather than by means of a lump sum.[1] Whether this approach was justified under the collective agreement is not in any material sense at issue in this motion.[2]

9. The CMI Entities also agree that the letters giving notice of layoff to the Union Claimants all indicated that the Union Claimants would receive their severance amounts if they continued to work for the CMI Entities until their last day of work, i.e. the effective date of their layoff.[3]

10. The Initial Order, in typical fashion, imposed a broad stay of proceedings in favour of the CMI Entities and permitted, without requiring, the CMI Entities to make certain employee-related payments.[4]

11. The Union Claimants, like any other provider of post-filing services, were paid all of their ordinary salary and benefits for the period of time during which they continued to work after the date of the Initial Order. The Union Claimants do not contend otherwise. However, the CMI Entities did not pay severance payments (or monies in lieu of notice of layoff), to either the pre-filing claimants or the post-filing claimants, because all of these amounts were subject to the Stay.

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1 See for example Affidavit of Rob Lumgair, Tabs L-T, Motion Record of the Union, pages 39 – 57 [Lumgair Affidavit] at para. 12

2 This issue is the subject of a separate grievance: see Lumgair Affidavit, para. 13.

3 See for example Lumgair Affidavit, Exhibit C.

4 Initial Order, paragraphs 15 and 16, paragraph 7(a).

PART III – ISSUES AND THE LAW

12. The CMI Entities submit that the Union's motion in respect of severance pay should be dismissed. The Union's position misconstrues the decision of Justice Morawetz and the decision of the Court of Appeal of Ontario in *Re Nortel Networks Corp.*, and is not supported by any of the recent CCAA case law.

Severance Entitlements of the Union Claimants Are Stayed

13. The Union appears to be limiting its claim for immediate and full payment of severance entitlements to the Post-Filing Claimants. Only the Post-Filing Claimants provided services after the date of the Initial Order. It is the CMI Entities' understanding that the Union does not contend that the Pre-Filing Claimants, who were no longer physically at work and providing services as of the date of the Initial Order, are entitled to immediate payment in full of their severance entitlements.

14. The Union sets out four basic principles that purport to justify immediate payment in full of the severance entitlements of the Post-Filing Claimants. These are:

(a) The collective agreements expressly provide for severance and termination pay;

(b) The collective agreements remain in force during the CMI Entities' CCAA proceedings;

(c) Section 11.01 of the CCAA provides that employees are entitled to immediate payment for services provided to the CMI Entities after the date of the Initial Order; and

(d) Severance and termination pay under the applicable collective agreements are payments in respect of services provided to the CMI Entities after the date of the Initial Order.[5]

15. The CMI Entities do not quarrel with the first three items on the above list. Pursuant to case law and to the CCAA, it is clear that the collective agreement survives the CCAA stay period unless modified as permitted by the CCAA.[6] However, the case law draws a clear distinction between the conclusion that a collective agreement subsists during the CCAA stay period and the conclusion that any and all amounts owing under the collective agreement can be enforced during that period.[7]

16. The CMI Entities also do not contest the entitlement of the Post-Filing Claimants to receive severance payments pursuant to the terms collective agreement.[8] Although those severance entitlements continue to exist on the basis that the collective agreement continues in force, the CMI Entities are currently not honouring these payments as a result of the Stay. Similarly, the CMI entities are not presently honouring numerous other obligations owed to their creditors.

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5 Factum of the Union, para. 16.

6 Section 33(1) of the CCAA provides that the collective agreements remain in force, unless modified in accordance with section 33. See also *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* (2003), 40 C.B.R. (4th) 95 (Que. C.A.) [*Jeffrey Mines*].

7 *Jeffrey Mines, ibid.* at paras. 60 to 62. See also *Re AbitibiBowater Inc.*, cited in *Fraser Papers, infra.*

8 Lumgair Affidavit, paras. 11 and 18.

17. The CMI Entities also do not disagree with the Union's characterization of the effect of section 11.01 of the CCAA (which was formerly section 11.3[9]) as requiring immediate and full payment for post-filing supplies and services. Section 11.01 provides:

> No order made under section 11 or 11.02 has the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.[10]

18. However, the Union makes a significant and illogical leap in putting forward the fourth proposition: namely, that "severance and termination pay under the applicable collective agreements are payments in respect of services provided to the Applicants after the date of the Initial Order." The CMI Entities submit that this statement simply cannot be sustained in the face of all of the recent case law addressing the effect of a CCAA stay of proceedings on an obligation to make termination or severance payments, including the recent decision of Morawetz J. in *Re Nortel Networks Corp.*, which was affirmed by the Ontario Court of Appeal.[11]

A. The Effect of *Nortel*

19. It is important to analyze carefully the findings of Morawetz J. in *Nortel* in order to demonstrate that, contrary to the submissions of the Union in this motion, the reasons of Morawetz J., as affirmed by the Court of Appeal, are the complete answer to the Union's request for immediate payment in full of severance entitlements.

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[9] The language of this provision did not materially change with the September 18, 2009 amendments to the CCAA.

[10] CCAA, section 11.01.

[11] (2009), 55 C.B.R. (5th) 68 (Ont. S.C.J.) [*Nortel Motion*], aff'd 2009 ONCA 833 [*Nortel Appeal*]. The non-unionized former employees of Nortel, whose simultaneous claims for termination and severance pay pursuant to employment standards legislation were also determined in these decisions, have sought leave to appeal the

20. The Union in *Nortel* requested a declaration that affected employees were entitled to immediate payment in full of certain post-employment retirement benefits and termination and severance pay amounts. Nortel was subject to an initial order that is virtually identical to the Initial Order in all respects that are material to this motion. The Union advanced several theories to justify this immediate entitlement, based, among other things, on the alleged application of section 11.01 (formerly section 11.3) of the CCAA to these amounts. However, the key findings of Morawetz J. in *Nortel* are as follows:

(a) Section 11.01 is an exception to the general stay provision authorized by section 11. As such, section 11.01 should be narrowly construed.[12]

(b) Section 11.01 applies to services provided after the date of the Initial Order. "Services" must be given its ordinary meaning. In other words, there must be some activity on behalf of the service provider which is performed after the date of the Initial Order.[13]

(c) The CCAA contemplates that pre-filing obligations <u>are not paid</u>, absent exceptional circumstances. Services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.[14]

(d) It does not matter whether a particular obligation crystallizes after the date of the Initial Order. If it relates to pre-filing services, it will not be paid, regardless of

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decision of the Court of Appeal to the Supreme Court of Canada. The Union has not sought leave to appeal the portion of the decision dealing with the Union issues.

[12] *Nortel Motion,* para. 66.

[13] *Nortel Motion,* para. 66.

[14] *Nortel Motion,* para. 66.

whether the obligation to pay had crystallized as of the date of the Initial Order, or whether it crystallizes afterwards.[15]

(e) The crystallization of an obligation under a collective agreement to pay severance does not fall into the category of essential services provided during the CCAA period. For the most part, severance pay is based on services that were provided pre-filing.[16]

21. The Court of Appeal upheld Morawetz J.'s findings. In particular, the Court of Appeal agreed that section 11.01 of the CCAA is to be interpreted narrowly.[17]

B. *Windsor Machine*

22. Morawetz J. reached similar conclusions in the subsequent case of *Windsor Machine & Stamping Ltd.*[18] In that case, the issue involved the obligation of the debtor company to make immediate payment in full of termination and severance payments under employment standards legislation for unionized employees terminated after the date of the initial order. The union attempted to argue that termination and severance pay are "ordinary course" obligations that should be paid as post-filing obligations. Morawetz J. stated that the conclusions in *Nortel* were equally applicable to this claim.[19]

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15 *Nortel Motion,* para. 67.

16 *Nortel Motion,* para. 67. See also para. 76, citing *Communication, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.*, 2005 SKQB 331 at paras. 11 and 15 [*Printwest Communications*].

17 *Nortel Appeal*, para. 17.

18 *Re Windsor Machine & Stamping Ltd.*, [2009] O.J. No. 3195 (S.C.J.) [*Windsor Machine*].

19 *Windsor Machine, ibid.*, para. 36.

23. Of note is the fact that Morawetz J. did not make any distinction between the facts of *Windsor Machine* and the facts of *Nortel*, despite the fact that the union's severance entitlements in *Nortel* arose in relation to employees who had been laid off prior to the date of the initial order, and the union's severance entitlements in *Windsor Machine* arose in relation to employees laid-off or terminated after the date of the initial order (i.e. employees who had provided post-filing services). The key factor involved the proper characterization of the payments claimed.

24. Thus, Morawetz J. distinguished the decision of the British Columbia Court of Appeal in *Re West Bay SonShip Yachts Ltd.*[20] (which is also cited by the Union in this motion). Morawetz J. rejected the argument that this case supports the characterization of severance payment obligations arising in the post-filing period as post-filing claims.[21] In fact, *West Bay* establishes that damages for wrongful dismissal are unlike severance payments and are not based on services provided during the pre-filing period.[22] In making this distinction, *West Bay* effectively acknowledges that severance payments generally relate to pre-filing service.

25. Finally, the only significance accorded by Morawetz J. to the fact that the employees in *Windsor Machine* provided post-filing service to the debtor, unlike the laid-off union members in *Nortel*, was that any incremental increase in termination pay and severance pay attributable to the period of time after the debtor went into CCAA protection may be treated as a post-filing claim.[23] At most, Morawetz J.'s decision stands for the proposition that the fact that an employee works for a brief period of time after the date of filing may mean that a small

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[20] 2009 BCCA 31 [*West Bay*].

[21] *Windsor Machine, supra* at para. 38.

[22] *West Bay*, paras. 13-16.

[23] *Windsor Machine, supra* at para. 38.

portion of that employee's termination or severance entitlement is attributable to post-filing service. Morawetz J. clearly held that employees are not entitled to the full amount of all termination and severance pay that might be owing.

C. ***CCAA Jurisprudence Dealing with Severance Entitlements***

26. Morawetz J.'s characterization in *Nortel* of severance payments as primarily based on services provided prior to filing is entirely consistent with a number of other cases on this issue. In *Mirant Canada Energy Marketing*[24] the Court dealt with a severance obligation contained in an individual employment agreement. The terminated employee argued that his severance entitlement was payable in full, claiming (among other things) that his severance entitlement was part of the compensation for services provided after the date of filing. The Court held that the severance obligation arose only on termination of services. That is, it was not an obligation that arose from the continued supply of services. Only the employee's regular salary fit within that definition.[25]

27. Although the severance entitlement in *Mirant* arose under an individual employment contract and not under a collective agreement, it is clear that the characterization of the obligations is the same regardless of their source. In fact, both Morawetz J. and the Court of Appeal in *Nortel* relied upon *Mirant* in reaching their respective conclusions.[26] Essentially, *Nortel*, *Windsor Machine* and *Mirant* establish that severance pay is to be characterized in the same manner – as related to prior service – regardless of whether the source of the severance

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[24] *Re Mirant Canada Energy Marketing Ltd.*, 2004 ABQB 218 [*Mirant*].

[25] *Mirant, ibid.* at para. 28.

[26] *Nortel Motion, supra*, para. 76 (Morawetz J. cited *Printwest Communications*, and *Printwest Communications* relied upon *Mirant*); *Nortel Appeal, supra* at para. 19.

obligation is a collective agreement, an employment standards statute or an individual employment contract.

28. In *Printwest Communications*, the Saskatchewan Court of Queen's Bench dealt with a request by the union representing the debtor company's employees for full payment of severance entitlements such that these entitlements should be dealt with outside a CCAA plan. The Court relied upon *Mirant* for the proposition that such payment was not to be made because severance pay does not fall into the category of essential services provided during the organization period in order to enable the debtor company to function.[27]

29. All of the case law that is directly on point affirms expressly or implicitly that severance pay is the antithesis of a payment for current service. It arises upon the termination of services, at the time when services are no longer required. It is calculated according to a formula that is clearly based on tenure of service, most of which will (in relation to the Post-Filing Claimants) have occurred in the pre-filing period.

D. ***Jurisprudence Involving Special Payments under Pension Legislation***

30. The position of the Court in *Nortel* and *Windsor Machine* with respect to the application of section 11.01 of the CCAA is consistent with the approach of other CCAA courts in determining whether to permit debtor companies to cease making "special payments" owed under pension legislation in order to satisfy a funding deficiency. In this case law, the rationale for allowing the debtor company to cease making such payments is that they do not relate to services provided after the date of the initial order. Unlike current service costs, they generally

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27 *Printwest Communications, supra* at para. 11

relate to service provided prior to the date of the initial order, and are therefore not mandatory under the provisions of section 11.01 of the CCAA.

31. This Honourable Court cited several precedents of this nature in *Fraser Papers Inc.*[28] As Pepall J. stated: "Performance of services is the determining factor, not crystallization of the payment obligation."[29] Pepall J. held that the special payments were related to services provided prior to filing and "the collective agreements do not change this fact."[30]

E. ***Consistency with General CCAA Principle***

32. All of the above case law is entirely consistent with well-established CCAA principles. In particular, the case law recognizes that, apart from certain express requirements to make employee-related payments,[31] amounts owing to employees, whether unionized or otherwise, are treated as unsecured claims and are not accorded any statutory priority under the CCAA, or under a bankruptcy.[32]

33. The purpose of the CCAA stay and the resulting need to give the stay power a broad scope has been recognized on numerous occasions by Canadian courts:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the

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[28] *Re Fraser Papers Inc.* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.) [*Fraser Papers*], citing *Re AbitibiBowater Inc.*, [2009] J.Q. No. 4473 (S.C.); *Jeffrey Mines, supra*; *Papiers Gaspesia Inc.*, [2003] R.J.Q. 420 (C.A.) and *Re Collins & Aikman Automotive Canada Inc.*, [2009] O.J. No. 2558 (S.C.J.).

[29] *Fraser Papers, ibid.* at para. 18.

[30] *Fraser Papers, ibid.* at para. 20.

[31] See for example section 6(5) of the CCAA.

[32] There are certain limited exceptions which are not relevant for the purposes of this motion. See for example, *Nortel Motion, supra* at para. 60; *Windsor Machine, supra* at paras. 39 to 46.

> company's creditors, shareholders, employees and other stakeholders. ***The s. 11 discretion is the engine that drives this broad and flexible statutory scheme*** ... [emphasis added][33]

34. The stay not only provides breathing space to allow the debtor an opportunity to restructure its business for the benefit of all stakeholders, it fosters the principles of fairness underlying a CCAA restructuring by ensuring that all creditors – with a few limited exceptions – are stayed from seeking payment of their claims and from getting a "leg up" on other creditors in similar situations.

> It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.[34]

35. Interpreting section 11.01 of the CCAA as a narrow exception to the broad stay of proceedings under the CCAA is entirely consistent with these principles. Only amounts that directly relate to post-filing services should be required to be paid under section 11.01 because any broader interpretation can have the effect of conferring a *de facto* priority on the person receiving payments. In order to accomplish this goal, it is both necessary and appropriate to examine the specific payment obligation to determine whether, in substance, it arises from a post-filing service, or whether, even though it crystallizes in the post-filing period, it relates to a

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33 *Nortel Appeal, supra* at para. 33, citing *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

34 *Re Lehndorff General Partner Ltd.* (1993), 9 B.L.R. (2d) 275 (Ont. C.J. Gen. Div.) at para. 6.

pre-filing service. The fact that the payment arises under a collective agreement does not change anything.

F. *Implications of the Union's Position*

36. The implications of the Union's position are that if a particular employee works for even one day after the date of filing, this provision of post-filing service causes all amounts owing to that employee to be immediately payable in full, regardless of the stay of proceedings and regardless of the nature of the amounts owing.

37. If this reasoning applies to employees, there is no reason why it would not apply to other suppliers of post-filing services. Many post-filing suppliers are owed other amounts related to pre-filing supplies of goods or services that are not being pay by operation of the Stay. Many such suppliers could argue that payment for their pre-filing obligations somehow relates to their post-filing supplies or services. The Union's reasoning leads to the conclusion that the simple fact of providing some post-filing supply or service is sufficient to result in a requirement for the debtor company to pay all pre-filing amounts as well, not just amounts owing for the actual post-filing services. Such a result would have dramatic implications for the ability of debtor companies to restructure for the benefit of all of their stakeholders.

38. The Union has taken Morawetz J.'s statements in paragraph 66 of his reasons out of context, and interpreted him to be saying that the Union simply has to point to some minimal activity occurring in the post-filing period in order to establish entitlement to payment in full for all other benefits or entitlements under the collective agreement, regardless of the proper

characterization of those benefits or entitlements.[35] That is not what Morawetz J. said. As Morawetz J. stated in para. 67:

> The flaw in the argument of the Union is that it equates crystallization of a payment obligation under the Collective Agreement to a provision of service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order, but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part on services that were provided pre-filing. ... The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service. [emphasis added][36]

39. Morawetz J.'s subsequent decision in *Windsor Machine* confirms that the correct interpretation of his reasons in *Nortel* is that the provision of post-filing service entitles the employees (unionized or not) only to the payment that they would receive for that post-filing service. That payment might include a small portion of severance pay that is actually attributable to the brief period of post-filing service. It does not result in a wholesale re-characterization of severance entitlements from pre-filing obligations to post-filing obligations.

40. The Union also attempts to characterize the Court of Appeal's reasons in *Nortel* as applying only when no post-filing service is provided to the debtor.

41. However, the Court of Appeal's decision is not so limited. The Court of Appeal's reference to the decision in *Mirant* supports the conclusion that the Court of Appeal implicitly endorsed the characterization of severance entitlements as based primarily on pre-filing service, and upheld the need to engage in this characterization exercise before determining that particular payments under a collective agreement are required to be paid under section 11.01 of the CCAA.

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35 See Factum of the Union, paras. 24 to 26.

36 *Nortel Motion,* para. 67.

Further, the Court of Appeal explicitly stated that "the periodic payments in issue cannot be characterized as part of the payment required by Nortel for the services provided to it by its continuing employees".[37]

42. The Union further argues that the severance payments are payable in full on the basis that they "vest" in relation to post-filing services. However, this is directly contrary to the reasons of Morawetz J., which were upheld by the Court of Appeal. Morawetz J. expressly stated that the fact that a payment obligation crystallizes in the post-filing period does not mean that it relates to post-filing services.[38] The Court of Appeal stated that:

> If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.[39]

43. As an alternative argument, the Union submits that there is a distinction between "termination pay" and "severance pay" under the collective agreement, and that certain Post-Filing Claimants received "termination pay". The Union argues that "termination pay" is more akin to damages for wrongful dismissal and then argues that the British Columbia Court of Appeal in *West Bay* supports the characterization of damages for wrongful dismissal as a post-filing claim, which must be payable in full.[40]

44. The CMI Entities submit that even if this distinction between termination and severance payment under a collective agreement is valid – and it is not necessary to consider this point – the *West Bay* case does not support treating such a claim as a post-filing claim that must

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37 *Nortel Appeal, supra* at para. 23.

38 *Nortel Motion, supra* at para. 67.

39 *Nortel Appeal*, *supra* at para. 22.

40 Factum of the Union, paras. 34 and 35.

be paid in full. On the contrary, the *West Bay* case supports the conclusion that a claim for damages for wrongful dismissal is the result of a termination of an executory contract, which, if it is carried out in the post-filing period, gives rise to a monetary claim that is subject to compromise under a plan. The issue of whether the claim was stayed under the initial order did not arise, but the conclusion that it was subject to compromise necessarily implies that the claim was also stayed and not required to be paid in full.[41]

45. Finally, the Union relies upon the terms of the letters notifying the Post-Filing Claimants of lay-off in support of the contention that the CMI Entities have, by postponing the effective date of the lay-off to the post-filing period, converted the severance obligations under the collective agreements into a payment in respect of post-filing service.[42] The Union implies that the CMI Entities used the promise of severance as an inducement to the Post-Filing Claimants to provide post-filing services. However, the CMI Entities submit that the manner in which the lay-off notices were given, including the condition that the employee had to continue to work on the effective lay-off date, simply followed the requirements of the law.

46. An employee's entitlement to severance does not arise until the termination of his or her employment relationship. The termination of the employment relationship does not occur at the time when the employer gives the employee advance notice of termination; rather, the termination occurs on its effective date. As a result, an employee must work until the effective date of his or her termination in order to be entitled to severance. An employee that leaves his or

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[41] See *West Bay, supra.*

[42] Factum of the Union, paras. 37 and 38.

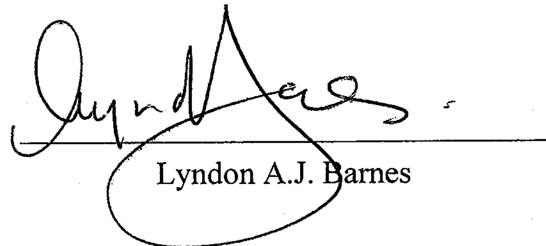
her employment prior to the effective date of the termination is deemed to have resigned and, therefore, is not entitled to severance, which is on account of termination.[43]

47. In any event, *Nortel* establishes that the timing of the effective date of a lay-off simply cannot have the effect of converting a severance entitlement that only arises upon termination of employment and is calculated based on tenure of past service into an entitlement to payment for post-filing service. In fact, Morawetz J. in *Nortel* stated the opposite conclusion – even if an entitlement crystallizes after filing, it cannot be presumed that it is a post-filing claim that must be paid under section 11.01. The time of crystallization is not important; the characterization of the payment is the key factor.

48. Finally, the means by which the CMI Entities have chosen to satisfy this obligation (i.e. by means of periodic payments, as opposed to a lump sum) simply has no bearing on the underlying nature of the obligation.

PART IV – NATURE OF THE ORDER SOUGHT

49. The CMI Entities therefore request that the relief sought by the Union be denied.



Lyndon A.J. Barnes

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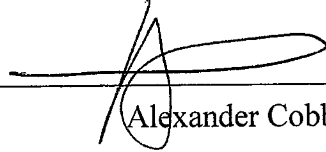
[43] See, e.g., *Re Wright Lithographing Co. and Graphic Communications International Union, Local 517*, 91 L.A.C. (4th) at pp. 141-145; *Providence Continuing Care Centre St. Mary's of The Lake v. Ontario Public Service Employees' Union – Local 483*, 85 C.L.A.S. 149, 2006 C.L.B. 12961 at pp. 15-16; and *Re ICM/Krebsoge Canada Ltd. And International Association of Machinists & Aerospace Workers, Local 1975*. 38 C.L.R. (4th)

Jeremy Dacks


Alexander Cobb

Schedule "A"

Applicants

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands)
18. CGS International Holdings (Netherlands)
19. CGS Debenture Holding (Netherlands)
20. CGS Shareholding (Netherlands)
21. CGS NZ Radio Shareholding (Netherlands)
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.

24. 30109, LLC

25. CanWest MediaWorks (US) Holdings Corp.

Schedule "B"

Partnerships

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

Schedule "C"

List of Authorities

1.	*Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*, 2005 SKQB 331
2.	*Re Fraser Papers Inc.* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.)
3.	*Re ICM/Krebsoge Canada Ltd. And International Association of Machinists & Aerospace Workers, Local 1975*, 38 L.A.C. (4th)
4.	*Re Lehndorff General Partner Ltd. (1993), 9 B.L.R. (2d) 275 (Ont. C.J. Gen. Div.)*
5.	*Re Mirant Canada Energy Marketing Ltd.*, 2004 ABQB 218
6.	*Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 68 (Ont. S.C.J.), aff'd 2009 ONCA 833
7.	*Providence Continuing Care Centre St. Mary's of The Lake v. Ontario Public Service Employees' Union – Local 483*, 85 C.L.A.S. 149, 2006 C.L.B. 12961
8.	*Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.)
9.	*Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* (2003), 40 C.B.R. (4th) 95 (Que. C.A.)
10.	*Re West Bay SonShip Yachts Ltd.*, 2009 BCCA 31
11.	*Re Windsor Machine & Stamping Ltd.*, [2009] O.J. No. 3195 (S.C.J.)
12.	*Re Wright Lithographing Co. and Graphic Communications International Union, Local 517,* 91 L.A.C. (4th) at pp. 141-145

Schedule “D”

Statutory References

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

11.01 Rights of Suppliers - No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

33.1 Collective Agreements – If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Court File No: CV-09-8396-00CL

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 CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Re CEP Severance/Hardship Motion)

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