

COURT OF APPEAL FOR ONTARIO

**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 EXHIBIT "A"**

**FACTUM OF THE RESPONDING PARTY
THE AD HOC COMMITTEE**

January 11, 2010

GOODMANS LLP

Suite 2400, 250 Yonge Street
Toronto, ON M5B 2M6

Benjamin Zarnett LSUC#: 17247M
Robert J. Chadwick LSUC#: 35165K
Logan Willis LSUC#: 53894K

Tel: 416-979-2211

Fax: 416-979-1234

Lawyers for the Ad Hoc Committee

COURT OF APPEAL FOR ONTARIO

**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 EXHIBIT "A"**

**FACTUM OF THE RESPONDING PARTY
THE AD HOC COMMITTEE**

OVERVIEW

1. The committee of holders of the 8% senior subordinated notes issued by Canwest Media Inc. (the "**Ad Hoc Committee**") represents the largest creditor group (by dollar value) in this insolvency proceeding. The Ad Hoc Committee opposes the motion by the Communications Energy and Paperworkers Union of Canada ("**CEP**") seeking leave to appeal the endorsement of the Honourable Justice Pepall dated October 27, 2009 (the "**CEP Endorsement**") and the Order of the Honourable Justice Pepall dated November 4, 2009 (the "**CEP Order**").
2. The granting of the CEP Endorsement and the CEP Order was a proper exercise of the motions judge's discretion as supervisory judge of the CMI Entities' proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). As great deference is due to a judge's exercise of discretion under the CCAA and as leave to appeal a decision of a supervisory judge is only to be granted in very limited circumstances which are not present in the case at bar, CEP's motion should be dismissed.

PART I – THE FACTS

3. The Ad Hoc Committee accepts as correct the facts referred to in the Factum of the CMI Entities and highlights the following facts.

4. Canwest Global Communications Corp., Canwest Media Inc. and certain of their affiliates (collectively, the “**CMI Entities**”) were granted protection from their creditors under the CCAA on October 6, 2009 pursuant to an order of the Honourable Justice Pepall.

Affidavit of John Maguire, sworn October 22, 2010 (the “**Maguire Affidavit**”) at para. 6, Responding Motion Record of the CMI Entities, Volume 1, Tab 2.

5. The CMI Entities intend to pursue a going concern recapitalization pursuant to a plan of arrangement under the CCAA (the “**Recapitalization**”) on the basis of a term sheet (the “**Term Sheet**”) that was negotiated and agreed to by the CMI Entities and the Ad Hoc Committee. The Term Sheet represents the culmination of extensive arm’s length negotiations. The Recapitalization is designed to enable the CMI Entities to emerge from their insolvency as a going concern, thus preserving value for the CMI Entities’ stakeholders and saving jobs for as many of their employees as possible.

Affidavit of John Maguire sworn October 5, 2009 (the “**Initial Maguire Affidavit**”) at para. 18 and 22, Responding Motion Record of the CMI Entities, Volume 2, Tab 7.

6. Among other things, the Term Sheet provides that the CMI Entities may not incur any charge on their assets or property without the consent of various parties, including the Ad Hoc Committee. In addition, the Term Sheet requires the CMI Entities to comply with the Use of Cash Collateral and Consent Agreement (the “**Cash Collateral Agreement**”) agreed to between the CMI Entities and the Ad Hoc Committee. The Cash Collateral Agreement provides that the

CMI Entities' expenditures must remain within the parameters of a detailed cash flow budget approved by, among others, the Ad Hoc Committee.

Initial Maguire Affidavit at para. 16-17 and 175, Responding Motion Record of the CMI Entities, Volume 2, Tab 7.

Term Sheet, attached at Exhibit "O" to the Initial Maguire Affidavit, sections B(o) and B(b), Responding Motion Record of the CMI Entities, Volume 2, Tab 7.

Cash Collateral Agreement, attached at Exhibit "J" to the Initial Maguire Affidavit, sections 5(b) and 5(m), Responding Motion Record of the CMI Entities, Volume 2, Tab 7.

7. The CMI Entities have continued to pay the CEP Members' salaries, current service and special payments with respect to the defined pension plans and post-employment and post-retirement benefits payments. The existing cash flow budget provides for the continued payment of these amounts. The existing cash flow budget does not, however, provide for any payments to CEP or its counsel to fund their participation in the CCAA proceedings, nor does the Term Sheet permit, without the consent of the Ad Hoc Committee, the charge on the CMI Entities' property sought by CEP to secure such funding.

Maguire Affidavit at para. 10, Responding Motion Record of the CMI Entities, Volume 1, Tab 2.

Term Sheet, attached at Exhibit "O" to the Initial Maguire Affidavit, section B(o), Responding Motion Record of the CMI Entities, Volume 2, Tab 7.

8. The CEP Endorsement and the CEP Order result from the CEP's motion returnable October 27, 2009 for an order, *inter alia*: (a) appointing the CEP to represent all current and former members of the CEP (the "**CEP Members**") who are or were employed by the CMI Entities in the CMI Entities' proceedings under the CCAA; (b) appointing the law firm CaleyWray as representative counsel for the CEP Members in the CCAA proceedings ("**CEP Counsel**"); (c) directing the CMI Entities to fund the CEP and CEP Counsel, including the

retention of financial and actuarial experts; and (d) granting a \$200,000 charge over the property of the CMI Entities in respect of fees and expenses incurred by the CEP and CEP Counsel.

CEP Factum, para. 2, 22 and 25.

9. Pursuant to the CEP Order and the CEP Endorsement, CEP and CEP Counsel were authorized to represent CEP's current and former members in the CCAA proceedings (with the exception of certain former members who would be represented independently by separate representatives and Cavaluzzo LLP). Substantially all other relief sought in the CEP motion was denied.

CEP Endorsement at para. 18, CEP Motion Record, Tab 3.

CEP Order at para. 2 and 3, CEP Motion Record, Tab 5.

PART II – ISSUES AND THE LAW

10. The sole issue to be determined on this motion is whether the CEP should be granted leave to appeal the CEP Endorsement and the CEP Order.

A. Deference should be accorded to the motions judge's exercise of discretion under the CCAA

11. Deference is to be accorded to a judge's decisions in CCAA proceedings where the judge is acting in a supervisory capacity over the proceedings:

...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. ...

A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course

of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

...Orders depend on a careful and delicate balance of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) at para. 35-37, Ad Hoc Committee's Book of Authorities, Tab 1.

12. Similarly, this Court has held:

Decisions in the CCAA context must be made quickly. They are, as in this case, usually made by a judge with considerable expertise in the area who has been managing the CCAA Proceedings and is intimately familiar with the context and issues at stake.

Algoma Steel Inc. v. Union Gas Limited (2003), 63 O.R. (3d) 78 (C.A.) at para. 16, Ad Hoc Committee's Book of Authorities, Tab 2.

13. Deference to the CCAA supervisory judge is especially appropriate where the decisions at hand involve the exercise of judicial discretion:

Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way.

Resurgence Asset Management LLC v. Canadian Airlines Corp., 2000 ABCA 149 at para. 28-29, Ad Hoc Committee's Book of Authorities, Tab 3.

14. The Honourable Justice Pepall is an experienced Commercial List judge who has been the judge responsible for the CMI Entities' CCAA proceedings since the proceedings were commenced. She has had the advantage of reviewing all materials filed and overseeing all motions in the CCAA proceedings to date. Accordingly, she is familiar with the complex array of issues facing the CMI Entities as they work towards the completion of a successful restructuring. In particular, she is intimately aware of the financial realities facing the CMI Entities, the delicate balance that must be maintained in order to hold together the restructuring

plan agreed to between the CMI Entities and the Ad Hoc Committee, as well as the interests and concerns of various stakeholders who have participated in the CCAA proceedings to date, including CEP.

15. The decisions resulting in the CEP Order and the CEP Endorsement clearly involved the exercise of judicial discretion.

16. Given Justice Pepall's intimate familiarity with all aspects of the CMI Entities' CCAA proceedings and given that the CEP Order and CEP Endorsement involved an exercise of her judicial discretion, considerable deference is due to the motions judge's decisions.

B. CEP has not met the high threshold for obtaining leave to appeal

17. Leave to appeal should be granted sparingly in the context of CCAA proceedings because of the discretionary nature underlying the judge's supervisory role.

Re Stelco (2005), 75 O.R. (3d) 5 (C.A.) at para. 24, CMI Entities' Book of Authorities, Tab 4.

Country Style Food Services Inc. (Re) [2002] O.J. No. 1377 (C.A.) at para. 15, Ad Hoc Committee's Book of Authorities, Tab 5.

18. Leave should not be granted unless there are serious and arguable grounds that are of real and significant interest to the parties and the practice. A party seeking leave to appeal must meet a high threshold based on the following criteria:

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point is of significance to the action;
- (c) whether the appeal is *prima facie* meritorious or frivolous; and
- (d) whether the appeal will unduly hinder the progress of the action.

Re Stelco (2005), 75 O.R. (3d) 5 (C.A.) at para. 24, CMI Entities' Book of Authorities, Tab 4.

19. CEP suggests that four primary matters underpin the basis of its prospective appeal:
- (i) the scope of a trade union's representative obligations in CCAA proceedings (CEP Factum, para. 31);
 - (ii) whether the costs of a trade union's participation in CCAA proceedings should be borne by the debtor company (CEP Factum, para. 32);
 - (iii) whether the decision not to grant a charge over the assets of the CMI Entities to secure payment by the CMI Entities of the fees and expenses incurred by CEP and CEP Counsel in the CCAA proceedings was in error (CEP Factum, para. 33 to 37); and
 - (iv) whether Justice Pepall erred in her finding of fact that the CMI Entities have paid and intend to continue paying amounts owed to the CEP Members (CEP Factum para. 59 to 61).
20. The foregoing matters do not meet the four criteria for leave to appeal and none are deserving of appellate attention. Each of these matters will be addressed in turn.

(i) **CEP's obligation to represent its members**

21. Whether CEP has an obligation to represent its members in the CCAA proceedings is an internal matter between CEP and its members and does not inform the insolvency or labour practice generally. While CEP asserts that this is a matter that remains unclear, it has clearly acted in this case as if it does have obligations to represent its members, including its former members. CEP indicates in its factum that the rights of its former members derive from the collective agreements that it is responsible for administering. CEP also states plainly that it intends to facilitate and advance claims by its current and former members. Consistent with this

approach CEP is in fact actively representing its current and former members in the CCAA proceedings, so no determination of whether CEP has an obligation to do so need be made.

CEP Factum at para. 8, 13 and 18.

22. Whether CEP has pre-existing obligations to represent its former members has no practical significance to the CCAA proceedings as it is apparent that CEP has elected to represent its former members in any event. This is evidenced by the fact that CEP actively sought to represent its former members prior to seeking any judicial determination of whether it has an obligation to do so. In addition, CEP is now expressly authorized to represent its former members by operation of the CEP Order (including for the purposes of advancing, settling or compromising the claims of any such members). Consequently, a determination of the issue CEP suggests this appeal would raise has no practical consequence for the proceedings.

CEP Factum at para. 13.

CEP Order at para. 2, CEP Motion Record, Tab 5.

23. Moreover, an appeal of this issue is unnecessary because it would not affect the result of Justice Pepall's decision to authorize rather than appoint CEP as a representative of the CEP Members. Contrary to CEP's submissions, Justice Pepall's determination does not turn on whether CEP has any legal obligation to the CEP Members. Rather, Justice Pepall's decision to authorize CEP to represent the CEP Members is based on the fact that no representation order is necessary where the applicable creditors are not "vulnerable". In this case, Justice Pepall determined that the CEP Members were not vulnerable since CEP "already represents its current members and plans to represent its former members," and the CMI Entities were already paying the CEP Members the amounts owed to them.

CEP Endorsement at para. 18, CEP Motion Record, Tab 3.

24. Accordingly, the Ad Hoc Committee submits that this issue does not meet the high threshold required to obtain leave to appeal.

(ii) **Funding of CEP's costs**

25. The basis on which a court will award funding of a representative's costs by a CCAA debtor company is not a novel question of law requiring appellate review. The matter has been addressed in previous CCAA case law and the test for whether funding should be granted is clear: the court will only grant a funding order for the benefit of parties who would not otherwise have legal representation.

Fraser Papers Inc. (Re) 2009 CanLII 55115 S.C.J. [Commercial List] at para. 10, CEP Book of Authorities, Tab 6 .

26. The motions judge applied this law in determining whether to grant funding in favour of CEP. CEP was already actively representing the CEP Members in the CCAA proceedings and had already retained counsel. As such, CEP did not meet the established test for obtaining funding in the CCAA context.

CEP Endorsement at para. 19, CEP Motion Record, Tab 3.

27. Since the existing CCAA jurisprudence has been applied consistently in this case, no clarification of the law is necessary.

28. CEP's reliance on *British Columbia (Minister of Forests) v. Okanagan Indian Band* does not assist it. That case deals with access to justice issues in circumstances of severe inequality between litigants where one party is in danger of being unable to advance a meritorious legal case because it lacks financial resources. That is manifestly not the case in the present circumstances, as evidenced by the fact that CEP has already filed contingent claims against the

CMI Entities (to address hypothetical claims that may arise at a later date) and has committed to representing the CEP Members regardless of whether it is ultimately awarded funding. In addition, the CMI Entities are themselves insolvent and must be cautious of incurring unnecessary costs as they seek to complete a restructuring of their business for the benefit of all stakeholders.

British Columbia (Minister of Forests) v. Okanagan Indian Band [2003] S.C.J. No. 76 at para. 31, CEP Book of Authorities, Tab 5.

CEP Factum at para.13 and 61.

29. CEP has attempted to elevate its request for funding into an issue of significance to the legal practice by asserting that present economic circumstances require it to finance participation in CCAA proceedings by obtaining funding from insolvent debtor companies. However, CEP's evidence is that it is funding its participation in other insolvency proceedings itself, and relies on the financial pressure caused by its expenditures in those other proceedings as support for its request for funding in these proceedings. CEP's ability to fund its involvement in all of the CCAA proceedings in which it finds itself involved is an internal matter for CEP relating to budgeting, allocation of resources, the adequacy of membership dues and the scope of its mandate. These are internal matters between CEP and its members, not matters of significance to the legal practice generally.

CEP Factum at para. 16-18.

30. Moreover, the granting of representative status and the funding of CEP's costs would not have a significant impact on the CCAA proceedings. The CMI Entities have paid and continue to pay amounts owed to the CEP Members. CEP has been authorized by the Court to represent the CEP Members and has clearly elected to do so regardless of whether it ultimately obtains

funding. Therefore, further consideration of this matter would have no impact on the interests of the CEP Members in the CCAA proceedings.

Maguire Affidavit at para. 10, Responding Motion Record of the CMI Entities, Volume 1, Tab 2.

(iii) Charge over the CMI Entities' property to secure funding of CEP

31. CEP asserts that Justice Pepall's decision not to grant a charge over the CMI Entities' property to secure funding for CEP pursuant to section 11.52(1)(c) of the CCAA was in error because it was based on the fact that Cavaluzzo LLP sought no such charge and none was granted to Cavaluzzo LLP. That was not the basis for Justice Pepall's denial of CEP's request. CEP's request for a charge was premised on obtaining an order requiring the CMI Entities to fund its costs. Since CEP's request for funding was denied, CEP's request for a charge to secure such funding was without foundation. Clearly a charge to secure funding has no application where the request for funding has been denied. As a result, issues concerning the appropriate factors to be considered by a court in applying section 11.52(1)(c) do not arise or require appellate attention in this case.

(iv) The finding that the CMI Entities have paid and will pay the CEP Members

32. The CEP asserts that the motions judge has made an error in her finding of fact that the CMI Entities have paid and intend to continue to pay the CEP Members' salaries, current service and special payments with respect to the defined pension plans and post-employment and post-retirement benefits payments. The Ad Hoc Committee submits that no error was made in this finding of fact. All of the above amounts have been provided for in the cash flow budgets approved by the Ad Hoc Committee and have been paid current by the CMI Entities.

Maguire Affidavit at para. 10, Responding Motion Record of the CMI Entities, Volume 1, Tab 2.

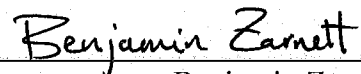
33. In any event, a determination of fact particular to these proceedings does not have significance to the practice generally. Additionally, it is not significant to the proceedings at hand because the CEP Endorsement makes it clear that the Court is free to revisit its decision and re-evaluate the adequacy of the CEP Members' representation in the event that the CMI Entities cease paying the amounts owed to the CEP Members at a later date.

CEP Endorsement at para.18, CEP Motion Record, Tab 3.

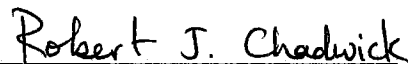
PART IV – RELIEF REQUESTED

34. In light of the foregoing, the Ad Hoc Committee respectfully requests that this court dismiss CEP's motion for leave to appeal.

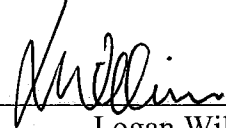
ALL OF WHICH IS RESPECTFULLY SUBMITTED



per. Benjamin Zarnett



per. Robert J. Chadwick



Logan Willis

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.)
2. *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.)
3. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149
4. *Re Stelco* (2005), 75 O.R. (3d) 5 (C.A.)
5. *Country Style Food Services Inc. (Re)* [2002] O.J. No. 1377 (C.A.)
6. *Fraser Papers Inc. (Re)* 2009 CanLII 55115 S.C.J. [Commercial List]
7. *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] S.C.J. No. 76

SCHEDULE "B" – STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON
SCHEDULE "A"

COURT OF APPEAL FOR ONTARIO

**FACTUM OF THE RESPONDING PARTY
THE AD HOC COMMITTEE**

GOODMANS LLP
Barristers & Solicitors

250 Yonge Street, Suite 2400
Toronto, Canada M5B 2M6

Benjamin Zarnett LSUC#: 17247M
Robert J. Chadwick LSUC#: 35165K
Logan Willis LSUC#: 53894K
Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for the Ad Hoc Committee