

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

APPLICANTS

NOTICE OF MOTION

Communications, Energy and Paperworkers Union of Canada (the "CEP") will make a motion which will be heard by the court in writing 36 days after service of the CEP's motion record, factum and transcripts, if any, or on the filing of the CEP's reply factum, if any, whichever is earlier.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.

THE MOTION IS FOR:

1. An Order granting leave to appeal the Order and endorsement of the Honourable Justice Pepall dated October 27, 2009 and the Order of the Honourable Justice Pepall dated November 4, 2009.
2. Costs of this motion; and
3. Such further and other relief as this Honourable Court considers just.

THE GROUNDS FOR THE MOTION ARE:

1. On October 6, 2009 Canwest Global Communications Corp. and certain of its subsidiaries listed in Schedule "A" (collectively, the "Applicants") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA"). The Initial Order also granted relief in respect of certain affiliated partnerships of the Applicants (the "Partnerships", and together with the Applicants, the "CMI Entities").
2. The CEP is the certified bargaining agent for approximately 1000 active employees employed by CMI Entities in Vancouver (BCTV), Kelowna (CHBC), Edmonton (CITV), Calgary (CICT), Lethbridge (CISA), Saskatoon (STV), Winnipeg (CKND), Toronto and Ottawa (Global Ontario) and Halifax and New Brunswick (Global Maritimes) (collectively, the CEP's "Current Members").
3. The CEP has negotiated eleven (11) collective agreement with the CMI Entities, all of which are nominally expired (the "Collective Agreements").
4. The terms and conditions of the Collective Agreements have a direct impact on the post-employment and post-retirement benefit entitlements of the CEP's former members and current retirees of the CMI Entities (the CEP's "Former Members").
5. The CMI Entities sponsor eleven defined benefit plans ("DB Plans") and four (4) defined contribution plans ("DC Plans"). The DB Plans have a combined windup deficiency of \$32,824,126 with current service costs of \$5,147,181.00 and annual special payments of \$4,983,348.00. The active DB Plans have approximately 1,237 active members, approximately 121 pensioners and 313 deferred vested and other members, the vast majority of which are the CEP's Current and Former Members.

6. The CMI Entities also provide post-employment and post-retirement benefits to the CEP's Former Members, including health, dental and term life insurance benefits.
7. Immediately after the issuance of the Initial Order, the CMI Entities ceased making payments to approximately thirty (30) of the CEP's Former Members that were in receipt of salary continuance. Further, upon the issuance of the Initial Order, the CMI Entities refused to continue a number of important legal proceedings, including grievance arbitration proceedings and proceedings before the Canada Industrial Relations Board pertaining to the configuration of the CEP's bargaining units. The CEP also has a substantial number of outstanding grievances against the CMI Entities that have been stayed by the Initial Order.
8. The Initial Order may necessitate filing a large number of diverse and complex claims on behalf of the CEP's Current and Former Members. The CCAA proceedings also require the CEP to undertake a communication campaign to ensure that its vulnerable Current and Former Members remain informed of the proceedings and have their interests effectively protected.
9. The economic crisis has caused a substantial reduction in the membership levels of the CEP. Moreover, the CEP has incurred significant costs associated with representing its vulnerable Current and Former Members in legal proceedings under the CCAA.
10. The CEP is under no legal obligation to represent its Former Members generally and specifically has no such obligations in respect of the CMI Entities' CCAA proceedings.
11. On October 27, 2009 the CEP brought a motion before the Honourable Justice Pepall in which it sought, *inter alia*, an Order appointing the CEP as representative and CaleyWray as representative counsel of the Current and Former Members in the CMI Entities' CCAA proceedings, an Order for funding/interim costs in respect to that that representation and a security or

charge against the property of the CMI Entities pursuant to section 11.52 of the CCAA.

12. On the same day, the CMI Entities brought a motion in which it sought the appointment of David Cremasco, Rose Tricker and Lawrence Schnurr as representatives (the "Representatives") and Cavalluzzo Hayes Shilton McIntyre & Cornish LLP ("Cavalluzzo") as representative counsel to the retirees of the CMI Entities, excluding the CEP's Former Members (the "Cavalluzzo Order"). The motion brought by the CMI Entities also sought funding/interim costs.
13. On October 27, 2009, the Honourable Justice Pepall issued an endorsement, *inter alia*, authorizing the CEP to represent its Current and Former Members but denied the CEP's request for funding/interim costs and a security or charge against the property of the CMI Entities. The motion brought by the CMI Entities was granted in its entirety, including relief in respect to funding.
14. On November 4, 2009 counsel to the CEP, the CMI Entities, the Monitor and the Bondholders attended before the Honourable Justice Pepall to resolve disputes over the form and content of the CEP's representation Order. After hearing the parties the submissions, Pepall J. Ordered that the CEP be granted an Order that was materially different than the Cavalluzzo Order. The differences include, *inter alia*, the following:
 - (i) The Representatives and Cavalluzzo were "appointed" whereas the CEP and CeleyWray were "authorized";
 - (ii) The Cavalluzzo Order includes a direction that the CMI Entities shall provide to Cavalluzzo the contact information of those it represents, as well as documents and data as are relevant to issues affecting the retirees it represents. The CEP Order contains a direction that the CMI Entities shall "use their best efforts" to provide the CEP or CaleyWray with the contact information of the Current and Former Members. The CEP's request for documents and data, identical to

that which was granted in the Cavalluzzo Order, was refused on the basis that such was not properly the "subject matter of a court Order";

- (iii) The Cavalluzzo Order provides that all reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements incurred by the Representatives and Cavalluzzo shall be paid by the CMI Entities. The CEP's request for funding was denied;
- (iv) The Cavalluzzo Order provides that the Representatives and Cavalluzzo may take any steps necessary to carry out the terms of the Order. No such provision is found in the CEP's Order;
- (v) The Cavalluzzo Order includes a limitation of liability for both the Representatives and Cavalluzzo. No such provision is found in the CEP's Order; and
- (vi) The Cavalluzzo Order permits Cavalluzzo to seek the advice and direction of the Court. No such authority is found in the CEP's Order.

15. The Orders and endorsement issued by the Honourable Justice Pepall dated October 27, 2009 and November 4, 2009 draw distinctions without legal foundation including, without limitation, authorizing the CEP to act as representative of its Current and Former Members and CaleyWray as representative counsel but denying its request for funding/interim costs and a security or charge against the property of the CMI Entities, and raise serious issues in respect of insolvency proceedings generally and the within CMI Entities' CCAA proceeding specifically:

- (i) What are the appropriate factors to consider and apply in the exercise of judicial discretion pursuant to section 131(1) of the

Courts of Justice Act to award funding/interim costs in respect to the representation of individual creditors of a debtor company in a CCAA proceeding that are represented by a single representative pursuant to Rule 10 of the *Rules of Civil Procedure*?

- (ii) Was it appropriate for the Honourable Justice Pepall to draw distinctions between the Cavalluzzo and CEP Orders including, without limitation, granting funding/interim costs in the Cavalluzzo Order but denying the CEP's request for same?
 - (iii) Was section 11.52 of the CCAA appropriately considered and applied in the circumstances? And
 - (iv) Did the Honourable Justice Pepall commit an error in her findings of fact?
16. These are issues of significance to insolvency practice generally in Ontario, and are of particular significance to the proceeding itself.
17. The Honourable Justice Pepall failed to consider and apply the appropriate factors in the exercise of her discretion to grant funding/interim costs pursuant to section 131(1) of the *Court of Justice Act*.
18. There is no legal or principled basis to draw distinctions between the Orders issued to Cavalluzzo and CEP, including, without limitation, "authorizing", rather than "appointing", the CEP to act as representative and CaleyWray as representative counsel. The CEP and CaleyWray should be "appointed" in the same fashion as the Representatives and Cavalluzzo were "appointed".
19. There is no legal or principled basis to authorize the CEP to act as representative and CaleyWray as representative counsel of its Current and Former Members but deny funding/interim costs in respect to that representation. The request for funding/interim costs requested by the CEP should have been granted in the

same fashion as the request for same was granted to the Representatives and Cavalluzzo.

20. The Honourable Justice Pepall failed to consider and apply section 11.52 of the CCAA in respect of the CEP's request for a security or charge against the property of the CMI Entities. A proper consideration and application of section 11.52 of the CCAA to the facts would have resulted in the CEP's request for a security or charge against the property of the CMI Entities being granted.
21. The Honourable Justice Pepall made findings of facts based on materials that were not part of the Motion Record at issue.
22. The appeal is therefore *prima facie* meritorious.
23. The appeal will not unduly hinder the progress of the proceeding. The CMI Entities' restructuring is continuing, and an appeal of Pepall J.'s order can proceed in tandem with it. An appeal will not in any way interfere with the ongoing restructuring.
24. The CEP relies on sections 11, 11.52 and 14 of the CCAA, Rule 61.03.1 of the *Rules of Civil Procedure* and section 131(1) of the *Court of Justice Act*.
25. The CEP relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be read in support of this motion:

1. Relevant excerpts from the record before Pepall J.;
2. Such further and other material as counsel may advise and this Honourable Court permit.

November 11, 2009

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COMMERCIAL LIST

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Applicants

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(Updated as of November 4, 2009)

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