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COURT FILE NUMBER	2401-02664
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR
DOCUMENT	**REPLY BENCH BRIEF OF THE APPLICANT, CANADIAN UNION OF PUBLIC EMPLOYEES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**KOSKIE MINSKY LLP** Barristers & Solicitors 20 Queen St. West, Suite 900 Toronto, ON M5H 3R3 Lawyers: Andrew Hatnay / Abir Shamim Telephone: 416-557-3633 / 557-2039 Email: ahatnay@kmlaw.ca / ashamim@kmlaw.ca File Number: 16407-240298

APPLICATION BEFORE THE HONOURABLE JUSTICE ARMSTRONG ON DECEMBER 4, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

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TABLE OF CONTENTS

REPLY

1. This is the Reply Brief of the Canadian Union of Public Employees ("CUPE") on behalf of the terminated Cabin Crew Employees of Lynx Air to the Monitor's Bench Brief and 7th Report served on November 29, 2024.

The purpose of WEPP is to provide payments to terminated employees

2. The purpose of the Wage Earner Protection Program ("**WEPP**") and its interpretation was recently confirmed in the case, *Arrangement relative à Former Gestion Inc.*, 2024 QCCS 3645:

> [19] *WEPPA*'s purpose is stated at s. 4 of the statute:
>
> 4. The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.
>
> [20] "Wages" are broadly defined under the statute to include "salary, commissions, compensation for services rendered, vacation pay, termination pay, severance pay and any other amounts prescribed by regulation."
> …
>
> [27] WEPPA is clearly remedial legislation intended to provide protection to workers who suffer lost wages as a result of a bankruptcy or restructuring. As such, the Act should "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives".
> …
>
> [32] The problem or "mischief" sought to be cured by WEPPA is the absence of a solvent employer who can pay wages owing to former employees. Seen in this context, the cessation of the employer's business operations, or the transfer of its liabilities to an insolvent third party, are irrelevant to the application of the Act. In the case of both an asset sale and a reverse vesting order, employees who have lost their jobs have no solvent employer from whom they can claim lost wages.
>
> *Arrangement relative à Former Gestion Inc.*, 2024 QCCS 3645 [CUPE's Reply Book of Authorities ("**CUPE's BOA**"), **Tab 2**].

3. The arguments by the Monitor, FTI Consulting Canada Inc. in its Bench Brief and Monitor's 7th Report can be distilled into the following. None of the Monitor's arguments are tenable and should be rejected:

a) Since the Monitor has already sent in its calculations of the Cabin Crew Employees' claim to Service Canada (despite no agreement with CUPE) and the employees have received a (partial) WEPP payment, the Monitor has no further obligation to correct its calculations, and if the Union or the employees continue to disagree with its calculations, they should pursue the statutory appeal process under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 ("**WEPPA**").;

b) The Cabin Crew Employees do not have a claim for pay in lieu of Group Termination Notice under section 212 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "**CLC**");

c) The Cabin Crew Employees' claim from Lynx Air's failure to provide them with Group Termination Notice under section 212 of the CLC are not "eligible wages" under section 2 of WEPPA; and

d) CUPE should not be appointed Representative under Rule 2.16 of the *Alberta Rules of Court*, Alta. Reg. 124/2010 to the Cabin Crew Employees because the factors under *Canwest Publishing Inc.*, 2010 ONSC 1328 ("**Canwest**") have not been met (which deals with the appointment of a representative counsel with funding, neither of which are sought in this case).

PART I - THE LAW AND ARGUMENT

a) Under section 21(1)(b) of the WEPPA, the Monitor has a duty to determine "the amount of eligible wages" owed to the Cabin Crew Employees, and that duty includes making corrections to claim amounts, not force the employees to appeal to the government to make the corrections

4. A monitor is a court-appointed officer and has a duty to be impartial and even-handed. If this Court determines that the severance pay claims of the Cabin Crew Employees should include Group Termination Notice, the Monitor should and can submit a revised claim. Under section 21(1)(b) of WEPPA, the Monitor is required to "determine the amount of eligible wages owing to each individual". If the Monitor's calculations or methodology are incorrect, then they are obligated to make corrections.

5. The Monitor argues that a review of their calculations can only be launched by each Cabin Crew Employee requesting a review of their WEPP payment under section 11 of WEPPA:

> **Request for review**
>
> 11. An applicant who is informed under section 10 may request a review of their ***eligibility or ineligibility***, as the case may be. [emphasis added]
>
> *WEPPA* [Monitor's Book of Authorities ("**Monitor's BOA**"), **Tab 10**].

6. CUPE, on behalf of the Cabin Crew Employees, is not requesting a review of its members' "eligibility or ineligibility" for a WEPP payment. Instead, it says that the Monitor failed to abide by its duty under section 21(1)(b) of WEPPA in correctly determining the amount of eligible wages owed to each Cabin Crew Employee by excluding an amount for Group Termination Notice and that the Monitor's claim calculations need to be corrected.

7. Although WEPP payments are administered by Service Canada, the program was designed to heavily rely on the information provided to Service Canada by insolvency administrators:

> The wage earner protection program will operate efficiently. **It will be delivered seamlessly, *building on the existing relationships between trustees and receivers and the employment insurance system*.**
>
> "Bill C-55: An Act to establish the Wage Earner Protection Program Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts", 2nd reading, *House of Commons Debates*, 38-1, No 127 (28 September 2005) at 8167 (Hon Joe Fontana) [**CUPE's BOA**, **Tab 5**].

8. This approach is further confirmed by government reports indicating that the administration of WEPP is supported by insolvency administrators who provide the requisite information to make a determination regarding an employee's WEPP eligibility:

> **Operation**
>
> Service Canada delivers the WEPP on behalf of the Labour Program by processing applications to assess the eligibility of applicants, issuing payments, administering the review process when a worker disagrees with the decision, and identifying any overpayments. Service Canada delivers these services to clients in-person, by telephone, and online.
>
> The Canada Revenue Agency recovers overpayments made to a recipient, trustee or receiver. The Agency also plays a role in the steps taken by the Government to recover WEPP payments from the bankrupt estate.
>
> **Insolvency Administrators**
>
> ***Trustees and receivers support the administration of WEPP by submitting the information that is used by Service Canada to help determine the eligibility of applicants for the Program***. Insolvency administrators are also required to inform workers about the WEPP and how they may apply for this benefit. In addition, trustees and receivers must inform the Minister when the trustee is discharged or the receiver completes their duties. [emphasis added]
>
> Canada, Employment and Social Development Canada, *Five-Year Statutory Review of the* Wage Earner Protection Program Act (Ottawa: ESDC, 2015) at 14 [**CUPE's BOA, Tab 7**].

9. Despite repeated requests by CUPE for it to review the Monitor's calculations of the Cabin Crew Employees' severance pay claims and to include a claim for pay in lieu of Group Termination Notice, the Monitor did not cooperate with CUPE. Instead, as revealed in the Monitor's 7th Report dated November 29, 2024 (para. 15(b)), and unbeknownst to CUPE, the Monitor had corresponded with an unidentified government "Labour Affairs Officer" to confirm its own legal opinion on the methodology to calculate the Cabin Crew Employees' severance pay claim which excludes an amount for Group Termination Notice. If this Court determines that the Cabin Crew Employees are entitled to a claim for Group Termination Notice, then section 21(1)(b) of WEPPA makes the Monitor responsible for making corrections.

> The Monitor's 7th Report at para 15(b).

b) <u>The Cabin Crew Employees have an entitlement to payment in lieu of Group Termination Notice when no prior notice was given</u>

10. Under the CLC, sections 230 (Individual Termination Notice) and 212 (Group Termination Notice) are part of the statutory scheme that dictates how much notice an employer is to provide to an employee before being terminated (sections 212(1) and 230(1)), to whom the notices are to be given (sections 212(2), 230(1), and 230(2)), and where the employer has not given the required notice, requiring the employer to give a payment to the employee in lieu of notice (section 230(1.1)).

11. The Group Termination provisions under section 230 of the CLC become applicable where the employer terminates a group of 50 or more employees within a four week period, and states that the employer must provide 16 weeks notice "***in addition to***" the individual notice required in section 230.

<u>Legislative history of the Group Termination Provisions in the CLC</u>

12. The Group Termination provisions were added to the CLC in 1971. The debates from the Second Reading in the House of Commons show that its purpose is to provide increased notice of termination when a group of 50 or more employees are terminated in the same four week period:

> The bill also covers group termination of employment. This proposed new part provides that an employer contemplating the termination of employment of 50 or more workers within a four-week period must give the Minister of Labour notice in writing. A copy of the notice must be sent to the nearest Canada Manpower centre and to the trade unions concerned. This part will apply to all employees, including persons performing managerial functions and professional people, but will exclude those who are seasonally or irregularly employed. I suggest that the committee give careful consideration to this proposal, because those employees who are not covered by labour union contracts-in other words, those who have an individual relationship with their employer-are not really given specific notice under this legislation.
>
> I should like to read the provision on page 11 of the bill. The section deals with the notice that must be given to the Minister of Labour and to the labour union. As far as the person not covered by labour union agreement is concerned, the bill provides:
>
> > -and where any employee in such group is not represented by a trade union, a copy of such notice shall he given to him or posted forthwith by the employer in a conspicuous place-

> I suggest that when the committee reviews the bill, it should give consideration to deleting the word "or" and substituting therefor the word "and", so that the bill would then provide that there is an obligation on the employer to give notice to the individual not covered by labour contract as well as to post that notice in a conspicuous place. I do not think that this proposal would be difficult to implement. Generally speaking, I am 100 per cent in favour of the provisions dealing with group termination of employment. I think they are long overdue. Under these provisions, an employer who wants to lay off between 50 and 100 workers within a four-week period would have to give eight weeks' notice; if he wanted to lay off between 100 and 300 workers he would have to give 12 weeks' notice; and to lay off more than 300 workers would require 16 weeks' notice.
>
> "Bill C-228: An Act to Amend the Canada Labour (Standards) Code", 2nd reading, *House of Commons Debates*, 28-3, No 5 (27 April 1971) at 5286-7 (Hon Norman Augustine Cafik) [**CUPE's BOA, Tab 6**].

13. In 1977, Parliament amended the CLC to add the language (which remains in the current CLC) that the 16 week notice of group termination is ***in addition to*** the notice required under the individual termination provision:

> **CANADA LABOUR CODE**
>
> **21.** (2) All that portion of subsection 60(1) of the said Act preceding paragraph (*a*) thereof is repealed and the following substituted therefor:
>
> ***Notice to be given of group terminations***
>
> **"60.**(1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of fifty or more employees employed by him within a particular industrial establishment, or of such lesser number of employees as is prescribed by a regulation made under paragraph 60.2(*b*) that is applicable to the employer, shall, ***in addition to any notice required to be given by him under section 60.4***, given notice to the Minister, in writing, of his intention to do so at least" [emphasis added]
>
> *Miscellaneous Statute Law Amendment Act, 1977*, 25-26 Eliz II, c. 28 [**CUPE's BOA, Tab 1**].

14. The Monitor argues that since section 230 does not duplicate the requirement in section 212 for an employer to provide pay in lieu of notice where it has failed to give prior individual notice, that must mean that an employer has no obligation to provide pay in lieu of notice where it has failed to give Group Termination Notice. The Monitor's argument is untenable for three reasons:

15. First, it is clear that the legislative purpose of section 230 Group Termination Notice is to "add" to the period of individual notice in section 212 and give a group of employees being terminated more notice and time to prepare for their mass job losses. It is also clear that section 230 is incorporated by reference into section 212. It does not displace the other provisions of section 230, and is not a separate, stand alone provision as the Monitor's interpretation implies. Section 212 works complementary with section 230 by increasing the notice period for a group termination situation.

16. Second, where an employer is required to give pay in lieu of notice and has failed to do so, the Supreme Court of Canada has held in *Rizzo & Rizzo Shoes Ltd., (Re),* [1998] 1 SCR 27, that the employee has a claim for unpaid termination pay against their employer, both for individual notice of termination and group termination:

> [2] Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.
>
> …
>
> [18] The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".
>
> …
>
> [41] …Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* [group termination provision] of the *ESA*.
>
> *Rizzo & Rizzo Shoes Ltd., (Re),* [1998] 1 SCR 27 [**CUPE's Bench Brief**, **Tab 15**].

17. Third, even though section 212 of the CLC does not duplicate the requirement in section 230 on the employer to provide pay in lieu of prior notice, the obligation to provide pay in lieu thereof remains and continues to apply to the "additional" group termination notice that is added to the individual notice period.

18. The Monitor's bifurcated interpretation that there is no obligation for an employer to provide pay in lieu of *group* notice, while there is an obligation to provide pay in lieu of *individual* notice, would lead to an absurd statutory interpretation of the scheme of section 212 and section 230. It would mean that an employer who does not provide the statutory notice of group termination, would not have to provide pay in lieu of notice, and the employee would not receive notice and have no claim against their employer for its failure to give the notice. However, the employee would have a claim for not receiving pay in lieu of *individual* notice. That bifurcated interpretation would defeat the statutory purpose of section 212 that requires 16 weeks notice be "added" to the length of individual notice the employer is required to provide prior to a group termination.

19. The CLC is remedial legislation, and a "fair, large and liberal construction" of the statute also supports that section 212 simply adds more notice to the section 230 individual notice requirement. The rest of section 230 continue to function, which includes the requirement to provide pay in lieu of notice.

c) The Cabin Crew Employees' claim for Group Termination Notice is part of "termination pay" that are "eligible wages" under WEPPA, it is not a "damages" claim

20. Under section 5(1)(c) of WEPPA, an individual is eligible to receive a WEPP payment if they are owed "eligible wages" by their former employer. Section 2 of WEPPA defines "eligible wages" as including "termination pay [and] severance pay":

> ***"eligible wages"*** means
>
> (b) …
>
> ***wages*** includes salaries, commissions, compensation for services rendered, vacation pay, ***termination pay, severance pay*** and any other amounts prescribed by regulation. [emphasis added]
>
> *WEPPA*, s 2 [**Monitor's BOA, Tab 10**].

21. In *WestJet*, a federal arbitrator held that payments required under section 212, like payments made under section 230 of the CLC, "fall within the category of ***termination pay and severance pay***" under the CLC. Therefore, Group Termination Notice qualifies as "termination pay" under sections 2 and 5(1)(c) of WEPPA. It is not a separate "damages" claim.

> *WestJet, an Alberta Partnership and Employees in the service of WestJet, an Alberta Partnership,* Re, 2021 CanLII 83985 at para. 12 [emphasis added]. [**CUPE's BOA, Tab 4**]

d) CUPE is the bargaining agent of the Cabin Crew Employees and should be appointed as Representative of its members so it can obtain the necessary information to calculate its members' severance pay claims.

22. The Monitor opposes a Representation Order be granted to CUPE because the test "for appointing *representative counsel* in CCAA-related proceedings" has not been met. The Monitor is conflating the appointment of CUPE as Representative of the Cabin Crew Employees with the appointment of a Representative Counsel who also seeks funding. CUPE is seeking neither.

23. The main reason CUPE is requesting an order appointing it as Representative of its members in this proceeding is for the order to also include a provision that CUPE be provided with the employee data of its members so that CUPE can calculate its members claims fully and accurately and prepare a Proof of Claim consistent with section 126(2) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3. Despite CUPE's position as the bargaining agent of its Cabin Crew Employees, numerous requests for the employee data of its members were refused by the Monitor who said the information could not be disclosed without Lynx Air's consent. The Monitor only provided some of the requested employee data after it had calculated the severance pay claims of the Employees (without Group Termination Notice) and initiated the WEPP process based on its calculations.

24. The Representation Order seeks to remedy this situation so that CUPE will have appropriate and complete access to their members' data to prepare a Proof of Claim on behalf of the Cabin Crew Employees.

25. Neither CUPE nor Koskie Minsky LLP are seeking to be appointed as Representative Counsel to the Cabin Crew Employees. The circumstances of this case are not like a situation where a non-union employee who does not have union protection, seeks to be appointed as a representative of all other terminated employees and a law firm be appointed as Representative Counsel. CUPE is the bargaining agent for the Cabin Crew Employees and is the sole entity that can directly negotiate with Lynx Air on their behalf:

> Labour relations law protects the collective bargaining rights as an **exclusive power of the union, once it has been certified, to represent its members.**
>
> Kevin P. McElcheran, Commercial Insolvency in Canada (Consulted on 1 December 2024), (Toronto: LexisNexis), ch 5 at 192 (LexisNexis Digital Library) [emphasis added] [**CUPE's BOA, Tab 8**]

26. In *Canwest*, the Ontario Superior Court outlined factors used to determine whether individual employee representatives and Representative Counsel should be appointed for former salaried employees and retirees. In making this assessment, the Court conducted a review of the circumstances specific to the appointment of *representative counsel*, particularly the availability of funding for the resulting legal fees:

> [20] No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). **Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group**.
>
> [21] Factors that have been considered by courts in granting these orders include:
> - the vulnerability and resources of the group sought to be represented;
> - any benefit to the companies under CCAA protection;
> - any social benefit to be derived from representation of the group;
> - the facilitation of the administration of the proceedings and efficiency;
> - the avoidance of a multiplicity of ***legal retainers***;
> - the balance of convenience and whether it is fair and just ***including to the creditors of the Estate;***
> - ***whether representative counsel has already been appointed*** for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
> - the position of other stakeholders and the Monitor.
>
> *Canwest Publishing Inc.*, 2010 ONSC 1328 [**Monitor's BOA**, **Tab 14**].

27. The above *Canwest* factors are not applicable to an assessment of whether CUPE should be appointed as the representative of its members in this proceeding.

28. Courts across Canada have consistently characterized the factors listed in *Canwest* as the test used to determine whether the appointment of *representative counsel* is appropriate:

> [23] Many case authorities discuss the factors to be considered by the courts in determining whether the appointment of ***representative counsel*** is appropriate. Generally, these cases refer to the well known non-exhaustive factors set out in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328.
>
> *Mountain Equipment Co-Op, Re,* 2020 BCSC 2037 [**Monitor's BOA, Tab 16**].
>
> [26] In determining ***whether it is appropriate to appoint Representative Counsel,*** I agree with the Tobacco Monitor's submission that the relevant factors are set out in Canwest Publishing Inc*./Publications Canwest Inc., Re,* 2010 ONSC 1328.
>
> *Imperial Tobacco Canada Ltd., Re,* 2020 ONSC 61 [**CUPE's BOA, Tab 3**].

29. None of the cases cited by the Monitor to support their argument against a Representation Order involve the appointment of a union. The Monitor has only cited cases involving the appointment of individual employee representatives and/or a Representative Counsel, all of which are inapplicable to this case.[1]

---

[1]

- *In the Matter of The Body Shop Canada Ltd.*, 2024 ONSC 3871: Appointment sought of individual employee representatives and representative counsel;
- *Mountain Equipment Co-Op, (Re),* 2020 BCSC 2037: Appointment sought of representative counsel;
- *Nortel Networks Corporation (Re),* 2009 CanLII 26603: Appointment sought of individual employee representatives and representative counsel;
- *Quadriga Fintech Solutions Corp. (Re),* 2019 NSSC 65: Appointment sought of individual employee representatives and representative counsel;
- *TBS Acquireco Inc. (Re),* 2013 ONSC 4663: Appointment sought of individual employee representatives and representative counsel;
- *U.S. Steel Canada Inc. (Re),* 2014 ONSC 6145: Appointment sought of individual employee representatives and representative counsel.

30. In the circumstances of this case, CUPE should be appointed the Representative of its members so that it can be provided with the complete data of its members.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2024.

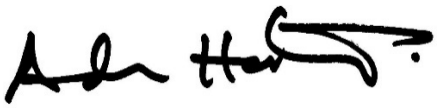

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TABLE OF AUTHORITIES