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

JOINT FACTUM OF THE CMI ENTITIES AND THE LP ENTITIES
(Motion by Gluskin Sheff Regarding Stay of Proceedings)

June 14, 2010

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AND TO: **THE SERVICE LIST**

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PART I – NATURE OF THIS MOTION

1. Canwest Media Inc. ("**CMI**") and Canwest Publishing Inc. ("**CPI**") obtained protection pursuant to the *Companies Creditors' Arrangement Act* ("**CCAA**"), R.S.C. 1985, c. C-36 on October 6, 2009 and January 8, 2010, respectively. CMI sought CCAA protection along with certain other applicants and partnerships, collectively referred to as the "**CMI Entities**". CPI sought CCAA protection along with certain other applicants and partnerships (the "**LP Entities**"). Both the LP Entities and the CMI Entities are protected by broad stays of proceedings (the "**Stays**") which preclude the taking or maintaining of proceedings against them, or affecting their business or property.

2. The CMI Entities and the LP Entities act as sponsor and administrator of certain defined benefit and defined contribution pension plans (as further described below, the "**Plans**"). The Plans provide for pension benefits to be payable to employees of the CMI Entities and the LP Entities, in accordance with their terms.

3. Gluskin Sheff + Associates Inc. ("**Gluskin Sheff**") commenced an action on January 20, 2010 against CMI and CPI in the Superior Court of Justice as Court File no. 10-8547-00CL (the "**Action**"). In the Action, Gluskin Sheff alleges that CMI and CPI breached a March 2006 Investment Management Agreement (the "**IMA**") by not paying a performance fee that Gluskin Sheff alleges it is owed. Pursuant to the IMA, CMI and CPI retained Gluskin Sheff to act as investment counsel and portfolio manager in respect of a portion of the Plans' assets.

4. In this motion, Gluskin Sheff seeks declarations from this Court that the Stays do not apply to the Action, or an order lifting the Stays to permit the Action to continue, or certain related relief in the alternative.

5. This factum is filed on behalf of both the CMI Entities and the LP Entities.

6. The fallacy that underlies Gluskin Sheff's motion and all of the relief it seeks is that its claim is actually against the Plans. That proposition is inherently flawed. A pension plan is, in essence, an agreement. There may also be a trust established which holds funds available to satisfy the pension promise set out in the agreement. The contents of the Plan documents are regulated. In particular, the relevant pension legislation requires that an administrator perform certain functions necessary to carry out the terms of the agreement. However, reduced to its essence a pension plan is a document, which may or may not have a trust associated with it. Accordingly, the suggestion that Gluskin Sheff contracted with the Plans is ill-conceived.

7. On its face, the IMA is a contract between Gluskin Sheff, CMI and CPI. CMI and CPI were the administrators of the Plans, and they alone were responsible for paying any fees properly payable to Gluskin Sheff under the IMA. Gluskin Sheff had no contractual or other right to require that its fees be paid out of the trust funds relating to the Plans. It invoiced CMI and CPI for the fees in question and it had no relationship with the members of the Plans.

Essentially the same arguments now being advanced by Gluskin Sheff were recently considered and rejected in *General Motors of Canada Ltd. v. Canada* ("***GMCL***"),[1] a decision that was upheld by the Federal Court of Appeal. The reasons for the decision in *GMCL* are highly relevant to why the Stays apply to the Action, and why this motion ought to be dismissed.

8. Gluskin Sheff's alternative request to lift the Stays should also be rejected. Gluskin Sheff is a sophisticated investment manager that is now attempting to manoeuvre a better outcome for itself than it would have had under the claims processes established in the CMI Entities' and LP Entities' CCAA proceedings. The two restructurings are now at a very advanced stage and it would be both unfair to creditors and prejudicial to the two restructurings to allow Gluskin Sheff to pursue the Action in court, when other similarly-situated contractual counterparties have participated in the claims processes established by this Honourable Court.

PART II – FACTS

BACKGROUND

9. Canwest Global Communications Corp. ("**Canwest Global**") is a leading Canadian media company with interests in free-to-air television stations and subscription-based specialty television channels. Canwest Global, CMI and the other CMI Entities are the subject of one CCAA proceeding. Canwest Global also has interests in newspaper publishing and digital and online media operations carried on by CPI and the other LP Entities. The LP Entities are the subject of a separate proceeding commenced under the CCAA.[2]

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1 *General Motors of Canada Limited v. Canada* [2008] T.C.J. No. 80 (T.C.C.), aff'd [2009] F.C.J. No. 447 (F.C.A.) (hereinafter "*GMCL*").

2 Affidavit of Wally Hassenrueck sworn June 3, 2010 ("**Hassenrueck Affidavit**"), at paras. 4-5.

10. For ease of reference, where the term "**Canwest**" is used in this affidavit it refers to the CMI Entities and the LP Entities collectively.

11. The CMI Entities and the LP Entities are in the process of being restructured separately, so that upon emergence they will operate as stand-alone enterprises with separate ownership. At the end of these processes, each of the LP Entities and the CMI Entities will have sole responsibility for the pension plans sponsored by them, and going forward LP Entity employees will only participate in pension plans sponsored by LP Entities, and CMI Entity employees will only participate in pension plans sponsored by CMI Entities. The process of "disentangling" the various business and other functions of Canwest is extremely complex. It has been ongoing for several months, and has been the subject of two agreements between the LP Entities and the CMI Entities that have been approved by the Court.[3]

CANWEST PENSION PLAN ADMINISTRATION

12. Certain CMI Entities act both as sponsor and administrator of a number of defined benefit ("**DB**") registered pension plans and defined contribution ("**DC**") registered pension plans (collectively, the "**CMI Plans**"). Certain LP Entities act both as sponsor and administrator of a number of DB registered pension plans (the "**LP Plans**", and together with the CMI Plans, the "**Plans**"). As noted above, the Plans are subject to, and registered under, different Canadian pension benefits standards legislation.[4]

13. In accordance with applicable pension benefits standards legislation, a pension trust fund (a **"Fund"**) has been established for each Plan. The assets held in respect of each Plan

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3 Hassenrueck Affidavit, at para. 7.

4 Hassenrueck Affidavit, at paras. 8-12.

are held in a corresponding Fund. RBC Dexia Investor Services Trust (the **"Trustee"**) is the custodian of each Fund. The Trustee acts pursuant to authorized instructions from Canwest.[5]

14. Pursuant to applicable pension benefits standards legislation, such as the *Pension Benefits Act* (Ontario), the relevant CMI Entity or LP Entity, as administrator, is required to oversee all Plan and Fund administration matters. In particular, the administrator is responsible for investing the assets of the pension fund in a reasonable and prudent manner and in the manner prescribed by the act and regulations.[6]

15. The administrator under each Plan must establish a Statement of Investment Policies and Procedures (**"SIP&P"**) which governs the investment of the Fund. Because all of the Funds are invested pursuant to a "consolidated investment structure", the SIP&P for each Plan is the same in all material regards from an investment perspective. The SIP&P confirms that, among other things:

(a) The administrator has overall responsibility for the investment of the Fund;

(b) The liabilities of the Plan are independent of the value of the assets in the Fund (in the case of DB Plans); and

(c) The Company's contributions to the Fund include special payments toward any unfunded liability, as necessary.[7]

16. CanWest MediaWorks Inc. (predecessor to CMI), Canwest MediaWorks Publications Inc. (predecessor to CPI) and the Trustee entered into a Master Trust Agreement

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5 Hassenrueck Affidavit, at para. 13.

6 Hassenrueck Affidavit, at para. 18.

(the **"Master Trust Agreement"**) dated August 10, 2007 to establish a trust (the **"Master Trust"**) for purposes of commingling a portion of the assets of all of the Plans under a consolidated investment structure. The Trustee is also the custodial trustee of the Master Trust.[8]

17. The Master Trust Agreement provides that the Trustee holds title to all assets comprising the Master Trust fund (section 3.1.1). However, the Trustee holds and invests the assets of the Master Trust only in accordance with the direction of CMI and CPI, or investment managers appointed by them (section 8.1). The power to appoint or terminate an investment manager rests solely with CMI and CPI, and not with the Trustee (sections 8.2 and 8.3).[9]

18. The CMI Entities and the CPI Entities are also responsible for funding (*i.e.*, making contributions to) the various Plans, in accordance with their terms and the relevant legislation. Fifteen of the seventeen Plans are DB Plans. Some of the Plans are "contributory", in the sense that employees are required to contribute a fixed proportion of their income to the applicable Plan as set out in the Plan documents. Some of the Plans are "non-contributory", in the sense that employee contributions are not required. However, in relation to all of the DB Plans, the Plan sponsor (i.e., the relevant Canwest entity) is responsible for funding the cost of benefits that will accrue during the year (the "current service cost") as well as payments in respect of solvency deficiencies ("special payments"), all in accordance with applicable pension standards legislation. For contributory DB plans the Plan sponsor is required to contribute the difference between the current service cost and the sum of employee contributions. In all cases, however, the sponsor is solely responsible for making any special payments. Accordingly, the

7 Hassenrueck Affidavit, at para. 19; SIP&P for the Canwest Publications Inc. Retirement Plan; Hassenrueck Affidavit, Exhibit "B".

8 Hassenrueck Affidavit, at para. 20.

9 Master Trust Agreement; Hassenrueck Affidavit, Exhibit "C".

DB Plan sponsors are ultimately responsible for ensuring that the DB Plans are fully funded in accordance with the Plan terms and governing legislation, including bearing responsibility for funding any deficits that may arise from time to time in the DB Plans.[10]

CANWEST'S RELATIONSHIP WITH GLUSKIN SHEFF

The IMA

19. In March, 2006, Gluskin Sheff and CanWest MediaWorks Inc. (predecessor to CMI) and CanWest MediaWorks Publications Inc. (predecessor to CPI) entered into the IMA, pursuant to which Gluskin Sheff was appointed to invest a portion of all of the Plans' assets.[11]

20. In accordance with Section B.3 of the IMA, an account was established under the Master Trust in relation to Gluskin Sheff's mandate. A portion of the assets of all of the Plans was credited to this account (the "**Account**") to be invested by Gluskin Sheff.[12]

21. Gluskin Sheff agreed to invest the monies held in the Account in a certain manner. Whether they did so in accordance with the IMA, and the consequences that flow from that, are the subject of a dispute between Gluskin Sheff and Canwest, as set out below.[13]

22. Section D of the IMA outlined the management fees, performance fees and costs that were payable under the IMA. Section D.2 provided that Gluskin Sheff would be entitled to management fees calculated and paid monthly based upon the asset value of the Account net of fees. Sections D.4, D.5 and D.6 of the IMA provided that Gluskin Sheff would be entitled to an annual performance fee in certain circumstances. Section D.3 of the IMA provided that "all

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10 Hassenrueck Affidavit, at para. 21.

11 Hassenrueck Affidavit, at para. 22.

12 Hassenrueck Affidavit, at para. 23.

13 Hassenrueck Affidavit, at para. 24.

maintenance and operating fees charged by brokers, custodians, banks or trust companies shall be borne by the Account".[14]

23. The Master Trust Agreement provided that the Trustee was authorized to pay expenses with respect to the operation of the Master Trust Fund, but was only entitled to pay the fees and expenses of an investment manager if directed to do so by CMI and CPI.[15]

24. In accordance with the foregoing, at all relevant times Gluskin Sheff invoiced Canwest for management fees and performance fees, whereas brokerage fees and other similar expenses were paid directly from the Account. Gluskin Sheff had no ability to require the Trustee to pay Gluskin Sheff's fees out of the Account. Such fees could only ever be paid out of the Account at the direction of Canwest, and nothing in the IMA compelled Canwest to give such a direction, or limited its ability to not give such a direction.[16]

25. Canwest submits that nothing in the IMA gives Gluskin Sheff a security interest in the assets held in the Account from time to time, nor in any portion of the Master Trust fund, nor in any of the Funds of the Plans. This is in contrast to the Master Trust Agreement, which provides that the compensation of the Trustee "shall constitute a charge upon the Master Trust Fund and shall be paid out of the Master Trust Fund unless such compensation, disbursements and expenses shall be paid by the Companies [...]."[17]

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14 Hassenrueck Affidavit, at paras. 25-30.

15 Master Trust Agreement, section 3.1.13.

16 Hassenrueck Affidavit, at paras. 25-30.

17 Master Trust Agreement, section 10.6.

The Dispute between Canwest and Gluskin Sheff

26. There is a dispute between Canwest and Gluskin Sheff concerning whether Gluskin Sheff is entitled to a performance fee in the amount of approximately $740,000, which was invoiced to CMI in July, 2009, as well as additional management fees. Canwest disputes that the performance fee and management fees are owed to Gluskin Sheff due to Gluskin Sheff's non-compliance with the IMA. Canwest maintains that it is entitled to be reimbursed for management fees and performance fees paid to Gluskin Sheff during the period that the Account was not compliant with the IMA.[18]

27. As set out in the motion materials filed by Gluskin Sheff, Canwest disputed that the fees in question were payable from as early as September, 2009. On September 22, 2009, Gluskin Sheff wrote to Canwest and indicated that it was "embarrassed and apologetic" for the non-compliance with the IMA, but that it was nevertheless entitled to its performance fee. On December 23, 2009, through counsel, Canwest advised that it was terminating the IMA. The assets in the Account were redeemed and deposited with the Trustee shortly thereafter.[19]

28. The CMI Entities filed for CCAA protection on October 6, 2009. Pursuant to the Initial Order, the CMI Entities gave public notice of the CCAA filing in the manner required by the CCAA. The LP Entities filed for CCAA protection on January 8, 2010. Public notice of the LP Entities' filing was also given in accordance with the LP Entities' initial order and the CCAA.[20]

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[18] Hassenrueck Affidavit, at paras. 31-32.

[19] Affidavit of Jeremy Freedman sworn April 14, 2010 ("**Freedman Affidavit**"), at paras. 23, 36-39, Exhibits D, E and I.

[20] Hassenrueck Affidavit, at paras. 35 and 37.

29. The individuals dealing with the disputed fees did not discuss the ongoing CCAA proceedings one way or the other.[21]

30. Counsel for Gluskin Sheff wrote to counsel for Canwest on January 22, 2010 advising that it had commenced an action against CMI and CPI. Counsel responded on January 28, confirming that the position of the CMI Entities and the LP Entities was that the commencement of the action was a violation of the stays imposed in their respective CCAA proceedings.[22]

31. Gluskin Sheff's motion was brought on April 20, 2010.[23]

32. The CMI Entities obtained authorization to carry out a claims procedure (as amended, the "**CMI Claims Procedure**") on October 14, 2009. Pursuant to the CMI Claims Procedure the CMI Entities issued notices in various newspapers and online calling for claims against the CMI Entities. Gluskin Sheff did not submit a claim by the claims bar date, and has never subsequently sought to do so.[24]

33. The LP Entities obtained authorization to carry out a claims procedure (as amended, the **"LP Claims Procedure**") on April 12, 2010. The LP Claims Procedure was also widely publicized in various media pursuant to the relevant court orders. Gluskin Sheff did not submit a claim in the LP Claims Procedure, and has not sought to do so.[25]

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21 Hassenrueck Affidavit, at para. 36.

22 Hassenrueck Affidavit, at para. 38.

23 Hassenrueck Affidavit, at para. 39.

24 Hassenrueck Affidavit, at paras. 40-43.

25 Hassenrueck Affidavit, at paras. 44-47.

34. Through this motion, Gluskin Sheff is seeking to have its dispute with CMI and CPI resolved outside of the CMI Claims Procedure and the LP Claims Procedure. It is the position of Canwest that allowing Gluskin Sheff to continue with its Action in this way would be disruptive, and would prejudice both restructurings, for a number of reasons.[26]

35. The purpose of establishing both the CMI Claims Procedure and the LP Claims Procedure was to ensure, to the fullest extent possible, that all claims against the respective enterprises be established and resolved before CCAA emergence. Both claims procedures are significantly advanced and the vast majority of claims asserted against the CMI Entities and the LP Entities have been resolved.[27]

36. Having the Gluskin Sheff claims resolved outside of either claims procedure would be contrary to the overall objectives of the restructurings, and it would mean that the Gluskin Sheff claim would be evaluated and (if applicable) remedied on an entirely different basis than the claims of other creditors that have participated in the claims procedures.[28]

37. This result would be particularly unfair in the context of the LP Entities' proceeding, because a creditors' meeting is being held on June 14, 2010 and sanction of a plan of compromise is being sought on June 18, 2010. Allowing the Gluskin Sheff action to proceed would be both prejudicial to the restructurings and unfair to others with claims against the LP Entities and the CMI Entities, particularly when the underlying dispute has been in existence

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26 Hassenrueck Affidavit, at para. 49.

27 Hassenrueck Affidavit, at para. 51.

28 Hassenrueck Affidavit, at para. 52.

since before either CMI or CPI filed for CCAA protection and there was nothing stopping Gluskin Sheff from participating in the claims processes.[29]

PART III – ISSUES

38. This motion raises the following issues:

(a) Is the Action captured by the Stays; and

(b) If so, should the Stays be lifted to permit the Action to proceed?

PART IV – LAW AND ARGUMENT

The Gluskin Sheff Motion is Clearly Stayed

39. As a general matter, it is not controversial that stays imposed in CCAA proceedings are to be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of effecting a successful restructuring, and ensuring that creditors are treated fairly. Some of the key principles governing the interpretation of stay provisions are as follows:

(a) The purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. It is remedial legislation that is entitled to a liberal interpretation.[30]

(b) The power to grant the stay is to be interpreted broadly, in order to permit the CCAA to accomplish its legislative purpose. It applies not only to all creditors,

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29 Hassenrueck Affidavit, at para. 53.

30 *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.) at p. 31 (hereinafter "*Lehndorff*").

but to all non-creditors and other parties that could potentially jeopardize the success of the plan and therefore the continuance of the company.[31]

(c) A key purpose of the stay 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 (or other stakeholder) an advantage to the prejudice of others that are less aggressive. In turn, such manoeuvres can undermine the company's financial position, making it less likely that a restructuring will succeed.[32]

(d) The possibility that one or more creditors (or other stakeholders) might be prejudiced by a stay of proceedings does not affect the court's exercise of authority in granting the stay, because such prejudice is offset by the benefit to all creditors and the company of facilitating a reorganization.[33]

(e) Other than certain specific exemptions set out in the CCAA, which are not relevant here, there is nothing in the CCAA which exempts any creditors of the debtor company from its provisions. The all-encompassing scope of the CCAA is underscored by section 8 of the CCAA, which precludes parties from contracting out of the CCAA.[34]

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31 *Ibid.*, at p. 33.

32 *Ibid.*, at p. 32.

33 *Ibid.*, at p. 32.

34 *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1991), 51 B.C.L.R. (2d) 84 (C.A.) at p. 4. Section 8 of the CCAA provides that: "This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument."

(f) The CCAA serves a broad constituency, including investors, creditors and employees.[35] As such, the restructuring process should be conducted in the general interest of all the creditors (and other stakeholders), which should always be preferred over the particular interests of individual creditors.[36]

40. The terms of the CMI Stay are as follows:

> THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

41. The terms of the LP Stay are similarly broad:

> THIS COURT ORDERS that until and including February 5, 2010, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property, except with the written consent of the applicable LP Entity, the Monitor and the LP CRA (in respect of proceedings affecting the LP Entities, the LP Property or the LP Business), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the LP Entities, the Monitor or the LP CRA or affecting the LP Business or the LP Property are hereby stayed and suspended pending further Order of this Court. In the case of the LP CRA, no Proceeding shall be commenced against the LP CRA or its directors and officers without prior leave of this Court on seven (7) days notice to CRS Inc.

42. In each case, the test for whether an action is stayed is disjunctive; for example, an action is captured by the LP Stay if it is any one or more of: (i) against an LP Entity; or (ii) in respect of an LP Entity; or (iii) affecting the LP Business; or (iv) affecting the LP Property.

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[35] *Ibid.*, at p. 7.

43. Based on the plain language of the Stays, the Action is clearly captured and Gluskin Sheff is clearly precluded from pursuing it.

44. Nevertheless, Gluskin Sheff advances a variety of arguments as to why an action commenced in this court during the pendency of these CCAA proceedings, against the Applicants in these proceedings, is not captured by the Stays. As set out below, each of these arguments ought to be rejected.

The Action is Against CMI and CPI

45. CMI and CPI are the defendants in the Action. The fact that they are sued in their capacity as administrators of the Plans is irrelevant. Accordingly, the Stays apply to the Action.

46. Gluskin Sheff asserts that the Action makes no allegations against Canwest and seeks no relief from it. Canwest submits that is not correct. The Statement of Claim is essentially devoted to a recitation of things that Canwest personnel did or did not do, knew or ought to have known and said or did not say. These allegations culminate with the assertion at paragraph 69 of the Statement of Claim that "Canwest is attempting, in bad faith, to take advantage of an innocent and inconsequential discrepancy between the language of the IMA document and the intent of the parties as evidenced by their conduct throughout [...]."[37]

47. Despite this litany of allegations against Canwest, Gluskin Sheff argues that it is really suing the Plans and their members; that is, the present and former employees of Canwest.

48. The assertion that Gluskin Sheff's cause of action lies against the Plans ignores the nature of the Plans themselves:

36 *Re Boutiques San Francisco Inc.* (2004), 5 C.B.R. (5th) 174 at para. 21.

> Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund. [38]

49. The Plans are basically contracts. The terms of the contracts are regulated by legislation. In particular, the law requires that an administrator be appointed to ensure that various responsibilities set out in the Plans are fulfilled. The Funds are established to act as a source of assets out of which the pensions promised by the Plan terms are to be paid.

50. In light of the foregoing, Gluskin Sheff's argument that Canwest was contracting as agent for the Plans, and therefore the Plans are the true parties liable under the IMA, does not withstand scrutiny. Neither does Gluskin Sheff's further argument that because Canwest contracted in its capacity as administrator, it was really the Plans who were receiving the services in question. Both of these arguments should be rejected.

51. First, it appears that Gluskin Sheff has improperly conflated the role of administrator of the Plans and trustee of the Funds. Canwest is the former, the Trustee is the latter. It is incorrect to suggest, as Gluskin Sheff does, that Canwest holds the Funds in trust for the Plans. The Trustee holds title to the Funds, as set out above.

52. It is extremely important to distinguish between the respective roles of the trustee and administrator. This point is well made in a policy promulgated by the Ontario pension regulator:

[37] Statement of Claim, at para. 69; Freedman Affidavit, Exhibit "J".

[38] *Schmidt v. Air Products Canada Ltd.* [1994] 2 S.C.R. 611, at para. 47.

> It is important not to confuse the Administrator with other persons involved in the administration of the plan. The employer who established and contributes to a plan is not the administrator if another person is designated to assume that role ... Professionals who advise about certain aspects of plan management or administration – investment managers, actuaries, lawyers, accountants, or brokers, whether any or all are part of consulting firms – may be employees, independent contractors or agents, but they are not Administrators. Nor are the trust companies which hold the assets of the pension plan.[39]

53. In fact, Canwest could not be the trustee of the Plans that are governed by the Ontario *Pension Benefits Act* ("**OPBA**"). Section 22(6) of that act provides that only prescribed persons may be trustees. Prescribed persons include trust corporations, three or more individual trustees or certain government bodies or insurance corporations. Neither CMI nor CPI would qualify to act as a trustee of the Plans governed by the OPBA.[40]

54. Accordingly, Canwest did not and could not enter into the IMA as a trustee of the Funds. This does not mean that Canwest's obligations in respect of the Plans are in any way attenuated. On the contrary, the administrator carries the most significant responsibilities in respect of pension plans, under any of the regulatory regimes relevant to this motion.

55. In particular, as administrator of the Plans it is Canwest that is responsible for investing or overseeing the investment of the Funds. That responsibility does not lie with the Trustee, or with the Plans themselves. By statute, pursuant to the SIP&P and pursuant to the terms of the Master Trust Agreement, Canwest alone is responsible for investing the Fund assets, and Canwest alone has the ability to engage investment advisors to assist it in the discharge of *its own* responsibility.

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[39] Financial Services Commission of Ontario Policy A300-100: *Administrator - Roles and Responsibilities* (May, 1990) at p. 1.

[40] *Pension Benefits Act*, R.S.O. 1990 c. P-8, section 22(6); *Pension Benefits Regulation*, R.R.O. 1990, Reg. 909, section 54.

56. The central fallacy underlying Gluskin Sheff's argument is that it was providing services to the Plans. Pursuant to the IMA, Gluskin Sheff was providing services to the administrator of the Plans, as principal and not as agent for the Plans, because ultimate responsibility for investing the Fund assets begins and ends with the administrator. The Plans do not need to hire an investment manager; they have an administrator that is bound by statute to perform that function.

57. This very issue was recently considered by the Tax Court of Canada, and then the Federal Court of Appeal, in *GMCL*.

58. The issue in *GMCL* was whether General Motors of Canada Limited was entitled to claim an input tax credit to offset Goods and Services Tax ("GST") payable on investment management fees relating to the administration and investment of its registered pension plans, or whether the input tax credit "belonged" to the pension funds (from which GMCL recovered the fees). CRA asserted that the services were, in essence, provided to the funds. For reasons that are directly applicable to this case, the Tax Court of Canada and the Federal Court of Appeal rejected this argument.

59. GMCL is the sponsor and administrator of a number of registered pension plans. As with the Canwest Plans, the assets of GMCL's pension plans were collectively invested through a master trust structure.[41] The GMCL pension master trusts were held by a custodial trustee that acted pursuant to authorized instructions of GMCL. As the administrator of its pension plans, GMCL contracted with third party investment managers to manage a portion of

[41] *GMCL*, *supra* at paras. 3, 9-12.

the assets held under GMCL's pension master trust structure, subject to applicable pension legislation and investment guidelines established by GMCL.[42]

60. The investment managers forwarded the invoices for any fees payable under the applicable investment management agreement to GMCL for review and approval, after which GMCL would direct that the pension fund trust pay these obligations, including the applicable Goods and Services Tax ("GST"), to the investment manager.[43]

61. The Court held that the administrator itself contracted for the investment management services and dismissed the argument that GMCL was simply acting as a trustee of the assets of the GMCL pension plans:

> The roles and respective duties of GMCL, as administrator, and Royal Trust, as the trustee, were entirely separate. While GMCL may have exercised some fiduciary duties as the plan's administrator, that does not mean that GMCL was a trustee of the trust. The only trustee of these pension plans can be Royal Trust, the Custodial Trustee, which, according to the definition of "trustee" and the evidence, holds legal title. Consequently, it was GMCL that contracted for and acquired the services of the Investment Managers.[44] [emphasis added]

62. The Court further confirmed that, as party to the investment management agreements, GMCL was liable to pay the investment management fees and associated GST:

> No evidence whatsoever was adduced to suggest that the Plan Trusts were a party to the Investment Management and Fee Agreements that made GMCL liable to pay, or that GMCL entered into an Investment Management Agreement as an agent on behalf of the Plan Trusts. The Fee Agreements, pursuant to which consideration was calculated with respect to the Investment Management Agreements, were solely between GMCL and the respective Investment Managers. The Investment Managers issued invoices, pursuant to the Agreements, solely to GMCL. GMCL approved the amounts invoiced in accordance with the Fee Agreements and then instructed the Trust to pay the Investment Managers from the funds it had placed in the pension plans. This in no way converts or transfers the liability for payment of the invoices to the trustee.

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42 *Ibid.*, at paras. 12-13.

43 *Ibid.*, at paras. 22-24.

44 *Ibid.*, at para. 42.

> Contractually, GMCL is the only party that carried the liability to pay this consideration to the Investment Managers. The Investment Management and Fee Agreements are definitive on this point. The Investment Managers invoiced only GMCL. Generally, liability crystallizes upon the issuance of an invoice. If GMCL did not pay the invoice, the Managers could sue only GMCL, not the Plan Trust. Only GMCL is liable to pay these invoices. Since the trust was never vested with responsibility for managing the assets, it had no requirement for the services of Investment Managers. The Managers can look only to GMCL for payment.[45] [emphasis added]

63. On this basis the Court held that GMCL itself was entitled to claim the input tax credits in respect of the GST relating to the investment management fees paid to the managers of the assets of GMCL's registered pension plans. The Court so held even though GMCL entered into the investment management agreements in its capacity as administrator of its registered pension plans.[46]

64. In this case, Canwest hired Gluskin Sheff because Canwest needed the assistance of investment managers in the discharge of Canwest's responsibilities. Gluskin Sheff seizes on the fact that the IMA refers to Canwest contracting "on behalf of" the Plans. When viewed in all of the circumstances, including the totality of the terms of the IMA, the statutory scheme, the SIP&P and the Master Trust Agreement, the reference to contracting "on behalf of" the Plans means nothing more than that Canwest was contracting in its capacity as administrator. Further, the fact that Canwest was contracting in its capacity as administrator does not in any way support the argument that the "real" counterparty to the IMA was somehow the present or former employees of Canwest.

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45 *Ibid*, at paras. 53-54.

46 *Ibid.*, at para. 67.

The Fact that Canwest Can Recoup Certain Expenses from the Funds is Irrelevant

65. Canwest is entitled in certain circumstances to charge the Funds for certain expenses it incurs in its capacity as administrator. That fact does nothing to alter the analysis of whether the Action is against Canwest or the Plans.

66. In this case, as in *GMCL*, the invoices for the fees in question were rendered to Canwest, and it was Canwest who was liable to pay them (or not, as the case may be). Gluskin Sheff had no ability to invoice the Trustee for its management and performance fees, as contrasted to other expenses such as brokerage fees. Moreover, the Trustee was prohibited from paying Gluskin Sheff's management or performance fees unless Canwest directed it to do so.

67. The fact that Canwest was entitled, in certain circumstances, to charge *its* expenses to the Funds does not give Gluskin Sheff a right to require payment of fees out of the Funds. As noted above, the IMA does not create such a right either. Accordingly, Gluskin Sheff could look to Canwest, and only to Canwest, for payment.

68. Again, *GMCL* contains useful analysis of a similar issue raised in that case:

> It follows from these comments that, although GMCL re-supplied the investment services to the trusts, and despite a reimbursement to GMCL by the Trust in the event that GMCL paid these fees directly, GMCL was still the person liable for the payment of the supply of these services by the Investment Managers, pursuant to the terms of the Agreements between GMCL and the Managers. The origin of the payment of the fees is irrelevant [...].[47]

The Action Affects Canwest's Businesses

69. For all of the foregoing reasons, the Action is against or in respect of the CMI Entities and the LP Entities, and is therefore stayed.

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47 *Ibid.*, at para. 57.

70. Even if that is incorrect, however, the Action still affects the CMI Business and the LP Business. This fact alone is sufficient to mean that it is stayed because, as noted above, the test under the Stays is disjunctive.

71. The terms "LP Business" and "CMI Business" are not defined in the Initial Order. Gluskin Sheff suggests that acts that Canwest undertakes in its capacity as administrator of the Plans somehow do not constitute the "business" of Canwest. As noted above, the power to stay proceedings should be interpreted broadly and in the interests of affording CCAA debtors the broadest opportunity to successfully restructure. A narrow definition of the 'business" of Canwest should not be preferred.

72. Gluskin Sheff asserts that based on *Morneau Sobeco Partnership v. Aon Consulting Inc.,*[48] a narrow definition of the "business" of Canwest is appropriate. In that case, the Court found that it was "not clear" that releases provided in an order terminating a CCAA proceeding precluded an action against certain individuals in a subsequent action. The releases were in favour of any person who served as an officer or director of the Applicants in that case, for claims that arose "by reason of, out of or in connection with" such service.[49]

73. The Court found that the claims asserted against the individuals in question for acts they took in connection with the administration of certain pension funds "may not" be barred by the termination order, on the basis that it was not clear that such liability arose out of their service as officers and directors.[50]

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48 (2008), 65 C.C.P.B. 293 (C.A.) (hereinafter "*Morneau Sobeco*").

49 *Ibid.*, at para. 16.

50 *Ibid.*, at paras. 30-31, 36.

74. The Court stated that its comments were not intended to be dispositive.[51] This court recently distinguished *Morneau Sobeco* in *Re Nortel Networks Corp.*, where an action was sought to be pursued against directors and officers under American pension legislation.[52]

75. In any event, neither *Morneau Sobeco* nor *Re Nortel Networks Corp.* speak to the scope of the "Business" of the CMI Entities and the LP Entities for the purpose of the Stays. The fact that Canwest was acting in its capacity as administrator is not determinative of whether the Stays apply, one way or the other. Rather, this Court should examine the overall purpose of the Stays and determine whether the Action or the relief sought in the Action would affect the Businesses. If it would, the Stays apply.

76. Again, *GMCL* contains a useful discussion of the issue. In that case, the Court had to consider whether investment management fees were incurred in the course of GMCL's commercial activities. The Court held that

> [w]hile the expenses associated with the administration of these pension assets may be viewed as being only indirectly related to the manufacture of vehicles, they are nonetheless an integral component to the overall success of GMCL's commercial activities in the market place... The only logical, common sense conclusion is that all of the functions of GMCL, in relation to these pension assets, are for the sole benefit of its employees, both the salaried and hourly employees and, consequently, they are an essential component to GMCL's business activities. Therefore, GMCL acquired the services of the Investment Managers for use in its commercial activities. As such, while GMCL does not directly utilize the services in making GST supplies in its operations, those services are part of its inputs toward its employee compensation program, which is a necessary adjunct of its infrastructure in making taxable sales. The expenses are not personal in nature. They are ancillary to the primary business activities of GMCL and meet the need of attracting and maintaining an adequate employee base to support its primary business operations.[53]

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51 *Ibid.*, at para. 37.

52 *Re Nortel Networks Corp.* (2009), 57 C.B.R. (5th) 232 (S.C.J.).

53 *GMCL, supra* at para. 67.

77. All of the foregoing is directly applicable in this case.

78. Also, as noted above, Canwest is ultimately responsible for ensuring that the DB Plans are funded in accordance with statutory requirements. If there are unfunded liabilities in the Plans, Canwest is required to make special payments until the Plans are fully funded. Accordingly, proper administration of the Funds, including investment management, can have a direct impact on the financial position of Canwest. As noted in the SIP&P:

> The goal underlying the establishment of this Statement is to ensure that the Fund is invested in a prudent manner so that it is sufficient to meet the benefit obligations of the Plan as they come due, at an acceptable cost to the Company. The prudent and effective management of the Fund will have a direct impact on the achievement of this goal. [54]

79. The effective administration of the Plans is an important aspect of the CMI Business and the LP Business. It is an important aspect of the relationship between Canwest and its employees, and it can have a significant and direct effect on the bottom line. Accordingly, to suggest that actions against Canwest *qua* administrator are not stayed because they do not affect the "Business" is both artificial and contrary to the overall principles governing the power to stay proceedings under the CCAA.

The Action Affects the CMI Property and the LP Property

80. Finally, the Action is stayed because it affects the LP Property and the CMI Property. Gluskin Sheff claims that it will be entitled to enforce a judgment (if any) against the Funds and accordingly the Action is without financial consequences for Canwest.

81. Canwest disputes that Gluskin Sheff would be able to execute a judgment against the Funds. Nothing in the IMA gives Gluskin Sheff a security interest over the Funds. Gluskin Sheff relies on section A.5 of the IMA, which says that Canwest's ability to withdraw cash from

the Account is "subject to any fees owing to [Gluskin Sheff] in respect of the Account". Canwest submits that section does not confer a security interest in the Account; it merely purports to restrict Canwest's ability to withdraw funds. In any event, section A.5 is now irrelevant because the Account has been collapsed.

82. In any event, even if Gluskin Sheff is able to execute a judgment against the Funds, such a judgment would still "affect" the CMI Property and the LP Property. As discussed above, as the employer (and sponsor) in relation to their respective Plans, the CMI Entities and LP Entities bear primary responsibility for funding the DB Plans out of their own property. The CMI Entities and LP Entities, not the members of the DB Plans, bear responsibility for funding any deficits that may arise from time to time in the DB Plans.

83. To the extent that the amounts claimed by Gluskin Sheff in the Action are paid from the Funds, the CMI Entities and LP Entities will in due course be required to pay additional contributions under the DB Plans out of the "CMI Property" and "LP Property". This effect has been recognized by the Ontario Court of Appeal:

> As the employer and plan sponsor, Kerry is responsible for the Fund's solvency. If costs are paid from the Fund, Kerry may be required to contribute more in future than it might otherwise have been required to pay.[55]

84. Accordingly, one way or the other, the Action affects the CMI Property and the LP Property, and is therefore stayed.

[54] SIP&P, section 1.5.

[55] *Kerry (Canada) Inc.* v. *DCA Employees Pension Committee* (2007), 282 D.L.R. (4th) 625 (C.A.) at para. 20.

The Stay Should Not Be Lifted

85. The case law recognizes certain very limited bases on which a CCAA stay should be lifted. It is incumbent on Gluskin Sheff to satisfy this Court that a basis for lifting the Stay exists in this case.

86. In *Canadian Airlines*, Paperny J. listed six factors that would lead a court to lift the stay in a CCAA proceeding.[56] These are as follows:

> (a) When the plan is likely to fail;
>
> (b) The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> (c) The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and jeopardize the debtor company's existence);
>
> (d) The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
>
> (e) It is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
>
> (f) After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.[57]

87. Neither the CMI Entities' plan nor the LP Entities' plan are likely to fail. The LP Entities' plan with its unsecured creditors is set for a sanction hearing on June 18, 2010, and a plan of arrangement with its senior lenders has already been conditionally sanctioned. The CMI

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[56] *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1.(Atlt. Q.B.) (hereinafter "*Canadian Airlines*") at pp.7-8, citing from *Canadian Commercial Reorganization: Preventing a Bankruptcy* (Aurora: Canada Law Book, looseleaf) at pp. 342-343.

[57] *Canadian Airlines*, at pp. 7-8.

Entities are also on their way to a successful restructuring. The first factor militates against lifting the stay.

88. Gluskin Sheff has demonstrated neither hardship nor necessity for payment.

89. With respect to the balancing of prejudices required by (d) above, Gluskin Sheff has identified no basis on which it is more prejudiced than any other creditor or stakeholder that has had an action stayed. It is now precluded from advancing a claim in the claims processes, but that is because it did not put in a claim in either process, despite the fact that this dispute predated either filing. Rather, Gluskin Sheff elected to commence the Action in full knowledge of the Stays. That is not "prejudice", within the meaning of the applicable test. On the contrary, it is the kind of manoeuvring that this Court has held should be discouraged.

90. On the other hand, both Canwest and its creditors stand to be prejudiced if the Action is now allowed to proceed. The purpose of running the Claims Procedures was to elicit and deal with claims against Canwest's two Businesses, so that upon emergence they could emerge with clean slates. Allowing a run of the mill contractual dispute to survive against both Businesses is directly contrary to the goal of a clean CCAA emergence. It is also unfair to those that submitted Claims in the Claims Procedures, in good faith and in a timely way, and are having those Claims compromised in the two plans. Allowing the Action to proceed would reward precisely the kind of manoeuvring that this Court has said should be discouraged.

91. Gluskin Sheff asserts that there is no prejudice in allowing the Actions to proceed because this case is analogous to the cases in which actions have been allowed to proceed so that a plaintiff could pursue money available under insurance policies. That argument fails for a number of reasons.

92. First, there is no basis to say that any judgment would be enforceable against the Funds. In any event, for the reasons discussed above, even if a judgment was enforced against the Funds, Canwest would bear responsibility for ultimately making up any shortfall created by the judgment.

93. Second, the Statement of Claim in the Action does not say that relief is sought only against the Plans and in fact scrupulously avoids specifying from whom damages are sought. In that regard, it is significant that in the Statement of Claim Gluskin Sheff cites Rule 17.02(h) (action for damages sustained in Ontario arising from a breach of contract) in support of service outside of Ontario.[58] Gluskin Sheff does not rely on Rule 17.02(d) (an action against a trustee for execution of a trust). Accordingly, it appears that Gluskin Sheff is keeping its options open concerning against whom any judgment would be enforceable.

94. Accordingly, there is no prejudice to Gluskin Sheff if the Stays are not lifted, except to the extent that they are in the same position as other creditors with stayed litigation. On the other hand, there would be prejudice to both creditors and the overall restructuring if the Stays are lifted.

95. In summary, therefore, Gluskin Sheff has not satisfied its onus to demonstrate that lifting the Stays is appropriate in this case.

PART IV – NATURE OF THE ORDER SOUGHT

96. The CMI Entities and the LP Entities therefore request an order dismissing the motion by Gluskin Sheff in its entirety.

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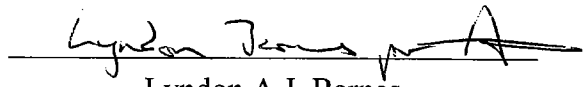
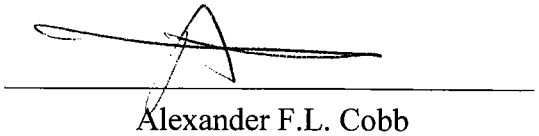
[58] Statement of Claim, at para. 70.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Lyndon A.J. Barnes



Alexander F.L. Cobb

Schedule "A" - Statutory References

COMPANIES' CREDITORS ARRANGEMENT ACT

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

PENSION BENEFITS ACT

R.S.O. 1990, Chapter P.8

8 (1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed. R.S.O. 1990, c. P.8, s. 8 (1); 1999, c. 15, s. 1; 2005, c. 31, Sched. 18, s. 2.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan. R.S.O. 1990, c. P.8, s. 8 (2).

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed. 2007, c. 7, Sched. 31, s. 2.

22 (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Benefit by administrator

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

Member of pension committee, etc.

(10) Subsection (9) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Payment to agent

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan. R.S.O. 1990, c. P.8, s. 22.

PENSION BENEFITS ACT

R.R.O. 1990, Regulation 909

General

Pension Fund Trustee

54. A pension fund shall be administered only,

(a) by a government;

(b) by an insurance company;

(c) by a trust in Canada governed by a written trust agreement under which the trustees are,

(i) a trust corporation registered under the *Loan and Trust Corporations Act*,

(ii) three or more individuals, at least three of whom reside in Canada and at least one of whom is independent of any employer contributing to the pension fund, to the extent the individual is neither a significant shareholder, partner, proprietor, director, officer, nor an employee of an employer contributing to the fund or an affiliate of the employer, or

(iii) a corporate pension society (established under the *Pension Fund Societies Act* (Canada));

(d) under the *Government Annuities Act* (Canada);

(e) by a board, agency, commission or corporation made responsible by an Act of the Legislature for the administration of the pension fund; or

(f) by any combination referred to in clauses (a) to (e). R.R.O. 1990, Reg. 909, s. 54.

78 (1) Beginning on January 1, 2001, the administrator of a pension plan shall establish a statement of investment policies and procedures for the plan that meets the requirements of the federal investment regulations. O. Reg. 144/00, s. 31.

(2) The federal investment regulations apply with respect to the statement of investment policies and procedures for the plan. O. Reg. 144/00, s. 31.

PENSION BENEFITS STANDARDS ACT, 1985

R.S., 1985, c. 32 (2nd Supp.)

Amounts to be held in trust

8. (1) An employer shall ensure, with respect to its pension plan, that

(*a*) the moneys in the pension fund,

(*b*) an amount equal to the aggregate of the prescribed payments that have accrued to date, and

(*c*) all

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer

that have not been remitted to the pension fund

are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

Where bankruptcy, etc., of employer

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

Administration of pension plan and fund

(3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

Standard of care

(4) In the administration of the pension plan and pension fund, the administrator shall exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person.

Manner of investing assets

(4.1) The administrator shall invest the assets of a pension fund in accordance with the regulations and in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments of a pension fund.

Special knowledge or skill

(5) Without limiting the generality of subsection (4), an administrator who in fact possesses, or by reason of profession or business ought to possess, a particular level of knowledge or skill relevant to the administration of a pension plan or pension fund shall employ that particular level of knowledge or skill in the administration of the pension plan or pension fund.

Administrator not liable

(5.1) An administrator is not liable for contravening subsection (4), (4.1) or (5) if the contravention occurred because the administrator relied in good faith on

(*a*) financial statements of the pension plan prepared by an accountant, or a written report of the auditor or auditors of the plan, that have been represented to the administrator as fairly reflecting the financial condition of the plan; or

(*b*) a report of an accountant, an actuary, a lawyer, a notary or another professional person whose profession lends credibility to the report.

Conflict of interest

(6) A person shall not accept an appointment to a body referred to in paragraph 7(1)(*a*) or (*b*) or subparagraph 7(1)(*c*)(ii) if there would be a material conflict of interest between that person's role as a member of that body and that person's role in any other capacity.

Not a conflict of interest

(6.1) For the purposes of subsection (6), merely being entitled to a pension benefit or having an interest in a pension benefit credit does not constitute a conflict of interest.

Eliminating conflict of interest

(7) A person described in subsection (6) shall, within ninety days after becoming aware that a material conflict of interest exists,

(*a*) eliminate that conflict of interest; or

(*b*) resign as a member of that body.

Validity of documents

(8) A document issued by a board of trustees or other similar body or a pension committee is valid notwithstanding a material conflict of interest of a member thereof.

Removal of member

(9) If a person contravenes subsection (6) or (7), the Superintendent or any other interested person may apply to a court of competent jurisdiction for an order that that person be replaced, and the court may make an order on such terms as it considers appropriate.

Other conflicts of interest

(10) If there is a material conflict of interest between the role of an employer who is an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator

(*a*) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension council or to the members of the pension plan; and

(*b*) shall act in the best interests of the members of the pension plan.

Court order

(11) If an administrator contravenes subsection (10), a court of competent jurisdiction may, on application by the Superintendent or any other interested person, make any order on such terms as the court considers appropriate.

RULES OF CIVIL PROCEDURE

R.R.O. 1990, Regulation 194

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Damage Sustained in Ontario

(h) in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;

Schedule "B"

LIST OF CASES

1. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1991), 51 B.C.L.R. (2d) 84 (C.A.)

2. *General Motors of Canada Limited v. Canada*, [2008] T.C.J. No. 80 (T.C.C.), aff'd [2009] F.C.J. No. 447 (F.C.A.)

3. *General Motors of Canada Limited v. Canada*, [2009] F.C.J. No. 447 (F.C.A.), aff'g [2008] T.C.J. No. 80 (T.C.C.)

4. *Kerry (Canada) Inc.* v. *DCA Employees Pension Committee* (2007), 282 D.L.R. (4th) 625 (C.A.)

5. *Morneau Sobeco Partnership v. Aon Consulting Inc.* (2008), 65 C.C.P.B. 293 (C.A.)

6. *Re Boutiques San Francisco Inc.* (2004), 5 C.B.R. (5th) 174

7. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1 (Atlt. Q.B.)

8. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.)

9. *Re Nortel Networks Corp.* (2009), 57 C.B.R. (5th) 232 (S.C.J.)

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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

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

Ontario
SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

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