

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED**

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

Applicants

**FACTUM
OF THE COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA
(Motion Returnable February 11, 2011)**

February 8, 2011

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

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PART I – OVERVIEW

1. This is a motion brought by the Communications, Energy and Paperworkers Union of Canada (the "CEP") seeking the following:

- (a) An Order, if necessary, that service of the CEP's motion record, factum and book of authorities is validated, such that this motion is properly returnable on February 11, 2011;
- (b) An Order lifting the stay of proceedings in respect of the **Bradley Grievances** (as defined in the Affidavit of David Lewington sworn on January 31, 2011) and directing that the **Bradley Grievances** be

adjudicated in accordance with the provisions of the applicable collective agreement; and

- (c) In the alternative, an Order amending the **Claims Procedure Order** so as to permit the **Bradley Claim** (as defined in the Affidavit of David Lewington sworn on January 31, 2011) to be adjudicated in accordance with the applicable collective agreement.

PART II - FACTS

2. On October 6, 2009, the Applicants, including the Company, filed for and were granted creditor protection under the *CCAA* (the "**Initial Order**").

3. Pursuant to the order of the Court dated October 14, 2009, a claims procedure was established (the "**Claims Procedure Order**"). The claims procedure established requires all Persons with Claims against the Applicants to file same in advance of the Claims Bar Date failing which a Person is thereafter barred from pursuing same.

4. The **Claims Procedure Order** defines a "Claim" in the broadest possible terms including, without limitation, claims for breach of contract including a breach of a collective agreement which arose before or after the issuance of the Initial Order.

Claims Procedure Order; Motion Record of the CEP, Tab 2A, page 14.

5. Pursuant to paragraph 11 of the **Claims Procedure Order**, certain Persons may be appointed as Claims Officers for the claims procedure. Other Persons may be appointed by the Court from time to time on application of the Applicants and the Monitor.

Claims Procedure Order; Motion Record of the CEP, Tab 2A, page 21-22.

6. Paragraph 12 of the **Claims Procedure Order** limits a Claims Officers jurisdiction to determining the *validity* and *amount* of disputed Claims in accordance with the **Claims Procedure Order**. Further, paragraph 12 equips a Claims Officer with broad discretion to determine "all procedural matters which may arise in respect of his or her determination of these matters, including the manner in which any evidence may be adduced." Finally, paragraph 12 enables a Claims Officer to exercise his or her discretion with respect to the payment of costs.

Claims Procedure Order; Motion Record of the CEP, Tab 2A, page 22.

7. Pursuant to the order of the Court dated October 27, 2009, the CEP was authorized to represent current and former CEP members ("Current and Former Members"), including pensioners, employed or formerly employed by the Applicants save and except CH Retirees who were represented by representative counsel. The authority granted by the Court included authority to file and pursue claims on behalf of CEP's Current and Former Members.

CEP Representation Order; Motion Record of the CEP, Tab 2B, page 71.

8. As of October 6, 2009, the date of the Initial Order, the CEP had a number of grievances under its applicable Collective Agreement that were filed against the Applicants and which had yet to be resolved or adjudicated. As such, the CEP filed claims in respect of the aforementioned grievances pursuant to the **Claims Procedure Order**. Those claims, however, were filed without prejudice to the CEP's position that the **Claims Procedure Order** could not compromise a grievance filed by the CEP

except in accordance with the terms of an applicable collective agreement including, without limitation, the selection of an arbitrator on the consent of the CEP and the Employer and (in the case of discharge grievances) the ability of an arbitrator to order reinstatement of employment as a remedy if it deemed it appropriate and just in the circumstances to do so.

Affidavit of David Lewington (sworn January 31, 2011); Motion Record of the CEP, Tab 2, page 7.

9. On or about February 24, 2010, the Employer imposed a five-day suspension on Mr. John Bradley (the "**Grievor**") for alleged misconduct. Thereafter on March 8, 2010, the Union filed a grievance under the applicable collective agreement (the "**Suspension Grievance**").

Affidavit of David Lewington (sworn January 31, 2011); Motion Record of the CEP, Tab 2, page 7.

Suspension Grievance; Motion Record of the CEP, Tab 2C, page 76.

10. The **Suspension Grievance** asserts that the Employer did not have just cause to suspend the **Grievor** within the meaning of Article 4.1(b) of the applicable collective agreement which provides as follows:

The Union acknowledges that the Employer has the exclusive right to manage the affairs of the Employer and that all rights shall remain exclusively with the Employer except as modified by a provision of this Agreement. Without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive right of the Employer:

...

(b) to hire, promote, demote, lay off, transfer and reclassify employees; and also the right of the Employer to discipline, suspend or discharge any employees for just cause, provided that a claim by an employee who has acquired seniority, that he/she has been disciplined, suspended or discharged without just cause, may be the subject of a grievance and dealt with as hereinafter provided.

Collective Agreement; Motion Record of the CEP, Tab 2D, pages 89 and 95.

11. On or about March 25, 2010, the Employer terminated the employment of the **Grievor** for alleged misconduct. At the time of his termination, the **Grievor** had been employed by the Employer as a full time ENG Cameraman Editor for approximately twenty (20) years.

Affidavit of David Lewington (sworn January 31, 2011); Motion Record of the CEP, Tab 2, page 8.

12. On March 26, 2010, the CEP filed a grievance in accordance with the terms of the collective agreement asserting that the Employer did not have just cause to terminate the **Grievor's** employment (the "**Termination Grievance**", or collectively with the **Suspension Grievance**, the "**Bradley Grievances**"). Further, as part of the grievance, the CEP demanded that the **Grievor** be reinstated forthwith.

Termination Grievance; Motion Record of the CEP; Tab 2E, page 182.

13. Pursuant to Article 12.3 of the collective agreement, grievances are to be heard by a single arbitrator appointed on the consent of the parties or in accordance with the list of arbitrators which had been negotiated and included in Article 12.4 of the collective agreement. The remedial jurisdiction of an arbitrator appointed under the collective agreement is described in Article 12.6 as follows:

The Arbitrator or Board of Arbitration shall not have the power to change, modify, extend or amend the provisions of this Agreement nor to award costs against either Party but shall have the power to direct, if he/she or the Board thinks appropriate, that any employee who has been suspended, discharged or otherwise disciplined without proper cause, shall be reinstated with pay or without pay or part pay and with and without any other benefit or part thereof under this Agreement which may have been lost...

14. Article 12.5 of the collective agreement provides that the cost and/or expenses of arbitration shall be borne equally by the Employer and the Union.

15. On June 23, 2010, Counsel to the CEP Ontario, the Applicants and the Monitor engaged in discussions with a view to resolving the pre-filing claims filed by CEP Ontario. Those discussions culminated in a global settlement of all pre-filing claims by CEP Ontario. The June 23, 2010 settlement was without precedent and had no effective whatsoever on any claim other than those expressly identified in the settlement document. The **Bradley Grievances** were not expressly or inferentially identified in the settlement.

Affidavit of David Lewington (sworn January 31, 2011); Motion Record of the CEP, Tab 2, page 8.

16. Later that day on June 23, 2010, a restructuring period claim was filed in respect of the **Bradley Grievances** (the "**Bradley Claim**"). This was in accordance with the parties' discussions and was done to preserve the CEP's rights with respect to same.

Paragraph 5 of Schedule "A" to the **Bradley Claim** states, in part, as follows:

The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available.

Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise. The Union reserves its right to make further submissions in this regard.

17. The CEP and the Employer, with the assistance of the Monitor, continued to engage in discussions regarding the **Bradley Claim**, including exchanging information concerning of the parties' respective positions on the merit of same. During the discussions between the CEP and Company, the Employer took the position that if the matter was not resolved, the **Bradley Claim** would be referred to a claims officer pursuant to the **Claims Procedure Order** who would be without jurisdiction to order reinstatement of employment as a remedy and who would be appointed unilaterally without the consent of CEP. This position was contested by the CEP and articulated in a letter dated August 4, 2010.

Affidavit of David Lewington (sworn January 31, 2011); Motion Record of the CEP, Tab 2, page 9.

18. The parties' discussions regarding the **Bradley Claim** continued until in or around the middle of September at which point it became apparent that no acceptable resolution to the **Bradley Claim** could be achieved. Accordingly, in light of the Employer's position regarding the selection and remedial jurisdiction of a claims officer, the CEP advised counsel to the Employer and the Monitor that it wished to bring a motion before the Court as soon as possible in order to seek the assistance of the Court with respect to the issues raised in the August 4, 2010 letter including, without limitation, confirmation that notwithstanding the **Claims Procedure Order**, the

collective agreement continues to govern the adjudication of grievances, including the **Bradley Grievances**.

19. The **Bradley Claim** is the only claim filed by CEP Ontario that was not resolved and therefore is the only claim filed by CEP Ontario that requires adjudication.

PART III – ISSUES AND THE LAW

20. The following issues arise in the within motion:

- (i) Should this Honourable Court exercise its discretion to lift the stay of proceedings in order to permit the **Bradley Grievances** to proceed to arbitration in accordance with the collective agreement?
- (ii) In the alternative, should this Honourable Court amend the **Claims Procedure Order** dated October 14, 2009 so as to enable the **Bradley Claim**, and the **Bradley Grievances**, to be adjudicated in accordance with the collective agreement?

ISSUE I: LIFTING THE STAY OF PROCEEDINGS

21. Pursuant to the *CCAA*, Courts are vested with a statutory authority and an inherent residual jurisdiction resulting from the equitable nature of Superior Courts.

***Skeena Cellulose Inc., Re;* [2003] B.C.J. No. 1335 at parass 38-39.**

22. Section 11 of the *CCAA* has been interpreted on the basis of an equitable balancing of convenience and potential prejudice to either party in respect of lifting a stay ordered by the Court. For instance, in *Re Pacific National Lease Holding Corp.*

(1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]), McFarlane J.A. states in his closing remarks:

In supervising a proceeding under the *C.C.A.A.* orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

***Re Pacific National Lease Holding Corp.*, [1992], B.C.I. No. 2309 (B.C.C.A. [In Chambers]) at para. 30.**

23. Where “sound reasons” exist, this Honourable Court should exercise its discretion and permit a party to pursue its rights against a debtor company subject to a *CCAA* proceeding. In determining what constitutes “sound reasons,” the following factors must be considered:

- (i) The balance of convenience;
- (ii) The relative prejudice to the parties; and
- (iii) The merits of the proposed action.

***ICR Commercial Real Estate (Regine) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 at para. 68.**

24. The balance of convenience in the within matter weighs heavily in favour of permitting the CEP to pursue the **Bradley Grievances** to arbitration.

25. In requesting this Honourable Court to lift the stay of proceedings, the CEP is seeking to compel the Employer to comply with fundamental obligations that flow from its collective agreement, including, without limitation, the appointment of an arbitrator

on consent with jurisdiction to award reinstatement of employment if he or she determines that the Employer did not have just cause to terminate the **Grievor's** employment.

26. Moreover, the **Claims Procedure Order** as currently constituted does not accord with the rights and obligations that flow from the parties' collective agreement. Requiring that the **Bradley Claim**, and the **Bradley Grievances**, be adjudicated in a manner that is inconsistent with the collective agreement would have the effect of depriving the **Grievor** of some of the most fundamental rights under a collective agreement.

27. In addition, permitting the **Bradley Grievances** to proceed to arbitration would prejudice no party to these proceedings.

28. Accordingly, there are sound reasons to lift the stay of proceedings and permit the **Bradley Grievances** to be adjudicated by an arbitrator in accordance with the terms of the collective agreement.

ISSUE II – AMENDING THE CLAIMS PROCEDURE ORDER

29. For the reasons that follow, it is respectfully submitted that the **Claims Procedure Order** ought to be amended so as to enable the **Bradley Claim**, and the **Bradley Grievances**, to be adjudicated in accordance with the collective agreement:

- (i) The **Claims Procedure Order** is in conflict with the terms of the collective agreement;

- (ii) The terms of the collective agreement remain in force and effect during the within proceedings;
- (iii) The **Claims Procedure Order** must be compliant with the express requirements of the *CCAA*; and
- (iv) Orders issued under the *CCAA* should not infringe upon the right to engage in associational activities protected by the *Canadian Charter of Rights and Freedoms*.

The Claims Procedure Order is in Conflict with the Collective Agreement

30. As described above, the **Claims Procedure Order** requires that all "Claims" against the Applicants be filed prior to the Claims Bar Date. Given the broad definition of "Claim" under the **Claims Procedure Order**, grievances filed by the CEP are included in the definition of a "Claim". Therefore, the CEP was under an obligation to file claims in respect of grievances or risk being forever barred from pursuing same.

31. The CEP did so, however, without prejudice to its position that the **Claims Procedure Order** could not compromise a grievance filed as a Claim unless the terms of the collective agreement were enforced. The CEP took this position because it was evident from a review of the **Claims Procedure Order** that it was in conflict with a number of fundamental provisions of the parties' collective agreement, including, without limitation, the appointment of an arbitrator on consent with the remedial jurisdiction to order reinstatement of employment as a remedy.

32. As discussed above, pursuant to paragraph 12 of the **Claims Procedure Order**, Claims Officers are appointed unilaterally without consultation with the CEP and have their jurisdiction limited to determining the validity and amount of disputed Claim. Further, a Claims Officer has the jurisdiction to determine, in its sole discretion, all procedural matters which may arise in his or her determination of a claim. A Claims Officer also has the ability to order a party to pay the costs of any hearing.

33. The foregoing provisions of the **Claims Procedure Order** are in direct conflict with certain fundamental terms contained in the parties' collective agreement. For instance, Article 12 of the collective agreement provides that grievances must be adjudicated by an arbitrator selected on the consent of the parties. Article 12.6 further provides an arbitrator appointed under the collective agreement with broad remedial jurisdiction to, inter alia, reinstate the employment of an employees that was terminated without just cause or to substitute some other penalty or disciplinary measure in place of the termination. These conflicts are irreconcilable.

34. The **Claims Procedure Order**, in its current form, has the effect of depriving and otherwise rendering a nullity the most basic and fundamental rights of employees under a collective agreement. The right to participate in the selection of an arbitrator with labour relations experience lies at the foundation of the adjudication of employee rights. There is a recognized expectation that arbitrators be selected on consent from a pool of experienced arbitrators broadly acceptable amongst the labour relations community.

Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), [2003] S.C.J. No. 28 at paras. 177 and 184.

35. Moreover, the selection of an arbitrator to adjudicate grievances under a collective agreement is mandated in section 57(1) of the *Canada Labour Code*, which provides as follows:

Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or the employees bound by the collective agreement, concerning its interpretation, application, administration or alleged violation.

36. Where the parties are unable to select an arbitrator on consent, section 57(4) permits a party to request that the Minister of Labour appoint an arbitrator if, in the Minister's discretion, it determines it necessary to do so. It is therefore not surprising that the ability to access a grievance and arbitration procedure for the purposes of adjudicating disputes arising out of a collective agreement has been recognized as a minimum standard in any functioning labour relations legislative scheme.

Fraser v. Ontario (Attorney General), [2008] O.J. No. 4543 at para. 28.

37. In its current form, the **Claims Procedure Order** purports to render a nullity the most fundamental and essential rights of employees.

The Terms of a Collective Agreement Remain in Force and in Effect

38. A proceeding commenced under the CCAA does not have the effect of rendering a nullity the CEP's collective agreement with the Applicants or any part thereof. The entirety of the Union's collective agreements with the Applicants remain in force and in

effect during the *CCAA* proceedings, including, without limitation, provisions in respect of the grievance and arbitration procedure. Section 33 of the *CCAA* provides, in part, as follows:

33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

...

33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

39. The CEP has not agreed to alter or modify the terms of its collective agreements.

The **Claims Procedure Order**, if permitted to override the terms of the collective agreement, would have that very effect.

40. The CEP's collective agreements remain in force and effect. This is an express requirement of the *CCAA* which has been confirmed repeatedly by the Courts.

***Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 at para. 19.**

***Syndicat national de l'industrie d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no 264 at para. 52.**

41. For instance, in *Fraser Papers Inc.*, this Honourable Court held that the Company had jurisdiction to suspend special payments to a pension plan but held that they did not have the jurisdiction to extinguish terms of the collective agreement.

***Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188 at para. 20.**

42. In *Abitibowater*, the Court rejected, *inter alia*, the Company's attempt to unilaterally modify or suspend the pension plan formula contained in the collective agreement. In rendering its judgement, the Court held:

Following the Court of Appeal's teachings on the subject, the Court considers that Abitibi cannot unilaterally modify the terms of a collective agreement applicable to its active employees in order to deprive them of certain rights...

...

On one part, Abitibi, as debtor, cannot, with regards to its active employees, terminate or suspend unilaterally the clauses of the collective agreements binding it, including the clauses in the Memorandum of Agreement which are an integral part of the collective agreements. By doing so, Abitibi would act illegally, breaching the rights of the CEP and its members.

...

To set aside these clauses, it must negotiate and reach an agreement with the CEP...

***Abitibowater* (2009) at paras. 30 and 42-43.**

43. In *Canwest Global Communications Corp.*, this Honourable Court provided its guidance and interpretation with respect to section 33 of the *CCAA*:

Consistent with established law, section 33 of the *CCAA* does provide that a collective agreement remains in force and may not be altered except as provided by section 33 or under the laws of the jurisdiction governing collective bargaining. It does not provide for any priority of treatment though. The section maintains the terms and obligations contained in the collective agreement but does not alter priorities or status.

***Canwest Global Communications Corp.*, [2010] O.J. No. 2544 at para. 32.**

44. If left in its current form, the **Claims Procedure Order** would have the effect of suspending the grievance and arbitration provisions in the collective agreement and, specifically with respect to the **Bradley Grievances**, forever deprive Mr. Bradley of the benefit of same. This flies in the face of the express wording of the CCAA and the jurisprudence established thereunder.

The Claims Procedure Order is non-Compliant the Restrictions in the CCAA

45. The **Claims Procedure Order** dated October 14, 2009 was issued pursuant to this Honourable Court's general power to issue orders found in section 11 of the CCAA. Specifically, section 11 provides as follows:

Despite anything in the *Bankruptcy and Insolvency Act* or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in this matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that is consider appropriate in the circumstances.

46. As described above, section 33 of the CCAA provides that the terms of the collective agreement remain in force and in effect. Nevertheless, the **Claims Procedure Order** has the effect of rendering a nullity key provisions of the collective agreement which is protected by statute and remains in force and in effect.

47. The **Claims Procedure Order** must therefore be amended to bring in into compliance with the section 33 of the CCAA and, specifically, the terms of the collective agreement.

The Claims Procedure Order Substantially Interferes with Freedom of Association

48. The process of collective bargaining has been recognized as a fundamental freedom pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms*. It has been determined that substantial interference in the collective bargaining process includes "less dramatic interference with the collective process", including "unilateral nullification of negotiated terms, without any process of meaningful discussion or consultation." In determining what matters may be significant enough to a union to engage section 2(d) of the Charter, the Supreme Court of Canada provided the following guidance:

While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state action that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.

Health Services and Support – Facilities Subsectors Bargaining Assn. v. British Columbia, [2007] S.C.J. No. 27 at paras. 92 and 96.

49. Grievance and arbitration provisions are mandated by the *Canada Labour Code* and are significant negotiated terms in the CEP's collective agreements with the Applicants. Protection from unjust dismissal with the right to proceed to arbitration by means of a grievance relating to termination and the power of an arbitrator to order reinstatement are substantive terms of a collective agreement. The effect of the

Claims Procedure Order is to nullify the force and effect of these important and fundamental statutory and collective agreement provisions.

50. The exercise of this Honourable Court's jurisdiction should be done in a manner that avoids running afoul both the express restrictions set out in section 33 of the CCAA, as well as Charter values with respect to collective bargaining.

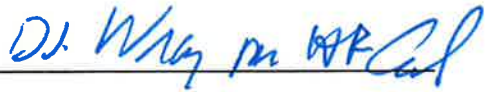
PART IV: ORDER REQUESTED

51. The CEP respectfully requests:

- (i) An Order lifting the stay of proceedings in respect of the **Bradley Grievances** (as defined in the Affidavit of David Lewington sworn on January 31, 2011) and directing that the **Bradley Grievances** be adjudicated in accordance with the provisions of the applicable collective agreement; and
- (ii) In the alternative, an Order amending the **Claims Procedure Order** so as to permit the **Bradley Claim** (as defined in the Affidavit of David Lewington sworn on January 31, 2011) to be adjudicated in accordance with the applicable collective agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 8th day of February 2011.



Douglas J. Wray



Jesse B. Kugler

Lawyers for the Communications,
Energy and Paperworkers Union
of Canada

**SCHEDULE A
LIST OF AUTHORITIES**

1. *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335
2. *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 2309
3. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313
4. *Canadian Union of Public Employees (C.U.P.E.) V. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28
5. *Fraser v. Ontario (Attorney General)*, [2008] O.J. No. 4543
6. *Nortel Network Corp. (Re)*, [2009] O.J. No. 4967
7. *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J. Q. no 264
8. *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188
9. *Abitibowater Inc. et al. v. Communications, Energy and Paperworkers Union of Canada and its Local sections* (2009) [decision of the Honourable Mr. Justice Clement Gascon, J.S.C. QCCS [unofficial English translation]
10. *Canwest Global Communications Corp. (Re)*, [2010] O.J. No. 2544
11. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. NO. 27

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General Power of Court

- 11.** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Collective agreements

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

Application for authorization to serve notice to bargain

- (2)** A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Conditions for issuance of order

- (3)** The court may issue the order only if it is satisfied that
- (a)** a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement;
 - (b)** the company has made good faith efforts to renegotiate the provisions of the collective agreement; and
 - (c)** a failure to issue the order is likely to result in irreparable damage to the company.

No delay on vote

- (4)** The vote of the creditors in respect of a compromise or an arrangement may not be delayed solely because the period provided in the laws of the jurisdiction

governing collective bargaining between the company and the bargaining agent has not expired.

Claims arising from termination or amendment

(5) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Order to disclose information

(6) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the company's business or financial affairs and that is relevant to the collective bargaining between the company and the bargaining agent. The court may make the order only after the company has been authorized to serve a notice to bargain under subsection (2).

Parties

(7) For the purpose of this section, the parties to a collective agreement are the debtor company and the bargaining agent that are bound by the collective agreement.

Unrevised collective agreements remain in force

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

Canada Labour Code, R.S.C. 1985, c. L-2

57. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

(2) Where any difference arises between parties to a collective agreement that does not contain a provision for final settlement of the difference as required by subsection (1), the difference shall, notwithstanding any provision of the collective agreement, be submitted by the parties for final settlement

(a) to an arbitrator selected by the parties; or

(b) where the parties are unable to agree on the selection of an arbitrator and either party makes a written request to the Minister to appoint an arbitrator, to an arbitrator appointed by the Minister after such inquiry, if any, as the Minister considers necessary.

(3) Where any difference arises between parties to a collective agreement that contains a provision for final settlement of the difference by an arbitration board and either party fails to name its nominee to the board in accordance with the collective agreement, the difference shall, notwithstanding any provision in the collective agreement, be submitted by the parties for final settlement to an arbitrator in accordance with paragraphs (2)(a) and (b).

(4) Where a collective agreement provides for final settlement, without stoppage of work, of differences described in subsection (1) by an arbitrator or arbitration board and the parties or their nominees are unable to agree on the selection of an arbitrator or arbitration board chairperson, as the case may be, either party or its nominee may, notwithstanding anything in the collective agreement, make a written request to the Minister to appoint an arbitrator or arbitration board chairperson, as the case may be.

(5) On receipt of a written request under subsection (4), the Minister shall, after such inquiry, if any, as the Minister considers necessary, appoint an arbitrator or arbitration board chairperson, as the case may be.

(6) Any person appointed or selected pursuant to subsection (2), (3) or (5) as an arbitrator or arbitration board chairperson shall be deemed, for all purposes of this Part, to have been appointed pursuant to the collective agreement between the parties.

The Constitution Act, 1982 (including the Canadian Charter of Rights and Freedoms)

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

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. et. al

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF
COMMUNICATIONS, ENERGY AND
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