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"

FACTUM OF FTI CONSULTING CANADA INC. IN ITS CAPACITY AS MONITOR

(Returnable February 11, 2011)

February 10, 2011

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David Byers LSUC#: 22992W
Tel: (416) 869-5697
Fax: (416) 947-0866

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Fax: (416) 947-0866

Lawyers for the Monitor, FTI Consulting Canada Inc.

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PART I - INTRODUCTION

1. The moving party, Communications, Energy and Paperworkers Union of Canada ("**CEP**"), is seeking an Order, *inter alia*:

   (a) lifting the stay of proceedings in respect of certain grievances filed by CEP with respect to Mr. John Bradley (collectively, the "**Bradley Grievances**") and directing that the Bradley Grievances be adjudicated in accordance with the provisions of the applicable collective agreement or,

   (b) in the alternative, amending the Claims Procedure Order (as defined below) so as to permit the claim filed by the CEP with respect to the Bradley Grievances to be adjudicated in accordance with the provisions of the applicable collective agreement.

2. FTI Consulting Canada Inc., in its capacity as the Court-appointed monitor (the "**Monitor**") of Canwest Global Communications Corp. ("**Canwest Global**") and certain of its subsidiaries and affiliated partnerships (collectively the "**CMI Entities**") opposes the relief sought by CEP because CEP has not demonstrated any legal basis for lifting the stay in the CCAA proceedings or sending the Bradley Grievances for resolution in a forum other than under the ambit of the CCAA.

3. Adjudication of the outstanding claims against the CMI Entities relating to grievances filed under applicable collective agreements in accordance with the provisions of the applicable collective bargaining agreements, rather than pursuant to the terms of the Claims Procedure Order, would result in additional costs and delays in administration of the remaining CMI Entities' estates.

4. Furthermore, a number of claims of similarly situated creditors of the CMI Entities have already been resolved in accordance with the provisions of the Claims Procedure Order, rather than the applicable collective bargaining agreements. Allowing the Bradley Grievances to proceed to be adjudicated outside the scope of the CCAA would result in unequal treatment of such similarly situated creditors.

PART II - THE FACTS[1]

General Background

5. Canwest Global carried on business through a number of subsidiaries and until recently was Canada's largest publisher of English language daily and non-daily newspapers.

Canwest Global directly or indirectly owned, operated and/or held substantial interests in free-to-air television stations and subscription-based specialty television channels, and websites in Canada.

6. By Order of this Court dated October 6, 2009 (the "**Initial Order**"), the CMI Entities obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "**CCAA**"). The Initial Order also appointed FTI Consulting Canada Inc. as Monitor of the CMI Entities.

7. Relief in the CCAA Proceedings was obtained by: Canwest Global, its principal operating subsidiary Canwest Media Inc. ("**CMI**"), certain subsidiary corporations and partnerships of CMI that owned and operated Canwest's free-to-air television broadcast business and certain Canadian subscription-based specialty television channels and The National Post Company/La Publication National Post.

8. The CMI Entities prepared and filed a consolidated plan of compromise, arrangement and reorganization accepted for filing by this Court on June 23, 2010, as restated on July 16, 2010, concerning, affecting and involving Canwest Global, CMI, Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd., The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc., as may be amended (the "**Plan**").

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[1] Unless otherwise indicated, the source of all statements in this section is the Twenty-First Report of the Monitor dated February

9. On July 19, 2010, an excess of the majority in number and two-thirds in value of the Affected Creditors of the Plan Entities with Proven Voting Claims (as these terms are defined in the Plan) present and voting at the creditors' meetings voted in favour of approving the Plan. On July 28, 2010, this Court granted an Order sanctioning the Plan.

10. The Plan was successfully implemented on October 27, 2010. The Monitor delivered and filed with the Court its certificate required under the Plan stating, *inter alia*, that the Plan Implementation Date (as defined in the Plan) has occurred.

Stay of Proceedings

11. On October 6, 2009, the CMI Entities obtained the Initial Order which provided for a stay of proceedings until November 5, 2009 (the "**Stay Period**").

12. By Orders dated October 30, 2009, January 21, 2010, March 29, 2010, June 8, 2010, and September 8, 2010, the Stay Period was extended until November 5, 2010. Following the Plan Implementation Date, the Stay Period with respect to Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., and Fox Sports World Canada Partnership was terminated. By Order dated November 2, 2010, the Stay Period with respect to the Remaining CMI Entities (as defined in the Plan) was extended until May 5, 2011.

7, 2011 [the "**Twenty-First Report**"].

13. Section 15 and 16 of the Initial Order define the scope of the Initial Order as follows:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**
>
> 15. **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.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.
>
> [Emphasis added]

The CMI Entities' Claims Procedure

14. On October 14, 2009, the CMI Entities obtained an Order (the "**Claims Procedure Order**") establishing a claims procedure for the identification and quantification of certain claims against the CMI Entities and the CMI Entities' directors and officers (the "**Claims Procedure**"). For reasons described in the Monitor's Sixth Report, the Claims Procedure Order was amended by Order of Justice Pepall dated November 30, 2009.

> (f) "**Claim**" means:
>
> (i) any right or claim of any Person against one or more of the CMI Entities, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the CMI Entities in existence on the Filing Date, including on account of Wages and Benefits, and any accrued interest thereon and costs payable in respect thereof to and including the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date, and includes any other claims that would have been claims provable in bankruptcy had the applicable CMI Entity become bankrupt on the Filing Date (each, a "**Prefiling Claim**", and collectively, the "**Prefiling Claims**");
>
> (ii) any right or claim of any Person against one or more of the CMI Entities in connection with any indebtedness, liability or obligation of any kind whatsoever owed by one or more of the CMI Entities to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach on or after the Filing Date of any contract, lease or other agreement whether written or oral and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this CMI Claims Procedure

> Order (each, a "**Restructuring Period Claim**", and collectively, the "**Restructuring Period Claims**"); and
>
> ...
>
> provided however, that in any case "**Claim**" shall not include an Excluded Claim[2];

15. The Claims Procedure Order also contains the following provisions with respect to the appointment of Claims Officers:

> **CLAIMS OFFICER**
>
> 11. **THIS COURT ORDERS** that the Honourable Ed Saunders, the Honourable Jack Ground, the Honourable Coulter Osborne, and such other Persons as may be appointed by the Court from time to time on application of the CMI Entities (in consultation with the CMI CRA), or such other Persons designated by the CMI Entities (in consultation with the CMI CRA) and consented to by the Monitor, be and they are hereby appointed as Claims Officers for the claims procedure described herein.
>
> 12. **THIS COURT ORDERS** that, subject to the discretion of the Court, a Claims Officer shall determine the validity and amount of disputed Claims in accordance with this CMI Claims Procedure Order and to the extent necessary may determine whether any Claim or part thereof constitutes an Excluded Claim. A Claims Officer shall 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. A Claims Officer shall have the discretion to determine by whom and to what extent the costs of any hearing before a Claims Officer shall be paid.
>
> 13. **THIS COURT ORDERS** that, notwithstanding anything to the contrary herein, a CMI Entity may with the consent of the Monitor: (i) refer a CMI Known Creditor's Claim for resolution to a Claims Officer or to the Court for voting and/or distribution purposes; and (ii) refer a CMI Unknown Creditor's Claim for resolution to a Claims Officer or to the Court for voting and/or distribution purposes, where in the CMI Entity's

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[2] "**Excluded Claim**" is defined in the Claims Procedure Order as "(i) claims secured by any of the "**Charges**", as defined in the Initial Order, (ii) any claim against a Director that cannot be compromised due to the provisions of subsection 5.1(2) of the CCAA, (iii) that portion of a Claim arising from a cause of action for which the applicable CMI Entities are fully insured, (iv) any claim of The Bank of Nova Scotia arising from the provision of cash management services to the CMI Entities; and (v) any claim of a subsidiary of Canwest Global which is not a CMI Entity against any of the CMI Entities [each a "**Canwest Intercompany Claim**"]."

view such a referral is preferable or necessary for the resolution of the valuation of the Claim.

16. CEP received notice of the CMI Entities' motion seeking the Claims Procedure Order and made no objections with respect thereto, including with respect to:

(a) inclusion of grievances in the Claims to be dealt with under and in accordance with the Claims Procedure Order;

(b) appointment of Claims Officers or the identity of the three individuals appointed as Claims Officers; or

(c) jurisdiction granted to the Claims Officers to determine the validity and amount of disputed Claims in accordance with the Claims Procedure Order.

17. By Order dated June 23, 2010, the bar date for Restructuring Period Claims was set at July 9, 2010.

18. Pursuant to paragraph 21 of the Order dated September 27, 2010, after the Plan Implementation Date, the Monitor is to "*(a) be empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept, settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other Person, and (ii) consulting with the Chief Restructuring Advisor and the CMI Entities; and (b) take such further steps and seek such amendments to the Claims Procedure Order or*

additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims."

19. Pursuant to the Order dated October 27, 2009, CEP was authorized to represent current and former CEP members, including with respect to advancing, settling and compromising such members' Claims under the Claims Procedure Order. The law firm of CaleyWray was also authorized to act as counsel for CEP and its current and former members in the CCAA Proceedings.

20. The law firm of Rogers, Bobert and Burton ("**RBB**") also represents CEP and its current and former members in the CCAA Proceedings and has filed Claims on behalf of certain CEP members in accordance with the Claims Procedure Order.

21. As at the date of the Twenty-First Report, over 1,800 Claims asserted against the CMI Entities, including numerous Claims filed by CaleyWray and RBB on behalf of CEP and its members, have been finally resolved in accordance with and pursuant to the terms of the Claims Procedure Order.

22. Since the commencement of the CCAA Proceedings, CEP only sought to lift the stay in respect of one Claim, namely a Claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Vicky Anderson's Claim because as at the date of the Initial Order, there had been eight days of hearing before an arbitrator, all evidence had already been called and only one further date was scheduled for final argument.

23. Numerous Claims filed by RBB on behalf of CEP and its members remain outstanding. The Bradley Grievances are the only outstanding Claims filed by CaleyWray on behalf of CEP and its members.

The Bradley Grievances

24. The Monitor was advised by the CMI Entities that on or about February 24, 2010, Canwest Television Limited Partnership ("**CTLP**") imposed a five day suspension on Mr. Bradley for events occurring during an international conference in Davos, Switzerland which was staffed by an "*ad hoc pool*" of individuals from the major networks, Global TV, CTV, and CBC. As a result of Mr. Bradley's conduct on the Davos trip, CTV advised Global that "*CTV would not find it acceptable to have [Mr. Bradley] on any future pools as a result of his unprofessional conduct*". It was CTLP's position that Mr. Bradley's misconduct in connection with the Davos assignment significantly hurt Global's business and reputation.

25. On March 8, 2010, CEP filed a grievance with respect to the five day suspension under the applicable collective agreement (the "**Suspension Grievance**").

26. On or about March 25, 2010, CTLP terminated the employment of Mr. John Bradley as a result of, *inter alia*, his previous disciplinary record and the culminating events of March 12, 2010 when he was on assignment with a fellow member of CEP, Ms. Shirlee Engel. Mr. Bradley drove the corporate vehicle. According to Ms. Engel, among other things, Mr. Bradley drove at speeds approaching 140 kilometers per hour, drove on the edge of the road for prolonged periods, and continued to unnecessarily accelerate while passing

trucks. As a result, CEP filed a grievance on behalf of Ms. Engel against CTLP in respect of Mr. Bradley's action and refused to work with Mr. Bradley on the basis that he is "*a liability to himself, other drivers as well as the company*" and as such she "*does not feel comfortable or safe riding in a vehicle with him*".

27. CTLP viewed Mr. Bradley's record (which includes, among other things: (i) another prior suspension as a result of his dangerous and inappropriate driving of a corporate vehicle in which a female CEP member was present, and (ii) disciplinary actions for sending an insubordinate and vulgar email to a superior and for a dangerous driving complaint by a City of Ottawa By-Law Officer) as one of apathy, sloppiness and disregard for the well-being of others, including certain female members of CEP all of which amounted to just cause to terminate Mr. Bradley's employment.

28. On March 26, 2010, CEP filed a grievance in accordance with the terms of the collective agreement asserting that CTLP did not have just cause to terminate Mr. Bradley and demanded that Mr. Bradley be reinstated forthwith (the "**Termination Grievance**").

29. On June 23, 2010, CEP filed a restructuring period claim with respect to the Bradley Grievances (the "**Bradley Restructuring Period Claim**").

30. The Claims Officer will have to determine the merits of the Bradley Restructuring Period Claim and the Monitor makes no comment or assessment with respect to same herein.

The Monitor's Recommendation

31. The Claims Procedure established under the Claims Procedure Order has been uniformly applied to resolve the Claims submitted against the CMI Entities by its various creditors, including the members of CEP.

32. CEP has not identified any basis on which Mr. Bradley is more prejudiced than any other creditor or stakeholder, including other CEP members, who are precluded from exercising their rights outside of the CCAA Proceedings and whose Claims have been dealt with in accordance with the Claims Procedure Order.

33. The Monitor is advised by its counsel, Stikeman Elliott LLP, that adjudications of grievances under applicable collective agreements, such as the Vicky Anderson arbitration mentioned above which took eight days of hearing, are typically much more costly and time consuming than adjudications before claims officers appointed under claims procedure orders granted in CCAA proceedings as a result of, *inter alia*:

    (a) the claims officers' jurisdiction to determine claims in a summary manner and to determine all procedural matters which may arise in respect of his or her determination of claims, including the ability of the claims officer to dispense with the requirement for *viva voce* evidence in appropriate circumstances; and

    (b) the Monitor and/or CCAA debtors' control over scheduling the adjudications of multiple claims in a timely and cost efficient manner.

34. Adjudication of Claims relating to grievances filed under applicable collective agreements in accordance with the provisions of the applicable collective bargaining

agreements, rather than pursuant to the terms of the Claims Procedure Order, would result in additional costs and delays in administration of the Remaining CMI Entities' estates and unfairly advantage certain creditors inconsistent with the objectives of CCAA proceedings.

PART III - ISSUES AND THE LAW

35. CEP's motion raises the following issues:

(a) should this Court lift the stay of proceedings in respect of the Bradley Grievances and direct that the Bradley Grievances be adjudicated in accordance with the provisions of the applicable collective agreement; and

(b) should this Court amend the Claims Procedure Order so as to permit the Bradley Claim to be adjudicated in accordance with the provisions of the applicable collective agreement?

36. The Monitor respectfully submits that both of these issues should be decided in the negative and the relief requested by CEP should be denied.

Purpose of the Stay of Proceedings under Section 11 of the CCAA

37. The purpose of the CCAA was described by Justice Farley in *Lehndorff General Partner Ltd., Re*[3] as follows:

> *The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.*

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[3] (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) [***"Lehndorff"***], at para. 6.

38. Key to providing such "*structured environment*" is the requisite stay of proceedings. The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) of the CCAA states:

> *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****.*
>
> *(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****.*
>
> [Emphasis added]

39. Section 11 of the CCAA provides an insolvent company with "breathing room", and by doing so, it preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process. The Ontario Court of Appeal in *Nortel Networks Corp. (Re)* described the discretion provided in Section 11 as "*the engine that drives this broad and flexible statutory scheme.*"[4]

40. The stay provisions also foster the principles of fairness underlying a CCAA restructuring by ensuring that all stakeholders – with a few limited exceptions – are stayed from seeking payment of the claims and from obtaining an advantage over other creditors in similar situations. As stated by Justice Farley in *Lehndorff General Partners Ltd. (Re)*[5]:

> *The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors:* [citations omitted]

41. Courts have consistently found that the power to stay proceedings under Section 11 of the CCAA must be broadly construed in order to permit the CCAA to "*accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection.*"[6]

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[4] *Nortel Networks Corp. (Re),* [2009] O.J. No. 4967 **["Nortel"]** at para. 33, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5. See also *Canwest Global Communications Corp. (Re)*, [2010] O.J. No. 2544 **["Canwest Global (2010)"]** at para. 30.
[5] *Lehndorff*, supra note 3 at para. 6.
[6] *Lehndorff,* supra note 3, at para. 10.

The Stay Should Not be Lifted

42. As with the imposition of a stay, the lifting of a stay is discretionary. The onus is on the party seeking to lift the stay. Citing Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", Justice Pepall stated in *Canwest Global (2009)*[7] that "*an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay*". It is incumbent on CEP to satisfy this Court that a basis for lifting the stay exists in this case.

43. There are no statutory guidelines contained in the CCAA for lifting the stay of proceedings. The case law recognizes certain very limited grounds on which a CCAA stay should be lifted. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action.[8] In *Canwest Global (2009)*[9], Justice Pepall listed the following factors that the Court could consider in determining whether to lift the stay in a CCAA proceeding:

a) whether 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;

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 period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;

g) there is a real risk that a creditor's loan will become unsecured during the stay period;

h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

i) it is in the interests of justice to do so.

44. Most of these grounds are inapplicable to this case and the Bradley Grievances.

45. With respect to the balancing of prejudices required by (d) above, CEP has identified no basis on which Mr. Bradley is any more prejudiced than another creditor, including other

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[7] [2009] O.J. No. 5379 [“***Canwest Global (2009)***”] at para. 32.
[8] *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 (Sask. C.A.) at para. 68.
[9] *Canwest Global (2009)*, supra note 7, at para. 33.

CEP members, who are precluded from exercising their rights under collective bargaining agreements or other statutory or contractual provisions entitling them to particular resolution forums and remedies absent CCAA proceedings. The Claims Officer can recognize Mr. Bradley's right to reinstatement (should the Claims Officer find that CTLP did not have just cause to terminate his employment) and monetize that right as is done for a multitude of other Claims, including various Claims filed by CEP on behalf of its members.

46. The essence of CEP's complaint in the within motion appears to be simply that Mr. Bradley would prefer having his dispute resolved by an arbitrator appointed under the applicable collective agreement.

47. As noted by the Alberta Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*,[10] there are cases where a specific issue arising under the CCAA has been sent for resolution to a forum other than the CCAA court. In each of those cases, however, as the Alberta Court of Appeal noted, it has been determined that resolution in the other forum would promote the objectives of the CCAA.

48. In *Luscar*, the Court dealt with the issue of whether a judge had the discretion under the CCAA to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the CCAA or whether the Court should stay the

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[10] [1999] A.J. No. 676 [***"Luscar"***]

proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the CCAA proceedings. In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, the Alberta Court of Appeal stated:[11]

> *The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. Arbitration Act.* ***The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by s. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of CCAA proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-CCAA arbitration.*** *For these reasons, having taken into account the nature and purpose of the CCAA, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the CCAA.*
>
> [Emphasis added]

49. Determination of the Bradley Grievances under the applicable collective agreement will not promote the objectives of the CCAA. The factors that led the Alberta courts in *Luscar* to deny exta-CCAA arbitration apply with equal force in these proceedings.

50. In addition, lifting the stay in respect the Bradley Grievances, where no individual prejudice to adjudication under the CCAA claims procedure has been demonstrated, could result in a flood of similar requests by unions with respect to their members' claims

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[11] *Luscar*, *Ibid*, at para. 33.

in this and other CCAA proceedings. Having to respond to such requests and proceeding to arbitration with all claims arising from collective agreements would place the already strained resources of insolvent CCAA debtors under significant further strain and divert those resources away from the restructuring and might lead to what has been called the "*death of a thousand cuts*"[12].

51. The stay of proceedings in this case has performed and continues to perform the essential function of keeping stakeholders at bay and ensuring that the rights of all stakeholders are determined fairly and equitably under the ambit of the CCAA and the Claims Procedure Order. For this reason and the reasons cited above, it is submitted that CEP's request to lift it with respect to the Bradley Grievances should be denied.

The Claims Procedure Order Should Not Be Amended

Courts Regularly Affect Employee Rights Arising From Collective Agreements During CCAA Proceedings

52. The discretion to stay proceedings under Section 11 of the CCAA and the principle of providing equal treatment for all creditors (as described in greater detail above) has been used regularly by supervisory judges to affect the application of various employee rights while a company is under the protection of the CCAA. Examples include the compromise of severance and termination payments and stay of "special payments" under pension plans. In *Fraser Papers*,[13] the Court referred to several examples of this nature,

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[12] *Air Canada (Re)*, [2003] O.J. No. 6254, at para. 26.
[13] *Re Fraser Papers Inc.* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.) **[*"Fraser Papers"*]** at paras. 17-19.

including the CCAA proceedings of Nortel Networks Corporation,[14] Collins & Aikman Canada Inc.,[15] Jeffrey Mine Inc.,[16] and AbitibiBowater Canada Inc.,[17] among others, all relating to the suspension of employee rights, which are contained in and/or inferred from a collective agreement, during the CCAA process.

53. Furthermore, the fact that these rights arise from collective agreements does not mean the Court has no ability to affect them in CCAA proceedings. In *Jeffrey Mines,* the Quebec Court of Appeal examined the question of whether the suspension of payments under a pension plan had the effect of unilaterally altering the collective agreement in place between the company and the union, thereby preventing the application of the stay. In answering this question in the negative, Justice Dalphond stated:[18]

> *In the case at bar, the Superior Court did not amend the collective agreements when it authorized the monitor to suspend pension plan contributions .... In fact, Jeffrey Mine Inc.'s obligations regarding the amounts payable to the pension fund under the collective agreements continue to exist, but are not being honoured because of insufficient funds. Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.*
>
> *The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons become creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mine Inc.'s having ceased to pay premiums.* ***The fact that these benefits are provided for in the collective agreements changes nothing.***
>
> [Emphasis added]

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[14] *Nortel*, supra note 4.
[15] *Collins & Aikman Automotive Canada Inc.*, [2007] O.J. No. 4186.
[16] *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no. 264 ["***Jeffrey Mines***"].
[17] *Re AbitibiBowater Inc.,* [2009] J.Q. no 4473.
[18] *Jeffrey Mines*, supra note 16. at paras. 57-58.

54. Similarly, proceeding by way of Court-approved claims procedure orders as opposed to the provisions of the applicable collective agreement does not amend the collective agreement; rather, it may affect the employees' claims arising from such agreements for the duration of the CCAA proceedings in a manner necessary to allow insolvent debtors to restructure under the CCAA.

Recent Amendments to the CCAA Do Not Change the Existing Case Law Regarding Treatment of Claims under Collective Agreements

55. Section 33 of the CCAA, which was added during the latest revisions to the CCAA in September 2009, codifies the principles set out in the existing CCAA jurisprudence mentioned above.[19] Subsections 33.1 and 33.8 of the CCAA now provide:

> *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.*

56. Section 33 of the CCAA allows a collective agreement to remain in full force and effect during the CCAA process.[20] However, as stated recently by Justice Mongeon of the Quebec Superior Court in *White Birch*,[21] the fact that a collective agreement remains in force under a CCAA proceeding does not have the effect of "*excluding the entire*

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[19] *Canwest Global 2010*, supra note 4, at para. 16, citing *Jeffrey Mines*.
[20] Further discussion is provided by Industry Canada in the "Clause by Clause Briefing Book" of the CCAA amendments, available online at <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00826.html>.
[21] *White Birch Paper Holding Company*, 2010 Q.C.C.S. 2590 ***["White Birch"]*** at para. 31.

collective labour relations process from the application of the CCAA." This point was reinforced by Justice Pepall in *Canwest (2010)* where she stated: "*the section maintains the terms and obligations contained in the collective agreement but does not alter priorities or status.*"[22]

57. CEP is arguing, as was the union in *White Birch*, that the collective agreement is raised, by way of section 33, to the rank of a contract which is completely outside the restructuring process and the CCAA, unless the union and employer agree otherwise. This position was explicitly denied in *White Birch*,[23] as it "*would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.*"

58. In *Canwest (2010)*, Justice Pepall recognized that there was no statutory justification for giving employees who have rights pursuant to a collective agreement priority over secured creditors by allowing immediate payment of severance payments and stated:[24]

> *There are certain provisions in the [recent CCAA] amendments that expressly mandate certain employee-related payments. In those instances, section 6(5) dealing with the sanction of a Plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims.* ***If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.***
>
> [Emphasis Added]

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[22] *Canwest Global 2010*, supra note 4, at para. 32.
[23] *White Birch,* supra note 21, at para, 35.
[24] *Canwest (2010)*, supra note 4, at para. 33.

59. The same can be said for resolution of claims arising under collective agreements within the ambit of a CCAA claims process. If Parliament had intended to carve grievances out of the claims process, it would have done so expressly. That was not done as, in the view of the Monitor, that would have undermined the purpose of the CCAA and, in particular, the claims process which is geared to streamline resolution of the multitude of claims against an insolvent debtor in the most time and cost efficient manner.

60. It is submitted that neither the existing case law nor the recent amendments to the CCAA have the effect of giving rights, such as adjudication by way of an arbitration under a collective agreement, any special priority or status. The fact that the collective agreement remains in force throughout the CCAA proceeding and the Court does not have the power to amend same does not have the result of excluding grievances brought under the collective agreements from the broad reach of the stay provisions of Section 11 of the CCAA and/or allowing them to bypass the claims process. As stated by Justice Pepall in *Canwest (2010)*: "*The nub of the issue is whether section 33 of the CCAA dealing with collective agreements alters the treatment of these obligations. In my view, it does not.*"[25]

Amending the Claims Procedure Order as requested by CEP Would Undermine the Purpose of the CCAA

61. CEP argues that this Court should amend the Claims Procedure Order so as to permit the Bradley Claim (and, therefore, all other unresolved CEP Claims, as well as all future grievances filed in subsequent CCAA proceedings) to be adjudicated in accordance with the provision of the applicable collective agreement. It is the Monitor's position that this

amendment would have the effect of undermining the purposes of the CCAA for the following reasons:

(a) One of the grounding principles of the CCAA is that all stakeholders should be treated equally and no one stakeholder should be allowed an advantage over another. If the requested amendment is allowed, the Bradley Claim will be treated differently than all other Claims that have already been resolved in accordance with the provisions of the existing Claims Procedure Order, including Claims of other similarly situated members of CEP.

(b) The adjudication of the Bradley Claim pursuant to the terms of the collective agreement would result in additional costs in the administration of the Remaining CMI Entities' estates.

(c) Proceeding by way of the collective agreement would result in further delays in the administration of the Remaining CMI Entities' estates in that an arbitrator would need to be chosen from the list in the collective agreement and would likely proceed by way of a full hearing with *viva voce* evidence. As described above and by way of example, the hearing of the Vicky Anderson grievance before an arbitrator took eight days to complete.

(d) There have been 1,800 Claims processed and dealt with by way of the Claims Procedure Order, many of them involving Claims filed by CEP on behalf of its members. The CEP was provided with notice of the motion wherein the Claims

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[25] *Canwest (2010)*, supra note 4, at para. 31.

Procedure Order and the Claims Officers were approved. CEP did not raise any objection to the Claims Procedure Order, the Claims Officers or the inclusion of the grievances in the Claims Procedure at the time the Order was granted.

(e) CEP has not identified any basis on which the Bradley Claim is more prejudiced than any other creditor or stakeholder, including other CEP members, who are precluded from exercising their rights outside of the CCAA Proceedings and whose Claims have been resolved in accordance with the Claims Procedure Order.

62. In addition to the reasons mentioned above, granting CEP's request to amend the Claims Procedure Order so as to permit the Bradley Claim to be adjudicated in accordance with the provisions of the collective agreement would create a precedent which could impact subsequent CCAA proceedings, particularly those involving large number of claims arising under collective agreements. It would allow creditors the opportunity to "forum shop" their claims where, such as in *Luscar*, the agreement with the insolvent debtor provided for an alternative dispute mechanism.

63. In *Canwest (2010)*, when dealing with a request to make an exception to the general stay provisions of the CCAA in regards to sixteen employees who were owed termination and severance pay, Justice Pepall stated that while it would be "appealing" to find in favour of the employees and the amount in question was not large relative to the overall amounts involved in the CCAA proceeding, she was seriously concerned with the precedent such a

decision would have. Quoting Justice Morawetz in *Windsor Machine and Stamping Ltd,*[26] Justice Pepall held that:[27]

> *Acceptance of CEP's submissions could well result in behaviour modification that would be an anathema to the interests of employees as a whole. As stated by Morawetz J. in Windsor Machine and Stamping Ltd., the giving of priority to termination and severance payments would result in:*
>
> > *"a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs."*
>
> *Other alternatives such as mass pre-filing terminations are even less palatable.*

64. As set out above, the stay of proceedings in this case has performed and continues to perform the essential function of keeping stakeholders at bay and ensuring that the rights of all stakeholders are determined fairly and equitably under the ambit of the CCAA and the Court-approved Claims Procedure Order.

65. For the reasons cited above, the Monitor submits that CEP's request to amend the Claims Procedure Order to permit the Bradley Claim to be adjudicated in accordance with the provisions of the applicable collective agreement should be denied.

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[26] *Windsor Machine and Stamping Ltd.*, [2009] O.J. No. 3195 at para. 43.
[27] *Canwest Global 2010,* supra note 4, at para. 36.

CEP's Argument that the Claims Procedure Order Interferes with Freedom of Association Is Ill-Conceived

66. CEP's argument that the Claims Procedure interferes with Mr. Bradley's freedoms under the *Canadian Charter of Rights and Freedoms* ("**Charter**") adds little to the argument. Nothing in the CCAA or the Claims Procedure Order inhibits the ability to collective bargain.

67. CEP is not challenging the validity of any section of the CCAA.

68. Furthermore, CEP ignores the Supreme Court of Canada's statements in *Health Services and Support – Facilities Subsectors Bargaining Assn. v. British Columbia*[28] that qualify the paragraph quoted and relied on by CEP in its factum and limit the protection of collective bargaining rights granted in *Health Services*[29]. Specifically, the Supreme Court of Canada stated, among other things, as follows:

> *We conclude that s. 2(d) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.* ***This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particular statutory regime.***

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[28] [2007] S.C.J. No. 27 ["***Health Services***"], at paras. 19 and 29.

[29] In that case, the government of B.C. introduced the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 (the "**HSSDIA**") which substantially altered the powers of health care employers to organize their relations with their employers. The HSSDIA invalidated important provisions of collective agreements then in force and effectively precluded meaningful collective bargaining on a number of specific issues. The HSSDIA stated that it would "prevail over collective agreements". The SCC found the HSSDIA to be unconstitutional under Section 2(d) of the Charter and held that the freedom of association explicitly protects collective bargaining rights and limited that protection to "*the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues*".

...

In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.

[Emphasis added]

69. It is submitted that nothing in the Claims Procedure Order or the CCAA impacts the "procedure" known as collective bargaining.

PART IV - ORDER REQUESTED

70. The Monitor requests that this Court dismiss CEP's motion in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February, 2011.

David Byers
Stikeman Elliott LLP

Maria Konyukhova
Stikeman Elliott LLP

Lawyers for the Monitor, FTI Consulting Canada Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Lehndorff General Partner Ltd., Re*, 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).
2. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (Ont.C.A).
3. *Canwest Global Communications Corp. (Re)*, [2010] O.J. No. 2544 (Ont. S.C.J.).
4. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 5379 (Ont. S.C.J.).
5. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 (Sask. C.A.).
6. *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 676 (Alta.C.A).
7. *Air Canada (Re),* [2003] O.J. No. 6254 (Ont. S.C.J.).
8. *Re Fraser Papers Inc.* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).
9. *Collins & Aikman Automotive Canada Inc.*, [2007] O.J. No. 4186 (Ont. S.C.J.).
10. *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no. 264 (Q.C.A).
11. *Re AbitibiBowater Inc.,* [2009] J.Q. no 4473 (Q.C.S.C.).
12. *White Birch Paper Holding Company*, 2010 Q.C.C.S. 2590 (Q.C.S.C.).
13. *Windsor Machine and Stamping Ltd.,* [2009] O.J. No. 3195 (Ont. S.C.J.).
14. *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia,* 1997 2 S.C.R. 391 (S.C.C.).

SCHEDULE "B"
RELEVANT STATUTES

1. Companies' Creditors Arrangement Act, R.S.C. 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.

...

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

11.02 (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.

...

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.

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"

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

FACTUM OF THE LAWYERS FOR THE MONITOR, FTI CONSULTING CANADA INC.

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David Byers LSUC#: 22992W
Tel: (416) 869-5697
Fax: (416) 947-0866

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Fax: (416) 947-0866

Lawyers for the Lawyers for the Monitor, FTI Consulting Canada Inc.