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

FACTUM OF THE APPLICANTS
(Declarations Regarding CH Plan Claims)

February 26, 2010

Osler, Hoskin & Harcourt LLP
P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Lyndon A. Barnes (LSUC# 13350D)
Tel: (416) 862.6679

Jeremy Dacks (LSUC# 41851R)
Tel: (416) 862.4923

Alexander Cobb (LSUC# 45363F)
Tel: (416) 862.5964

Fax: (416) 862.6666

Lawyers for the Applicants

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PART I – NATURE OF THIS MOTION

1. On October 6, 2009, Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed on Schedule "A" hereto (the "**Applicants**", and together with the Partnerships listed on Schedule "B" hereto the "**CMI Entities**") applied for and were granted protection under the *Companies Creditors Arrangement Act* ("**CCAA**") pursuant to an Order (the "**Initial Order**") of this Court.

2. In this motion, the CMI Entities are asking the Court to determine two claims made against the CMI Entities in the claims procedure established by this Court pursuant to an order dated October 14, 2009 and amended November 30, 2009 (as amended, the "**Claims Procedure Order**"). The Claims Procedure Order provides that in appropriate circumstances claims against the CMI Entities can be referred to this Court for determination.

3. Both claims concern the termination of the Global Communications Limited Retirement Plan for CH Employees (the "**CH Plan**"). The CH Plan was terminated effective August 31, 2009 and it is all but certain that as of its termination its assets will be less than the actuarial value of its liabilities. In other words, as more fully described below, it will have a Terminal Deficiency.

4. Both the Communications, Energy and Paperworkers Union of Canada (the "**CEP**") and representative counsel appointed on behalf of certain retired employees of the CMI Entities ("**Cavalluzzo**") allege that the CMI Entities are required to fund the Terminal Deficiency. Both CEP and Cavalluzzo have made Claims pursuant to the Claims Procedure Order (the "**CEP Terminal Deficiency Claim**" and the "**Retiree Terminal Deficiency Claim**", respectively) claiming that the CMI Entities are required to fund the Terminal Deficiency.

5. Neither the governing statute, nor the terms of the CH Plan, nor the terms of any collective agreement impose an obligation, on the part of the CMI Entities, to fund any Terminal Deficiency in the CH Plan.

6. Accordingly, the CMI Entities are asking this Court to declare that the CMI Entities are not required to fund any Terminal Deficiency in the CH Plan and order that the claims advanced by the CEP and Cavalluzzo in respect of the CH Plan be valued at zero for voting and distribution purposes.

PART II – FACTS

Termination of the CH Plan

The CH Plan

7. Until recently, Canwest Television Limited Partnership ("**CTLP**") was the owner of five free-to-air television stations which operated under the E! brand, including *CHCH-TV* in Hamilton. The CH Plan is a defined benefit pension plan for full-time and part-time employees who were employed at *CHCH-TV*. It is governed by the *Pension Benefits Standards Act* S.C. 1985, c.32 (2nd Supp.) (the "**PBSA**") and is subject to the regulatory authority of the Office of the Superintendent of Financial Institutions ("**OSFI**").[1]

8. The CH Plan was originally established on October 5, 1959 by Niagara Television Limited. After a series of transactions over the years, *CHCH-TV* was eventually acquired by the CMI Entities and, in due course, CTLP became the sponsor and administrator of the CH Plan.[2]

9. Mercer (Canada) Limited ("**Mercer**") is the actuary for the CH Plan.[3]

10. The terms of the CH Plan (the "**Plan Terms**") provide for a pension fund (the "**Plan Fund**"). The Plan Terms require that all contributions to the CH Plan are required to be deposited in the Plan Fund, and all benefits payable pursuant to the CH Plan are required to be paid from the Plan Fund.[4]

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1 Affidavit of John Maguire sworn February 11, 2010, Motion Record of the Applicants, Tab 2 ("Maguire Affidavit"), at paragraph 10

2 Maguire Affidavit, at paragraph 11

3 Maguire Affidavit, at paragraph 12

4 Plan Terms – consolidation prepared November, 2001, Maguire Affidavit, Exhibit "D", sections 4.1, 4.2 and 4.6

11. The employer is required to make contributions, based on the advice of the actuary, (i) sufficient to provide for the current service cost (as defined below), after taking into account member contributions and the assets of the Plan Fund; and (ii) to provide for the "proper amortization of any unfunded liability or solvency deficiency with respect to benefits previously accrued in accordance with the requirements of the [PBSA]".[5]

Events Leading to the Termination of the CH Plan

12. *CHCH-TV* was one of five free-to-air television stations owned by CTLP which operated under the *E!* brand. On February 5, 2009, Canwest Global announced that the *E!*-branded stations were not core to the CMI Entities' television strategy going forward, and that a strategic review would be conducted to explore options for the stations. CTLP has now closed, sold or rebranded all five stations.[6]

13. Pursuant to the strategic review, a comprehensive sales and marketing process was conducted in respect of all of the *E!*-branded stations. As a result of that process CTLP sold *CHCH-TV* (along with *CJNT-TV* in Montreal) to an affiliate of Channel Zero Inc. ("**Channel Zero**").[7]

14. Certain employees at *CHCH-TV* are represented by Local 1100 of the CEP. *CHCH-TV* and CEP Local 1100 entered into a collective agreement dated April 1, 2005 (the "**Former CH Collective Agreement**"). The Former CH Collective Agreement was for a three-

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5 Plan Terms, section 3.2

6 Maguire Affidavit, at paragraph 19

7 Maguire Affidavit, at paragraph 20

year term with provision for automatic yearly renewals after March 31, 2008. It continued in force after March 31, 2008 until it was amended as set out below.[8]

15. Article 18.3.1 of the Former CH Collective Agreement provided for the continuation of the CH Plan:

> The Pension Plan presently in effect shall be continued during the term of this Agreement and is hereby incorporated by reference into this Agreement... [9]

16. On June 30, 2009, Canwest Global announced that an agreement had been reached to sell *CHCH-TV* to Channel Zero. The proposed sale was conditional on securing agreement with the CEP for a new collective agreement which, among other things, removed all provisions relating to the CH Plan.[10]

17. On June 30, 2009, OSFI was notified of the plan sponsor's intention to terminate the CH Plan effective August 31, 2009 or such later date as may be advised by the plan sponsor.[11]

18. The CEP filed a grievance on July 20, 2009 alleging that CTLP's intention to terminate the CH Plan was a violation of the Former CH Collective Agreement. The grievance also alleged that CTLP's intention not to fully fund any shortfall in the CH Plan on termination was a violation of the Former CH Collective Agreement.[12]

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8 Maguire Affidavit, at paragraph 21

9 Maguire Affidavit, at paragraph 22

10 Maguire Affidavit, at paragraph 23

11 Maguire Affidavit, at paragraph 24

12 Maguire Affidavit, at paragraph 25

19. On July 28, 2009, CTLP and CEP and its Local 1100 agreed to amend the Former CH Collective Agreement. The amending agreement provided that immediately upon the closing of the sale to Channel Zero all references to the CH Plan would be removed from the collective agreement and, in particular, Article 18.3.1 would be deleted. Accordingly, as of the closing of the sale to Channel Zero on August 31, 2009, any obligation that existed under the Former CH Collective Agreement to keep the CH Plan in force was at an end. CTLP and CEP further agreed that the term of the revised collective agreement (the "**New CH Collective Agreement**") would be from April 1, 2008 until one year after the closing of the sale.[13]

20. The sale of *CHCH-TV* closed on August 31, 2009. The CH Plan was terminated effective August 31, 2009. [14]

21. On November 4, 2008 Mercer's actuarial valuation for the CH Plan as at December 31, 2008 (the "**Actuarial Valuation**") was filed with OSFI.[15]

22. The Actuarial Valuation estimated that the employer's minimum required current service cost contributions and special payments from January 1, 2009 to August 31, 2009 totalled $1,829,835, or $228,729 per month.[16]

The Terminal Deficiency

23. Starting at page 8, the Actuarial Valuation sets out the financial position of the CH Plan under various scenarios. Since the CH Plan has been terminated, the relevant scenario for present purposes is the financial position of the CH Plan on a wind-up basis. As discussed

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[13] Maguire Affidavit, at paragraph 26

[14] Maguire Affidavit, at paragraph 27

[15] Maguire Affidavit, at paragraph 29

[16] Actuarial Valuation – Maguire Affidavit, Exhibit "K", at page 15

below, if the CH Plan had been wound up on December 31, 2008, the value of the actuarial liabilities of the CH Plan would exceed the assets by $10,244,733: that would be the CH Plan's estimated Terminal Deficiency.[17]

24. The Actuarial Valuation refers to the "actuarial liabilities" of the CH Plan. At any valuation date, the cost of benefits required to be paid out of a defined benefit plan fund in the future can only be estimated. The benefits to be received under a defined benefit plan are "defined" in the sense that a given member of the plan knows in advance of retirement that the benefit he or she will receive will be calculated based on a formula set out in the plan, and will not be dependent on or referable specifically to the amount he or she has contributed to the plan. However, the cost of providing those benefits – and therefore the assets that need to be held in the plan to pay for all of the accrued benefits – is uncertain. The actuary makes assumptions about the future with respect to economic circumstances (such as investment rates of return and inflation) and demographic behaviour (such as rates of death, termination, and retirement). Based on these assumptions, the actuary can calculate the present value of the benefits expected to be paid, and using a funding method, allocate those costs to different time periods. The portion allocated to the period prior to the valuation date – that is, the amount of money that will be required to pay the benefits already accrued under the plan – is referred to in the Actuarial Valuation as the actuarial liability. The portion allocated to the year following the date of the valuation – that is, the amount of money that will be required to pay the benefits that will accrue (*i.e.* be earned) during the year following the valuation date – is referred to as the current service cost.[18]

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[17] Maguire Affidavit, at paragraph 30

[18] Maguire Affidavit, at paragraph 31

25. Since the CH Plan is being wound up, the assets of the plan fund will be distributed to pay for the benefits accrued under the CH Plan up to the termination date. Members will have certain portability options provided for under the PBSA; they may have the option of receiving a lump sum representing (subject to adjustment for the Terminal Deficiency) the commuted value of their accrued benefits or their accrued benefits may be settled by the purchase of an annuity. Mercer's assumptions as to which options will be chosen are set out in the Actuarial Valuation.[19]

26. As set out in the Actuarial Valuation, the actuarial liabilities of the CH Plan as at December 31, 2008 were $46,344,400 on a wind up basis. The market value of the assets in the plan fund as at that date were $36,099,667, which would not be sufficient to make annuity purchases or commuted value payments that would fully satisfy the actuarially-determined accrued benefits. Accordingly, as at December 31, 2008 the CH Plan would have had an estimated Terminal Deficiency of $10,244,733.[20]

27. As required by the PBSA, Mercer is preparing a termination report which will set out the Terminal Deficiency of the CH Plan as at August 31, 2009. The termination report will show an updated financial picture for the CH Plan as compared to the Actuarial Valuation, as it will reflect amounts contributed to the CH Plan, amounts owing to the CH Plan, earnings on the CH Plan assets, additional benefits earned by CH Plan members from January 1, 2009 through to August 31, 2009 and benefits (*e.g.* pension payments) and expenses paid out of the CH Plan during that period.[21]

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[19] Maguire Affidavit, at paragraph 32

[20] Maguire Affidavit, at paragraph 33

[21] Maguire Affidavit, at paragraph 34

28. It is for all intents and purposes certain that the CH Plan will have a Terminal Deficiency, although the precise amount of such Terminal Deficiency is not currently known.[22]

The Terminal Deficiency Claims

29. Unlike most provincial pension benefits legislation, the PBSA does not require that an employer fund a Terminal Deficiency. The federal government has announced that it intends to introduce amendments to the PBSA which would impose an obligation on plan sponsors to fund Terminal Deficiencies. Those proposed changes are not in force.[23]

30. The Retiree Terminal Deficiency Claim is for an estimated $10,244,733, which is equal to the estimated Terminal Deficiency described in the Actuarial Valuation. As noted in the Notice of Disallowance, the CMI Entities rejected the Retiree Terminal Deficiency Claim in particular because the PBSA does not require that Terminal Deficiencies be funded.[24]

31. The CEP Terminal Deficiency Claim was estimated at $15,438,739, which purports to be the amount "owing to active members as at December 31, 2008".[25]

32. The figure cited by CEP is equal to the portion of the Actuarial Liabilities of the CH Plan attributable to active members calculated on a wind up basis – as set out at page 12 of the Actuarial Valuation. As discussed above, that figure represents an estimate of how much it will cost to fund benefits accrued to the date of the Actuarial Valuation. It is incorrect to refer to that amount as an amount "owing to active members"; it is an estimate of the cost of the funding

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22 Maguire Affidavit, at paragraph 35

23 Maguire Affidavit, at paragraph 36

24 Maguire Affidavit, at paragraph 37

25 Maguire Affidavit, at paragraph 38

benefits which active members will become eligible to receive in the future and it does not take into account the assets of the CH Plan that are available to provide these benefits.[26]

33. In any event, the CMI Entities rejected the CEP Terminal Deficiency Claim for the reasons set out in the Notice of Revision or Disallowance including, in particular, that there is no obligation to fund a Terminal Deficiency under the PBSA, that the termination of the CH Plan was not a violation of the Former (or New) CH Collective Agreement and that the CMI Entities are not required to fund any Terminal Deficiency under the terms of the CH Plan or the Former (or New) CH Collective Agreement.[27]

PART III – ISSUES

34. The CMI Entities raise the following issues in their motion:

(a) Are the CMI Entities required to fund any Terminal Deficiency in the CH Plan, either:

(i) by the terms of the PBSA;

(ii) by the terms of the CH Plan; or

(iii) by the terms of the New CH Collective Agreeemnt or the Former CH Collective Agreement.

(b) If the answer to (a) is yes, are the Terminal Deficiency Claims capable of being compromised in a plan of compromise or arrangement of the CMI Entities?

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[26] Maguire Affidavit, at paragraph 39

[27] Maguire Affidavit, at paragraph 40

PART IV – LAW AND ARGUMENT

35. This motion is properly brought pursuant to the Claims Procedure Order. The Terminal Deficiency Claims fit squarely within the definition of "Claim" in the Claims Procedure Order. The definition of "Claim" includes claims on account of "Wages and Benefits", which in turn includes employer contributions in respect of pensions, and payments under collective bargaining agreements.[28] The Claims Procedure Order sets out a process whereby disputed Claims may be resolved by a Claims Officer. However, the Claims Procedure Order provides that the CMI Entities may refer Claims to the Court for resolution where such a referral is preferable or necessary for the resolution of the Claim.[29]

36. The ability, in their discretion, of the CMI Entities to refer significant Claims to the Court for determination furthers the fundamental goal in CCAA proceedings of promoting the efficient and expeditious resolution of claims that could have an impact on the restructuring.[30]

37. In the view of the CMI Entities it is in the interests of the overall restructuring that the Terminal Deficiency Claims be determined by the Court[31]. The Monitor has consented to have the Terminal Deficiency Claims referred to the Court.

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[28] Claims Procedure Order, Maguire Affidavit, Exhibit "B", paragraphs 2(g) and (rr)

[29] Claims Procedure Order, Maguire Affidavit, Exhibit "B", paragraphs 12 and 24

[30] This goal has been recognized in a number of cases. See for example *Kormarnicki v. Hurricane Hydrocarbons Ltd.*, [2007] A.J. No. 1243 (Alta. C.A.) at para. 14: "To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay."

[31] Maguire Affidavit, at paragraph 41

38. CEP takes the position that the grievance they filed, raising the same issues they raise in the CEP Terminal Deficiency Claim, should be remitted to arbitration so that a labour arbitrator who has significant experience regarding collective bargaining, contract interpretation and general labour relations could determine the issues raised.[32] The CMI Entities submit that this Honourable Court has the jurisdiction to determine all of the issues that are raised by the CEP Terminal Deficiency Claim, and that it should do so in the interests of certainty and efficiency in the context of the restructuring of the CMI Entities. The CEP's grievance that relates to its Terminal Deficiency Claim is currently stayed under the Initial Order and there is no basis for ordering the stay to be lifted to allow the grievance to be pursued outside the Claims Procedure.

39. The right to refer claims to the Court for determination exists despite the fact that other legislation that may confer jurisdiction (in the absence of insolvency proceedings) on another tribunal or decision-maker. Section 20 of the CCAA specifically provides that the amount of the claim of any secured or unsecured creditor is to be determined by the court on summary application by the company or by the creditor.[33] CCAA Courts have frequently made orders requiring disputes that might otherwise have been decided in another forum to be decided within the CCAA claims process.

40. For example, in the context of a CCAA proceeding, a Court may properly consider whether and to what extent a CCAA debtor is required to make pension plan

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[32] Affidavit of David Lewington, sworn February 24, 2010, paras. 19 to 21.

[33] CCAA, section 20(1).

contributions, both in the unionized and non-unionized setting, including whether such payment obligations (if any) may be stayed or compromised.[34]

41. Similarly, the claims of employees under Part III of the *Canada Labour Code* have been referred for determination within a CCAA claims process, rather than under the adjudicative mechanism set out under the *Code*.[35] In the same vein, Morawetz J. very recently noted in the context of determining certain employee rights in *Nortel* that "when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals."[36]

42. The CCAA courts have also assumed jurisdiction over matters that would otherwise be decided by an arbitrator under a contractual arbitration clause pursuant to arbitration legislation. In *Smoky River*, the Alberta Court of Appeal required a dispute to be resolved in the CCAA process that the parties had agreed under contract to submit to arbitration. The Court refused to apply the British Columbia arbitration statute to stay a motion by the debtor company seeking to compel the resolution of the dispute under the CCAA process. The Court acknowledged that arbitration can be an expeditious means of resolving a dispute, but noted that commercial arbitration awards can be appealed and that they can be subject to judicial review, thereby lengthening and complicating the decision-making process. The efficacy of the CCAA

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[34] See, for example, *Re Collins & Aikman Automotive Canada Inc.*, [2007] O.J. No. 4186 at paras. 87-89; *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no 264 [*Jeffrey Mines*] at paras. 57-62; *TQS inc.* 2008 CarswellQue 4863 (Superior Court of Quebec) (translated); *TQS inc.* 2008 CarswellQue 7132 (Court of Appeal of Quebec) (translated) [*TQS inc.*] at paras. 24-27.

[35] *Re Air Canada*, [2004] O.J. No. 3048 (Ont. S.C.J.) at para. 12.

[36] *Re Nortel Networks Corp.*, [2009] O.J. No. 2558 (Ont. S.C.J.) [*Nortel*] at para. 74, aff'd [2009] O.J. No. 4967 (Ont. C.A.).

process could be seriously undermined by forcing the debtor company to participate an arbitration outside the CCAA.[37]

43. The British Columbia Supreme Court recently followed *Smoky River* in *Hayes Forest Services*, which also involves an exercise of discretion by a CCAA court to order a dispute that would otherwise be subject to arbitration by virtue of both a contract and a statute to be resolved within the CCAA process. In making this determination, the Court referred to several factors, including (a) the likelihood that the arbitration process would be less expeditious; (b) the likelihood that appeals and/or judicial review would result in an undue lengthening of the decision-making process; and (c) the lack of any persuasive reason why the Court could not determine the issue.[38]

44. Whether the Court should exercise the discretion to order determination of the issues in another forum or within the CCAA process is fact-dependent.[39] In this case, it makes eminent good sense, from the point of view of efficiency and in the interests of the overall restructuring, to have the Court assume jurisdiction over, and decide, both of the Terminal Deficiency Claims.

45. The matters at issue in this motion only partially relate to issues of interpretation of the collective agreement. The crux of the dispute relates to the interpretation of the PBSA, and the CH Plan. Neither of these areas is within the special expertise of a labour arbitrator. Moreover, the Retiree Terminal Deficiency Claim is being asserted on behalf of both unionized

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37 *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 676 (Alta. C.A.) [*Smoky River*] at para. 33.

38 *Re Hayes Forest Services Ltd.*, [2009] B.C.J. No. 1725 [*Hayes Forest Services*] at para. 30.

39 *Smoky River, supra* at para. 67.

and non-unionized retirees.[40] It would be inefficient to have the Retiree Terminal Deficiency Claim dealt with by the Court and the CEP Terminal Deficiency Claim dealt with by an arbitrator. Such a procedure would waste resources, give rise to the risk of inconsistent decisions and create the potential for delay.

46. Finally, any determination by an arbitrator in relation to the grievance would presumably be subject to judicial review by either the CMI Entities or by the CEP, depending on the outcome of the arbitration. Such judicial review could only have the effect of significantly delaying and complicating the determination of the Terminal Deficiency Claims, creating uncertainty in the restructuring of the CMI Entities to the detriment of all parties. Since the issues will fall to be considered by this Court on judicial review in any event, there seems to be little real advantage in requiring the initial determination to be made by an arbitrator.

47. Accordingly, it is in the interests of the efficient and expeditious resolution of the Terminal Deficiency Claims and the overall best interests of the restructuring that the two Terminal Deficiency Claims be dealt with, together, in this Court.

THE PBSA DOES NOT REQUIRE FUNDING OF A TERMINAL DEFICIENCY

The General Funding Requirements Under The PBSA

48. The general funding requirement under the PBSA is set out in section 9(1), which provides as follows:

> A pension plan shall provide for funding, in accordance with the prescribed tests and standards for solvency, that is adequate to provide for payment of all pension benefits and other benefits required to be paid under the terms of the plan.

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[40] See for example Affidavit of John Jarrett, sworn February 23, 2010, para. 6.

49. Section 8 of the general regulation under the PBSA[41] (the "**Regulation**") provides that the standards for solvency that are referred to in section 9 of the PBSA will be considered to be met if the funding is in accordance with section 9 of the Regulation.

50. Fundamentally, the PBSA recognizes that from time to time, a pension plan may not be fully funded. Where that situation arises, neither the PBSA nor the Regulation require that contributions to fully fund the plan must be made immediately. Rather, the Regulation establishes a mechanism whereby the funded position of an ongoing pension plan is determined as of a particular point in time and if at that point in time the assets are less than the liabilities, then the shortfall can be amortized by "special payments" made over a specified period.

51. Specifically, Section 9 of the Regulation recognizes two methods of determining the funded position of a pension plan – valuing a plan on a "going concern" basis (i.e. assuming that the plan would continue indefinitely) and valuing a plan on a "solvency" basis (i.e. assuming that the plan was terminated as of the valuation date). The employer under a pension plan must make contributions to the pension plan based on both valuation measures.

52. Section 9(3)(b) of the Regulation provides that where an actuarial valuation reveals a going concern unfunded liability, this unfunded liability is required to be funded by special payments to be made in the future over a period no greater than 15 years.

53. Where an actuarial valuation reveals a solvency deficiency, this solvency deficiency is required to be funded by special payments to be made in the future over a period no greater than 5 years, pursuant to section 9(4) of the Regulation.

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41 SOR 87-19, as amended.

54. Contributions on account of current service cost, and any special payments required to be made, must be made at least on a quarterly basis (Regulation, section 9(14)):

> (14) Payments to a plan shall be made as follows:
>
> (*a*) the normal cost of the plan and any special payment to be made during the plan year shall be paid in equal instalments or as an equal percentage of the anticipated remuneration to be paid to the members during the plan year and shall be paid not less frequently than quarterly and not later than 30 days after the end of the period in respect of which the instalment is paid;
>
> (b) the contributions of plan members shall be remitted to the administrator not later than 30 days after the end of the period in respect of which such contributions were deducted;
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> (c) any other payment shall be remitted to the administrator not later than 30 days after the end of the period in respect of which it is made; and
>
> (d) the administrator shall forthwith pay into the fund any amount remitted to the administrator.

55. The Actuarial Valuation, at page 14, sets out Mercer's advice that the minimum monthly special payments required to amortize the unfunded liability on a going concern and solvency basis, as at December 31, 2008, was $191,222.

PBSA Funding Requirements On Termination

56. Section 29(6) of the PBSA sets out the payments that are required to be made on termination of a pension plan:

> (6) On the termination of the whole of a pension plan, the employer shall pay into the plan all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the plan
>
> (*a*) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any prescribed special payments,
>
> that have accrued to the date of the termination; and
>
> (*b*) 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 at the date of the termination.

57. Section 29(6) of the PBSA does not require the employer to fully fund any Terminal Deficiency on termination. Unfunded liabilities are to be amortized over a five or fifteen year period. Special payments accrue periodically over the length of that five or fifteen year period, and are required to be paid not more than 30 days after "the end of the period in respect of which the instalment is paid".[42] The special payments that have accrued to the date of the termination (*i.e.*, in this case, the special payments that have accrued to August 31, 2009) are required to be paid. Special payments that would otherwise have accrued during the rest of the period over which the unfunded liability was amortized are not required to be paid.

58. In this regard, the PBSA and the Regulation differ from the pension benefits legislation in a number of provinces. In those provinces, pension benefits legislation and/or regulations require: (i) that on termination an employer must pay amounts accrued to the date of termination; and (ii) where there is a Terminal Deficiency, the employer must continue to make payments into the plan after the effective date of the termination. Section 29(6) of the PBSA imposes the former obligation, but nothing in the PBSA or the Regulation imposes the latter obligation, or anything having the same effect.

59. The provincial provisions imposing an obligation on employers to fund Terminal Deficiencies are summarized below. The provisions, as well as the provisions corresponding to section 29(6) of the PBSA, are reproduced in full in a Schedule to this Factum

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[42] Section 9(14) of the Regulation.

Alberta[43]
73(2) Where, at the termination of a pension plan ... the plan has a solvency deficiency, then ... the employer shall continue to make payments into the plan fund after the termination, and the prescribed rules apply.
British Columbia[44]
51(2) If a pension plan, other than a negotiated cost plan, is terminated with a solvency deficiency and the employer is not insolvent, (a) the employer must fund the remaining solvency deficiency as prescribed ...
Manitoba[45]
Reg 4(3.1) Where a pension plan, other than a multi-unit plan, is terminated or wound up and it has a solvency deficiency, the employer shall continue to make payments into the plan pursuant to clause 3(c), this section and section 13.
Newfoundland and Labrador[46]
61.(2) Where, on the termination, after April 1, 2008 , of a pension plan, ... the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.
Nova Scotia[47]
80(1A) Where, at the wind up on or after May 1, 2007, of a pension plan in whole or in part, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan and under Section 79, the employer shall make such payments into the pension fund of the amount necessary to fund the benefits provided under the plan and under Section 79.

43 *Employment Pension Plans Act,* R.S.A. 2000, c. E-8.

44 *Pension Benefits Standards Act,* R.S.B.C. 1996, c. 352.

45 *Pension Benefits Act,* C.C.S.M. c. P32.

46 *Pensions Benefits Act, 1997,* S.N.L. 1996, c. P-4.01.

47 *Pension Benefits Act,* R.S.N.S. 1989, c. 340.

Ontario[48]
75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund, ... (b) an amount equal to the amount by which, (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan, (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74, exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

60. In January, 2009 the Department of Finance issued a consultation paper and called for comments on possibly "amending [the Regulation] to require full funding of pension benefits on plan termination"[49]. The Department of Finance has indicated that it intends to make these changes. However, no amending legislation or amendments to the Regulation have been tabled.

61. In summary, neither the PBSA nor the Regulation requires the CMI Entities to fund the Terminal Deficiency in the CH Plan.

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[48] *Pension Benefits Act,* R.S.O. 1990, c. P.8.

[49] "Strengthening the Legislative and Regulatory Framework for Private Pension Plans Subject to the Pension Benefits Standards Act, 1985", consultation paper dated January 9, 2009, Maguire Affidavit, Exhibit "L", at page 337 of the Motion Record.

THE PLAN TERMS DO NOT REQUIRE THE CMI ENTITIES TO FUND THE TERMINAL DEFICIENCY

62. The requirement for employer contributions is set out in the CH Plan at section 3.2, which provides as follows:

> The Company shall make contributions for deposit in the Pension Fund in such total amount as, based on the advice of the Actuary, is sufficient to provide for the cost of the benefits currently accruing in accordance with the provisions of the Plan, and to provide for the proper amortization of any unfunded liability or solvency deficiency with respect to benefits previously accrued in accordance with the requirements of the Pension Benefits Standards Act, after taking into account the assets of the Pension Fund, the contributions of Members and all other relevant factors. All Company contributions shall be paid in equal instalments not less frequently than quarterly and within 30 days after the end of the period in respect of which the installment is due. Notwithstanding the foregoing, if at any time while the Plan continued in existence the Actuary certifies that the assets of the Pension Fund exceed the actuarial liabilities of the Plan in respect of benefits defined by the Plan, then such excess or any portion of such excess may be used by the Company to reduce its contribution obligations under the terms of the Plan, or, subject to such prior approval as may be required by the regulatory authorities, may be refunded to the Company.

63. Section 3.2 is the only provision in the Plan Terms that imposes an obligation on the employer to make contributions to the Plan Fund. Section 13.3 of the Plan Terms provides for what happens if the CH Plan is discontinued. It provides, generally, that the assets that are in the Plan Fund are to be applied for the benefit of members. It does not, however, expand upon the contribution requirement set out in section 3.2.

64. Moreover, section 12.2 makes it clear that the rights which members have pursuant to the CH Plan are limited to those rights set out within the Plan Terms:

> The establishment and implementation of the Plan shall not constitute an enlargement of any rights which a Member has apart from the Plan, nor shall Membership in the Plan give a Member, the Member's Spouse, Beneficiary, or joint annuitant any legal right to any benefit hereunder except as provided herein.

65. Accordingly, the Plan Terms do not impose an obligation on the part of the CMI Entities to fund any Terminal Deficiency unless section 3.2, properly construed, requires such funding.

66. In the submission of the CMI Entities, it does not. Section 3.2 requires the Company to make contributions that are sufficient to provide for:

(a) The cost of the benefits currently accruing; and

(b) The proper amortization of any unfunded liability or solvency deficiency with respect to benefits previously accrued in accordance with the requirements of the PBSA.

67. The cost of the benefits currently accruing is the current service cost; the cost of providing for benefits which will accrue in the period following the valuation date. In the case of the Actuarial Valuation, that period is January 1, 2009 to August 31, 2009.

68. On termination of a pension plan, benefit accruals cease. Accordingly, on termination the requirement to pay "the cost of benefits currently accruing" cannot import an obligation to fund a Terminal Deficiency.

69. The obligation to provide for the "proper amortization" of any unfunded liability in accordance with the requirements of the PBSA does not create an obligation to fund a Terminal Deficiency either. As set out above, the requirements of the PBSA and the Regulation do not include funding a Terminal Deficiency. The requirement to "properly amortize" unfunded liabilities in section 3.2 is explicitly tied to the requirements of the PBSA and the Regulation and does not create any greater obligation than that imposed by the PBSA or Regulation. Accordingly, it does not impose an obligation to fund a Terminal Deficiency.

THE CH COLLECTIVE AGREEMENT DOES NOT REQUIRE THE CMI ENTITIES TO FUND THE TERMINAL DEFICIENCY

70. Pursuant to the amending agreement between the CMI Entities and the CEP, the New CH Collective Agreement provided that, as of August 31, 2009, any and all references to the CH Plan and pension benefits would be deleted. Accordingly, the CMI Entities submit that the New CH Collective Agreement, which was made retroactive to April 1, 2008, cannot have the effect of imposing an obligation to fund a Terminal Deficiency in the CH Plan.

71. Be that as it may, even to the extent that the terms of the Former CH Collective Agreement were relevant to the CEP Terminal Deficiency Claim, they do not create any greater obligations on the part of the CMI Entities to fund the CH Plan than those obligations that are set out in the Plan Terms themselves.

72. Section 18.3.1 of the Former CH Collective Agreement provided that the Plan Terms were "incorporated by reference" into the Former CH Collective Agreement. Arbitral jurisprudence is clear that "incorporated by reference" means that all of the Plan Terms are incorporated in to the Former CH Collective Agreement:

> Article 26 refers to the "present Pension Plan." What is the present plan? The present plan is the whole plan, not only the plan providing for the company and employees' contributions and benefits, but clauses as heretofore quoted enabling the company to amend or discontinue the plan at any time or times...[50]

73. The Plan Terms provide that all contributions are to be remitted to the Plan Fund, that all benefits are to be paid from the Plan Fund, and that members are only entitled to such benefits as are set out in the Plan Terms[51]. All of those provisions are incorporated by reference into the Former CH Collective Agreement. Accordingly, the Former CH Collective Agreement

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[50] *Re United Automobile Workers, Local 199, and Columbus McKinnon Ltd.*, 17 L.A.C. 213, at page 3 (Canada Law Book); see also *Re Globe and Mail Ltd and Toronto Newspaper Guild,* (1978) 21 L.A.C. (2d) 112 at paras. 11-13; and *Re Toronto Public Library Board and C.U.P.E., Local 1996*, 12 C.L.A.S. 66 at para. 25.

[51] Plan Terms, Maguire Affidavit, Exhibit "D", sections 4.2, 4.6 and 12.2

does not confer any greater rights to benefits, or impose any greater obligations to contribute, than the rights and obligations that are explicitly set out in the Plan Terms..

74. The Plan Terms, as discussed above, do not require the CMI Entities to fund the Terminal Deficiency in the CH Plan. Accordingly, neither the New CH Collective Agreement nor the Former CH Collective Agreement (to the extent it is relevant) require the CMI Entities to fund the Terminal Deficiency in the CH Plan.

ANY CLAIM CONCERNING THE TERMINAL DEFICIENCY, IF VALID, COULD BE COMPROMISED

75. For all of the foregoing reasons, the CMI Entities submit that the Terminal Deficiency Claims should be rejected in their entirety.

76. However, to the extent that the issue arises, the CMI Entities also reject the assertion, set out in the CEP Terminal Deficiency Claim, that the obligation to fund a Terminal Deficiency (if one exists) "cannot properly be compromised pursuant to a Plan of Arrangement in these proceedings".

77. Courts have repeatedly held that claims arising under a collective agreement do not enjoy special status or priority, and are capable of being compromised in a plan of arrangement.[52] As the Quebec Court of Appeal recently put it [translation]:

> It is true that even when a company uses the protection of the CCAA, it cannot escape the conditions imposed by the collective bargaining agreement that binds it to its employees. ...
>
> This does not mean that the claims of the employees prior to the date of the initial order must be paid in full. These claims are not immune to the painful

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[52] See *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*, [2005] S.J. No. 484 (Q.B.) at paras. 11-13; *Nortel, supra* at paras. 73-74.

> compromise inevitably implied by the Plan of arrangement. The employees who became creditors are not entitled to priority or guaranteed status.[53]

78. In particular, Courts have held that claims concerning special payments allegedly not made to a pension plan, even in the unionized context, are capable of being stayed[54] and capable of being compromised in a plan of arrangement[55].

79. Accordingly, even if the Terminal Deficiency Claims, and in particular the CEP Terminal Deficiency Claim, are valid, they are nevertheless capable of being compromised and dealt with in any plan of arrangement of the CMI Entities.

PART IV – NATURE OF THE ORDER SOUGHT

80. For all of the foregoing reasons, the CMI Entities seek the relief set out in the proposed Order found in the motion record:

(a) Declaring that the CMI Entities are not required to fund any Terminal Deficiency in the CH Plan; and

(b) Valuing the Terminal Deficiency Claims at zero for voting and distribution purposes.

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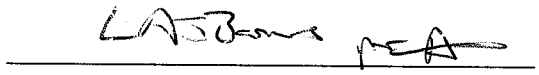
53 *TQS inc. supra*, note 34 at paras. 24 and 25.

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

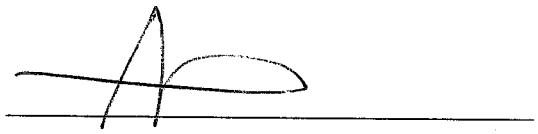
55 *Jeffrey Mines, supra* at para. 57

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Lyndon A.J. Barnes

Jeremy Dacks



Alexander Cobb

Schedule "A"

Applicants

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands) B.V.
18. CGS International Holdings (Netherlands) B.V.

19. CGS Debenture Holding (Netherlands) B.V.

20. CGS Shareholding (Netherlands) B.V.

21. CGS NZ Radio Shareholding (Netherlands) B.V.

22. 4501063 Canada Inc.

23. 4501071 Canada Inc.

24. 30109, LLC

25. CanWest MediaWorks (US) Holdings Corp.

Schedule "B"

Partnerships

1. Canwest Television Limited Partnership

2. Fox Sports World Canada Partnership

3. The National Post Company/La Publication National Post

Schedule "C" - Statutory References

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

Determination of amount of claims

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount
(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,
(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or
(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, to be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Pension Benefits Standards Act, 1985 (1985, c. 32 (2nd Supp.)) (Canada)

Funding of pension plan

9. (1) A pension plan shall provide for funding, in accordance with the prescribed tests and standards for solvency, that is adequate to provide for payment of all pension benefits and other benefits required to be paid under the terms of the plan.

Actuarial reports

(2) In the case of an actuarial report required pursuant to subsection 12(3), where the Superintendent is of the opinion that the report has not been prepared

(a) on the basis of actuarial assumptions or methods that are adequate and appropriate, and
(b) in accordance with the standards of practice adopted by the Canadian Institute of Actuaries, except as otherwise specified by the Superintendent,
the Superintendent shall notify the administrator in writing of this opinion and shall direct the administrator to cause the appropriate changes to be made to the report, and the administrator shall forthwith comply with such a direction.

Amended report

(3) A pension plan shall be funded in accordance with the report referred to in subsection (2) as amended pursuant to any direction of the Superintendent under that subsection.

Termination and winding up of pension plans

Deemed termination

29. (1) The revocation of registration of a pension plan shall be deemed to constitute termination of the plan.
Where Superintendent may declare a plan terminated

(2) The Superintendent may declare the whole or part of a pension plan terminated where

(a) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;
(b) the employer has discontinued or is in the process of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or
(c) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).
Idem

(3) A declaration made under subsection (2) shall declare a pension plan or part thereof, as the case may be, to be terminated as of the date that the Superintendent considers appropriate in the circumstances.

Adoption of new plan

(4) If employer contributions to a pension plan are suspended or cease as a result of the adoption of a new plan, the original plan is deemed not to have been terminated, and the pension benefits and other benefits provided under the original plan are deemed to be benefits provided under the new plan in respect of any period of membership before the adoption of the new plan, whether or not the assets and liabilities of the original plan have been consolidated with those of the new plan.

Notice of voluntary termination or winding-up

(5) An administrator who intends to terminate the whole or part of a pension plan or wind up a pension plan shall notify the Superintendent in writing of that intention at least sixty days before the date of the intended termination or winding-up.

Payments by employer to meet solvency requirements

(6) On the termination of the whole of a pension plan, the employer shall pay into the plan all amounts that would otherwise have been required to be paid to meet the prescribed tests and

standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the plan

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) any prescribed special payments,

that have accrued to the date of the termination; and

(b) 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 at the date of the termination.

Assets of the plan

(7) On the termination or winding-up of the whole of a pension plan, no part of the assets of the plan shall revert to the benefit of the employer until the Superintendent's consent has been obtained and provision has been made for the payment to members and former members and their spouses, common-law partners, beneficiaries, estates or successions of all accrued or payable benefits in respect of membership up to the date of the termination or winding-up and, for that purpose, those benefits shall be treated as vested without regard to conditions as to age, period of membership in the plan or period of employment.

Effect of termination on assets

(8) On the termination of the whole of a pension plan, all assets of the plan that are to be used for the purpose of providing pension benefits or other benefits continue to be subject to this Act.

Report to Superintendent

(9) On the termination of a pension plan or part of a plan, the administrator of the plan shall file with the Superintendent a report, prepared by a person having the prescribed qualifications, setting out the nature of the pension benefits and other benefits to be provided under the plan and a description of the methods of allocating and distributing those benefits and deciding the priorities in respect of the payment of full or partial benefits to the members.

Assets not to be applied until report approved

(10) Assets of the plan may not be applied toward the provision of any benefits until the Superintendent has approved the report required by subsection (9), but the administrator of the plan may nevertheless pay to the person entitled, as they fall due, pension benefits, or refunds of employee contributions and interest thereon, as the case may be.

Superintendent may direct winding-up

(11) Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(j), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.

Partial termination of plan

(12) Where a plan is terminated in part, the rights of members affected shall not be less than what they would have been if the whole of the plan had been terminated on the same date as the partial termination.

Pension Benefits Standards Regulations, 1985 - Regulation SOR/87-19

8. The funding of a plan shall be considered to meet the standards for solvency if the funding is in accordance with section 9.

9. (1) For the purposes of this section,

"initial unfunded liability" means the increase on or after January 1, 1987 in the going concern liabilities of a plan or the decrease on or after January 1, 1987 in the going concern assets of a plan as a result of

(a) the establishment of the plan,

(b) an amendment to the plan,

(c) a change in the methods or bases of valuation of the plan, or

(d) an experience loss;

"solvency deficiency" means the extent to which the liabilities of a plan, determined on the basis that the plan is terminated, or on a basis that is certified by an actuary to be reasonably approximate thereto, and that takes into account any significant increases or decreases in benefits to the plan members as a result of the termination, exceed the aggregate of

(a) the value of the assets of the plan, determined on the basis of market value or of a value related to the market value by means of a method using market values over a period of not more than five years to stabilize short-term fluctuations,

(b) the present value of a special payment established pursuant to the Pension Benefits Standards Regulations, as those Regulations read on December 31, 1986,

(c) the present value of a special payment in respect of an initial unfunded liability that emerged after December 31, 1986 as a result of benefits granted for a period of employment prior to the

effective date of the plan, where such employment had not previously been recognized by the plan,

(d) the present value of any other special payment due in the next five years; and

(e) in respect of a plan that becomes subject to the Act after January 1, 1987, the present value of special payments with respect to an initial unfunded liability that emerged before the plan became subject to the Act, established in a valuation report that has been filed with the Superintendent and, in the Superintendent's opinion, has been prepared

(i) on the basis of actuarial assumptions or methods that are adequate and appropriate,

(ii) in accordance with paragraph 12(3.1)(a) of the Act, and

(iii) prior to the plan becoming subject to the Act.

(2) For the purposes of this section,

(a) the date of emergence of an initial unfunded liability in respect of an occurrence described in

(i) paragraph (a) of the definition "initial unfunded liability" in subsection (1), is the effective date of the plan,

(ii) paragraph (b) of the definition "initial unfunded liability" in subsection (1), is the effective date of the amendment,

(iii) paragraph (c) of the definition "initial unfunded liability" in subsection (1), is the date as of which the change is made, and

(iv) paragraph (d) of the definition "initial unfunded liability" in subsection (1), is the date as of which the going concern valuation that identified the experience loss was performed;

(b) the present values referred to in paragraphs (b), (c) and (d) of the definition "solvency deficiency" in subsection (1), shall be determined on the basis of the assumed interest rate used in the valuation of the liabilities for the purpose of that definition; and

(c) the date of emergence of a solvency deficiency is the date as of which the valuation that identified the deficiency was performed.

(3) An initial unfunded liability of a plan shall be funded

(a) first, by the amount by which the going concern assets of the plan exceed the going concern liabilities of the plan; and

(b) second, by special payments sufficient to liquidate the remaining amount of the initial unfunded liability by equal annual payments over a period not exceeding 15 years from the date on which the initial unfunded liability emerged.

(4) A solvency deficiency of a plan emerging after December 31, 1986 shall be funded by special payments sufficient to liquidate the solvency deficiency by equal annual payments over a period not exceeding five years from the date on which the solvency deficiency emerged.

(5) At the date of the emergence of a solvency deficiency, any special payments required to fund an initial unfunded liability that are to be made after the five-year period over which the solvency deficiency is to be funded may be reduced pro rata so that at the date of the emergence of the solvency deficiency the present value of the special payments made to fund the initial unfunded liability and the solvency deficiency is not less than the amount by which the going concern liabilities of the plan exceed the going concern assets of the plan.

(6) The interest rate used to determine the present value of the reduced special payments in accordance with subsection (5) shall be the same as the interest rate used to determine the going concern liabilities of the plan.

(7) Subject to subsection (8), a plan shall be funded in each plan year by

(a) a contribution equal to the normal cost of the plan;

(b) a special payment referred to in subsection (3);

(c) a special payment referred to in subsection (4); and

(d) a special payment established pursuant to the Pension Benefits Standards Regulations, as those Regulations read on December 31, 1986.

(7.1) The amount of a contribution described in paragraph (7)(a) may be reduced by all or a portion of the lesser of

(a) the amount by which the going concern assets of the plan exceed the going concern liabilities of the plan, and

(b) the amount by which the solvency assets of the plan, as referred to in paragraph (a) of the definition "solvency deficiency" in subsection 9(1), exceed the solvency liabilities of the plan.

(8) In lieu of the special payments referred to in paragraphs (7)(b) and (c), special payments may be established as of the date of the emergence of the initial unfunded liability or the solvency deficiency, so that each payment is the same percentage of the anticipated remuneration to be paid to the plan members

(a) in the case of an initial unfunded liability, for a period not exceeding 15 years, or

(b) in the case of a solvency deficiency, for a period not exceeding five years,

and the present value of the payments shall be equal to the remaining amount of the initial unfunded liability referred to in paragraph (3)(b) or the solvency deficiency.

(9) Where an actuarial report filed pursuant to subsection 12(3) of the Act reveals an actuarial gain under a plan that emerges on or after January 1, 1987, the amount of the gain shall

(a) first, be applied to reduce the outstanding balance of any initial unfunded liability or solvency deficiency; and

(b) second,

(i) be applied to increase benefits under the plan,

(ii) be applied to reduce the contribution of the employer to the normal cost of the plan, or

(iii) be left in the fund.

(10) Subject to subsection (11), where an outstanding balance of a solvency deficiency or an initial unfunded liability has been reduced by the application of an actuarial gain in accordance with subsection (9), the special payments remaining to be made in respect of the initial unfunded liability or solvency deficiency shall be reduced pro rata to take into account the application of the actuarial gain.

(11) A special payment shall not be reduced if the reduction has the effect of increasing the time over which a solvency deficiency is liquidated in accordance with subsection (4).

(12) An actuarial gain under a plan that emerged prior to January 1, 1987 may be applied in accordance with the Pension Benefits Standards Regulations, as those Regulations read on December 31, 1986.

(13) Where an initial unfunded liability or solvency deficiency has been liquidated at a rate greater than the minimum rate required under subsections (3) and (4) by the making of an additional payment of any kind, the amount of a special payment for a subsequent plan year may be reduced if the outstanding balance of any initial unfunded liability or solvency deficiency will at no time be greater than it would have been had the special payment referred to in subsection (3) or (4) been made, taking into account the effect of the application of paragraph (9)(a) or (b).

(14) Payments to a plan shall be made as follows:

(a) the normal cost of the plan and any special payment to be made during the plan year shall be paid in equal instalments or as an equal percentage of the anticipated remuneration to be paid to the members during the plan year and shall be paid not less frequently than quarterly and not later than 30 days after the end of the period in respect of which the instalment is paid;

(b) the contributions of plan members shall be remitted to the administrator not later than 30 days after the end of the period in respect of which such contributions were deducted;

(c) any other payment shall be remitted to the administrator not later than 30 days after the end of the period in respect of which it is made; and

(d) the administrator shall forthwith pay into the fund any amount remitted to the administrator.

Employment Pension Plans Act, R.S.A. 2000, c. E-8. (Alberta)

Payments to meet solvency requirements

73(1) Subject to this section, within 30 days after the termination of a pension plan, the employer shall pay into the plan all amounts whose payment is required by the terms of the plan or this Act and, without limiting the generality of the foregoing, shall make all payments that, by the terms of the plan or this Act, are due from the employer to the plan but have not been made at the date of the termination and those that have accrued to that date but that are not yet due.

(2) Where, at the termination of a pension plan other than a specified multi- employer plan, a multi- unit plan or a pension plan to which section 48(6) applies, the plan has a solvency deficiency, then, subject to limitations imposed by the tax Act in respect of plans for specified individuals, the employer shall continue to make payments into the plan fund after the termination, and the prescribed rules apply.

(3) Where a multi- unit plan is terminated or a participating employer withdraws from a multi- unit plan and does not join or establish a successor plan that assumes responsibility for the liabilities of the predecessor plan in respect of that employer and there is a solvency deficiency, the employers who are no longer participating employers as a result of that event shall continue to make payments into the plan fund after the termination, and the prescribed rules apply.

(4) Without limiting subsection (3), the employer designated under section 11(1), if any, is and remains liable to make all the payments required by subsection (3) should the employers referred to in subsection (3) fail to make them.

Pension Benefits Standards Act, R.S.B.C. 1996, c. 352. (British Columbia)

Payments to meet solvency requirements

51 (1) Within 30 days after the termination of a pension plan, the employer must

(a) pay into the plan all amounts for which payment is required by the terms of the plan or this Act, and

(b) without limiting the generality of paragraph (a), make all payments that, by the terms of the plan or this Act,

(i) are due from the employer to the plan but have not been made at the date of the termination, and

(ii) have accrued to the date of termination but that are not yet due.

(2) If a pension plan, other than a negotiated cost plan, is terminated with a solvency deficiency and the employer is not insolvent,

(a) the employer must fund the remaining solvency deficiency as prescribed,

(b) the administrator must continue to file information returns and actuarial valuation reports as required by section 9 (3) (a) and (b) until the solvency deficiency has been retired, and

(c) subject to section 55, the assets of the plan must be distributed in the manner and to the extent prescribed.

***Pension Benefits Act,* C.C.S.M. c. P32. (Manitoba)**

Liability on winding up of plan

26(3) Upon the termination or winding up of a pension plan filed or required to be filed for registration under section 18, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

Man. Reg. 188/87 R

Employer to continue payments if terminated plan has deficiency

Reg 4(3.1) Where a pension plan, other than a multi-unit plan, is terminated our wound up and it has a solvency deficiency, the employer shall continue to make payments into the plan pursuant to clause 3(c), this section and section 13.

***Pensions Benefits Act, 1997,* S.N.L. 1996, c. P-4.01. (Newfoundland and Labrador)**

Termination payments

61. (1) On termination of a pension plan, the employer shall pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency, including

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) special payments prescribed by the regulations,

that have accrued to the date of termination; and

(b) 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 at the date of termination.

(2) Where, on the termination, after April 1, 2008 , of a pension plan, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan, the employer shall, as prescribed by the regulations, make the payments into the pension fund, in addition to the payments required under subsection (1), that are necessary to fund the benefits provided under the plan.

Pension Benefits Act, R.S.N.S. 1989, c. 340. (Nova Scotia)

Employer's payments on wind up

80 (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund an amount equal to the total of all payments that, pursuant to this Act, the regulations and the pension plan, are due or have accrued and that have not been paid into the pension fund.

(1A) Where, at the wind up on or after May 1, 2007, of a pension plan in whole or in part, other than a multi-employer pension plan, the assets in the pension fund are less than the value of the benefits provided under the plan and under Section 79, the employer shall make such payments into the pension fund of the amount necessary to fund the benefits provided under the plan and under Section 79.

Pension Benefits Act, R.S.O. 1990, c. P.8. (Ontario)

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Schedule "D"

LIST OF AUTHORITIES

1. *Air Canada (Re)*, [2004] O.J. No. 48 (S.C.J.)

2. *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186

3. *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*, [2005] S.J. No. 484

4. *Kormarnicki v. Hurricane Hydrocarbons Ltd.*, [2007] A.J. No. 1243 (Alta. C.A.)

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

6. *Hayes Forest Services Ltd. (Re)*, [2009] B.C.J. No. 1725 (B.C.S.C.)

7. *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 676 (Alta. C.A.)

8. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558; Aff'd [2009] O.J. No. 4967 (C.A)

9. *Re Globe and Mail Ltd and Toronto Newspaper Guild*, (1978) 21 L.A.C. (2d) 112

10. *Re United Automobile Workers, Local 199, and Columbus McKinnon Ltd.*, 17 L.A.C. 213

11. *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no 264

12. *Toronto Public Library Board and C.U.P.E., Local 1996 (Re)*, 12 C.L.A.S. 66

13. *TQS inc.* 2008 CarswellQue 4863 (Superior Court of Quebec) [English translation and french version]

14. *TQS inc.* 2008 CarswellQue 7132 (Court of Appeal of Quebec) [English translation and french version]

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
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Declarations Regarding CH Plan Claims)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

Lyndon A.J. Barnes (LSUC#: 13350D)
Tel: (416) 862-6679

Jeremy E. Dacks (LSUC#: 41851R)
Tel: (416) 862-4923

Alexander Cobb (LSUC#: 45363F)
Tel: (416) 862-5964

Fax: (416) 862-6666

Lawyers for the Applicants

F. 1114233