

COURT OF APPEAL FOR ONTARIO

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

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

APPLICANTS

FACTUM

PART I—THE MOVING PARTY AND THE COURT APPEALED FROM

1. This proceeding arises out of the insolvency proceedings of Canwest Global Communications Corp. and the other Applicants listed on Schedule "A" (collectively "CMI Entities" or the "Applicants"), which are currently in protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCA").
2. Communications, Energy and Paperworkers Union of Canada (the "CEP" or the "Union") brought a motion in the Applicants' CCA proceedings seeking, *inter alia*, the following:
 - (a) An Order appointing the Union to represent current and former members of the Union, including pensioners, employed or formerly employed by the Applicants ("Current and Former Members") in the proceedings under the

Companies' Creditors Arrangement Act ("CCAA"), the *Bankruptcy and Insolvency Act* (the "BIA") or in any other proceeding which has been or may be brought before this Honourable Court (the "Proceedings");

- (b) An Order that all reasonable legal, actuarial and financial expert and advisory fees and all other incidental fees and disbursements, as may have been or shall be incurred by the Union and their counsel, shall be paid by the Applicants on a bi-weekly basis, forthwith upon the rendering of accounts.
- (c) An Order declaring that the property of the Applicants is subject to a security or charge in the amount of \$200,000 in respect of the fees and expenses of the Union incurred in connection with retaining any financial, legal or other experts necessary in order to effectively participate in the Proceedings; and
- (d) An Order that the Applicants shall forthwith provide to the Union and their counsel, without charge:
 - (i) The names, last known addresses and last known email addresses (if any) of all the Current and Former Members, whom they represent, as well as applicable data regarding their entitlement, subject to a confidentiality agreement and to only be used for the purposes of the Proceedings;

- (ii) All documents and data, including generally those pertaining to the various pension, benefit, and severance and termination payments and other arrangements for group health, life insurance, retirement and severance payments, including up to date financial information regarding the funding and investments of any of these arrangements; and
- (iii) Any other documents relevant to the Claims.

Reference: Notice of Motion; Motion Record of CEP, Tab 7

3. The motion proceeded before the Honourable Justice Pepall of the Superior Court of Justice (Commercial List) on October 27, 2009. Pepall J. decided the matter by way of Order and endorsement dated October 27, 2009. The parties were unable to resolve certain disputes over the form and content of CEP's Order and attended before Pepall J. to resolve such. Pepall J. issued a supplementary endorsement dated November 4, 2009 disposing of the outstanding issues between the parties.
4. Pursuant to the Order of Pepall J. dated October 27, 2009, CEP was authorized to represent its former members and authorized to continue to represent its current members in the Proceedings (with the exception that CEP's former members that participate in the CH pension plan would be represented independently). All other relief sought in CEP's motion, including funding and a charge or security against the debtor's estate, was denied.

5. CEP now seeks leave of this Honourable Court to appeal the Order and endorsements of Pepall J.

PART II – THE FACTS

6. CEP represents approximately 1,000 bargaining unit employees employed by the Applicants in Vancouver (BCTV), Kelowna (CHBC), Edmonton (CITV), Calgary (CICT), Lethbridge (CISA), Saskatoon (STV), Winnipeg (CKND), Toronto and Ottawa (Global Ontario) and Halifax and New Brunswick (Global Maritimes). A principal function of CEP as exclusive bargaining agent of employees employed by the Applicants is the negotiation and administration of collective agreements.

Reference: Affidavit of Peter Murdoch sworn October 21, 2009 at paragraph 5 (“Murdoch Affidavit”); Motion Record of CEP, Tab 8, page 54.

7. CEP has negotiated eleven (11) collective agreements with the Applicants, all of which are nominally expired (“Collective Agreements”).

Reference: Murdoch Affidavit at paragraph 6; Motion Record of CEP; Tab 8, page 54.

8. The terms and conditions of the Collective Agreements negotiated by the Union have a direct impact on the benefit entitlements payable to the Union’s Former Members. The pension and post-retirement/post-employment benefits currently enjoyed by the Union’s Former Members are the product of benefits negotiated by the Union with the Applicant that form part of the collective agreements. Given the foregoing, the Union has extensive knowledge of the issues that may

arise in respect to the interests of its Former Members during the Applicants' CCAA proceedings.

Reference: Murdoch Affidavit at paragraph 7; Motion Record of CEP, Tab 8, page 54.

9. The Applicants sponsor eleven (11) defined benefit plans ("DB Plans") and four (4) defined contribution plans ("DC Plans"). The DB Plans have a combined windup deficiency of \$32,824,126. The estimated annual current service cost in respect of the DB Plans is \$5,147,181.00. The annual special payments made by the Applicants in respect of the deficiencies in the DB Plans is \$4,983,348.00. If certain funding relief measures are not achieved by the Applicants as at 2010, then the annual special payments made by the Applicants is projected to increase by approximately \$1.7 million.

Reference: Murdoch Affidavit at paragraph 8; Motion Record of CEP, Tab 8, page 54-55.

10. The Applicants' DB Plans, excluding the recently closed CHCA-TV and sold CHCH-TV and CHCK-TV, have, in aggregate, approximately 1,237 active members, approximately 121 pensioners and 313 deferred vested and other members. The vast majority of the aforementioned active members, pensioners and deferred vested and other members are the Union's Current and Former Members.

Reference: Murdoch Affidavit at paragraph 9; Motion Record of CEP; Tab 8, page 55.

11. The Applicants also provide post-retirement/post-employment benefits to the Union's Former Members, including health, dental and term life insurance benefits. The aggregate annual cash contribution in the 2008 fiscal year to

provide such post-retirement/post-employment benefits was approximately \$0.4 million. The aggregate accrued benefit obligation relating to these benefits as at the end of the fiscal 2008 year totalled approximately \$16.7 million.

Reference: Murdoch Affidavit at paragraph 10; Motion Record of CEP; Tab 8, page 55.

12. On October 6, 2009 the Applicants obtained an order pursuant to the CCAA staying all proceedings and claims against them (the "Initial Order"). The effect of the Stay Order has been far reaching. Immediately after the issuance of the Initial Order, the Applicants stopped making payments to a number of the Union's Formers Members that were in receipt of salary continuance. Further, upon the issuance of the Initial Order, the Applicants refused to continue a number of important proceedings, including a termination grievance and proceedings before the Canada Industrial Relations Board pertaining to the configuration of the Union's bargaining units. The Union has a substantial number of outstanding grievances against the Applicants that have been stayed by the Initial Order.

Reference: Murdoch Affidavit at paragraph 11; Motion Record of CEP, Tab 8, page 55.

13. The Initial Order has necessitated filing a large number of diverse and complex claims on behalf of the Current and Formers Members, including complex pension related claims. The Union intends to facilitate and advance the claims of its Current and Former Members.

Reference: Murdoch Affidavit at paragraph 12; Motion Record of CEP; Tab 8, page 56.

14. To the extent possible, the Union has been communicating with the Current and Former Members regarding the Proceedings and the impact of the Initial Order. Given the Union's localized operations, it has been effective in keeping the Current and Former Members informed and advised of the progress of the Proceedings. Counsel for the Union has contacted counsel to the Applicants in writing and by telephone to request the contact information of the Current and Former Members.

Reference: Murdoch Affidavit at paragraph 13; Motion Record of CEP; Tab 8, page 56.

15. As a result of the current economic crisis, the number of companies seeking protection under the CCAA has risen dramatically. The Canadian forestry and media industries have been particularly damaged as a result of the economic crisis. Due to the Union's strong presence in the Canadian forestry and media industries, a significant number of companies that have a collective bargaining relationship with the Union have sought protection under the CCAA or ceased operations altogether.

Reference: Murdoch Affidavit at paragraph 14; Motion Record of CEP; Tab 8, page 56.

16. The result of has been twofold. The Union has incurred significant costs associated with representing its Current and Former Members in proceedings under the CCAA. In addition to the present proceeding, the following is list of employers that employ the Union's members which have recently been granted

protection under the CCAA: AbitibiBowater, Fraser Papers Inc., Smurfit-Stone, Grant Forest Products, Quebecor, Nortel, Korex and Bruce R. Smith. The costs associated with meaningfully participating in such proceedings has been substantial and has adversely affected the Union's financial position to the point where its ability to provide effective representation to the Current and Former Members in the Proceedings is dependent on receipt of funding with respect to the provision of that representation. Such funding would enable the Union to retain any financial, legal or other experts necessary to provide the Current and Former Members with effective representation in the Proceedings.

Reference: Murdoch Affidavit at paragraph 15; Motion Record of CEP, Tab 8, page 57.

17. In the preceding six (6) months, the Union has expended approximately \$250,000 on legal on costs in connection with CCAA proceedings. The Union anticipates that such costs will increase substantially in the near future.

Reference: Murdoch Affidavit at paragraph 16; Motion Record of CEP, Tab 8, page 57.

18. Although Current Members pay union dues, Former Members do not. Accordingly, a significant amount of cash is expended on the representation of a group that does not contribute financially. In other words, the representation of Former Members in proceedings under the CCAA, although part of the Union's internal mandate, creates costs that are outside the Union's cost structure. This has placed extraordinary strain on the Union financial position.

Reference: Murdoch Affidavit at paragraph 17; Motion Record of CEP; Tab 8, page 57.

19. Further, the economic crisis has resulted in a dramatic reduction in the Union's membership levels. Over the preceding twelve (12) months, the Union has lost approximately 12,000 members. This extraordinary loss in membership is the largest experienced by the Union over any twelve (12) month period since its inception. This, of course, has caused a corresponding decrease in the amount of union dues collected by the Union, further undermining its financial position and ability to provide effective representation in the Proceedings.

Reference: Murdoch Affidavit at paragraph 18; Motion Record of CEP, Tab 8, page 57.

20. The current economic crisis has created the perfect storm. On the one hand, the Union is expending an extraordinary amount of cash on the representation of its Current and Former Members in proceedings under the CCAA. On the other hand, the Union's membership levels, and therefore dues collected, have been considerably reduced. As such, the Union requires funding in order to provide effective representation to the Current and Former Members in the Proceedings.

Reference: Murdoch Affidavit at paragraph 19; Motion Record of CEP; Tab 8, page 58.

21. On October 27, 2009, two motions were heard before the Honourable Justice Pepall:
- (a) A motion brought by the Applicants requesting an Order appointing certain individuals to represent the Applicants' retirees ("Representatives") in the Proceedings (including CEP's former members

that are entitled to benefits under the CH pension plan and excluding all other CEP's current and former members) and an Order appointing the law firm Cavalluzzo as representative counsel ("Cavalluzzo Motion"); and

- (b) A motion brought by CEP requesting, *inter alia*, an Order appointing CEP as representative of its current and former members (excluding its former members that are entitled to benefits under the CH pension plan), an Order appointing CaleyWray as representative counsel to CEP and its current and former members, and an Order registering a charge or security against the debtors' estate pursuant to section 11.52 of the CCAA ("CEP Motion").

22. On October 27, 2009, Pepall J. issued an endorsement in respect of the above-noted motions. In respect of the Cavalluzzo Motion, Pepall J. found that the balance of convenience favoured granting the Order sought and therefore *appointed* the Representatives and Cavalluzzo as representative counsel. The retirees encompassed by the Cavalluzzo Motion were found to be vulnerable creditors without the resources necessary to effectively protect their interests in the Proceedings. Further, Pepall J. found that Cavalluzzo was qualified to act as representative counsel.

Reference: Endorsement of the Honourable Justice Pepall dated October 27, 2009 at paragraphs 14-15; Motion Record of CEP, Tab 3, page 27.

23. In respect of the CEP Motion, Pepall J found it appropriate to *authorize*, rather than *appoint*, CEP to represent its current and former members. In respect of the

CEP's request for funding, Pepall J. concluded that such an Order was inappropriate. Pepall J further held that since no charge or security was requested or granted to the Cavalluzzo representation order none should be granted to CEP.

Reference: Endorsement of the Honourable Justice Pepall dated October 27, 2009 at paragraphs 18-20; Motion Record of CEP, Tab 3, pages 28-29.

24. Subsequently, disputes arose between CEP and the Applicants as to the form and content of CEP's Order. The parties were unable to resolve same and, on November 4, 2009, appeared before Pepall J. in chambers to dispose of the disputes. During the aforesaid chambers appearance, counsel to CEP presented Pepall J. with an draft Order that was modified to reflect Her Honour's endorsement of October 27, 2009.

Reference: Proposed CEP Order; Motion Record of CEP, Tab 5.

25. At the conclusion of the chambers appearance, Pepall J. issued a subsequent Order/endorsement disposing of the parties' disputes and modifying CEP's Order.

Reference: Order/Endorsement of the Honourable Justice Pepall dated November 4, 2009; Motion Record of CEP; Tab 4.

26. CEP's modified Order is substantially and materially different than the Cavalluzzo Order. The differences include, amongst other things, the following:

- (i) The Representatives and Cavalluzzo were "appointed" whereas the CEP and CeleyWray were "authorized";

- (ii) The Cavalluzzo Order includes a direction that the CMI Entities shall provide to Cavalluzzo the contact information of those it represents, as well as documents and data as are relevant to issues affecting the retirees it represents. The CEP Order contains a direction that the CMI Entities shall "use their best efforts" to provide the CEP or CaleyWray with the contact information of the Current and Former Members. The CEP's request for documents and data, identical to that which was granted in the Cavalluzzo Order, was refused on the basis that such was not properly the "subject matter of a court Order";
- (iii) The Cavalluzzo Order provides that all reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements incurred by the Representatives and Cavalluzzo shall be paid by the CMI Entities. The CEP's request for funding was denied;
- (iv) The Cavalluzzo Order provides that the Representatives and Cavalluzzo may take any steps necessary to carry out the terms of the Order. No such provision is found in the CEP's Order;
- (v) The Cavalluzzo Order includes a limitation of liability for both the Representatives and Cavalluzzo. No such provision is found in the CEP's Order; and

- (vi) The Cavalluzzo Order permits Cavalluzzo to seek the advice and direction of the Court. No such authority is found in the CEP's Order.

Reference: Order of the Honourable Justice Pepall dated October 27, 2009; Motion Record of CEP, Tab 2 ("CEP Order").

Reference: Order of the Honourable Justice Pepall dated October 27, 2009; Motion Record of CEP, Tab 6 ("Cavalluzzo Order").

27. CEP now seeks leave to appeal the CEP Order and endorsements issued by the Honourable Justice Pepall.

PART III – THE PROPOSED QUESTIONS TO BE DETERMINED ON APPEAL

28. This appeal raises serious questions in respect of insolvency and labour proceedings:

- (i) What are the appropriate factors to consider and apply in the exercise of judicial discretion pursuant to section 131(1) of the *Courts of Justice Act* to award funding/interim costs in respect to the representation of individual creditors of a debtor company in a CCAA proceeding that are represented by a single representative pursuant to Rule 10 of the *Rules of Civil Procedure*?
- (ii) Was it appropriate for the Honourable Justice Pepall to draw distinctions between the Cavalluzzo and CEP Orders including, without limitation, granting funding/interim costs in the Cavalluzzo Order but denying the CEP's request for same?

- (iii) Was section 11.52 of the CCAA appropriately considered and applied in the circumstances? and
- (iv) Did the Honourable Justice Pepall commit an error in her findings of fact?

PART IV – THE ISSUES AND ARGUMENT

29. As the Order of Pepall J. was rendered in a proceeding under the CCAA, leave to appeal is required under section 13 of the CCAA.
30. The test to be applied for leave to appeal under section 13 of the CCAA is well established. It has four components:
- (i) Whether the point on appeal is of significance to the practice;
 - (ii) Whether the point raised is of significance to the proceedings itself;
 - (iii) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - (iv) Whether the appeal will unduly hinder the progress of the action.

Reference: *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A. at para. 2; Book of Authorities of the CEP, Tab 1, para. 2

Re Country Style Food Services Inc. (2002), 158 O.A.C. 30 (C.A.) at para. 15; Book of Authorities of the CEP, Tab 2, para. 16

The Points on Appeal is of Significance to the Practice

31. Trade unions, acting on behalf of their membership, have become increasingly involved in insolvency proceedings. However, the scope of a trade union's representative obligations in such proceedings has yet to be addressed by an appellate court. The endorsement of Pepall J. dated October 27, 2009 draws numerous distinctions between the CEP Order and the Cavalluzzo Order. One such distinction is that CEP was *authorized*, rather than *appointed*, to represent its former members in the Proceedings. Although the basis on which this distinction is drawn remains unclear, it appears as though Pepall J. has concluded that CEP has some pre-existing authority to represent its former members in the Proceedings sufficient to render a court Order appointing CEP unnecessary. The legal relationship between a trade union and its former members, however, is not of the legal character implied by the Order and endorsements of Pepall J. The scope of a trade union's obligations vis-à-vis its former members is an issue that needs to be resolved and that is essential to both insolvency and labour practices.

32. Given that trade unions have become far more active in insolvency proceedings, issues pertaining to costs/interim funding are important to both insolvency and labour practices generally. The costs associated with meaningfully participating in insolvency proceedings can be taxing and fall outside the typical cost structure of a trade union. The endorsement of Pepall J dated October 27, 2009 has the effect of precluding a union from receiving costs/interim funding where it seeks

to represent the interests of its current and former members in insolvency proceedings. The issue of whether a trade union is entitled to have its costs borne by a debtor company in proceedings under the CCAA is an issue that has received no appellate attention. Appellate guidance in respect of this issue would be exceedingly helpful to the practice, and this case affords a unique opportunity to provide it.

33. Moreover, Pepall J. failed to consider CEP's submissions concerning the application of section 11.52(1)(c) of the newly amended CCAA. Section 11.52(1)(c) of the CCAA, which came into force on September 18, 2009, provides a mechanism for stakeholders to secure the costs of participating in a CCAA proceedings:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

...

(c) any financial, legal or other experts necessary by any other interests person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

34. The undisputed evidence on the record before Pepall J. indicated that funding and/or a charge or security against the debtor's estate was necessary to ensure that CEP was able to provide effective representation and otherwise effectively participate in the proceedings on behalf of its current and former members.

35. Notwithstanding the evidence and CEP's submissions in respect of the application of section 11.52(1)(c) of the CCAA, Pepall J.'s consideration of such was limited to a statement indicating that no charge or security was warranted for CEP since none was given in the Cavalluzzo Order.

Reference: Endorsement of the Honourable Justice Pepall dated October 27, 2009 at paragraph 20; Motion Record of CEP, Tab 3, page 29.

36. In CEP's submission, Pepall J. erred in her consideration and application of section 11.52(1)(c) of the CCAA. No consideration was given to the statutory criteria set out in the CCAA nor was any consideration given to the evidence on the record. The purported basis for denying CEP's request pursuant to section 11.52(1)(c) was that the Cavalluzzo Order did not contemplate same (we note parenthetically that this was the only occasion in which Pepall J. sought consistency with respect to the CEP and Cavalluzzo Orders). With respect, CEP submits that Pepall J. committed an error of law and appellate intervention is necessary.

37. Appellate intervention is particularly warranted given that this was the first time that section 11.52(1)(c) received judicial scrutiny. The proper interpretation of section 11.52(1)(c) is essential to the practice generally. Where an leave to appeal concerns the first consideration of a section or subsection of the CCAA, leave to appeal is generally granted.

Reference: *Re Blue Range Resource Corp.* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.) at para. 14; Book of Authorities of the CEP, Tab 3.

The Points Raised are of Significance to the Proceeding Itself

38. The points raised are of significance to the Applicants' CCAA proceeding. It is imperative that the CEP, and other trade unions participating in proceedings under the CCAA, have a full and proper understanding of the scope of their representative obligations. Without such an understanding, CEP will be unable to ensure that it has satisfied its duty to represent its members fairly. The distinction drawn by Pepall J. between "authorization" and "appointment" is ambiguous and, moreover, is erroneous insofar that distinction purports to reflect a pre-existing legal relationship between a trade union and its former members. Clarity on these issues is vitally important to CEP's fulfillment of its obligations in the Applicants' CCAA proceedings.
39. Moreover, the issue of costs/interim funding that forms part of Pepall J.'s Order of October 27, 2009 is important to the proceeding, both in respect of CEP's ability to effectively participate in the proceedings, as well as in respect of the rights of CEP's current and former members. The cost associated with advancing the interests of CEP's current and former members in the Applicants' CCAA proceeding fall outside the Union's cost structure. The claims of the current and former members were complex, and will require CEP to retain financial, legal and other experts in order to effectively advance their interests in the proceedings.
40. The decision of Pepall J. to deny costs/interim funding to the CEP but grant it to the Representatives places CEP at an unfair and arbitrary disadvantage. Moreover, CEP's current and former members, a vulnerable group of employee

creditors, are entitled to the same standard of representation, and the same benefits from the Applicants, as every other class of employee creditor. Appellate guidance on the above issues would be of great assistance in the context of the Applicants' CCAA proceedings.

The Appeal is *Prima Facie* Meritorious and Not Frivolous

41. A number of important issues are raised in this appeal.
42. First, what is the nature of the relationship between CEP and its former members? Pepall J, by implication, concluded that the CEP and its former members have a legal relationship sufficient to render an order appointing it unnecessary. Pepall J. concluded that a court Order appointing the Representatives and Cavalluzzo was necessary because a court Order provided the necessary authority to act on behalf of those it represented. Based on the foregoing distinction, it is clear that Pepall J concluded that CEP maintains a legal relationship to its former members.
43. Pursuant to federal and provincial labour law in Canada, trade unions are authorized to represent their members that fall within a collective bargaining unit. This authority extends to the representation of *employees* in a collective bargaining unit in respect of issues flowing from a collective bargaining agreement with their employer. This statutory authority does not extend to the representation of former members of a bargaining unit and retirees of an employer. While a trade union may have some residual authority to enforce certain rights of its former members vested in expired collective agreements, it

does not possess any independent source of authority to represent its former members in proceedings under the CCAA or elsewhere. Accordingly, CEP submits that Pepall J. erred in her characterization of its legal relationship to its former members.

Reference: *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 at para. 85-86; Book of Authorities of CEP, Tab 4.

44. Second, did Her Honour err by dismissing CEP's request for funding/interim costs in the circumstances? In order to consider this issue, an appreciation of the pertinent facts is necessary.

45. The individual employees that CEP represents are vulnerable creditors in the Applicants' CCAA proceedings. The interests of CEP's current and former members are directly engaged by the Proceedings and the actions taken by the Applicants before and after filing the Initial Order. In order to effectively represent its current and former members, CEP will be required to retain financial and other experts in order to advance interests in the Proceedings, including complex pension related claims. The cost associated with CEP's representation of its current and former members is significant and CEP's ability to fund such representation is at risk. If CEP did not represent its current and former members in the Applicants' CCAA proceedings, these vulnerable creditors "would fall through the cracks" and otherwise be unrepresented. No other party sought to represent their interests in the Applicants' CCAA proceedings.

46. The Court has articulated a variety of tests to assist in the determination of interim cost/funding orders. The Supreme Court has held that “in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.”

Reference: *British Columbia (Minister of Forests) v. Okanagan Indian Band [2003] S.C.J. No. 76* at para. 36; Book of Authorities of CEP, Tab 5.

47. Pepall J.’s decision does not provide any analysis or reference whatsoever to the applicable factors that the Supreme Court of Canada established for the exercise of judicial discretion in respect of cost/interim funding orders. There is insufficient consideration of the three criteria of impecuniosity, a meritorious case and special circumstances in either deciding to award funding/interim costs to Cavalluzzo or to deny same to CEP.

48. In *Fraser Papers Inc.*, the Court articulated a different test in determining whether funding/interim costs should be ordered. In that case, the Court held that funding should only be granted for the “benefit of those that otherwise would have no legal representation.”

Reference: *Re Fraser Papers Inc.* at para. 10; Book of Authorities of CEP, Tab 6.

49. The facts in the present case are clear. CEP’s ability to provide effective representation in the proceedings is contingent on receipt of funding/interim

costs. A funding Order was appropriate in the circumstances given that CEP's current and former members might otherwise be without effective representation.

50. In any event, CEP respectfully submits that there is no basis on the factual record in which the awarding of full funding to one appointed representative and the denial of such funding to another authorized representative can be sustained as a tenable distinction.
51. Third, did Pepall J. err in respect of CEP's request for a charge or security pursuant to section 11.52(1)(c) of the CCAA? The CEP respectfully submits that the answer must be in the affirmative. This was the first opportunity to have this section of the CCAA scrutinized by the Court. The analysis given to the application of section 11.52(1)(c) to CEP's request was inadequate and insufficient to provide any meaningful guidance as to its application. It cannot be that Parliament intended section 11.52(1)(c) to apply only in the limited circumstances articulated in Her Honour's decision (i.e., where another representative has requested and been granted a charge or security).
52. Section 11.52(1)(c) applies to "interested persons" that satisfy the Court that a security or charge is "necessary for their effective participation" in a CCAA proceeding. This section of the CCAA has not been previously been interpreted. Pursuant to section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21 it is deemed remedial, and should be given such fair, large and liberal construction

and interpretation as best ensures the attainment of its objectives. This approach has been regularly adopted and applied.

Reference: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Worker, Local 771*, [2005] S.C.J. No. 72, at paragraphs 17-18.; Book of Authorities of CEP, Tab 7

53. A careful application of section 11.52(1)(c) to the present facts leads to the conclusion that a charge or security ought to have been granted. The motion was brought on behalf of CEP's current and former members who have a clear and direct "interest" in the Proceedings. Moreover, they clearly are "persons" within the meaning of section 11.52(1)(c) of the CCAA. Accordingly, the relief requested is being brought on behalf of "interested persons".
54. Further, the record confirms that a security or charge is necessary to secure the effective participation and representation of CEP's current and former members in the Proceedings. Neither CEP nor the current and former members that it represents have the financial ability to retain the financial, legal or other experts necessary to ensure effective participation in the Proceedings. Further, no party, other than CEP, sought to represent the interests of its current and former members in the Proceedings. These facts were on the record and undisputed.
55. Section 11.52(1)(c) should be given a broad and liberal interpretation to ensure the attainment of its objectives. The objectives and rationale of section 11.52(1)(c) are described in a report produced by Industry Canada as follows:

The process of preparing a compromise or arrangement under the CCAA can be a time consuming and expensive proposition for all of the parties involved. To obtain an agreement requires negotiations between the debtor, creditors and other stakeholders. The expense of engaging such professionals may be beyond the resources of many stakeholders, including unions or employee groups, pensioners and trade creditors. Stakeholders without the necessary resources may be unable to participate effectively, thereby reducing their ability to protect their interests.

The intention of the reform is to ensure effective participation of interested stakeholders – either directly, if they are large creditors, or indirectly as part of a creditors' group or stakeholders group. It is expected that the court will limit the application of this provision to situations where a group of small creditors may be jointly represented rather than allow each creditor to engage their own experts at the debtor's expense.

...Paragraph (c) provides for third party's professional costs to be paid. Stakeholder groups have stated that small creditors tend not to be well represented during negotiations because the cost of engaging professionals is too high. The reform is intended to increase the ability of more creditors to act.

[emphasis added]

56. Section 11.52(1)(c), based on the legislative intent described above, is clearly applicable in the circumstances. The extraordinary expense of engaging the professionals necessary to effectively represent the interests of CEP's current and former members is significant and may impede CEP's ability to provide effective representation. Absent the provision of a security or charge, the Union, and the current and former members, will be unable to effectively participate in the Proceedings. This would be contrary to the stated intent of section 11.52(1)(c), which is to increase the ability of more creditors to act. Based on the foregoing,

it is respectfully submitted that Pepall J. erred in her consideration and application of section 11.52(1)(c) of the CCAA.

57. Fourth, are the numerous other distinctions drawn between the Orders issue to CEP and Cavalluzzo sustainable? In CEP's submission, the distinctions drawn are arbitrary and place CEP at a significant disadvantage in the Proceedings. For instance, Pepall J. ordered that the Applicants were to provide Cavalluzzo, upon reasonable request, with information that is necessary in order to advance claims against the debtor company in the proceedings. When CEP proposed the same language in its draft Order, Pepall J stated that she did "not believe it should be the subject matter of a court order."

Reference: Order of the Honourable Justice Pepall dated October 27, 2009 ("Cavalluzzo Order"); Motion Record, Tab 6, paragraph 5(b).

Reference: Proposed CEP Order dated October 27, 2009 ("CEP Proposed Order"); Motion Record, Tab 5, paragraph 4(b)

Reference: Order/Endorsement of the Honourable Justice Pepall dated November 4, 2009; Motion Record, Tab 4

58. This distinction, and the others drawn by Pepall J., are unsustainable and erroneous.
59. Finally, did the Honourable Pepall J. err in making findings of fact? In Pepall J.'s endorsement dated October 27, 2009, Her Honour made certain findings of fact which led her to conclude that "the evidentiary support that might merit a funding request is absent." With respect to the Applicants' pension plans, Pepall J. found as follows:

The CMI Entities have paid and intend to continue to pay, amongst other things, salaries, current service and special payments with respect to the defined benefit pension plans and post-employment and post-retirement benefit payments.

Reference: Endorsement of the Honourable Justice Pepall dated October 27, 2009 at paragraph 19; Motion Record of CEP, Tab 3, page 28-29.

60. The above finding of fact is inconsistent with Pepall J.'s earlier findings of fact wherein Her Honour noted that that the Applicants have terminated the CH pension plan and anticipate an unfunded liability upon the filing of the termination report. CEP represents its current members that are participants in the CH pension plan and therefore CEP represents a vulnerable group of employee creditors with a significant claim against the debtor that will require the retention of actuarial and other expertise.

Reference: Endorsement of the Honourable Justice Pepall dated October 27, 2009 at paragraph 5; Motion Record of CEP, Tab 3, page 25.

61. This inconsistency constitutes a palpable and overriding error insofar as it is the basis upon which Pepall J. concluded that there was a lack of evidentiary support that might merit a funding order. In addition to the above-noted pension issues, CEP was required to file claims in respect of approximately 36 members that had their salary continuance discontinued as of the date of the Initial Order. Further, CEP was required to file claims in respect of approximately 75 outstanding grievances against the Applicants. Finally, CEP was required to file contingent claims in the event that Applicants decided not to honour their active pension and post-retirement benefit obligations. In CEP's respectful submission, the

above facts provide a sufficient factual basis to warrant a funding Order. On the facts, there is no meaningful distinction between the nature of the claims advanced by Cavalluzzo and those advanced by CEP. Both are complex. Both require resources and expertise. And both therefore representatives ought to be entitled to the same rights pursuant to the Court's Orders.

62. Based on the foregoing, the CEP respectfully submits that the present appeal is *prima facie* meritorious.

The Appeal will Not Unduly Hinder the Progress of the Proceedings

63. The issues raised in the present appeal will not unduly hinder the progress of the Applicants' proceedings. The issues raised in this appeal are backward looking which seek to determine, after the fact, the parties' respective legal rights. This appeal does not pertain to forward looking litigation, and therefore will not in any way interfere with the Applicants' CCAA proceedings. On this basis, this court should have no concerns about allowing this appeal to proceed.

Reference: *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div.) at para. 7; Brief of Authorities of CEP, Tab 8.

CONCLUSION

64. The CEP therefore requests an order granting it leave to appeal, with costs.



ALL OF WHICH IS RESPECTFULLY SUBMITTED
this 17th day of December, 2009.

Douglas Wray



Jesse Kugler

Solicitors for the
Communications, Energy and
Paperworkers Union of Canada

SCHEDULE "A" – AUTHORITIES REFERRED TO

1. *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.)
2. *Re Country Style Food Services Inc.* (2002) 158 O.A.C. 30 (C.A.)
3. *Re Blue Range Resource Corp.*, [1999] A.J. No. 975 (Alta. CA)
4. *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 (S.C.C.)
5. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76 (S.C.C.)
6. *Re Fraser Papers Inc.*, [2009] O.J. No. 4287
7. *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72
8. *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div.)

SCHEDULE "B" – TEXT OF RELEVANT STATUTES, REGULATIONS AND BY-LAWS

Companies' Creditors Arrangement Act

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Court of appeal

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such

costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

Appeals

15. (1) An appeal lies to the Supreme Court of Canada on leave therefor being granted by that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

Courts of Justice Act

131.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Interpretation Act

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

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

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

Court File No. M38188

COURT OF APPEAL FOR ONTARIO

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