

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

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

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

Applicant

**FACTUM  
OF THE COMMUNICATIONS, ENERGY AND  
PAPERWORKERS UNION OF CANADA  
(Motion Returnable October 27, 2009)**

October 23, 2009

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**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 Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the other Applicants listed on Schedule "A"**

**APPLICANTS**

**FACTUM OF THE MOVING PARTY**

**(Returnable October 27, 2009)**

**PART I – OVERVIEW**

1. This is a motion made by the Communications, Energy and Paperworkers Union of Canada (the "Union") requesting an Order appointing the Union to represent current and former members of the Union, including pensioners and their beneficiaries, 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").

2. The scope of the representation Order requested by the Union does not encompass its Former Members of CHCH TV, which we understand to be separately represented in the Proceedings.
3. The Union is further requesting an Order that the cost associated with the Union's representation of its Current and Former Members be borne by the Applicants in order to enable the Union to retain any financial, legal or other experts that are necessary to provide effective representation and participation in the Proceedings. The Union requests that court Order a security or charge against the property of the Applicants to cover such costs.
4. Finally, the Union is requesting that the Claims Bar Date, as defined in the Claims Procedure Order dated October 14, 2009, be extended from November 19, 2009 to a date and time deemed appropriate by this Honourable Court.
5. No party, other than the Union, is seeking to represent the Current and Former Members in the Proceedings.

## **PART II - FACTS**

6. The Union 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 the Union 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, Motion Record of the Moving Party, Tab A, paragraph 5 ("Murdoch Affidavit").

7. The Union has negotiated eleven (11) collective agreements with the Applicants, all of which are nominally expired ("Collective Agreements").

Reference: Murdoch Affidavit, paragraph 6.

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, paragraph 7.

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, paragraph 8.

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, paragraph 9.

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, paragraph 10.

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. For instance, 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, paragraph 11.

13. The Initial Order may necessitate filing a large number of diverse and complex claims on behalf of the Current and Formers Members. The Union intends to facilitate and advance the claims of its Current and Former Members.

Reference: Murdoch Affidavit, paragraph 12.

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 Formers 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. To date, the production of such contact information has been refused on the basis of privacy considerations.

Reference: Murdoch Affidavit, paragraph 13.

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, paragraph 14.

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, paragraph 15.

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, paragraph 16.

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, paragraph 17.

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, paragraph 18.



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, paragraph 19.

### **PART III – ISSUES AND THE LAW**

21. The following issues arise in respect of the within motion:

- (i) Is it appropriate for the Court to appoint the Union as representative, and CaleyWray as representative counsel, on behalf of the Union's Current and Former Members?
- (ii) Is it appropriate for the court to grant the Union request for funding and a security or charge against the Applicants' property?
- (iii) Is it appropriate for the Court to grant an extension of the Claims Bar Date as requested by the Union?

### **ISSUE I: REPRESENTATION ORDER**

#### **Jurisdiction**

22. The Court has the authority under Rule 10.01(1) of the Rules of Civil Procedure to appoint representative counsel where person with an interest in an estate cannot be readily ascertained, found or served. Rule 10.01 states:

"10.01(1)...a judge may by order appoint one or more persons to represent any person or class of persons who are

unborn or unascertained or who have a present, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 199, R. 10.01(1)

23. The Honourable Justice Campbell in a matter on the Commercial List recently stated the test for a Rule 10 representation order as "a simple balance of convenience test". Justice Campbell indicated:

"...the court is to consider the inconvenience that would be experienced by each party if the order were or were not granted".

*Dugal v. Research In Motion Ltd* (2007), 87 O.R. (3d) 721 (S.C.J. - Commercial List), para. 21 ("*Dugal v. Research In Motion*")

24. In *Dugal v. Research In Motion*, Justice Campbell decided that a Representation Order was appropriate, particularly given the opt out provision that was included in the Order. In his analysis, Justice Campbell refers to *Police Retirees of Ontario v. Ontario Municipal Employees' Retirement Board*, a leading case on Representation Orders as follows:

"... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience test, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted".

*Dugal v. Research in Motion*, supra, para. 21

*Police Retirees of Ontario Inc v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.), para. 18

25. Alternatively, Rule 12.07 of the Rules of Civil Procedure provides the Court with the authority to appoint a representative defendant where numerous persons have the same interests. Rule 12.07 provides as follows:

"12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so."

*Rules of Civil Procedure, R.R.O.* 1990, Reg. 194, R. 12.07

26. The Court has wide discretion pursuant to Section 11 of the CCAA to appoint Representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the company. Section 11 of the CCAA provides as follows:

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

### **Vulnerable Group**

27. Employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings

or other related insolvency proceedings. The vulnerability of employees terminated in connection with an insolvency has been articulated as follows:

"Employees comprise the largest segment of those creditors of business organizations who have little capacity to protect themselves from the effects of their debtors. This is due in large part to the fact that the circumstances surrounding the formation of employment contracts do not facilitate the use of protective measures. A prospective employee rarely has the bargaining power to demand some form of security interests in the property of a prospective employer to protect against the possibility that amounts owing under an employment contract are not paid...Further, employees do not have the capacity to spread the loss resulting from non-payment over a large number of transactions. Nor can an employee "write-off" a loss from non-payment of wages against other income."

*R.C.C. Cuming*, Enhanced Enforcement of Wage Claims under Canadian Bankruptcy and Receivership Law, prepared for the Corporate Law Policy Directorate of Industry Canada by Robert C.C. Cuming, College of Law - University of Saskatchewan, April 1998, p. 1.

28. This reasoning extends to all Current and Former Members, who are or were employees of the Applicants. Notwithstanding that the Current Members continue to be represented by the Union, both they, the Former Member retirees, and the Union do not have all the relevant information, and have few means to pursue their claims in respect of pension, termination, severance, retirement payments and other claims in the Proceedings and will benefit from an Order appointing the Union as representative and CaleyWray as representative counsel in the Proceedings.

## **Social Benefit**

19. Granting a representation order and appointing representative counsel will provide a social benefit by assisting Current and Former Members, the vast majority of whom would otherwise have no means to advance their claims in respect of retirement and employment-related payments. Representative counsel will provide a reliable source for these individuals for information about the process. Representative counsel can speak on behalf of Current and Former Members to other stakeholders and report back through various modes of communication including the Union's website and its legal counsel's website. The Union can advocate on behalf of Current and Former Members in the negotiation of any potential Plan of Arrangement and can address with the Court issues that may affect their interests.

## **Streamlined Process**

20. Appointing the Union in a representative capacity, and representative counsel, benefits all parties as it creates a unified voice for the Current and Former Members and streamlines the process for all parties involved in Fraser Papers' insolvency. It prevents Former Members in particular from filing inconsistent claims and ensures that claims are advanced by all Members in a timely and efficient manner.

21. Having a representative and representative counsel to appointed to act on behalf of the Current and Former Members is important in large-scale insolvencies where there is potential for proceedings to become delayed if individual employees begin to advance claims and interests without an effective unified voice.

### **Efficiency**

36. Appointing a representative and having representative counsel will introduce efficiency to the process as having one representative for all Current and Former Members of the Union benefits the entire group of creditors and also the estate by avoiding multiple legal representations and proceedings. The practical reality is that a large-scale restructuring such as the Applicants' may be unable to progress in an efficient manner without a Representation Order. The large number of employees working or retired in multiple locations and provinces, and the concomitant pension and other complex issues, require effective and efficient advocacy.
37. Protracted and unnecessary litigation depletes the assets of the company and its estate, if applicable, which is a concern in complex insolvency proceedings. As stated earlier, by authorizing specialized counsel to provide legal services to all Current and Former Members as a group, rather than having employees and retirees individually seeking their own counsel, protracted and duplicative proceedings are avoided and the assets of all interested parties are maximized.

*Ontario (Director, Mortgage Broker's Act) v. Coulter* [1990] O.J. 1334 (Ont. S.C.J) at 9.

38. The "balance of convenience test" as outlined in *Dugal v. Research in Motion* has been met in this case. The Current and Former Members are not otherwise represented and are a vulnerable group that requires assistance in the restructuring process. The appointment of the Union as representative and CaleyWray as representative counsel to the Current and Former Members would provide a social benefit and would streamline and introduce efficiency to the process for all parties involved in the Proceedings. It is therefore beneficial that the Union be appointed as representative, and CaleyWray be appointed as representative counsel, to the Current and Former Members.

*Fraser Papers Inc.*, Endorsement the Honourable Pepall J. dated September 17, 2009, at paragraph 7.

*Nortel Networks Corp.*, [2009] O.J. No. 2166, at paragraphs 13-14.

### **The Union as Representative**

39. No other party may seek to represent the unionized current employees (the Current Members) since the Union has legally binding exclusive bargaining rights pursuant to the applicable provincial labour legislation with respect to those employees.

40. The Courts have held that absent clear legislation to the contrary, unions have legal status in courts when such status is necessary for them to perform their labour relations functions.

*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2002] O.J. No. 4831 (Ont. C.A.), at paras. 25 – 27.

41. Unions have legal status in the courts, which is to say that they must be treated as juridical entities, for the purpose of defending their members or former members from the possible adverse effects of any changes to their pensions and benefits.

*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2002] O.J. No. 4831 (Ont. C.A.), at para. 32.

42. Section 3(2) of the *Rights of Labour Act* does not prevent the Union from being added as a party to act in a representative capacity. The section states:

A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of this Act or of the *Labour Relations Act*.

*Rights of Labour Act*, R.S.O. 1990, c.R.33

43. When considering whether s. 3(2) prohibits the Court from making a union a party to an action, the Court asks “whether irrespective of the RLA or the OLRA, the [applicants] may be parties to an action in court.”

*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2002] O.J. No. 4831 (Ont. C.A.), at para. 30.



44. The Union has collective agreements with the Applicants which only it has the right to enforce, or to re-negotiate, if necessary. It also has extensive knowledge of the terms and conditions of the collective agreements and pension and benefits entitlements.

Reference: Murdoch Affidavit, paragraphs 5-7

45. Furthermore, since the Pension Plans form part of all of the collective agreements, the retirees (the Former Members), have always had their interests represented through the Union and the collective agreements, the Union is the appropriate representative for them in the context of a restructuring in which defined pension and other rights that were negotiated by the Union may have to be addressed in the Proceedings.
46. The representative who is granted representative status on behalf of all Current and Former Members should create a unified voice for them, should have their trust, and should be well-equipped to deal with all their issues and interests.
47. The Union is a large, established, democratically run and well-organized entity that has as its mandate to negotiate collective agreements and represent the interests of its members. It has in place established means of communicating with its members and former members.

Reference: Murdoch Affidavit, paragraphs 4, 5 and 13

48. Given its localized operations, the Union has been effective in keeping Current and Former Members informed and updated as to the progress of the proceedings. The Union has been engaged in determined efforts to create a strong and unified voice for the Current and Former Members in the CCAA process as exemplified by its efforts on behalf of its members and its retention of qualified legal counsel.

Reference: Murdoch Affidavit, paragraph 13

49. Given that the Union is national in scope it has the facility and infrastructure to address the needs and interests, and the informational requirements of its Current and Former Members whether they are located in British Columbia, Ontario or anywhere else.

50. For the reasons outlined above, the Union is well-suited to represent all Current and Former Members in the Applicants' Proceedings in respect of all of their interests, and therefore the Court should exercise its discretion pursuant to section 11 to grant a Representation Order in favour of the Union.

### **The Appointment of Representative Counsel**

51. It is important for the Union, if appointed as representative on behalf of the Current and Former Members, to retain legal counsel which is well-suited to

dealing with the labour and pension issues relating to all Current and Former Members, and who will adequately advance their claims.

### **Duplication**

52. As stated in *Ontario (Director, Mortgage Broker's Act) v. Coulter*, by authorizing specialized counsel to provide legal services to all of the Union's members and Fraser Papers' Current and Former employees as a group, rather than having individuals seek their own counsel, protracted and duplicative proceedings are avoided and the assets of all interested parties are maximized.

*Ontario (Director, Mortgage Broker's Act) v. Coulter* [1990] O.J. 1334 (Ont. S.C.J.) at 9.

53. By appointing the Union as representative for all Current and Former Members and CaleyWray as representative counsel, the Court will avoid offending the principle of multiplicity and will avoid the duplicative proceedings that may arise.

### **Advantages of appointing CaleyWray as Representative Counsel**

54. It is in the best interests of the Current and Former Members to be represented by counsel of the Union's choice who are best able to deal with all of their claims and have the experience required to deal with all of the issues in the Proceedings.

55. The lawyers and administrative staff at CaleyWray have the necessary experience and are equipped to deal with all of the legal issues and communications that may be required in these proceedings.

Reference: Affidavit of Gail Misra sworn October 21, 2009, paragraphs 4-5

### **Unified Voice**

56. It is in the best interests of the Current and Former Members to be represented as one group with a strong, unified voice as opposed to being fragmented into smaller, weaker constituent groups. The Union has a large number of Current and Former Members who are and were employed by the Applicants across Canada, has a developed strong network of communication and has retained legal counsel that is well-suited to deal with all issues affecting the Current and Former Members.

### **Economies of Scale**

57. It is in the best interests of the Current and Former Members to take advantage of the economies of scale that will come with having one able representative counsel acting for all of them. Should the Court grant the Order sought by the Union, the Current and Former Members will be able to take advantage of experienced legal counsel at no cost.

### **No Conflict of Interest**

58. As all the Current and Former Members may ultimately have unsecured claims against the Applicants in the CCAA proceedings, there is no conflict of interest as been the claims the Current and Former Members.
59. While Current Members have an interest in preserving their employment with the Applicants and thus may have somewhat different interests than Former Members, there is no conflict of interest between these groups because the Current Members would also have an interest in the preservation and maintenance of the DB Plans and post-retirement/post-employment benefits.
60. There is no actual conflict of interest at this time and the Court need not be concerned with hypothetical scenarios which may never materialize. In the unlikely event of a serious conflict between the groups, such matters can be brought to the attention of the Court by the Union and its counsel for resolution.
61. For the reasons listed above, it is in the best interests of the Current and Former employees that the Representation Order be granted in favour of the Union and that its legal counsel CaleyWray be appointed as Representative Counsel.

**ISSUE II: FUNDING AND CHARGE OR SECURITY**

62. The court has jurisdiction to order funding, or costs, to a party pursuant to section 131(1) of the *Courts of Justice Act*, section 197(1) of the BIA and section 11 of the CCAA.

63. The court has held that funding in respect of representation provided in a CCAA proceeding should be ordered where, absent funding, representation would not be available.

*Fraser Papers Inc., supra*, paragraph 10.

64. The Union's ability to provide effective representation to its Current and Former Members in the Proceedings, including retaining financial, legal or other experts, is dependent on receipt of funding in respect of the provision of that representation. As the Current and Former Members would have no such representation absent funding, it is appropriate, just and equitable for funding to be ordered in the circumstances.

Reference: Murdoch Affidavit, paragraph 15.

65. In addition to the court's above-noted jurisdiction to order funding, section 11.52(1) of the recently amended CCAA provides that the court may order a security or charge against the property of a debtor company to cover the costs incurred by an interested person where it is necessary to ensure effective participation in a CCAA proceedings. Section 11.52(1) states:

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 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.

66. Section 11.52(1)(c) applies to interested persons that satisfy the court the a security or charge is necessary for their effective participation in CCAA proceedings. This provision of the CCAA has not been previously been interpreted. Its application to the present circumstances, therefore, is a matter of statutory interpretation. Pursuant to section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives. This approach has been regularly adopted an applied.

*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Worker, Local 771*, [2005] S.C.J. No. 72, at paragraphs 17-18.

67. The within motion, although brought by the Union, constitutes a request for relief under section 11.52(1)(c) on behalf of the Union's Current and Former Members. The Current and Former Members 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 in being brought on behalf of "interested persons".

68. Further, the record confirms that a security or charge is necessary to secure the effective participation and representation of the Current and Former Members in the Proceedings. Neither the Union nor the Current and Former Members that it represents have the financial capability of retaining the financial, legal or other experts necessary to ensure their effective participation in the Proceedings. Further, no party, other than the Union, is seeking to represent the interests of the Current and Former Members in the Proceedings.
69. The economic crisis has severely prejudiced the Union's ability to provide effective representation and to effectively participate in the Proceedings. The Union has a strong presence in the Canadian forestry and media industries which have been particularly damaged as a result of the current economic crisis. As a result, 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, paragraph 14.

70. As a result, the Union has incurred significant unforeseen costs associated with representing its members, current and former, in proceedings under the CCAA. The Union's involvement has been extensive and financially taxing to the point that its ability to provide effective representation to its Current and Former Members is dependent on receipt of funding. 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.



Reference: Murdoch Affidavit, paragraph 15.

71. The Union's ability to provide effective representation and to effectively participate in the Proceedings has been further impaired by cost associated with representing Former Members, whom do not contribute financially to the Union, in proceedings under the CCAA and the fact that the Union has shedding members as a result of the economic crisis at record rates. Based on the foregoing, the effective participation and representation of the Current and Former Members is dependent on securing a charge or security against the Applicants' property in accordance with section 11.52(1)(c).

Reference: Murdoch Affidavit, paragraph 18.

72. 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.

73. Section 11.52(1)(c), based on the legislative intent described above, is clearly applicable in the circumstances. The expense of engaging the professionals necessary to effectively represent the interests of the Current and Former Members is beyond the financial ability of the Union. Absent the provision of resources, 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, the Order requested by the Union with respect to section 11.52(1)(c) is consistent with Parliament's intent and is therefore appropriate in the circumstances.
74. Section 11.52(2) permits the court to order that the security or charge rank in priority over the claim of any secured creditor of the company. It is the Union's position that its request for a security or claim in connection with section 11.52(1)(c) should be ranked consistently with the securities and charges previously ordered in respect of the costs of the financial, legal or other experts of other stakeholders in the Proceedings, including those of the Applicants and Monitor.

### **ISSUE III: EXTENSION OF THE CLAIMS BAR DATE**

75. The court has the jurisdiction and authority to extend the Claims Bar Date, as defined in the Claims Procedure Order, pursuant to section 11 of the CCAA. The Union submits that it is appropriate and in the interests of the stakeholders that it represents to extend the Claims Bar Date. Simply put, the Union does not have sufficient time to identify, value and process claims within the timeframe contemplated by the Claims Procedure Order. To date, the Union has been unsuccessful in its attempts to secure the contact information of the Current and Former Members from the Applicants, which has had the effect of impeding its ability to assess the status of the Current and Former Member's claims. Accordingly, it is respectfully submitted that it is appropriate for the court to order that the Claims Bar Date be extended so as to enable the Union to effectively advance the interests of the Current and Former Members.

### **PART IV: ORDER REQUESTED**

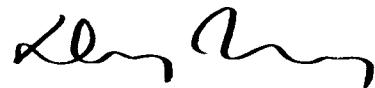
76. The Union respectfully requests:
- (a) If necessary, **AN ORDER** disposing for the need for service of the motion material.
  - (b) **AN ORDER** appointing the Union to represent current and former members of the Union, including pensioners, employed or formerly employed by the Applicants ("Current 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"). The Union may determine, advance and compromise any and all claims of its Current and Former Members claims which have arisen or may arise at law or equity or under federal or provincial legislation, including but not limited to actual or deemed trust claims,

secured or unsecured claims under the BIA, contractual claims, and any claims arising under the applicable collective agreements, provincial employment standards, pension, human rights, workplace safety and insurance legislation which may be made against the Applicants or its estate, as the case may be, relating to or arising out of the Current and Former Members employment with the Applicants (the "Claims"). For Greater Clarity, the Union does not represent CHCH retirees.

- (c) **AN ORDER** that CaleyWray is hereby appointed as counsel for the Current and Former Members in the Proceedings for all matters relating to the Claims and any issues affecting the Current and Former Members in the Proceedings.
- (d) **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.
- (e) **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.
- (f) **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.
- (g) **AN ORDER** that notice of the granting of this Order may be provided to the Current and Former Members in such form and under such terms and conditions as deemed appropriate by the Union and this Honourable Court.

- (h) **AN ORDER** that the Union, or their counsel on their behalf, are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other governmental ministry, department or agency, and to take all such steps are necessary or incident thereto.
- (i) **AN ORDER** that any individual Former Member who does not wish to be bound by this Order and all other Orders which may subsequently be made in these proceedings shall, within 30 days of receiving notice of this Order, notify the Monitor, the Applicants and CaleyWray in writing, and shall thereafter represent themselves as an independent individual party to these proceedings,
- (j) **AN ORDER** that the Union and CaleyWray shall have no liability as a result of their respective appointment or the fulfilment of their duties in carrying out the provisions of this Order save and except for any gross negligence or unlawful misconduct on their part.
- (k) **AN ORDER** that the Union shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of their powers and duties.
- (l) **AN ORDER** extending the Claims Bar Date from November 19, 2009 to a date and time deemed appropriate by this Honourable Court so as to enable the Union to establish the value of the claims of the Union's Current and Former Members and to prepare any such claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED  
this 3rd day of September 2009.



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**Douglas Wray**



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**Jesse Kugler**  
Solicitors for the  
Communications, Energy and  
Paperworkers Union of Canada

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

*Dugal v. Research In Motion Ltd* (2007), 87 O.R. (3d) 721 (S.C.J. - Commercial List)

*Police Retirees of Ontario Inc v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.)

*Ontario (Director, Mortgage Broker's Act) v. Coulter* [1990] O.J. 1334 (Ont. S.C.J)

*Fraser Papers Inc.*, Endorsement the Honourable Pepall J. dated September 17, 2009

*Nortel Networks Corp.*, [2009] O.J. No. 2166

*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2002] O.J. No. 4831 (Ont. C.A.)

*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Worker, Local 771*, [2005] S.C.J. No. 72

## **SCHEDULE "B"**

### **TEXT OF STATUTES**

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

##### *General power of court*

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

##### *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.

##### *Priority*

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

#### *Rights of Labour Act, R.S.O. 1990, c. R-33*

##### *Acts done by two or more members*

3.--(1) Any act done by two or more members of a trade union, if done in contemplation or furtherance of a trade dispute, is not actionable unless the act would be actionable if done without any agreement or combination.

##### *Trade union, party to action*

(2) A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of this Act or of the Labour Relations Act.

*Courts of Justice Act*, R.S.O. 1990, c. C-43

*Costs*

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.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

*Costs in discretion of court*

197. (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.



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

**Applicant**

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM**

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