

**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" TO THE INITIAL
ORDER (the "Applicants")**

FACTUM OF THE RESPONDING PARTY

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**FACTUM OF THE RESPONDING PARTY
(Returnable October 27, 2009)**

Part I – Overview

1. The Applicants have brought this motion to appoint Rose Stricker, David Cremasco and Lawrence Schnurr (the "Representatives") as representatives on behalf of:
 - (a) all former employees of the CMI Entities (as defined in the Maguire affidavit) (or their predecessors, as applicable), or the surviving spouses of such former employees if applicable, who are in receipt of a pension from a registered or unregistered pension plan sponsored by a CMI Entity,
 - (b) all former employees of the CMI Entities (or their predecessors, as applicable), or the surviving spouses of such former employees if applicable, who are entitled to receive a deferred vested pension from a registered or unregistered pension plan sponsored by a CMI Entity, and

(c) all former employees of the CMI Entities (or their predecessors, as applicable), or the surviving spouses of such former employees if applicable, who were, immediately before October 6, 2009 (the "Filing Date"), entitled to receive non-pension benefits from a CMI Entity,

but excluding the CEP Retirees (collectively, the "Retirees"), in this proceedings under the proceeding, in any proceeding under *Companies' Creditors Arrangement Act*, R.S., 1985, c. C-36 ("CCAA"), the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") or in any other proceeding which has been or may be brought before this Honourable Court, including without limitation, for the purpose of settling or compromising claims by the Retirees in this CCAA proceeding. The CEP Retirees are former employees of the CMI Entities (or their predecessors, as applicable) who were represented by the CEP when they were so employed and who are not entitled to benefits under the CH Employees Plan (as defined in the Maguire Affidavit) or the surviving spouses of such former employees, if applicable.

2. The Representatives are members of the CHCH 11 Retirees Association, a group of retired former employees and deferred vested former employees from CHCH TV in Hamilton, Ontario.
3. The Applicants also seek an order appointing Cavalluzzo Hayes Shilton McIntyre & Cornish LLP ("CHSMC") as representative counsel for the Retirees.
4. In the current proceedings, the Retirees are a particularly vulnerable group. Without assistance in information gathering for the court proceedings and the claims process, the Retirees are at risk of being unable to understand and protect their interests in the restructuring. The appointment of the Representatives and representative counsel, along

with expert actuarial and benefit advisors, will give the Retirees access to necessary resources they would be unable to obtain on an individual basis.

5. The Representatives and CHSMC are in the best position to represent the Retirees in the Proceedings, both for the purposes of properly representing the interests of all Retirees, and in assisting in creating an efficient and effective process. At this time, there is no conflict of interest between the formerly unionized and non-unionized Retirees, and any committee formed to aid the Representatives will have union representation and be broadly reflective of the geographic diversity of the Retirees.

Part II - The Facts

A. Canwest and Its Obligations to Retirees

6. Canwest Global is a major Canadian media company, with interests in free-to-air and subscription specialty television channels, as well as newspaper publishing and digital media operations.
7. During the late part of 2008 and throughout 2009, the CMI Entities were experiencing financial difficulties, which led to defaults on certain crucial financial obligations. As a result of these defaults and other events, the CMI Entities undertook to access the restructuring process available under the CCAA.

8. On October 6, 2009, the CMI Entities obtained an order pursuant to the CCAA staying all proceedings and claims against them (the "Initial Order").¹
9. At the date of the Initial Order, the CMI Entities had approximately 1,700 active employees. There were approximately 280 retirees and surviving spouses who were receiving a pension benefit from a CMI Entity sponsored pension plan and 180 former employees who were receiving post retirement benefits, such as extended health benefits ("PRB"). Approximately 80 of the former employees in receipt of the PRB had not been members of a union while employed with the CMI Entities.²
10. The CMI Entities, at this time, intend to honour obligations to active employees, and make current service and special payments to all but one of the CMI Entity sponsored defined benefit pension plans, as further discussed below, as well as make payments to post-employment and post-retirement benefit plans for formerly unionized employees.³
11. However, the CMI Entities intend to cease making payments for post-employment and post-retirement benefit plans for former non-unionized employees, effective November 13, 2009.⁴
12. Additionally, one of the defined benefit plans sponsored by the CMI Entities, the Global Communications Limited Retirement Plan for CH Employees (the "CH Plan") has been purported to be wound-up as of August 31, 2009. The federal regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), has required that a more recent actuarial valuation, to December 31, 2008, be filed before the termination is

¹ Affidavit of John E. Maguire, Sworn October 22, 2009, ("Maguire Affidavit"), Motion Record of the Applicants, Tab. 2, p. 3, para. 3.

² *Ibid.* at p. 4, para. 9.

³ *Ibid.* at p. 4, para. 10.

⁴ *Ibid.* at p. 5, para. 11.

approved. The CMI Entities have stated that they anticipate that such a valuation will show that the assets of the CH Plan will not be sufficient to satisfy the liabilities. In the normal course, this would give rise to the requirement for special payments from the plan sponsor. Issues regarding these special payments and the CH Plan members' benefits may arise.⁵

13. The CMI Entities had also sponsored the Canwest Global Communications Corp and Related Companies Retirement Compensation Arrangement Plan (the "CGCC RCA"). A letter of credit with Royal Bank secured those liabilities. After the CGCC RCA was terminated as of May 2009, payment of the letter of credit was made, and the process of distributing the assets to the beneficiaries began on September 4, 2009. A partial distribution was made, and a further distribution is contemplated after the refundable taxes held by the Canada Revenue Agency are refunded to Royal Trust. There will be two beneficiaries who will have not received the entire value of their entitlement after the final distribution.⁶

B. The Representatives and Representative Counsel

14. The Representatives are members of the CH Retiree Group, which has been involved with the termination of the CH Plan. They have been active in the organization of the CH Retiree Group, which has been successful in its advocacy efforts with respect to the termination of the CH Plan.
15. Rose Stricker is a non-unionized deferred vested member of the CH Plan. David Cremasco is a formerly unionized retiree with entitlements to post-retirement benefits. Lawrence Schnurr is a formerly salaried employee with entitlements to post-retirement benefits.⁷

⁵ *Ibid.* at p. 5-6, para. 14-16.

⁶ *Ibid.* at p. 5, para. 12-13.

⁷ Affidavit of Rose Stricker, Responding Motion Record, Tab 1, p. 2, para. 8 ("Stricker Affidavit"); Affidavit of David Cremasco, Responding Motion Record, Tab 2, p. 2, para. 7 ("Cremasco

16. If appointed, the Representatives will seek to form a broader committee with respect to the Retirees, with a member from each of the major population centres in which Retirees reside, and with at least one additional formerly unionized member.⁸

17. If appointed, the Representatives and CHSMC will also take the following steps:
 - a. The establishment of a toll-free telephone line to provide information to Retirees, which will be established and monitored by CHSMC staff;
 - b. The establishment of a website, including dedicated email address, to provide information to Retirees;
 - c. Conducting information sessions in each of the identified population centers where Retirees reside; and
 - d. Hiring of expert advisors, including a benefits consultant and actuary, to provide information and assist the Retirees during the claims process.⁹

18. CHSMC has acted as counsel in a number of insolvency and restructuring matters, such as Air Canada and the Canadian Press, as well as major class actions with respect to retiree benefits and pension issues. CHSMC has been involved with the CH Retiree Group since its inception, and has assisted in the advocacy efforts with respect to the CH Plan.¹⁰

Affidavit"); Affidavit of Lawrence Schnurr, Responding Motion Record, Tab 3, p. 2, para. 5 ("Schnurr Affidavit").

⁸ Stricker Affidavit, Responding Motion Record, Tab 1, p. 6, para. 23; Cremasco Affidavit, Responding Motion Record, Tab 2, p. 6, para. 24; Schnurr Affidavit, Responding Motion Record, Tab 3, p. 5, para. 20.

⁹ Stricker Affidavit, Responding Motion Record, Tab 1, p. 6, para. 24-27; Cremasco Affidavit, Responding Motion Record, Tab 2, p. 6, para. 25-28; Schnurr Affidavit, Responding Motion Record, Tab 3, p. 5, para. 21-25.

¹⁰ Cremasco Affidavit, Responding Motion Record, Tab 2, p. 4, para. 15.

Part III – Issues

19. Should the Representatives and CHSMC be appointed to represent the Retirees?

Part IV – Law and Argument

A. A Representation Order is Appropriate

20. This Honourable Court has the jurisdiction to appoint representatives and representative counsel pursuant to the *Rules of Civil Procedure*, Reg. 194, R.R.O. 1990 (the "Rules") and the CCAA.
21. Rule 10.01(f) of the Rules states:

10.01(1) In a proceeding concerning,

...

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may order to appoint one or more persons to represent any person or class of persons ... who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and how cannot be readily ascertained, found, or served.

22. The test for granting a representation order has been previously considered in the context of retiree benefits. In *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)*¹¹, the Court stated:

...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 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 ... in analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.

¹¹ [1997] O.J. No. 3086 (Gen. Div.), Brief of Authorities, Tab 1, at p. 6 of 9 (Q.L.).

23. The test has been described by this Court as a “simple balance of convenience” test:

The court is to consider the inconvenience that would be experienced by each party if the order were or were not granted.¹²

24. Under the CCAA, Section 11 allows the Court wide discretion to make an order with respect to the affairs of a restructuring company, including to appoint representatives and allow the funding of representative counsel and other advisors from the estate. It reads:

11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Wind-up Act*, where 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 this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

25. In insolvency proceedings, representation orders will be granted where it will facilitate the process and the administration of the estate.¹³
26. Funding orders will be granted where it is “fair and just” and the work of counsel will be to the benefit of the estate or necessary for the “management and preservation of the assets of the estate.”¹⁴
27. As the court stated in *Nortel*:

It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the

¹² *Dugal v. Research in Motion Ltd.* (2007), 87 O.R. (3d) 721 (C.L.), Brief of Authorities, Tab 2, at para. 21.

¹³ *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 3300 (C.L.), Brief of Authorities, Tab 3, at para. 34 and 41.

¹⁴ *Westar Mining Ltd. (Re)*, [1999] B.C.J. No. 2169 (S.C.J.), Brief of Authorities, Tab 4, at para. 17, *Dylex Ltd. (Re)*, [2002] O.J. No. 1505 (S.C.J.), Brief of Authorities, Tab 5, at para. 14.

appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.¹⁵

28. Here, the Representatives and representative counsel can assist the administration of the estate in:
 - a. Communicating with and providing information to a large group of individuals;
 - b. Bringing forward the concerns of the Retirees to this Court and the Applicants;
 - c. Assisting in participation in the claims process for the Retirees.

29. Furthermore, as discussed in *Nortel*, and as accepted by the Court, employees and retirees are in a particularly vulnerable position in restructuring proceedings:

...it is submitted that 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. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.¹⁶

C. The Representatives can ably represent all Retirees

30. The participation of the Representatives and representative counsel will be beneficial for both the Retirees and the estate. The Representatives have shown the willingness and the ability to communicate effectively with a diverse group of former employees, to advocate on behalf of their

¹⁵ *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166 (C.L.), Brief of Authorities, Tab 6, at para. 53 ("Nortel").

¹⁶ *Ibid.* at para. 13.

membership, and act as a resource for information gathering and dissemination.

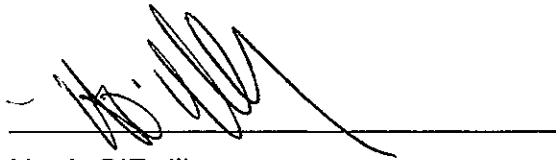
31. The proposed representative counsel has previously acted for employees, retirees and unions in large-scale insolvency proceedings and class action, and has a practice dedicated to employee and retiree employment, labour, pensions and benefits issues. Furthermore, CHSMC has been involved with the CH Retiree group since its inception, and is already well versed in the issues faced by former employees in the restructuring of the Applicants.
32. The proposed committee will, when established, have a representative from each of the major former employee groups: formerly unionized and non-unionized, deferred vested members, and members in receipt of a supplemental pension, as well as members from each of the major population centers in which retirees reside. All former employees' interests will be represented on the committee.
33. The court in *Nortel* recognized that where there may be differences in opinion between groups of employees or retirees in the future, but that no such conflict is apparent on the face of the proceedings as they are currently constituted, further directions may be provided by the court, and that until such conflict has manifested, one group of representatives and representative counsel may be appropriate.¹⁷
34. While not each Retiree has an identical claim, all retirees have a "common interest in that each one is an unsecured creditor who is owed some form of deferred compensation"¹⁸, be it entitlement from the pension plans or post-retirement employee benefits.

¹⁷ *Ibid.* at para. 53-54.

¹⁸ *Ibid.* at para. 56.

35. Accordingly, the Representatives and representative counsel can assist the Retirees by disseminating information and advocating on their behalf, and this Court in the Proceedings to promote a more efficient and effective process for all stakeholders.

All of which is respectfully submitted this 23rd day of October, 2009.

A handwritten signature in black ink, appearing to read "Hugh O'Reilly", is written over a solid horizontal line.

Hugh O'Reilly

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SCHEDULE "A" – List of Authorities

1. *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1997), 35 O.R. (3d) 177 (Gen. Div.)
2. *Dugal v. Research in Motion Ltd.* (2007), 87 O.R. (3d) 721 (C.L.)
3. *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 3300 (C.L.)
4. *Westar Mining Ltd. (Re)*, [1999] B.C.J. No. 2169 (S.C.J.)
5. *Dylex Ltd. (Re)*, [2002] O.J. No. 1505 (C.L.)
6. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166 (C.L.)

SCHEDULE "B" – Statutes and Regulations

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

10.01(1) In a proceeding concerning,

...

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may be ordered to appoint one or more persons to represent any person or class of persons ... who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and how cannot be readily ascertained, found, or served.

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

11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Wind-up Act*, where 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 this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

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

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Proceedings commenced at Toronto

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(Motion Returnable October 27, 2009)

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