

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

APPLICANTS

MEMORANDUM OF LAW OF THE APPLICANTS
(Re CEP Representation Motion)

1. This memorandum of law is submitted by the Applicants listed in Schedule "A" hereto and the Partnerships listed in Schedule "B" hereto (collectively, the "**CMI Entities**") in response to the motion brought by the Communications, Energy and Paper-workers Union of Canada (the "**CEP**") seeking, *inter alia*, an order (a) appointing the CEP to represent all current and former members of the CEP, including pensioners, who are or were employed by the CMI Entities, in this CCAA proceeding (other than the CH Retirees)¹ (the "**CEP Members**"); (b) appointing the law firm CaleyWray as representative counsel for the CEP Members in this CCAA proceeding (the "**CEP Representative Counsel**"); (c) directing the CMI Entities to fund the CEP and CEP Representative Counsel, including actuarial and financial experts retained by the CEP and/or CEP Representative Counsel; (d) granting a \$200,000 charge over the property of the CMI Entities in respect of fees and expenses incurred by the CEP; and (e) extending the Claims Bar Date (as defined in the Claims Procedure Order dated October 14, 2009) with respect to union claims to a date to be fixed by the Court.

2. The CMI Entities take no position with respect to the appointment of the CEP as representatives of the CEP Members or the appointment of CaleyWray as CEP Representative Counsel.² However, the CMI Entities strongly oppose the granting of funding for such

¹ In its draft Order in respect of the present motion, the CEP does not seek to represent the CH Retirees. The CH Retirees are dealt with in a separate representation motion – see paragraph 7.

² The CMI Entities are mindful, however, of the implications that such an order may have and, in particular, the possibility that they will be faced with numerous other similar representation motions in the future.

representation and/or the granting of a charge over their property in respect of the fees and expenses incurred for such representation. The CMI Entities also oppose any extension to the Claims Bar Date with respect to union claims.

Request for Funding is Inappropriate

3. In support of its request that all legal, actuarial and financial expert and advisory fees be paid by the CMI Entities, the CEP states that the CEP Members will not have effective representation absent such funding because, among other things, it has incurred “significant, unforeseen costs” associated with representing its current and former members in various proceedings under the CCAA, and the fact that former members of the CEP do not pay union dues or otherwise contribute financially to the CEP. The CEP also states that the “expense of engaging the professionals necessary to effectively represent the interests of the CEP Members is beyond the financial ability of the Union”.

4. The CMI Entities submit that the CEP’s funding request is both inappropriate and unnecessary. First, as noted in the affidavit of John E. Maguire dated October 22, 2009 (the “**Maguire Affidavit**”) and in the Third Report of the Monitor, since filing for CCAA protection, the CMI Entities have paid and intend to continue paying the following:³

- (a) salaries, commissions, bonuses and outstanding employee expenses for both unionized and non-unionized employees;
- (b) current service and special payments with respect to the active DB Pension Plans (as defined in the Maguire Affidavit); and
- (c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the CMI Entities.

5. In other words, because all current and former CEP Members are being kept current in respect of salary, pension and post-retirement benefits (with the exception of those union members who receive a pension under the CH Employees Plan (as defined in the Maguire Affidavit) and approximately 9 CEP members who were recently terminated from their employment and have been advised that they will no longer receive salary continuance), to the

³ Third Report of the Monitor, para. 7.

best of the knowledge of the CMI Entities, none of the CEP Members are creditors of the CMI Entities and, as such, none have (or will have) a claim against the CMI Entities.⁴ With no claims to be made against the CMI Entities, the CEP Members have no need to retain financial, legal or other experts to ensure their effective participation in the CCAA proceedings.

6. Moreover, it is submitted that it would be inappropriate to grant funding to the CEP in respect of fees and disbursements on mere speculation that the CMI Entities' may later decide to revisit its decision to continue paying salaries, pension and post-retirement benefits to the CEP Members. As the CEP itself states in its factum, "the Court need not be concerned with hypothetical scenarios which may never materialize".⁵ In the hypothetical scenario that the CMI Entities change their position in respect of current and former unionized employees, the need for funding can be addressed at that time.

7. There are some former CEP Members who receive a pension under the CH Employees Plan. There is a separate representation motion which has been brought by the CMI Entities to address this group. In that motion, the CMI Entities support the appointment of David Cremasco, Rose Stricker and Lawrence Schnurr to act as the representatives for this group, and for all other Retirees (as defined therein), and the appointment of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP ("**Cavalluzzo LLP**") to serve as representative counsel. In its draft Order in respect of the present motion, the CEP does not seek to represent the CH Retirees and thus the CEP's present motion does not apply to this group.

8. With respect to the approximately 9 CEP Members who were recently terminated and who have been notified that they will no longer be receiving salary continuance, or any other CEP Members who may be terminated in the course of this CCAA proceeding, the CMI Entities oppose the funding request because, unlike non-unionized retirees, the claims of these individuals do not need to be valued based on a complicated formula which relies on actuarial

⁴ As described in the affidavit of David Lewington sworn in support of the CEP's motion requesting that the stay of proceedings be lifted to allow it to proceed with its arbitration concerning the termination of Vicky Anderson, there are a number of outstanding grievances of CEP Members against the CMI Entities. However, as noted at p. 127 of the CEP's Motion Record in respect of that motion, the applicable collective agreements provide that the costs and expenses of arbitration shall be borne equally by the employer and the union. Accordingly, there is no need for funding to pay for the costs and expenses of the CEP in respect of outstanding grievances.

⁵ CEP Factum, paragraph 60.

methods and assumptions but will instead be based on the respective agreements that were entered into with the applicable employee at the time of his or her termination. Review of this quantification is a fact-specific exercise which will vary from former employee to former employee and which does not require expert analysis as the specific calculations can be easily verified by the former employee. In fact, in the affidavit of David Lewington, sworn in support of the CEP's parallel motion requesting that the stay of proceedings be lifted to allow it to proceed with its arbitration concerning the termination of Vicky Anderson, Mr. Lewington has already identified the amount of salary continuance that the CEP alleges to be outstanding to the 9 CEP Members who were recently terminated.⁶

9. The CMI Entities also submit that the CEP's funding request is inappropriate and unnecessary because the CEP Members are already represented in this proceeding by the CEP and the CEP has already retained CaleyWray to act for it (as evidenced by the fact that the CEP filed a notice of appearance on October 13, 2009). In addition, the granting of funding would impose an undue burden on the CMI Entities at a time when they are attempting to restructure their businesses. In *Re Fraser Papers Inc.*⁷, a decision addressing four separate motions in which each of the moving parties was seeking to be appointed as representative counsel for various groups of stakeholders, the Honourable Justice Pepall stated that funding by the Applicants "should only be provided for the benefit of those who otherwise have no legal representation".⁸ Justice Pepall also noted that funding requests should not impose an undue burden on insolvent entities struggling to restructure:⁹

The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants.

⁶ See paragraph 7(a) of the Lewington Affidavit, p.6 of the CEP's Motion Record.

⁷ *Fraser Papers (Re)* 2009 CanLII 55115 (Ont. S.C.J.) [Commercial List].

⁸ *Ibid.*, at para. 10.

⁹ *Ibid.*, at para 19.

In that case, the CEP was seeking an Order appointing it as representative of its current and former members and that its legal and expert fees be funded by the Applicants. The Court denied the CEP's request for funding.

10. It is further submitted that the funding order ought not to be granted because such funding is not currently contemplated in the cash flow projections of the CMI Entities and is not agreed to by the Ad Hoc Committee. Under section 5(m) of the Use of Cash Collateral and Consent Agreement (the "**Use of Cash Agreement**"), the CMI Entities have covenanted that they shall not be entitled to pay any professional or advisory fees unless such fees are specifically listed in the most recent 3 month cash flow forecast approved by the Consenting Noteholders (as defined in the affidavit of John E. Maguire sworn October 5, 2009 (the "**Initial Order Affidavit**")). The failure of the CMI Entities to comply with section 5 of the Use of Cash Agreement is an Event of Default under that Agreement, if declared to be so by Consenting Noteholders holding at least 51% of the aggregate principal amount of the 8% Senior Subordinated Notes held by all Consenting Noteholders.¹⁰ It is a condition of the Recapitalization Transaction that there shall not exist or have occurred any default or Event of Default under the Use of Cash Agreement.¹¹ The Ad Hoc Committee has indicated that, while it supports the funding arrangements that have been negotiated between the CMI Entities and Cavalluzzo LLP in respect of the proposed representation of the Retirees (as defined in the affidavit of John E. Maguire sworn October 22, 2009), it is opposed to the CEP's funding request.

11. Finally, the CMI Entities submit that the fact that the CEP is experiencing declining membership and financial difficulties due to the economic crisis and its involvement in numerous CCAA proceedings is irrelevant to its funding request in the present case. The internal funding of the CEP's activities, and the fact that the CEP's former members do not pay dues, is not something that ought to be of concern to the CMI Entities.

¹⁰ See section 9(a) of the Use of Cash Agreement.

¹¹ See section B(b) of the Recapitalization Term Sheet.

Request for a Charge or Security is Inappropriate

12. The CMI Entities submit that the CEP's request for a charge or security over the property of the CMI Entities to cover the costs incurred by the CEP and its counsel is similarly inappropriate.
13. In support of the relief sought, the CEP repeats many of the arguments that it makes in support of its request for funding, namely that neither it nor its former members have the financial capability of retaining the financial, legal or other experts necessary to ensure their effective participation in the proceedings. For the reasons outlined above, the CMI Entities submit that there is no need for the CEP to retain financial, legal or other experts in this CCAA proceeding because the vast majority of active and former members of the CEP do not have claims that need to be identified or verified by such experts. As stated in the Industry Canada report which is cited in the CEP's factum, section 11.52(1)(c) is intended "to increase the ability of more creditors to act". In the present case, with the exception of the approximately 9 CEP members who were receiving salary continuance immediately prior to the Filing Date, to the best of the knowledge of the CMI Entities the CEP Members are not creditors of the CMI Entities.
14. Moreover, the Term Sheet also restricts the granting of the charge requested by the CEP, unless the charge has been agreed to by CMI, the Management Directors and the Ad Hoc Committee (as all of those terms are defined in the Initial Order Affidavit).¹² Unless this condition of the Recapitalization Transaction is waived by the Consenting Noteholders, there is no obligation on the part of the Consenting Noteholders to continue to support the Recapitalization Transaction if a charge on the property of the CMI Entities is granted. The Ad Hoc Committee has indicated that it is opposed to the CEP's request that a charge be granted to secure its and its legal counsel's fees and disbursements.
15. Accordingly, it is submitted that a charge is not required for the "effective participation" of the CEP Members or appropriate in the circumstances.¹³

¹² See section B(o) of the Recapitalization Term Sheet.

¹³ Contrary to the submission at paragraph 66 of the CEP's factum, section 11.52(1)(c) of the CCAA has, in fact, been previously interpreted by the Court. Specifically, in her reasons for decision granting CCAA protection to the CMI Entities in this CCAA proceeding, the Honourable Justice Pepall accepted the submissions of the Applicants that a charge under s.11.52(1)(c) was appropriate for the financial advisors to the Ad Hoc Committee because they are "necessary to implement the recapitalization transaction". See *Re Canwest Global Communications Corp. et al.*, 2009 CanLII 55114 (Ont S.C.) [Commercial List] at para. 39.

Request for Extension of Claims Bar Date is Inappropriate

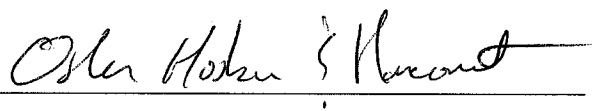

16. In this motion, the CEP also seeks an order extending the Claims Bar Date from November 19, 2009 with respect to union claims to a date and time deemed appropriate by the Court. In support of this request, the CEP asserts that it does not have sufficient time to identify, value and process claims within the timeframe contemplated by the Claims Procedure Order.

17. The CMI Entities strongly oppose this request. As noted in the affidavit of John E. Maguire sworn on October 8, 2009 in support of the Claims Procedure Order, the CMI Entities have developed the Claims Procedure, and set the timeline contained therein, in order to advance the recapitalization process in accordance with the Key Dates and timeframe contemplated in the Support Agreement. The Support Agreement requires the CMI Entities to take all steps reasonably necessary to obtain creditor approval of a plan of arrangement by no later than January 30, 2010 and to cause the plan of arrangement to be implemented by no later than April 15, 2010. If the Key Dates in the Support Agreement are not satisfied, the Support Agreement can be terminated and the Consenting Noteholders will no longer be under any obligation to support the Recapitalization Transaction. This is clearly not in the best interest of the CMI Entities.

18. Moreover, for the reasons expressed above, the CMI Entities submit that there will be little need to "identify, value and process claims" in this CCAA proceeding because, with the exception of the approximately 9 CEP Members who were receiving salary continuance immediately prior to the Filing Date, the CEP Members do not have claims that need to be identified or verified and, for the reasons set out in paragraph 8, the valuation of these claims should not be a complicated process.

19. Accordingly, the CMI Entities submit that the Claims Bar Date should not be extended.

All of which is respectfully submitted this 26th day of October, 2009.

 per 

OSLER, HOSKIN & HARCOURT LLP
Counsel for the Applicants

Schedule "A"

Applicants

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands)
18. CGS International Holdings (Netherlands)
19. CGS Debenture Holding (Netherlands)
20. CGS Shareholding (Netherlands)
21. CGS NZ Radio Shareholding (Netherlands)
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.
24. 30109, LLC
25. CanWest MediaWorks (US) Holdings Corp.

Schedule "B"

Partnerships

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post