ROGERS BOBERT
Lawyers

Daniel J. Rogers, B.A. LL.B.
Donald W. Bobert, B.Com., LL.B.*
Debra L. Burton, B.A., LL.B.

July 17, 2008

File 8825

Via Delivery

Canada Industrial Relations Board
Suite 410 - 757 West Hastings Street
Vancouver, B.C.
V6C 1A1

Attention: Mr. Tom Panelli, Regional Director (Registrar)
Western Region

Dear Sirs/Mesdames

Re: Application by Communications, Energy & Paperworkers' Union of Canada requesting a compliance order pursuant to Section 21 of the *Code and* alleging that the Employer, Canwest Media Inc., has refused to participate in the procedure required under Section 18.1 (4) of the *Code*

We are counsel for the Communications, Energy & Paperworkers' Union of Canada (the "Union" or the "Applicant").

This is an application pursuant to Section 21 of the *Code* alleging that the Employer, Canwest Media Inc., (the "Employer") has refused to participate in the procedure required under Section 18.1(4) of the *Code* as directed by the Board in its decision of November 6, 2007 and in its Reasons for Decision dated April 25, 2008.

Suite 1210 – 1140 West Pender Street, Vancouver, B.C. V6E 4G1
Phone: 604.681.5600 • Fax: 604.681.1475
e-mail: dan@rogerslaw.ca • don@rogerslaw.ca • debra@rogerslaw.ca

*a Law Corporation

THE PARTIES

Name and Address of the Applicant:

Communications, Energy & Paperworkers' Union
Ste. 540 - 1199 West Pender Street
Vancouver, B.C.
V6E 2R1

Telephone: 604-682-6501
Fax: 604-685-5078

Attention: Mr. Robert Lumgair, Business Agent

Counsel for the Applicant:

Rogers Bobert, Lawyers
Ste. 1210 - 1140 West Pender
Vancouver, B.C.
V6E 4G1

Telephone: 604-681-5600
Fax: 604-681-1475

Attention: Mr. Daniel J. Rogers/Mr. Donald W. Bobert

Name and Address of the Respondent:

Canwest Media Inc.
31st Floor, Canwest Place
201 Portage Avenue
Winnipeg, Manitoba
R3B 3L7

Counsel for the Respondent:

Thompson, Dorfmann & Sweatman
Barristers & Solicitors
Ste. 2200 - 201 Portage Avenue
Winnipeg, Manitoba
R3B 3L3

Telephone: 204-934-2534
Fax: 204-943-6445

Attention: Mr. E.W. Olson / Mr. Keith D. LaBossiere

I SUBMISSION OF FACT

1. Section 18.1 of the *Code* provides as follows:

> 18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.
>
> (2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board
>
> (a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
>
> (b) may make any orders it considers appropriate to implement any agreement.
>
> (3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.
>
> (4) For the purposes of subsection (3), the Board may
>
> (a) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
>
> (b) amend any certification order or description of a bargaining unit contained in any collective agreement;
>
> (c) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
>
> (d) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;
>
> (e) if the conditions of paragraphs 89(1)(a) to (d) have been met with respect to some of the employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions of those paragraphs are met with respect to the unit; and
>
> (f) authorize a party to a collective agreement to give notice to bargain collectively. 1998, c. 26, s. 7.

2. In the March 17, 2006 Decision of the first Reconsideration Panel, which set aside a portion of the Original Panel's Decision purporting to fashion three bargaining units, the Panel stated that the parties had not been afforded sufficient opportunity to negotiate certain matters as contemplated by the *Code*. The parties, pursuant to the first Reconsideration Decision, were given ninety days to agree upon an appropriate bargaining structure. Those discussions, however, were unsuccessful, and the parties advised the Board of this on June 14, 2006. Accordingly, the parties sought direction from the Board in relation to the manner in which certain issues were to be determined.

3. On July 6, 2006, the Board advised that it would entertain submissions with respect to various outstanding issues (the "Phase 2 issues"), including the following:

   1. Structure of the bargaining unit (i.e. number of units).
   2. Scope of the bargaining units, including "inclusions" and "exclusions";
   3. The issue of bargaining, collective agreements and termination dates of collective agreements; and
   4. Updated submissions in relation to CH Hamilton.

4. A copy of the Board's direction of July 6, 2006 is attached at Tab "1". A copy of the Union's submissions in response to that direction, filed October 6, 2006, is attached at Tab "2". These were the Union's first submissions regarding the Phase 2 issues.

5. The Union provided the Board with significant submissions with respect to the issues of the scope of the bargaining unit, inclusions and exclusions, and the applicability of the collective agreements. The Union's submissions with respect to the scope and inclusions/exclusions issues can be found at pages 40 through 51 of the document at Tab "2", while the Union's submissions with respect to bargaining and the applicability of collective agreements can be found at pages 52 through 61 of Tab "2".

6. The Board issued its "bottom line" letter decision with respect to the Union's Applications on November 6, 2007, which can be found at Tab "3".

7. In that decision, the Board stated the following with respect to what the Union has referred to as Phase 2 of the process:

> "Further to a case management conference held on October 24, 2006 in Calgary, it was determined that the Board would first hear evidence with respect to the bargaining unit structure in light of the circumstances that have evolved since the issuance of the single employer declaration in 2005. It was also determined that the

> Board would render a decision on this issue prior to adjudicating any other issues that may still be in dispute, such as inclusions and exclusions and the applicable collective agreements....."
>
> (page 4, our emphasis)
>
> "Pursuant to Sections 18.1 (3) and 18.1(4) of the *Code*, the Board retains jurisdiction to determine any outstanding issues in this matter, including aspects of issues pertaining to the collective agreements, exclusions and inclusions and final description of the new bargaining units."
>
> (page 5)

8. Subsequent to this "bottom line" decision, the Employer communicated to the Union in the form of the letter dated January 14, 2008 which is found at Tab "4".

9. Attached at Tab "5" of this submission is the response from the Union dated January 18, 2008, written by Mr. David W. Lewington, National Representative. We note the following paragraph of Mr. Lewington's letter:

> "You have correctly pointed out that there are further procedural issues, often referred to as phase two of the hearing process which arises even after the matter of the Union's application is finally completed. The Union agreed sometime ago that Mr. Robert Lumgair would be our point of contact with respect to our application and the other issues along the way and, therefore, I invite you to contact Mr. Lumgair to discuss what you will."

10. Mr. Lewington's invitation to discuss the Phase 2 issues did not elicit a reply from the Employer. The Employer's response, which can be found at Tab "6", is not responsive to the Union's request to continue with the Phase 2 process. Instead, the Employer asked the Union to engage in collective bargaining for the Eastern Bargaining Unit only, fully aware by now that the Union wished to engage in the Phase 2 process with respect to all three bargaining units. The Board's direction in the November 6, 2007 decision and the Union's request to engage in discussions respecting the Phase 2 issues was completely ignored by the Employer.

11. Given this lack of response, Mr. Lumgair wrote to the Employer in the February 21, 2008 letter found at Tab "7". After pointing out that the Union had in fact, responded to the Employer's letter of January 14, 2008 through Mr. Lewington's letter, Mr. Lumgair indicated that "collective bargaining" was not appropriate, given that the Phase 2 process has not been engaged in at all, let alone completed. Mr. Lumgair referred to this problem at page 2 of his letter:

> "With respect to Phase 2 of the hearing process, we are of the view that the number of the units have little or no bearing in the determination of bargaining unit inclusions and exclusions. As you know, the CIRB strongly encouraged the parties to commence those discussions and we are prepared to start the process at any time. It is likely that given the differences in our respective positions, we will require the offer of assistance and it would be in the best interests of everyone to start the process as soon as possible.
>
> "Please advise as to whether the Company is prepared to begin those discussions and if so, what dates are available."

12. The Employer's response to Mr. Lumgair's invitation, found in the February 29, 2008 letter at Tab "8", continued the Employer's strategy of refusing to engage in the Phase 2 process while insisting on beginning "collective bargaining" for the Eastern Bargaining Unit only:

> "In response to your request to negotiate bargaining unit inclusions and exclusions, it is our position that the number of bargaining units does have a significant impact on those discussions. Scope issues are addressed within each bargaining unit. We propose status quo scope and collective agreements for the Eastern Bargaining Unit. There is nothing that would prevent the parties from setting aside any scope issues for the duration of any agreement and there is no compelling reason to address scope if the priorities to deal with economic security issues.
>
> We are sincere in our interest to address employee concerns. We would like to address the concerns raised by the Employees in the Eastern Bargaining Unit, first. Not only do the employees want their issues addressed quickly, but given that the Hamilton agreement is the last agreement in the Eastern Bargaining Unit and will expire on March 31, 2008, the parties are ideally situated to commence collective bargaining and we look forward to doing so as soon as possible...."

13. Earlier in the Employer's response of February 29, 2008, the Employer, notably, stated the following:

> ".... from the Employer's perspective, the issues that need to be addressed in the B.C. and Alberta Bargaining Units are different than what needs to be addressed in the Eastern Bargaining Unit. Negotiations at each of the other two bargaining units in the west will be different as they operate with different collective agreements in different markets...."

14. The Union submits that the Employer's purposes are clear: it does not wish to engage in Phase 2 discussions with respect to <u>all three bargaining units</u>. It only wishes, for its own strategic purposes, to engage in general collective bargaining with respect to the Eastern Bargaining Unit.

15. Having received the Employer's reply of February 29, 2008, Mr. Lumgair again responded to the Employer in the form of the letter dated March 4, 2008 found at Tab "9". Again, Mr. Lumgair indicated a disinterest in participating in general collective bargaining but an interest in completing the Phase 2 process:

> "...we remain prepared to discuss inclusions and exclusions. Please advise as to whether the Company is prepared to begin those discussions and, if so, what dates are available."

16. The next relevant event was the publishing of the Board's Reasons for Decision on April 25, 2008, found at Tab "10" of the Employer's brief.

17. The Board referred to the Phase 2 issues as follows at paragraph 12 of those Reasons:

> "...[12] Further to a case management conference held on October 24, 2006, in Calgary, it was determined that the Board would first hear evidence on the structure of the bargaining units, considering the circumstances that have arisen since the single employer declaration was issued in 2005. It was also determined that the Board would render a decision on that issue before adjudicating any other matters that may still be in dispute, such as bargaining unit inclusions and exclusions and the applicable collective agreements."

18. The Board then proceeded to provide reasons for its determination that three bargaining units were appropriate. The majority concluded its Reasons by stating the following at paragraphs 91 and 92:

> "...[91] Having determined the number of bargaining units appropriate for collective bargaining, the Board is confident that the parties can reach an agreement on the remaining issues (scope of the bargaining units, inclusions and exclusions and collective agreements). Should the parties require assistance in reaching an agreement, the Board offers its facilitation services to help them in resolve (*sic*) any issues that may arise.
>
> [92] The parties have 90 days from the date of these for decision to reach a final agreement on the remaining issues. The parties should communicate with the Board as soon as they reach an agreement. However, the Board retains its jurisdiction to determine any question that may arise and any remaining issues pursuant to sections 18.1(3) and 18.1(4) of the *Code*."

19. The Board clearly contemplated that the parties would engage in Phase 2 discussions and, should those discussions be partially or fully unfruitful, the issues with respect to scope, inclusions/exclusions and the applicable collective agreements would be remitted to the Board for determination under Section 18.1(4) of the *Code*. The discussions with respect to Phase 2 of the process were to have been completed 90 days from April 25, 2008, or July 24, 2008.

20. Subsequent to the issuing of the Board's Reasons on April 25, 2008, Mr. Lumgair of the Union again wrote to the Employer reiterating the Union's position that it was important for the parties to engage in the Phase 2 discussions. This letter of May 14, 2008 can be found at Tab "11" and states, in part:

> "...However, as we have indicated in our previous correspondence, the Union believes it is time to proceed with discussions on scope, and inclusions/exclusions as directed by the Board. We are of the view that efforts to resolve these issues will be both useful and productive. Please advise as to whether the Employer is prepared to participate in these negotiations and possible dates on which to begin the process."

21. The Employer's response to Mr. Lumgair's letter was made on May 30, 2008 and can be found at Tab "12". This letter is almost completely non-responsive to the Union's plea to commence the Phase 2 discussions.

22. However, the Employer did make the following brief reference to the Phase 2 process:

> "On April 25, 2008, the Board directed the Parties to reach agreement under "remaining issues (scope of the bargaining units, inclusions and exclusions and collective agreements)." In your letter you propose to limit the negotiations to scope and inclusions and exclusions and state that "...collective bargaining would be premature and counter productive."
>
> (Our emphasis)

23. With respect, it appears that the Employer has misunderstood the reference to "collective agreements" at paragraphs 12 and 91 of the Board's Reasons of April 25, 2008. The reference to "collective agreements" does not refer to general overall "collective bargaining" in the sense provided for in other parts of the *Code*. The use of the words "collective agreements" refers to the power of the Board under Section 18.1(4) (c), (d) and (e) to consider what amendments are necessary to existing collective agreements in order to complete the Board's review of existing collective bargaining structure and provide a new structure through which the parties can then commence productive and fruitful collective bargaining. The specific reference to "applicable collective agreements"at paragraph 12 of the Board's Reasons of April 25, 2008 makes this abundantly clear. The Board, in using the words "collective agreements", is referring to Section 18.1 issues under the *Code*. It is not directing the parties to engage in general "collective bargaining" toward renewed or revised collective agreements as part of the Phase 2 process.

24. It is the Union's position that the Phase 2 process must be complete before general collective bargaining can begin. This is the appropriate order of proceedings under the *Code*. Mr. Lumgair alluded to this in his letter of June 17, 2008 which is found at Tab "13". He states the following at page one:

> "With respect to phase two of the hearing process, issues relating to inclusions/exclusions were not the sole reason for our original application but they were a significant part of that application. As you are aware, there is a clear responsibility to bargain any new member's wages and working conditions. Given the number of disputed positions, we believe it makes perfect sense to determine who is in the bargaining unit, prior to negotiations.
>
> The CIRB strongly encouraged the parties to commence those discussions as soon as possible and as we stated in our previous responses, we are prepared to start the process any time. We are also prepared to start those discussions in separate locations as the number of bargaining units will, in our view, have no bearing in the ultimate determinations. It is likely that given the differences in our respective positions, we will require the Board's offer of assistance.
>
> Again, please advise as to whether the Company is prepared to begin the Phase 2 process and, if so, what dates are available."

25. The Employer's final Response of June 23, 2008 is attached as Tab "14" of this application. It again completely fails to respond to the Union's request to commence Phase 2 of the process under Section 18.1 of the *Code*. The Employer continues its tactic of insisting on general collective bargaining for the Eastern Bargaining Unit only.

II. SUBMISSIONS

26. The Union submits that the documentary evidence indicates a refusal on the part of the Employer to engage in the Phase 2 process required under the *Code* and as directed by the Board's decisions. Instead, for its own strategic reasons, the Employer wishes to engage in general collective bargaining for the Eastern Bargaining Unit only prior to completing the Phase 2 process directed by the Board, which includes addressing the issues of scope, inclusions and exclusions, and the applicable collective agreements for all three bargaining units.

27. The Union submits that it is only after the Phase 2 issues are dealt with for each of the three bargaining units can the parties then engage in meaningful collective bargaining moving forward to renewed or revised collective agreements. That has been frustrated by the Employer's refusal to comply with the Board's

direction to the parties to complete the Phase 2 process within ninety days of the April 25, 2008 decision.

28. Section 21 of the *Code* provides as follows:

> "...[21] The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, and any regulation made under this Part, or with any decision made in respect of a matter before the Board.
>
> (Our emphasis)

29. Section 21 of the *Code* is a general provision under which the Board may make orders requiring compliance with Part 1 of the *Code*: *Canadian Pacific Air Lines Limited* v. *Canadian Air Line Pilots Association*, [1993] 3 S.C.R. 724, 108 D.L.R (4th) 1 (Tab "15").

30. Section 18.1(2), (3) and (4) of the *Code* allow the Board to direct the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from that review.

31. In the present case, the Board did direct the parties to enter into discussions with respect to the Phase 2 issues in the passages of the Board's Decision of November 6, 2007, referred to at paragraph 7 above, as well as the passages of the Board's Reason for Decision of April 25, 2008, referred to at paragraphs 17 and 18 above. Those discussions were to have been completed by July 24, 2008.

32. Despite this, as described above, the Employer has steadfastly refused to enter into the Phase 2 discussions pursuant to Section 18.1 of the *Code*, and as directed by the Board.

33. In these circumstances, the Union submits that it is appropriate for the Board to utilize its powers under Section 21 of the *Code* to make Orders requiring compliance with the provisions of the *Code* and with its two decisions made in this matter. Such Orders should direct the Employer to participate with the Union in discussions toward the resolving of the issues encompassed by the Phase 2 process before the Board.

34. The Union wishes to advise the Board that once the 90 day period has passed, the Union will be asking the Board to re-activate the process under Section 18.1(4) of the *Code*.

ORDERS SOUGHT

35. The Union requests the following orders of the Board:

    a. An Order or Orders pursuant to Section 18.1 and Section 21 of the *Code* directing the Employer to commence the discussions with the Applicant required by Phase 2 of the Section 18.1 process before the Board and the Board's Decisions; and

    b. Such other relief as to the Board may seem just in all of the circumstances.

36. All of which is respectively submitted.

Yours truly,

ROGERS BOBERT

DONALD W. BOBERT and DANIEL J. ROGERS
DWB/DJR:mk

cc: client
Thompson Dorfman Sweatman - Keith LaBossiere