

**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 PUBLISHING
INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS
INC., AND CANWEST (CANADA) INC.

APPLICANTS

**FACTUM OF THE APPLICANTS
(Re Assignment of Leases)**

July 5, 2010

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PART I – NATURE OF THIS MOTION

1. The LP Entities are currently in the process of selling their businesses to a corporation (the “**Purchaser**”) sponsored by members of an *ad hoc* committee of holders of 9.25% notes issued by the LP Entities and members of the syndicate of lenders that are parties to Canwest Limited Partnership’s senior subordinated credit agreement (the “**Ad Hoc Committee**”). The terms for the sale transaction (the “**AHC Transaction**”) are contained in an asset purchase agreement (as amended and as defined below, the “**Amended AHC APA**”). Pursuant to the Amended AHC APA, the Purchaser will be acquiring substantially all of the contracts and agreements of the LP Entities. In the case of contracts that cannot be assigned or that require consent prior to assignment, the LP Entities are required to use commercially reasonable efforts to obtain consents to such assignments.

2. The LP Entities have not been able to obtain consents to the assignments of four leases that are being acquired by the Purchaser.¹ In this motion, the LP Entities are requesting

¹ As of June 29, 2010, which is the date that the Affidavit of Douglas E.J. Lamb was sworn, the LP Entities had not obtained consent to assign five leases. Since that date, the LP Entities have obtained consent to assign the lease

that the Court permit the assignment of all of the four leases for which the relevant consents have not been obtained.

3. In each case, the lease in question is important to the businesses of the LP Entities, and it would be disruptive to the AHC Transaction and the ongoing operation of such businesses if the lease were not transferred to the Purchaser. Either the LP Entities or the Purchaser will cure any monetary defaults under the leases on or before the date that the Amended AHC Plan is implemented. The Monitor supports the assignment of the leases in question.

PART II - FACTS

4. On January 8, 2010, CPI, Canwest Books Inc. and Canwest (Canada) Inc. were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") pursuant to an initial Order of this Honourable Court (the "**Initial Order**"). The Initial Order also extended protection to Canwest Limited Partnership and appointed FTI Consulting Canada Inc. as monitor of the LP Entities (the "**Monitor**").²

5. The LP Entities have accepted an offer (the "**AHC Bid**") to sell substantially all of their businesses and assign certain liabilities to the Purchaser. The AHC Bid was the product of a lengthy and robust sale and investor sale and solicitation process (the "**SISP**") that commenced on January 11, 2010 and was conducted over the course of more than fifteen weeks. At the end of Phase 2 of the SISP, three binding offers were received, one of which was an offer from the Ad Hoc Committee. The AHC Bid was the only Superior Cash Offer received at the Phase 2 bid deadline.³

6. The AHC Bid presents many advantages to the LP Entities and their stakeholders. Its terms are contained in an asset purchase agreement between 7535538 Canada Inc. ("**Holdco**"), CW Acquisition Limited Partnership and the LP Entities that is dated as of May 10,

between London Life Insurance Company and Southam Inc. dated April 1, 1991, which is the first lease listed on Schedule "A" to the draft Order.

² Affidavit of Douglas E.J. Lamb sworn June 29, 2010, Motion Record of the Applicants, Tab 2 ("Lamb Affidavit"), at para. 8.

³ Lamb Affidavit, at para. 9.

2010 (the “**AHC APA**”). The LP Entities, Holdco, CW Acquisition Limited Partnership and 7536321 Canada Inc. (the “**Purchaser**”) have entered into an agreement dated as of June 10, 2010 (the “**Assignment and Amending Agreement**”) under which, among other things, CW Acquisition Limited Partnership assigned all of its rights and obligations under the AHC APA to the Purchaser. The AHC APA, together with the Assignment and Amending Agreement, is referred to as the “Amended AHC APA”.⁴ Holdco has since changed its name to “Postmedia Network Canada Corp.” and the Purchaser has since changed its name to “Postmedia Network Inc.”⁵

7. The businesses of the LP Entities are being sold to the Purchaser on a going concern basis, and the Amended AHC APA contemplates that the Purchaser will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated. The Purchaser will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities (excluding any equity or equity-like compensation, supplementary retirement or supplementary pension arrangements or plans) and other benefits of employees that will be employed by the Purchaser. The AHC Transaction is to be implemented pursuant to a consolidated plan of compromise (as amended, the “**Amended AHC Plan**”), which was approved by the required majority of affected creditors on June 14, 2010 and sanctioned by this Honourable Court by Order dated June 18, 2010.⁶

8. Pursuant to the Amended AHC APA, the assets to be acquired by the Purchaser (the “**Acquired Assets**”) include all material contracts and agreements (including leases) relating to the businesses of the LP Entities to which any of the LP Entities is a party on the third business day after the Plan Sanction Order and the Vesting Order become final. The Plan Sanction Order and the Vesting Order become final on the date of either (i) the expiry of the applicable appeal period; or (ii) in the event of an appeal or an application for leave to appeal, the final determination of such appeal by the relevant court (each a “**Contract**” and collectively, the “**Contracts**”). Where a Contract is not assignable or requires consent for an assignment, the

⁴ Lamb Affidavit, at para. 10

⁵ Lamb Affidavit, at para. 13.

⁶ Lamb Affidavit, at paras. 11-12.

Amended AHC APA requires that the LP Entities use commercially reasonable efforts to secure third party approval for such assignment.⁷

9. The LP Entities have conducted a review of all of their Contracts to identify those Contracts that either do not permit assignment or that require consent prior to assignment. The LP Entities have made efforts to make contact with all of the counterparties to secure consents where required. In the majority of cases, consents have been secured. However, the LP Entities have not been able to obtain consents to the assignment of four leases (collectively, the “**Assigned Leases**”).⁸

10. In all cases, the Assigned Leases are important to the businesses of the LP Entities that are being sold to the Purchaser. All of the Assigned Leases were entered into before January 8, 2010. It would be extremely disruptive to business operations if the businesses using the leased properties in question were not permitted to continue to use such properties pursuant to the terms of the existing leases. Significantly, the LP Entities and/or the Purchaser will pay any and all rent owing in arrears to the landlords pursuant to the Assigned Leases on or before the Plan Implementation Date.⁹

11. The Ad Hoc Committee has represented that the businesses of the LP Entities will continue to operate in substantially the same manner that they are currently operated. One of the primary objectives of this CCAA restructuring has been to secure a going concern outcome for the businesses and stakeholders of the LP Entities. The AHC Bid was identified by the Monitor as a Superior Cash Offer and accepted by the LP Entities. This Honourable Court has approved the AHC Transaction. The Amended AHC Plan was approved by a significant majority of affected creditors and was sanctioned by this Honourable Court. There is no reason to believe that the Purchaser is not an appropriate counterparty to the Assigned Leases: the Purchaser will be operating the businesses of the LP Entities on a going concern basis with no plans to immediately shut down or discontinue any operations. There is also no reason to believe that any prejudice will be caused to the landlords in question as the result of the assignment of the Assigned Leases. Moreover, the LP Entities have no reason to believe that any of the leased

⁷ Lamb Affidavit, at para. 26.

⁸ Lamb Affidavit, at para. 27.

⁹ Lamb Affidavit, at para. 28.

properties in question will be used in a different manner than they are currently used. The Monitor has reviewed the most recent cash flow forecast and the *pro forma* financial statements of the LP Entities and has expressed the view that the Purchaser is an appropriate counterparty to the Assigned Leases. The Monitor supports the assignment of the Assigned Leases.¹⁰

PART III – ISSUES AND THE LAW

12. The issue addressed in this factum is:
- (a) Should the Court permit the assignment of the Assigned Leases?

Assignment of the Assigned Leases

13. The LP Entities submit that this Honourable Court should permit the assignment of the Assigned Leases because:

- (a) The Assigned Leases are important to the ongoing operations of the businesses of the LP Entities;
- (b) The Monitor supports the assignment of the Assigned Leases;
- (c) The Purchaser has expressed an intention to continue to operate the businesses of the LP Entities in substantially the same manner that they are currently operated;
- (d) The most recent cash flow forecast and the recently released *pro forma* financial statements of the LP Entities demonstrate that the Purchaser should be able to fulfill its obligations under the leases; and
- (e) The failure to assign the leases would prejudice the transition of the businesses of the LP Entities to the Purchaser and would also prejudice the ongoing operation of certain of such businesses.

¹⁰ Twelfth Report of the Monitor dated July 1, 2010 (“Twelfth Report”) at paras. 37 and 38.

Assignment of Leases

14. The recent amendments to the CCAA that came into force on September 18, 2009 include a new provision at s. 11.3 expressly granting the Court discretion to make an order assigning the rights and obligations of a debtor company under an agreement to another person. Specifically:

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

15. Pursuant to section 11.3(2) of the CCAA, section 11.3(1) does not apply to agreements that are not assignable because of their nature or to (i) agreements entered into after the date that the CCAA proceeding was commenced; (ii) eligible financial contracts; or (iii) collective agreements.

16. Section 11.3 sets out the factors to be considered by the Court when considering whether to grant a requested assignment, which include:

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

17. Prior to making the assignment, the Court must be satisfied that all monetary defaults that have occurred under the agreement – with the exception of those arising by reason only of the company's insolvency, the commencement of CCAA proceedings or the company's failure to perform a non-monetary obligation – will be remedied.¹¹

18. Finally, the applicant seeking the assignment of an agreement must serve a copy of the order on every party to the agreement and the monitor.

19. There are no decisions specifically interpreting s. 11.3, although the order dated June 4, 2010 made by Mr. Justice Morawetz in the CCAA proceeding of Planet Organic Health

¹¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, at s. 11.3(4).

Corp. and Darwen Holdings Ltd. included a provision approving the assignment of certain agreements pursuant to s. 11.3 of the CCAA.¹²

20. Also, prior to the recent amendments to the CCAA, courts on occasion approved the assignment of non-assignable agreements or agreements containing consent provisions – including where such assignment was specifically opposed by the counterparty to the agreement in question – where the assignment was appropriate in the circumstances and in keeping with the purposes and spirit of the CCAA.¹³ For example, in *Re Playdium Entertainment Corporation et al.*, Justice Spence of the Ontario Superior Court of Justice approved the assignment of a material agreement against the wishes of the counterparty to the agreement, noting that:

Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.¹⁴

21. In this case, the proposed assignments of the Assigned Leases fulfill all of the requirements established by the CCAA:

- (a) the Monitor approves the proposed assignment;¹⁵
- (b) as noted in the Twelfth Report of the Monitor, the current cash flow projections and the *pro forma* financial statements of the LP Entities suggest that the Purchaser will be able to perform its obligations under the Assigned Leases;¹⁶ and
- (c) there is no reason to believe that the Purchaser is not an appropriate counterparty to the Assigned Leases, and the Ad Hoc Committee has indicated that the

¹² *Re Planet Organic Health Corp. and Darwen Holdings Ltd.*, Order of Mr. Justice Morawetz dated June 4, 2010 at para. 6.

¹³ *Re Playdium Entertainment Corp. et al.*, [2001] O.J. No. 4252 (S.C.J.) [Commercial List], at para. 27.

¹⁴ *Re Playdium Entertainment Corp. et al.*, 2001 CanLII 28282 (ON S.C.) [Commercial List], at para. 42.

¹⁵ Twelfth Report, at para. 38.

¹⁶ Twelfth Report, at para. 37.

Purchaser will continue to operate the businesses of the LP Entities in substantially the same manner that they are currently operated.

22. The assignment is also not prohibited under s. 11.3(2): the Assigned Leases are not by their nature non-assignable, each of the Assigned Leases was entered into prior to January 8, 2010 and the Assigned Leases are neither eligible financial contracts nor collective agreements.

23. Finally, the Motion Record of the Applicants was served on each of the landlords under the Assigned Leases, and either the LP Entities or the Purchaser will cure any outstanding monetary defaults on or before the Plan Implementation Date, which is the effective date of the assignment.

24. The LP Entities are at the brink of the culmination of a highly successful CCAA restructuring that will result in a going concern outcome for their businesses. As a result, thousands of employees will keep their jobs, retirees will maintain their retirement benefits and the newspapers of the LP Entities will continue to provide information to the millions of Canadians that depend on them for their daily news.


25. The Amended AHC APA and the Amended AHC Plan are designed to facilitate the seamless transition of a number of highly complex businesses from one owner to another. The transfer of material contracts, including leases, to the Purchaser is a crucial component of the AHC Transaction. The success of this transition will not be possible – and the implementation of the Amended AHC Plan will not be smooth – unless the Purchaser can rely on third parties to continue to provide the same services to the businesses of the LP Entities on the day after plan implementation as were provided the day before plan implementation.


26. The cash flow forecast and the *pro forma* financial statements, which are a good indication of what the financial health of the Purchaser will be in the period immediately after the Plan Implementation Date, suggest that the Purchaser is an appropriate counterparty to the leases being assigned. There is no evidence of any prejudice to the counterparties to the Assigned Leases, but there will be disruption to the businesses of the LP Entities if the Assigned Leases are not assigned to the Purchaser.

PART IV – NATURE OF THE ORDER SOUGHT

27. The LP Entities therefore request Orders substantially in the forms of the draft Orders submitted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


per Lyndon A.J. Barnes


Elizabeth Allen Putnam

Schedule "A" - Statutory References
COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, as amended

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Schedule “B” – List of Authorities

1. *Re Planet Organic Health Corp. and Darwen Holdings Ltd*, Order dated June 4, 2010, Ontario Superior Court of Justice [Commercial List].
2. *Re Playdium Entertainment Corporation et al.*, [2001] O.J. No. 4252 (S.C.J.) [Commercial List]
3. *Re Playdium Entertainment Corporation et al.*, 2001 CanLII 28282 (ON S.C.) [Commercial List]

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