

**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

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**FACTUM OF THE APPLICANTS  
(Re CSER Group Representative Counsel Motion)**

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February 18, 2010

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**AND TO: THE SERVICE LIST**

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**PART I - OVERVIEW**

1. This factum is filed by Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (the “**Applicants**”) and Canwest Limited Partnership (together with the Applicants, the “**LP Entities**”) in response to the motion brought by a group calling itself the Canwest Salaried Employees and Retirees (CSER) Group (the “**CSER Group**”). The CSER Group is seeking an Order, *inter alia*:

- (a) appointing Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bales as representatives (the “**Representatives**”) of the former salaried employees and retirees of the LP Entities;
- (b) appointing the law firms Nelligan O’Brien Payne and Shibley Righton LLP (“**NOB/SR**”) as representative counsel for the CSER Group in the proceeding; and
- (c) directing the LP Entities to fund all reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements, as may have been or will be incurred by the Representatives and/or NOB/SR during this CCAA proceeding.

2. The LP Entities oppose both the appointment of NOB/SR as representative counsel and the granting of funding for such representation. First, even if the appointment of representative counsel were otherwise warranted, it is premature to do so at this time. The amounts outstanding to the CSER Group are pre-filing unsecured obligations. Unless a Superior Offer is received in the sale and investor solicitation process (the “SISP”) that is currently underway, the LP Entities will implement a Support Transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As a result, there is no current need or intention to carry out a claims process in which the members of the CSER Group could theoretically require assistance to understand or pursue their respective claims. Although a Superior Offer may materialize in the SISP, the outcome of the SISP is currently unknown.

3. In any event, representative counsel is not required, will not contribute to the efficiency of the administration of the estate, may unnecessarily hinder the restructuring and could even contribute to the depletion of the assets of the estate.

4. If this Honourable Court sees fit to appoint representative counsel, the LP Entities oppose the granting of funding for such representation. The LP Entities are being asked to fund counsel whose fees will deplete the resources of the estate without any possible corresponding benefit to either the CSER Group or the restructuring. Moreover, the Support Agreement with the LP Secured Lenders does not permit the LP Entities to pay any of the legal, financial or other advisors to any other person, except as expressly contemplated by the Initial Order or with the consent in writing from the LP Administrative Agent. The Initial Order does not provide for the funding of counsel for the CSER Group, and the LP Administrative Agent has advised that it will not provide its consent to the funding request at this time. The Monitor also opposes the funding request, and the funding of representative counsel is not contemplated in the cash flow forecast.

5. For all of these reasons and others detailed below, the LP Entities request that this Honourable Court deny the relief requested in the proposed order submitted by the CSER Group.

## PART II - FACTS

### 1. CCAA Filing and the Support Transaction

6. On January 8, 2010, Canwest Publishing Inc/Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (collectively, the “**Applicants**”) 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 (the “**Initial Order**”) of this Honourable Court. The Initial Order also extended relief to the Limited Partnership (together with the Applicants, the “**LP Entities**”) and appointed FTI Consulting Canada Inc. as monitor (the “**Monitor**”) of the LP Entities.

7. The LP Entities were seriously affected by the economic downturn that began in the latter half of 2008. The combination of sharply declining advertising revenues and increases in certain operating costs eroded the financial position of the LP Entities and led to a series of defaults on loan and debt obligations. On May 29, 2009, the LP Entities failed for the first time to make certain principal and interest payments owing under the LP Credit Agreement. Further defaults occurred under the LP Credit Agreement, the LP Senior Subordinated Credit Agreement and the LP Note Indenture in the ensuing months. As of the commencement of CCAA proceedings on January 8, 2010, the LP Secured Lenders, the *pari passu* swap counterparties, the LP Subordinated Lenders and the LP Noteholders were in positions to demand immediate repayment of all amounts outstanding under their respective loan documents, which aggregated approximately \$1.45 billion.<sup>1</sup>

8. In an effort to ensure a going concern outcome for the businesses of the LP Entities, beginning in late August 2009 the LP Entities and the LP Secured Lenders entered into negotiations over the terms of a consensual, pre-arranged restructuring, recapitalization or reorganization of the businesses of the LP Entities.<sup>2</sup> The ultimate outcome of these difficult, hard-fought negotiations was an agreement that the LP Entities and the LP Secured Lenders would enter into a Support Transaction pursuant to which the LP Secured Lenders would acquire

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<sup>1</sup> Affidavit of Thomas C. Strike sworn January 7, 2010 (the “**Initial Order Affidavit**”), paras. 9-14, LP Entities’ Application Record, Volume 1, Tab 2.

<sup>2</sup> Initial Order Affidavit, para. 11, LP Entities’ Application Record, Volume 1, Tab 2.

substantially all of the assets and undertaking of the LP Entities in full satisfaction of their outstanding secured claims minus a discount amount of \$25 million.<sup>3</sup> In order to ensure that that the Support Transaction represented the best available outcome for the businesses and stakeholders of the LP Entities, the parties agreed that, after the commencement of a CCAA proceeding, the LP Entities would conduct the SISP under the supervision of the proposed Monitor and with the assistance of the Financial Advisor.<sup>4</sup> Subject to court sanction and a Superior Offer in the SISP, the Support Transaction will be implemented through the Senior Lenders CCAA Plan.<sup>5</sup>

9. If the Senior Lenders CCAA Plan is implemented there will not be any value remaining for the unsecured creditors of the LP Entities.<sup>6</sup> There is, therefore, no need at present to ascertain the claims of unsecured creditors or to conduct a claims process.

10. The LP Entities believe that the Support Transaction is in the best interests of the maximum number of stakeholders of the LP Entities because it permits a going concern outcome for the businesses of the LP Entities. The SISP, as modified in the order granted by this Honourable Court on February 2, 2010, presents an opportunity to test the value of the Support Transaction in the market and to identify a Superior Offer to the extent that one is available. It remains to be seen whether a Superior Offer will materialize, whether the Superior Offer will be approved and what, if any, recovery it will contemplate for unsecured creditors.

## **2. Payments in the CCAA Proceeding**

11. Since January 8, 2010, the LP Entities have been carrying out the terms of the Initial Order and, in particular, have commenced the SISP under the supervision of the Monitor and in consultation with the Financial Advisor.

12. Throughout the course of this CCAA proceeding the LP Entities have continued to pay:

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<sup>3</sup> Initial Order Affidavit, para. 16, LP Entities' Application Record, Volume 1, Tab 2.

<sup>4</sup> Initial Order Affidavit, para. 18, LP Entities' Application Record, Volume 1, Tab 2.

<sup>5</sup> Initial Order Affidavit, para. 16, LP Entities' Application Record, Volume 1, Tab 2.

<sup>6</sup> Initial Order Affidavit, para. 210, LP Entities' Application Record, Volume 1, Tab 2.

- (a) Salaries, commissions, bonuses and outstanding employee expenses;
- (b) Current service and special payments in respect of the active registered pension plans; and
- (c) Post-employment and post-retirement benefits to former employees that were represented by a union when they were employed by the LP Entities.

13. The LP Entities intend to continue to pay these employee-related obligations throughout the course of this CCAA proceeding. Pursuant to the Support Agreement, AcquireCo will assume all of CPI's employee-related obligations including existing pension plans (other than supplemental pension plans), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding. This assumption by AcquireCo is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.<sup>7</sup>

14. Upon commencement of this CCAA proceeding, the LP Entities ceased making payments to certain former employees and retirees. These included payments to: (i) former employees in respect of termination and severance; and (ii) payments owing pursuant to Southam Executive Retirement Arrangements ("SERAs"), which are non-registered, supplemental pension arrangements.<sup>8</sup> In the case of the former, prior to filing for CCAA protection the LP Entities entered into agreements with certain employees that provided for post-employment termination and severance payments. In the case of the latter, nine executives of the LP Entities entered into SERA arrangements with the LP Entities during the course of their employment that provided for pension benefits as part of an unregistered, unfunded plan that was supplemental to the pension generated by the registered pension plan. SERA payments were made from the general revenues of the LP Entities. The affected SERA participants were all receiving payments or would become eligible to receive payments pursuant to the SERAs at the time that the LP Entities filed for CCAA protection.

15. In all cases, the obligations owing to the CSER Group are unsecured. The unsecured nature of the SERA payments is confirmed in the Memorandum of Agreement made

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<sup>7</sup> Initial Order Affidavit, para. 193, LP Entities' Application Record, Volume 1, Tab 2.

<sup>8</sup> Initial Order Affidavit, para. 135, LP Entities' Application Record, Volume 1, Tab 2.

as of July 13, 1990 between Southam Inc. and Russell A. Mills (the “**SERA Agreement**”) that is attached as Exhibit “B” to the Affidavit of Russell Mills sworn January 28, 2010 (the “**Mills Affidavit**”).

11...

(F) Neither the Executive nor any other person shall acquire by reason of this Agreement any right in or title to any assets, funds or property of the Company or Employing Company whatsoever. Nothing contained in the Agreement constitutes a guarantee by the Company that the assets of the Company shall be sufficient to pay any benefit to any person.

16. The claims for termination and severance and SERA payments owing to the CSER Group are based on services provided to the LP Entities prior to January 8, 2010 and would be, assuming they are valid, claims in respect of pre-filing unsecured obligations.

### **3. The CSER Group Motion**

17. The individuals that have brought this motion seek to be named as representatives to a group referring to itself as the CSER Group. The CSER Group is made up of: (i) former employees of Canwest whose severance packages are no longer being paid; (ii) former or retired employees who, prior to January 8, 2010, were receiving payments pursuant to SERAs; and (iii) current employees and retirees with unsecured claims against the LP Entities. NOB/SR intend to facilitate and advance the claims of the CSER Group in the LP Entities’ CCAA proceeding.

18. The provision of funding by the LP Entities in respect of the representation of the CSER Group is in violation of the Support Agreement made as of January 8, 2010 between the LP Entities and the LP Administrative Agent, which sets forth certain of the terms and arrangements relating to the Support Transaction. Specifically, pursuant to s. 5.1(j) the LP Entities may:

Not pay any of the legal, financial or other advisors to any other person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee.

19. The Initial Order also does not contemplate or permit such payments. The LP Administrative Agent does not consent to the funding request at this time. The funding request is also opposed by the Monitor.



### PART III – ISSUES AND THE LAW

20. The issues on this motion are as follows:

- (a) Should NOB/SR should be appointed representative counsel?; and
- (b) If so, should the request for funding be granted?

21. The LP Entities submit that the request to appoint representative counsel is premature and that the request for funding is both inappropriate and counter to the restructuring objectives of the LP Entities.

#### **A. APPOINTMENT OF REPRESENTATIVE COUNSEL IS PREMATURE AND UNNECESSARY**

22. Ontario courts have jurisdiction under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel in cases where persons with interest in an estate cannot be readily ascertained, found or served.

10.01(1)...a judge may 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.<sup>9</sup>

23. Within a CCAA context, the court has discretion under s. 11 to make any order that it considers appropriate in the circumstances. Ontario courts seized of CCAA proceedings have interpreted the discretion under s. 11 to include the authority, where appropriate, to appoint representatives and representative counsel and to order legal and professional expenses of such counsel to be paid from the estate of the applicant.<sup>10</sup>

24. In a CCAA context, representative counsel is only appropriate in circumstances where such counsel is required to provide assistance to a vulnerable group with a stake in the course and outcome of the CCAA proceeding in question. The appointment of representative counsel is intended to introduce efficiency into the restructuring process by streamlining the representation of a group with common interests and needs. This provides a benefit to the group

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<sup>9</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 199, R. 10.01(1).

<sup>10</sup> *Nortel Networks Corporation et al. (Re)*, 2009 CanLII 26603 (ON S.C.)[Commercial List] ("*Re Nortel*"), paras. 10 and 12.

in question, which might not otherwise have the ability to obtain representation, and to the debtor, which may avoid the unnecessary distraction and inconvenience of having to address the queries and concerns of a multiplicity of lawyers for stakeholders within a single group.<sup>11</sup> The overarching purpose of representative counsel, however, is to advance the restructuring objectives of the debtor by helping to identify and advance the needs and interests and/or claims of stakeholders with vested interests in the outcome of the restructuring. Where there is no possibility of a recovery for a particular group, there is no need for representative counsel.

25. Courts seized of CCAA matters have held that representative counsel should not be appointed where the following factors are not present:

- (a) the group is vulnerable and has limited means to pursue their claims so they would benefit from an order appointing representative counsel;<sup>12</sup>
- (b) the granting of a representation order would provide a social benefit by assisting the members of the group and the representative counsel would provide a reliable resource for the group about the process;
- (c) the appointment of representative counsel would have the benefit of streamlining and introducing efficiency to the process for all parties involved in the proceeding; and<sup>13</sup>
- (d) the balance of convenience favours the appointment.<sup>14</sup>

26. Courts considering representative counsel motions in CCAA proceedings have also taken into account whether the Applicant and the Monitor support the proposed appointment and whether there is any other specific support or opposition to the motion. For example, Morawetz J. noted in an endorsement approving the appointment of representative counsel in *Re Nortel* that the Monitor supported the appointment and that no party was opposed.<sup>15</sup>

27. It is submitted by the LP Entities that the members of the CSER Group are not vulnerable and do not require assistance in the restructuring process because they are unsecured

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<sup>11</sup> Endorsement of Pepall J. In *Re Canwest Communications Corp.* dated October 27, 2009 (ON S.C.) [Commercial List] (unpublished) ("*Re Canwest*"), para. 15.

<sup>12</sup> *Id.*, para. 14.

<sup>13</sup> *Re Nortel*, paras. 10, 12-14.

<sup>14</sup> *Re Canwest*, *supra*, para. 14.

<sup>15</sup> *Re Nortel*, *supra*, para. 15.

creditors with claims for pre-filing obligations that have been properly stayed by the Initial Order. In *Indalex Limited et al. (Re)*, Morawetz J. considered a motion by members of the Indalex Supplemental Executive Retirement Plan (the “SERP”) who sought an order requiring the Applicants to reinstate payment of supplemental pension benefits. The SERP – like the SERAs - was an unfunded, non-registered pension plan whose benefits were paid out of the general revenues of the Applicants. In the endorsement dismissing the motion, Morawetz J. stated:

[9] SERP payments are based on services provided to Indalex prior to [the date of the commencement of the CCAA proceedings]. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.

[10] The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.<sup>16</sup>

28. Although Justice Morawetz was considering the claim of the SERP participants in a different context, his reasons are applicable here. As with the SERP participants, the SERA participants and the former employees whose claims for termination and severance have been stayed by the Initial Order have claims based on services provided to the LP Entities prior to the commencement of this CCAA proceeding. As noted above, the unsecured nature of the SERA obligations is confirmed at s. 11(F) of the SERA agreement that is exhibited to the Mills Affidavit:

Neither the Executive nor any other person shall acquire by reason of this Agreement any right in or title to any assets, funds or property of the Company or Employing Company whatsoever. Nothing contained in the Agreement constitutes a guarantee by the Company that the assets of the Company shall be sufficient to pay any benefit to any person.<sup>17</sup>

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<sup>16</sup> 2009 CanLII 39487 (ON S.C)[Commercial List] (“*Re Indalex*”).

<sup>17</sup> Affidavit of Russell A. Mills sworn January 28, 2010 (“*Mills Affidavit*”), CSER Group Motion Record, Tab 2B.

29. As in *Re Indalex*, these obligations are pre-filing unsecured obligations. The CSER Group are therefore not entitled to different treatment than any other unsecured creditor of the LP Entities.

**1. The CSER Group is Not Vulnerable and there is No Evidence that its Members Lack Means to Retain Counsel**

30. Although there is no specific test set out in the case law establishing the criteria for vulnerability in a CCAA context, courts considering the issue have characterized groups as vulnerable where they require assistance and have limited means to pursue their claims in a complex CCAA proceeding.<sup>18</sup> In the context of the CCAA proceeding of the LP Entities, the members of the CSER Group are not vulnerable and do not require representative counsel.

31. Implicit in the notion of vulnerability is the requirement for legal assistance. There is no need for representative counsel to assist in the development or quantification of the claims of the CSER Group because there is no claims process and unsecured creditors have no role in the CCAA proceeding as of yet.

32. In any event, there is no evidence that the SERA participants, in particular, lack the means or the ability to retain and instruct counsel. The SERA participants who are included in the CSER Group either are or were executives of the LP Entities who were receiving (or would be eligible to receive) amounts above and beyond the maximum pension payments allowed by the *Income Tax Act* under a registered pension plan. In fact, the individuals who have sworn affidavits on behalf of the CSER Group's motion include the former president of the Southam Newspaper Group and the former general counsel of Southam Group Inc.

33. There is also no basis to say that the individuals with salary continuance claims require legal assistance. There is no factual or legal complexity to their claims: they claim that they are entitled to a stream of fixed payments for a defined period of time. More importantly, the terminated employees will not require any assistance to quantify their claims until there is an actual claims process, and that prospect and possibility are hypothetical at this point in time

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<sup>18</sup> See, e.g., *Re Nortel*, *supra*, paras. 13-14 and *Fraser Papers Inc. et al. (Re)*, 2009 CanLII 55115 (ON S.C.) [Commercial List] ("*Re Fraser Papers*"), para. 7.

## 2. **There is No Social Benefit to Be Provided Where There is No Claims Process**

34. For similar reasons, there is no social benefit to be provided by the appointment of representative counsel. It is suggested in the CSER Group's Notice of Motion that NOB/SR will provide expert representation that will benefit the CSER Group and that the claims of the CSER Group are complex and varied and require legal, actuarial and accounting advice in order to be ascertained and filed.<sup>19</sup> At present, there is no benefit to be provided because there is no possibility of any recovery for any members of the CSER Group. There is also no need to ascertain or file claims on behalf of the CSER Group because there is no claims process for the unsecured creditors and there is no foreseeable need for a future claims process. By extension, there is also no need for the extensive production of materials requested by the CSER Group. Rather than providing a social benefit, the proposed representation may lead to needless expenditures of legal and financial resources.

35. Mr. Mills suggests at paragraph 25 of his affidavit that representative counsel should be appointed so that the CSER Group can explore and pursue possible claims against the directors of the LP Entities.<sup>20</sup> Although the CSER Group is entitled to enlist its own counsel to investigate and pursue such claims, if any, against Canwest, the LP Entities submit that it would be highly inappropriate for the court to facilitate – and the LP Entities to fund – such representation. As noted by the court in *Re Westar Mining* in the context of a request for funding of representative counsel in a bankruptcy: “to succeed in this application [the law firm] must establish that the legal work it is doing for the Greenhills Mine Suppliers is work that will either benefit the Westar Estate or that is necessary for the management and preservation of the assets of the estate. (emphasis added)”<sup>21</sup> In rejecting the funding request, the court noted: “Instead, the work undertaken by [the law firm] will reduce the Westar Estate, not enhance it.”<sup>22</sup> This Honourable Court should deny the CSER Group's request for representation to pursue possible claims against the directors of the LP Entities on the same basis.

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<sup>19</sup> Notice of Motion of CSER Group, Motion Record, Tab 1.

<sup>20</sup> Mills Affidavit, para. 25, CSER Group Motion Record, Tab 2.

<sup>21</sup> *Re Westar Mining Ltd.* [1999] B.C.J. No. 2169 (“*Re Westar Mining*”), para. 23.

<sup>22</sup> *Id.*, para. 25.

**3. The Appointment of Representative Counsel Will Not Streamline the Process and May Lead to Wasted Legal Resources**

36. Representative counsel will not streamline or introduce efficiency into the process. At present, the only creditors with an economic stake in the LP Entities are the LP Secured Lenders. Therefore, there is no need to address the claims of unsecured creditors at all, and there is a risk that the introduction of counsel into the process will lead to, for example, unnecessary court attendances and court filings by representative counsel. Because there is no claims process and no anticipated recovery for the unsecured creditors, the value of this representation is questionable at best.

**4. The Balance of Convenience Does Not Favour the Appointment**

37. Finally, the balance of convenience does not favour the appointment of representative counsel. The appointment of representative counsel is likely to generate unnecessary work for the LP Entities and their counsel and will not provide any corresponding benefit to the CSER Group or the restructuring. Notably, the LP Secured Lenders oppose the appointment of representative counsel for the CSER Group. Under these circumstances, it would be problematic if the court were to grant the relief requested.

38. In sum, the appointment of representative counsel at this time is, at a minimum, premature and, more generally, inappropriate unless and until the facts change and there is some reasonable prospect of a recovery for the unsecured creditors.

**B. THE FUNDING OF REPRESENTATIVE COUNSEL IS INAPPROPRIATE IN THIS CONTEXT**

39. The LP Entities also oppose the funding of representative counsel in this context. Funding requests are granted only in limited cases where there is a demonstrated need for representation and an inability to fund such representation. In this case, there is no need for representation, and the granting of funding would be a breach of the Support Agreement. The funding of a group of unsecured creditors that cannot and will not at this point in time recover anything from the LP Entities will deplete the limited assets of the estate and provide no benefit to the restructuring as a whole. Therefore, the LP Entities submit that this Honourable Court should dismiss this motion.

40. The court's authority to order legal and other professional expenses of representative counsel to be paid from the applicant's estate emanates from its broad discretion under s. 11 of the CCAA. Notwithstanding this discretion, courts are often reluctant to grant funding requests unless it can be demonstrated that the individual members of the group require and would otherwise would have no legal representation. As noted by Pepall J. in *Re Canwest*:

As for funding, as I indicated in the *Fraser Papers* case, it should only be provided for the benefit of those former employees who otherwise would have no legal representation.<sup>23</sup>

41. Most importantly, however, to succeed in an application for funding of representative counsel the moving party should be able to demonstrate that the legal work will ultimately benefit the Applicants or that the work is necessary to the restructuring. As noted by the British Columbia Supreme Court in *Re Westar Mining Ltd.* quoting the British Columbia Supreme Court in *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage*:

Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation had not....the Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.<sup>24</sup>

## **1. The CSER Group Does Not Require Representation**

42. For the reasons discussed above, the members of the CSER Group have not demonstrated that they require representation or that they could not otherwise afford to obtain individual representation, particularly where there is no claims process and no current contemplation of plan of compromise or arrangement with the LP Entities' unsecured creditors. The appointment of representative counsel will therefore not facilitate the administration of the estate.

## **2. The Granting of the Funding Request is a Breach of the Support Agreement**

43. The granting of the request for funding threatens to undermine the restructuring of the LP Entities because it would be a breach of the Support Agreement between the LP Entities

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<sup>23</sup> *Re Canwest*, *supra*, para. 19.

<sup>24</sup> *Re Westar Mining*, *supra*, para. 23 quoting *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage* [1998] B.C.J. No. 282, para. 36.

and the LP Administrative Agent. Pursuant to s. 5.1(j) of the Support Agreement, the LP Entities have covenanted to:

Not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee.<sup>25</sup>

44. The Initial Order does not contemplate the funding of counsel for the CSER Group, and the LP Entities have not received written consent for such funding from the LP Administrative Agent. Pursuant to s. 6.1 of the Support Agreement, the Administrative Agent is permitted to terminate the Support Agreement in the event of any default by the LP Entities in the performance or observance of any covenant under the agreement.

45. The cooperation and support of the LP Administrative Agent and the LP Secured Lenders are critical to the restructuring. At present, the LP Secured Lenders are the only economic stakeholders in this CCAA proceeding, so, as noted in *Re Westar Mining*, they are being asked to bear the expense of this representation. In the words of Sinclair Prowse J. in *Re Westar Mining*: "...to permit these legal expenses to be paid from the Westar Estate would be neither fair nor equitable to the owners, that is the creditors, of the Westar Estate."<sup>26</sup>

46. The order in question in the instant motion will deplete the resources of the LP Entities in the name of representation of a group with no demonstrated need for it and at the risk of threatening the relationship with the LP Secured Lenders. The LP Entities submit that this burden is both undue and unwarranted. As noted by Pepall J. in *Re Fraser Papers*:

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 restructuring.<sup>27</sup>

### **3. The Monitor Opposes the Funding Request**

47. Finally, courts often consider the views of the Monitor when considering a request for funding of representative counsel.<sup>28</sup> In this case, the Monitor does not support the

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<sup>25</sup> Support Agreement between the LP Entities and the LP Administrative Agent, LP Entities' Application Record, Volume III, Tab X.

<sup>26</sup> *Re Westar Mining*, *supra*, para. 26.

<sup>27</sup> *Re Fraser Papers*, *supra*, para. 19.



funding of representative counsel. The funding of representative counsel also is not contemplated by the cash flow forecast.

#### **PART IV - CONCLUSION**

48. The LP Entities have entered into a Support Agreement with the LP Secured Lenders which, subject to court approval and a Superior Offer in the SISP, will be carried out through the Senior Lenders CCAA Plan. If the Senior Lenders CCAA Plan is implemented there will be no claims process – and no recovery – for the unsecured creditors. The interest and involvement of the CSER Group in the LP Entities’ restructuring is therefore, at present, inchoate and theoretical.

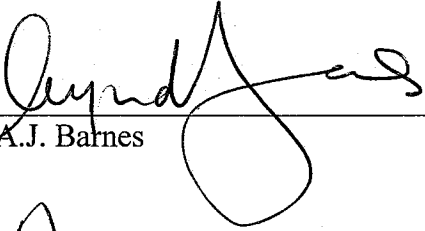
49. The appointment of representative counsel is reserved for cases where a vulnerable group is in need of assistance and such representation provides a social benefit and contributes to the efficient administration of the debtor’s estate. In this case, representative counsel is not appropriate because the CSER Group is not vulnerable: there is no claims process, so claims do not need to be assessed, quantified or submitted. Moreover, this Honourable Court should not appoint representative counsel solely for the purpose of enabling the CSER Group to explore possible claims against the directors and officers of the LP Entities.

50. Funding is granted sparingly by courts where the group could not otherwise obtain representation and the funding does not pose an undue burden to the debtor. In this case, funding should not be granted because there is no demonstrated need for representation. Furthermore, the granting of such a funding request is a breach of the Support Agreement and could undermine the delicate relationship between the LP Entities and the LP Secured Lenders. Finally and significantly, both the Monitor and the LP Administrative Agent oppose the funding request at this time.

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<sup>28</sup> See, e.g., *Re Canwest*, *supra*, para. 19.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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Lyndon A.J. Barnes



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Alexander Cobb



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Elizabeth Allen Putnam

## Schedule "A"

**Schedule “A”**

**LIST OF AUTHORITIES**

1. Endorsement of Pepall J. in *Canwest Global Communications Corp. (Re)* dated October 27, 2009 (ON S.C.) [Commercial List] (unpublished)
2. *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.* [1998] B.C.J. No. 282 (B.C.S.C.)
3. *Fraser Papers Inc. et al. (Re)*, 2009 CanLII 55115 (ON S.C.) [Commercial List]
4. *Indalex Limited et al. (Re)*, 2009 CanLII 39487 (ON S.C.) [Commercial List]
5. *Nortel Networks Corporation et al. (Re)*, 2009 CanLII 26603 (ON S.C.) [Commercial List]
6. *Westar Mining Ltd. (Re)* [1999] B.C.J. No. 2169 (B.C.S.C.)

## Schedule “B”

## Schedule "B"

### STATUTORY REFERENCES

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

**11. General power of court** – 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 the 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.

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*Rules of Civil Procedure*

*Courts of Justice Act*, R.R.O. 1990, Regulation 194

### **RULE 10 REPRESENTATION ORDER**

#### **REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED**

##### ***Proceedings in which Order may be Made***

**10.01** (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the *Variation of Trusts Act*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

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, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

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

Court File No: CV-10-8533-00CL

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

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS  
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