Court File No.

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

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OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Lyndon A.J. Barnes (LSUC #13350D)
Tel: (416) 862-6679
Edward Sellers (LSUC #30110F)
Tel: (416) 862-5959
Alexander Cobb (LSUC #45363F)
Tel: (416) 862-5964

Fax: (416) 862-6666

Lawyers for the Applicants

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PART I – NATURE OF THIS APPLICATION

1. In this Application, Canwest Publishing Inc./Publications Canwest Inc. ("**CPI**"), Canwest Books Inc. ("**CBI**"), and Canwest (Canada) Inc. ("**CCI**"), (together, the "**Applicants**") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). Furthermore, although the related Canwest Limited Partnership (the "**Limited Partnership**") is not an Applicant in this proceeding, the Applicants also request this Court to exercise its jurisdiction to grant a stay of proceedings and to extend the other benefits of an Initial Order under the CCAA to the Limited Partnership. The Limited Partnership carries on operations integral to the business of the Applicants and must be protected by a stay in order to effect a successful restructuring of the Applicants' business. Collectively, the Applicants and the Limited Partnership are referred as the "**LP Entities**".

2. The LP Entities do not comprise the entire Canwest Global Communications Corp. ("**Canwest Global**") enterprise. The entities that are seeking relief in this CCAA

proceeding consist solely of the entities in Canwest's[1] Canadian newspaper operations (with the exception of National Post Inc., which does not seek relief in this CCAA proceeding). Canwest Global, the entities in Canwest's Canadian television business and the National Post Company, which prior to October 30, 2009 owned and published the *National Post*, (the "**CMI Entities**") obtained protection from their creditors in a separate CCAA proceeding pursuant to the initial order of the Honourable Madam Justice Pepall dated October 6, 2009.

3. The LP Entities have been in default under certain key credit facilities since the spring of 2009. As a result, throughout the summer and fall of 2009, the LP Entities have participated in difficult and extremely complex negotiations with their lenders and other stakeholders, both to obtain their continued forbearance from demanding immediate repayment of indebtedness owed to them by the LP Entities, and to work toward a consensual restructuring or recapitalization that would put the long-term future of the LP Entities on a sound footing.

4. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to allow them to restructure and reorganize their businesses and preserve their enterprise value for the ultimate benefit of their broader stakeholder community. In an effort to ensure that the value for stakeholders of the LP Entities is maximized, the LP Entities are asking for the Court's authorization for the Monitor to conduct a robust sale and investor solicitation process (the "**SISP**") to elicit offers for all or substantially all of the LP Entities' business. At the same time, the LP Entities are seeking the Court's authorization to enter into a Support Agreement (as defined below) and file a plan of compromise and arrangement that contemplate, subject to the

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[1] Where reference is made to the Canwest Global enterprise as a whole, which includes the LP Entities together with Canwest Global's other subsidiaries that are not Applicants or Partnerships in this CCAA proceeding, the term "**Canwest**" will be used.

outcome of the SISP, a pre-arranged support transaction (the "**Support Transaction**") pursuant to which, if no superior offer is received during the SISP, the LP Entities intend to sell substantially all of their assets to an entity controlled by their senior secured lenders (the **"LP Secured Lenders**").

5. The LP Entities are of the view the SISP, backstopped by the Support Transaction presents the best opportunity for the businesses of the LP Entities to continue to operate as going concerns, thereby preserving jobs, as well as the economic and social benefits of their continued operation.

6. Depending on the outcome of the SISP, the Support Transaction will be approved by the LP Secured Lenders pursuant to a plan of compromise or arrangement (the "**Senior Lenders' CCAA Plan**") between the Limited Partnership, CPI and the LP Secured Lenders. The proposed Initial Order contemplates the filing of the Senior Lenders' CCAA Plan as well as the procedures for the meeting and voting thereon. In a number of cases courts have confirmed that a plan directed only to secured creditors can be developed and approved by those creditors and the court.

7. The LP Entities need the stability of CCAA protection in order to organize their affairs in the near-to-medium term, maintain employment for as many as possible of their approximately 5,100 employees in Canada, run a comprehensive SISP to ensure that maximum value is generated for their stakeholders, and to engage with their respective stakeholders in the hopes of achieving a long-term solution to their current financial issues. At this stage, the alternative is a bankruptcy or liquidation, which would result in significant detriment not only to the creditors and employees of the LP Entities, but to the broader community that benefits from the continued operation of the LP Entities' publishing businesses.

PART II – FACTS

8. The facts with respect to this Application are more fully set out in the Affidavit of Thomas C. Strike sworn January 7, 2010 (the "**Strike Affidavit**"). Capitalized terms in this Factum that are not otherwise defined have the same meanings as in the Strike Affidavit.

Overview of Canwest's Business

9. Canwest Global is a leading Canadian media company with interests in (i) newspaper publishing and digital media operations; and (ii) free-to-air television stations and subscription-based specialty television channels.[2]

10. Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English-language newspapers in Canada. The newspapers of the LP Entities together have an estimated average daily circulation of approximately 1.1 million copies and an estimated average weekly readership of approximately 4.1 million people. The LP Entities also publish a number of community newspapers and other publications and have extensive online operations.[3] In addition, the LP Entities, through their ownership of National Post Inc., publish the *National Post* national newspaper and related online operations. National Post Inc. does not seek relief as part of these CCAA proceedings.

11. As noted above, the television side of the Canwest business is currently under CCAA protection pursuant to the Order of this Honourable Court dated October 6, 2009.

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2 Strike Affidavit, para. 4, Application Record of the Applicants (the "Application Record").

3 Strike Affidavit, para. 5, Application Record.

Financial Position

12. The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644 million[4] (decreased from approximately $650 million as at August 31, 2009).

Indebtedness under Credit Facilities

13. As at August 31, 2009, the LP Entities had indebtedness (excluding accrued and unpaid interest) totalling approximately $1.45 billion.[5]

A. The LP Senior Secured Credit Agreement

14. Canwest MediaWorks Limited Partnership (now the Limited Partnership) entered into a credit agreement (the "**LP Credit Agreement**") dated as of July 10, 2007 with The Bank of Nova Scotia, as Administrative Agent, the LP Secured Lenders and CanWest MediaWorks (Canada) Inc. (now CCI), CanWest MediaWorks Publications Inc. (now, CPI) and CBI, as guarantors (the "**LP Guarantors**"). The LP Credit Agreement provides the Limited Partnership with a number of credit facilities (collectively, the "**LP Secured Credit Facilities**").[6]

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4 Unless noted otherwise, amounts stated herein are in Canadian dollars.

5 A chart showing a breakdown of the indebtedness under various credit facilities is contained in the Strike Affidavit, para. 76, Application Record.

6 Strike Affidavit, para. 77, Application Record.

B. The Senior Subordinated Credit Agreement

15. CanWest MediaWorks Limited Partnership (now the Limited Partnership) entered into a subordinated credit agreement (the "**Subordinated Credit Agreement**") dated as of July 10, 2007 with The Bank of Nova Scotia, as Administrative Agent, a syndicate of lenders (the "**Subordinated Lenders**"), and CanWest MediaWorks (Canada) (now, CCI), CanWest MediaWorks Publications (now, CPI) and CBI, as guarantors (the "**Subordinated Guarantors**") which provides the Limited Partnership with access to a term credit facility of up to $75 million (the "**LP Senior Subordinated Credit Facility**").[7]

C. Senior Subordinated Unsecured Notes

16. On July 13, 2007, CanWest MediaWorks (now, the Limited Partnership) entered into a note indenture (the "**LP Note Indenture**") with CanWest MediaWorks Publications (now, CPI) and CBI as guarantors (the "**LP Note Indenture Guarantors**"), the Bank of New York, as U.S. Trustee, and BNY Trust Company of Canada as Canadian Trustee in connection with the issuance of Senior Subordinated Notes (the "**LP Senior Notes**") in an amount of US$400 million.[8]

17. Under the terms of the LP Note Indenture, the Limited Partnership is required to make semi-annual interest payments to its noteholders (the "**LP Noteholders**"). The LP Senior Notes bear interest at 9.25% and are due in August 2015. The LP Senior Notes have a variable prepayment option at a premium. The LP Note Indenture Guarantors have guaranteed the

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7 Strike Affidavit, para. 104, Application Record.

8 Strike Affidavit, para. 112, Application Record.

payment and performance of the amounts owing by the Limited Partnership under the LP Note Indenture.[9]

18. After signing the LP Note Indenture, the Limited Partnership entered into a US$400 million foreign currency and interest rate swap resulting in a fixed currency exchange rate of US$1:$1.0725 until July 2015 and a fixed interest rate of 9.1% (the "**LP Senior Notes Swap**").[10]

Issues in the Publishing Industry

19. The LP Entities, like most other companies in the publishing industry, generate the majority of their revenues from the sale of advertising (approximately 72% of the LP Entities' total revenue in 2009). Over the past year, the entire Canwest enterprise, including the LP Entities, has been seriously affected by the economic downturn in Canada. The generally weak Canadian economy has caused advertising customers to reduce the amounts that they spend on advertising. The decreased demand for advertising has forced the LP Entities to lower advertising rates. As a result, Canwest's advertising revenues have declined substantially during this period.[11]

20. At present, the outlook for the advertising market in Canada has become more stable but remains difficult.[12]

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9 Strike Affidavit, para. 113, Application Record.

10 Strike Affidavit, para. 114, Application Record.

11 Strike Affidavit, para. 163, Application Record.

12 Strike Affidavit, para. 165, Application Record.

Efforts to Respond to Deteriorating Economic Conditions

21. In response to the current economic conditions, the LP Entities have taken a number of steps to improve cash flow and strengthen their balance sheet. Among other things, the LP Entities have:[13]

(a) commenced workforce reductions through voluntary buyouts, attrition and reductions and other cost savings initiatives, including hiring and salary freezes, freezes on discretionary spending;

(b) introduced initiatives to reduce newsprint consumption, including aggressive reductions in return targets and newsprint waste and reduced editorial content pages;

(c) closed non-core or developing businesses including directories in Ottawa, Saskatoon and Regina and the rush hour free daily newspapers in Ottawa, Calgary and Edmonton; and

(d) attempted to sell some or all of the assets of the Vancouver Island Newspaper Group.

22. In addition to the above, the board of directors of Canwest Global (the "**Board**") has struck a special committee of directors (the "**Special Committee**") with a mandate to explore and consider strategic alternatives in order to maximize value in light of the financial difficulties being experienced by Canwest. The Special Committee has appointed a Recapitalization Officer and has retained a Restructuring Advisor for the LP Entities. The

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[13] Strike Affidavit, paras. 166-170, Application Record.

Restructuring Advisor will become the Chief Restructuring Advisor of the LP Entities should this Honourable Court grant the Initial Order.[14]

Tightening of Credit

23. Notwithstanding the proactive steps taken by the LP Entities to date, the LP Entities have begun to experience significant tightening of credit from critical suppliers and other trade creditors as a result of the continued and well publicized uncertainty surrounding the stability of the businesses of the LP Entities. On the advertising sales side, certain advertising agencies have advised the LP Entities that their clients plan to reduce advertising spending because of this uncertainty. Certain large advertising clients have already advised the LP Entities that they will not renew their existing advertising contracts.[15]

24. Similarly, newsprint and printing suppliers have insisted on more restrictive credit terms, including requiring the Limited Partnership to provide cash in advance or cash on delivery. Canwest's credit card processors have recently requested that they be allowed to hold back amounts in reserve or, in certain cases, extend the payment cycle.[16]

Insolvency of the LP Entities

25. Because of declines in advertising revenues and increases in certain operating costs, on May 29, 2009, the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments aggregating approximately $10 million in respect of the LP Secured Credit Facilities. On the

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[14] Strike Affidavit, paras. 171-176, Application Record.

[15] Strike Affidavit, para. 177, Application Record.

[16] Strike Affidavit, para. 177, Application Record .

same day, the Limited Partnership announced that it would be in breach of certain financial covenants set out in LP Credit Agreement as of May 31, 2009. The Limited Partnership also failed to make principal, interest and fee payments due on June 21, 2009, June 22, 2009, July 21, 2009, July 22, 2009 and August 21, 2009.[17]

26. On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement (the "**Forbearance Agreement**") under which certain of the LP Secured Lenders agreed, subject to certain terms and conditions, including payment of outstanding interest and fees, to forbear from enforcement of their security. The Forbearance Agreement expressly contemplated that the LP Secured Lenders and the Limited Partnership would negotiate a pre-packaged restructuring or reorganization of the affairs of the Limited Partnership and set out milestones to be achieved in furtherance of that goal (the "**Pre-Pack Milestones**").[18]

27. The LP Secured Lenders have extended the Pre-Pack Milestones on several occasions. On November 9, 2009, the Forbearance Agreement expired on its terms. Since the termination of the Forbearance Agreement, the LP Secured Lenders have been in a position to take steps to demand immediate payment of all amounts owing under the LP Secured Credit Facilities (totalling approximately $953.4 million (exclusive of interest) as at August 31, 2009) from the LP Entities.[19]

28. As a result of the events of default occurring in respect of the LP Secured Credit Facilities, events of default were triggered in respect of the Limited Partnership's related LP

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17 Strike Affidavit, para. 10, Application Record.

18 Strike Affidavit, para. 11, Application Record.

19 Strike Affidavit, para. 11, Application Record.

Senior Notes Swaps. The swap counterparties have terminated the swaps and demanded immediate payment of $68.9 million. These unpaid amounts rank *pari passu* with amounts owing under the LP Secured Credit Facilities and are accruing interest daily.[20]

29. On July 21, 2009, the Limited Partnership failed, for the first time, to make the interest payment in respect of the LP Senior Subordinated Credit Facility resulting in an Event of Default under the Subordinated Credit Agreement. In addition, the defaults under the LP Secured Credit Facilities have resulted in a default under the LP Senior Subordinated Cedit Facility, entitling the LP Subordinated Lenders to take steps to demand immediate payment of all amounts owing (totalling approximately $75 million as at August 31, 2009).[21]

30. On August 3, 2009, the Limited Partnership announced that it would not make an interest payment of approximately US$18.5 million due on August 1, 2009, which resulted in an event of default under the LP Note Indenture on September 1, 2009. In addition, the termination and demand for payment in respect of the Limited Partnership's LP Senior Notes Swaps has resulted in an Event of Default under the LP Note Indenture due to the cross default and cross acceleration provisions in the LP Note Indenture. The LP Noteholders are now in a position to take steps to demand immediate payment of all amounts due in respect of the LP Senior Notes (totalling approximately US$400 million as at August 31, 2009).[22]

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20 Strike Affidavit, para. 12, Application Record.

21 Strike Affidavit, para. 13, Application Record.

22 Strike Affidavit, para. 14, Application Record.

31. Altogether, the indebtedness of the LP Entities totals approximately $1.45 billion.[23] The LP Entities do not have the liquidity required to make payment in respect of this substantial indebtedness and are therefore insolvent.[24]

Support Transaction Process

32. In order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities and the LP Secured Lenders (including the *pari passu* swap counterparties) have negotiated the Support Transaction pursuant to which, if it is implemented, an entity capitalized by the LP Secured Lenders and the *pari passu* secured swap counterparties ("**AcquireCo**") would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. The Support Transaction is to be approved by the LP Secured Lenders pursuant to the Senior Lenders' CCAA Plan.[25]

33. The Senior Lenders' CCAA Plan contemplates that AcquireCo will offer employment to all or substantially all of the employees of the LP Entities and will assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.[26]

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[23] Strike Affidavit, paras. 76 & 187, Application Record.

[24] Strike Affidavit, para. 188, Application Record.

[25] Strike Affidavit, para. 16, Application Record.

[26] Strike Affidavit, para. 17, Application Record.

34. In order to ensure that the Support Transaction will produce the highest possible benefits to all of the stakeholders of the LP Entities, RBC Dominion Securities Inc., a member company of RBC Capital Markets ("**RBC Capital Markets**"), as financial advisor to the LP Entities (the "**Financial Advisor**") will conduct the SISP with an initial phase of approximately nine weeks in an effort to attract a higher or better offer from a third party (defined in the Strike Affidavit as a "**Superior Offer**") than the one contained in the Senior Lenders' CCAA Plan. RBC Capital Markets has prepared an extensive list of prospective financial and strategic acquirers and/or investors that will be approached upon commencement of the SISP.[27]

35. Subject to Court approval and any Superior Offer, the Senior Lenders' CCAA Plan anticipates that each of the LP Secured Lenders and the *pari passu* swap counterparties would exchange its existing outstanding secured claims against the Limited Partnership and the LP Guarantors (each a "**Secured Claim**") minus a $25 million discount from the aggregate amount of Secured Claims (which $25 million amount would remain as an unsecured claim against the LP Entities) for a *pro rata* share of the debt and equity to be issued by AcquireCo based upon a plan value equal to the aggregate amount of all Secured Claims calculated as of the date of the closing less the $25 million discount.[28]

36. The LP Secured Lenders have advised that they may choose to enforce their rights through a non-consensual court proceeding if the LP Entities do not move forward with the Support Transaction and the SISP.[29]

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[27] Strike Affidavit, para. 18, Application Record.

[28] Strike Affidavit, para. 19, Application Record.

[29] Strike Affidavit, para. 20, Application Record.

37. In furtherance of the pursuit of the Support Transaction, on January 7, 2010, the LP Entities and the LP Administrative Agent executed a support agreement (the "**Support Agreement**") that sets forth the terms of certain agreements and arrangements between the LP Entities and the LP Administrative Agent in respect of the Support Transaction. Pursuant to the Support Agreement, subject to the approval of this Honourable Court, the LP Entities have agreed, *inter alia*, to commence this CCAA proceeding and to use commercially reasonable efforts to implement the Support Transaction, conduct the SISP and obtain an Order from this Honourable Court sanctioning the Senior Lenders' CCAA Plan.[30]

38. In addition, as part of the initial application the Applicants also seek relief in respect of a meeting of creditors and voting procedures including, *inter alia:* (i) authorization to file the Senior Lenders' CCAA Plan; (ii) establishment of a Senior Lenders' claims process; (iii) authorization to the LP Entities to call and conduct a meeting of the LP Secured Lenders on January 15, 2009 for the purpose of voting on a resolution to approve the Senior Lenders' CCAA Plan; (iv) classification of creditors and voting such that for the purposes of voting on the Senior Lenders' CCAA Plan there is one class of creditors consisting of the LP Secured Lenders; and (v) establishment of procedures for the delivery of notice and materials relating to the meeting of the LP Secured Lenders.[31]

PART III – ISSUES AND THE LAW

39. The issues on this Application are as follows:

(a) Are the Applicants "debtor companies" to which the CCAA applies?

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[30] Strike Affidavit, para. 195, Application Record.

[31] Strike Affidavit, para. 213, Application Record.

(b) Does this Honourable Court have jurisdiction to grant relief to the Limited Partnership?

(c) Does this Honourable Court have jurisdiction to authorize the Applicants to file the Secured Lender Plan?

(d) Does this Honourable Court have jurisdiction to grant an order entitling the LP Entities to make pre-filing payments to critical suppliers?;

(e) Does this Honourable Court have jurisdiction to grant the DIP Lenders' Charge on a priority basis over the property of the CMI Entities (the "**Property**")?

(f) Does this Honourable Court have jurisdiction to grant the Administration Charge on a priority basis over the Property?;

(g) Does this Honourable Court have jurisdiction to grant the Directors Charge on a priority basis over the Property?

(h) does this Honourable Court have jurisdiction to grant the Management Incentive Plan ("**MIP**") Charge on a priority basis over the Property?; and

(i) Should this Honourable Court exercise its discretion to seal the Confidential Supplement to the proposed Monitor's Pre-Filing Report (the "**Confidential Supplement**")?

A. THE APPLICANTS ARE COMPANIES TO WHICH THE CCAA APPLIES

40. The CCAA applies to a "debtor company" (including a foreign company having assets or doing business in Canada) or affiliated debtor companies where the total of claims

against the debtor or its affiliates exceeds five million dollars. Under section 2 of the CCAA, a "debtor company" means, *inter alia*, a company that is insolvent.[32]

41. In the present case, each of the Applicants satisfies the definition of "debtor company" under section 2 of the CCAA. The Applicants are all affiliated debtor companies with total claims against them far exceeding $5 million.

42. Furthermore, the Applicants are clearly insolvent. The insolvency of the debtor is assessed as of the time of filing.[33] The CCAA does not define "insolvent" or "insolvency". In assessing solvency for the purposes of the CCAA, it is common practice to refer to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* ("BIA") in order to establish that an applicant is a "debtor company" in the context of the CCAA.[34] The definition of "insolvent person" in the BIA is as follows:

> s. 2(1)
>
> ... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

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32 CCAA, sections 2 and 3(1).

33 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) [Commercial List] [hereinafter *Stelco* (Solvency)]; leave to appeal to C.A. refused 2004 CarswellOnt 2936 (C.A.), Book of Authorities of the Applicant ("Authorities"), Tab 25.

34 See *Stelco, ibid.* Note that *Stelco* also puts forward an expanded definition of "insolvency" for the purposes of the CCAA. The LP Entities do not rely upon this expanded definition on the basis that the BIA definition is clearly satisfied, as indicated below. However, it is clear that the LP Entities would also meet the expanded definition.

43. Since May 29, 2009, the Limited Partnership has been in default under the LP Secured Credit Facilities. The Forbearance Agreement, which prevented the immediate demand for repayment and the enforcement of the LP Secured Lenders' Security, expired on November 9, 2009. The LP Secured Lenders are now in a position to demand immediate repayment of approximately $953.4 million. The LP Entities have also received demands under the LP Senior Notes Swaps, and they are in default under the Senior Subordinated Credit Agreement and the LP Note Indenture.[35]

44. The LP Entities do not have sufficient liquidity to satisfy any of these obligations[36], thereby satisfying both (a) and (b) of the BIA definition above. Accordingly, the Applicants are insolvent.

B. JURISDICTION TO GRANT RELIEF TO THE PARTNERSHIPS

45. In the present case, the Applicants seek to have the stay of proceedings extended to the Limited Partnership. The CCAA applies to a "debtor company" or "affiliated debtor companies". It is clear that the CCAA definition of a "company" does not include a partnership or limited partnership:[37]

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

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35 Strike Affidavit, paras. 10-12, Application Record.

36 Strike Affidavit, paras. 11 & 12, Application Record.

37 CCAA, section 2.

46. On a number of occasions, CCAA Courts have exercised their inherent jurisdiction to stay proceedings where it is just and convenient against partnerships and limited partnerships whose businesses are inextricably linked with those of applicant debtor companies. This relief has been held to be appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question that not extending the stay to the latter would significantly limit the effectiveness of the stay in respect of the debtor companies[38].

47. Recently, in *Re Canwest Global Communications Corp.*, Pepall J. held that the request to extend relief to certain related partnerships of the Applicants was appropriate because the operations of the partnerships were integral to and closely interrelated with those of the Applicants. As Pepall J. stated:

> The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.[39]

48. The Limited Partnership is the administrative backbone of the LP Entities and is integral to the Applicants' ongoing operations. Among other things, the Limited Partnership: (i) owns all shared information technology assets used by the various Canwest entities; (ii) provides hosting services for all Canwest properties; (iii) holds all software licenses used by the LP Entities; (iv) is party to certain shared services agreements with other Canwest entities; (v) employs approximately 390 full-time equivalent employees that work in Canwest's shared services areas.

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[38] See *Re Lehndorff General PartnersLtd.* (1993), 9 B.L.R. (2d) 275 (Ont. C.J. Gen. Div.) [hereinafter *Re Lehndorff*], at 292, *Re Calpine Canada Energy Ltd.* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) at paras. 33-34.

[39] *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (ON S.C.), at para. 29.

49. Failure to extend the stay of proceedings to the Limited Partnership would have a profoundly negative impact on the value of the Applicants and the Limited Partnership and the Canwest enterprise as a whole. Furthermore, exposing the assets of the Limited Partnerships to demands of creditors would make it impossible for the LP Entities to successfully restructure their business.

50. The LP Entities therefore submit that it is appropriate for this Court to exercise its jurisdiction to extend the relief in the proposed Initial Order to the Limited Partnership.

C. AUTHORIZING THE FILING OF THE LP SECURED LENDERS PLAN

51. The LP Entities will present the Secured Lender Plan only to the LP Secured Lenders. Under the Secured Plan, claims of unsecured creditors will not be addressed, and unsecured creditors will not attend the creditor meetings or vote to approve the Secured Lenders' Plan.

52. A single creditor-class plan is contemplated by the express terms of the CCAA. While it is common for a plan under the CCAA to address both secured and unsecured creditor claims, the authority to propose a plan of compromise or arrangement to only one creditor class arises from the structure of sections 4 and 5 of the CCAA, which provide separately for secured and unsecured creditor compromises or arrangements:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured credits or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured credits or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the

> creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

53. Courts have accepted that the bifurcated structure of sections 4 and 5 permit a debtor company to present a plan of compromise or arrangement to their secured creditors only, their unsecured creditors only, or to both. In *Re Philip Services Corp.*[40], the debtor successfully proposed and obtained court approval for a plan involving only its secured creditors. As noted by Blair J. in that case:

> ...There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors, or to both groups[41].

54. Similarly, in *Re Anvil Range Mining Corp.*,[42] the debtor company developed a plan to implement a settlement among three groups of the debtor's secured creditors. These three groups of creditors were the only parties with a legal and economic interest in the debtor's assets. There was no possibility of recovery for any of the other creditors. The plan was approved by the affected creditors and sanctioned. The Ontario Court of Appeal dismissed an objection that it was unfair for the unsecured creditors to recover nothing, noting that the value of the secured claims far exceeded the value of the debtor's assets. The Court expressly affirmed:

> ...s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.[43]

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40 *Re Philip Services Corp.* (1999) CarswellOnt 4673 (Ont. S.C.J.).

41 *Ibid*, at para. 19.

42 *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to SCC refused (March 6, 2003).

43 *Anvil Range, ibid.* at para. 34.

55. In other circumstances, the Court has also confirmed the ability of a debtor company to propose a plan that excludes one or more classes of its creditors.[44]

56. The stay of proceedings in relation to a debtor company can extend beyond the class of creditors whose interests will be addressed in a plan. As Blair J. stated:[45]

> ...The stay is imposed to enable the debtor company to have some breathing room in the face of pending and potential proceedings against it, in order to give it the time and uninterrupted opportunity to attempt to work out a restructuring. It is not inconsistent with that purpose for the stay to reach beyond the target group of creditors for the Plan, if the proposed restructuring from an overall perspective will assist the debtor's survival and is in the interests of those concerned as a whole. There are examples in the jurisprudence of stays being imposed against claimants who were not sought to be made the subject of plans of compromise.

57. The Secured Lender Plan provides for three alternative outcomes (assuming it is approved by the requisite majority): (i) if the SISP results in a Superior Cash Offer (as defined in the SISP), the LP Entities will seek an order sanctioning the entering into of the transactions contemplated by the Superior Cash Offer; (ii) if the SISP results in a Superior Alternative Offer (as defined in the SISP) the Secured Lender Plan will terminate so that such Superior Alternative Offer can be implemented; or (iii) if the SISP does not result in a Superior Offer, the LP Entities will seek sanction of the Support Transaction. It is the position of the LP Entities that the Support Transaction has the potential to provide maximum benefits for the greatest number of stakeholders of the LP Entities because it contemplates that the businesses of the LP Entities will continue to operate as going concerns. The Monitor will supervise a robust

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[44] See for example *Re GT Group Telecom Inc.* (2002), 38 C.B.R. (4th) 203 (Ont. S.C.J.), in which Farley J. affirmed the ability of a debtor company to propose a plan in relation to the creditors of a subsidiary debtor company, leaving out the parent debtor company, thereby excluding certain significant unsecured creditors from the benefit of the restructuring. Farley J. cited both *Philip Services* and *Anvil Range*. See also *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. S.C.J.) in which R.A. Blair J. relied upon s. 5 of the CCAA to sanction a plan that was not approved by 8 out of the 35 creditor classes voting at the creditor meetings. He noted that s. 5 allowed the court to approve a plan involving some but not all of the classes of creditors (para. 64). He concluded that there was no unfairness in this result on the basis that the plan did not affect those classes who did not vote to approve it (para. 75).

and lengthy SISP to thoroughly canvass the market for alternative transactions. The SISP will provide the best litmus test possible for whether there are options that are better for all stakeholders than the proposed Support Transaction.

58. It is therefore entirely appropriate to stay proceedings against all creditors and stakeholders who might bring proceedings or exercise rights and remedies against the LP Entities in order to create overall stability while the LP Entities seek approval for the Secured Lender Plan and/or while the LP Entities determine whether it is possible to develop a plan that involves stakeholders other than those whose interests are addressed in the Secured Lender Plan. It is also entirely appropriate for this Court to authorize the LP Entities to file and to present the Secured Lender Plan for voting by the affected creditors, subject to the completion of the SISP.

D. ENTITLEMENT TO MAKE PRE-FILING PAYMENTS TO CRITICAL SUPPLIERS

59. As part of the initial order sought, the LP Entities ask that they be authorized, but not required, to pay, subject to the consent of the proposed Monitor, pre-filing amounts owing in arrears to certain suppliers if, in the opinion of the LP Entities: (i) the supplier is critical to the business and ongoing operations of the LP Entities; or (ii) the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. At present, it is contemplated that such suppliers would consist of, *inter alia*, certain newsprint suppliers, newspaper distributors, other logistic suppliers and the Amex Bank of Canada. The LP Entities are not seeking a charge to secure payments to any of its critical suppliers.[46]

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[45] *Id.*, at para 16.

[46] Strike Affidavit, paras. 226-241, Application Record.

60. In the recent amendments to the CCAA, section 11.4(1) gives the courts the statutory jurisdiction to declare a person to be a critical supplier to the debtor:

> **11.4(1)** ***Critical Supplier*** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

61. There is limited jurisprudence interpreting this section since it is so new. This Honourable Court has already noted that the latter subsections of section 11.4 suggest that this provision may not apply where no charge is requested. However, since subsection 11.4(2) appears to be permissive, rather than mandatory, and it is subsection (2) that triggers the court's powers to order a charge under subsections (3) and (4), it is possible to read subsection 11.4(1) as giving the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. In any event, section 11.4 does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested.[47]

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[47] *Re Canwest, supra*, at para 41 to 43.

62. Courts have recognized that the broad and flexible powers under the CCAA include the power to approve arrangements for payment of pre-filing amounts owed to critical suppliers. Although the aim of the CCAA is to maintain the *status quo* while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have recognized and clearly stated that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt statuses of each creditor:

> The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered. [48]

63. The jurisdiction to permit payment of pre-filing amounts owing to critical suppliers was recently exercised by this court in the CCAA proceedings involving the CMI Entities (the television side of Canwest's business). In that proceeding, the Court emphasized the importance of the active participation of the Monitor in approving the requested relief.[49] This same level of participation is proposed in the present case.

64. This jurisdiction has also been exercised on a number of other occasions:

(a) In *Re Air Canada*[50], Farley J. granted an initial order that provided that Air Canada was permitted, but not required to, with the consent of the Monitor, pay

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48 *Alberta-Pacific Terminals Ltd, supra* at 105.

49 *Re Canwest Global, supra* at para. 43.

50 *Re Air Canada* [2003] O.J. No. 1157 (Ont. S.C.J.) [Commercial List].

up to an aggregate of $25 million for goods and services supplied prior to the date of filing by a North American supplier if, in its opinion, the supplier was critical to its business and ongoing operations.[51]

(b) More recently, in *Re Smurfit-Stone*, supra, Pepall J. granted an initial order that included a provision allowing the applicants and partnerships to pay pre-filing amounts to suppliers which they deemed critical to their respective businesses.[52]

65. The LP Entities believe that it would be damaging to both the ongoing operations of the LP Entities and their ability to restructure if they are not provided the ability to pay, with the consent of the proposed Monitor, their accrued and future liabilities to critical creditors or suppliers if, in the opinion of the LP Entities, the supplier is critical to the business and ongoing operations of the LP Entities. The categories of suppliers that are currently proposed to be paid as critical suppliers are described in the Strike Affidavit.[53] It is submitted that this Honourable Court should exercise its statutory or inherent jurisdiction to permit the LP Entities to treat these parties as critical suppliers, and to make payments of pre-filing amounts owing to these creditors with the consent of the Monitor.

E. JURISDICTION AND DISCRETION TO GRANT A DIP FINANCING CHARGE ON A PRIORITY BASIS

66. In the proposed initial order, the Applicants seek approval of the LP DIP Facility in the amount of up to $25 million, to be secured by a charge over all of the assets of the LP Entities, to rank ahead of all other charges except the Administration Charge, and ahead of all

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[51] *Ibid.*, at para 60 of Initial Order.

[52] *Re Smurfit-Stone.*, [2009] O.J. No. 349 (Ont S.C.J.) [Commercial List] at para 21.

[53] Strike Affidavit, paras. 226-241, Application Record.

other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.[54] Section 11.2 of the amended CCAA confers on the Courts the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge and provides that:

> **11.2(1)** ***Interim Financing*** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
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> **11.2(2)** ***Priority – Secured Creditors*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> ...

67. Section 11.2(4) of the recently amended CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **11.2(4)** ***Factors to be considered*** – In deciding whether to make an order, the court is to consider, among other things:
>
> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
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> (b) how the company's business and financial affairs are to be managed during the proceedings;
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> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report.

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[54] Strike Affidavit, paras. 189-190, Application Record.

68. In *Re Canwest*, Pepall J. recently approved a DIP facility under this provision, noting that, in addition to the factors enumerated in s. 11.2(4), the Court should consider the following when evaluating a request for a DIP financing charge under s. 11.2:

(a) whether notice has been given to secured creditors likely to be affected by the security or charge;[55]

(b) whether the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement;[56] and

(c) whether the DIP charge secures an obligation that existed before the Order was made (which it should not).[57]

69. Prior to the recent amendments to the CCAA, it was well established that the court could permit DIP financing and provide that it be secured by a charge on the debtor company's assets, with priority, where appropriate, over prior security interests.[58] DIP financings with priority over prior security interests were viewed as extraordinary measures to be granted where the benefits to the debtor company and its general body of creditors, employees and shareholders clearly outweigh any potential prejudice to creditors whose security might be subordinated.[59]

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55 *Re Canwest, supra*, at para. 32.

56 *Id.*, at para. 33.

57 *Id.*, at para. 34.

58 *Re Temple City Housing Inc.* (2007), 42 C.B.R. (5th) 274 at para. 14 (Alta. Q.B.) [*Temple City Housing*], leave to appeal refused *Canada (Deputy Attorney General) v. Temple City Housing Inc.* (2008), 43 C.B.R. (5th) 35 (Alta. C.A.), Book of Authorities, Tab 26; *Skydome Corp. v. Ontario* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.) at para. 9. [*Skydome*], Book of Authorities, Tab 28.

59 *Re United Used Auto & Truck Parts* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.) at para. 28, aff'd (2000), 73 B.C.L.R. (3d) 236 (B.C.C.A.), leave to appeal to SCC granted [2000] S.C.C.A. No 142 (appeal discontinued).

70. In the present case, it is submitted that this Honourable Court should grant the DIP Lenders' Charge over the Property. DIP financing is essential to provide the LP Entities with a necessary backstop if additional liquidity is required during a sale and investor solicitation process that is anticipated to last well into 2010. The LP Entities expect to be subject to these CCAA proceedings (and therefore require access to the DIP Facility) until that time.

71. The following factors also support the granting of the DIP Lenders' Charge:

(a) The LP Entities' cash flow statements project that they may require the additional liquidity afforded by the DIP Facility in order to continue to operate through the pendency of the proposed CCAA proceeding. [60]

(b) It is anticipated that the DIP Facility will provide the LP Entities with sufficient liquidity to conduct the SISP and consummate either a recapitalization transaction or a sale of all or some of its assets.[61]

(c) The LP Entities have appointed a CRA to negotiate and implement the Credit Bid, providing a degree of additional oversight and restructuring expertise to the LP Entities during the period when the LP DIP Facility will be in place.[62]

(d) The DIP Facility will increase the likelihood of a successful sale and investor solicitation process, which is intended to generate higher value for stakeholders of the LP Entities.

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60 Strike Affidavit, para. 191, Application Record.

61 Strike Affidavit, para. 191, Application Record.

62 Strike Affidavit, para. 174, Application Record.

(e) The LP Secured Lenders have indicated that they will not provide a DIP Facility if the DIP Lenders' Charge is not approved.[63]

(f) To the extent that the court, under the amended CCAA, must still weigh relative prejudices in determining whether to grant the DIP Charge, the LP Secured Lenders, who have first ranking security over the Property, are the DIP Lenders.[64] The benefit to the stakeholders of the CCAA process outweighs any minimal prejudice to subordinated secured creditors.

(g) The DIP Lenders' Charge does not secure any amounts that were owing prior to the filing.

(h) Secured creditors have either been given notice of the DIP Facility, or are not affected by it.[65]

(i) The proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

72. Accordingly, the LP Entities' submit that this Honourable Court ought to grant the DIP Lenders' Charge in the amount of $25 million over the Property.

F. JURISDICTION AND DISCRETION TO GRANT ADMINISTRATION CHARGE

73. The Applicants also seek a charge over the Property in the amount of $3 million to secure the fees of the Monitor and its counsel, of the LP Entities' counsel and of other

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63 Strike Affidavit, para. 190, Application Record.

64 Strike Affidavit, para. 189, Application Record.

65 Strike Affidavit, para. 271, Application Record.

professionals whose services are critical to the successful restructuring of the LP Entities' business. [66] This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances, as set out in the proposed Initial Order.

74. As in the case of a DIP charge, an administration charge was formerly granted under the authority of the inherent jurisdiction of the CCAA court. The recent CCAA amendments now confer on CCAA courts the statutory jurisdiction to grant an administration charge. Specifically, section 11.52 of the CCAA now provides as follows:

> **11.52(1) Court may order security or charge to cover certain costs** – On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
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> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> **11.52(2) Priority** – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

75. This section is permissive, and does not contain any specific criteria for a court to consider in granting such a charge. In case law decided under the court's inherent jurisdiction, the Court has recognized that the magnitude of an administration charge reflects the size and complexity of the business that is being restructured.[67] In this case, the restructuring

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[66] Strike Affidavit, para. 270, Application Record.

[67] In *Re Air Canada* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.) at para. 3 [*Air Canada*], Farley J. approved an administration charge of $10 million in recognition of the magnitude and complexity of the Air Canada proceedings.

has been and will continue to be highly complex and will require the extensive involvement of professional advisors. The business of the LP Entities and the tasks associated with its restructuring are of a magnitude and complexity that justify the amount of the proposed Administration Charge.

76. The LP Entities submit that this is an appropriate circumstance for this Honourable Court to grant the Administration Charge with priority over pre-existing security interests. Each of the professionals whose fees are to be secured by the Administration Charge has played a critical role in the LP Entities' restructuring activities to date. Moreover, each of the professionals will continue to be integral in the implementation of the SISP. It is unlikely that the above-noted advisors will continue to participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

F. DIRECTORS' AND OFFICERS' PROTECTIONS

77. In the present case, the Applicants each seek a directors' and officers' charge (the "**Directors' Charge**") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The Directors' Charge would be secured by the Property and will rank in relation to other security interests as set out in the proposed Initial Order.[68]

78. The Directors Charge is essential to the successful restructuring of the LP Entities, which would not be possible without the continued participation of the LP Entities' experienced boards of directors, management and employees.[69]

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[68] Strike Affidavit, para. 246, Application Record.

[69] Strike Affidavit, para. 247, Application Record.

79. Prior to the enactment of the recent CCAA amendments, there was ample authority in prior decisions of the Court for the granting of a "super priority" charge – including a directors' and officers' charge - in the context of a CCAA proceeding notwithstanding the fact that the CCAA made no specific provision for this practice.[70] The recent amendments to the CCAA now codify the earlier decisions of the Court with respect to the granting of a directors' and officers' charge on a priority basis. In particular, section 11.51 provides as follows:

> **11.51(1)** ***Security or charge relating to director's indemnification*** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **11.51(2)** ***Priority*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **11.51(3)** ***Restriction – indemnification insurance*** – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> **11.51(4)** ***Negligence, misconduct or fault*** – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

80. In *Re Canwest,* Pepall applied s. 11.51 to the request by the CMI Entities for a directors' and officers' charge and also noted that the Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred by the directors and officers after the commencement of proceedings. In approving the request, Pepall J. stated:[71]

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[70] *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 118 (Ont. C.J. Gen. Div.) at 122.

[71] *Re Canwest, supra,* at para. 48.

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.*[(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

81. CCAA Courts have frequently held that the purpose of creating a directors' and officers' charge is to keep the directors and officers in place during the restructuring period by providing them with additional protection against liabilities that they could incur during the restructuring and reorganization of the company.[72] As the Quebec Superior Court stated in *Re JetsGo Corporation* (citing Pamela L.J. Huff and Line A. Rogers in the *Commercial Insolvency Reporter*), a directors and officers charge reflects the specific risks to which these individuals are exposed in the event of an insolvency:[73]

> Thus, against the backdrop of a potential business failure, a CCAA restructuring creates new risks and potential liabilities for another group of critical participants in an insolvency: the directors and officers of a debtor corporation.

82. Canwest Global maintains directors' and officers' liability insurance (the D&O Insurance") for the directors and officers of Canwest Global and its subsidiaries (including the directors and officers of the LP Entities). The current D&O Insurance provides $30 million in coverage plus $10 million in excess coverage for a total of $40 million in coverage. The D&O Insurance originally expired on August 31, 2009 but was subsequently extended to December 1, 2009 in light of the LP Entities' current financial situation. The D&O Insurance was recently

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72 *Re General Publishing Co.* (2003) 39 C.B.R. (4th) 216 (Ont. S.C.J.) at para 6.

73 [2005] Q.J. No. 4091 (Quebec S.C.) at para 42.

extended to February 28, 2009 but no further extensions are available and, to date, Canwest has not been able to obtain additional or replacement insurance coverage.[74]

83. The directors of the Applicants have indicated that, due to the potential for significant personal liability, they cannot continue their service and involvement in this restructuring unless the Initial Order includes the Directors' Charge.[75]

84. The LP Entities submit that the requested Directors' Charge is reasonable in amount given the complexity of the LP Entities' business,[76] its substantial workforce and the corresponding potential exposure of the directors and officers to personal liability. The Directors' Charge will also provide assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied.

85. In its pre-filing report, the proposed Monitor has advised that it is supportive of the charges proposed in the draft Initial Order, including the Directors Charge. All secured creditors have either been given notice, or are unaffected by the Directors' Charge.

86. For these reasons, it is submitted that this Honourable Court should grant the Directors Charge.

G. APPROVAL OF MANAGEMENT INCENTIVE PLAN AND SPECIAL ARRANGEMENTS

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74 Strike Affidavit, para. 245, Application Record.

75 Strike Affidavit, para. 246, Application Record.

76 In *Air Canada, supra*, Farley J. considered this factor in determining to grant a directors' charge of $170 million. In addition, he noted that although the amount of the requested charge appeared large in absolute terms (and in *Air Canada,* the requested charge was larger than the Directors' Charge requested here), it was not large relative to the overall indebtedness of the debtor company. Furthermore, he noted that $170 million would be "in the 'crushing liability' range for [the directors and officers] on a joint and several basis." (para. 14).

87. The LP Entities have developed Management Incentive Plans (the "**LP MIP**" and the "**NP MIP**") and have made amendments to the employment agreements with two key employees (the "**Special Arrangements**").[77] The LP MIP, NP MIP and Special Arrangements are designed to facilitate and encourage the continued participation of certain of the LP Entities' senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The LP MIP will provide its participants (the "**MIP Participants**") with payments as an incentive to continue their employment with the LP Entities through the full term of the CCAA proceedings.[78] In total, there are 24 MIP Participants.[79] The LP MIP and the Special Arrangements are to be secured by a charge (the "**LP MIP Charge**") over the Property, which is to rank in priority over most prior security interests as described above.[80]

88. There is no express statutory jurisdiction for a CCAA court to approve a key employee retention plan (**"KERP"**). CCAA courts have held that the approval of a KERP is a matter of discretion.[81] A KERP is designed to retain employees that are important to the management and operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.[82]

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77 Strike Affidavit, paras. 248 and 257, Application Record.

78 Strike Affidavit, para. 248, Application Record.

79 LP MIP, Exhibit "AA" to the Strike Affidavit, Application Record.

80 Strike Affidavit, paras. 250 & 254, Application Record.

81 *Re Grant Forest Products Inc. et al.* [2009] O.J. No. 3344 (Ont. S.C.J.) [Commercial List] [hereinafter *Re Grant Forest*].

82 *Houlden & Morawetz Bankruptcy and Insolvency Analysis, Westlaw, 2009* at N79.

89. KERPs have been approved in numerous CCAA proceedings where the retention of key employees is critical to a successful restructuring[83]. Recently, in approving certain payment plans designed to retain key employees during the Nortel restructuring, Morawetz J. held that the commitment and retention of key employees was "essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement".[84]

90. In *Re Grant Forest.*[85], one of the debtor's unsecured creditors took the position that the proposed KERP had the effect of preferring the interests of senior executives over the interests of certain creditors. In rejecting this objection and approving the KERP charge, the Court considered the following factors:

(a) whether the monitor supports the KERP agreement and the KERP charge;

(b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved[86];

(c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company;

(d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and

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83 See, for example, *Re Nortel Networks Corp.* [2009] O.J. No. 1044 (Ont. S.C.J.) [Commercial List]; *Re Grant Forest, supra*; *Re Biltrite Rubber (1984) Inc.*, supra, at paras 16-17; *Re Nortel Networks Corp.* [2009] O.J. No. 1188 (Ont. S.C.J.) [Commercial List].

84 *Re Nortel Networks Corp.* [2009] O.J. No. 1044 (Ont. S.C.J.) [Commercial List] at para 4.

85 *Re Grant Forest, supra* note 81.

86 In *Re Nortel Networks Corp.*, [2009] O.J. No. 1188 (Ont. S.C.J.) [Commercial List], Morawetz J. approved a key executive incentive plan arrangement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors.

(e) the business judgement of the board of directors of the debtor company.

91. Most recently, in *Re Canwest*, Pepall J. approved the KERP charge requested by the CMI Entities on the basis that the factors enumerated in *Re Grant Forest, supra*, were satisfied and that the Monitor had carefully reviewed the charge and was supportive of the request. Pepall J. also noted that the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Ad Hoc Committee of bondholders had all approved the KERP charge.[87]

92. All of the LP MIP Participants are critical to the successful restructuring of the LP Entities, as they are experienced executives and have played critical roles in the restructuring initiatives taken to date.[88] It is anticipated that the LP MIP Participants will continue to play important roles in the planning and implementing of the SISP. Moreover, it is probable that the LP MIP Participants will consider other employment opportunities if the LP MIP is not secured by the LP MIP Charge [89] The departure of senior management will distract from and undermine the restructuring process that is underway. It would be extremely difficult at this stage of the restructuring process to find replacements for those employees.[90]

93. The LP MIP provides appropriate incentives for the LP MIP Participants to remain in their current positions and also ensures that they are properly compensated for their assistance in the reorganization process.[91]

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87 *Re Canwest, supra,* at para. 50.

88 Strike Affidavit, paras. 251, Application Record.

89 Strike Affidavit, paras. 252, Application Record.

90 Strike Affidavit, para. 252, Application Record.

91 Strike Affidavit, para. 248, Application Record.

94. In *Re Grant Forest, supra*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the Monitor should rarely be ignored when it comes to approving a KERP charge:

> The business acumen of the board of directors of [the debtor company], including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and [the Chief Restructuring Advisor of the debtor company] for the KERP provisions. Their business judgment cannot be ignored.[92]

95. In this case, the LP MIP has been approved in form and substance by the Board, and the Special Committee of Canwest Global.[93] Moreover, in its pre-filing report, the proposed Monitor has indicated its support for the LP MIP Charge. [94] The LP Entities submit that this militates strongly in favour of approving the proposed arrangements, including the LP MIP Charge.

96. The LP Entities therefore request that this Honourable Court grant the LP MIP Charge.

H. SEALING THE CONFIDENTIAL SUPPLEMENT

97. Finally, the LP Entities request that this Honourable Court seal the Confidential Supplement, which contains the unredacted LP MIP. The unredacted LP MIP contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the LP MIP.[95]

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92 *Re Grant Forest, supra*, at para 18.

93 Strike Affidavit, paras. 259, Application Record.

94 Strike Affidavit, paras. 259, Application Record.

95 Strike Affidavit, paras. 256, Application Record.

98. This Honourable Court has the discretion, pursuant to section 137(2) of the *Courts of Justice Act*, to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.[96]

99. The courts will exercise their discretion to depart from the general principle that court proceedings should be public where it is demonstrated that openness would cause a serious harm or injustice. As the Court stated in *MacIntyre* v. *Nova Scotia (Attorney General)*:[97]

> Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

100. In *Sierra Club of Canada* v. *Canada (Minister of Finance)*[98], a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:[99]

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

101. Iacobucci J. stated that the risk in question must be real and substantial and pose a serious threat to the commercial interest in question.

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96 *Courts of Justice Act,* section 137(2).

97 (1982), 132 D.L.R. (3d) 385 (S.C.C.) at 405.

98 [2002] 2 S.C.R. 522.

99 *Ibid.*, at para 55.

102. In *Re Canwest*, Pepall J. recently applied the *Sierra Club* test and approved a similar request by the applicants for the sealing of a confidential supplement containing unredacted copies of the KERPs for the employees of the CMI Entities. Pepall J. concluded:[100]

> In this case, the unredacted KERPS reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that the second branch of the test has been met. The relief requested is granted.

103. With respect to the first branch of the *Sierra Club* test, the Confidential Supplement contains unredacted copies of the LP MIP. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which will cause harm to both the LP Entities and the LP MIP Participants, is an important commercial interest that should be protected. Moreover, the LP MIP Participants have a reasonable expectation that their names and their salary information will be kept confidential.

104. With respect to the second branch of the *Sierra Club* test, it is submitted that keeping this information confidential will not have any deleterious effects. In any event, the salutary effects of sealing the Confidential Supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept strictly confidential by an employer and would not find its way into the public domain. Moreover, the aggregate amount of the LP MIP Charge has been disclosed in the Strike Affidavit. There is no compelling reason for allowing disclosure of the individual compensation arrangements that will be provided to the LP MIP Participants.

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[100] *Re Canwest, supra* at para 52.

105. Accordingly, it is submitted that that this Honourable Court ought to order that the Confidential Supplement be permanently sealed from and do not form part of the public record.

PART IV – NATURE OF THE ORDER SOUGHT

106. The LP Entities therefore request an Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Lyndon A.J. Barnes

Alexander Cobb

TAB A

Schedule "A" - Statutory References

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

s. 2 ("company")

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

s. 2 ("debtor company")

debtor company" means any company that

(*a*) is bankrupt or insolvent,

(*b*) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(*c*) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(*d*) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

s. 3(1) Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

s. 3(2) Affiliated companies

For the purposes of this Act,

> (*a*) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
>
> (*b*) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

s. 4 Compromise with unsecured creditors

Where a compromise or an arrangement is proposed between a debtor company and its unsecured credits or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 5 Compromise with secured creditors

Where a compromise or an arrangement is proposed between a debtor company and its secured credits or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 9(1) Jurisdiction of court to receive applications

Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or,

if the company has no place of business in Canada, in any province within which any assets of the company are situated.

s. 11(1) 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 any 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. caution is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

11.2 (1) Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2 (2) Priority - Secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2 (3) Priority - other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2 (4) Factors to be considered –

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.4 (1) Critical supplier

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

11.4 (2) Obligation to supply

If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

11.4 (3) Security or charge in favour of critical supplier

If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

11.4 (4) Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51 (1) Security or charge relating to director's indemnification

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51 (2) Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51 (3) Restriction — indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51 (4) Negligence, misconduct or fault

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

11.52 (1) Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52 (2) Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

s.2 ("insolvent person")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(*a*) who is for any reason unable to meet his obligations as they generally become due,

(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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CANADA LABOUR CODE

R.S.C. 1985, c. L-2, as amended

s.2

In this Act,

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(*a*) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(*c*) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(*d*) a ferry between any province and any other province or between any province and any country other than Canada,

(*e*) aerodromes, aircraft or a line of air transportation,

(*f*) a radio broadcasting station,

(*g*) a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,

(*i*) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and

(*j*) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the *Oceans Act* apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(*k*) of that Act;

s. 251.18

Directors of a corporation are jointly and severally liable for wages and other amounts to which an employee is entitled under this Part, to a maximum amount equivalent to six months' wages, to the extent that

(*a*) the entitlement arose during the particular director's incumbency; and

(*b*) recovery of the amount from the corporation is impossible or unlikely.

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COURTS OF JUSTICE ACT

R.S.O. 1990, c. 43, as amended

s. 137(2)

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

TAB B

Schedule "B"

LIST OF AUTHORITIES

1. *MacIntyre* v. *Nova Scotia (Attorney General)* (1982), 132 D.L.R. (3d) 385 (S.C.C.)
2. *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. S.C.J.)
3. *Re Air Canada* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.); *Re Air Canada* [2003] O.J. No. 1157 (Ont. S.C.J.) [Commercial List]
4. *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.)
5. *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.)
6. *Re Biltrite Rubber* (1984) Inc. [2009] O.J. No. 1180 (Ont. S.C.J.) [Commercial List]
7. *Re Calpine Canada Energy Ltd.* (2006), 19 C.B.R. (5th) 187 (Alta Q.B.)
8. *Re Canwest Global Communications Corp.* 2009 O.J. No. 4286 (Ont. S.C.J.) [Commercial List]
9. *Re General Publishing Co.* (2003) 39 C.B.R. (4th) 216 (Ont. S.C.J.)
10. *Re Global Light Telecommunications Ltd.* (2004), 33 B.C.L.R. (4th) 155 (B.C.S.C.)
11. *Re Grant Forest Products Inc. et al.* [2009] O.J. No. 3344 (Ont. S.C.J.) [Commercial List]
12. *Re GT Group Telecom Inc.* (2002) 38 C.B.R. (4th) 203 (Ont. S.C.J.)
13. *Re JetsGo Corporation* [2005] Q.J. No. 4091 (Quebec S.C.)
14. *Re Lehndorff General Partner Ltd.* (1993), 9 B.L.R. (2d) 275 (Ont. C.J. Gen. Div.)
15. *Re Nortel Networks Corp.* [2009] O.J. No. 1044 (Ont. S.C.J.) [Commercial List]
16. *Re Nortel Networks Corp.* [2009] O.J. No. 1188 (Ont. S.C.J.) [Commercial List]

17. *Re Philip Services Corp.* (1999) CarswellOnt 4673 (Ont. S.C.J.) [Commercial List]

18. *Re Smurfit-Stone Container Canada Inc.* [2009] O.J. No. 349 (Ont S.C.J.) [Commercial List]

19. *Re Stelco Inc* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) [Commercial List], leave to appeal to C.A. refused 2004 CarswellOnt 2936 (C.A.)

20. *Re Temple City Housing Inc.* (2007) 42 C.B.R. (5th) 274 (Alta Q.B.), appeal to the Alberta Court of Appeal dismissed, *Canada (Deputy Attorney General) v. Temple City Housing Inc.* (2008), 43 C.B.R. (5th) 35 (Alta C.A.)

21. *Re United Used Auto & Truck Parts Ltd.* 12 C.B.R. (4th) 144

22. *Skydome Corp.* v. *Ontario* (1998), 16 C.B.R. (4th) 118 (Ont. C.J. Gen. Div.)

23. *Sierra Club of Canada* v. *Canada (Minister of Finance)* [2002] 2 S.C.R. 522

Secondary Sources

24. *Houlden & Morawetz Bankruptcy and Insolvency Analysis, Westlaw, 2009*

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

Court File No:

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

Lyndon A.J. Barnes (LSUC #13350D)
Tel: (416) 862-6679
Edward Sellers (LSUC #30110F)
Tel: (416) 862-5959
Alexander Cobb (LSUC #45363F)
Tel: (416) 862-5964
Fax: (416) 862-6666

Lawyers for the Applicants

F. 1117119