

**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

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

**(Motion for Approval of the AHC Transaction and Conditional Sanction of the Senior
Lenders' CCAA Plan)**

May 16, 2010

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TO: THE SERVICE LIST

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PART I – NATURE OF THIS MOTION

1. On January 8, 2010, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (collectively, the “Applicants”) were granted protection under the Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the “CCAA”) pursuant to an initial order (the “Initial Order”) of this Honourable Court. The Initial Order also extended relief to Canwest Limited Partnership/Canwest Societe en Commandite (together with the Applicants, the “LP Entities”) and appointed FTI Consulting Canada Inc. as monitor (the “Monitor”) of the LP Entities.

2. The Initial Order contemplated a restructuring package that contained three elements: (i) a Support Agreement; (ii) a plan of compromise and arrangement for the senior secured lenders of the LP Entities (the “**Senior Lenders CCAA Plan**”) that contemplated a “credit bid” by the senior lenders for the sale of the LP Entities as a going concern (the “**Support**

Transaction"); and (iii) a sale and investor solicitation process (the "**SISP**") to test the market for offers that were superior to the Support Transaction.

3. Throughout the months leading up to the Initial Order, and in the period that has followed, the LP Entities have dedicated themselves to securing the best available going concern outcome for the business, in the interests of all of the stakeholders of the LP Entities. Thanks to the unwavering efforts of the LP Entities, the LP CRA, the Monitor and the Financial Advisor in carrying out the SISP, the LP Entities believe they have elicited an offer that represents exactly that.¹

4. The Financial Advisor received three bids from Qualified Bidders on the Phase 2 Bid Deadline. The Monitor, in consultation with the Financial Advisor and the LP CRA, determined that the bid received from the *ad hoc* committee (the "**Ad Hoc Committee**") of holders of 9.25% senior subordinated notes (the "**LP Noteholders**") issued by the Limited Partnership (the "**AHC Bid**") is a Superior Cash Offer. Neither of the other bids was a Superior Offer. Accordingly, in accordance with the terms of the SISP, the Monitor recommended that the AHC Bid be selected and a definitive agreement be negotiated and settled to carry out the transactions contemplated by the AHC Bid (the "**AHC Transaction**"). This recommendation was supported by the Financial Advisor and the LP CRA.²

5. The AHC Transaction will provide stability for employees, retirees, suppliers and other stakeholders. It will also provide significant value for unsecured creditors, including a full recovery for the smallest creditors of the LP Entities. For the reasons set out herein, the Special Committee has accepted the Monitor's recommendation. The LP Entities are therefore seeking authorization to enter into the AHC APA and carry out the AHC Transaction, which is (if approved) presently targeted to close on July 15, 2010.³

6. At the same time, the LP Entities recognize that it will be helpful to them to continue to benefit from the stability afforded by the Support Agreement, including maintaining the ability to pursue the Support Transaction in the event that the AHC Transaction is unable to

¹ Affidavit of Douglas Lamb sworn May 10, 2010 (the "**Lamb Affidavit**"), at paragraph 6.

² Lamb Affidavit, at paragraph 7.

³ Lamb Affidavit, at paragraph 9.

close for whatever reason. Accordingly, the LP Entities are also seeking sanction of the Senior Lenders' CCAA Plan (the basis of which is the Support Transaction) on terms, negotiated between the LP Entities, the Monitor, the LP Administrative Agent and the Ad Hoc Committee, that will permit the LP Entities to pursue the AHC Transaction.⁴

7. With the assistance of the Monitor, the parties have agreed on terms for a "dual track" restructuring, pursuant to which the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. This proposal has been assented to by the LP Entities, the Ad Hoc Committee and the LP Administrative Agent.

8. In this motion, the LP Entities are seeking relief which will facilitate the carrying out of the process proposed by the Monitor. In particular, the LP Entities seek:

- (a) An order authorizing the LP Entities to enter into and carry out the AHC Transaction, and granting related relief with respect to amending the claims procedure and the SISP;
- (b) An order establishing procedures to hold a meeting of unsecured creditors, to approve a plan of compromise or arrangement through which the AHC Transaction will be carried out; and
- (c) An order sanctioning the Senior Lenders' CCAA Plan, with the implementation of the Plan conditional on, in summary, the Monitor's determination that the AHC Transaction will not be able to close.

PART II – FACTS

Background and the SISP

The Support Transaction and the CCAA Filing

9. Starting in May 2009, the LP Entities fell into default with respect to payments owed to their Senior Lenders (*i.e.* the LP Secured Lenders and certain counterparties whose obligations rank *pari passu* to the Claims of the LP Secured Lenders (the "**Hedging Creditors**"). A period of forbearance and negotiations followed and, on January 7, 2010, the LP Entities and

⁴ Lamb Affidavit, at paragraph 10. The Lamb Affidavit was sworn before the agreement concerning the dual track process was reached.

the LP Administrative Agent entered into an agreement (the “**Support Agreement**”) pursuant to which the LP Entities agreed to, among other things: (i) commence a CCAA proceeding; (ii) use commercially reasonable efforts to implement the Support Transaction; and (iii) commence the SISP with the objective of obtaining a Superior Offer than the Support Transaction. As such, the Support Transaction was similar to a “stalking horse” bid.⁵

10. As part of their initial application for protection under the CCAA, the LP Entities sought Court authorization to file the Senior Lenders’ CCAA Plan, the basis for which was the Support Transaction. Pursuant to the Initial Order, the Senior Lenders’ CCAA Plan was accepted for filing. The Initial Order also authorized the LP Entities to commence the SISP. As noted in the Initial Order Affidavit, implementation of the Support Transaction was subject to the identification of a Superior Offer in the SISP.⁶

The Conduct of the SISP

11. The SISP commenced on January 11, 2010 and proceeded in two phases. During Phase 1, strategic and financial parties executed confidentiality agreements and were provided with copies of a confidential information memorandum containing detailed, non-public information about the businesses and financial affairs of the LP Entities and National Post Inc. Potential bidders were required to submit Non-Binding Indications of Interest prior to March 5, 2010 (the “**Phase 1 Bid Deadline**”). Following the Phase 1 Bid Deadline, as reported in the Fourth Report of the Monitor dated March 12, 2010, the Monitor determined that there was a reasonable prospect of obtaining a credible, reasonably certain and financially viable offer that would result in a cash distribution to the LP Secured Lenders on closing of the amount owed to them less a discount of \$25 million (a “**Superior Cash Offer**”). Accordingly, the Monitor recommended to the Special Committee that the SISP continue to Phase 2. Phase 2 of the SISP commenced on March 12, 2010.⁷

12. During Phase 2 of the SISP the remaining Qualified Bidders were granted access to an electronic data room. The LP Entities also prepared and conducted numerous management

⁵ Lamb Affidavit, at paragraphs 13-15.

⁶ Lamb Affidavit, at paragraph 16.

⁷ Lamb Affidavit, at paragraph 20.

presentations in which senior management of the LP Entities provided more extensive insight into the businesses of the LP Entities. During this period, the LP Entities fielded and responded to hundreds of specific due diligence questions and requests from the Qualified Bidders and conducted numerous site visits. In order to facilitate an “apples to apples” comparison with the Support Transaction, those interested in making Qualified Purchase Bids were provided with a form of Purchase Agreement which was based on the Acquisition and Assumption Agreement contemplated by the Support Transaction, and asked to provide a blacklined version along with their bid. Qualified Bidders were required to deliver final, binding proposals to the Financial Advisor on or before April 30, 2010 (the “**Phase 2 Bid Deadline**”).⁸

13. Pursuant to the SISP Procedures, subject to the ability of the Monitor to waive strict compliance, a bid received prior to the Phase 2 Bid Deadline had to fulfill certain requirements in order to be considered a Qualified Bid (either a Qualified Purchase Bid or a Qualified Investment Bid). Bidders were advised that their offers should represent their final and best offer with respect to a Qualified Purchase Bid or a Qualified Investment Bid.⁹

The Evaluation of the Qualified Bids

14. The Financial Advisor received three bids before the Phase 2 Bid Deadline, two of which were Qualified Bids. The Monitor, in consultation with the Financial Advisor and the LP CRA, conducted an in-depth analysis of the material aspects of each of the Qualified Bids, paying particular attention to purchase price, financing and structure, excluded assets and excluded liabilities, treatment of employees and pension obligations, tax issues, material representations and warranties, regulatory issues, covenants, conditions, material closing risks and time to closing. Based on this analysis, the Monitor, in consultation with the Financial Advisor, determined that the AHC Bid was a Superior Cash Offer and the only Superior Offer received.¹⁰

15. On May 10, 2010, the Monitor made a recommendation to the Special Committee that the LP Entities pursue the AHC Transaction (the “**Superior Cash Offer**”).

⁸ Lamb Affidavit, at paragraph 21.

⁹ Lamb Affidavit, at paragraphs 22-24.

¹⁰ Lamb Affidavit, at paragraphs 25-26.

Recommendation”). The Superior Cash Offer Recommendation was supported by the Financial Advisor and the LP CRA. The Special Committee accepted the Superior Cash Offer Recommendation, whereupon the parties negotiated certain amendments to the AHC APA.¹¹

The AHC Transaction

16. The AHC Transaction, the material terms of which are contained in an asset purchase agreement (the “**AHC APA**”), contemplates that 7535538 Canada Inc. (“**Holdco**”) will effect a transaction through a new limited partnership (CW Acquisition Limited Partnership or “**Opco LP**”) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain specified liabilities of the LP Entities for an effective purchase price totalling \$1.1 billion, as described below. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities that will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicate that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management. The AHC Bid will also allow for a full pay-out of the debt owed by the LP Entities to the LP Secured Lenders under the LP Credit Agreement and the Hedging Creditors (as defined below) and provides an additional \$150 million in value which will be available to provide realization for the unsecured creditors of the LP Entities and may ultimately include up to 45% of the equity of Holdco.¹²

17. Pursuant to the AHC APA, Opco LP will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. on an as-is-where is basis for a total effective purchase price of approximately \$1.1 billion (the “**Purchase Price**”). The AHC APA also provides that Holdco will issue shares as additional consideration that will be available for distribution to the unsecured creditors of the LP Entities. The materials submitted with the AHC Bid indicate that Opco LP will continue to operate the businesses of the

¹¹ Lamb Affidavit, at paragraphs 27-28.

¹² Lamb Affidavit, at paragraph 8.

LP Entities in substantially the same manner as they are currently operated: at present, there are no plans to divest or discontinue operations or to sell assets or change management.¹³

18. Holdco will effect the acquisition of the financial and operating assets of the LP Entities through Opco LP. Holdco will own all of the limited partnership interests in Opco LP, and a wholly-owned subsidiary of Holdco will be the general partner of Opco LP.¹⁴

19. The Purchase Price will consist of:

- (a) A cash amount equal to the sum of the Senior Secured Claims Amount (as defined in the AHC APA) as at the Acquisition Date (as defined below) and the DIP Claims Amount (as defined in the AHC APA) as at the Acquisition Date;
- (b) A promissory note in the principal amount of \$150 million (less the amount of cash paid out to the unsecured creditors who elect to receive a cash payment as described below), which will be exchanged immediately after closing for up to 45% of the common shares of Holdco (the “**Holdco Common Shares**”) (as described in greater detail below); and
- (c) The assumption by Opco LP of certain liabilities of the LP Entities.¹⁵

20. The Ad Hoc Committee has indicated in its bid materials that Holdco has received commitments for \$950 million of funded debt and equity financing to finance the AHC Bid. This amount will include: (i) \$700 million of new senior funded debt to be raised by Opco LP and secured by the acquired assets and shares and assets of subsidiaries; and (ii) \$250 million of mezzanine debt and equity to be raised, including from the current members of the Ad Hoc Committee. The AHC Bid includes letters from reputable financial institutions indicating firm commitments to raise the \$700 million of senior debt financing within the timeframe contemplated by the AHC Bid.¹⁶

¹³ Lamb Affidavit, at paragraph 29.

¹⁴ Lamb Affidavit, at paragraph 30.

¹⁵ Lamb Affidavit, at paragraph 31.

¹⁶ Lamb Affidavit, at paragraph 32.

21. Other important features of the AHC APA include:
- (a) Opco LP will purchase substantially all of the financial and operating assets of the LP Entities as well as the shares of National Post Inc. and the outstanding indebtedness owed by National Post Inc. to the LP Entities. Opco LP will also assume substantially all of the operating liabilities of the LP Entities, including liabilities to substantially all active employees and obligations under pension plans, as well as obligations of the LP Entities under those contracts and leases that are identified in schedules to the AHC APA.
 - (b) Opco LP will not be acquiring, among other things, the following assets (the “**Excluded Assets**”): (i) avoidance claims; (ii) corporate records; (iii) certain lease agreements; (iv) the LP Indenture, the LP Credit Agreement, the LP Senior Subordinated Credit Agreement, the LP DIP Facility and the Support Agreement; and (v) agreements that have been disclaimed or resiliated by the LP Entities.
 - (c) Certain liabilities are excluded (the “**Excluded Liabilities**”), including in particular pre-filing liabilities and restructuring period claims; liabilities under any of the charges in the Initial Order; all liabilities for taxes payable or remittable by the LP Entities, other than transfer taxes payable in relation to the contemplated transaction; certain employee-related liabilities, including all liabilities relating to employees other than those that are transferred to Opco LP pursuant to the AHC APA, and liabilities under the Southam Executive Retirement Arrangements (the “**SERAs**”); and inter-company liabilities between and among the LP Entities and the CMI Entities.¹⁷
22. Effective as of the closing date of the transaction (the “**Acquisition Date**”), Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then-existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to ten percent of the non-unionized part-time or temporary employees employed by the LP Entities. Opco LP will assume all pension liabilities and other benefits for employees of the LP Entities that will be employed by Opco LP after the Acquisition Date and retirees currently covered by registered pension plans or other benefit plans. Of particular importance to the LP Entities, the AHC APA does not include a provision that would allow Opco LP to elect not to assume pension plans, benefit plans or other employee obligations.¹⁸

¹⁷ Lamb Affidavit, at paragraphs 33-35.

¹⁸ Lamb Affidavit, at paragraphs 36-38.

23. Pursuant to the AHC APA, the AHC APA may be terminated if the Acquisition Date is not on or before August 15, 2010. The third party debt financing commitments expire on July 15, 2010.¹⁹

24. The AHC Bid contains certain assumptions and conditions, including assumptions relating to the LP Entities' cash on hand at closing and the DIP Claims Amount. In the view of the LP Entities, the Monitor and the Financial Advisor, the conditions and assumptions are not likely to present any serious impediment to consummation of the AHC APA.²⁰

The AHC Plan

25. The AHC Bid contemplates that the AHC Transaction will be implemented pursuant to a plan of compromise or arrangement (the "**AHC Plan**") between the LP Entities and certain unsecured creditors (the "**Affected Creditors**") including those currently participating in a claims process (the "**LP Claims Process**") pursuant to the Claims Procedure Order. The Affected Creditors are the only creditors of the LP Entities whose claims will be affected under the AHC Plan. The LP Entities intend to file the AHC Plan no later than May 20, 2010. An outline of the terms of the AHC Plan is contained in Schedule "1.1(29)" to the AHC APA.²¹

26. In general terms, the AHC Plan will provide that, subject to Affected Creditor approval and sanction by this Honourable Court, the following will be approved and implemented:

- (a) Pursuant to the terms of the AHC APA, Opco LP will acquire substantially all of the assets of the LP Entities, including the shares and intercompany indebtedness of National Post Inc.;
- (b) The Senior Lenders will be unaffected creditors and will, on closing, receive a cash distribution equal to the full amount owing to them, including accrued interest and reimbursement of costs and expenses to the extent not previously paid by the LP Entities;
- (c) Opco LP will make a cash payment to any unsecured creditors with Proven Claims at the time of closing equal to or less than \$1,000, or who have elected to

¹⁹ Lamb Affidavit, at paragraph 39.

²⁰ Lamb Affidavit, at paragraph 41.

²¹ Lamb Affidavit, at paragraph 94

receive a cash payment, in an amount equal to the lesser of the amount of their Proven Claim and \$1,000 (the “**Cash Election**”), provided that any creditor making such Cash Election shall be deemed to vote in favour of the AHC Plan;

- (d) The balance of the consideration will be satisfied by an unsecured demand note or notes of Opco LP in the amount of \$150 million minus the aggregate cash amount paid pursuant to the previous sub-paragraph (the “**Opco Note**”) to be issued in favour of the LP Entities;
- (e) Immediately after receipt of the Opco Note, the LP Entities will purchase from Holdco common shares of Holdco (the “**Holdco Common Shares**”) in exchange for the Opco Note. The price per share will be \$13.33;
- (f) The Monitor will satisfy specified categories of administrative costs and claims outstanding on the Acquisition Date from an account established by the Monitor in trust pursuant to a further Order of this Court;
- (g) Affected Creditors with Proven Claims will be required to certify whether they are Canadian for purposes of the *Income Tax Act*;
- (h) There will two classes of Holdco Common Shares: Voting Common Shares (for Affected Creditors that are Canadian and hold Proven Claims) and Limited Voting Shares (for Affected Creditors that are non-Canadian and hold Proven Claims);
- (i) The Monitor will advise Holdco as to the number of shares distributable to Affected Creditors that are Canadian, and Holdco will proportionately issue Voting Common Shares and Limited Common Shares. The Monitor will then immediately distribute the Holdco Common Shares on a *pro rata* basis, holding back shares in an amount reflecting the value of outstanding disputed claims in the LP Claims Process at the time of distribution;
- (j) Holdco will purchase additional units of Opco LP using the Opco Note and the Opco Note will be cancelled;
- (k) A full release will be provided in favour of the former directors and officers of the LP Entities, the advisors of the LP Entities, the Monitor and its advisors, the LP CRA and its advisors and the members of the Special Committee and its advisors; and
- (l) Following the plan implementation date and completion of the acquisition of the assets, Holdco will take steps to apply for the listing of its common shares on the Toronto Stock Exchange.²²

27. The AHC Plan also contemplates that, subject to Court approval in a subsequent Order, on or before the plan implementation date, an administrative reserve (the

²² Lamb Affidavit, at paragraph 95.

“**Administrative Reserve**”) will be established in an amount to be agreed by the Monitor, the LP Entities and Holdco, and not to exceed \$25,000,000, using cash and cash equivalents from the accounts of the LP Entities in a segregated account to be held in trust by the Monitor for the benefit of persons entitled to be paid certain specified costs and Holdco. These costs will include, among others, (i) amounts owing that are secured by the Administration Charge, the LP MIP Charge and the Financial Advisor Charge and the reasonable fees and costs of the Monitor and its counsel; (ii) amounts secured by the Directors’ Charge; (iii) government priority claims; (iv) “Pension Priority Claims” as defined in the AHC APA; (v) fees and costs of any trustee in bankruptcy that may be appointed in respect of any of the LP Entities after the Acquisition Date; and (vi) trade payables incurred by the LP Entities after the filing date and before the Acquisition Date, in the ordinary course of business and in compliance with the Initial Order.²³

Acceptance of the Superior Cash Offer Recommendation

28. The Monitor, in its reasonable business judgment and in consultation with the Financial Advisor and the LP CRA, determined that the AHC Bid is a Superior Cash Offer and that neither of the other bids were Superior Cash Offers. On that basis, as required by the SISP, the Monitor made the Superior Cash Offer Recommendation, which was supported by the Financial Advisor and the LP CRA. A number of factors were relevant in considering the Superior Cash Offer Recommendation, including the following:

- (a) The proposed cash distribution to the Senior Lenders under the AHC Bid is greater than the Reference Amount described in the SISP. Under the AHC Bid the Senior Lenders will receive 100 cents on the dollar, as compared to approximately 97.5 cents on the dollar under the Support Transaction;
- (b) The AHC Transaction has many of the same key features as the Support Transaction. It will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities’ suppliers and the millions of people who rely on LP Entity publications every day. The AHC Transaction also preserves the employment of substantially all of the LP Entities’ current employees, as well as largely protecting the interests of former employees and retirees;
- (c) The AHC Transaction will provide for significant recoveries for unsecured creditors of the LP Entities. The AHC Bid contemplates that the AHC Transaction will be implemented through the AHC Plan under which \$150

²³ Lamb Affidavit, at paragraph 96.

million, in cash or shares, will be available for distribution to unsecured creditors of the LP Entities; and

- (d) Whereas the Support Transaction gives Acquireco, acting commercially reasonably, the option not to assume certain pension or employee benefit obligations, the AHC APA does not contain the same “optionality”. Although the LP Administrative Agent has indicated, including in Court on numerous occasions, that it is not likely to exercise this option, the absence of optionality is a factor in favour of the AHC Bid.²⁴

29. The LP Entities believe that the SISP was successful. It encouraged as many credible potential bidders as possible to come forward, and it gave potential bidders a long period to conduct meaningful due diligence with the full cooperation and assistance of the LP Entities, the Monitor and the Financial Advisor. Bidders were advised to put their best offer forward, and the LP Entities have every reason to believe that they did so.²⁵

30. For all of these reasons the LP Entities believe that the AHC Bid represents the best available outcome for the LP Entities. Accordingly, the Special Committee, after consulting with the LP CRA, the Financial Advisor and the Monitor, accepted the Monitor’s recommendation. The LP Entities are committed to working to complete the AHC Transaction in an expeditious manner.²⁶

Concurrent Sanction of the Senior Lenders’ CCAA Plan

31. The business carried on by the LP Entities is complicated, and many weeks’ worth of very hard work will be required between the approval of the AHC APA (if granted) and closing of the AHC Transaction. The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the AHC Bid is credible, reasonably certain and financially viable. The LP Entities agree with that assessment.²⁷

32. However, in the view of the LP Entities, the prudent course is to leave open the prospect of closing the Support Transaction if the AHC Transaction fails to close for any reason,

²⁴ Lamb Affidavit, at paragraphs 42-45; Seventh Report of FTI Consulting Canada Inc., in its Capacity as Monitor of the Applicants (“Monitor’s Seventh Report”), at page 21.

²⁵ Lamb Affidavit, at paragraph 46.

²⁶ Lamb Affidavit, at paragraph 47.

²⁷ Lamb Affidavit, at paragraph 48.

because the consequences to the LP Entities of a non-closing of the AHC Transaction without a Support Transaction backstop should be avoided if reasonably possible.²⁸

33. The LP Entities, the Monitor, the Ad Hoc Committee and the LP Administrative Agent have agreed on terms pursuant to which the LP Entities can both advance the AHC Transaction and take such steps as are required to maintain the possibility of proceeding with the Support Transaction if the AHC Transaction cannot close.

34. The LP Entities believe that simultaneously advancing the AHC Transaction and the Support Transaction is the best way to secure a going concern outcome for the businesses of the LP Entities. Pursuant to the procedures agreed between the parties, the LP Entities intend to advance the AHC Transaction and concurrently use reasonable efforts to advance the Support Transaction so that they will be in a position to close the Support Transaction if the AHC Transaction does not close for any reason.²⁹

The Senior Lenders' CCAA Plan

35. As part of the initial application for protection under the CCAA the LP Entities obtained authorization to file the Senior Lenders' CCAA Plan, the basis of which is the Support Transaction. The terms of the Support Transaction are set out in an Acquisition and Assumption Agreement which is a schedule to the Senior Lenders' CCAA Plan. In this motion the LP Entities are also seeking conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.³⁰

36. The Senior Lenders' Claims Process, which was established pursuant to the Initial Order, commenced immediately after January 8, 2010. Principal and Hedging Claims were established and, upon the expiry of the period stipulated in the Initial Order, all additional claims by Senior Lenders were deemed to be forever extinguished and barred. The Senior Lenders' Meeting was held on January 27, 2010. In total, 97.5% in number and 88.7% of in value of the Senior Lenders holding Proven Principal Claims that were present and voting at the Senior

²⁸ Lamb Affidavit, at paragraphs 49, 50, 52.

²⁹ Lamb Affidavit, at paragraphs 53-54.

³⁰ Lamb Affidavit, at paragraphs 55-57.

Lenders' Meeting voted in favour to approve the Senior Lenders' CCAA Plan, well in excess of the required majorities.³¹

Sanction of the Senior Lenders' CCAA Plan

37. The Monitor is of the view, and the LP Entities agree, that the requirements for sanctioning the Senior Lenders' CCAA Plan have been satisfied, and that if the AHC Transaction does not close the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities' creditors and the LP Entities. The Monitor supports the sanction of the Senior Lenders' CCAA Plan on the terms agreed by the parties, as described below.³²

38. A form of Credit Acquisition Sanction, Approval and Vesting Order was scheduled to the Support Agreement and was also part of the Meeting Materials delivered in advance of the Senior Lenders' Meeting.³³ The LP Entities now seek approval of a conditional sanction order (the "**Credit Bid Sanction Order**") adding certain provisions relating to the conditionality of the sanction and the approval of the Acquisition and Assumption Agreement.

39. Pursuant to the terms of the proposed Credit Bid Sanction Order:

- (a) The sanction of the Senior Lenders' CCAA Plan will not be effective until after the Monitor delivers to the LP Entities and the LP Administrative Agent and files with the Court a certificate (the "**Monitor's Credit Bid Sanction Certificate**"). The Monitor will not deliver its certificate making the conditional Sanction of the Credit Acquisition operative if the AHC Bid closes and would not deliver it prior to July 29, 2010 unless the Monitor determines in its reasonable business judgment that there is no reasonable chance that the AHC Bid can close, in which case it may apply to Court on 4 business days' notice for authority to deliver the Monitor's certificate in advance of July 29, 2010. In the event that the Monitor's Credit Bid Sanction Certificate has not been delivered by July 30, 2010, the Credit Bid Sanction Order provides that the LP Administrative Agent may apply to the Court to compel delivery of such certificate by the Monitor;
- (b) The Monitor may delay the delivery of the Monitor's Credit Bid Sanction Certificate past July 29, 2010 if, in its reasonable business judgement and in consultation with the LP CRA and the Financial Advisor, it believes that the AHC

³¹ Lamb Affidavit, at paragraphs 58-68.

³² Monitor's Seventh Report, pages 32-34, Lamb Affidavit, at paragraph 70 (the Monitor's Letter was amended after the Lamb Affidavit was filed.

³³ Lamb Affidavit, at paragraphs 74-75.

Transaction will close within a reasonably short period of time after July 29, 2010;

- (c) The closing date for the Support Transaction is extended to July 29, but will not be extended further without the consent of the LP Administrative Agent; and
- (d) Upon delivery of the Monitor's Credit Bid Sanction Certificate: (i) the LP Entities will be authorized to execute the Acquisition and Assumption Agreement, which contains the specific terms for implementation of the Support Transaction; and (ii) the Acquisition and Assumption Agreement and the transactions contemplated thereby will be deemed approved.³⁴

40. The parties have also agreed that priority, in terms of advisor and management time, will be given to working to close the AHC Transaction. However, the LP Entities will use reasonable efforts to comply with information requests from the LP Administrative Agent and its advisors provided they do not prejudice the closing of the AHC Transaction. The parties have agreed that if any issues arise concerning closing requirements as between the AHC Transaction and the Support Transaction the Monitor will assist the parties in resolving them, failing which the Monitor will seek advice and directions from the Court.

Revisions to Claims Procedure Order and the Continuation of the LP Claims Process

41. Pursuant to terms of the Claims Procedure Order, the LP Entities have commenced a claims process (the "**LP Claims Process**") in which they are calling for the claims of certain of their creditors.³⁵

42. The AHC Transaction must close on or before August 15, 2010. In order to implement all of the steps required to close the AHC Transaction by that date, the LP Entities have determined that the Meeting of Unsecured Creditors must be convened for the purpose of a vote on the AHC Plan (as defined below) no later than June 10, 2010. In order to permit certain additional creditors to participate in a vote on and eventual distribution under the AHC Plan, and in anticipation of the imminent Meeting of Unsecured Creditors, the LP Entities propose to make

³⁴ Lamb Affidavit, at paragraphs 75-78.

³⁵ Lamb Affidavit, at paragraph 79.

a number of amendments to the Claims Procedure Order relating to: (i) restructuring period claims; (ii) claims against directors and officers; and (iii) employee claims.³⁶

43. The Claims Procedure Order currently requires the LP Entities to deliver claims packages (the “**LP Claims Packages**”) to creditors with included claims arising after January 8, 2010 (the “**Restructuring Period Claims**”) as soon as practicable after the LP Entities have knowledge of such Restructuring Period Claims but in any event no later than 31 calendar days before any meeting of creditors. As a result, under the Claims Procedure Order as it is currently drafted, creditors with Restructuring Period Claims that arise after May 10, 2010 (which is 31 days in advance of the proposed Meeting of Unsecured Creditors) will not be included in or affected by the AHC Plan.³⁷

44. In order to enable a greater number of LP Creditors with Restructuring Period Claims to participate in the Meeting of Unsecured Creditors and the AHC Plan, the LP Entities propose to amend paragraph 21 of the Claims Procedure Order so that LP Claims Packages need be to be delivered before on or before May 20, 2010. The LP Entities also propose to amend the LP Restructuring Period Claims Bar Date to June 3, 2010, which is seven days before the Meeting of Unsecured Creditors. In the event that a Restructuring Period Claim is not finally determined before the Meeting of Unsecured Creditors, the proposed Claims Procedure Order permits the LP Entities to accept such LP Creditor’s claim as a voting claim and then revisit the determination of the claim for distribution purposes.³⁸

45. The current Claims Procedure Order largely excludes claims by current and former employees, subject to certain exceptions, as well as claims against directors and officers. The LP Entities propose to amend the Claims Procedure Order so that the LP Claims Process includes additional employee claims other than Grievance claims and claims that will be assumed by the purchaser pursuant to the AHC APA, as well as director and officer claims.³⁹

³⁶ Lamb Affidavit, at paragraph 80.

³⁷ Lamb Affidavit, at paragraph 81.

³⁸ Lamb Affidavit, at paragraph 82.

³⁹ Lamb Affidavit, at paragraphs 84-86.

46. If approved, the Monitor will post the Amended Claims Procedure Order on its website immediately after the granting of the Order Approving the AHC Bid.⁴⁰

47. Pursuant to the Claims Procedure Order, after the initial call for claims, no steps were to be taken to adjudicate or resolve claims until the posting of notice by the Monitor that a determination had been made that such steps were required to close a Successful Bid or, after the closing of a Successful Bid, to facilitate a distribution of proceeds to unsecured creditors.⁴¹

48. The Monitor, the LP CRA, the LP Entities and the LP Administrative Agent have made a determination pursuant to the Claims Procedure Order that additional steps in the LP Claims Process are required for the closing of the AHC Bid. Accordingly, the LP Entities will be taking immediate steps to proceed with the adjudication and resolution of claims.⁴²

Meeting and Voting Procedures

49. As part of this motion, the LP Entities also seek a Meeting Order providing for a Meeting of Unsecured Creditors and associated voting procedures. The LP Entities and the Ad Hoc Committee have agreed that, subject to Court approval, the LP Entities intend to call and conduct a meeting of the Affected Creditors on June 10, 2010 for the purpose of voting on a resolution to approve the AHC Plan. Because the LP Entities must close the AHC Transaction no later than August 15, 2010, it is critical that the Meeting of Unsecured Creditors take place as soon as possible so that the LP Entities can seek a sanction Order and take such other steps as may be required prior to the Acquisition Date.⁴³

50. The LP Entities propose that, within two business days of the granting of the proposed Meeting Order, the Monitor will publish notice of the Meeting of Unsecured Creditors (the “**Meeting Notice**”) substantially in the form attached as Schedule “A” to the draft Meeting

⁴⁰ Lamb Affidavit, at paragraph 87.

⁴¹ Lamb Affidavit, at paragraph 91.

⁴² Lamb Affidavit, at paragraphs 92-93.

⁴³ Lamb Affidavit, at paragraph 97.

Order for two business days in the *National Post*, *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal*.⁴⁴

51. Details concerning the proposed Meeting, including specific provisions concerning establishing voting claims amounts for LP Subordinated Lender Claims and LP Noteholder Claims are set out in the Lamb Affidavit and the proposed Meeting Order. The latter provisions have been worked out with counsel for the LP Subordinated Lenders and the LP Noteholders, respectively. The LP Entities propose that, in respect of the LP Subordinated Lenders, copies of the Meeting Notice and the Meeting Materials will be provided solely to the LP Subordinated Agent and, in respect of the LP Noteholders, copies of the Meeting Notice and the Meeting Materials will be provided solely to the Trustees.⁴⁵

Amendment to the SISP Procedures

52. Pursuant to the SISP Procedures, if the Special Committee accepts the Superior Cash Offer Recommendation, the Monitor is directed to take steps toward implementation of the Superior Cash Offer. Specifically, the SISP Procedures provide that:

If the Special Committee accepts the Superior Cash Offer Recommendation, the Monitor, in consultation with the Financial Advisor and the LP CRA, shall negotiate and settle a definitive agreement in accordance with the recommendation but subject to the terms and conditions of the Senior Lenders' CCAA Plan.⁴⁶

53. The LP Entities, in consultation with the Monitor, the Financial Advisor and the LP CRA, have determined that it is prudent and reasonable to seek conditional sanction of the Senior Lenders' CCAA Plan on the terms set out in the Monitor's Letter. The LP Entities wish to clarify and eliminate any concerns that the foregoing provision in the SISP Procedures precludes the concurrent pursuit of the AHC Transaction and the Support Transaction.⁴⁷

54. The SISP Procedures also provide that the Monitor's Superior Cash Offer Recommendation is conditional upon Court Approval and "the Superior Cash Offer closing

⁴⁴ Lamb Affidavit, at paragraph 101.

⁴⁵ Lamb Affidavit, at paragraph 106.

⁴⁶ Lamb Affidavit, at paragraph 107.

⁴⁷ Lamb Affidavit, at paragraph 108.

within 60 days after the Phase 2 Bid Deadline, or such longer period as shall be agreed to by the Monitor, in consultation with the Financial Advisor and the LP CRA, and consented to by the Agent, acting in consultation with the Steering Committee.” The LP Entities will endeavour to close the AHC Transaction as expeditiously as possible. However, the businesses of the LP Entities are extremely large and complex and the AHC Transaction – as well as the Support Transaction – contains numerous time-consuming conditions to closing. As a result, in the LP Entities best estimate, the AHC Transaction will not close until well into July, well after 60 days after the Phase 2 Bid Deadline has elapsed. Furthermore, the Monitor has indicated that it does not support, and the Ad Hoc Committee will not support, conditional sanction of the Senior Lenders’ CCAA Plan where the Order contains a hard stop deadline beyond which the LP Entities would be compelled to implement the Support Transaction. In order to accommodate the real possibility that such closing timeline will not be possible and to build flexibility into the process to accommodate reasonable delays caused by uncontrollable variables, the LP Entities wish to revise the SISP Procedures so that they provide that the 60-day provision is amended to 91 days, and may also be extended by further Order of the Court.⁴⁸

55. In order to clarify that the SISP Procedures permit concurrent pursuit of the AHC Transaction and the conditional sanction of the Senior Lenders’ CCAA Plan and to introduce the possibility of a further revision of the closing deadline by the Court, the LP Entities therefore propose to revise the section of the SISP Procedures entitled “**Superior Cash Offer is Received**” as follows (with new additions in italics and underlined):

If the Monitor determines in its reasonable business judgment following consultation with the Financial Advisor and the LP CRA, that one or more of the Qualified Bids is a Superior Cash Offer, the Monitor, in consultation with the Financial Advisor and the LP CRA, shall recommend (the “**Superior Cash Offer Recommendation**”) to the Special Committee that the most favourable Superior Cash Offer be selected and that a definitive agreement be negotiated and settled in respect of that Superior Cash Offer, conditional upon Court approval and conditional on the Superior Cash Offer closing within 91⁴⁹ days after the Phase 2 Bid Deadline, or such longer period as shall be agreed to by the Monitor, in consultation with the Financial Advisor and the LP CRA, and consented to by the Agent, acting in consultation with the Steering Committee, or by further Order of the Court.

⁴⁸ Lamb Affidavit, at paragraph 109.

⁴⁹ The proposed order changes the deadline from 60 days to 91 days – through inadvertence neither the Lamb Affidavit nor the form of order attached at tab 3 to the Motion Record reflect that this is a change, but it is.

If the Special Committee accepts the Superior Cash Offer Recommendation, the Monitor, in consultation with the Financial Advisor and the LP CRA, shall negotiate and settle a definitive agreement in accordance with the recommendation but subject to the terms and conditions of the Senior Lenders' CCAA Plan, provided that nothing herein shall prevent the LP Entities or the Monitor from seeking sanction of the Senior Lenders' CCAA Plan which sanction will remain conditional upon delivery of a Monitor's Certificate on such terms as may be agreed to by the LP Entities, the Monitor and the Agent or ordered by the Court and, if such conditional sanction is granted, taking such commercially reasonable steps as are required for the LP Entities to remain in compliance with the terms of the Support Agreement and the Senior Lenders' CCAA Plan pending the closing of the Successful Bid (as defined herein).⁵⁰

56. The Monitor and the LP CRA support this amendment to the SISP Procedures.⁵¹

PART III – ISSUES AND THE LAW

57. The issues on this motion are as follows:

- (a) Should the Court approve the AHC Transaction?
- (b) Should the Court amend the Claims Procedure Order?
- (c) Should the Court approve the changes to the SISP so as to permit the LP Entities to concurrently pursue the AHC Transaction and the Support Transaction?
- (d) Should the Court conditionally sanction the Senior Lenders' CCAA Plan on terms that will permit the LP Entities to concurrently pursue the AHC Transaction and the Support Transaction?

Approval of the AHC Transaction

58. The LP Entities submit that this Honourable Court should approve the AHC Transaction because:

- (a) the process by which the AHC Bid was elicited (that is, the SISP) was fair, and was conducted effectively and with integrity;
- (b) the AHC Transaction is fair and reasonable, and will benefit the stakeholders generally; and
- (c) the proposed disposition of assets pursuant to the AHC Transaction meets the criteria in section 36 of the CCAA.

⁵⁰ Lamb Affidavit, at paragraph 110.

⁵¹ Lamb Affidavit, at paragraph 111.

The SISP was Fair and Effective

59. The decision of the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*⁵² established that a court, in granting approval for a sale of assets by a court-appointed receiver, should consider:

- (a) whether the receiver has made sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.⁵³

60. CCAA Courts have on numerous occasions looked to these criteria in determining whether to approve a sale of assets of a debtor company.⁵⁴ In this case, the LP Entities submit that the *Soundair* principles are a useful measure of whether the SISP was carried out in such a way as to effectively elicit a better bid than the Support Transaction.

61. The LP Entities further submit that, using the *Soundair* principles as a guide, the SISP was clearly effective and very successful. As noted in the Initial Order Reasons, the Court authorized the LP Entities to carry out the SISP under the supervision of the Monitor, and drew comfort from the fact that the terms of the SISP did not fetter the discretion of the Monitor to seek advice and directions from the Court.⁵⁵

62. It is readily apparent that the LP Entities, the Financial Advisor and the Monitor made “sufficient efforts” to attract the best possible transaction, and did not act improvidently. The SISP was widely publicized and attracted considerable attention from potential bidders. Although the AHC Transaction is a cash offer, interested parties also had the option of making

⁵² [1991] O.J. No. 1137.

⁵³ *Ibid.*, at paragraph 16.

⁵⁴ See for example *Re Canadian Red Cross Society* [1998] O.J. No. 3306 (Ont. Gen. Div.). Recent examples include *Re Eddie Bauer of Canada Inc.*, [2009] CarswellOnt 5450 (S.C.J.); *Re Intertan Canada Ltd.*, [2009] Carswell 1489 (S.C.J.); and *Re Nortel Networks Corp.*, [2009] CarswellOnt 4467 (S.C.J.).

⁵⁵ Initial Order Reasons, at paragraphs 27-28.

investment proposals. From beginning to end, interested parties had approximately four months to conduct due diligence and prepare offers, during which time the LP Entities, the Monitor and the Financial Advisor were all available to answer questions, make presentations and conduct site visits.

63. The interests of all parties were appropriately addressed in the carrying out of the SISP. The SISP was designed to encourage offers for the entirety of the LP Entities' enterprise as a going concern. In particular, the Support Transaction, which essentially served as a stalking horse, contemplated a going concern outcome which protected the interests of the suppliers, trade creditors and substantially all the employees (subject to optionality). This fostered bids for the LP Entities which had the same attributes. The interests of the Senior Lenders were protected by the design of the SISP, which contemplated that unless an offer provided for a cash payout for the Senior Lenders, or was otherwise acceptable to them, the Support Transaction would proceed.

64. It is also readily apparent that the SISP was effective and was conducted with integrity. The best assurance of the integrity of the process was that it was conducted under the supervision of the Monitor, and every step of the process was subject to consultation with and/or the approval of the Monitor, the Financial Advisor, the LP CRA and the LP Administrative Agent. The best assurance of the effectiveness of the process is the result: dozens of interested parties came in to the process and the transaction that resulted is clearly superior to the Support Transaction.

65. The LP Entities submit that the process by which the AHC Transaction was reached was fair. The SISP was amended once, on consent, after the Ad Hoc Committee brought a motion seeking certain changes to the process.⁵⁶ Other than that, the LP Entities are not aware of any person claiming that there has been any unfairness in the carrying out of the SISP to date.

66. As discussed below, the LP Entities are seeking amendments to the SISP in order to permit the pursuit of the AHC Transaction and the Support Transaction along "dual tracks". The fact that the LP Entities wish to amend the SISP to vary what happens after a Superior Offer

⁵⁶ By an Order herein dated February 2, 2010 (the "Amended SISP Order").

is identified does not detract from the LP Entities' submission that the process leading up to the identification of a Superior Offer was both fair and effective.

The AHC Transaction is Fair and Reasonable and Benefits the Stakeholders

67. Courts frequently approve significant transactions and agreements that occur in the course of CCAA proceedings on the basis that the transaction is fair and reasonable. For example, in *Re Calpine Canada Energy Ltd.*⁵⁷, the Alberta Court of Queen's Bench held that:

the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.⁵⁸

68. Romaine J. further noted that the Court has the jurisdiction to approve settlements or major transactions during the CCAA stay period.⁵⁹ In accepting this proposition, Romaine J. cited the decision of Farley J. in *Re Air Canada*⁶⁰ in which Farley J. noted that the approval of agreements during a CCAA process was to be carried out based on the following principles:

... approval of the Court may be given where there is consistency with the purpose and spirit of that legislation [the CCAA], a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally...⁶¹

69. In *Re Air Canada*, Farley J. cited his own earlier decision in *Re Sammi Atlas Inc.*⁶² for the proposition that in determining whether an agreement is "fair and reasonable", it is necessary to look at the creditors as a whole (*i.e.*, generally) and to any objecting creditors specifically to see if rights are compromised in an attempt to balance interests, as opposed to a confiscation of rights. Although *Re Sammi Atlas* was a decision sanctioning a plan of compromise and arrangement involving the debtor company, Farley J. indicated that he was of

⁵⁷ 2007 ABQB 504 [*Re Calpine*].

⁵⁸ *Re Calpine*, supra, at paragraph 58.

⁵⁹ *Re Calpine*, supra, at paragraph 56.

⁶⁰ [2004] O.J. No. 303 (4th) 169 (Ont. S.C.J.) [*Re Air Canada*].

⁶¹ *Ibid.*, at paragraph 9.

⁶² [1998] O.J. No. 1089 (Ont. Gen. Div.) [*Re Sammi Atlas*].

the view that similar principles should apply in circumstances where the court is asked to approve a major agreement during the CCAA stay period.⁶³

70. The LP Entities submit that the AHC Transaction meets these criteria. Among other things, the AHC Transaction provides the following:

- (a) a going concern outcome for the operating business carried on by the LP Entities, including the preservation of substantially all employees on substantially the same terms and the safeguarding of important retiree and other benefits;
- (b) the opportunity for the smallest LP unsecured creditors, those with claims equal to or less than \$1,000, to have their claims satisfied in cash;
- (c) the opportunity for other LP unsecured creditors to participate in up to 45 percent of the equity of the restructured business;
- (d) the satisfaction of the claims of the LP Senior Lenders at 100 cents on the dollar, a rate of recovery which is superior even to the Support Transaction they sponsored; and
- (e) a long-term solution, with no plans to discontinue operations or sell assets, preserving the LP Entities' business as a Canadian enterprise serving millions of members of the Canadian public.

Section 36 of the CCAA is Satisfied

71. Section 36 of the CCAA, which was relatively recently amended, provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a Court. In deciding whether to grant such authorization, the Court is required to consider certain enumerated factors⁶⁴. The LP Entities submit that the application of these factors to this case clearly militates in favour of the approval of the AHC Transaction:

⁶³ *Re Air Canada*, supra, at paragraph 9.

⁶⁴ These factors are found at section 36(3) of the CCAA.

- (a) *Whether the process leading to the proposed sale or disposition was reasonable in the circumstances:* for the reasons set out above, the SISP was both fair and effective.
- (b) *Whether the monitor approved the process leading to the proposed sale or disposition:* the Monitor was intimately involved in supervising the SISP and it was the Monitor who ultimately made the Superior Cash Offer Recommendation.
- (c) *Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy:* the Monitor previously advised this Court that in its opinion the Support Transaction was preferable to a bankruptcy. Since the AHC Transaction is a Superior Offer, by inference it is also preferable to a bankruptcy.
- (d) *The extent to which the creditors were consulted:* the LP Senior Lenders were consulted with respect to and/or had the right to approve the various steps in the SISP.
- (e) *The effects of the proposed sale or disposition on the creditors and other interested parties:* as discussed above, the AHC Transaction provides for a going concern outcome and significant recoveries for unsecured creditors.
- (f) *Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value:* the Financial Advisor and the Monitor are both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction, which was the “stalking horse” offer made by the single largest creditor constituency.⁶⁵

72. Accordingly, the LP Entities submit that the criteria in section 36(3) of the CCAA are satisfied. Moreover, for all of the foregoing reasons, the LP Entities submit that the AHC Transaction ought to be approved.

Amending the Claims Procedure Order

73. The establishment of a claims procedure is not specifically provided for in the CCAA; rather, it is a matter for the exercise of the Court’s supervisory jurisdiction under section 11 of the CCAA, or alternatively under its inherent jurisdiction.

74. The Claims Procedure Order made on March 12 reflected the fact that, at that time, the results of Phase 2 of the SISP were not known. Accordingly, the scope of claims that

⁶⁵ Monitor’s Seventh Report, at page 41.

were called for was limited, and the resolution and/or adjudication of claims was not to proceed unless, generally, it was necessary to do so in order to close a Superior Offer.

75. Now that the SISP has elicited a Superior Offer, and moreover a Superior Offer that will be effected through a plan of compromise and arrangement, it is evident that the scope of the Claims Process needs to be expanded. The first aspect of this is that claims that have already been filed will move to adjudication and resolution. The Monitor, the LP CRA and the LP Administrative Agent have all consented to these steps being taken.

76. The second aspect is that the scope of claims that are the subject of the Claims Procedure needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the AHC Plan, and to participate in the distributions to unsecured creditors contemplated by the AHC Plan. The proposed amendments to the Claims Procedure Order achieve that result.

77. The third aspect is that the timing for delivery of Restructuring Period Claims has to be abbreviated in order to permit those creditors with Restructuring Period Claims to participate in the meeting. To that end, the Restructuring Period Claims Bar Date has been brought forward, as has the date by which Claims Packages are to be delivered to creditors with Restructuring Period Claims.

78. The proposed amendments to the Claims Procedure Order are dictated by the reality that the LP Entities do not have time within which to conduct an extended claims process. The timing of the steps required to close the AHC Transaction is such that a meeting has to be held on or before June 10. In order to accommodate that timing while having as effective and inclusive a meeting as possible, the Claims Procedure Order must be amended so that it can proceed on an ambitious timetable. Nevertheless, the LP Entities submit that with the proposed amendments the Claims Procedure is “flexible and expeditious”, particularly having regard to the overriding discretion in the Monitor and the LP Entities, acting reasonably, to waive strict compliance with the terms of the Claims Procedure Order.⁶⁶

79. Accordingly, the LP Entities submit that the proposed amendments to the Claims Procedure Order should be approved.

Amending the SISP

80. The SISP Procedures contemplate that if a Superior Cash Offer is made, the LP Entities will pursue it, and close it, within sixty days of the Phase 2 Bid Deadline.

81. It is now apparent that, because the AHC Transaction is to be effected through the AHC Plan, closing it will require steps such as calling for claims and holding a meeting of unsecured creditors. Those steps simply cannot be carried out within the sixty days contemplated by the SISP. Accordingly, with the consent of the Monitor, the Ad Hoc Committee and the LP Administrative Agent, the LP Entities are asking that the SISP be amended to extend the date by which a Superior Cash Offer can close.

82. Also, the SISP does not explicitly authorize the LP Entities to pursue both the Support Transaction and a Superior Cash Offer. However, there is no reason in principle or policy why the LP Entities should be precluded from doing so, where it is feasible, and where it can be done without unfairly affecting stakeholders. Accordingly, with the consent of the Monitor, the Ad Hoc Committee and the LP Administrative Agent, the LP Entities are asking that the SISP be amended to permit the proposed procedure.

83. The SISP is a schedule to the Initial Order. The Initial Order, by its terms, is liable to being amended from time to time. Paragraph 102 of the Initial Order contains a “comeback clause” which provides that interested parties, including the LP Entities, may move to amend the Initial Order on notice. This would include a motion to amend the SISP, which is effectively incorporated into the Initial Order by reference. Moreover, the Court has broad general jurisdiction under section 11 of the CCAA to make any order it considers appropriate. The power to authorize the SISP in the first place was derived from section 11, as opposed to a specific provision in the CCAA, and it is therefore liable to be amended using the same jurisdiction. The Court is therefore free to amend the SISP if it considers it appropriate, in the exercise of its discretion, to do so.

84. The LP Entities submit that the proposed amendments to the SISP are clearly warranted both as a practical matter and in light of the overall objective of this proceeding,

⁶⁶ *Re ScoZinc Ltd.* [2009] N.S.J. No. 187, at paragraphs 23-24.

which is to procure the best available going concern outcome for the LP Entities and their stakeholders.

Sanction of the Senior Lenders' CCAA Plan

85. The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan, on the basis that the implementation of the Support Transaction is conditional on the delivery of a Monitor's certificate as described above.

86. Section 6(1) of the CCAA provides that the Court may sanction a plan if it has achieved the requisite vote. The effect of the Court's approval is to bind the company and its creditors:

If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

87. The criteria that a debtor company must satisfy in seeking the Court's approval for a plan under the CCAA are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.⁶⁷

88. As Paperny J. (as she then was) held in considering whether to sanction the plan of compromise and arrangement proposed in relation to *Re Canadian Airlines Corp.*⁶⁸:

The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.⁶⁹

Compliance with Statutory Requirements

89. Under this first branch of the test for sanctioning a CCAA plan, the Court typically considers factors such as whether (a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant or affiliated debtor companies have total claims in excess of \$5 million; (c) the notice of meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meetings of creditors were properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite double majority or majorities.⁷⁰

90. As set out in the Initial Order Reasons, the Applicants are companies to which the CCAA applies. The Monitor's Seventh Report details the formalities with respect to the meeting and concludes that those prerequisites to sanction, including majority approval, have been fulfilled.⁷¹

91. Additional statutory restrictions on what a plan may contain are found in sections 6(3), 6(5) and 6(6) of the CCAA. These sections provide that the Court may not sanction a plan unless it makes certain specified provisions concerning crown claims, employee claims and

⁶⁷ *Re Canadian Airlines Corp.*, 2000 ABQB 442 [*Canadian Airlines*] at paragraph 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001; *Re Sammi Atlas*, *supra*.

⁶⁸ *Canadian Airlines*, *supra*.

⁶⁹ *Canadian Airlines*, *supra*, at paragraph 3.

⁷⁰ *Canadian Airlines*, *supra*, at paragraph 62.

⁷¹ Monitor's Seventh Report, at paragraphs 83-84.

pension claims. Those provisions are made in the Senior Lenders' CCAA Plan at sections 5.2, 5.3 and 5.4 thereof.⁷²

No Unauthorized Steps

92. As Paperny J. noted in the Canadian Airlines decision, this criterion has not received much discussion in the authorities. It has been held that the court must rely upon the reports of the Monitor, as well as the parties, in ensuring that nothing contrary to the CCAA has occurred or is contemplated by the plan.⁷³

93. It is submitted that no unauthorized steps have been taken and that this Honourable Court has been kept apprised of key issues throughout the restructuring.

Fair and Reasonable

94. Paperny J. in Canadian Airlines indicated that the meaning of "fairness" and "reasonableness" are "necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply." The court's discretion is to be guided by the purpose of the CCAA – namely, to facilitate the reorganization of the debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons:

Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation...⁷⁴

95. The Ontario Court of Appeal has noted that the fact that a Plan is proposed only to secured creditors and does not provide for recovery for unsecured creditors does not, in itself, affect the fairness of such a Plan. As the Court noted:

...the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement.⁷⁵

⁷² Senior Lenders' CCAA Plan, Lamb Affidavit, Exhibit "E", at sections 5.2-5.4.

⁷³ *Canadian Airlines*, supra, at paragraph 64, citing *Olympia & York Developments Ltd. v. Royal Trust Co.* [1993] O.J. No. 545 (Ont. Gen. Div.) and *Re Cadillac Fairview Inc.*, [1995] O.J. No. 274 (Gen. Div.).

⁷⁴ *Canadian Airlines*, supra, at paragraph 95, citing *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* [1987] 2 W.W.R. 566 at 574 (Alta. Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (BCCA) [*Northland*].


96. However, as noted above, one of the factors the Court should consider is “available commercial alternatives to what is offered in the proposed plan”. In this case, the available alternative to the Support Transaction is the AHC Transaction; a going concern outcome which, on closing, would deliver more value for the stakeholders than the Support Transaction, including complete recovery for the LP Secured Lenders. Accordingly, are proposing that the implementation of the Support Transaction pursuant to the Senior Lenders’ CCAA Plan be made conditional, such that it will only take effect if the AHC Transaction fails to close. If the AHC Transaction fails to close, the Court will be in a position to conclude that there are no available commercial going concern alternatives to the Senior Lenders’ CCAA Plan, because the market was fully canvassed during the SISP and the AHC Bid was the only Superior Offer. In this way, the Court will have additional comfort that the Senior Lenders’ CCAA Plan is fair and reasonable.

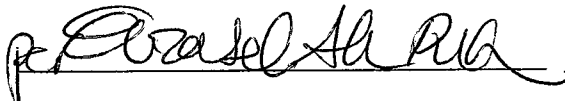
97. Accordingly, the LP Entities submit that the proposed Sanction Order, which is submitted to the Court with the consent of the LP Administrative Agent, the Ad Hoc Committee, the Monitor and the LP CRA, is fair, reasonable, and provides the LP Entities the opportunity to achieve a very successful outcome in this CCAA proceeding.

PART IV – NATURE OF THE ORDER SOUGHT

98. The LP Entities therefore request Orders substantially in the form of the draft Orders submitted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


Lyndon A.J. Barnes


Alexander Cobb

⁷⁵ *Re 1078385 Ontario Ltd.* [2004] O.J. No. 6050 (Ont. C.A.) at paragraph 31, citing *Re Anvil Range Mining Corp.* [2001] O.J. No. 1453 (Ont. S.C.J.), aff’d on other grounds [2002] O.J. No. 2606 (C.A.).

Schedule "A" - Statutory References

COMPANIES' CREDITORS ARRANGEMENT ACT

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

Definitions

2. (1) In this Act,

“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;

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the

Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Court may give directions

7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

- (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

- (5) For the purpose of subsection (4), a person who is related to the company includes
- (a) a director or officer of the company;
 - (b) a person who has or has had, directly or indirectly, control in fact of the company; and
 - (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

- (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Schedule “B” – List of Authorities

1. *Algoma Steel Corp. v. Royal Bank* [1992] O.J. No. 889 (Ont. C.A.)
2. *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* [1988] A.J. No. 1226 (Alta. Q.B)
3. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (BCCA)
4. *Olympia & York Developments Ltd. v. Royal Trust Co.* [1993] O.J. No. 545 (Ont. Gen. Div.)
5. *Royal Bank of Canada v. Soundair Corp.* [1991] O.J. No. 1137 (Ont. C.A.)
6. *Re 1078385 Ontario Ltd.* (2004), [2004] O.J. No. 6050 (Ont. C.A.)
7. *Re Anvil Range Mining Corp.* [2001] O.J. No. 1453 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (Ont. C.A.)
8. *Re Air Canada*, [2004] O.J. No. 303 (Ont. S.C.J.)
9. *Re Cadillac Fairview Inc.*, [1995] O.J. No. 274 (Ont. Gen. Div.)
10. *Re Calpine Canada Energy Ltd.* 2007 ABQB 504 (Alta. Q.B.)
11. *Re Canadian Airlines Corp.*, 2000 ABQB 442 (Alta Q.B.), leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001
12. *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Ont. Gen. Div.)
13. *Re Canwest Publishing Inc.*, [2010] O.J. No. 188 (Ont. S.C.J.)
14. *Re Central Guaranty Trustco Ltd.*, [1993] O.J. No. 1479 (Ont. Gen. Div.)
15. *Re Eddie Bauer of Canada Inc.*, [2009] CarswellOnt 5450 (Ont. S.C.J.)
16. *Re Intertan Canada Ltd.*, [2009] Carswell 1489 (Ont. S.C.J.)
17. *Re Keddy Motor Inns Ltd.* [1992] N.S.J. No. 214 (N.S.T.D.)
18. *Re Nortel Networks Corp.*, [2009] CarswellOnt 4467 (Ont. S.C.J.)
19. *Re Sammi Atlas Inc.*, [1998] O.J. No. 1089 (Ont. Gen. Div.)
20. *Re ScoZinc Ltd.* [2009] N.S.J. No. 187 (N.S.S.C.)

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.

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

APPLICANTS

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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