

Court File No. CV-09-8396-00CL

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

**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 GLOBAL  
COMMUNICATIONS CORP., AND THE OTHER  
APPLICANTS LISTED ON SCHEDULE "A"

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF CANWEST PUBLISHING  
INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS  
INC., AND CANWEST (CANADA) INC

APPLICANTS

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**JOINT FACTUM OF THE CMI ENTITIES AND THE LP ENTITIES  
(Approval of the Omnibus Transition and Reorganization Agreement)**

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June 4, 2010

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**(Approval of the Omnibus Transition and Reorganization Agreement)**

**PART I – NATURE OF THIS MOTION**

1. The CMI Entities and the LP Entities have brought motions in their respective CCAA proceedings for Orders, substantially in the forms submitted, approving an agreement (the "Omnibus Transition and Reorganization Agreement") between Canwest Global Communications Corp. ("Canwest Global") Canwest Global, Canwest Media Inc. ("CMI"), Canwest Television Limited Partnership ("CTLP"), The National Post Company/La Publication National Post ("The National Post Company"), Canwest Limited Partnership/Canwest Societe en Commandite ("Canwest LP"), National Post Inc. ("NPI"), and Canwest Publishing Inc./Publications Canwest Inc. ("CPI") addressing the further separation of the business activities and operations of the CMI Entities and the LP Entities. This factum is filed jointly by the CMI Entities and the LP Entities in support of their respective motions.

2. This Honourable Court's involvement in disentangling the businesses of the CMI Entities and the LP Entities began on October 30, 2009 when this Honourable Court granted an

Order approving the Transition and Reorganization Agreement (which attached the New Shared Services Agreement and the National Post Transition Agreement). The Transition and Reorganization Agreement set forth the terms of a reorganization and realignment of the Shared Services (as defined below) between the CMI Entities and the LP Entities and addressed the transfer of the assets and business of the *National Post* newspaper. Since the approval of the Transition and Reorganization Agreement by this Honourable Court on October 30, 2009, the CMI Entities and the LP Entities have determined that it is necessary to take additional steps in furtherance of the Transition and Reorganization Agreement by entering into the Omnibus Transition and Reorganization Agreement. The matters dealt with in the Omnibus Transition and Reorganization Agreement are part of the larger objective of creating a full and final separation of the businesses of the CMI Entities and the LP Entities so that each can function as an autonomous business enterprise and are critical to ultimately facilitating independent, going concern outcomes for the businesses of the CMI Entities and the LP Entities.

3. There is little or no marketable value to the interests being assigned and the assets being transferred have either already been paid for by the entity they are being transferred to through the Shared Services arrangements, or are of approximately equal value. In recognition of these facts, and after taking into account the totality of the transfers and assignments in each direction that are contemplated in the Omnibus Transition and Reorganization Agreement, the parties have agreed that no additional monetary consideration will flow in respect of these arrangements.

4. The Omnibus Transition and Reorganization Agreement constitutes the next step in a previously approved internal corporate reorganization that is not “outside the ordinary course of business”. The parties have agreed to use commercially reasonable efforts to obtain the approval of this Honourable Court of the Omnibus Transition and Reorganization Agreement. Approval of the Omnibus Transition and Reorganization is supported by significant stakeholders of both the LP Entities and the CMI Entities and their respective Monitors and Chief Restructuring Advisors.

## PART II – FACTS

5. The facts with respect to this Motion are more fully set out in the Affidavit of John E. Maguire sworn on June 3, 2010 (the “Maguire Affidavit”).<sup>1</sup> Capitalized terms in this Factum not otherwise defined have the same meanings as in the Maguire Affidavit.

### Background

6. For many years, the businesses of the CMI Entities and the LP Entities were integrated and shared critical business and support functions (collectively, the “Shared Services”).<sup>2</sup>

7. In 2005, CanWest MediaWorks Limited Partnership (now Canwest LP) was formed to acquire all of CanWest MediaWorks Inc’s newspaper publishing and digital and online media operations (with the exception of the *National Post*) and to operate such businesses as part of the creation of a publicly-listed income trust. At that time, a determination was made to continue the Shared Services arrangements that were then in existence, but under various inter-entity agreements (the “Inter-Entity Agreements”) which provided for cost/expense reimbursement on commercially reasonable terms. The CMI Entities agreed to provide the LP Entities with, among other things, executive advisory services, corporate and administrative services (including legal, tax, financial and human resources) and insurance related services. The LP Entities agreed to provide the CMI Entities with many of the existing Shared Services, including, among other things, financial and accounting support services, corporate human resources services and information technology (“IT”) infrastructure and support services. Pursuant to the terms of the Inter-Entity Agreements, the service provider was generally entitled to reimbursement for all costs and expenses incurred in connection with the provision of the Shared Service in question. Neither the reimbursement of costs and expenses nor the payment of fees was intended to result

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<sup>1</sup> The Maguire Affidavit is attached as an Exhibit to the Affidavit of Douglas E.J. Lamb sworn June 3, 2010 (the “Lamb Affidavit”). The Lamb Affidavit adopts the description of the Omnibus Transition and Reorganization Agreement set out in the Maguire Affidavit.

<sup>2</sup> Maguire Affidavit, para. 6.

in any material financial gain or loss to the service provider. The income trust transaction was completed in October 2005.<sup>3</sup>

8. In 2007, Canwest LP effected a going-private transaction of the income trust and, since July 2007, Canwest LP has been a 100% wholly-owned indirect subsidiary of Canwest Global. The LP Entities nonetheless continued to maintain a separate debt structure and credit facilities from the CMI Entities and both groups of entities continued to provide many of the Shared Services to each other pursuant to the Inter-Entity Agreements.<sup>4</sup>

### **The Transition and Reorganization Agreement**

9. In 2009, it was determined that the CMI Entities and the LP Entities would undergo discrete and parallel restructurings. It is anticipated that the separate restructurings will ultimately result in going concern outcomes for both the CMI Entities and the LP Entities which will see distinct and unrelated third party ownership of their respective businesses. In light of the impending and permanent separation of their respective businesses, it was recognized in or about October 2009 that the Shared Services would need to be disentangled so as to allow the CMI Entities and the LP Entities to operate independently of one another as restructured enterprises. As set out above, the process of disentangling the Shared Services formally commenced in an internal corporate reorganization that was agreed to by the CMI Entities and the LP Entities and carried out pursuant to the terms of the Transition and Reorganization Agreement dated as of October 26, 2009, which was approved by Order of this Honourable Court dated October 30, 2009.<sup>5</sup>

### **The Omnibus Transition and Reorganization Agreement**

10. Subject to the approval of this Honourable Court, the CMI Entities and the LP Entities have determined that it is necessary to take additional steps in furtherance of the Transition and Reorganization Agreement and the New Shared Services Agreement by entering into the Omnibus Transition and Reorganization Agreement. The Omnibus Transition and Reorganization Agreement has three main functions: (i) the transfer, assignment or realignment of certain misaligned contracts, trademarks, domain names, IT and interests in real estate; (ii) the

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<sup>3</sup> Maguire Affidavit, para. 18.

<sup>4</sup> Maguire Affidavit, para. 19.

<sup>5</sup> Maguire Affidavit, para. 3.

extension and/or amendment of certain provisions in the New Shared Services Agreement; and (iii) the entering into of new arms-length arrangements between certain of the CMI Entities and the LP Entities. The agreement is in furtherance of the larger objective of creating a full and final separation of the businesses of the CMI Entities and the LP Entities so that each can emerge from their respective restructurings as autonomous going concerns.<sup>6</sup>

11. The key elements of the Omnibus Transition and Reorganization Agreement are summarized below.

(a) ***The realignment of certain misaligned contracts and other interests***

(i) **Assignment of Contracts**

12. The CMI Entities have entered into various contractual arrangements on behalf of both the CMI Entities and the LP Entities, as have the LP Entities. Such contractual arrangements were entered into pursuant to the terms of the Inter-Entity Agreements and with the approval of the LP Entities, in the case of contracts entered into by the CMI Entities, and the CMI Entities, in the case of contracts entered into by the LP Entities. As a result, there are currently a number of contracts in which Canwest Global or CTLP is the contracting party, but which are held for the benefit of both the CMI Entities and the LP Entities.<sup>7</sup>

13. The Omnibus Transition and Reorganization Agreement contemplates the assignment of eight contracts from CTLP to CPI and two contracts from Canwest Global to CPI. The LP Entities have an interest in continuing the contracts in question, whereas the CMI Entities have determined that they do not. In all cases, the CMI Entities have no need or intention to continue to use the contracts, as the services provided under the contracts are used predominantly by the LP Entities (and, in some cases, are used by NPI). In short, there is no value to Canwest Global and/or CTLP in maintaining the contracts in question and their assignment will result in no detriment to the estate of the CMI Entities, while failure to assign the

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<sup>6</sup> Maguire Affidavit, para. 22.

<sup>7</sup> Maguire Affidavit, para. 20 and 25.

contracts in certain cases could be disruptive and could have a negative impact on the businesses of the LP Entities.<sup>8</sup>

(ii) **Realignment of Intellectual Property**

14. In 2005, trade-marks used exclusively by the LP Entities were transferred to the LP Entities as part of the income trust spin-off, however, those trade-marks that are used jointly by the CMI Entities and the LP Entities continue to reside with Canwest Global or CMI. The Omnibus Transition and Reorganization Agreement provides for the transfer of 18 trade-marks (the “Trade-marks”) to CPI that are currently registered in the name of Canwest Global or CMI (or a predecessor of CMI) and which have been used jointly by the CMI Entities and the LP Entities but which the CMI Entities no longer have an interest in continuing to use. None of the Trade-marks proposed to be transferred to CPI have any ascribed value in the books and records of the CMI Entities. In all cases, the consideration for the Trade-marks has already been paid by the LP Entities through the cost expense/reimbursement provisions of the Shared Services arrangements.<sup>9</sup>

15. The Omnibus Transition and Reorganization Agreement also provides for the assignment of 277 domain names (the “Domain Names”) from the LP Entities to the CMI Entities. In all cases, none of the Domain Names provide no value to the various businesses of the LP Entities, whereas the failure to assign such Domain Names would be detrimental to various businesses of the CMI Entities. In all cases, the consideration for the Domain Names has already been paid for by the CMI Entities through the cost/expense reimbursement provisions of the Shared Services arrangements that govern the use of domain names by the CMI Entities.<sup>10</sup>

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<sup>8</sup> Maguire Affidavit, para. 26, 28 and 29.

<sup>9</sup> Maguire Affidavit, para. 30, 31 and 33.

<sup>10</sup> Maguire Affidavit, para. 36.

**(iii) Realignment of IT Hardware**

16. Canwest LP currently owns certain computer hardware that is used by CTLP (collectively with certain software, defined in the Omnibus Transition and Reorganization Agreement as the “LP IT Hardware”). Similarly, CTLP currently owns certain computer hardware that is used by Canwest LP (collectively with certain software, defined in the Omnibus Transition and Reorganization Agreement as the “Television LP IT Hardware”). In view of the fact that: (i) the CMI Entities and the LP Entities have agreed that it would be extremely difficult to remove the equipment, and (ii) the value of the Television LP IT Hardware is approximately equivalent in value to the LP IT Hardware, the Omnibus Transition and Reorganization Agreement provides that Canwest LP will transfer and assign its interest in the LP IT Hardware to CTLP and CTLP will similarly transfer and assign its interest in the Television LP IT Hardware to Canwest LP.<sup>11</sup>

**(iv) Joint Ownership of Certain Proprietary Software**

17. Over the past several years, certain employees of CTLP jointly with certain employees of CPI developed and created an IT software application, known within the Canwest enterprise as “WEB AP” (the “Proprietary IT Software”). The Proprietary IT Software is currently used by both the CMI Entities and the LP Entities to assist in the on-line review and processing of their respective accounts payable and has been enhanced and modified “in-house” periodically over time by employees of CTLP and Canwest LP.<sup>12</sup>

18. Both CTLP and Canwest LP have ownership interests in the Proprietary IT Software and wish to continue to use it going forward. Accordingly, the Omnibus Transition and Reorganization Agreement provides that CTLP and Canwest LP have the right to independently exercise any and all rights of ownership then known or thereafter created or recognized, including the right to use, reproduce, and modify the Proprietary IT Software for any purpose whatsoever, without the need for further authorization to exercise any such rights or any obligation of accounting or payment of royalties. The parties have agreed that each of CTLP and

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<sup>11</sup> Maguire Affidavit, para. 39

<sup>12</sup> Maguire Affidavit, para. 40.



Canwest LP will only exercise their rights for their internal business operations and will not resell or distribute the Proprietary IT Software to any third party.<sup>13</sup>

**(v) Termination of Certain Pension and Benefit Plan Participation Arrangements**

19. As a result of the extensive Shared Services arrangements that existed between the CMI Entities and the LP Entities, there were a number of individuals who were employed by the CMI Entities but who participated in a pension plan sponsored by the LP Entities, and *vice versa*. The New Shared Services Agreement recognized that certain steps would need to be taken in order to rectify this historical misalignment, including the termination of the pension plan participation arrangements for these misaligned pension plan participants. The goal of such steps is that, from and after the separation of the businesses, current LP Entity employees will be members of pension plans sponsored by an LP Entity and current CMI Entity employees will be members of pension plans sponsored by a CMI Entity, without any “misalignments”.<sup>14</sup>

20. The Omnibus Transition and Reorganization Agreement documents the steps that have been taken (or in some cases will be taken) to complete the transfer process that was contemplated in the New Shared Services Agreement. Specifically, the Omnibus Transition and Reorganization Agreement acknowledges the termination of the pension plan cross-over participation agreements in respect of the following employees:

- 237 employees of Canwest LP participating in a defined contribution pension plan sponsored by CTLP;
- 72 employees of Canwest LP participating in a defined benefit pension plan sponsored by CTLP; and
- 1 employee of CTLP (whose employment with CTLP has since been terminated) participating in a defined benefit pension plan sponsored by CPI.

21. In addition, the Omnibus Transition and Reorganization Agreement documents the termination of pension plan participation agreements for 1 employee of CMI (who was not

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<sup>13</sup> Maguire Affidavit, paras. 41-42.

<sup>14</sup> Maguire Affidavit, para. 70.

identified in the New Shared Services Agreement) who participated in a defined benefit pension plan sponsored by CPI and certain employees of CMI (also not identified in the New Shared Services Agreement) who participated in the National Post Retirement Plan.<sup>15</sup>

(vi) **Real Property Realignments**

22. There are two properties located in British Columbia (the “B.C. Properties” as defined in the Maguire Affidavit) in respect of which CMI holds bare legal title but in respect of which CPI hold beneficial ownership. In accordance with the terms of the Nominee Agreements entered into in respect of the B.C. Properties, CMI has no independent ability to sell, mortgage, encumber or otherwise transfer its bare legal interests in the B.C. Properties. Accordingly, the B.C. Properties hold no value for CMI, pose no liability to CMI and cannot be properly considered as assets of CMI. The B.C. Properties are not reflected on the books and records, cash flows or financial statements of the CMI Entities.<sup>16</sup>

23. In contrast, CPI enjoys all rights, benefits, obligations and other aspects of beneficial ownership of the B.C. Properties, including entitlement to its use, income, rents and profits. Pursuant to the terms of the Nominee Agreements, CPI is obligated to indemnify and hold CMI harmless from all costs, expenses, losses and damages of whatsoever kind and character that arise out of CMI being the registered owner of the B.C. Properties. The B.C. Properties are currently charged as part of the LP Entities’ credit arrangements, and there is registered security on the Nanaimo Property in conjunction with these credit arrangements. The B.C. Properties are assets of CPI.<sup>17</sup>

24. Accordingly, the Omnibus Transition and Reorganization Agreement provides that CMI will execute and deliver all such documents and instruments relating to the B.C. Properties as are required by CPI or as CPI may direct, including, without limitation, any deeds transferring legal title that are required by CPI.<sup>18</sup>

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<sup>15</sup> Maguire Affidavit, para. 71.

<sup>16</sup> Maguire Affidavit, paras. 55 and 61.

<sup>17</sup> Maguire Affidavit, para. 62.

<sup>18</sup> Maguire Affidavit, paras. 65 and 69.

25. The Omnibus Transition and Reorganization Agreement further addresses the entering into of sub-lease arrangements between the CMI Entities and the LP Entities in respect of (i) the Ste. Catherine Street Location; (ii) the O'Connor Street Location; and (iii) the Queen Street Location. The parties have agreed that the subleases will be on commercially reasonable terms, which are set out as schedules to the Omnibus Transition and Reorganization Agreement.

26. In respect of the Ste. Catherine Street Location, while it is currently leased by CPI and primarily used to produce the Montreal Gazette newspaper, it is also used by the Montreal affiliate of the Global Television Network as a broadcast facility pursuant to an existing sub-lease between CTLP and CPI. There are also currently a small number of employees of the CMI Entities who occupy office space within the Ste. Catherine Street Location. The Omnibus Transition and Reorganization Agreement provides for the entering into of a formal sublease to recognize the use of this space by these employees.<sup>19</sup>

27. The O'Connor Street Location is currently leased by CPI but it is also used by the Ottawa affiliate of the Global Television Network as a news broadcast studio. As there is no sublease agreement presently in place, the Omnibus Transition and Reorganization Agreement provides for the entering into of a sublease between CTLP and CPI in respect of portions of the O'Connor Street Location.<sup>20</sup>

28. The Queen Street Location is currently leased to CTLP. As there is currently one employee of NPI who maintains an office in the Queen Street Location, the Omnibus Transition and Reorganization Agreement provides for a formal sublease between CTLP and NPI.<sup>21</sup>

(b) ***Extension of Certain Provisions in the New Shared Services Agreement***

29. When the New Shared Services Agreement was negotiated in October 2009, the CMI Entities and the LP Entities recognized that there was a possibility that the termination of certain of the Shared Services arrangements addressed therein might take longer than anticipated due to, among other things, the complexity of the tasks that were being undertaken.

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<sup>19</sup> Maguire Affidavit, para. 66.

<sup>20</sup> Maguire Affidavit, para. 67..

<sup>21</sup> Maguire Affidavit, para. 68.

30. As permitted by section 2.7 of the New Shared Services Agreement, the CMI Entities and the LP Entities have determined that certain terms and conditions set out in the New Shared Services Agreement require amendment and/or extension. The parties have included the proposed extensions/amendments in the Omnibus Transition and Reorganization Agreement as part of the process of separating the two enterprises.<sup>22</sup>

31. Specifically, the Omnibus Transition and Reorganization Agreement provides for the amendment and extension of certain provisions in the New Shared Services Agreement pertaining to the provision of certain IT services from the LP Entities to the CMI Entities.<sup>23</sup>

32. In addition, the Omnibus Transition and Reorganization Agreement amends a trade-mark licensing agreement (the "Trade-mark Licence Agreement") that granted the LP Entities' businesses a royalty-free, non-exclusive, non-transferrable license to use the trade-marks covered by the agreement subject to certain terms and conditions. The primary purpose of the Trade-mark Licence Agreement was to allow the LP Entities to use the "Canwest" name and trade-mark. The parties to the Omnibus Transition and Reorganization Agreement have now agreed to amend the New Shared Services Agreement to confirm the list of trade-marks used under licence and to extend the termination of the Trade-mark Licence Agreement to February 28, 2011 or such other date as the parties may agree. The extension of the agreement will, *inter alia*, allow the LP Entities to continue to use the trade-marks set out therein, including the "Canwest" name, while they transition into separate ownership.<sup>24</sup>

33. Furthermore, in the New Shared Services Agreement, the LP Entities and the CMI Entities agreed that the provision of certain corporate and executive advisory services and other employee sharing arrangements would terminate effective February 28, 2011. However, because neither the CMI Entities nor the LP Entities had completed their respective restructurings by that date, it was determined that certain of these corporate and executive advisory services and employee sharing arrangements should continue for a discrete period of time. The terms of these extensions, including in respect of certain human resources services, legal services and financial services as well as the costs and expenses of shared employees, the termination or replacement of

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<sup>22</sup> Maguire Affidavit, para. 44.

<sup>23</sup> Maguire Affidavit, para. 45.

<sup>24</sup> Maguire Affidavit, paras. 47-49.

shared employees, access to records and terminations were documented in a letter agreement (the “Letter Agreement”) dated as of March 1, 2010. The terms of the extension of the corporate and executive advisory services and employee sharing arrangements, as set out in the Letter Agreement (subject to certain amendments negotiated between the parties), have been incorporated into the Omnibus Transition and Reorganization Agreement.<sup>25</sup>

(c) ***Entering into New Inter-Company Agreements***

34. As noted above, one of the three main functions of the Omnibus Transition and Reorganization Agreement is to document the entering into of certain new arms-length agreements (separate and apart from the Inter-Entity Agreements) between the CMI Entities and the LP Entities in respect of the provision of certain services from one entity to the other. It is anticipated that most of these agreements will take effect in September 2010.

35. The Omnibus Transition and Reorganization Agreement contemplates that Canwest Digital Media, a division of CPI, and CTLP will enter into a new stand-alone agreement commencing September 1, 2010 (the “Sales Agency Agreement”), on or before the LP Closing Date, wherein Canwest Digital Media will provide CTLP with services relating to, *inter alia*, the solicitation of advertisements for placement on certain CTLP websites. Entering into the Sales Agency Agreement will benefit both the CMI Entities and the LP Entities. CTLP will be able to use the expertise of Canwest Digital Media to procure advertisements for placement on CTLP’s websites. Canwest Digital Media will be compensated at market rates for the services that it provides to CTLP.<sup>26</sup>

36. The Omnibus Transition and Reorganization Agreement also provides that CPI and CTLP will execute and deliver a new stand-alone agreement on or before the LP Closing Date pertaining to the provision of marketing services by CTLP to CPI (the “Master Marketing Services Agreement”). The services to be provided under the Master Marketing Services Agreement include the generation of research reports, the development of marketing strategies,

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<sup>25</sup> Maguire Affidavit, para. 53.

<sup>26</sup> Maguire Affidavit, paras. 80-81.

preparation of strategic plans for advertising campaigns and the negotiating and entering into of contracts with media suppliers on behalf of CPI.<sup>27</sup>

37. The Omnibus Transition and Reorganization Agreement also provides that CPI and CTLP will enter into a new stand-alone agreement pertaining to the licence by CTLP of certain specified proprietary software owned by CPI and the provision by CPI of certain IT support and maintenance services.<sup>28</sup>

38. Finally, the Omnibus Transition and Reorganization Agreement provides that CPI and CTLP will enter into an agreement pertaining to the rates upon which CTLP will be charged to advertise in newspapers owned by CPI (or its assigns) and the minimum dollar amount that CTLP will commit to spend in those newspapers.<sup>29</sup>

(d) ***Assignment of Case Management Responsibility for the National Post Insured Litigation***

39. Pursuant to the National Post Transition Agreement, the assets and business of the *National Post* newspaper were transferred as a going concern from The National Post Company to a new wholly-owned subsidiary of CPI. The National Post Transition Agreement provides that certain contingent liabilities relating to existing litigation claims against or in respect of The National Post Company were not assumed by the transferee.<sup>30</sup>

40. The parties to the Omnibus Transition and Reorganization Agreement have now agreed that NPI will assume the defence and responsibility for the conduct of certain litigation matters (including libel notices or other similar notices of an intention to commence a claim) that are insured by policies of insurance maintained for the benefit of The National Post Company and its employees in which The National Post Company and/or its employees are defendants.<sup>31</sup>

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<sup>27</sup> Maguire Affidavit, para. 83.

<sup>28</sup> Maguire Affidavit, para. 84.

<sup>29</sup> Maguire Affidavit, para. 85.

<sup>30</sup> Maguire Affidavit, para. 86.

<sup>31</sup> Maguire Affidavit, para. 87.

## **Confidential Supplement**

41. Certain of the matters provided for in the Omnibus Transition and Reorganization Agreement, including the form of Sales Agency Agreement, the Advertising Agreement, the term sheet relating to the provision of business services by the LP Entities to the CMI Entities in connection with certain financial reporting processes and information relating to Shared Employee Costs are highly commercially sensitive. The details concerning these matters are set out in a Disclosure Letter from the LP Entities to the CMI Entities that are party to the Omnibus Transition and Reorganization Agreement. Public disclosure of the matters contained in the Disclosure Letter could place the LP Entities and the CMI Entities at a competitive disadvantage, as well as hamper their businesses and ongoing restructuring efforts. The Disclosure Letter will be included in a confidential supplement (the “Confidential Supplement”) to the CMI Monitor’s and the LP Monitor’s reports filed in connection with this motion. The Confidential Supplement will be filed subject to a request for a sealing order.<sup>32</sup>

## **PART III – ISSUES**

42. The issues on this Motion are as follows:

- (a) Should this Honourable Court approve the Omnibus Transition and Reorganization Agreement?
- (b) Should this Honourable Court exercise its discretion to seal the Confidential Supplement? and
- (c) Should this Honourable Court extend the stay of proceedings in respect of the CMI Entities?

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<sup>32</sup> Maguire Affidavit, para. 23.

**PART IV – THE LAW**

**This Honourable Court Should Approve the Omnibus Transition and Reorganization Agreement**

43. The CMI Entities and the LP Entities submit that this Honourable Court should approve the Omnibus Transition and Reorganization Agreement. It is fair and reasonable, and furthers the interests of the CMI Entities, the LP Entities and their respective stakeholders, in particular because it will advance the process of disentangling the respective enterprises and facilitate CCAA emergence for both enterprises as stand-alone going concerns. The Omnibus Transition and Reorganization Agreement furthers the internal reorganization that was commenced with the Transition and Reorganization Agreement. For reasons that are essentially identical to those cited by this Honourable Court in its decision approving the Transition and Reorganization Agreement, section 36 of the CCAA does not apply. In any event, a consideration of the factors in section 36 of the CCAA militates in favour of the approval of the Omnibus Transition and Reorganization Agreement.

**The Omnibus Transition and Reorganization Agreement is an Extension of the Internal Reorganization Previously Approved by this Court**

44. As noted above, on October 30, 2009, this Honourable Court approved the Transition and Reorganization Agreement. On November 12, 2009, this Honourable Court released written reasons in respect of the approval of the Transition and Reorganization Agreement (the “*TRA Approval Decision*”<sup>33</sup>). To date, the *TRA Approval Decision* is the only decision of which the CMI Entities and the LP Entities are aware in which section 36 has been substantively considered.

45. The Omnibus Transition and Reorganization Agreement is principally an extension and continuation of the Transition and Reorganization Agreement. In many respects it simply amplifies and provides further detail concerning various aspects of the previous agreement. It provides for the continuing internal reorganization of the CMI Entities and the LP Entities and, as discussed further below, it is within the ordinary course of business.

46. The essential purpose of the Omnibus Transition and Reorganization is to realign shared services and assets within the Canwest corporate family so that they are appropriately

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<sup>33</sup> *Re Canwest Global Communications Corp. et al*, [2009] O.J. No. 4788 (S.C.J. [Commercial List])



situated therein. Such steps will facilitate the ongoing restructuring processes of both the CMI Entities and the LP Entities. Indeed, the Omnibus Transition and Reorganization Agreement effectively tidies up the remnants of a structure (i.e. the Income Trust Spin-off) that was carried out in 2005 as part of a different internal reorganization to take advantage of the tax treatment of income trusts available at the time.

47. It is important to note that there is little or no independent, marketable value to the contracts and interests being assigned and the assets being transferred have either already been paid for by the entity they are being transferred to through the Shared Services arrangements, or are of approximately equal value.<sup>34</sup> Moreover, an examination of some of the various elements of the Omnibus Transition and Reorganization Agreement demonstrates that it constitutes a logical reorganization of various inter-estate matters so as to position the two enterprises to continue as stand-alone businesses:

- (a) the contracts are being assigned by entities that do not have an ongoing need for them to entities that do have an ongoing need for them<sup>35</sup>;
- (b) trade-marks and Domain Names are being realigned so that the appropriate entity that uses them and has paid for them through the Shared Services arrangements will own them<sup>36</sup>;
- (c) the parties are agreeing that they will essentially exchange IT hardware of approximately equal value in the most efficient way possible<sup>37</sup>;
- (d) the parties are agreeing to jointly own and use Proprietary IT Software that was jointly created by employees of the CMI Entities and the LP Entities<sup>38</sup>;

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<sup>34</sup> Maguire Affidavit, para. 7.

<sup>35</sup> Maguire Affidavit, para. 29.

<sup>36</sup> Maguire Affidavit, para. 33 and 36.

<sup>37</sup> Maguire Affidavit, para. 39.

<sup>38</sup> Maguire Affidavit, para. 41.

- (e) the Omnibus Transition and Reorganization Agreement completes the realignment of pension and benefit functions so that going forward, LP Entity employees will participate in LP Entity-sponsored pension plans, and vice-versa<sup>39</sup>;
- (f) the transfer of legal title to the B.C. Properties from CMI to CPI recognizes the fact that the B.C. Properties are assets of CPI<sup>40</sup>;
- (g) the execution of subleases in respect of certain premises in Ottawa, Montreal and Toronto formalizes the existing uses of the subject premises<sup>41</sup>; and
- (h) the new inter-company agreements facilitate the effective transition of the LP Entities and the CMI Entities to stand-alone enterprises.

48. Accordingly, it is submitted that the Omnibus Transition and Reorganization Agreement is properly characterized as an extension of the process that began with the Transition and Reorganization Agreement and should likewise be approved by this Honourable Court.

### **Section 36 of the CCAA Does Not Apply to the Omnibus Transition and Reorganization Agreement**

49. One of the issues that was considered in the *TRA Approval Decision* was the applicability of Section 36 of the CCAA to the Transition and Reorganization Agreement. Section 36 was added in the amendments to the CCAA which came into force on September 18, 2009.<sup>42</sup> The relevant clauses of section 36 are as follows:

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.

36(2) A company that applies to the court for authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

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<sup>39</sup> Maguire Affidavit, para. 71.

<sup>40</sup> Maguire Affidavit, para. 63.

<sup>41</sup> Maguire Affidavit, paras. 68-70.

<sup>42</sup> S.C. 2005, c. 47, s. 128, as amended by S.C. 2007, c. 36, s. 65.

36(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.

36(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.

50. Court approval under section 36 is only required if there is a proposed sale of assets outside the ordinary course of business.<sup>43</sup> Where such sale or disposition is “outside the ordinary course of business”, the court is provided with a list of factors to consider in determining whether to approve the sale or disposition.

51. It is submitted that the Omnibus Transition and Reorganization Agreement is properly characterized as an internal reorganization in the ordinary course of business for the purposes of section 36. Therefore, it is submitted, the approval requirements set out in section 36 of the CCAA are not triggered in this Motion.

52. In the *TRA Approval Decision*, this Honourable Court determined that, while an internal reorganization would not necessarily escape the purview of section 36, the Transition and Reorganization Agreement did not fall within the ambit of section 36 in the circumstances.

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<sup>43</sup> *TRA Approval Decision* at para. 26.

This Honourable Court stated that the analysis of whether the subject transaction is in the ordinary course of business and therefore outside the ambit of section 36, is a contextual one and that the court should examine the circumstances of the subject transaction within the context of the business carried on by the debtor.<sup>44</sup>

53. As noted in the *TRA Approval Decision*, it has been stated by the Supreme Court of Canada that the concept of an “ordinary course” transaction cannot be comprehensively defined for the purpose of all transactions. Instead, it must be defined in the particular context, depending on the circumstances of each case.<sup>45</sup>

54. The meaning of “ordinary course of business” must be considered from the perspective of the purpose of section 36 and of the CCAA overall. As this Honourable Court held in granting the Initial Order in the CMI Entities’ CCAA proceeding:

This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind. (emphasis added)<sup>46</sup>

55. In an Industry Canada brief discussing the purpose of section 36, it was stated that, “The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse.”<sup>47</sup>

56. In the *TRA Approval Decision*, this Honourable Court identified several factors that formed the basis for the conclusion that section 36 did not apply to the Transition and Reorganization Agreement. Specifically, the Court found that:

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<sup>44</sup> *TRA Approval Decision* at para. 35.

<sup>45</sup> *Pacific Mobile Corp. (Trustee of) v. American Biltrite (Canada) Ltd.* (1985), 16 D.L.R. (4<sup>th</sup>) 319 (S.C.C.)

<sup>46</sup> *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4286 (S.C.J.) at para. 24.

<sup>47</sup> Industry Canada “Bill C-55: Clause by Clause Analysis – Bill Clause No. 131 – CCAA Section 36”, available at the Industry Canada website: <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00828.html>

- the Transition and Reorganization Agreement was an internal reorganization transaction designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model<sup>48</sup>;
- the realignment of the shared services and transfer of the assets are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities<sup>49</sup>; and
- the Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders<sup>50</sup>.

57. All of the foregoing factors apply equally to the Omnibus Transition and Reorganization Agreement, and support the conclusion that section 36 is not triggered. This transaction does not prejudice any creditors and is, in fact, supported by all of the significant stakeholders and the Monitors and Chief Restructuring Advisors appointed in both the CMI and LP restructurings. The Omnibus Transition and Reorganization Agreement facilitates the legitimate restructuring efforts of the CMI Entities and the LP Entities.

58. The CMI Entities and the L.P. Entities submit that the Transition and Reorganization Agreement is a transaction that is properly characterized as in the ordinary course of business for the purposes of section 36. Therefore, it is submitted, the approval requirements set out in section 36 of the CCAA are not triggered in this Motion.

### **Omnibus Transition and Reorganization Agreement is Fair and Reasonable**

59. In the *TRA Approval Decision*, this Honourable Court noted that the court has broad jurisdiction to approve agreements that facilitate a restructuring. The Ontario Court of Appeal has held, in the context of an appeal from the approval by a CCAA judge of three agreements negotiated in the *Re Stelco* proceeding, that:

Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, section 11(4) includes the power to vary the stay and allow the company to enter into agreements to

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<sup>48</sup> *TRA Approval Decision* at para. 36.

<sup>49</sup> *Ibid.*

<sup>50</sup> *TRA Approval Decision* at para. 36.

facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process.<sup>51</sup>

60. Courts frequently approve 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.*<sup>52</sup>, 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.<sup>53</sup>

61. Romaine J. further noted that the Court has the jurisdiction to approve settlements or transactions during the CCAA stay period.<sup>54</sup> In accepting this proposition, Romaine J. cited the decision of Farley J. in *Re Air Canada*<sup>55</sup> 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...<sup>56</sup>

62. In *Re Air Canada*, Farley J. cited his own earlier decision in *Re Sammi Atlas Inc.*<sup>57</sup> 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

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<sup>51</sup> *Re Stelco Inc.* (2005), 15 C.B.R. (5<sup>th</sup>) 288 (Ont. C.A.) at para. 18.

<sup>52</sup> 2007 ABQB 504 [*Re Calpine*].

<sup>53</sup> *Re Calpine*, *supra*, at paragraph 58.

<sup>54</sup> *Re Calpine*, *supra*, at paragraph 56.

<sup>55</sup> [2004] O.J. No. 303 (4<sup>th</sup>) 169 (Ont. S.C.J.) [*Re Air Canada*].

<sup>56</sup> *Ibid.*, at paragraph 9.

<sup>57</sup> [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.<sup>58</sup>

63. In the *TRA Approval Decision*, this Honourable Court cited *Re Stelco* in support of the proposition that the court has broad jurisdiction to approve agreements that facilitate a restructuring. This Honourable Court also noted that “even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.”

64. This Honourable Court held that the Transition and Reorganization Agreement facilitated the restructuring of the CMI Entities and was fair. It is submitted that the Omnibus Transition and Reorganization Agreement should also be approved because it complies with general principles of fairness and with the overall purpose of facilitating the restructuring of the CMI Entities and the LP Entities. To the extent this Honourable Court wishes to consider the factors in section 36, they also support approval of the Omnibus Transition and Reorganization Agreement. The CMI Entities and the LP Entities submit that the analysis in the *TRA Approval Decision* applies directly to the analysis in respect of the Omnibus Transition and Reorganization Agreement, and leads to the same conclusion. The CMI Entities and the LP Entities submit that this Honourable Court should approve the Omnibus Transition and Reorganization Agreement having regard to the following factors:

- (a) The CMI Monitor and LP Monitor support the Omnibus Transition and Reorganization Agreement and each filed a report with the Court to that effect;
- (b) The major stakeholders of both the CMI Entities and the LP Entities support the Omnibus Transition and Reorganization Agreement;
- (c) The terms of the Omnibus Transition and Reorganization Agreement were agreed to after consultation with the respective Chief Restructuring Advisors of the CMI Entities and the LP Entities. Both Chief Restructuring Advisors support the entering into of the Omnibus Transition and Reorganization Agreement;

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<sup>58</sup> *Re Air Canada*, supra, at paragraph 9.

- (d) Notice of this Motion has been given to secured creditors of the LP Entities and the CMI Entities;
- (e) There is little or no marketable or independent value to the contracts and other interests being assigned and the assets being transferred have either already been paid for by the recipient entity or are of approximately equal value to an asset being exchanged between the entities;
- (f) The realignment process to be continued by the Omnibus Transition and Reorganization Agreement is in furtherance of the restructuring objectives of both the CMI Entities and the LP Entities and will facilitate the going concern outcomes of their respective businesses; and
- (g) The continuation of the disentanglement of the Shared Services effected by the Omnibus Transition and Reorganization Agreement will assist in realizing going concern outcomes for both the CMI Entities and the LP Entities which will see distinct and unrelated third party ownership of their respective businesses.

65. Accordingly, the Omnibus Transition and Reorganization Agreement is fair and facilitates the respective restructurings of the LP Entities and the CMI Entities and ought to be approved.

### **Sealing the Confidential Supplement**

66. As a general rule, Court proceedings should be public. However, the Courts have and will depart from this principle where it is demonstrated that openness would cause a serious harm or injustice. As the Supreme Court of Canada stated in *MacIntyre v. Nova Scotia (Attorney General)*:<sup>59</sup>

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.

67. Section 137(2) of the *Courts of Justice Act* provides that:

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<sup>59</sup> (1982), 132 D.L.R. (3d) 385 (S.C.C.) at 405,



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.

68. In *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>60</sup>, 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:<sup>61</sup>

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.

69. In *Sierra Club*, Iacobucci J. stated that the risk in question must be real and substantial, and pose a serious threat to the commercial interest in question.<sup>62</sup>

70. In the present case, the Confidential Supplement contains documents that are highly commercially sensitive. Their public disclosure could place the LP Entities and the CMI Entities at a competitive disadvantage, as well as impair their ongoing restructuring efforts.<sup>63</sup> The Confidential Supplement includes the unredacted Sales Agency Agreement, the Advertising Agreement, the term sheet relating to the provision of business services by the LP Entities to the CMI Entities in connection with certain financial reporting processes and information relating to Shared Employee Costs.<sup>64</sup>

71. It is submitted that these documents contain, *inter alia*, highly commercially sensitive information pertaining to the sales and advertising strategies and policies of the CMI Entities and the LP Entities. The disclosure of such information to the public would place both the CMI Entities and the LP Entities at a competitive disadvantage. Indeed, disclosure of the information would only serve to hamper the ongoing restructuring efforts of the CMI Entities

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<sup>60</sup> [2002] 2 S.C.R. 522,

<sup>61</sup> *Ibid.*, at para 55.

<sup>62</sup> *Ibid.*, at para 54.

<sup>63</sup> Maguire Affidavit, para. 23

<sup>64</sup> *Ibid.*

and the LP Entities. Accordingly, it is submitted that the preservation of this confidential and commercially sensitive information constitutes a sufficiently important commercial interest to pass the first branch of the Sierra test.

72. With respect to the second branch of the Sierra test, it is submitted that the salutary effects of sealing the Confidential Supplement outweighs the possible deleterious effects. In the normal course, absent these CCAA proceedings, the proprietary and confidential information contained in the Confidential Supplement would remain strictly confidential and would not be in the public domain. Importantly, keeping this information confidential in this CCAA proceeding will not have any deleterious effects.

73. It is therefore submitted that that this Honourable Court ought to order that the Confidential Supplement be sealed from and not form part of the public record.

### **Stay Extension is Appropriate for the CMI Entities**

74. In the Initial Order, the Court granted the CMI Entities a stay of proceedings until November 5, 2009 (the “Stay Period”). Pursuant to section 11.02(2) of the CCAA, a Court may extend the Stay Period “for any period that the court considers necessary.” Section 11.02(3) requires that the applicants must show that the granting of an extension of the stay period is appropriate and that the applicants have acted in good faith and with due diligence. Since the granting of the Initial Order, this Honourable has extended the Stay Period on three subsequent occasions, most recently on March 29, 2010, with the Stay Period now scheduled to expire on June 15, 2010.

75. As described more fully in the Maguire Affidavit, since the granting of the most recent extension of the Stay Period, the CMI Entities have acted in good faith and with due diligence to further a restructuring under the CCAA. Specifically, the CMI Entities have made significant progress in resolving the unresolved claims within the Claims Process.<sup>65</sup>

76. As noted in the Maguire Affidavit, the Shaw Transaction Documents amended the terms of a consensual recapitalization transaction that had been negotiated between the CMI Entities and the Ad Hoc Committee. Since the granting of the most recent extension of the Stay Period, the Shaw Recapitalization Transaction (as defined in the Maguire Affidavit) has further

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<sup>65</sup> Maguire Affidavit, paras. 93-94.

amended the recapitalization transaction involving the CMI Entities. The Shaw Recapitalization Transaction is proposed to be implemented pursuant to a plan of compromise and arrangement (the "Plan") to be filed pursuant to the CCAA which will allow the CMI Entities to continue operating as going concerns thereby preserving employment for as many of their employees as possible, and preserving enterprise value for their stakeholders.<sup>66</sup>

77. Pursuant to the Shaw Recapitalization Transaction, the CMI Entities have agreed to use their commercially reasonable efforts to obtain an order from this Honourable Court sanctioning the Plan on or before August 27, 2010. Further, it is contemplated that the Shaw Recapitalization Transaction will be completed no later than September 30, 2010, subject to extension in certain circumstances.<sup>67</sup> As these key dates arise after the expiry of the current Stay Period, it is necessary and appropriate to extend the Stay Period to August 31, 2010.

78. Indeed, the CMI Entities have been and continue to proceed with good faith and due diligence to complete a restructuring under the CCAA. In taking steps to realign certain services and misaligned assets of the CMI Entities and the LP Entities through the Omnibus Transition and Reorganization Agreement, the CMI Entities are advancing their restructuring objectives and facilitating a going concern emergence from the restructuring process. While the CMI Entities have made significant progress, an extension of the Stay Period is required to allow the CMI Entities to further advance the restructuring process. Under the terms of the Shaw Recapitalization Transaction, other matters that remain to be completed include (i) the resolution of Outstanding Claims filed pursuant to the Claims Procedure, (ii) the finalization of the Plan; (iii) the holding of meetings of affected creditors; (iv) obtaining Court approval of the Plan; (v) regulatory approvals; and (vi) the preparation of all corporate documentation required to implement the Shaw Recapitalization Transaction.<sup>68</sup>

79. In light of the good faith efforts and due diligence of the CMI Entities, and in light of the significant progress that has been made and the measures that remain to be completed, it is submitted that it is necessary and appropriate to extend the Stay Period to August 31, 2010.

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<sup>66</sup> Maguire Affidavit, paras. 102-103.

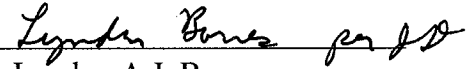
<sup>67</sup> Maguire Affidavit, para. 104.

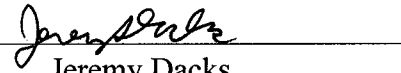
<sup>68</sup> Maguire Affidavit, para. 107.


**PART IV – NATURE OF THE ORDER SOUGHT**

80. The CMI Entities and the LP Entities therefore request Orders substantially in the form of the draft Orders attached to their respective Motion Records.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

  
Lyndon A.J. Barnes

  
Jeremy Dacks

  
Alexander Cobb

**Schedule "A"**

**Applicants**

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands) B.V.
18. CGS International Holdings (Netherlands) B.V.
19. CGS Debenture Holding (Netherlands) B.V.
20. CGS Shareholding (Netherlands) B.V.
21. CGS NZ Radio Shareholding (Netherlands) B.V.
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.
24. 30109, LLC
25. CanWest MediaWorks (US) Holdings Corp.

**Schedule "B"**

**Partnerships**

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

**Schedule "C" - Statutory References**

***COMPANIES' CREDITORS ARRANGEMENT ACT***

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

**s. 11 General power of court**

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of 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.

**11.02 (2) Stays, etc. — other than initial application** - A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**36. (1) Restriction on disposition of business assets** - 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.

**36. (2) Notice to creditors** - 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.

**36. (3) Factors to be considered** - 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.

36. (4) **Additional factors – related persons** - 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.

36. (5) **Related persons** - 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).

36. (6) **Assets may be disposed of free and clear** - 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.

36. (7) **Restriction – employers** - 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 “D”**

**LIST OF CASES**

1. *MacIntyre v. Nova Scotia (Attorney General)* (1982), 132 D.L.R. (3d) 385 (S.C.C.)
2. *Pacific Mobile Corp. (Trustee of) v. American Biltrite (Canada) Ltd.* (1985), 16 D.L.R. (4<sup>th</sup>) 319 (S.C.C.)
3. *Re Air Canada*, [2004] O.J. No. 303 (Ont. S.C.J.)
4. *Re Calpine Canada Energy Ltd.*, 2007 ABQB 504
5. *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4286 (S.C.J. [Commercial List])
6. *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4788 (S.C.J. [Commercial List])
7. *Re Sammi Atlas*, [1998] O.J. No. 1089 (Ont. Gen. Div.)
8. *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 288 (Ont. C.A.)
9. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522

**SECONDARY SOURCES**

1. Industry Canada “Bill C-55: Clause by Clause Analysis – Bill Clause No. 131 – CCAA Section 36”, available at the Industry Canada website: <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/c100828.html>

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 GLOBAL  
COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

Court File No. CV-09-8396-00CL  
Court File No. CV-10-8533-00CL

*Ontario*

**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**JOINT FACTUM OF THE CMI ENTITIES AND  
THE LP ENTITIES  
(Approval of the Omnibus Transition and  
Reorganization Agreement)**

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