

**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"

APPLICANTS

FACTUM OF THE APPLICANTS
(Sale of Corporate Aircraft-Returnable March 4, 2010)

March 2, 2010

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PART I – NATURE OF THIS MOTION

1. This factum is filed by Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed on Schedule "A" hereto (the "**Applicants**") and the Partnerships listed on Schedule "B" hereto (the "**Partnerships**" and, together with the Applicants, the "**CMI Entities**") seeking an Order (the "**Approval and Vesting Order**"), substantially in the form attached to the Motion Record, *inter alia*,:

- (a) approving the Aircraft Sale Agreement (the "**Sale Agreement**") by and between Canwest Global and First Canadian Aviation Inc. (the "**Purchaser**") and Tribal Councils Investment Group of Manitoba Ltd. ("**TCIGM**") dated March 1, 2010, which provides for a sale of the Corporate Aircraft (as defined below) and the Accessories (as defined below) (collectively, the "**Purchased Assets**") to the Purchaser (the "**Asset Sale**");
- (b) authorizing Canwest Global and the Monitor (as defined below) to complete all requirements, conditions and transactions contemplated by the Sale Agreement;
- (c) vesting the Purchased Assets in the Purchaser free and clear of any rights, title or interest of any Person in the Purchased Assets, including any security interests (whether contractual, statutory or otherwise), hypothecs, mortgages, trusts or

deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges (including the Charges as defined in and created by the Initial Order), Claims (as defined in the Sale Agreement) or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Encumbrances**”) upon delivery of a Certificate by the Monitor confirming fulfilment of all conditions precedent to the Asset Sale; and

- (d) sealing the Confidential Supplement to the Monitor’s Eleventh Report (the “**Confidential Supplement**”) and treating it as confidential pending further Order of this Honourable Court.

PART II – FACTS

2. The facts with respect to this Motion are more fully set out in the Affidavit of John E. Maguire sworn on March 1, 2010 (the “**Maguire Affidavit**”). Capitalized terms in this Factum not otherwise defined have the same meanings as in the Sale Agreement.

Background

3. The CMI Entities were granted protection from their creditors 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 the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated October 6, 2009. FTI Consulting Canada Inc. was appointed at that time to act as monitor (the “**Monitor**”) in this CCAA proceeding.¹

4. The Initial Order granted, *inter alia*, a stay of proceedings until November 5, 2009, or such later date as this Honourable Court may order. The stay of proceedings has been extended on two separate occasions, most recently on January 21, 2010, at which time the stay of proceedings was extended from January 22, 2010 until March 31, 2010.²

¹ Maguire Affidavit, para. 3, Motion Record of the Applicants (the “**Motion Record**”), Tab 2, p. 11.

² Maguire Affidavit, para. 4, Motion Record, Tab 2, p. 11.

The Corporate Aircraft

5. Canwest Global is the current legal owner of a 1988 British Aerospace model BAE 125 Series 800A, serial no. 258123, Canadian registration C-GCGS (the “**Corporate Aircraft**”), and the Engines, Propellers and Avionics detailed in Appendix A to the Sale Agreement (collectively, the “**Accessories**”). The Corporate Aircraft is known in the airline industry as a Hawker 800A.³

6. The Corporate Aircraft was built in 1988. It is a mid-size business aircraft which has approximately 8322 total flight hours since new and approximately 4434 total cycles since new.⁴

Lease and Charter Arrangements with Av-Jet

7. Since 1996, Canwest Global has made the Corporate Aircraft available to its and its subsidiaries’ officers, directors, and employees for charter use. The Corporate Aircraft is also made available to third parties for charter use. To do so, Canwest Global, through its then subsidiary Canwest Leasing Inc. (“**Canwest Leasing**”), entered into an exclusive aircraft lease agreement with Av-Jet Services Limited (“**Av-Jet**”), a provider of aircraft management services, whereby Av-Jet agreed to operate and maintain the Corporate Aircraft during the term of the lease (the “**Lease Agreement**”). Canwest Leasing has since been dissolved and all of its assets and liabilities have been assumed by Canwest Global. Under the Lease Agreement, Av-Jet is responsible in the first instance for, among other things, training expenses, crew expenses, in-flight service expenses, permits, fuel charges, and landing charges in respect of the Corporate Aircraft. These expenses are then billed by Av-Jet to Canwest Global. In consideration for the operation and maintenance of the Corporate Aircraft, Av-Jet is entitled to an administration fee.⁵

8. In conjunction with the Lease Agreement, Av-Jet has entered into a sub-lease (the “**Sub-Lease**”) with Perimeter Aviation L.P. (“**Perimeter**”), as represented by its general partner

³ Maguire Affidavit, para. 7, Motion Record, Tab 2, p. 12.

⁴ Maguire Affidavit, para. 8, Motion Record, Tab 2, p. 12.

⁵ Maguire Affidavit, para. 9, Motion Record, Tab 2, pp. 12-13.

Perimeter Aviation GP Inc., wherein Perimeter has agreed to assume responsibility for the airworthiness of the Corporate Jet.⁶

Costs of Operating the Corporate Aircraft

9. In the calendar year 2008, the fixed costs in respect of the Corporate Aircraft totalled \$426,408 and the operating costs totalled \$1,224,319, for an aggregate cost of approximately \$1.65 million. Fixed costs include such items as pilot salaries, hangar rent, accounting, insurance, use of license and administrative charges. Operating costs include such costs as fuel, airframe maintenance, engine maintenance, crew expenses, training and landing fees. The high operating costs are reflective of the fact that the Corporate Aircraft is over ten years old and is considerably less efficient than newer aircrafts.⁷

10. In the calendar year 2009, the fixed costs in respect of the Corporate Aircraft were consistent with the prior year, totalling approximately \$457,000, whereas operating costs totalled \$381,496. The lower operating costs in 2009 reflected the fact that the Corporate Aircraft had not been used for company purposes since December 2008 and thereafter was offered exclusively to third parties for charter use. Prior to that time, Canwest Global had offered the Corporate Aircraft to third parties for charter use on a much more limited basis.⁸

Sales Process

11. Due to the high fixed and operating costs associated with the Corporate Aircraft, and in light of the financial difficulties that the CMI Entities were experiencing at the time, Canwest Global began contemplating the sale of the Corporate Aircraft in the late spring/early summer of 2009. Mr. Allan Nimmo, the chief pilot of the Corporate Aircraft, who is familiar with and well-connected in the North American airline industry, had advised Canwest Global that he was aware of a number of parties in the Winnipeg market who were interested in purchasing the Corporate Aircraft, including some who were already using it for charter

⁶ Maguire Affidavit, para. 10, Motion Record, Tab 2, p. 13.

⁷ Maguire Affidavit, para. 11, Motion Record, Tab 2, p. 13.

⁸ Maguire Affidavit, para. 12, Motion Record, Tab 2, pp. 13-14.

purposes. Mr. Nimmo suggested that Canwest Global consider contacting an aircraft broker who would be able to provide Canwest Global with a summary of the aircraft resale market and, if engaged, could advertise the Corporate Aircraft in national and international sales publications and assist in any sales negotiations.⁹ As described below, Canwest Global ultimately elected not to retain an aircraft broker.

12. In or around that time, Canwest Global was contacted directly by a potential purchaser who was interested in purchasing the Corporate Aircraft. Discussions ensued with the prospective purchaser between late June and early July 2009.¹⁰

13. Ultimately, the discussions with the first potential purchaser culminated in a formal offer that was received by Canwest Global on or about July 17, 2009. The price offered was made "in light of current economic conditions, the significant operational costs of the Aircraft, and the fact that, at present, 40% of all manufactured Hawkers are currently on the market with little or no resulting transactions." Canwest Global rejected the offer and responded with a counter-offer on August 21, 2009 in which it sought a significantly higher purchase price. The prospective purchaser was unwilling to increase his offer and a sale therefore did not materialize.¹¹

14. In October 2009, a representative of TCIGM contacted Canwest Global to express interest in the Corporate Aircraft. At the time, TCIGM had been using the Corporate Aircraft for charter air service. Over the next several months, discussions ensued between the parties and TCIGM was provided with access to certain financial records related to the operation of the Corporate Aircraft.¹²

15. On January 9, 2010, Canwest Global received an informal expression of interest via email from a new third party. The purchase price that was proposed was significantly less than what Canwest Global was prepared to accept and, in fact, was less than the offer Canwest

⁹ Maguire Affidavit, para. 13, Motion Record, Tab 2, p. 14.

¹⁰ Maguire Affidavit, para. 15, Motion Record, Tab 2, p. 15.

¹¹ Maguire Affidavit, para. 16, Motion Record, Tab 2, p. 15.

¹² Maguire Affidavit, para. 17, Motion Record, Tab 2, p. 15.

Global had received in July 2009. The prospective purchaser was advised to increase his offer if he was serious about his interest in the Corporate Aircraft.¹³

16. In or around this time, Canwest Global also approached the party who had submitted a formal offer to purchase in July 2009 advising that the Corporate Aircraft was still on the market and enquiring as to whether it had a continuing interest in the Corporate Aircraft. This party confirmed its interest, but stated that it had not changed its views as to the purchase price that it was willing to pay.¹⁴

17. Ultimately, after a period of inactivity over the holiday season, TCIGM delivered a formal offer to purchase the Corporate Aircraft on January 13, 2010. The offer received was “clean”, in that it was made on an “as is” basis (with limited exception), and was open for acceptance until January 15, 2010. While Canwest Global was interested in the offer, and more optimistic that a sale could be consummated, it was still not satisfied with the consideration to be paid. TCIGM was therefore asked to increase the amount of the proposed purchase price. Canwest Global also advised TCIGM that any offer would need to be conditional upon, among other things, approval of this Honourable Court. The Offer to Purchase, revised to increase the purchase price and add the necessary conditions, was received from TCIGM later in the day on January 13, 2010. The Offer to Purchase was accepted by Canwest Global on January 21, 2010. It was a condition of the Offer to Purchase that the parties negotiate and enter into a formal aircraft sale agreement which would incorporate the terms and conditions of the Offer to Purchase. The Offer to Purchase also provided that TCIGM had the right to nominate any person, firm or corporation, including a corporation to be incorporated, to take title to the Corporate Aircraft in its place and stead.¹⁵

18. Two days after accepting the Offer to Purchase, Canwest Global received a formal offer to purchase from the prospective purchaser who had expressed interest earlier in January 2010. The purchase price in the formal offer was the same as the purchase price in TCIGM’s offer, however, it contained significantly more conditions than did the Offer to Purchase, including, among other things, a detailed pre-purchase inspection at Canwest Global’s

¹³ Maguire Affidavit, para. 18, Motion Record, Tab 2, p. 16.

¹⁴ Maguire Affidavit, para. 19, Motion Record, Tab 2, p. 16.

¹⁵ Maguire Affidavit, para. 20, Motion Record, Tab 2, p. 16.

expense (up to a maximum of \$75,000), a complete exterior stripping of the existing paint and logo and new paint applied at the buyer's direction and the seller's expense, and delivery of the Corporate Aircraft to the buyer at the seller's expense. The Offer to Purchase, in contrast, was in an "as is" condition, subject to limited exception. Canwest Global did not pursue this offer.¹⁶

The Sale Agreement

19. The Sale Agreement was executed by Canwest Global, the Purchaser and TCIGM on March 1, 2010. The Purchaser is a nominee of TCIGM. The Sale Agreement provides that Canwest Global shall sell and the Purchaser shall purchase the Purchased Assets free and clear of all Encumbrances.¹⁷

A. The Purchased Assets

20. The Purchased Assets are to be acquired in their current "as is" condition, with limited exception.¹⁸

B. The Purchase Price

21. The Purchase Price is payable on the Closing Date (being March 8, 2010 or such other date as the parties may agree in writing as the date upon which the closing shall take place, provided that the Closing Date shall be no later than March 15, 2010).¹⁹

22. The Sale Agreement provides that the Purchaser shall satisfy the Purchase Price at the Closing Date by payment to Canwest Global of the Purchase Price, less the amount of the Deposit by way of wire transfer of immediately available funds to the account specified by the Monitor.²⁰

¹⁶ Maguire Affidavit, para. 21, Motion Record, Tab 2, p. 17.

¹⁷ Maguire Affidavit, para. 22, Motion Record, Tab 2, p. 17.

¹⁸ Maguire Affidavit, para. 24, Motion Record, Tab 2, p. 17.

¹⁹ Maguire Affidavit, para. 25, Motion Record, Tab 2, p. 18.

²⁰ Maguire Affidavit, para. 26, Motion Record, Tab 2, p. 18.

C. Representations and Warranties

23. The Sale Agreement includes a number of representations and warranties including, *inter alia*, the representation that, to the knowledge of Canwest Global, all airworthiness directives and service bulletins issued by Transport Canada in respect of the Aircraft are current and complete as of the Closing Date.²¹

D. Conditions of Closing

24. The Sale Agreement includes certain closing conditions that are required to be satisfied on or before the Closing Date, including a condition that the terms and conditions of the Asset Sale be approved by the Monitor, the Ad Hoc Committee and CIT. It is also a condition that the Approval and Vesting Order be issued and entered.²²

25. In addition, it is a condition of the Sale Agreement that there shall be no Order issued delaying, restricting or preventing the closing of the transaction, and no pending or threatened Claim or judicial or administrative proceeding, or investigation against any Party by any Person, for the purpose of enjoining or preventing the consummation of the transactions contemplated in the Sale Agreement or otherwise claiming that the consummation of such transactions is improper or would give rise to proceedings under any Laws.²³

26. It is also a condition of the Sale Agreement that the Purchaser shall have entered into an agreement, satisfactory to the Purchaser in its sole discretion, to lease the Corporate Aircraft to a Person holding a Commercial Operator's Certificate. The Purchaser has advised the CMI Entities that discussions are ongoing with Av-Jet and Perimeter and that the Purchaser anticipates that a leasing agreement will be in place before the hearing of the motion seeking the Approval and Vesting Order. Accordingly, it is anticipated that the current Lease Agreement with Av-Jet will be terminated at the same time as a new leasing agreement between the

²¹ Maguire Affidavit, para. 27, Motion Record, Tab 2, p. 18.

²² Maguire Affidavit, para. 28, Motion Record, Tab 2, p. 19.

²³ Maguire Affidavit, para. 30, Motion Record, Tab 2, p. 20.

Purchaser and Av-Jet and Perimeter is entered into. A notice of cancellation of the Lease Agreement will be filed with Transport Canada.²⁴

E. Joint and Several Liability

27. Under the Sale Agreement, TCIGM has agreed to be jointly and severally liable with the Purchaser to Canwest Global for any failure of the Purchaser to discharge any of its duties under the Sale Agreement or if the Purchaser fails to perform any of its representations, warranties and covenants under the Sale Agreement or arising in connection with the Sale Agreement.²⁵

PART III – ISSUES AND THE LAW

28. The issues on this Motion are:

- (a) should this Honourable Court grant the Approval and Vesting Order?; and
- (b) should this Honourable Court exercise its discretion to seal the Confidential Supplement?

It is Appropriate to Grant the Approval and Vesting Order

29. Until recently, there was no specific provision in the CCAA for the approval of a sale of assets prior to a plan of compromise or arrangement. Instead, the Courts derived their authority to approve an asset sale from section 11 of the CCAA and upon the inherent jurisdiction of the Court.²⁶ In *Re Canadian Red Cross Society*, Blair J. stated:²⁷

²⁴ Maguire Affidavit, para. 31, Motion Record, Tab 2, p. 20.

²⁵ Maguire Affidavit, para. 33, Motion Record, Tab 3, p. 20.

²⁶ *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.) [Commercial List], per Farley J., at p. 110, Applicants' Book of Authorities, Tab 5; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 at p. 315, paras. 43 and 45 (Ont. Gen. Div.), per Blair J., Applicants' Book of Authorities, Tab 2.

²⁷ *Re Canadian Red Cross Society*, supra, paras. 43 and 45 (Ont. Gen. Div.), per Blair J., Applicants' Book of Authorities, Tab 2.

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them.

30. The recent CCAA amendments which came into force on September 18, 2009 have now conferred on CCAA Courts the statutory jurisdiction to authorize a sale or disposition of assets, even if shareholder approval was not obtained. Specifically, under section 36 of the CCAA, court approval is required if (i) a debtor company proposes to sell or dispose of assets; and (ii) the sale or disposition of assets is outside the ordinary course of business. The relevant clauses of section 36 are as follows:

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(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(5)(a) and 6(6)(a) if the court had sanctioned the compromise or arrangement.

31. Additionally, pursuant to section 36(4) of the CCAA, certain mandatory criteria must be met for court approval of a sale or disposition to a related party. In the present case, Canwest Global, the Purchaser, and TCIGM are not related persons within the meaning of the CCAA.²⁸

32. Section 12(e) of the Initial Order provides that the CMI Entities shall have the right to, *inter alia*, pursue all offers for material parts of the CMI Property (as defined therein), in whole or in part, subject to prior approval of this Honourable Court being obtained before any sale (subject to section 12(a) of the Initial Order).²⁹

33. The new amendments to the CCAA should be interpreted and applied with regard to the underlying purposes of the CCAA. As this Honourable Court held in granting the Initial Order in these proceedings:

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)³⁰

34. In discussing section 36 of the CCAA specifically, this Honourable Court stated the following in a separate motion in these proceedings:³¹

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."

²⁸ Maguire Affidavit, para. 23, Motion Record, Tab 2, p. 17.

²⁹ Initial Order, Motion Record, Tab 2(a), p. 36.

³⁰ *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4286 (S.C.J.) [Commercial List] at para. 24, Applicants' Book of Authorities, Tab 3.

³¹ [2009] O.J. No. 4788 (S.C.J.) [Commercial List] at para. 32, Applicants' Book of Authorities, Tab 4.

35. The CMI Entities submit that, taking into account the factors listed in section 36(3) of the CCAA, in addition to certain other factors, and with regard to the general interpretative provisions of the CCAA, this Honourable Court ought to grant the Approval and Vesting Order.

A. Sales Process was Reasonable in the Circumstances

36. The CMI Entities submit that Canwest Global followed a reasonable process leading up to the Asset Sale.

37. Canwest Global did not retain an aircraft broker or formally list the Corporate Aircraft for sale prior to entering into the Sale Agreement. This decision was made for a number of reasonable business reasons. First, Canwest Global was cognizant of the fact that the primary market for corporate aircrafts is in the United States and that if Canwest Global were to sell the Corporate Aircraft to a purchaser located in the United States, approximately \$100,000 in modifications would be required. Second, there are sizable fees associated with listing a corporate aircraft for sale. In particular, a listing fee of approximately 5% of the purchase price would have been payable upon a sale of the Corporate Aircraft. Third, and as described below, at the time that Canwest Global was considering retaining an aircraft broker, it was already aware of a number of parties who had expressed interest in purchasing the Corporate Aircraft.³²

38. Instead, Canwest Global elected to sell the Corporate Aircraft privately, relying on the able assistance of Mr. Allen Nimmo, the Chief pilot of the Corporate Aircraft, who is extremely familiar with and well-connected in the North American airline industry. Mr. Nimmo was aware of a number of parties in the Winnipeg market who were interested in purchasing the Corporate Aircraft, including some who were already using it for charter purposes.³³

39. At Mr. Nimmo's recommendation, Canwest Global obtained a marketing report from an aircraft broker for the period June 2008 to May 2009 (the "**2008/2009 Marketing Report**"). Canwest Global also received an "Aircraft Bluebook Price Digest" valuation, as well as details regarding two similar aircraft that were on the market in the vicinity of eastern North

³² Maguire Affidavit, para. 15, Motion Record, Tab 2, p. 15.

³³ Maguire Affidavit, paras. 13-17, Motion Record, Tab 2, pp. 14-15.

America. Canwest Global used this information, in addition to a marketing report that was later received for the period June 2009 to December 2009, to determine its expectations as to current market value of the Corporate Aircraft.³⁴

40. Canwest Global engaged in discussions with a number of prospective purchasers between June 2009 and January 2010 and received three formal offers.³⁵ Ultimately, the Offer to Purchase was accepted by Canwest Global on January 21, 2010.³⁶

B. The Purchase Price is Fair and Reasonable

41. The CMI Entities submit that based on the fact that a significant number of Hawker 800's (and other similar corporate jets) are currently for sale in the North American resale market, and the fact that the resale market for aircraft built prior to 1995 is stagnant and unlikely to improve, the purchase price to be received by Canwest Global from the Purchaser is reasonable and fair in the circumstances.

42. In particular, a second market summary that was obtained from the aircraft broker in January 2010, which provided a snapshot of the number of Hawker 800A's for sale in North America between July and December 2009 (the "**2009 Market Summary**"), reveals that between July and December 2009:³⁷

- (a) at least fifty Hawker 800's were on the resale market in North America in each given month. This did not include other similar corporate aircraft such as Cessnas, Challengers and Learns;
- (b) on average, only three Hawker 800's were sold each month;
- (c) on average, for every Hawker 800 sold, an additional Hawker 800 entered the resale market during the same month;

³⁴ Maguire Affidavit, para. 14 and 34, Motion Record, Tab 2, pp. 14 and 21.

³⁵ Maguire Affidavit, paras. 14-20, Motion Record, Tab 2, pp. 15-16.

³⁶ Maguire Affidavit, para. 20, Motion Record, Tab 2, p. 16.

³⁷ Maguire Affidavit, para. 34, Motion Record, Tab 2, p. 21.

- (d) of the over 50 Hawker 800's that were listed for sale each month, over 60% did not list an asking price, instead were placed on the market with a request that potential purchasers "make an offer"; and
- (e) the number of days on the market for the 50 plus Hawker 800's ranged from 38 days to 317 days.

43. Moreover, cross referencing the 2009 Market Summary against the 2008/2009 Market Summary reveals that the number of Hawker 800's available on the resale market had increased from 30 in June 2008 to 55 in December 2009 and the average asking price (where disclosed) had decreased by approximately \$1.5 million.³⁸

44. The information in the 2009 Market Summary is consistent with information disclosed in a recent 2009 article from Conklin and de Decker regarding a potential recovery in the aircraft resale market in 2010 (the "**Conklin and de Decker Article**"). Conklin & de Decker is a leading provider of market research regarding aircraft operating costs, aircraft performance, and specifications. The Conklin and de Decker Article noted the following:³⁹

- (a) greater than 25% of the active fleet of older business jets is currently for sale;
- (b) approximately 24% of Hawker 800s built between 1984 and 1995 are currently for sale;
- (c) the values for business aircraft built before the mid-1990s are in dire straits – and they won't likely recover;
- (d) many of the early, first generation business jets are probably at or near their salvage value: the value of their individual airworthy components;

³⁸ Maguire Affidavit, para. 36, Motion Record, Tab 2, p. 22.

³⁹ Maguire Affidavit, para. 35, Motion Record, Tab 2, pp. 21-22.

- (e) given their relatively high operating costs, many of the oldest models, although airworthy, are near the end of their economic useful life. There remain far fewer buyers than sellers for these aircraft, at nearly any price; and
- (f) if an aircraft is in the oldest group, it is recommended that the owner upgrade to obtain reduced operating costs, updated avionics, and greater availability.

45. In addition, the Purchase Price exceeds the consideration that was offered in one of the two formal offers received by Canwest Global for the Corporate Aircraft and is the same amount as the other formal offer that was received (with the added benefit of having considerably less conditions attached).⁴⁰

46. Accordingly, the CMI Entities submit that the purchase price to be received by Canwest Global from the Purchaser is reasonable and fair in the circumstances.

C. The Monitor Supports the Transaction

47. The Monitor has advised the CMI Entities that it will recommend in its Eleventh Report that the Sale Agreement be approved by this Honourable Court. In arriving at this recommendation, the Monitor has concluded that (i) Canwest Global has acted in good faith to maximize value in attempting to divest the Corporate Aircraft; (ii) Canwest Global made satisfactory efforts to obtain the best price and has not acted improvidently; and (iii) the sale of the Corporate Aircraft under a bankruptcy would not be more beneficial to the creditors of Canwest Global.

D. Other Creditors Were Consulted

48. Canwest Global has had discussions with counsel to the Ad Hoc Committee, CIT, the CMI CRA, Canwest MediaWorks Ireland Holdings (“CMIH”) and Shaw Communications Inc. (“Shaw”) in respect of the Asset Sale. The Ad Hoc Committee, CIT, the CMI CRA and

⁴⁰ Maguire Affidavit, paras. 19-20, Motion Record, Tab 2, p. 16.

CMIH have all indicated that they are in support of the Asset Sale. Shaw is not opposed to the Asset Sale.⁴¹

49. Counsel to the CMI Entities has conducted searches of the personal property registry systems in all Canadian provinces and territories against Canwest Global as well as against the Corporate Aircraft's serial number (the "**PPR Searches**"). The PPR Searches reveal numerous provincial registrations over all of Canwest Global's present and after-acquired property in favour of CIBC Mellon Trust Company, as well as registrations in Nunavut and Manitoba against the Corporate Aircraft's serial number by the Toronto-Dominion Bank ("**TD Bank**") in connection with certain credit facilities provided to Perimeter. In addition to the foregoing registrations, the PPR Searches reveal that other parties have filed financing statements against Canwest Global in respect of certain specified collateral other than the Corporate Aircraft. CIBC Mellon Trust Company, TD Bank, and all other parties who have registered financing statements against Canwest Global or against the Corporate Aircraft as revealed by the PPR Searches have been served with a copy of the Motion Record in respect of the present motion.⁴²

50. In addition, the Monitor has advised that its counsel has conducted a search of the International Registry of Mobile Assets (the "**International Registry**"), which defines the priority of interests on airframes, aircraft engines and helicopters, for financial interests that have been registered against the Corporate Aircraft. The search results revealed that no international interests have been registered against the Corporate Aircraft.

51. Thus, while not every creditor of the CMI Entities has been consulted in respect of the Asset Sale, the CMI Entities' most significant creditor groups have been involved in the discussions and, in the case of the Ad Hoc Committee, CIT, the CMI CRA and CMIH, have indicated that it supports the Asset Sale, and Shaw has indicated that it does not object. All parties who have registered a security interest against Canwest Global, as well as against the Corporate Aircraft, have been served with the motion materials in respect of the present motion.

⁴¹ Maguire Affidavit, para. 38, Motion Record, Tab 2, p. 23. The Eleventh Report of the Monitor will include an acknowledgement that CMIH supports the Asset Sale.

⁴² Maguire Affidavit, para. 39, Motion Record, Tab 2, p. 23.

Accordingly, the CMI Entities submit that significant interests of creditors have been represented.

E. Other Factors in Support of Approval

52. Finally, the CMI Entities submit that the following additional factors also support the granting of the Approval and Vesting Order:⁴³

- (a) there is no prejudice to the creditors of the CMI Entities;
- (b) it divests Canwest Global of an asset that is non-core to its business;
- (c) it avoids the expense of engaging an aircraft broker and listing the Corporate Aircraft for sale and/or engaging in an unnecessary and costly sales process that is unlikely to locate a purchaser who is willing to offer significantly more for the Corporate Aircraft; and
- (d) it eliminates the significant fixed and ongoing operating costs of the Corporate Aircraft.

53. In addition, as the Asset Sale is simply the monetization of a hard asset and does not contemplate the transfer of employees or pension plans to the Purchaser (or otherwise touch on employee issues), and as Canwest Global itself does not have any employees and is not a sponsor of any pension plan, the CMI Entities submit that section 36(7) of the CCAA has no application to the present motion.

54. The CMI Entities therefore submit that, in the circumstances, and with regard to the factors listed in section 36(3) of the CCAA, it is appropriate for this Honourable Court to grant the Approval and Vesting Order.

SEALING THE CONFIDENTIAL SUPPLEMENT

55. 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

⁴³ Maguire Affidavit, para. 37, Motion Record, Tab 2, p. 22.

harm or injustice. As the Supreme Court of Canada stated in *MacIntyre v. Nova Scotia (Attorney General)*:⁴⁴

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.

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

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.

57. In *Sierra Club of Canada v. Canada (Minister of Finance)*⁴⁵, 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:⁴⁶

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.

58. 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.⁴⁷

59. In the present case, the Confidential Supplement contains (i) unredacted copies of the Offer to Purchase and the Sale Agreement;⁴⁸ and (ii) copies of the two other offers that Canwest Global received but did not accept from potential purchasers.⁴⁹

⁴⁴ (1982), 132 D.L.R. (3d) 385 (S.C.C.) at 405, Applicants' Book of Authorities, Tab 1.

⁴⁵ [2002] 2 S.C.R. 522, Applicants' Book of Authorities, Tab 6.

⁴⁶ *Ibid.*, at para 55.

⁴⁷ *Ibid.*, at para 54.

⁴⁸ Maguire Affidavit, paras. 20 and 33, Motion Record, Tab 2, pp. 16 and 21.

⁴⁹ Maguire Affidavit, paras. 16 and 21, Motion Record, Tab 2, pp. 15 and 17.

60. The CMI Entities submit that if these documents are made available to the public and the Asset Sale does not close, the CMI Entities will be at a competitive disadvantage, as disclosure of the consideration that Canwest Global was willing to accept for the Corporate Aircraft and/or the amount of the other two offers would significantly weaken Canwest Global's ability to bargain with other third parties who may later express an interest in the Corporate Aircraft in the event the Approval and Vesting Order is not granted or the Asset Sale does not close.⁵⁰

61. 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.

62. 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, offers to purchase that have been rejected and/or the amount of consideration that is ultimately accepted by the vendor would be kept strictly confidential and would not find its way into the public domain. Keeping this information confidential in this CCAA proceeding will not have any deleterious effects.

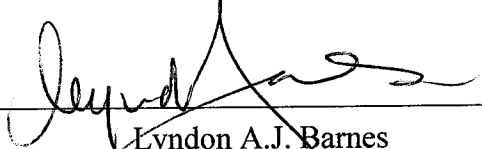
63. It is therefore submitted that that this Honourable Court ought to order that the Confidential Supplement be sealed from and not form part of the public record.

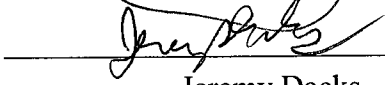
⁵⁰ Maguire Affidavit, para. 33 Motion Record, Tab 2, p. 21.

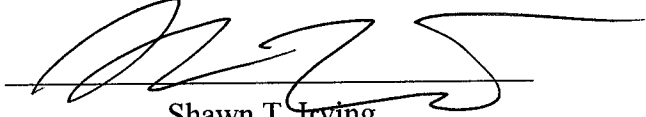
PART IV – NATURE OF THE ORDER SOUGHT

64. The CMI Entities therefore request an Order substantially in the form of the draft Order attached to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


Lyndon A.J. Barnes


Jeremy Dacks


Shawn T. Irving

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(1) General power of court - Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. **caution** is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

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.

COURTS OF JUSTICE ACT
R.S.O. 1990, c. C-43, as amended

Sealing documents

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

Schedule "D"

LIST OF AUTHORITIES

1. *MacIntyre v. Nova Scotia (Attorney General)* (1982), 132 D.L.R. (3d) 385 (S.C.C.)
2. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.)
3. *Re CanWest Global Communications Corp. et al.* [2009] O.J. No. 4286 (Ont. S.C.J.)
4. *Re CanWest Global Communications Corp. et al.* [2009] O.J. No. 4788 (S.C.J.)
[Commercial List]
5. *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.)
6. *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522

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

Ontario

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS

(Sale of Corporate Aircraft-Returnable March 4, 2010)

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