

**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
**(Approval of Transition and Reorganization Agreement
Returnable October 30, 2009)**

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, substantially in the form attached to the Motion Record, *inter alia*,:

- (a) approving the Transition and Reorganization Agreement by and among Canwest Global, Canwest Limited Partnership / Canwest Societe en Commandite ("**Limited Partnership**"), CMI, Canwest Publishing Inc. / Publications Canwest Inc. ("**CPI**"), Canwest Television Limited Partnership ("**CTLP**") and The National Post Company / La Publication National Post (the "**National Post Company**") dated as of October 26, 2009, including Schedule "A" to the Transition and Reorganization Agreement, being an Agreement on Shared Services and Employees (the "**New Shared Services Agreement**") entered into between Canwest Global, the Limited Partnership, CMI, CPI, CTLP and the National Post Company, dated as of October 26, 2009 and Schedule "B" to the Transition and Reorganization Agreement, being the National Post Transition Agreement (the "**National Post Transition Agreement**") between the National

Post Company and CPI, dated as of October 26, 2009 (the “**National Post Transition Agreement**”);

- (b) vesting in the Transferee (as defined below) the National Post Company’s and Canwest Global’s right, title and interest in and to the Transferred Assets (as defined in Schedule “B” to the Transition and Reorganization Agreement); and
- (c) extending the Stay Period (as defined below) from November 5, 2009 to January 22, 2010.

2. The CMI Entities and the LP Entities (as defined below) are pursuing independent, but co-ordinated, restructuring plans. To facilitate these restructurings, the CMI Entities and the LP Entities, in consultation with the Ad Hoc Committee (as defined below) and the LP Senior Lenders (as defined below), have established a framework to properly restructure their existing inter-entity “shared services” arrangements for the benefit of their stakeholders. As the business of the National Post Company and the businesses of the LP Entities are highly integrated and interdependent, the CMI Entities and the LP Entities, in consultation with the Ad Hoc Committee and the LP Senior Lenders, have also agreed that the assets and business of the National Post Company ought to be formally integrated into the corporate structure of the LP Entities at the same time as the inter-entity arrangements are restructured. The Transition and Reorganization Agreement has been entered into by the CMI Entities and the LP Entities to accomplish these goals.

3. The Transition and Reorganization Agreement is part of an internal corporate reorganization and is not “outside the ordinary course of business”. Approval of the Transition and Reorganization Agreement is in the best interest of a broad constituency of stakeholders of the CMI Entities and the National Post Company, including their employees, suppliers and customers, and the LP Entities.

PART II – FACTS

4. The facts with respect to this Motion are more fully set out in the Affidavit of John E. Maguire sworn on October 27, 2009 (the “**Maguire Affidavit**”). Capitalized terms in this Factum not otherwise defined have the same meanings as in the Maguire Affidavit.

Background

5. The businesses operated by the CMI Entities include (i) Canwest’s free-to-air television broadcast business (*i.e.*, the *Global Television Network* stations); (ii) certain subscription-based specialty television channels; and (iii) the *National Post* newspaper.¹ As noted below, the CMI Entities were granted protection from their creditors pursuant to the Initial Order of the Honourable Justice Pepall dated October 6, 2009.²

6. Canwest Global’s newspaper publishing and digital media business is carried on through the Limited Partnership, the Limited Partnership’s general partner, Canwest (Canada) Inc. (“**CCI**”), and its subsidiaries (namely CPI and Canwest Books Inc. (“**CBI**”)) (collectively the “**LP Entities**”) and the National Post Company. The Limited Partnership is the largest publisher of daily English-language newspapers in Canada.³

7. The LP Entities publish 10 metropolitan daily newspapers (including the *Montreal Gazette*, the *Ottawa Citizen* and the *Vancouver Sun*), 2 other smaller market daily newspapers (broadsheets), 22 non-daily newspapers, 12 community newspapers, 5 bi-weekly and 2 weekly newspapers, and 3 community publications.⁴

The Income-Trust Spin-Off

8. Prior to 2005, all of the businesses which were wholly-owned by Canwest Global, including all of the businesses now operated by the CMI Entities and all of the businesses now operated by the LP Entities, were operated directly or indirectly by a single corporate entity,

¹ Affidavit of John E. Maguire sworn October 27, 2009 (the “Maguire Affidavit”), para. 5, Motion Record of the Applicants (“Motion Record”) Tab 2, p. 11.

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

³ Maguire Affidavit, para. 5, Motion Record Tab 2, p. 11.

⁴ Maguire Affidavit, para. 7, Motion Record Tab 2, p. 22.

namely Canwest MediaWorks Inc. (“**MediaWorks**”) (since renamed CMI). As one unified business, all business critical and support services, including executive services, information technology, human resources, accounting and finance, were shared amongst MediaWorks and its subsidiaries.⁵

9. In 2005, the Limited Partnership was formed to acquire all of MediaWorks’ newspaper publishing and digital media entities (excluding the *National Post*) and to operate such businesses, as well as certain of the above noted shared services operations – as part of a planned income trust spin-off of CMI’s newspaper publishing and digital media assets. The income trust spin-off was completed in October 2005. The *National Post* was specifically excluded from the income trust spin-off because, unlike Canwest Global’s other newspaper publications, it was unprofitable and therefore unsuited for inclusion in an income trust. Instead, the *National Post* remained with the other entities which were wholly-owned by Canwest Global in the form of a general partnership – the National Post Company.⁶

10. In conjunction with the income trust spin-off, the Limited Partnership entered into a credit agreement with a syndicate of lenders, and the Bank of Nova Scotia as Administrative Agent (the “**2005 LP Credit Facility**”). The guarantors of the 2005 LP Credit Facility were comprised of the other LP Entities. Since entering into the 2005 LP Credit Facility, the Limited Partnership and its subsidiaries have been financed by independent credit facilities.⁷

Formalization of the Shared Services Arrangements

11. When the newspaper publishing and digital media entities operated by MediaWorks were spun-off to the newly formed Limited Partnership, there was a recognition that the corporate services that had previously been shared between the various entities in the Canwest enterprise (the “**Shared Services**”) would need to continue, but that the cost of the provision of such services should be on commercially reasonable terms. Accordingly, MediaWorks and the Limited Partnership formalized the existing shared services arrangements

⁵ Maguire Affidavit, para. 6, Motion Record Tab 2, pp. 11-12.

⁶ Maguire Affidavit, para. 7, Motion Record Tab 2, p. 12.

⁷ Maguire Affidavit, para. 8, Motion Record Tab 2, p. 12.

by entering into various inter-entity agreements which governed the provision and cost allocation of the applicable services (the “**Shared Services Arrangements**”).⁸

12. For example, the Shared Services Arrangements that were put in place formalized the provision of executive advisory services, corporate and administrative services, and the placement of insurance coverage, by MediaWorks to the Limited Partnership.⁹

13. Similarly, the Shared Services Arrangements also formalized the provision of services by the Limited Partnership to MediaWorks, including information and technology support, human resources support, and management, invoicing, and collection of advertising revenues. It was acknowledged in the Shared Services Arrangements that the service provider (whether MediaWorks or the Limited Partnership) would be entitled to reimbursement for all costs and expenses incurred in the provision of the Shared Services. It was agreed that expenses that were shared between the service provider and the service recipient would be allocated between the parties on a commercially reasonable basis consistent with past practice. Neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.¹⁰

Synergies between the National Post Company and the LP Entities

14. With respect to the *National Post*, notwithstanding that it was segregated from the other Canwest newspaper publications as part of the income trust spin-off in 2005, the National Post Company remained intertwined with the operation and publication of the newspapers owned by the Limited Partnership and continued to share many of the Shared Services. For example, under the Shared Services Arrangements that were entered into in conjunction with the Income Trust spin-off, the Limited Partnership agreed to continue providing the National Post Company with, *inter alia*, the following Shared Services:¹¹

- (a) financial and accounting support services, including accounts payable, accounts receivable, payroll services, cash flow management, and accounting services;

⁸ Maguire Affidavit, para. 9, Motion Record Tab 2, pp. 12-13.

⁹ Maguire Affidavit, para. 10, Motion Record Tab 2, p. 13.

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

¹¹ Maguire Affidavit, paras. 11 and 74, Motion Record Tab 2, pp. 13 and 30.

- (b) corporate services, including human resources consulting, pension services, and employee benefits administration;
- (c) IT infrastructure and support services, including information technology and processing and website development and maintenance services (*FPinfomart.ca*; *NationalPost.com*);
- (d) advisory services regarding corporate development, capital expenditures and other operational matters;
- (e) advisory services regarding corporate development, capital expenditures and other operational matters;
- (f) content from Canwest News Service and other editorial services; (g) sales and marketing services;
- (g) classified advertising and customer support services provided by ReachCanada call centre; and
- (h) printing and distribution services, including outsourced printing of the National Post Company at various metropolitan newspaper printing facilities.

15. In addition, the Limited Partnership also agreed to collect and invoice certain advertising and circulation revenues on behalf of the National Post Company and subsequently advance such revenues to the National Post Company.¹²

16. As noted above, it was acknowledged that the Limited Partnership, as service provider, would be entitled to costs and expenses incurred in provision of the above-noted Shared Services.¹³

17. The multitude of operations that were conducted by the LP Entities on behalf of the *National Post* rendered the National Post Company dependent on the Shared Services

¹² Maguire Affidavit, para. 75, Motion Record Tab 2, p. 31.

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

Arrangements and the operational synergies that have been developed between the *National Post* and the family of newspaper publications and digital and online operations of the LP Entities.¹⁴

Privatization of the Limited Partnership

18. The Limited Partnership and its subsidiaries operated as an income trust between October 2005 and May 2007. In 2007, following an announcement by the Federal government regarding the future taxation of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. The unitholders approved the going private transaction in July 2007.¹⁵

19. Since July 2007, the Limited Partnership has been a 100% wholly-owned indirect subsidiary of Canwest Global.¹⁶

Continuation of Shared Services Arrangements Following Repatriation of the Limited Partnership

20. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have, since that time, continued to maintain separate credit facilities from CMI and have continued to participate in and be bound by the Shared Services Arrangements, including those Shared Service Arrangements noted above. This interdependence has been mutually beneficial to the LP Entities and the CMI Entities (including the National Post Company). However, the interdependence has also, unintentionally, resulted in certain misalignments of personnel and services. For example, there are certain employees who are on the payrolls of the CMI Entities but who provide services exclusively to the LP Entities and there are certain employees who are on the payrolls of the LP Entities but who provide services exclusively to the CMI Entities. As well, some employees of the CMI Entities are participants of a pension plan sponsored by the LP Entities and *vice versa*.¹⁷

Financial Difficulties of the CMI Entities and LP Entities

21. Both the CMI Entities and the LP Entities have experienced significant deterioration in their financial performance over the past 12-18 months and, due to their

¹⁴ Maguire Affidavit, para. 11, Motion Record Tab 2, p. 13.

¹⁵ Maguire Affidavit, para. 12, Motion Record Tab 2, p. 13.

¹⁶ Maguire Affidavit, para. 12, Motion Record Tab 2, p. 13.

¹⁷ Maguire Affidavit, para. 13, Motion Record Tab 2, p. 14.

independent credit facilities, have been forced to pursue independent, but co-ordinated, restructuring and reorganization plans.¹⁸

22. The CMI Entities are pursuing a plan of arrangement (the “**Plan**”) under the CCAA in respect of the CMI Recapitalization Transaction on the basis of the Recapitalization Term Sheet (as defined below) that was negotiated by the CMI Entities and the Ad Hoc Committee. Each of the holders of the 8% Senior Subordinated Notes who support the Term Sheet (the “**Consenting Noteholders**”) have executed a support agreement (the “**Support Agreement**”), which attaches the Recapitalization Term Sheet as a schedule thereto. By executing the Support Agreements, the Consenting Noteholders have indicated that they intend to vote in favour of the Plan at any meeting of creditors held to consider the Plan, subject to certain conditions.¹⁹

23. The purpose of the Recapitalization Transaction is to, among other things, restructure CMI into a viable and competitive industry participant able to deal with the current issues facing the broadcasting industry and other competitive factors. The CMI Entities anticipate that the CMI Recapitalization Transaction will allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns – thereby preserving enterprise value for stakeholders and maintaining employment for as many employees of the CMI Entities as possible.²⁰

24. The Limited Partnership is currently in default of certain of its financial covenants under its various existing credit facilities and has failed to make certain principal and interest payments in respect of those facilities. The Limited Partnership has recently entered into an agreement (the “**LP Forbearance Agreement**”) with certain of its senior lenders (the “**LP Senior Secured Lenders**”) wherein those lenders have agreed not to take any steps to demand immediate payment or enforce the security held in support of the Limited Partnership’s senior secured credit facilities in order to afford the Limited Partnership and the LP Senior Secured

¹⁸ Maguire Affidavit, para. 14, Motion Record Tab 2, p. 14.

¹⁹ Maguire Affidavit, para. 28, Motion Record Tab 2, p. 18.

²⁰ Maguire Affidavit, para. 29, Motion Record Tab 2, pp. 18-19.

Lenders an opportunity to attempt to negotiate a consensual pre-packaged restructuring or reorganization of the LP Entities.²¹

25. The LP Forbearance Agreement is subject to the satisfaction of certain milestones including reaching an agreement realigning the Shared Services Arrangements and on the principal terms of a restructuring transaction involving the LP Entities.²²

Need to Disentangle the Shared Services Arrangements

26. Because the CMI Entities and the LP Entities have been forced to pursue independent, but co-ordinated, restructuring and reorganization plans, there has been a recognition that the Shared Services Arrangements need to be disentangled and realigned. To that end, both the LP Forbearance Agreement and the CMI Recapitalization Transaction require that the CMI Entities and the LP Entities are to agree on an orderly transition and disentanglement and/or realignment of the existing Shared Services Arrangements. In addition, the Term Sheet governing the CMI Recapitalization Transaction (the “**Recapitalization Term Sheet**”) originally required that a definitive agreement in respect of a transfer of the National Post Company to the Limited Partnership be entered into on terms acceptable to the Ad Hoc Committee by no later than October 15, 2009. As negotiations with the Limited Partnership to effect such a transfer had advanced but had not concluded by that date, the Ad Hoc Committee subsequently agreed to extend the date by which such an agreement is required to close until October 30, 2009.²³

27. To that end, the CMI Entities and the LP Entities have entered into the Transition and Reorganization Agreement, subject to the approval of this Honourable Court. The Transition and Reorganization Agreement was entered into following extensive and comprehensive negotiations between the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee and the LP Senior Secured Lenders and their respective financial and legal advisors. By entering into the

²¹ Maguire Affidavit, para. 15, Motion Record Tab 2, pp. 14-15.

²² Maguire Affidavit, para. 15, Motion Record Tab 2, pp. 14-15.

²³ Maguire Affidavit, para. 16, Motion Record Tab 2, p. 15.

Transition and Reorganization Agreement, the parties have established the framework to properly restructure their inter-entity arrangements for the benefit of their stakeholders.²⁴

The New Shared Services Agreement

28. Attached as Schedule “A” to the Transition and Reorganization Agreement is the New Shared Services Agreement. The New Shared Services Agreement effects the intention of the CMI Entities and the LP Entities to amend and, where necessary, to properly realign the Shared Services and certain Canwest personnel, and to eliminate certain redundancies, as between them. Attached as Schedule “B” to the Transition and Reorganization Agreement is the National Post Transition Agreement.²⁵

29. Under the New Shared Services Agreement, the parties have agreed that during fiscal 2010, the costs for the Shared Services Arrangements will continue in each cost centre at the existing allocations, or as amended by the New Shared Services Agreement, until certain specified dates, at which time the Shared Service will either cease to be provided to the service recipient or will be renegotiated on commercial terms, as applicable. Certain cost and expense allocations in respect of the Shared Services Arrangements will be reduced as and to the extent that the personnel providing the Shared Services Arrangements are transferred from the service provider to the service recipient. The New Shared Services Agreement also addresses certain employee-related matters, including a realignment of those employees who are currently misaligned and a transfer of certain misaligned pension plan participants to pension plans which are sponsored by the appropriate party.²⁶

30. The LP Entities, the CMI CRA and the Monitor have consented to the entering into of the New Shared Services Agreement. The Administrative Agent, acting on behalf of the Limited Partnership’s senior secured lenders, has indicated that it requires this Honourable Court to approve the entering into of the New Shared Services Agreement and the parties have agreed that seeking this Honourable Court’s approval is appropriate in the circumstances. It is a

²⁴ Maguire Affidavit, para. 17, Motion Record Tab 2, p. 15.

²⁵ Maguire Affidavit, para. 18, Motion Record Tab 2, pp. 15-16.

²⁶ Maguire Affidavit, para. 19, Motion Record Tab 2, p. 16.

milestone of the LP Forbearance Agreement that the Limited Partnership enter into arrangements with respect to the restructuring or termination of the existing Shared Services Arrangements.²⁷

The National Post Transition Agreement

31. Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the “**Transferee**”).²⁸

32. The National Post Transition Agreement provides that certain of the property and assets of the National Post Company will not be assumed by the Transferee (the “**Excluded Assets**”). The Excluded Assets include (i) the benefit of all insurance policies related to the Business; (ii) all of the corporate charters, minute and share record books and corporate seals of the National Post Company; and (iii) amounts owing to the National Post Company by any of the CMI Entities.²⁹

33. The Transferee will assume substantially all of the operating liabilities (the “**Assumed Liabilities**”) of the National Post Company. The Assumed Liabilities are explicitly identified in the National Post Transition Agreement and are generally comprised of the following liabilities: (i) accounts payable; (ii) accrued expenses; (iii) deferred revenue; and (iv) any amounts due to employees. In addition, the Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post Pension Plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer, including (i) the CMI Payables; and (ii) contingent liabilities relating to existing litigation claims.³⁰

34. Under the National Post Transition Agreement, CPI will cause the Transferee to offer employment to all of the National Post Company’s employees.³¹

²⁷ Maguire Affidavit, para. 91, Motion Record Tab 2, pp. 37-38.

²⁸ Maguire Affidavit, para. 20, Motion Record Tab 2, p. 16.

²⁹ Maguire Affidavit, para. 98, Motion Record Tab 2, p. 39.

³⁰ Maguire Affidavit, para. 93, Motion Record Tab 2, p. 38.

³¹ Maguire Affidavit, para. 20, Motion Record Tab 2, p. 16.

The Need for a Bundled Transaction

35. In the course of the negotiations, it was recognized that an agreement with respect to the Shared Services Arrangements was functionally inseparable from properly realigning the *National Post*. In short, the Shared Services generally and the Shared Services with respect to the *National Post* can not be settled in isolation from each other. Accordingly, it was agreed that the consummation of an agreement with respect to a transfer of the *National Post* could only occur if it was bundled with the consummation of an agreement in respect of the Shared Services Arrangements generally.³²

36. In addition to the operational benefits of reintegrating the *National Post* newspaper with the other newspaper publications of the LP Entities, the transition of the *National Post* newspaper as contemplated by the terms of the National Post Transition Agreement is necessary for the survival of the *National Post* as a going concern. Since its inception in 1998, the *National Post* has never generated a profit and it continues to suffer significant operating losses. The members of the Ad Hoc Committee have, since May 2009, agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs. As noted above, in the course of negotiating the Recapitalization Term Sheet, the Ad Hoc Committee made it clear that it would not continue to support the continued funding of the *National Post* by CMI indefinitely. To that end, the members of the Ad Hoc Committee have since advised that they will not support the funding of the *National Post* by CMI past October 30, 2009. In the absence of any funding for its ongoing operating losses, it is doubtful that the *National Post* could sustain its operations. In such a scenario, the inevitable and immediate result would be a shut down of the *National Post* and the consequent loss of employment for the National Post Company's employees.³³

PART III – ISSUES

37. The issues on this Motion are as follows:

- (a) The Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36 of the *Companies' Creditors Arrangement Act*;

³² Maguire Affidavit, para. 21, Motion Record Tab 2, p. 16.

³³ Maguire Affidavit, para. 22, Motion Record Tab 2, pp. 16-17.

- (b) The Transition and Reorganization Agreement is fair and reasonable, does not prejudice creditors and stakeholders of the CMI Entities, and facilitates the restructuring of both the CMI Entities (under the CCAA) and the separate, but coordinated restructuring of the LP Entities; and
- (c) The Stay Period should be extended to January 22, 2010.

PART IV – THE LAW

General Interpretive Principles under the CCAA

38. It has long been held that the CCAA is remedial legislation, which should be given a broad interpretation with a view to fulfilling its purpose – namely, the facilitation of restructuring of debtor companies, for the benefit of creditors, stakeholders and other constituencies that would be detrimentally affected by the cessation of the debtor’s business in a bankruptcy or liquidation.

39. As Blair J. stated in *Re Royal Oak Mines Inc.*:³⁴

It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved.

40. In *Re Lehndorff*, the Court held that the purpose of the statute is to “enable insolvent companies *to carry on business in the ordinary course* or otherwise deal with their assets so as to enable [a] plan of compromise or arrangement to be prepared, file and considered by their creditors and the court.” (emphasis added).³⁵

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

41. Section 36 of the CCAA was added in the recent amendments to the CCAA which came into force on September 18, 2009.³⁶ 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

³⁴ *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 at 317 (Ont. Gen. Div.) [*Royal Oak*].

³⁵ *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para. 31.

³⁶ S.C. 2005, c. 47, s. 128, as amended by S.C. 2007, c. 36, s. 65.

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.

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.

42. Since section 36 is a new provision, there is no jurisprudence considering the application of this section.

43. Section 36 provides for court approval where a debtor under CCAA protection proposes to sell or otherwise dispose of assets “outside the ordinary course of business”. 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.

44. However, it is clear on the plain wording of the section that consideration of the listed factors is not necessary unless the transaction meets the threshold requirement in section

36(1) – namely, it is a transaction that is properly characterized as “outside the ordinary course of business.” The implication of this threshold requirement is that transactions that occur in the ordinary course of business generally would not require court approval, unless (for example) there are provisions in the Initial Order or any subsequent order specifically requiring the court to approve a particular transaction or such approval is requested by a particular stakeholder.

45. The CMI 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.

46. As demonstrated by the facts surrounding the negotiation of the Transition and Reorganization Agreement, and the objectives that are intended to be accomplished by giving effect to this transaction, the Transition and Reorganization Agreement is designed to carry out an internal reorganization within the Canwest corporate family that is no more unusual than the types of internal reorganization frequently carried out by corporations to take advantage of particular tax treatment of members of a corporate family. In fact, the Transition and Reorganization Agreement effectively tidies up the remnants of a structure (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.³⁷

47. The Transition and Reorganization Agreement embodies an integrated, bundled internal reorganization transaction that is clearly designed to realign shared services and assets within the Canwest corporate family to rationalize the business structure and to better reflect the business model of the corporate family. This business structure predated the insolvency of the CMI Entities. It is within this context that the National Post Transition Agreement must be viewed.

48. Characterizing this type of internal corporate reorganization as an ordinary course transaction accords with commercial sense. It also is clearly in keeping with the purpose of section 36. In fact, the contrary interpretation in the context of this type of transaction would

³⁷ Maguire Affidavit, para. 17, Motion Record Tab 2, p. 15.

generate commercially unreasonable results that would be out of step with the overall purpose of the CCAA.

49. 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.³⁸

50. In this case, 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 these proceedings:

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)³⁹

51. 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.” In particular, subsection 36(4), which applies specifically to sales or other dispositions of assets to a related party and imposes certain mandatory criteria for court approval, was designed to:

...prevent the possible abuse by “phoenix corporations”. Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a “new” business using assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.⁴⁰

³⁸ *Pacific Mobile Corp. (Trustee of) v. American Bilrite (Canada) Ltd.* (1985), 16 D.L.R. (4th) 319 (S.C.C.)

³⁹ *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4286 (S.C.J.) at para. 24.

⁴⁰ 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>

52. Although commentary of a legislator does not represent a definitive guide to the interpretation of a statutory provision, it can be a useful indicator of specific legislative intent and it is admissible by a court for this purpose.⁴¹ Viewed in light of this articulation of purpose, it is submitted that the Transition and Reorganization Agreement is very far from the abuses that the section was designed to prevent.

53. This conclusion is also supported by considering the results if section 36 were interpreted to catch the type of transaction represented by the Transition and Reorganization Agreement. In particular, given that an internal corporate reorganization almost inevitably involves transfers of assets to related parties within the corporate family, the implication of concluding that such a transaction is “outside the ordinary course” would be that a debtor corporation would not be able to carry out common reorganization transactions within a corporate family without offering such assets to third parties, thereby potentially taking them out of the corporate family. This interpretation does not accord with commercial sense in the context of a transaction that does not prejudice any creditors (and is in fact supported not only by the creditors but also the Monitor). Nor does it facilitate the legitimate restructuring efforts of debtor companies, which is a well-established purpose of the CCAA.

54. Even if it is not possible to state as a general matter that in all cases, an internal corporate reorganization should not be subject to the provisions of section 36, it is clear that the facts of this particular transaction, when examined in light of the purpose of section 36 and of the CCAA, indicate that it is not a transaction that should be subject to section 36. This analysis is in keeping with the general conclusion that the characterization of a transaction as an “ordinary course” transaction is context- and circumstance-dependent.

55. In the context of the Transition and Reorganization Agreement, the clear focus of the transaction is the realignment of the Shared Services between the CMI Entities and the LP Entities. The transfer of the assets and business of the National Post Company to the publishing side of the business is merely a necessarily incidental step in the overall realignment of the Shared Services. This step is part of an integrated, bundled transaction and it must occur as part

⁴¹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th Edition (Markham, LexisNexis Canada: 2008) at pp. 608 to 615.

of the overall restructuring of the Shared Services Arrangements.⁴² This necessary and incidental step recognizes the intertwined nature of the National Post business with the publishing side of the Canwest operations such that the realignment of the Shared Services cannot take place independently of the National Post Transition Agreement.⁴³

56. Therefore, even if this Honourable Court determines that all internal corporate reorganizations may not be exempt from section 36, it is submitted that the Transition and Reorganization Agreement, which does not prejudice creditors or stakeholders (as discussed further below), and which is based on a realignment of Shared Services provided on commercial terms in order to reflect the manner in which the debtor company's business actually operates, should not be subject to the requirements of section 36. Within the particular factual context of the business structure of the Canwest enterprise, this transaction is within the ordinary course of business. Moreover, it would be commercially unreasonable to require the CMI Entities to offer the *National Post* to third parties before permitting the CMI Entities to carry out the Transition and Reorganization Agreement to accomplish its goals of realigning Shared Services – which would be the consequence of interpreting the Transition and Reorganization Agreement as a transaction occurring “outside the ordinary course.”

57. Furthermore, it is submitted that the fact that a particular transaction is prompted by the debtor's insolvency does not necessarily lead to the conclusion that the transaction is “out of the ordinary course of business”. If the transaction could properly be characterized as an ordinary course of business transaction in the absence of an insolvency, this characterization should not change merely because the corporation is insolvent.

58. The Monitor supports the characterization by the CMI Entities of the Transition and Reorganization Agreement as a transaction which is not subject to section 36 of the amended CCAA.⁴⁴

⁴² Maguire Affidavit, paras. 21 and 80, Motion Record Tab 2, pp. 16 and 32.

⁴³ Maguire Affidavit, para. 80, Motion Record Tab 2, p. 32.

⁴⁴ Fourth Report of the Monitor, paras. 66 and 67.

Transition and Reorganization Agreement is Fair

59. In any event, to the extent that this Honourable Court is obliged to consider the fairness of the Transition and Reorganization Agreement and to approve it, even apart from the requirements of section 36, it is submitted that this Court has the jurisdiction to grant such approval and that it should exercise the discretion to do so.

60. It has been frequently held that this Honourable Court has the jurisdiction, either as a matter of the broad statutory discretion granted under section 11 of the CCAA or as a matter of inherent jurisdiction, to grant orders that are designed to facilitate the restructuring of a debtor company.

61. 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 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 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.⁴⁵

62. This broad jurisdiction has not been eliminated under the recent amendments to the CCAA. In fact, section 11 of the CCAA continues to provide for a broad general power of the Court, subject only to the restrictions in the CCAA, to make any order that it considers appropriate in the circumstances.⁴⁶ In addition, section 11.02(2) (which replaces section 11(4)) continues to provide that the court may make an order in relation to the stay of proceedings on "such terms as it may impose."⁴⁷

63. The CMI Entities submit that the Transition and Reorganization Agreement should be approved as it clearly complies with general principles of fairness and with the overall purpose of facilitating their restructuring. In particular:

⁴⁵ *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 288 (Ont. C.A.) at para. 18.

⁴⁶ CCAA, section 11.

⁴⁷ CCAA, section 11.02(2).

- (a) The CMI Recapitalization Transaction, which has prompted the Transition and Reorganization Agreement, is designed to facilitate the restructuring of CMI into a viable and competitive industry participant, and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns, thereby preserving value for stakeholders and maintaining employment for as many employees of the CMI Entities as possible.⁴⁸
- (b) The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their financial and legal advisors, their respective restructuring advisors, the Ad Hoc Committee and the LP Senior Secured Lenders and their respective financial and legal advisors.⁴⁹ The process has been both open and consultative.
- (c) The National Post Transition Agreement transfers both assets and liabilities to the publishing side of the Canwest operations. In particular, substantially all of the operating liabilities are to be assumed by the Transferee.⁵⁰ There is no sense in which liabilities are to be stranded in a corporate entity that will have materially fewer assets to satisfy them.
- (d) The major creditors of the CMI Entities are not prejudiced by the Transition and Reorganization Agreement. In fact, CMI's senior secured lender (Irish Holdco) and the Ad Hoc Committee support the Transition and Reorganization Agreement.⁵¹ In addition, the LP Senior Secured Lenders also support the transaction.⁵²
- (e) The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the

⁴⁸ Maguire Affidavit, paras. 29-30, Motion Record Tab 2, pp. 18-19.

⁴⁹ Maguire Affidavit, para. 79, Motion Record Tab 2, p. 32.

⁵⁰ Maguire Affidavit, para. 98, Motion Record Tab 2, p. 40.

⁵¹ Fourth Report of the Monitor, para. 67(f).

⁵² Maguire Affidavit, paras. 79-82, Motion Record Tab 2, pp. 32-33.

CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities.⁵³

- (f) In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company, which has never generated a profit and continues to suffer significant operating losses, would be required to shut down, resulting in the consequent loss of employment for most or all of the National Post Company's employees.⁵⁴ Under the National Post Transition Agreement, which is part and parcel of the Transition and Reorganization Agreement, all of the National Post employees will be offered employment, and the National Post Company's obligations and liabilities under the National Post Company's pension plan will be assumed (subject to required approvals).⁵⁵
- (g) No third party has expressed any interest in acquiring the National Post Company.⁵⁶
- (h) The fact that the major creditors of the CMI Entities, represented by the Ad Hoc Committee, are supporting this transaction is *prima facie* evidence that the consideration for the transfer of National Post Company to the publishing side of the business is reasonable.

Stay Extension is Appropriate

64. 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 satisfy the Court 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.

65. In the present case, the granting of an extension of the Stay Period is appropriate as certain key dates with respect to the recapitalization of the CMI Entities arise after the current

⁵³ Fourth Report of the Monitor, para. 72

⁵⁴ Maguire Affidavit, paras. 31 and 65-66, Motion Record Tab 2, pp. 19 and 27.

⁵⁵ Maguire Affidavit, para. 20, Motion Record Tab 2, p. 16.

⁵⁶ Fourth Report of the Monitor, para. 55.

expiry of the Stay Period. For example, the Recapitalization Term Sheet includes certain key dates with respect to key elements of the recapitalization of the CMI Entities, including (i) creditor approval of the Plan must occur no later than January 30, 2010 and (ii) the Plan implementation date must occur no later than April 15, 2010.⁵⁷

66. Moreover, pursuant to the Claims Procedure Order, the CMI Entities, with the assistance of the Monitor, sent claims packages to their known creditors setting out the quantum of the known creditor's claim (as set out in the books and records of the CMI Entities) on or before October 22, 2009. The Claims Procedure Order requires such known creditors to deliver notices of dispute of claims by no later than November 19, 2009 (the "**Claims Bar Date**") in the event that the known creditor disputes the quantification of its claim by the CMI Entities. Subsequent to the Claims Bar Date, the Claims Procedure Order provides a further process for the CMI Entities to dispute Proofs of Claim filed by unknown creditors (a response is required by November 30, 2009) and to resolve the claims of known creditors for voting and distribution purposes.⁵⁸

67. Since the granting of the Initial Order, the CMI Entities have been operating their businesses as going concerns. The CMI Entities have been and continue to act in good faith and with due diligence in pursuing a recapitalization in order to ensure that as many as possible of the CMI Entities, and the businesses they operate, continue as going concerns – thereby preserving and maximizing enterprise value and maintaining employment for as many employees as possible. With the assistance of the Monitor, the CMI Entities have communicated and dealt with numerous stakeholders from an operational perspective.⁵⁹

68. Accordingly, as certain key dates with respect to the recapitalization of the CMI Entities arise after the current expiry of the Stay Period, and the CMI Entities have demonstrated good faith and due diligence in pursuing a recapitalization, an Order granting an extension of the Stay Period to January 22, 2010 is appropriate and necessary.

⁵⁷ Maguire Affidavit, para. 106, Motion Record Tab 2, p. 43.

⁵⁸ Maguire Affidavit, para. 105, Motion Record Tab 2, pp. 42-43.

⁵⁹ Maguire Affidavit, para. 104, Motion Record Tab 2, p. 42.

PART IV – NATURE OF THE ORDER SOUGHT

69. 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 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. *Pacific Mobile Corp. (Trustee of) v. American Biltrite (Canada) Ltd.* (1985), 16 D.L.R. (4th) 319 (S.C.C.)
2. *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4286 (S.C.J.)
3. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.)
4. *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div.)
5. *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 288 (Ont. C.A.)

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/cl00828.html>
2. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th Edition (Markham, LexisNexis Canada: 2008) at pp. 608 to 615.