

**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 NUNAVUT IRON ORE, INC., BAFFINLAND IRON
MINES CORPORATION, AND 12334992 CANADA INC.**

Applicants

FACTUM (COMEBACK HEARING - MAY 25, 2026)

May 23, 2026

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PART I – OVERVIEW¹

1. The Applicants Nunavut Iron Ore, Inc., 12334992 Canada Inc. and Baffinland Iron Mines Corporation, together with Baffinland Iron Mines LP (“**BIM LP**”, and together with the Applicants, the “**Debtors**”), are a group of affiliated entities engaged in iron ore mining operations at the Mary River Mine located in the Qikiqtani Region of Nunavut on Baffin Island, Canada.

2. On May 15, 2026, an order (the “**Initial Order**”) was made granting the Applicants protection from their creditors under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”), which, among other things:

- (a) granted a stay of proceedings in favour of the Debtors and the directors and officers of the Debtors and members of the Operating Committee (to the extent such member is or was directly or indirectly exercising the powers of a director of any of the Debtors) (collectively, the “**D&O Parties**”), until and including May 25, 2026;
- (b) appointed FTI Consulting Inc. as Monitor of the Debtors;
- (c) granted charges against the property of the Debtors (i) in favour of the Monitor, counsel to the Monitor and counsel to the Debtors to the maximum amount of \$2 million² (the “**Administration Charge**”), and (ii) in favour of the D&O Parties to the maximum amount of \$14 million (the “**D&O Charge**”); and

¹ Capitalized terms used and not defined herein have the meanings ascribed to them in the Affidavit of Celeste van Tonder sworn May 14, 2026 [the “**Initial Affidavit**”] and the Affidavit of Celeste van Tonder sworn May 20, 2026 [the “**Comeback Affidavit**”].

² All dollar amounts referenced herein are expressed in United States dollars unless otherwise stated.

(d) set a date for a comeback hearing (the “**Comeback Hearing**”) of May 25, 2026.

3. This factum is filed in support of the Comeback Motion for an amended and restated Initial Order (the “**ARIO**”) substantially in the form of the draft order at Tab 3 of the Motion Record dated May 20, 2026, to, among other things:

- (a) extend the stay of proceedings against the Debtors and the D&O Parties to June 5, 2026 (the “**Stay**”);
- (b) extend and increase the amount of the Administration Charge from \$2 million to \$5 million; and
- (c) extend and increase the amount of the D&O Charge from \$14 million to \$20.4 million.

PART II – SUMMARY OF FACTS

4. The facts underlying this Motion are more fully set out in the Affidavit of Celeste van Tonder sworn May 14, 2026 (the “**Initial Affidavit**”), the Affidavit of Celeste van Tonder, sworn May 20, 2026, and the First Report of the Monitor dated May 22, 2026 (the “**First Report**”).

A. Background

5. The Debtors are a group of affiliated entities engaged in iron ore mining operations at the Mary River Mine (the “**Mine**”), which is one of the highest-grade iron ore mines in the world.³ The Mine is located in the Qikiqtani Region of Nunavut on Baffin Island, Canada,

³ Comeback Affidavit, ¶17, Motion Record of the Applicants dated May 20, 2026 [“**MRA**”], Tab 2.

making it one of the most northern mining operations in the world.⁴ The day-to-day operations at the Mine are carried out by BIM LP, through its general partner Baffinland Iron Mines Corporation (together, “**Baffinland**”).⁵

6. The Mine and the operations of the Debtors are of economic importance to the Qikiqtani Region and to Nunavut more broadly.⁶ Baffinland is the largest private employer in Nunavut, employs approximately 300 Inuit employees and is an important commercial partner to Inuit communities and businesses in the region.⁷

7. Despite the Mine’s potential for profitability, the Debtors are in financial distress due to several converging factors: (a) high debt-servicing costs; (b) significant capital expenditures on a proposed railway that was later rejected by the federal Minister of Northern Affairs; (c) constrained transportation and shipping limits under existing regulatory approvals; and (d) high operating costs.⁸ The Debtors have been unable to generate sufficient revenue to service their outstanding debt obligations and cover their fixed operating costs.⁹

8. The Mine’s remote location requires all supplies, fuel and equipment to be shipped by sea during a narrow shipping window (mid-July to mid-October).¹⁰ The Debtors’ financial difficulties made it difficult to secure the fuel and other supplies needed for the Mine’s operations, impairing their ability to operate the Mine through the coming year.¹¹

⁴ Comeback Affidavit, ¶17, MRA, Tab 2; Comeback Affidavit, Exhibit “A”, Initial Affidavit, ¶132, MRA, Tab 2A.

⁵ Comeback Affidavit, ¶17, MRA, Tab 2.

⁶ Comeback Affidavit, ¶17, MRA, Tab 2; Comeback Affidavit, Exhibit “A”, Initial Affidavit, ¶146, MRA, Tab 2A.

⁷ Comeback Affidavit, Exhibit “A”, Initial Affidavit, ¶14, 146, MRA, Tab 2A.

⁸ Comeback Affidavit, ¶8, MRA, Tab 2; Comeback Affidavit, Exhibit “A”, Initial Affidavit, ¶127-132, MRA, Tab 2A.

⁹ Comeback Affidavit, ¶9, MRA, Tab 2.

¹⁰ Comeback Affidavit, ¶28, MRA, Tab 2; Comeback Affidavit, Exhibit “A”, Initial Affidavit, ¶13, 62, MRA, Tab 2A.

¹¹ Comeback Affidavit, Exhibit “A”, Initial Affidavit, ¶144, MRA, Tab 2A.

9. The Applicants accordingly sought and obtained protection under the CCAA pursuant to the Initial Order on May 15, 2026 (the “**Filing Date**”).¹²

10. CCAA protection was and remains necessary to preserve the going-concern value of the Debtors' business, protect the interests of all stakeholders, and afford the Debtors the opportunity to stabilize operations, continue to pursue debtor-in-possession (“**DIP**”) financing and pursue a refinancing, recapitalization, restructuring plan, investment, or sale solicitation process (or any combination of the foregoing) (a “**Strategic Process**”) designed to maximize value for the benefit of all stakeholders.¹³

B. The Debtors’ Activities Since the Granting of the Initial Order

11. In the period since the granting of the Initial Order, the Debtors have worked closely with the Monitor to stabilize the Debtors’ business and operations, including by engaging with the Debtors’ stakeholders concerning the CCAA proceedings, advancing discussions on fuel procurement and other supplies needed for the upcoming sea lift season and continuing a competitive DIP solicitation process.¹⁴

(i) Stakeholder Communications

12. The Debtors, with the assistance of the Monitor, have undertaken a high level of stakeholder engagement in respect of the CCAA proceedings.¹⁵ The stakeholders engaged with include, among others:

¹² Comeback Affidavit, ¶10, MRA, Tab 2.

¹³ Comeback Affidavit, ¶35, MRA, Tab 2.

¹⁴ Comeback Affidavit, ¶12-13, 22, MRA, Tab 2.

¹⁵ Comeback Affidavit, ¶13; First Report of the Monitor dated May 22, 2026 [the “**First Report**”], ¶10.

- (a) **Service List.** The Debtors served the Initial Order and Application Record on the service list on the Filing Date.¹⁶ The Debtors also published a press release in order to inform their various stakeholders of the granting of the Initial Order.¹⁷
- (b) **Employees and Union.** Senior management of the Debtors held meetings on the Filing Date with both the Debtors' employees and representatives of the union representing the Debtors' unionized employees.¹⁸ A communication was issued by the union thereafter advising the Debtors' unionized employees that operations at the Mine will continue as normal.¹⁹
- (c) **Governmental Authorities.** The Debtors communicated with key governmental authorities, including, among others, federal agencies, the Government of Nunavut and the Qikiqtani Inuit Association (the "QIA") concerning the CCAA proceedings.²⁰ A statement was subsequently issued on behalf of the Government of Nunavut expressing support for the continued operation of the Mine.²¹
- (d) **Suppliers.** Individual communications describing the CCAA proceedings and the Initial Order were delivered to the Debtors' suppliers.²² The Debtors have engaged with their suppliers on ongoing supply terms and do not currently anticipate any material disruption in supply.²³ Among these suppliers are the

¹⁶ Comeback Affidavit, ¶14, MRA, Tab 2.

¹⁷ Comeback Affidavit, ¶14, MRA, Tab 2; Comeback Affidavit, [Exhibit "B"](#), Press Release of Baffinland Iron Mines Corporation dated May 15, 2026, MRA, Tab 2B.

¹⁸ Comeback Affidavit, ¶15, MRA, Tab 2.

¹⁹ Comeback Affidavit, ¶15, MRA, Tab 2; Comeback Affidavit, [Exhibit "C"](#), Communication Issued by the International Union of Operating Engineers, Local 793 dated May 15, 2026, MRA, Tab 2C.

²⁰ Comeback Affidavit, ¶16, MRA, Tab 2.

²¹ Comeback Affidavit, ¶16, MRA, Tab 2; Comeback Affidavit, [Exhibit "D"](#), Joint Statement Issued by the Premier of Nunavut and the Community Services Minister for Nunavut dated May 15, 2026, MRA, Tab 2D.

²² Comeback Affidavit, ¶17, MRA, Tab 2.

²³ Comeback Affidavit, ¶17, MRA, Tab 2.

issuing banks (the “**LC Issuers**”) under the Debtors’ outstanding letters of credit, the majority of which serve as financial reassurance for the Debtors’ environmental remediation obligations.²⁴ While the Initial Affidavit indicated that the Debtors intended to seek a critical supplier charge at the Comeback Hearing, the responses the Debtors have received from their suppliers and the LC Issuers to date has obviated the need for such a charge at this time.²⁵

13. In addition to these steps taken by the Debtors to engage with their stakeholders, the Monitor has, among other things, established a website where updates on the CCAA proceedings, as well as Court materials filed in connection therewith will be posted periodically.²⁶ The Monitor also created a dedicated email address and telephone hotlines through which stakeholders can communicate directly with the Monitor concerning the CCAA proceedings.²⁷

14. Importantly, because the Filing Date was the day before the Victoria Day long weekend, a number of stakeholders only began to engage with the Debtors on the following Tuesday. The Debtors accordingly delayed serving their materials for the Comeback Motion until May 20, 2026 to ensure that meaningful responses were provided to these stakeholders’ inquiries and the appropriate scope of relief was being sought on this motion.²⁸

²⁴ Comeback Affidavit, ¶18, MRA, Tab 2.

²⁵ Comeback Affidavit, ¶20, MRA, Tab 2.

²⁶ Comeback Affidavit, ¶23, MRA, Tab 2; First Report, ¶10-13

²⁷ Comeback Affidavit, ¶23, MRA, Tab 2; First Report, ¶11.

²⁸ Comeback Affidavit, ¶21, MRA, Tab 2.

(ii) Offtake Agreements

15. As discussed in the Initial Factum and Initial Affidavit, the Debtors' primary source of operating cash flow is from Offtake Agreements with IRH Global Trading Ltd. ("IRH").²⁹ Under these agreements, Baffinland deposits iron ore produced at the Mine onto a stockpile at the Milne Port, at which point title to the ore is transferred to IRH and payment is made by IRH to Baffinland (subject to potential true-up payments).³⁰

16. In response to an inquiry from IRH concerning the impact of the CCAA proceedings on the treatment of the Offtake Agreements, the Debtors, in consultation with the Monitor, informed IRH that they currently intend to perform their obligations under the Offtake Agreements in the ordinary course.³¹ The Debtors proceeded to invoice IRH on May 19, 2026 for iron ore placed on the Milne Port stockpile earlier that month.³² The Debtors have no reason to believe that IRH will not pay the amount outstanding pursuant to such invoice.³³

(iii) Fuel Arrangements

17. As set out in the Initial Affidavit, one of the reasons the Debtors sought protection under the CCAA was to afford the Debtors the opportunity to stabilize their operations.³⁴ Central to that objective was the need to negotiate arrangements for the delivery of arctic diesel and jet fuel, upon which the Mine's operations are critically dependent.³⁵ This fuel can only be transported to the Mine by sea during the annual shipping window, which runs from

²⁹ Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[55](#), MRA, Tab 2A.

³⁰ Comeback Affidavit, ¶[24](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[56-57](#), MRA, Tab 2A.

³¹ Comeback Affidavit, ¶[25-26](#), MRA, Tab 2.

³² Comeback Affidavit, ¶[27](#), MRA, Tab 2.

³³ Comeback Affidavit, ¶[27](#), MRA, Tab 2.

³⁴ Comeback Affidavit, ¶[28](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[14](#), MRA, Tab 2A.

³⁵ Comeback Affidavit, ¶[28](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[13](#), [62](#), MRA, Tab 2A.

mid-July to mid-October.³⁶ Accordingly, the underlying delivery arrangements must be finalized in advance of the first shipment in July.³⁷

18. The commencement of the CCAA proceedings has already helped stabilize the Debtors' operations in this respect. Following the issuance of the Initial Order, potential counterparties to the fuel arrangements withdrew their preexisting requirement for a material deposit by the Debtors to secure supply.³⁸ The Debtors made a request for final proposals for fuel arrangements on May 18, 2026, and the Debtors continue to negotiate terms.³⁹ The first payment for fuel will not be payable until July 2026, when shipment occurs, and it is contemplated that such payment will be funded from advances under a DIP credit facility following completion of the DIP Solicitation Process (defined below).⁴⁰

(iv) DIP Solicitation Process

19. As discussed in the Initial Affidavit, although the Debtors anticipate continued receipt of payments under the Offtake Agreements with IRH, additional interim financing is required to fund expenditures required for the upcoming sea lift season (including fuel expenses) or to complete any Strategic Process.⁴¹ Accordingly, the Monitor has continued to advance the DIP solicitation process on behalf of the Debtors (the "**DIP Solicitation Process**") following the Filing Date.⁴²

³⁶ Comeback Affidavit, ¶[28](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[13](#), [62](#), MRA, Tab 2A.

³⁷ Comeback Affidavit, ¶[28](#), MRA, Tab 2.

³⁸ Comeback Affidavit, ¶[28](#), MRA, Tab 2.

³⁹ Comeback Affidavit, ¶[29-30](#), MRA, Tab 2.

⁴⁰ Comeback Affidavit, ¶[29-30](#), MRA, Tab 2.

⁴¹ Comeback Affidavit, ¶[31](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[170](#), MRA, Tab 2A.

⁴² Comeback Affidavit, ¶[32](#), MRA, Tab 2.

20. Interested parties were initially instructed to submit term sheets by no later than 5:00 p.m. on May 20, 2026.⁴³ Given the significant interest expressed by prospective lenders, the Monitor extended the submission deadline to 5:00 p.m. on May 25, 2026, to afford parties additional time to prepare their best proposals.⁴⁴ The Debtors, in consultation with the Monitor, anticipate seeking approval of the successful DIP proposal the first week of June.⁴⁵

PART III – ISSUES

21. The issue on the Comeback Motion is whether this Court should grant the ARIO, including:

- (a) the extension of the Stay to and including June 5, 2026;
- (b) the increase of the Administration Charge from \$2 million to \$5 million; and
- (c) the increase of the D&O Charge from \$14 million to \$20.4 million.

PART IV – LAW & ARGUMENT

A. The Stay Should be Extended to June 5, 2026

22. The current Stay expires on May 25, 2026. Pursuant to subsections 11.02(2) and 11.02(3) of the CCAA, the Court may grant an extension of the Stay for “any period that the court considers necessary”, provided that the Court is satisfied that (a) circumstances exist that make the order appropriate; and (b) the applicant has acted, and is acting, in good faith and with due diligence.⁴⁶ Each of these criteria is met in this case.

⁴³ Comeback Affidavit, ¶[33](#), MRA, Tab 2; First Report, ¶[19](#).

⁴⁴ Comeback Affidavit, ¶[33](#), MRA, Tab 2; First Report, ¶[20](#).

⁴⁵ Comeback Affidavit, ¶[34](#), MRA, Tab 2; First Report, ¶[20](#).

⁴⁶ *Companies' Creditors Arrangement Act*, [R.S.C. 1985, c. C-36](#) [the “CCAA”], ss. [11.02\(2\)](#) and [\(3\)](#).

23. An extension of the Stay is necessary for three reasons. First, it will allow the Debtors to continue stabilizing their operations during this critical period, in which they must procure the supplies, fuel, shipping, and ancillary arrangements required for the upcoming sea-lift season.⁴⁷ Second, it will also allow the Debtors to continue to engage with their stakeholders, including the QIA and the Inuit suppliers and communities who support the Debtors' business operations.⁴⁸ Third, it will allow the Debtors to advance the DIP Solicitation Process. The length of the proposed Stay extension aligns with the anticipated timeline to complete the DIP Solicitation Process.⁴⁹

24. As detailed in the cash flow forecast prepared by the Monitor, the Debtors are expected to have sufficient liquidity to continue their operations during the requested extension of the Stay.⁵⁰

25. In addition, the Monitor believes the Debtors have acted, and are acting, in good faith and with due diligence in these CCAA proceedings.⁵¹ The Debtors have given notice of these proceedings to their stakeholders and engaged extensively with them since the Filing Date, including their suppliers, letter of credit providers and the QIA.⁵² The Debtors also meaningfully advanced their fuel procurement efforts⁵³ and continued the DIP Solicitation Process.⁵⁴

⁴⁷ Comeback Affidavit, ¶[35](#), MRA, Tab 2.

⁴⁸ Comeback Affidavit, ¶[35](#), MRA, Tab 2.

⁴⁹ Comeback Affidavit, ¶[35](#), MRA, Tab 2.

⁵⁰ Comeback Affidavit, ¶[37](#), MRA, Tab 2; First Report, ¶[33](#); First Report, [Appendix "B"](#), May 22 Forecast.
⁵¹ First Report, ¶[10](#), [35](#).

⁵² Comeback Affidavit, ¶[14-19](#), MRA, Tab 2; First Report, ¶[10](#).

⁵³ Comeback Affidavit, ¶[28-30](#), MRA, Tab 2.

⁵⁴ Comeback Affidavit, ¶[31-34](#), MRA, Tab 2; First Report, ¶[18-20](#).

26. The Monitor is supportive of the requested extension of the Stay and believes that the Debtors' creditors would not be materially prejudiced by the proposed extension of the Stay.⁵⁵

B. The Increase to the Administration Charge is Appropriate

27. The Initial Order approved the Administration Charge in the amount of \$2 million, which was designed to cover the period between the Filing Date and the Comeback Hearing.⁵⁶ The Debtors now seek to increase the Administration Charge to \$5 million.⁵⁷

28. Section 11.52 of the CCAA expressly gives this Court the ability to grant the Administration Charge, on notice to the secured creditors who are likely to be affected by the charge. Further, under this Court's authority to make the Administration Charge "in an amount that the court considers appropriate", this Court has the power to increase this charge.⁵⁸

29. Notice of the increase to the Administration Charge has been provided to the Debtors' secured creditors who will be affected by such charge, being the holders of the 2026 Notes, Oaktree, Hartree and EDC, the LC Issuers and the parties with security registrations against the Debtors.⁵⁹

30. The non-exhaustive factors⁶⁰ set out in *Canwest Publishing* for determining whether to grant an administration charge, upon which the Debtors relied in seeking the Administration Charge at the outset, remain applicable:

⁵⁵ First Report, ¶36.

⁵⁶ Comeback Affidavit, ¶38, MRA, Tab 2; First Report, ¶21.

⁵⁷ Comeback Affidavit, ¶38, MRA, Tab 2.

⁵⁸ CCAA, s. 11.52.

⁵⁹ Comeback Affidavit, ¶41, MRA, Tab 2.

⁶⁰ *Canwest Publishing Inc.*, 2010 ONSC 222, ¶54.

- (a) the business is complex. The Mine is an integral part of Nunavut's economy, including as its largest private employer and as a commercial partner of the Inuit population;⁶¹
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout these proceedings;⁶²
- (c) the Debtors anticipate no unwarranted duplication of roles;
- (d) the Debtors have worked with the Monitor to determine the proposed increase to the quantum of the Administration Charge, and the parties believe it to be reasonable and appropriate given the complexity of the CCAA proceeding and the services to be rendered by the beneficiaries of the Administration Charge;⁶³
- (e) the Monitor supports the increase of the Administration Charge.⁶⁴

C. The Increase to the D&O Charge is Appropriate

31. The Initial Order granted a D&O Charge against the Property in the amount of \$14 million in favour of the D&O Parties as security for the Debtors' obligation to indemnify the D&O Parties for obligations and liabilities they may incur in such capacity.⁶⁵ The Debtors are seeking an increase of the D&O Charge to \$20.4 million.⁶⁶

⁶¹ Comeback Affidavit, ¶7, MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶¶14, 146, MRA, Tab 2A.

⁶² Comeback Affidavit, ¶39, MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶156, MRA, Tab 2A.

⁶³ Comeback Affidavit, ¶40, MRA, Tab 2; First Report, ¶22.

⁶⁴ First Report, ¶23.

⁶⁵ Comeback Affidavit, ¶42, MRA, Tab 2.

⁶⁶ Comeback Affidavit, ¶42, MRA, Tab 2.

32. The initial amount of the D&O Charge reflected the wages, salaries and applicable withholdings, as well as the accrued vacation pay, for which the D&O Parties could potentially have statutory personal liability during the 10-day period between the date of the Initial Order and the Comeback Hearing.⁶⁷

33. The increase of the D&O Charge includes a calculation of the amount of wages, salaries and applicable withholdings, as well as accrued vacation pay, that the D&O Parties could potentially have statutory personal liability for a full payroll period, rather than the 10-day period between the date of the Initial Order and the Comeback Hearing.⁶⁸ The increase to the quantum of the D&O Charge also reflects that directors and officers have personal liability for unpaid statutory termination pay under Nunavut law.⁶⁹ Although the Debtors currently have no intention to terminate any employees in Nunavut, the D&O Parties still require protection for the termination costs for all of Baffinland's Nunavut employees, both active and inactive, as calculated pursuant to the applicable legislation.⁷⁰

34. This Court has jurisdiction under section 11.51 of the CCAA to grant and increase a priority charge in favour of directors and officers as security for an indemnity by the Applicants, on notice to the secured creditors who are likely to be affected by the charge.⁷¹ In *Canwest Global Communications*, this Court held that the purpose of a directors' and officers' charge is to "keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur" during that process.⁷² Courts will grant

⁶⁷ Comeback Affidavit, ¶42, MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶158, MRA, Tab 2A; First Report, ¶25-26.

⁶⁸ Comeback Affidavit, ¶46-47, MRA, Tab 2; First Report, ¶27.

⁶⁹ Comeback Affidavit, ¶47, MRA, Tab 2; First Report, ¶27; See *Labour Standards Act*, RSNWT (Nu) 1988, c L-1, s. 62, which provides that every director and officer is liable for up to two months of unpaid wages, and s. 14.10, which deems termination pay for all purposes to be wages.

⁷⁰ Comeback Affidavit, ¶47, MRA, Tab 2; First Report, ¶27.

⁷¹ CCAA, s. 11.51.

⁷² *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (ONSJ Commercial List), [2009] OJ No 4286, ¶48.

such charges if reasonable and necessary in the circumstances and where the applicant was unable to acquire adequate insurance at a reasonable cost.⁷³

35. The increase to the D&O Charge is reasonable and necessary because the Debtors do not have sufficient funds to satisfy indemnities that could arise during the CCAA proceedings.⁷⁴ The Debtors maintain director and officer insurance but the insurance may include contractual contingencies and uncertainty associated with possible coverage.⁷⁵ The Debtors do not believe the insurance coverage is sufficient to cover against potential liabilities and were unable to obtain adequate additional insurance at a reasonable cost.⁷⁶

36. The factors⁷⁷ identified in *Jaguar Mining Inc., Re* for determining whether to grant a directors' and officers' charge, upon which the Debtors relied in seeking the D&O Charge at the outset, remain applicable:

- (a) notice of the increased D&O Charge has been provided to the Debtors' secured creditors, being the holders of the 2026 Notes, Oaktree, Hartree and EDC, the LC Issuers and the parties with security registrations against the Debtors;⁷⁸
- (b) as noted above, while the Debtors maintain director and officer insurance, the exclusions and limitations thereunder create risk concerning whether sufficient coverage exists;⁷⁹

⁷³ CCAA, ss. [11.001](#) & [11.51\(3\)](#).

⁷⁴ Comeback Affidavit, ¶[43-44](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[161](#), MRA, Tab 2A.

⁷⁵ Comeback Affidavit, ¶[43](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[159](#), MRA, Tab 2A.

⁷⁶ Comeback Affidavit, ¶[44](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[160-161](#), MRA, Tab 2A.

⁷⁷ *Jaguar Mining Inc., Re*, [2014 ONSC 494](#), ¶[45](#).

⁷⁸ Comeback Affidavit, ¶[48](#), MRA, Tab 2.

⁷⁹ Comeback Affidavit, ¶[43](#), MRA, Tab 2; Comeback Affidavit, Exhibit "A", Initial Affidavit, ¶[159](#), MRA, Tab 2A.

- (c) the proposed increase has been determined in consultation with the Monitor to reflect the increased potential scope of liability during the CCAA proceedings;⁸⁰
- (d) the indemnification obligation secured by the D&O Charge does not apply to any obligations incurred as a result of gross negligence or wilful misconduct;⁸¹
- (e) the beneficiaries of the D&O Charge are likely to resign unless the D&O Charge is granted and their expertise and knowledge is necessary for the business' continued operation;⁸² and
- (f) the requested increase to the quantum of the D&O Charge is reasonable given that the initial amount was sized to the anticipated 10-day stay period of the Initial Order and did not include a full payroll period or liability for termination of employees.⁸³

37. The Monitor supports the Debtors' request to increase the quantum of the D&O Charge, which it believes is reasonable and justified in relation to the quantum of the D&O Parties' estimated potential liability.⁸⁴

PART V – ORDER SOUGHT

38. The Applicants respectfully request that this Court grant the ARIO substantially in the form of order provided at Tab 3 of the Motion Record.

⁸⁰ Comeback Affidavit, ¶43, MRA, Tab 2; First Report, ¶27.

⁸¹ Comeback Affidavit, ¶44, MRA, Tab 2; Draft Amended and Restated Initial Order, ¶21, MRA, Tab 3.

⁸² Comeback Affidavit, ¶45, MRA, Tab 2.

⁸³ Comeback Affidavit, ¶47, MRA, Tab 2.

⁸⁴ Comeback Affidavit, ¶47, MRA, Tab 2; First Report, ¶29.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2026.

A handwritten signature in black ink, consisting of several sharp, overlapping strokes that form a stylized, abstract shape.

**Davies Ward Phillips & Vineberg
LLP**

Lawyers for the Applicants and
Baffinland Iron Mines LP

**SCHEDULE A
LIST OF AUTHORITIES**

Caselaw

1. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (ONSJ Commercial List), [2009] OJ No 4286 [See Schedule C]
2. *Canwest Publishing Inc.*, [2010 ONSC 222](#)
3. *Jaguar Mining Inc., Re*, [2014 ONSC 494](#)

Legislation

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
2. *Labour Standards Act*, RSNWT (Nu) 1988, c L-1

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date May 23, 2026



Signature

**SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

1. *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

11.001 Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

...

11.02

11.02(1) Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(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.

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.

11.02(3) Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4) Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

...

11.51

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

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

11.51(2) Priority

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

11.51(3) Restriction — indemnification insurance

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

11.51(4) Negligence, misconduct or fault

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

...

11.52

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

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

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

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

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

11.52(2) Priority

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

2. *Labour Standards Act, RSNWT (Nu) 1988, c L-1*

14.10 Deeming provision

Termination pay shall for all purposes be deemed to be wages.

...

62. Liability of corporation directors

Every director and other officer of a corporation is liable for the unpaid wages of the employees of the corporation, but not exceeding the equivalent of two months wages for each employee who has not been paid, and the provisions of this Act respecting the recovery of wages apply, with the necessary changes and so far as they are applicable, to the recovery of such wages from a director and other officer of a corporation that does not pay its employee's wages.

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**SCHEDULE C
SUPPLEMENTAL AUTHORITIES**

1. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (ONSJ Commercial List), [2009] OJ No 4286

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286,
181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED**

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE
OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS
CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Pepall J.:

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.¹ The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations);

(ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Background Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*². It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic

environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US\$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US\$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to \$75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of \$4.855 billion and total consolidated liabilities of \$5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling \$2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately \$954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by \$272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by \$253 million or 47%. It reported a consolidated net loss of \$1.578 billion compared to \$22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by \$8 million or 4% in the third quarter of 2009 and operating profit was \$21 million compared to \$39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US\$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US\$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US\$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US\$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of \$75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to \$23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of \$100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately \$634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for

certain letters of credit in an aggregate face amount of \$10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US \$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of \$187.3 million and an unsecured promissory note in the principal amount of \$430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than \$2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of \$13.3 million as at the last valuation date and a wind up deficiency of \$32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 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.

(a) Threshold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding \$5 million. The CMI Entities are in default of their

obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US\$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*³ definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*⁴. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*⁵; *Smurfit-Stone Container Canada Inc., Re*⁶; and *Calpine Canada Energy Ltd., Re*⁷. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*⁸ and *Global Light Telecommunications Inc., Re*⁹

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

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

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

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

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to \$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately \$10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need

for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is \$10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

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

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

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

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

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

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to \$15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect

to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

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

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

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

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

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card

Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of \$20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank *pari passu* with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first \$85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

- (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
- (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
- (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
- (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer

if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of \$20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for \$30 million in coverage and \$10 million in excess coverage for a total of \$40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*¹⁰ Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom

are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of \$5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*¹¹ have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*¹² provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the 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. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

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

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from \$1000 to \$5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

- 1 R.S.C. 1985, c. C. 36, as amended
- 2 R.S.C. 1985, c.C.44.
- 3 R.S.C. 1985, c. B-3, as amended.
- 4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).
- 5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).
- 6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).
- 7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).
- 8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).
- 9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).
- 10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

- 11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
- 12 [2002] 2 S.C.R. 522 (S.C.C.).

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nunavut Iron Ore, Inc., Baffinland Iron Mines Corporation, and 12334992 Canada Inc.

Applicants

Court File No. CL-26-00000219-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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