Court File No.: CV-16-11582-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

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 OLD PSG WIND-DOWN LTD., OLD BHR WIND-DOWN CORP., OLD BPSU WIND-DOWN CORP., OLD BPSDS WIND-DOWN CORP., OLD EBS WIND-DOWN CORP., OLD PLG WIND-DOWN CORP., OLD PSGI WIND-DOWN CORP., OLD BHR INC., OLD BH INC., OLD BPSU INC., OLD BPSCI INC., OLD SPSUSH INC., OLD EBS INC., OLD PLG INC., AND OLD PSGI INC.

Applicants

FACTUM AND AUTHORITIES OF THE MOVING APPLICANTS
(Motion returnable December 3, 2018)

November 26, 2018

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TO: THE SERVICE LIST

TABLE OF CONTENTS

PAGE

PART I - INTRODUCTION

1. During these insolvency proceedings, the Applicants (defined below) completed a sale of substantially all their assets. After repayment of their secured debt, the Applicants had significant residual sale proceeds to distribute to stakeholders.

2. After several months of negotiations between the Applicants and various stakeholders, the Applicants developed the First Amended Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and its affiliated debtors (as it may be further amended, modified, or supplemented from time to time, the "**Joint Plan**"). The Joint Plan provided for the successful completion of the Applicants' liquidation and distribution of approximately $50 million of remaining sale proceeds.

3. The Joint Plan was approved by order of this Court on December 20, 2017 (the "**Plan Approval Order**").

4. The Plan Approval Order also extended the Stay Period (as defined in the Initial Order (defined below)) until December 31, 2018, to provide time to carry out various distributions and other liquidation measures contemplated under the Joint Plan. The Applicants have diligently advanced these measures, and more than $11 million of the sale proceeds have already been distributed.

5. However, certain distributions cannot be made until certain tax clearance certificates have been obtained and the claims of Canada Revenue Agency and Quebec Revenue Agency are resolved. Efforts to complete these steps are underway, but to facilitate the remaining steps contemplated in the Joint Plan, the Applicants move for an extension of the Stay Period to June 30, 2019.

PART II - THE FACTS

A. Background and Commencement of the CCAA Proceedings

6. The applicants in this proceeding are Old PSG Wind-down Ltd. ("**PSG**" or the "**Parent Debtor**"), Old BHR Wind-down Corp., Old BPSU Wind-down Corp., Old BPSDS Wind-down Corp., Old EBS Wind-down Corp., Old EBS Wind-down Corp., Old PLG Wind- down Corp., Old PSGI Wind-down Corp., Old BHR Inc., Old BH Inc., Old BPSU Inc., Old BPSCI Inc., Old BPSCI Inc., Old BPSUSH Inc., Old EBS Inc., Old PLG Inc., and Old PSGI Inc. (collectively, the "**Applicants**").[1]

7. The Applicants formerly designed, developed, manufactured, marketed and sold performance sports equipment, accessories, and related apparel for a variety of sporting activities including ice hockey, lacrosse, baseball and softball, under the brand names of BAUER, EASTON, MISSION, MAVERIK, CASCADE, INARIA and COMBAT.[2]

8. On October 31, 2016 (the "**Filing Date**"), the Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") pursuant to an Order (as amended and restated, the "**Initial Order**") of this Court (the "**Canadian Court**").[3]

9. Also on the Filing Date, the Applicants filed for creditor protection (the "**Chapter 11 Cases**") in the U.S. Bankruptcy Court for the District of Delaware (the

[1] Affidavit of Mark Palmer, to be sworn ("**Palmer Affidavit**"), para 1, Motion Record of the Moving Applicants ("**Motion Record**"), Tab 2.
[2] Palmer Affidavit, para 6, Motion Record, Tab 2.
[3] Palmer Affidavit, para 7, Motion Record, Tab 2.

"**Bankruptcy Court**" and together with the Canadian Court, the "**Courts**") under the Bankruptcy Code.[4]

10. Pursuant to the Initial Order, Ernst & Young Inc. was appointed as the Monitor (the "**Monitor**") in these CCAA proceedings (the "**CCAA Proceedings**" and together with the Chapter 11 Cases, the "**Insolvency Proceedings**").[5]

11. The Applicants' restructuring included the going concern sale of substantially all of their assets. On November 30, 2016, the Courts issued and entered orders approving a sales process (the "**Sales Process**"), including a stalking horse asset purchase agreement dated October 31, 2016, (as amended, the "**Purchase Agreement**") for the sale of substantially all of the Applicants' assets to Peak Achievement Athletics Inc. (f/k/a 9938982 Canada Inc.) or its designate (the "**Purchaser**").[6]

12. On February 6, 2017, the Courts issued and entered orders approving, among other things, the Purchase Agreement vesting the purchased assets in the Purchaser free and clear (the "**Sale Orders**"). On February 28, 2017, the Applicants announced the sale of substantially all of their assets to the Purchaser under the Sale Orders (the "**Sale**").[7]

13. Following the Sale, the Applicants' DIP Facilities were fully repaid.[8]

14. There remained residual funds in the estate to (i) repay the Holders of General Unsecured Claims (in Canada and the U.S.) in full, upon resolution of those claims in

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[4] Palmer Affidavit, para 8, Motion Record, Tab 2.
[5] Palmer Affidavit, para 9, Motion Record, Tab 2.
[6] Palmer Affidavit, para 10, Motion Record, Tab 2.
[7] Palmer Affidavit, para 11, Motion Record, Tab 2.
[8] Palmer Affidavit, para 12, Motion Record, Tab 2.

accordance with the claims procedures described below; and (ii) make a distribution to the holders of equity claims in the Parent Debtor (the "**Sale Proceeds**").[9]

B. Joint Plan and Plan Approval Order

15. Following the closing of the Sale, the Applicants, the Monitor, and various stakeholders negotiated an agreement to effectively wind-up the Insolvency Proceedings. These stakeholders included the statutory committee of equity holders appointed in the Chapter 11 Cases (the "**Equity Committee**") and the statutory committee of unsecured creditors appointed in the Chapter 11 Cases (the "**Creditors' Committee**"). The Joint Plan was the result of these negotiations.[10]

16. The Joint Plan is a global settlement reached between the parties in order to resolve the Insolvency Proceedings in an efficient manner. The Joint Plan resolves all claims as between the Applicants. The Joint Plan provides for the successful completion of the Applicants' liquidation and the distribution of approximately $50 million in remaining Sale Proceeds. The Joint Plan also provides for a class settlement (the "**Class Settlement**") between the Applicants and the Plumbers & Pipefitters National Pension Fund, acting for itself and on behalf of the putative class of purchasers of common shares of PSG.[11]

17. On November 1, 2017, the Bankruptcy Court granted an order authorizing, among other things, the Applicants to solicit votes on the Joint Plan. The Canadian Court

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[9] Palmer Affidavit, para 12, Motion Record, Tab 2.
[10] Palmer Affidavit, para 13, Motion Record, Tab 2.
[11] Palmer Affidavit, paras 14 & 17, Motion Record, Tab 2.

also granted a reciprocal order to solicit votes on the Joint Plan. Ultimately, every class voted at least 88.24% in number and 99% in amount to accept the Joint Plan.[12]

18. At a joint hearing of the Canadian Court and the Bankruptcy Court to consider confirmation of the Joint Plan on December 20, 2017, the Courts approved the Joint Plan and the Canadian Court granted the Plan Approval Order.[13]

19. The Plan Approval Order extended the Stay Period until December 31, 2018.[14]

i. Corporate Governance

20. As part of the Joint Plan and Plan Approval Order, the Applicants' directors and officers resigned or were deemed to have resigned. The Joint Plan recommended a new board, and this board (the "**PSG Board**") was appointed under the Plan Approval Order.[15]

21. A Liquidation Trust was created to provide Holders of Parent Equity Interests with an option to exchange their equity interests for beneficial interests in the Liquidation Trust. The Equity Committee selected members for a Liquidation Trust Advisory Board (the "**Trust Advisory Board**") to review decisions made regarding the Liquidation Trust, among other things.[16]

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[12] Palmer Affidavit, para 15, Motion Record, Tab 2.
[13] Palmer Affidavit, para 16, Motion Record, Tab 2.
[14] Palmer Affidavit, para 2, Motion Record, Tab 2; Order of Justice Hainey dated December 20, 2017, Motion Record, Tab 2(A).
[15] Palmer Affidavit, para 19, Motion Record, Tab 2.
[16] Palmer Affidavit, para 20, Motion Record, Tab 2.

22. The Applicants transferred to the Liquidation Trust assets allocable to the exchanged equity interests, along with certain Liquidation Trust expense reserves.[17]

23. Under the Plan Approval Order, Theseus Strategy Group LLC ("**Theseus**") was appointed to the role of trustee of the Liquidation Trust ("**Liquidation Trustee**"). The Equity Committee recommended that Theseus also act as Chief Wind-Down Officer to wind-up and dissolve each of the Applicants other than PSG, and this appointment became effective through the Plan Approval Order.[18]

C. Claims Procedure

24. On December 19, 2016, the Canadian Court issued a claims procedure order (the "**Claims Procedure Order**") to solicit claims against the Applicants. The Bankruptcy Court granted a similar order.[19]

25. On April 10, 2017, the Canadian Court issued a claims procedure order for the solicitation of claims from the Applicants' former employees (the "**Employee Claims Procedure Order**''). The Bankruptcy Court granted a similar order.[20]

26. On September 1, 2017, the Canadian Court granted an order (the "**Claims Resolution Order**") establishing a process to resolve claims against the Canadian-incorporated Applicants (the "**Canadian Debtors**"). The Claims Resolution Order also set out a protocol to resolve cross-border claims filed against both the Canadian Debtors

[17] Palmer Affidavit, para 20, Motion Record, Tab 2.
[18] Palmer Affidavit, paras 18 & 21, Motion Record, Tab 2.
[19] Palmer Affidavit, para 22, Motion Record, Tab 2.
[20] Palmer Affidavit, para 22, Motion Record, Tab 2.

and the American-incorporated Applicants (the "**U.S. Debtors**"). On October 19, 2017, the Bankruptcy Court granted a reciprocal order.[21]

27. Since the issuance of the Claims Resolution Order, the Applicants and the Monitor have worked diligently to reconcile and resolve claims filed against the Applicants.[22]

D. Performance of the Joint Plan following the Plan Approval Order

28. Following the issuance of the Plan Approval Order, the Parent Debtor has taken steps to implement the transactions contemplated therein with the advice and direction of the PSG Board and Trust Advisory Board (collectively, the "**Boards**") to ensure that the Applicants are liquidated and disbursements are made to their creditors.[23]

i. Trust Beneficiary Elections

29. Under the Chapter 11 Plan, Holders of Parent Equity Interests exchanged their equity interests in the Parent Debtor for beneficial interests in the Liquidation Trust. The exercise of this election resulted in a countervailing transfer of the assets of the Parent Debtor to the Liquidation Trust. In order to assess the total quantum of assets so transferred between the Applicants and the Liquidation Trust, the Liquidation Trustee was required to undertake a good faith valuation of the Applicants' and Liquidation Trust's assets. FTI Consulting Inc. ("**FTI**") was engaged to conduct the valuation and prepare a report.[24]

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[21] Palmer Affidavit, para 23, Motion Record, Tab 2.
[22] Palmer Affidavit, para 24, Motion Record, Tab 2.
[23] Palmer Affidavit, para 25, Motion Record, Tab 2.
[24] Palmer Affidavit, para 26, Motion Record, Tab 2.

30. In connection with this contemplated valuation by FTI, the Boards approved the valuation of the Liquidation Trust's assets as of two valuation dates:

(a) the effective date of the Chapter 11 Plan (being the day following the Plan Approval Order: December 21, 2017); and

(b) the effective date on which equity holders in the Parent Debtor who elected to exchange their shares for beneficial interests in the Liquidation Trust would be deemed to have so exchanged such shares for beneficial interests in the Liquidation Trust (the "**Split Date**").[25]

31. On May 24, 2018, the PSG Board and Trust Advisory Board resolved to establish May 31, 2018 as the Split Date, and provided authorization to implement any adjustments necessary to effect this exchange in an administratively efficient manner.[26]

ii. Distributions

32. Under the Joint Plan, the Parent Debtor and the Monitor act as Distribution Agent for all distributions to Holders of General Unsecured Claims. Distributions may be made to such Holders following either receipt of applicable clearance certificates or a comfort letter from the relevant taxing authorities, including the Canadian Revenue Agency (the "**CRA**"), and Quebec Revenue Agency ("**QRA**"), or such other arrangements as are satisfactory to the Monitor. Since the Plan Approval Order, the Monitor and the Parent Debtor have received comfort letters to enable distributions to Holders of General Unsecured Claims, and have been working towards securing

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[25] Palmer Affidavit, para 27, Motion Record, Tab 2.
[26] Palmer Affidavit, para 28, Motion Record, Tab 2.

applicable clearance certificates from the relevant taxing authorities in order to enable distributions to Holders of Parent Equity Interests.[27]

33. As of July 18, 2018, a sufficient number of claims against the U.S. Debtors and the Canadian Debtors had been resolved to satisfy the Monitor that it would be appropriate to make a distribution to Canadian and U.S. holders of General Unsecured Claims. The Monitor agreed to proceed with a distribution.[28]

34. The Boards discussed the quantum of such a distribution and the maximum value of unresolved claims with a view to understanding whether the estate had sufficient funds to meet all creditor claims when resolved. The Boards concluded that sufficient funds were available to meet those liabilities and unanimously resolved to make distributions to Canadian and U.S. Holders of General Unsecured Claims.[29]

35. As of November 19, 2018, 9 claims against the Applicants remained unresolved, representing approximately $4.6 million in maximum asserted potential exposure.[30]

E. Extension of the Stay Period

36. As described in the Monitor's Report dated November 26, 2018, more than $11 million has been distributed in connection with the satisfaction of claims.[31]

37. As described above, under the terms of the Joint Plan the Parent Debtor will not be in a position to make an equity distribution until applicable clearance certificates have

[27] Palmer Affidavit, paras 29 & 30, Motion Record, Tab 2.
[28] Palmer Affidavit, para 31, Motion Record, Tab 2.
[29] Palmer Affidavit, para 32, Motion Record, Tab 2.
[30] Palmer Affidavit, para 33, Motion Record, Tab 2.
[31] Palmer Affidavit, para 36, Motion Record, Tab 2.

been obtained from Canadian tax agencies which requires the resolution of the outstanding claims of CRA and QRA.[32]

38. Although the Monitor and the Parent Debtor have been working diligently with CRA and QRA to resolve those claims and to obtain those clearances, it is not expected that these items will be resolved prior to the expiry of the Stay Period. As such, the Applicants seek an extension of the Stay Period until June 30, 2019.[33]

39. The Applicants expect that the sought extension would permit completion of distributions and liquidation measures contemplated in the Plan Approval Order.[34]

PART III - ISSUES AND THE LAW

40. The issue to be decided on this application is whether this Canadian Court should extend the Stay Period to June 30, 2019.

41. The Applicants submit that this Canadian Court should exercise its discretion to grant an extension of the Stay Period. The extension would facilitate the steps necessary to conclude the distributions and liquidation measures ordered under the Plan Approval Order. The Monitor supports the relief sought by the Applicants on this motion. No conflicts are borne out on the record for this motion. There is no evidence of any objection by any stakeholder.

42. Pursuant to section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor where: (a) circumstances exist that make the order

[32] Palmer Affidavit, para 37, Motion Record, Tab 2.
[33] Palmer Affidavit, para 38, Motion Record, Tab 2.
[34] Palmer Affidavit, para 39, Motion Record, Tab 2.

appropriate; and (b) the debtor companies have acted and are acting in good faith and with due diligence.[35]

43. In the decision of this Court in *Canwest Global*, an extension of a stay of proceedings was granted based on the presence of the following factors: (a) the debtors' forecasts indicated they had sufficient cash resources to operate throughout the extension of the stay period; (b) the monitor supported the extension; (c) there was a lack of opposition to the motion; and (d) the debtors had acted and were continuing to act in good faith and with due diligence.[36]

44. The factors identified in *Canwest Global* are also present on this motion.

45. A reserve fund for the Applicants' ongoing expenses has been maintained - and will continue to be maintained - until clearance certificates from CRA and QRA have been obtained.[37]

46. The Monitor supports the extension of the Stay Period sought by the Applicants on this motion.

47. The Applicants have acted, and continue to act, in good faith and with due diligence in performing the measures contemplated in the Plan Approval Order. More than $11 million of the estate has already been distributed in connection with the satisfaction of claims.

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[35] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 11.02.
[36] *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788, 2009 CanLII 63368, 183 A.C.W.S. (3d) 325 (Ont. S.C.J. [Comm. List]) ["Canwest Global"] at para 43, Factum and Authorities, Schedule A.
[37] Order of Justice Hainey dated December 20, 2017, Motion Record, Tab 2(A), para 21.

48. Pursuant to the terms of the Joint Plan, the Parent Debtor will not be in a position to make an equity distribution until tax clearances have been obtained from Canadian tax agencies which requires the resolution of the outstanding claims of CRA and QRA. The Liquidation Trustee, the Boards, and the Monitor have been diligently working towards securing the requisite clearance certificates. However, is not expected that these certificates will be secured before the expiry of the Stay Period, and as such it is not expected that distribution will be considered until the end of the first quarter in 2019. As such, the Applicants seek an extension of the Stay Period until June 30, 2019. In these circumstances, an order extending the Stay Period is appropriate.

PART IV - ORDER REQUESTED

49. The Applicants respectfully request that this Court grant an order in the form appended as Schedule “A” to the Notice of Motion, extending the Stay Period to June 30, 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of November, 2018.

Jeffrey Levine
Tushara Weerasooriya
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Lawyers for the Applicants

TAB A

SCHEDULE "A"
Canwest Global Communications Corp. (Re)

1.	*Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788, 2009 CanLII 63368, 183 A.C.W.S. (3d) 325 (Ont. S.C.J. [Comm. List]).

TAB 1

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091112

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors of Canwest
David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett for the Ad Hoc Committee of Noteholders
Peter J. Osborne for Proposed Management Directors of National Post
Andrew Kent and Hilary Clarke for Bank of Nova Scotia, Agent for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.
Amanda Darroch for Communication Workers of America
Alena Thouin for Superintendent of Financial Services

REASONS FOR DECISION

Relief Requested

[1] The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("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, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

[2] In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

[3] At the conclusion of oral argument, I granted the order requested with reasons to follow.

Backround Facts

(a) Parties

[4] The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act ("CCAA")* protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

[5] The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

[6] To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

[7] In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of

Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

[8] In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;

- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and

- 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.

[9] The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

[10] In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

[11] Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their *CCAA* filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recapitalization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

[12] The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

[13] Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

[14] Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

[15] The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of $9.3 million in fiscal year ending August 31, 2009 and a net loss of $0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately $139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of $1.5 million and a wind up deficiency of $1.6 million.

[16] The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note- $187.3 million

CIT Secured Facility- $10.7 million

CMI Senior Unsecured Subordinated Notes- US$393.2 million

Irish Holdco Unsecured Note- $430.6 million

[17] 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"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

[18] The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. 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 the debt of approximately $139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately $1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

[19] CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

[20] The Transferee is to pay a portion of the price or cost in cash: (i) $2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of $1 million), less (ii) a reduction equal to the amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds $6.3 million.

[21] The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately $14 million in the fiscal year ending August 31, 2010.

[22] In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization

alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

[23] The Monitor has concluded that the transaction has the following advantages over a liquidation:

- it facilitates the reorganizaton and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;
- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;
- it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and
- the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

[24] The issues to consider are whether:

(a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA;*

(b) the Transition and Reorganization Agreement should be approved by the Court; and

(c) the stay should be extended to January 22, 2010.

Discussion

(a) Section 36 of the *CCAA*

[25] Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

[26] Court approval is required under section 36 if:

(a) a debtor company under CCAA protection

(b) proposes to sell or dispose of assets outside the ordinary course of business.

[27] Court approval under this section of the Act[1] is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

[28] Specifically, section 36 states:

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[1] Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.

(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.

(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.

(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.

(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.

(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*).

(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.

(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.[2]

[29] While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

[30] In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

[31] The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under

[2] The reference to paragraph 6(4)a should presumably be 6(6)a.

CCAA protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

[32] The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book[3] on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."[4]

[33] The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act*[5]. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.*[6], authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act*[7], courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller[8]. In *Pacific Mobile Corp.*[9], the Supreme Court of Canada stated:

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[3] Industry Canada "Bill C-55: Clause by Clause Analysis—Bill Clause No. 131—CCAA Section 36".
[4] Ibid.
[5] R.S.C. 1985, c.C-36 as amended.
[6] (2003), 47 C.B.R. (4th) 278 at para.52.
[7] R.S.O. 1990, c. B. 14, as amended.
[8] D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.
[9] [1985] 1 S.C.R. 290.

> It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.
>
> We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business"…
>
> 'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

[34] In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4),which deals with dispositions of assets to a related party, was intended 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 the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.[10]

[35] In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp*[11]., a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

[36] In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal

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[10] Supra, note 3.

reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

[37] As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Re Stelco Inc*.[12] Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

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[11] Supra, note 9.
[12] (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

[38] I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which 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. This preserves value for stakeholders and maintains employment for as many employees of the CMI Entities as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

[39] There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. 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 CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

[40] In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company’s employees. Under the National Post

Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

[41] No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

[42] The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

<u>Stay Extension</u>

[43] The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash

flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

Pepall J.

Released: November 12, 2009

TAB B

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Stays, etc. — initial application

11.02 (1) 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 30 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.

Marginal note: Stays, etc. — other than initial application

(2) 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.

Marginal note: Burden of proof on application

(3) 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.

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 OLD PSG WIND-DOWN LTD., et al.
Applicants

Court File No.: CV-16-11582-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM AND AUTHORITIES OF THE MOVING APPLICANTS
(Motion returnable December 3, 2018)

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