Clerk's Stamp

COURT FILE NUMBER	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	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 ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.
DOCUMENT	**APPLICANTS' BENCH BRIEF FOR EXTENSION APPLICATION AND INTERIM FINANCING DRAW**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Stephanie A. Wanke Oviatt Law #401, 10408 124 Street Edmonton AB T5N 1R5 T 780.809.2219 F 780.669.7215

A. INTRODUCTION

1. Since the Initial Order was granted in these proceedings on July 5, 2017 under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**"), Canada North Group Inc., Canada North Camps Inc. ("**CNC**"), Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd. ("**1371047 Alberta Ltd.**") and 1919209 Alberta Ltd. (collectively, the "**Applicants**"), have worked diligently and in good faith towards putting a Plan of Arrangement to their creditors.

2. The Applicants have made material steps towards securing the necessary investment and refinancing to fund a Plan of Arrangement that is in the interests of the stakeholders of these proceedings, including the preferred creditors, the secured creditors, the unsecured creditors, the employees and the customers and suppliers of the Applicants.

3. As set out in the Monitor's Seventh Report dated January 25, 2018 and the Ninth Affidavit of Shayne McCracken and the Confidential Supplement thereto, both sworn on January 22, 2018, these material steps include:

   (a) Securing a binding commitment from a restructuring investor;

   (b) Engaging in promising and ongoing negotiations with potential complementary refinancing parties; and

   (c) Extensive discussions with respect to the outline of the intended Plan of Arrangement with key stakeholders.

4. In short, all indications are that, permitted to continue for a short additional period, this will be a successful restructuring CCAA.

5. To continue toward that end, the Applicants now seek the following relief:

   (a) An extension of the Stay of Proceedings to March 2, 2018; and

   (b) Authorization to draw the final amount of the authorized Interim Financing, being the final $500,000 draw on a total of $3,500,000.

6. The Applicants are not aware of any opposition to their application.

B. EXTENSION OF STAY OF PROCEEDINGS

7. The extension should be granted as the CCAA Parties continue to acted in good faith and with due diligence

8. S. 11.02(2) of the *CCAA* provides the jurisdiction for the Court to extend an Initial Application:

> **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.

9. S. 11.02(3) of the *CCAA* further provides the test for an extension:

> **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.

10. Where there is a realistic chance of a successful Plan of Arrangement being presented, which is the case here, the Court should grant a further extension: *Starcom International Optics Corp., Re:*, [1998] B.C.J. No. 506 at para 35 [**Tab 1**].

11. The Applicants had, in the Application, suggested an extension to April 15, 2018 which would approximate the anticipated Plan implementation date. The Monitor has subsequently suggested an extension to March 2, 2018 as a return to Court on or about February 28, 2018 is necessary to set the meeting of the Creditors.

12. The Applicants take no issue with an extension to March 2, 2018.

C. AUTHORIZATION OF INTERIM FINANCING DRAW

13. Section 11.2 of the CCAA empowers the Court to grant interim financing. As prescribed by subsection 11.2(4) of the CCAA, the Court to consider, among other things:

    (a) the period during which the company is expected to be subject to proceedings under the CCAA;

(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;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced; and

(g) the monitor's report.

14. As set out in greater detail in the Monitor's Seventh Report, the final $500,000 draw on the Interim Financing is required for operations through to the plan implementation date.

15. The Plan of Arrangement is dependent on continued operations of the Applicants, which in turn requires this final draw.

16. The factors outlined above support the Applicants' request: the interim financing is matched to the period necessary to implement a plan, the loan is necessary for a viable Plan, there is no evidence of prejudice to creditors or of objection by creditors and the Monitor is in support.

17. The Applicants' request is also consistent with the underlying purpose of interim CCAA financing as summarized in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4288 **[Tab 2]** at para 31: "[T]he premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allow the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors."

18. For the reasons set out above, the Applicants seek an extension of the Stay of Proceedings to March 2, 2018 and authorization to draw the final $500,000 tranche of the Interim FInancing

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF JANUARY, 2018.

OVIATT LAW

Stephanie A. Wanke
Counsel for Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd. and 1919209 Alberta Ltd.

TAB 1

1998 CarswellBC 477
British Columbia Supreme Court [In Chambers]

Starcom International Optics Corp., Re

1998 CarswellBC 477, [1998] B.C.J. No. 506, 3 C.B.R. (4th) 177, 78 A.C.W.S. (3d) 11

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

In the Matter of the Company Act, R.S.B.C. 1996, c. 62

In the Matter of Starcom International Optics Corporation, Starcom Service Corporation (B.C.) Starcom Service Corporation (Washington State), Petitioners

Saunders J.

Heard: February 27 and March 3, 1998
Judgment: March 6, 1998
Docket: Vancouver A980298

Counsel: *H.C. Ritchie Clark, Q.C.*, and *J.A. Dawson*, for the Petitioners.
C.S. Bird and *M. Verbrugge*, for AT&T Capital Corporation.
W.C. Kaplan and *J.J. Lynch*, for Lucent Technologies of Canada Inc.
J.R. Sandrelli, for Burlington Northern and Santa Fe Railway Company.
N.E. Kornfeld, for Intelcom Group (U.S.A.), Inc.
V.L.M. Strike, for Metronet Communication Corp.
Cyrus Bilimoria, John Nesbitt, Dan Robertson and Neil Callow on their own behalf.

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.a Procedure
      XIX.2.a.i Applicant
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.b Grant of stay
      XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.f Lifting of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.g Monitor
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Application of Act

Petitoners applied for extension of interim order made under Companies' Creditors Arrangement Act which protected petitioners from proceedings by creditors — Conditions required for initial order were still present at time of application — Petitioners' reorganization attempt was not doomed to failure and refinancing was realistic — Petitioners acted with good faith and due diligence in providing information to major creditor's agent and in developing new cash-flow projections — Interim order was extended to date by which petitioners were required to present reorganization plan — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Stay of proceedings was granted to parent company and its two subsidiaries under Companies' Creditors Arrangement Act — Creditors applied for order lifting stay of parent company as it had no active business or lifting stay of parent company to allow replacement of management team — Creditors also applied for abridgment of term of stay because petitioners' position could deteriorate significantly while stay was in effect — Parent company and its subsidiaries were managed together and to lift stay would fracture status quo without benefit to reorganization effort — Change of management team would also alter status quo, new proposed team was not described to court and current management team had confidence of shareholders and some creditors — Application for lifting of stay was dismissed — Application to abridge term of stay was dismissed — Large debt of petitioners would take time to resolve — Monitor was ordered to report cash-flow projections to court on regular basis — Stay involving all petitioners was lifted only for purpose of allowing one creditor to commence proceedings against security given to law firm representing petitioners — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Creditors applied for amendment of interim order made under Companies' Creditors Arrangement Act which gave payment priority to fees of monitor and other professional advisors — Priority of monitor's fees protected as monitor acts on behalf of court for benefit of all parties — Cash-flow projections submitted by petitioners provided for monthly payment of professional advisors — Act permits professionals to require immediate payment — Order was amended to give priority only to monitor's fees — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Creditors applied for order that financial information be provided for each of three related petitioners protected under Companies' Creditors Arrangement Act — Application was dismissed — Relative assets and liabilities of each company was not significant — Major creditor also applied for order that it be allowed to participate in reorganization of petitioners — Application was dismissed — It would not be appropriate to require petitioners to join together with creditor where creditor expressed little confidence in petitioners' management team — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Saunders J.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) — considered

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2)*) 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2)*) 297 A.P.R. 12 (N.S. T.D.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146 (B.C. S.C.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — considered

Statutes considered:

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

Generally — considered

s. 11(4) [en. 1997, c. 12, s. 124] — referred to

s. 11(6) [en. 1997, c. 12, s. 124] — considered

s. 11(6)(b) [en. 1997, c. 12, s. 124] — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — referred to

s. 11.6 [en. 1997, c. 12, s. 124] — referred to

APPLICATION for extension of protection afforded by order under Companies' Creditors Arrangement Act.

Saunders J. **(In Chambers):**

1 On January 30, 1998 I granted an *ex parte* interim order, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, protecting the petitioners from their creditors, permitting them to file a reorganization plan on or before July 31, 1998, and appointing a monitor. The interim order required a hearing of the petition on February 27, 1998. The February 27, 1998 hearing dealt with extension of the original order granted *ex parte* as well as applications by AT&T Capital Corporation and Lucent Technologies of Canada Inc.

2 I will be referring to the petitioners as Starcom International, Starcom B.C. and Starcom Washington.

3 The issues that have emerged from these several applications are:

1. should the interim order protecting the petitioners be extended and confirmed?

2. should the order be amended to delete Starcom International from protection of the *Act*?

3. should the stay as it relates to Starcom International be modified and a receiver-manager appointed of its shares in Starcom B.C. and Starcom Washington with the object of replacing the current management team of Starcom B.C. and Starcom Washington?

4. in the event the stay as it relates to the shares, is not lifted, should the interim order be amended to require a reorganization plan to be presented to the court prior to July 31, 1998?

5. should the monitor's fees be paid in priority to the claims of creditors?

6. should the fees of other professional advisors be paid in priority to the claims of creditors?

7. should the petitioners be required to provide financial statements, prepare cash flow projections and keep accounts in a segregated way?

8. should the petitioners be required to disclose to AT&T all negotiations and discussions conducted in preparing their reorganization plan, and be required to permit AT&T to be present during such negotiations or discussions?

9. should the order be amended to permit a challenge to be brought to a security granted by the petitioners to Devlin Jensen, lawyers?

History

4 The original order was made January 30, 1998. On February 13, 1998 AT&T applied to lift the stay as it affected the shares of Starcom B.C. and Starcom Washington and to appoint a receiver-manager, with the intention of replacing the petitioners' management team. The application was denied, with liberty to reapply, which AT&T has done.

5 The general circumstances and position of the parties before me was described in my oral reasons of February 17, 1998. For completeness, I describe them again.

6 Starcom International, a British Columbia incorporated company, is owned by shareholders who, on the information before me, invested about $4.5 million in the fibre optics enterprise. Starcom International owns 100 percent of the voting shares of Starcom B.C., a British Columbia incorporated company, and Starcom Washington, a Washington incorporated company registered extra-provincially in British Columbia. Starcom International also owns 45 percent of their non-voting shares. Another company, Intelcom Group (U.S.A.), Inc. ("ICG"), owns the other 55 percent of the non-voting shares of Starcom B.C. and Starcom Washington. ICG acquired these shares when it converted about $5.6 million debt of the petitioners to shares, as part of a refinancing that saw AT&T become the petitioners' principal creditor.

7 Starcom B.C. and Starcom Washington, between them, own and operate a fibre optics network between Vancouver, B.C. and Seattle, Washington. The line is located on the Burlington Northern right of way. For regulatory reasons, the portion of the line in British Columbia is an asset of Starcom B.C. and that portion in the State of Washington is an asset of Starcom Washington. On the material before me, Starcom B.C. and Starcom Washington appear to be integrated in their operations and accounting functions. Concurrent creditor protection proceedings are ongoing in Washington State concerning Starcom Washington, I am instructed.

8 Starcom B.C. and Starcom Washington have borrowed more than $40 million from AT&T. Starcom International, which has no direct debt to AT&T, has pledged its shares in the two operating companies to AT&T as part of the security package which AT&T took in exchange for the funds advanced. AT&T appeared on the application as the dominant secured creditor of the two operating companies and as holding the Starcom International pledge of the shares of the operating companies.

9 On the information before me, the petitioners owe approximately $4.3 million to creditors other than AT&T. Of these, the largest creditor is Lucent Technologies of Canada, which appeared at the hearing. It has rendered accounts of more than $2.5 million, which are unpaid. The next largest creditor is Burlington Northern Railroad, which on the material, is owed more than $450,000. Another creditor is Devlin Jensen, the law firm acting for the petitioners, which is a secured creditor owed more than $240,000. In these reasons, I have, in a rough calculation, converted any sums in American dollars into Canadian dollars.

10 The loan from AT&T has been in payment default since January 31, 1997. In the spring of 1997, AT&T and the petitioners entered into a forbearance agreement in which AT&T agreed to forebear for some time to permit the petitioners time to refinance. In late December 1997, they entered into another agreement whereby AT&T agreed to forebear collection until January 31, 1998. The petitioners have not paid AT&T and have not presented a plan acceptable to AT&T for repayment of the AT&T loan.

11 On the *ex parte* application, the materials filed included consolidated financial statements and consolidated cash flow projections.

12 On February 17, 1998 I asked the monitor to advise on the degree of difficulty, if any, in presenting cash-flow projections and financial statements for Starcom International on one hand and the two operating companies on the other. Since that request the financial information has been presented to the court segregated on that basis. Further, the original cash flow projections have been amended to now include enhanced revenue, which is explained by the petitioners as increases from new sales, and to include required expenditures such as Lucent Technologies' fees calculated

on a monthly basis for future maintenance. Although the cash flow projections do not yet reflect charges of Burlington Northern for use of its right of way as Burlington Northern had not advised that monthly payments were required, there are sufficient revenues projected to be received to pay these additional expenses, provided the projections are accurate.

13 The monitor has stated that in his view the assumptions on which the most recent cash flow projections are made are reasonable.

14 In recent affidavits the petitioners have described their general plan to re-finance the company, with the objective of paying out AT&T in full. The current plan includes a combination of selling one or more indivisible rights of use ("IRU's"), attraction of fresh equity capital and completion of a new debt arrangement with a new lender.

Purpose of the Legislation

15 In deciding the many issues raised, it is useful to consider the overall purpose of the *Companies' Creditors Arrangement Act*. The purpose has been frequently described by the courts.

16 *Alberta-Pacific Terminals Ltd., Re* (8 May 1991) Vancouver A903661 (B.C. S.C.) [reported at 8 C.B.R. (3d) 99], Madam Justice Huddart described the purpose at p.7 as being:

> ... to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue to do business...

17 She discussed the need to maintain the status quo, saying at p.10-11:

> ... The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the Prairie Provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at 315, Mr. Justice Gibbs described the legislation in these terms:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s.11.

19 Mr. Justice Brenner in *Pacific National Lease Holding Corp., Re*, (17 August 1992) Vancouver A922870 (B.C. C.A. [In Chambers]) [reported at 72 B.C.L.R. (2d) 368], summed up the principles to consider in applications under the *Act*, at p.10:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.

(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.

(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

1. Should the Protection of the Act Continue?

20 As this hearing follows the *ex parte* order made on the initial application, any order made to continue protection will be made under s.11(4) of the *Act*. On any orders made under s.11(4), 11(6) of the Act places the burden of proof upon the applicants:

11.6 Notwithstanding the Bankruptcy and Insolvency Act,

(a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part; and

(b) an application under this Act by a bankruptcy may only be made with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the Bankruptcy and Insolvency Act, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the Bankruptcy and Insolvency Act.

21 Section 11(6), new to the *Act* in 1997, establishes three pre-conditions to an order under s.11(4):

(a) that circumstances exist that make the order appropriate;

(b) that the applicants have acted and continue to act in good faith; and,

(c) that the applicants have acted and continue to act with due diligence.

22 Before enactment of s.11(6), the test in British Columbia for continued protection derived from *Chef Ready Foods Ltd.*, *supra*, in which Mr. Justice Gibbs spoke at p.315 of "moving the process along to a point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure". In the context of s.11(6), the question of whether the attempt is doomed to failure is one consideration in determining whether the order is appropriate. In making an assessment of appropriateness, the court must also consider whether the conditions necessary for the initial order are met.

23 Here the conditions required for an initial order are present. The issues are whether the reorganization attempt is doomed to failure, whether there has been and is good faith and whether there has been and is due diligence.

24 AT&T, Lucent, and to some extent Burlington Northern question the propriety of continued protection. They say, given the history and AT&T's lack of confidence, the exercise is doomed to failure, and that the petitioners have not displayed the degree of good faith and diligence required. However, even in arguing against continuation of the stay as presently framed they did not seek, as their first choice, total discontinuance of the *Act*'s protection. Rather they couched their submissions in terms of lack of confidence in the present management team and their desire to see the team replaced by, as yet, unidentified persons.

25 Without dealing, at this point, with the application to lift the stay from Starcom International completely or in part, which I address below, I am satisfied that the petitioners have shown the court that the reorganization attempt, at this stage, is not doomed to failure. Although AT&T, the predominant creditor, has expressed its present lack of confidence in the management team, I cannot conclude that it would turn down a plan of refinancing whereby it would be paid in full. The evidence before the court explains the current efforts being made by the petitioners to refinance their debt through sale of one or more IRU's, sale of shares and fresh agreement with a new lender. On all the material before the court, I am not satisfied that this initiative is doomed to failure. Continuation of protection of the Starcom Group is appropriate, given the objectives of the *Act*, the current cash flow position of the company and the indications before the court that reorganization and refinancing is a realistic ambition.

26 Questions have been raised about the good faith and diligence of the petitioners. AT&T and Lucent correctly point to deficiencies in the cash flow projections which were first presented to the court, and the adjustments to them to project increased revenue and expenditures. AT&T complains that the petitioners were not as cooperative with its agent, Ernst & Young, as it considered they should be and wonders why he was not provided a copy of the new cash flow projections before they were submitted in the monitor's report.

27 Some of the criticisms of the cash flow projections are justified. However, on the issue of lack of cooperation, the evidence conflicts. What is clear is that the petitioners have provided the basic information requested by Ernst & Young, and with a limited staff, spent considerable time with Ernst & Young representatives. On balance, I am satisfied that the petitioners have met the onus under s.11(6) (b). The monitor has expressed his view that the assumption reflected in the latest projections are reasonable, and the projections are more positive than those originally presented. The new projections are responsive to criticisms from Ernst & Young and the monitor, and reflect and address the criticisms received. I cannot conclude that the first cash flow projections were prepared with a lack of good faith, and in my view the manner in which the criticisms have been dealt with in the ones now before the court indicate both good faith and diligence.

28 I consider that the interim order, in general, should be extended to the date by which the reorganization plan must be presented.

2. Should the Stay be Lifted from Starcom International?

29 AT&T has applied for an order lifting the stay from Starcom International, contending that the court should exercise its discretion to take Starcom International out of court protection because it has no active business, its only asset being shares in the operating companies.

30 It is clear that the companies are managed as a group. The management team of the operating companies is controlled by Starcom International, which owns all the voting shares in the two operating companies. While there may be merit at some point in seeking separation of any obligations which are singular to Starcom International, to protect only the two subsidiary companies and not the parent company will fracture the status quo without apparent benefit to the reorganization effort. This application is dismissed.

3. Should the Stay Concerning Starcom International be Lifted as it Concerns the Shares?

31 AT&T, supported by Lucent and Burlington Northern, has applied for a stay of the order concerning Starcom International to permit the shares of the operating companies to be handled by a receiver-manager, and the management team to be replaced.

32 On February 17, 1998 I denied this application with leave to re-apply. That decision was made, in part, in recognition that many of those interested in the order were not then before the court but would be in attendance at the comeback hearing.

33 There is little doubt that the range of creditor profiles is extreme, and that AT&T, over the past year, has displayed forbearance towards the petitioners. While this forbearance may have been prompted in part by considerations of business advantage and the possibility of success, a likely result has been that the failure of the petitioners to advance their revenues more swiftly, and to locate further investors more promptly, has diminished AT&T's confidence in the group.

34 While the AT&T perspective and experience must be considered, the court must also consider the broader constituency protected by the *Act*, referred to in the cases referred to earlier. On balance I am satisfied that the purpose of the *Act* is best advanced by leaving the present management team in place, subject to such changes as may naturally develop. I say this for the following reasons.

1. the *Act* is designed to preserve the *status quo* and to prevent manoeuvring of creditors: see, for example, *Alberta-Pacific Terminals Ltd., Re*; *Chef Ready Foods Ltd.* and *Pacific National Lease Holding Corp., supra*. To permit the proposed change in management is to significantly alter the *status quo* and place the predominant creditor in control of the petitioners, while still receiving the protection of the *Act*;

2. the present management team has embarked on discussions with potential investors and customers. A change of team at this time may waste that effort and lose the reputation and client goodwill referred to in the affidavits as accruing to the benefit of the petitioners;

3. the new, proposed team, is not described to the court. Whether any of the contemplated persons have experience in this industry, or this geographic area or with these customers, is a matter of speculation, not evidence;

4. although representing investors with amounts at stake smaller than the secured debt owing to AT&T, significant confidence in the present management team has been expressed to the court by shareholders in Starcom International and by ICG, as well as certain smaller creditors. These expressions of confidence confirm the goodwill referred to in the First Marathon correspondence which is in evidence, and indicate a certain degree of competence in the operations of the company, which should not be ignored.

35 In my view, the objects of the *Act* would not be advanced by the order sought. The *Act* intends time to be given to corporations that require reorganization, where there is a realistic prospect of success. This time is given not just to facilitate repayment of debt, which naturally is key to continued survival, but also to make use of experienced pools of knowledge and expertise within the organization, and to protect the investment in the enterprise, all this for the better good of those touched by the protected corporations. Drawn from the deep woes of the depression, protection of the *Act* is available to protect modern corporations, such as these, on the front edge of technology where the investment is high, the capacity is great and the need for time to attract business and investors is acute.

36 For these reasons, I consider the petitioners, directed by the present management team, should have the opportunity to reorganize their finances. The application to lift the stay as it relates to the shares, is dismissed.

4. Should the Term of the Stay be Abridged?

37 AT&T, Lucent and Burlington Northern all seek an order shortening the time within which a reorganization plan must be produced. They refer to the decision of Chief Justice Glubé in *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43 (N.S. T.D.) in which she stated, at p.56:

> A serious general concern which I have is the length of time which the courts in Nova Scotia have been giving to a company to present a plan. There is no question that 120 days is a long period of time. Until the plan is presented, the initial order may place the bank which finances a company's operating loan in a precarious position. If the position of the operating company deteriorates dramatically during that period, this could seriously affect the bank's position. Although in most cases a monitor is in place, that will not necessarily prevent serious deterioration occurring. In my opinion, shorter time periods should be considered by the courts both for the application to approve the appropriate classes of creditors and for the presentation of the formal plan of compromise or arrangement. The court should be given reasons why longer periods are necessary and I suggest that on any new applications by companies under the C.C.A.A. that the length of time granted for any of the steps be given very careful consideration. Although several recent applications in Nova Scotia contain the same times as in the present case, there are a number of cases in other provinces which have much shorter time frames, which may be more appropriate.

38 The decision of Chief Justice Glubé was issued before the amendments to the *Act* which establish a threshold of $5 million in indebtedness, require cash flow projections and require a second hearing within 30 days.

39 In British Columbia the standard order is for something considerably longer than the thirty or sixty days proposed to the court. In my view the concerns of Chief Justice Glubé may be met by vigilant reporting by the monitor, so that any significant deterioration in the companies' position will soon be detected and can be dealt with by fresh application. While each business will have its own financing possibilities, I consider it safe to say that generally large loans, significant equity injections, or large sales, as is required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement. Further, the more frequently those managing a corporation are required to return to court, the greater the distraction from their primary task of salvage. This is particularly so where the employee complement is, as here, small.

40 In my view the original time frame of a stay until July 31, 1998, by which time a plan shall have been presented, is at least a better estimate of the time which should be provided than is any other suggestion, and is consistent with the evidence of Mr. Maasen of ICG itself in the telecommunications business, to the effect that given the industry, more time, rather than less, will be required to develop a reorganization plan.

41 This issue of time, is, of course, a matter of the court's discretion to be exercised after peering into a foggy crystal ball.

42 The concerns of AT&T, Lucent and Burlington Northern, however, should not be overlooked, particularly given the incomplete cash flow projections initially presented to the court. I ask the monitor to report the petitioners updated cash flow projections to the court on a bi-weekly basis, thereby to alert parties to any significant deterioration in the picture now presented.

43 Lastly, on this issue, I note that AT&T premised its request for a short order on its concern that interest was continuing to accrue at the rate of $17,000 per day. It submitted that AT&T would experience serious prejudice by passage of time during which interest continued to accrue. Lucent referred to the deterioration of the position of unsecured creditors, as the interest was added to the amount of debt secured by AT&T's security agreement. No doubt interest will mount. However, the interest issue will not be resolved in the sense of creation of greater revenue or payment of the debt, simply by shortening the length of the stay or even by changing the management team. The best solution is development of a successful reorganization plan.

44 For these reasons, the original date of July 31, 1998, less than five months hence, shall remain as the end date of the order.

5. Should the Monitor's Fees be Paid in Priority?

45 In the *ex parte* order I granted an order that the monitor's fees be paid in priority to other creditors.

46 AT&T submitted that the court lacks jurisdiction to make this order, and in any event should decline to do so. It relies upon *Fairview Industries Ltd., Re, supra.*

47 The notion of a monitor, now found in the *Act*, was created in *Northland Properties Ltd., Re* (5 July 1988) Vancouver A880966 (B.C. S.C.) [reported at 69 C.B.R. (N.S.) 266]. In that case Mr. Justice Trainor held that he had jurisdiction to appoint an interim receiver and to spell out the responsibilities such that the true role was one of monitor or watchdog. Thus, the primary purpose of the monitor is to watch from a neutral perspective, and to report to the court and the parties.

48 This court, in previous cases which postdate *Fairview Industries Ltd., Re*, has acted to give priority for payment of accounts. For example, in *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.) Mr. Justice Macdonald exercised his discretion to create a "first charge" to secure monies advanced to permit operations to continue. Considering this authority, and the genesis of the office of monitor, I conclude that this court does have jurisdiction to create a priority for fees charged by the monitor.

49 Further, in my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties. An order protecting the fees, as first granted in the *ex parte* order, shall continue. To ensure that the true position of the petitioners is known, I request the monitor to submit accounts on at least a monthly basis, so that they may be reflected in the financial information received from time to time by the parties.

6. Should the Fees of Other Professional Advisors be Granted Priority?

50 AT&T supported by Lucent, likewise challenged the priority initially given by the *ex parte* order to accounts of other professional advisors.

51 In my view, for the same reasons, I am satisfied I may make the order. The question is whether I should do so.

52 There is no material before me, as apparently there was in Westar, to the effect that the priority is required to enable operations to continue. In any case, the cash flow projections provide for monthly payment of professional fees in sizeable sums, and s.11.3 of the *Act* permits a person providing services to require immediate payment for the services.

53 At this time, in my view, the protection of s.11.3 of the *Act* and the revenue flow shall suffice as protection for payment of these services.

54 The terms of the order shall be amended to provide for priority only of the monitor's fees and disbursements.

7. Should Separate Financial Information be Provided for Each Petitioner

55 AT&T, Lucent and Burlington Northern seek an order that financial information be provided for each company. Segregated information has been provided for Starcom International following the oral decision of February 17, 1998. The issue is subdivision of the accounts of the two operating companies.

56 There may come a time when the relative assets and liabilities, and cash flow, of the two companies is significant. I do not think that time has arrived.

57 Before such an order is made, the court should have information of the relative ease or difficulty of the task. I ask the monitor, as I did concerning Starcom International, to provide advice to the court on this matter.

8. Should the Petitioners Advise AT&T of all Negotiations and Discussions and Permit its Participation?

58 AT&T has applied for an order that the petitioners advise it of all negotiations and discussions towards a reorganization plan, and ask to be allowed to participate. Lucent supported this application.

59 In my view, the court should not exercise its discretion to make this order. There is little or no confidence now expressed by AT&T in the management team. While these proceedings and any progress which may be made by the petitioners may ameliorate AT&T's present sentiments, the management team has an onerous task ahead of them, and such a formalized requirement may clog the process further. I do not consider that the court should place a formal requirement on the petitioners which may have the affect of stretching their personnel even thinner, which may itself create difficulties requiring delicate handling of confidences between the petitioners and those with whom they negotiate, and which would impose an obligation on the petitioners to join in their discussions a party that has expressed its lack of confidence in them and in the plan they hope to present.

60 Although the court encourages full communication between the parties to the extent this is practicable, this encouragement does not extend to the order sought.

61 The application is denied.

9. May Lucent Challenge the Security Given to Devlin Jensen?

62 It is agreed that the stay on all proceedings involving the petitioners shall be lifted to permit a court challenge to be brought to the security given to Devlin Jensen. It is so ordered.

63 This lifting of the stay extends only to commencement of proceedings. Any further step will await further submissions of counsel and decision of the court.

Order accordingly.

End of Document

TAB 2

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.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, 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 — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Table of Authorities

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 23 — considered
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137(2) — considered
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act*.

***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.

Backround 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) Threshhold 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.).

