

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

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

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO
GROWTHWORKS CANADIAN FUND LTD.

BRIEF OF AUTHORITIES

March 4, 2014

McCarthy Tétrault LLP
Barristers and Solicitors
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSCU# 48354R
Tel.: (416) 601-8342
Fax: (416) 868-0673

Lawyers for Growthworks Canadian Fund
Ltd.

INDEX

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

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

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO
GROWTHWORKS CANADIAN FUND LTD.

BRIEF OF AUTHORITIES

I N D E X

| Authorities | Tab |
|---|------------|
| <i>Worldspan Marine Inc. (Re)</i> , 2011 BCSC 1758 | 1 |
| <i>Canwest Global Communications Corp. (Re.)</i> , [2009] O.J. No. 4788 (Ont. S.C.J.) | 2 |

TAB 1

Case Name:

Worldspan Marine Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Canada Business Corporations Act,
R.S.C. 1985, c. C-44, and the Business Corporations Act,
S.B.C. 2002, c. 57
AND IN THE MATTER OF Worldspan Marine Inc., Crescent Custom
Yachts Inc., Queenship Marine Industries Ltd., 27222
Developments Ltd., and Composite FRP Products Ltd.,
Petitioners**

[2011] B.C.J. No. 2467

2011 BCSC 1758

86 C.B.R. (5th) 119

211 A.C.W.S. (3d) 557

2011 CarswellBC 3667

Docket: S113550

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

P.J. Pearlman J.

Heard: December 16, 2011.

Judgment: December 21, 2011.

(54 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Com-
promises and arrangements -- Application by petitioner, Worldspan, for an extension of time to
work toward plan of arrangement, allowed -- Worldspan had contracted with Sargeant to construct*

a 144-foot custom motor yacht -- Sargeant stopped making payments after dispute arose between parties -- Worldspan alleged Sargeant's failure to pay resulted in its insolvency -- Worldspan needed additional time to market yacht to find another buyer, to explore debtor-in-possession financing to complete construction of yacht, and to resolve priorities among in rem claims against yacht -- Court satisfied Worldspan had acted in good faith and with due diligence -- Restructuring still best option.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Application by petitioner, Worldspan, for an extension of time to work toward plan of arrangement, allowed -- Worldspan had contracted with Sargeant to construct a 144-foot custom motor yacht -- Sargeant stopped making payments after dispute arose between parties -- Worldspan alleged Sargeant's failure to pay resulted in its insolvency -- Worldspan needed additional time to market yacht to find another buyer, to explore debtor-in-possession financing to complete construction of yacht, and to resolve priorities among in rem claims against yacht -- Court satisfied Worldspan had acted in good faith and with due diligence -- Restructuring still best option.

Application by the petitioner, Worldspan Marine Inc., for an extension of the initial order permitting them additional time to work toward a plan of arrangement. The proceedings had their genesis in a dispute between the Worldspan and one of its creditors, Sargeant. Sargeant had contracted with Worldspan to construct a 144-foot custom motor yacht. Construction on the yacht stopped after a dispute arose as to the cost of the vessel. Sargeant alleged he was being overcharged to offset funds that were being stolen from the company, and stopped making payments on the yacht. Sargeant claimed against Worldspan for the full amount he paid towards the yacht's construction, which amounted to almost \$21 million. Worldspan maintained that Sargeant's failure to pay monies due to them resulted in their insolvency and led to its application under the Companies' Creditors Arrangement Act (CCAA). Worldspan argued it needed additional time to work toward a plan of arrangement by continuing the marketing of the yacht for the purpose of finding another buyer, to explore potential debtor-in-possession (DIP) financing to complete construction of the yacht pending a sale, and to resolve priorities among in rem claims against the yacht. Parallel proceedings had been commenced in the Federal Court with respect to the in rem claims against the yacht. The application was supported by the monitor as the best option available to all the creditors and stakeholders, and was either supported or not opposed by all of the creditors besides Sargeant.

HELD: Application allowed. The Court found that an extension of the stay would not materially prejudice any of the creditors or other stakeholders. The petitioners were simultaneously pursuing both the marketing of the yacht and efforts to obtain DIP financing that, if successful, would have enabled them to complete the construction of the yacht. Worldspan could not have finalized a restructuring plan until the yacht was sold and terms were negotiating for completing the yacht. All its creditors, other than Sargeant, shared the view that the best course of action was to have the yacht marketed and sold through an orderly process supervised by the courts. While the CCAA proceedings could not be extended indefinitely, at this stage restructuring was still the best option. The Court was satisfied that Worldspan had acted in good faith and with due diligence in the proceedings.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02(2), s. 11.02(3)(a), s. 11.02(3)(b), s. 36

Counsel:

Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products: J.R. Sandrelli and J.D. Schultz.

Counsel for Wolrige Mahon (the "VCO"): K. Jackson and V. Tickle.

Counsel for the Respondent, Harry Sargeant III: K.E. Siddall.

Counsel for Ontrack Systems Ltd.: J. Leathley, Q.C.

Counsel for Mohammed Al-Saleh: D. Rossi.

Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.: G. Wharton and P. Mooney.

Counsel for Canada Revenue Agency: N. Beckie.

Counsel for Comerica Bank: J. McLean, Q.C.

Counsel for The Monitor: G. Dabbs.

Reasons for Judgment

P.J. PEARLMAN J.--

INTRODUCTION

1 On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

2 The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

3 The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

4 The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

5 These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

6 The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately \$4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("CCAA") in these proceedings.

7 Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals \$20,945,924.05.

8 Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

9 Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

10 Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

11 As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

12 On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

- (a) whether circumstances exist that make the order appropriate; and
- (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

13 In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

14 In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

15 A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

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.

16 In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

- (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 manoeuvres 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.

17 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

18 At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

19 In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

20 As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

21 Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

22 Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

23 The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings, the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

24 The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

25 There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

- (a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.
- (b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the *CCAA* proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.
- (c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

26 All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

27 On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid \$4 million into his solicitor's trust account on or before September 29, 2011.

28 Mr. Sargeant failed to pay the \$4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

29 On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at \$18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

30 On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222 Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

31 Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

32 The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

33 After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

| | |
|------------------------------|-----------------|
| Sargeant | \$20,945.924.05 |
| Capri Insurance Services | \$45,573.63 |
| Cascade Raider | \$64,460.02 |
| Arrow Transportation and CCY | \$50,000.00 |

| | |
|---------------------------------|--------------|
| Offshore Interiors Inc. | \$659,011.85 |
| Continental Hardwood Co. | \$15,614.99 |
| Paynes Marine Group | \$35,833.17 |
| Restaurant Design and Sales LLC | \$254,383.28 |

34 The petitioner, Worldspan's, *in rem* claim in the amount of \$6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

35 In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for \$9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of \$28,800,000.

36 The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

37 The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately \$10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be \$28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

38 An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

39 Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied

successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through an orderly process supervised by this Court and the Federal Court.

40 I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

41 The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

42 Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

43 The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

44 The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

45 There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the

Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

46 I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

47 Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

48 Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

49 While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, or fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

50 In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

51 This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

52 In *Re San Francisco Gifts Ltd.*, at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

53 The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

54 The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

P.J. PEARLMAN J.

cp/e/qlrxg/qlvxw/qlhcs

TAB 2

Case Name:

Canwest Global Communications Corp. (Re)

**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"**

[2009] O.J. No. 4788

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

November 12, 2009.

(43 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Applications -- Sanction by court -- Application by a group of debtor companies for approval of an agreement that would enable them to restructure their business affairs, allowed -- Applicants were under the protection of the Companies' Creditors Arrangement Act -- Agreement was approved because it facilitated the restructuring of the applicants to enable them to become viable and competitive industry participants and it was fair -- Related transaction regarding the transfer of the business and assets of a newspaper that the applicants had an interest in did not require Court approval under s. 36 of the Act because it was an internal corporate reorganization which was in the ordinary course of business -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36.

Application by a group of debtor companies and entities for an order approving a Transition and Reorganization Agreement between them and other related parties. The applicants were granted protection under the Companies' Creditors Arrangement Act on October 6, 2009. They were engaged in the newspaper, digital media and television business. The Agreement pertained to the restructuring of the applicants' business affairs. It was an internal reorganization transaction that was designed to realign shared services and assets within the corporate family that the applicants belonged to. The Agreement was entered into after extensive negotiations between the parties who

were affected by it. The Monitor, who was appointed under the Act, concluded that this transaction had several advantages over a liquidation.

HELD: Application allowed. Court approval under s. 36 of the Act was required if a debtor company under the protection of the Act proposed to sell or dispose of assets outside the ordinary course of business. It did not apply to a transaction regarding the transfer of the assets and business of a newspaper that the applicants had an interest in because it was an internal corporate reorganization which was in the ordinary course of business. The Agreement was approved because it facilitated the restructuring of the applicants to enable them to become viable and competitive industry participants and it was fair. It also allowed a substantial number of the businesses operated by the applicants to continue as going concerns. The Agreement did not prejudice the applicants' major creditors. In the absence of the Agreement the newspaper would have to shut down and most of its employees would lose their employment. The stay that was granted under the Act was extended to enable the applicants to continue to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act,

Bulk Sales Act, R.S.O. 1990, c. B.14,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 2(1), s. 36, s. 36(1), s. 36(4), s. 36(7)

Counsel:

Lyndon Barnes and Jeremy Dacks for the Applicants.

Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett for the Ad Hoc Committee of Noteholders.

Peter J. Osborne for Proposed Management Directors of National Post.

Andrew Kent and Hilary Clarke for Bank of Nova Scotia, Agent for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

Amanda Darroch for Communication Workers of America.

Alena Thouin for Superintendent of Financial Services.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLP") and The National Post Company/La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

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

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

Background Facts

(a) Parties

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

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

(b) History

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

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

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

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;
- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and
- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

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

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

(c) Restructuring

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

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

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans

that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

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

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

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

Irish Holdco Secured Note -- \$187.3 million

CIT Secured Facility -- \$10.7 million

CMI Senior Unsecured Subordinated Notes -- US\$393.2 million

Irish Holdco Unsecured Note -- \$430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately \$139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately \$1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

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

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

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

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

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

- it facilitates the reorganization and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;

- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;

- it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and

- the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

- (a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;
- (b) the Transition and Reorganization Agreement should be approved by the Court; and
- (c) the stay should be extended to January 22, 2010.

Discussion

(a) Section 36 of the *CCAA*

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

26 Court approval is required under section 36 if:

- (a) a debtor company under *CCAA* protection
- (b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act¹ is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

28 Specifically, section 36 states:

- (1) Restriction on disposition of business assets -- A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

- (2) Notice to creditors -- A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
- (3) Factors to be considered -- In deciding whether to grant the authorization, the court is to consider, among other things,
 - (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- (4) Additional factors -- related persons -- If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
 - (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
- (5) Related persons -- For the purpose of subsection (4), a person who is related to the company includes
 - (a) a director or officer of the company;
 - (b) a person who has or has had, directly or indirectly, control in fact of the company; and
 - (c) a person who is related to a person described in paragraph (a) or (b).

- (6) Assets may be disposed of free and clear -- The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
- (7) Restriction -- employers -- The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.²

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

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

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

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book³ on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."⁴

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act*. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.*⁶, authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act*, courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller⁸. In *Pacific Mobile Corp.*⁹, the Supreme Court of Canada stated:

It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.

We approve of the following passage from Monet J.A.'s reasons, [1982] C.A. 501, discussing the phrase "ordinary course of business" ...

'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4), which deals with dispositions of assets to a related party, was intended to:

... prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.¹⁰

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

36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either

the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

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

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

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

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

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

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

S.E. PEPALL J.

cp/e/qlrxg/qljxr/qlced/qlaxw

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

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

3 Industry Canada "Bill C-55: Clause by Clause Analysis-Bill Clause No. 131-CCAA Section 36".

4 Ibid.

5 *R.S.C. 1985, c. C-36 as amended.*

6 (2003), 47 C.B.R. (4th) 278 at para. 52.

7 R.S.O. 1990, c. B.14, as amended.

8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

9 [1985] 1 S.C.R. 290.

10 *Supra*, note 3.

11 *Supra*, note 9.

12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.
C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE
OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD

Court File No. CV-13-10279-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding Commenced at Toronto

**BRIEF OF AUTHORITIES
(Stay Extension Motion,
returnable March 6, 2014)**

McCarthy Tétrault LLP
Barristers and Solicitors
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSUC# 48354R
Tel.: (416) 601-8242
Fax: (416) 868-0673

Lawyers for Growthworks Canadian Fund
Ltd.

#13238186