

Court File No: 31-1423385

Court File No: 31-1423389

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

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985,  
c. B-3, AS AMENDED**

**AND IN THE MATTER OF BANKRUPTCY OF LEGACY NPC PARTNERSHIP,  
of City of Toronto, in the Province of Ontario**

**AND IN THE MATTER OF BANKRUPTCY OF 4514858 CANADA INC.,  
of the City of Toronto, in the Province of Ontario**

**FACTUM OF THE MOVING PARTY  
(Motion Returnable January 24, 2011)**

January 20, 2011

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**PART I - INTRODUCTION**

1. This Motion is brought by FTI Consulting Canada Inc. ("FTI") in its capacity as trustee in bankruptcy of 4514858 Canada Inc. ("4514858") and in its capacity as trustee in bankruptcy of Legacy NPC Partnership ("Legacy") for an Order consolidating the bankrupt estates of 4514858 and Legacy into one bankrupt estate (the "National Post Consolidated Estate").

**PART II - FACTS**

2. Legacy is a partnership organized under the *Partnership Act* (Ontario), R.S.O. 1990, c. P.5. Its units are held by 4514866 Canada Inc. (formerly, Canwest Media Inc.) ("CMI"), and 4514858, a wholly owned subsidiary of CMI.

4514858 Canada Inc., Second Report of the Trustee, dated December 16, 2010 ("4514858 Second Report of the Trustee"), at para. 12, Motion Record of 4514858 Canada Inc. ("4514858 Motion Record"), Tab 2, p. 11; Motion Record of Legacy NPC Partnership ("Legacy Motion Record"), Tab 2, pp. 21-22.

3. Legacy formerly carried on business as the National Post Company/La Publication National Post and published *The National Post* national newspaper and operated related online publications.

4514858 Second Report, at para. 11, 4514858 Motion Record, Tab 2, p. 11; Legacy Motion Record, Tab 2, p. 22.

4. 4514858 (formerly National Post Holdings Ltd.) is incorporated pursuant to the *Business Corporations Act* (Canada), R.S., 1985, c. C-44. and is the general partner of Legacy.

4514858 Second Report, at paras. 11 and 17, 4514858 Motion Record, Tab 2, pp. 11 and 12; Legacy Motion Record, Tab2, pp. 21 and 22.

4514858 Second Report, at para. 16, 4514858 Motion Record, Tab 2, p. 12; Legacy Motion Record, Tab 2, p. 22.

5. Prior to filing respective assignments in bankruptcy, both Legacy and 4514858 were under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

### **The CCAA Proceedings**

6. On October 6, 2009, Canwest Global Communications Corp., CMI, and certain of its subsidiaries, including Legacy and 4514858, (collectively, the "CMI Entities") obtained protection from their creditors under the CCAA pursuant to an initial order (the "Initial Order"). The Initial Order appointed FTI as Monitor of the CMI Entities. The proceedings commenced by the CMI Entities under the CCAA will be referred to herein as the "CCAA Proceedings".

4514858 Second Report, at para. 6, 4514858 Motion Record, Tab 2, p. 10; Legacy Motion Record, Tab 2, p. 20.

7. As part of the CCAA Proceedings, pursuant to a court-approved reorganization and transition agreement (the "National Post Transition Agreement"), on or about October 30, 2009, the assets and operations of Legacy and 4514858 were transferred to the National Post Inc., a wholly owned subsidiary of

Canwest Publishing Inc./Publications Canwest Inc. (which subsequently commenced separate proceedings under the CCAA). Importantly, certain of the liabilities of the National Post remained with Legacy.

4514858 Second Report, at para. 13, 4514858 Motion Record, Tab 2, p. 12;  
Legacy Motion Record, Tab 2, p. 22.

8. As a result of the closing of the National Post Transition Agreement, Legacy has no assets and no employees. Similarly, 4514858 is inactive and has no employees.

4514858 Second Report, at paras. 14 and 18, 4514858 Motion Record, Tab 2, p. 12; Legacy Motion Record, Tab 2, p.22.

9. The CMI Entities prepared and filed a consolidated plan of compromise, arrangement and reorganization accepted for filing by this Court on June 23, 2010, as restated July 16, 2010, (as may be amended, the "CCAA Plan").

4514858 Second Report, at para. 7, 4514858 Motion Record, Tab 2, p. 10;  
Legacy Motion Record, Tab 2, p. 20.

Restated Consolidated Plan of Compromise, Arrangement and Reorganization, dated June 23, 2010, as amended ("CCAA Plan"), Schedule "A" to 4514858 Second Report, 4514858 Motion Record, Tab 2A.

10. Section 5.6 of the CCAA Plan provides, *inter alia*:

**5.6 National Post and National Post Holdings**

(b) On the Plan Implementation Date, National Post Holdings and National Post shall deliver to the Monitor assignments in bankruptcy under the BIA naming the Monitor as Trustee in Bankruptcy. **The Trustee in Bankruptcy shall apply for an order consolidating the bankruptcy estates of National Post Holdings and National Post to create the National Post Consolidated Bankruptcy Estate. [Emphasis added]**

4514858 Second Report, at para. 9, 4514858 Motion Record, Tab 2, p. 11;  
Legacy Motion Record, Tab 2, p. 21.

CCAA Plan, Schedule "A" to 4514858 Canada Inc., Second Report of the Trustee, 4514858 Motion Record, Tab 2A, p. 61.

11. On July 19, 2010, the creditors of the CMI Plan Entities (as defined in the CCAA Plan) voted in favour of the CCAA Plan and on July 28, 2010, this Court granted an Order sanctioning the CCAA Plan (the "**Plan Sanction Order**").

45184858 Second Report, at para. 8, 4514858 Motion Record, Tab 2, p. 11;  
Legacy Motion Record, Tab 2, p. 21.

Plan Sanction Order, dated July 28, 2010 ("**Plan Sanction Order**"),  
Schedule "B" to 4514858 Second Report, 4514858 Motion Record, Tab  
2B.

12. Section 88 of the Plan Sanction Order states:

88. **THIS COURT ORDERS** that the Monitor shall be and is hereby authorized, directed and empowered to file on or after the Plan Implementation Date assignments in bankruptcy under the BIA for National Post and National Post Holdings and FTI shall be and is hereby authorized, directed and empowered to apply for consolidation of and to act as trustee in bankruptcy of such entities, including the National Post Consolidated Bankruptcy Estate, if any.

45184858 Second Report, at para. 8, 4514858 Motion Record, Tab 2, p. 11;  
Legacy Motion Record, Tab 2, p. 21.

Plan Sanction Order at s. 88, Schedule "B" to 4514858 Second Report,  
4514858 Motion Record, Tab 2B, p. 102.

### **The Bankruptcy Proceedings**

13. In accordance with the CCAA Plan and the Plan Sanction Order, on October 27, 2010, Legacy and 4514858 filed respective assignments in bankruptcy. FTI was appointed trustee of 4514858 (the "**4514858 Trustee**") and of Legacy (the "**Legacy Trustee**"), (collectively with the 4514858 Trustee, the "**Trustee**").

45184858 Second Report, at para. 15, 4514858 Motion Record, Tab 2, p.  
12; Legacy Motion Record, Tab 2, p. 22.

4514858 Canada Inc. Certificate of Appointment dated October 28, 2010,  
Schedule "B" to 4514858 Second Report, 4514858 Motion Record, Tab  
2D, p. 110.

Legacy NPC Partnership Certificate of Appointment, dated October 28,  
2010, Schedule "E" to 4514858 Second Report, 4514858 Motion Record,  
Tab 2E, p. 111.

### **Assets of the Bankrupt Estates**

14. Legacy held a bank account with the Bank of Nova Scotia. The balance of that account, \$1.254 million, has been transferred to a trust account set up by the Trustee.

45184858 Second Report, at para. 20, 4514858 Motion Record, Tab 2, p. 13; Legacy Motion Record, Tab 2, p. 23.

Legacy NPC Partnership Statement of Affairs, dated October 27, 2010, Schedule "G" to 4514858 Second Report, 4514858 Motion Record, Tab 2G, p. 119.

15. Additionally, Legacy holds 3,456 Canadian Equipment Rental Fund Limited Partnership units and 770 Gaz Metro Limited Partnership units. The estimated proceeds of these holdings is \$21,250. The Legacy Trustee is in the process of realizing upon the assets of Legacy.

45184858 Second Report, at para. 21, 4514858 Motion Record, Tab 2, p. 13; Legacy Motion Record, Tab 2, p. 23.

Legacy NPC Partnership Statement of Affairs, dated October 27, 2010, Schedule "G" to 4514858 Second Report, 4514858 Motion Record, Tab 2G, p. 119.

16. 4514858 did not have any cash at hand and has no assets.

45184858 Second Report, at para. 23, 4514858 Motion Record, Tab 2, p. 13; Legacy Motion Record, Tab 2, p. 23.

4514585 Canada Inc. Statement of Affairs, dated October 27, 2010, Schedule "I" to 4514858 Second Report, 4514858 Motion Record, Tab 2I, p. 126.

### **The Creditors of the Bankrupt Estates**

17. Legacy and 4514858 have no secured creditors.

45184858 Second Report, at para. 25, 4514858 Motion Record, Tab 2, p. 13; Legacy Motion Record, Tab 2, p. 24.

18. 4514858 has *di minimus* liabilities totalling \$1,744. Notably, more that 37% of those liabilities are due to CMI.

45184858 Second Report, at para. 26, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.

List of Creditors of 4514858 Canada Inc., Schedule "J" to 4514858 Second Report, 4514858 Motion Record, Tab 2J, p. 127.

19. Approximately \$138 million of \$142 million (or more than 99%) of Legacy's total liabilities are due to CMI.

45184858 Second Report, at para. 26, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.

List of Creditors of Legacy NPC Partnership, Schedule "K" to 4514858 Second Report, 4514858 Motion Record, Tab 2K, pp. 128-30.

20. CMI has no objection to the proposed consolidation of the bankrupt estates of 4514858 and Legacy.

45184858 Second Report, at para. 28, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.

### **Anticipated Realization and Distribution Process**

21. Based on the estimated realizable value of Legacy's assets, the Legacy Trustee is of the view that the unsecured creditors with proven claims are expected to receive a pro-rata distribution of the available assets.

45184858 Second Report, at para. 29, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.

22. Based on the estimated realizable value of the assets of 4514858, the 4514858 Trustee is of the view that the unsecured creditors with proven claims will receive a nil distribution of the available assets.

45184858 Second Report, at para. 30, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.

### **First Meeting of Creditors**

23. On November 16, 2010, the First Meeting of Creditors of Legacy and 4514858 were held (together, the "**First Creditor Meetings**"). Susan Leston, a representative of the creditors Newsworthy Inc., was appointed as the sole inspector of Legacy. No inspector was appointed for 4514858.

45184858 Second Report, at para. 31, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.



24. At the First Creditor Meetings, the Trustee reviewed the respective Reports of the Trustee on Preliminary Administration of Legacy and of 4514858, both of which state:

Within the coming weeks, the Trustee intends to bring a motion in the bankruptcy Court to consolidate the estates of Legacy NPC Partnership and 4514858 Canada Inc.

4514858 Second Report, at para. 32, 4514858 Motion Record, Tab 2, p. 14; Legacy Motion Record, Tab 2, p. 24.

4514858 Canada Inc. Report of the Trustee on the Preliminary Administration, dated November 16, 2010, Schedule "H" to 4514858 Second Report of the Trustee, 4514858 Motion Record, Tab 2H, p. 116.

Legacy NPC Partnership Report of the Trustee on the Preliminary Administration, dated November 16, 2010, Schedule "F" to 4514858 Second Report of the Trustee, 4514858 Motion Record, Tab 2F, p. 116.

### **The Claims Process**

25. The CCAA claims procedure, as is set out in the Order dated October 14, 2009, continues to apply in respect of the determination of claims against Legacy, 4514858 and the proposed National Post Consolidated Estate, if any, for voting purposes and distributions in such estates. In addition, neither Legacy nor 4514858 carried on any business since October 30, 2009 and as a result, no new claims against Legacy or 4514858 are expected or will be accepted.

4514858 Second Report, at para. 33, 4514858 Motion Record, Tab 2, p. 15; Legacy Motion Record, Tab 2, p. 25.

### **Rationale for Consolidation**

26. Currently, the Trustee must perform separate and duplicative actions in respect of each Legacy and 4514858, thereby resulting in increased expenses and decreased efficiency. A consolidation of Legacy's and 4514858's estates will reduce administrative expenses as the Trustee will avoid performing the following separate actions:

- (a) convening and conducting meetings of creditors and inspectors;

- (b) issuing separate trustee reports for the respective bankrupt estates;
- (c) making, filing, advertising and distributing all filings and notices required under the BIA;
- (d) maintaining and reconciling two separate bank accounts; and
- (e) conducting all such other administrative duties and responsibilities to be carried out by a trustee in the administration of a bankrupt estate.

45184858 Second Report, at para. 34, 4514858 Motion Record, Tab 2, p. 15; Legacy Motion Record, Tab 2, p. 25.

27. Additionally, Legacy and 4514858 are related entities. 4514858 is the general partner of Legacy and both Legacy and 4514858 are owned, directly or indirectly, by CMI, and, as a result, there were numerous overlapping transactions involving Legacy and 4514858. The proposed National Post Consolidate Estate will avoid the Trustee performing a duplicate review of the transactions during the administration of the estates resulting in a more efficient administration Legacy's and 4514858's estates.

45184858 Second Report, at para. 12, 4514858 Motion Record, Tab 2, p. 11; Legacy Motion Record, Tab 2, p. 21.

Organization Chart, Schedule "C" to 4514858 Second Report of the Trustee, 4514858 Motion Record, Tab 2C, p. 109.

28. Furthermore, the CCAA Plan and the Plan Sanction Order provide that the trustee of Legacy and 4514858 shall apply for consolidation of these bankrupt estates.

45184858 Second Report, at para. 12, 4514858 Motion Record, Tab 2, p. 11; Legacy Motion Record, Tab 2, p. 21.

Organization Chart, Schedule "C" to 4514858 Second Report of the Trustee, 4514858 Motion Record, Tab 2C, p. 109.

29. On or about December 17, 2010, the respective creditors of Legacy and 4514858 were served with the relevant Motion Record.

## ISSUES AND THE LAW

30. The sole issue on this motion is whether an Order should be made consolidating the bankrupt estate of Legacy and the bankrupt estate of 4514858 (together, the “Bankrupt Estates”) into one bankrupt estate, the National Post Consolidated Estate.

31. While there is no specific authority in the *Bankruptcy and Insolvency Act* (“BIA”) permitting the consolidation of two or more bankrupt estates, the Court has the authority to do so pursuant to its equitable jurisdiction in section 183 of the BIA.

*Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended, s. 183.

*Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449 (S.C.J. [Comm List]) at para. 71, Moving Party’s Book of Authorities (“BOA”), Tab 1.

32. Consolidation of the Bankrupt Estates avoids a multiplicity of proceedings and allows the Trustee to avoid performing, *inter alia*, the following separate actions, thereby increasing efficiency and reducing certain administrative expenses:

- (a) convening and conducting meetings of creditors and inspectors;
- (b) issuing separate trustee reports for the respective bankrupt estates;
- (c) making, filing, advertising and distribution of all filings and notices required under the BIA;
- (d) maintaining and reconciling two separate bank accounts; and
- (e) conducting all such other administrative duties and responsibilities to be carried out by a trustee in the administration of a bankrupt estate.

33. Expediency is an appropriate consideration in determining whether a substantive consolidation of two or more bankrupt estates which provides for the *pari passu* distribution of the assets of each estate should be ordered.

*J.P. Capital Corp, (Re)*, 1995 CarswellOnt 53 (Gen. Div.) at para. 18, BOA, Tab 2.

*Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449 (S.C.J. [Comm List]) at para. 78, BOA, Tab 1.

34. While substantive consolidation is not appropriate where it results in potential prejudice to the creditors or is at the expense of any particular creditor, no such prejudice exists in the present case.

*J.P. Capital Corp, (Re)*, 1995 CarswellOnt 53 (Gen. Div.) at para. 18, BOA, Tab 2.

*Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449 (S.C.J. [Comm List]) at para. 78, BOA, Tab 1.

35. In *A. & F. Baillargeon Express Inc.*, the trustee sought, *inter alia*, the substantive consolidation of five related bankrupt companies. Notably, the Court was concerned that substantive consolidation may result in a creditor of one company receiving a larger dividend on an individual company basis than through an intermingled and consolidated basis could be prejudiced, whereas other creditors might benefit from consolidation. However, the Court found that this concern was largely diminished by the fact that the likelihood of realization by the creditors was remote.

*A. & F. Baillargeon Express Inc. (Re)*, 1993 CarswellQue 49 (S.C.) at paras. 18 and 19, BOA, Tab 3

36. CMI, which is by far the largest creditor of Legacy, and a creditor of 4514858, does not object to the proposed consolidation.

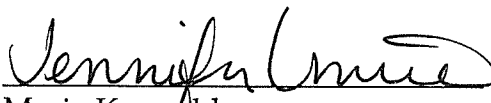
37. The creditors of Legacy are expected to receive a pro rata distribution of Legacy's assets, which currently total approximately \$1.3 million, while the creditors of 4514858 are expected to receive a nil distribution. However, Legacy's liabilities

total over \$142 million and the addition of 4514858's *di minimus* liabilities of \$1,744 as a result of a substantive consolidation of the Bankrupt Estates will have little impact, if any, on the distributions to be received by Legacy's creditors and, therefore, will not result in any prejudice the creditors of Legacy or 4514858.

**PART IV - ORDER REQUESTED**

38. The Trustee therefore requests Orders consolidating the Bankrupt Estates substantially in the form of the draft orders attached at Tab 3 of the Motion Record of Legacy and the Motion Record of 4514858, respectively.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup>, day of January, 2011.

  
per: Maria Konyukhova  
Stikeman Elliott LLP

Lawyer for the Trustee

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Ashley v. Marlow Group Private Portfolio Management Inc.*, 2006 CarswellOnt 3449 (S.C.J. [Comm. List]).
2. *J.P. Capital Corp. (Re)*, 1995 CarswellOnt 53 (Gen. Div.).
3. *& F. Baillargeon Express Inc. (Re)*, 1993 CarswellQue 49 (S.C.).

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**1. *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended***

**Courts vested with jurisdiction**

**183. (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Trial Division of the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

**Superior Court jurisdiction in the Province of Quebec**

**(1.1)** In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

**Courts of appeal – common law provinces**

**(2)** Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

**Court of Appeal of the Province of Quebec**

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

**Supreme Court of Canada**

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.



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Proceeding commenced at Toronto

**FACTUM OF THE MOVING PARTY  
(RETURNABLE JANUARY 24, 2011)**

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