

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

APPLICANTS

FACTUM OF THE APPLICANTS
(Red Deer Property Sale - Returnable December 8, 2009)

December 4, 2009

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TO: THE SERVICE LIST

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PART I – NATURE OF THIS MOTION

1. This factum is filed by Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed on Schedule "A" hereto (the "**Applicants**") and the Partnerships listed on Schedule "B" hereto (the "**Partnerships**" and, together with the Applicants, the "**CMI Entities**") seeking an Order (the "**Approval and Vesting Order**"), substantially in the form attached to the Motion Record, *inter alia*,:

- (a) approving the Offer to Purchase and Interim Agreement (the "**Offer to Purchase**") by and between Canwest Television GP Inc. ("**CTGP**") and Canwest Television Limited Partnership ("**CTLP**" and together with CTGP, the "**Vendors**") and Jim Pattison Developments Ltd. (the "**Purchaser**"), delivered to the Vendors on November 26, 2009 and accepted by the Vendors on November 27, 2009, which provides for a sale (the "**Property Sale**") of the real property located at 2840 Bremner Avenue in Red Deer, Alberta together with the Building (as hereinafter defined) (the "**Red Deer Property**") and related assets;
- (b) authorizing the Vendors and the Monitor to complete all requirements, conditions and transactions contemplated by the Offer to Purchase;

- (c) vesting all of the Purchased Assets in the Purchaser free and clear of any Encumbrances (save and except for the Title Reservations) upon the delivery of an escrow certificate from the Monitor to the Purchaser confirming that all closing deliveries have been made and are being held in escrow pending registration and the registration of the Approval and Vesting Order at the Alberta Land Titles Office; and
- (d) sealing the confidential supplement to the Monitor's Eighth Report (the "**Confidential Supplement**") until further Order of the Court.

PART II – FACTS

2. The facts with respect to this Motion are more fully set out in the Affidavit of John E. Maguire sworn on November 27, 2009 (the "**Maguire Affidavit**"). Capitalized terms in this Factum not otherwise defined have the same meanings as in the Offer to Purchase.

Background

3. The CMI Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), pursuant to an initial order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated October 6, 2009 (the "**Filing Date**"). FTI Consulting Canada Inc. was appointed at that time to act as monitor (the "**Monitor**") in this CCAA proceeding.¹

4. The Initial Order granted, *inter alia*, a stay of proceedings until November 5, 2009, or such later date as the Court may order. On October 30, 2009, the CMI Entities obtained an Order, *inter alia*, extending the stay of proceedings until January 22, 2010.²

5. Later in the day on October 6, 2009, the Monitor obtained a Temporary Restraining Order from the United States Bankruptcy Court (Southern District of New York)

¹ Affidavit of John E. Maguire sworn November 27, 2009 (the "Maguire Affidavit"), para. 3, Motion Record of the Applicants (the "Motion Record"), Tab 3, p. 25.

² Maguire Affidavit, para. 4, Motion Record, Tab 3, p. 25.

(the “**Bankruptcy Court**”) under Chapter 15 of the *U.S. Bankruptcy Code* temporarily enjoining certain suppliers, including television production studios, distributors and other key suppliers, from taking certain actions against the CMI Entities who are party to the Chapter 15 proceedings.³

6. On November 3, 2009, the Monitor obtained an Order from the Bankruptcy Court granting formal recognition of the CCAA proceedings as “foreign main proceedings” and a permanent injunction for the duration thereof.⁴

The Red Deer Property

7. CTGP is the current legal owner of the Red Deer Property. CTGP holds the Red Deer Property on behalf of CTLP, which is the sole beneficial owner of the Red Deer Property. The Red Deer Property is legally described as Lot 10A Block 14 Plan 7922866 excepting thereout all mines and minerals.⁵

8. The Red Deer Property is located in the neighbourhood of Bower, in the City of Red Deer, in the Province of Alberta, just north of the Bower Mall, and fronting onto Bremner Avenue. The subject property consists of one lot measuring 350 ft x 250 ft, with the site area totalling 2.01 acres.⁶

9. A single commercial building (the “**Building**”) exists on the Red Deer Property. The Building consists of two stories with approximately 14,094 square feet on the main level and approximately 9,174 square feet on the upper level for a total size of 23,268 square feet.⁷

³ Maguire Affidavit, para. 5, Motion Record, Tab 3, p. 25.

⁴ Eighth Report of the Monitor dated December 3, 2009 (the “Eight Report of the Monitor”), para. 3, p. 2.

⁵ Maguire Affidavit, para. 8, Motion Record, Tab 3, p. 26.

⁶ Maguire Affidavit, para. 9, Motion Record, Tab 3, p. 26.

⁷ Maguire Affidavit, para. 10, Motion Record, Tab 3, p. 26.

Lease Agreement with Jim Pattison Industrial Ltd.

10. Until recently, the Vendors occupied the entire main floor of the Building. The upper level of the Building is currently occupied by Big 105FM Radio (*CHUB*), a division of Jim Pattison Industrial Ltd. (the “**Tenant**”), pursuant to a lease agreement dated September 1, 2002, as amended by a lease amendment dated August 3, 2004 (collectively, the “**Lease**”).⁸

11. The Lease was set to expire on November 30, 2009.⁹ As described below, the Lease was extended pending closing or termination of the Offer to Purchase.¹⁰

Shut down of *CHCA-TV* in August 2009

12. Until recently, CTLP owned and operated, among other assets, five free-to-air television stations in Canada that delivered entertainment programming under the *E!* brand (the “*E!* Stations”). One of the *E!* Stations was *CHCA-TV* in Red Deer. *CHCA-TV* operated out of the Building.¹¹

13. On February 5, 2009, Canwest Global announced that it was exploring strategic options in respect of the five *E!* Stations.¹²

14. With the assistance of its financial advisor, Canwest Global subsequently engaged in a comprehensive sales and marketing process in respect of the five *E!* Stations. CTLP ultimately sold three of the five *E!* Stations (*CHCH-TV* in Hamilton, *CJNT-TV* in Montreal and *CHEK-TV* in Victoria) to third parties and rebranded a fourth (*CHBC-TV* in Kelowna) into a *Global Television Network* affiliate. Despite best efforts, the fifth *E!* Station – *CHCA-TV* in Red

⁸ Maguire Affidavit, para. 13, Motion Record, Tab 3, p. 27.

⁹ Maguire Affidavit, para. 14, Motion Record, Tab 3, p. 27.

¹⁰ Eighth Report of the Monitor, para. 18, p. 6.

¹¹ Maguire Affidavit, para. 15, Motion Record, Tab 3, p. 27.

¹² Maguire Affidavit, para. 16, Motion Record, Tab 3, p. 27.

Deer – was permanently closed on August 31, 2009 after it became apparent that there were no viable options for that station.¹³

15. Since the closure of *CHCA-TV*, the Vendors have ceased regular operations at the Red Deer Property. The main floor of the Building is currently unoccupied.¹⁴

Property Appraisals in respect of the Red Deer Property

16. Following the announcement in February 2009 that Canwest Global was beginning to explore its strategic options in relation to the *E!* Stations, the Vendors commenced discussions with various real estate professionals regarding the sale options that were available in respect of the Red Deer Property. In order to determine the fair market value of the Red Deer Property, the Vendors commissioned two reputable real estate appraisers, namely Colliers International Realty Advisors Inc. (“**Colliers**”) and Soderquist Appraisals Ltd. (“**Soderquist**”) (a local Red Deer real estate firm), to conduct independent property appraisals.¹⁵

17. Colliers delivered its appraisal (the “**Colliers Appraisal**”) of the Red Deer Property to the CMI Entities in May 2009. Soderquist delivered its appraisal (the “**Soderquist Appraisal**”) and together with the Colliers Appraisal, the “**Appraisals**”) of the Red Deer Property in September 2009.¹⁶

Interest from Purchaser Expressed in July 2009

18. On or about July 29, 2009, a representative of the Purchaser contacted the Vendors to inquire about the sales process surrounding *CHCA-TV* and to express interest in the Red Deer Property in the event that it would be put up for sale. In the weeks that followed, the

¹³ Maguire Affidavit, para. 17, Motion Record, Tab 3, p. 27.

¹⁴ Maguire Affidavit, para. 18, Motion Record, Tab 3, p. 28.

¹⁵ Maguire Affidavit, para. 19, Motion Record, Tab 3, p. 28.

¹⁶ Maguire Affidavit, para. 20, Motion Record, Tab 3, p. 28.

Vendors had a number of discussions with the Purchaser regarding how a direct sale could be facilitated.¹⁷

19. On November 12, 2009, the Purchaser delivered a draft Offer to Purchase to the Vendors. After further negotiation and discussion, the Purchaser delivered an executed Offer to Purchase to the Vendors on November 26, 2009. The Vendors accepted the Offer to Purchase on November 27, 2009.¹⁸

The Offer to Purchase

20. The Offer to Purchase provides that the Purchaser offers and agrees to purchase the Purchased Assets (as defined below).¹⁹

A. The Purchased Assets

21. The consideration to be paid by the Purchaser (the “**Purchase Price**”) is in respect of the following assets (the “**Purchased Assets**”):

- (a) the Red Deer Property;
- (b) all buildings, structures, erections, improvements and fixtures (other than the Excluded Improvements) including the Building (the “**Improvements**”); and
- (c) the machinery, equipment and chattels as listed in Schedule “A” to the Offer to Purchase.

The Purchased Assets are to be acquired in their current “as is, where is and with all faults” condition.²⁰

¹⁷ Maguire Affidavit, para. 22, Motion Record, Tab 3, p. 29.

¹⁸ Maguire Affidavit, para. 24, Motion Record, Tab 3, p. 30.

¹⁹ Maguire Affidavit, para. 25, Motion Record, Tab 3, p. 30.

²⁰ Maguire Affidavit, para. 27, Motion Record, Tab 3, p. 31.

22. The Offer to Purchase provides that the Purchased Assets shall on Closing be free and clear of all Encumbrances, save and except for any reservations or exceptions stated in the existing certificate of title to the Red Deer Property (the “**Title Reservations**”).²¹

B. Excluded Improvements

23. The Offer to Purchase provides, *inter alia*, that certain of the assets will not be acquired by the Purchaser (the “**Excluded Improvements**”). The Excluded Improvements include the following:

- (a) portions of the rooftop transmission tower structure, including (i) microwave point-point used for remote; (ii) CHCA/CITV-1 STL; (iii) Weather Central receive devices; and (iv) two TV Antennas; and
- (b) all satellite dishes and associated concrete pads, and anchors located upon and within the Red Deer Property and Improvements, specifically including the four satellite dishes on the roof of the Building, but excluding the Radio Dish located on the roof of the Building.²²

C. Adjustments to the Purchase Price

24. The Purchase Price is subject to adjustment for items normally adjusted in transactions of similar nature in Edmonton, Alberta.²³

D. Conditions of Closing

25. The Offer to Purchase includes certain closing conditions that are required to be satisfied on or before the Closing Date, including a condition that the Approval and Vesting Order be issued and entered. The Closing Date is defined to be December 15, 2009, or such earlier or later date as the parties may agree in writing (provided that the Vendors shall have the right to extend the Closing Date if the Approval and Vesting Order (as defined below) has not

²¹ Maguire Affidavit, para. 29, Motion Record, Tab 3, p. 31.

²² Maguire Affidavit, para. 30, Motion Record, Tab 3, pp. 31-32.

²³ Maguire Affidavit, para. 31, Motion Record, Tab 3, p. 32.

been obtained, except that the Vendors shall not have any right to extend the Closing Date beyond January 19, 2010).²⁴

E. Amendment to Lease

26. By accepting the Offer to Purchase, the Vendors have agreed that the Lease will be amended to extend the termination of the Lease to the earlier of the Closing Date and the date of termination of the Offer to Purchase, and that the Lease, including the obligations of the Tenant to pay the rent to the termination date at the same rent as currently paid under the Lease, shall continue on the same terms and conditions as are in place prior to the extension until the Closing Date, and the Purchaser shall cause the Tenant to execute an amending agreement to the Lease to effect such an extension.²⁵

PART III – ISSUES

27. The issues on this Motion are:

- (a) should this Honourable Court grant the Approval and Vesting Order?; and
- (b) should this Honourable Court exercise its discretion to seal the Confidential Supplement?

PART IV –THE LAW

General Interpretive Principles under the CCAA

28. It has long been held that the CCAA is remedial legislation, which should be given a broad interpretation with a view to fulfilling its purpose – namely, the facilitation of restructuring of debtor companies, for the benefit of creditors, stakeholders and other constituencies that would be detrimentally affected by the cessation of the debtor’s business in a bankruptcy or liquidation.

²⁴ Maguire Affidavit, para. 32, Motion Record, Tab 3, pp. 32-33.

²⁵ Maguire Affidavit, para. 33, Motion Record, Tab 3, p. 33.

29. As Blair J. stated in *Re Royal Oak Mines Inc.*:²⁶

It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved.

30. In *Re Lehndorff*, the Court held that the purpose of the statute is to “enable insolvent companies *to carry on business in the ordinary course* or otherwise deal with their assets so as to enable [a] plan of compromise or arrangement to be prepared, file and considered by their creditors and the court.” (emphasis added).²⁷

It is Appropriate Grant the Approval and Vesting Order

31. Until recently, there was no specific provision in the CCAA for the approval of a sale of assets prior to a plan of compromise or arrangement. Instead, the Courts derived their authority to approve an asset sale from section 11 of the CCAA and upon the inherent jurisdiction of the Court.²⁸ In *Re Canadian Red Cross Society*, Blair J. stated:²⁹

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton’s restructuring being only one of them.

32. The recent CCAA amendments which came into force on September 18, 2009 have now conferred on CCAA Courts the statutory jurisdiction to authorize a sale or disposition of assets, even if shareholder approval was not obtained. Specifically, under section 36 of the CCAA, court approval is required if (i) a debtor company proposes to sell or dispose of assets; and (ii) the sale or disposition of assets is outside the ordinary course of business. The relevant clauses of section 36 are as follows:

²⁶ (1999), 6 C.B.R. (4th) 314 at 317 (Ont. Gen. Div.), Applicants’ Book of Authorities, Tab 6.

²⁷ *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para. 31, Applicants’ Book of Authorities, Tab 5.

²⁸ *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.) [Commercial List], per Farley J., at p. 110, Applicants’ Book of Authorities, Tab 4; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 at p. 315, paras. 43 and 45 (Ont. Gen. Div.), per Blair J., Applicants’ Book of Authorities, Tab 2.

²⁹ *Re Canadian Red Cross Society*, supra, paras. 43 and 45 (Ont. Gen. Div.), per Blair J., Applicants’ Book of Authorities, Tab 2.

36(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.

36(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.

36(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.

...

36(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.

36(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(5)(a) and 6(6)(a) if the court had sanctioned the compromise or arrangement.

33. Additionally, pursuant to section 36(4) of the CCAA, certain mandatory criteria must be met for court approval of a sale or disposition to a related party. In the present case, the Vendors and the Purchaser are not related persons within the meaning of the CCAA.³⁰

³⁰ Maguire Affidavit, para. 26, Motion Record, Tab 3, p. 30.

34. The new amendments to the CCAA should be interpreted and applied with regard to the underlying purposes of the CCAA. As this Honourable Court held in granting the Initial Order in these proceedings:

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. (emphasis added)³¹

35. The CMI Entities submit that, taking into account the factors listed in section 36(3) of the CCAA, in addition to certain other factors, and with regard to the general interpretative provisions of the CCAA, this Honourable Court ought to grant the Approval and Vesting Order.

A. Process Leading to the Property Sale was Reasonable in the Circumstances

36. The CMI Entities submit that, in carrying out the following steps, the Vendors followed a reasonable process leading up to the Property Sale:

- (a) Canwest Global announced to the market in early February 2009 that it was exploring strategic options in respect of the five *E!* Stations. The news release made it clear that Canwest Global was considering selling the stations as a group or individually. *CHCA-TV* was one of the five *E!* Stations;³²
- (b) Canwest Global subsequently engaged in a comprehensive sales and marketing process, with the assistance of its financial advisor, in respect of the five *E!* Stations;³³
- (c) concurrently with the sales and marketing process, and in anticipation of having to sell *CHCA-TV* to a third party, the Vendors commenced discussions with

³¹ *Re CanWest Global Communications Corp. et al.*, [2009] O.J. No. 4286 (S.C.J.) at para. 24, Applicants' Book of Authorities, Tab 3.

³² Maguire Affidavit, para. 16, Motion Record, Tab 3, p. 27.

³³ Maguire Affidavit, para. 17, Motion Record, Tab 3, p. 27.

various real estate professionals regarding the sale options that were available in respect of the Red Deer Property;³⁴

- (d) the Vendors commissioned the Colliers Appraisal and later the Soderquist Appraisal in order to determine the fair market value of the Red Deer Property. The Vendors also obtained a survey of the Red Deer Property;³⁵
- (e) Canwest Global announced to the market in early July 2009 that there were no viable options for *CHCA-TV* and that the station would be permanently closed effective August 31, 2009;³⁶
- (f) the Vendors engaged in discussions with the Purchaser between July 2009 and November 2009;³⁷ and
- (g) the Vendors made it clear to the Purchaser that they would not entertain a direct sale if it would be unfavourable to the Vendors as compared to an open sales process.³⁸

37. Importantly, during this 9 month process, neither the Vendors nor any of the other CMI Entities received any formal expressions of interest in respect of the Red Deer Property or in respect of the related assets. The market had been aware that Canwest Global was exploring its strategic options in respect of *CHCA-TV* since February 2009.³⁹

³⁴ Maguire Affidavit, para. 19, Motion Record, Tab 3, p. 28.

³⁵ Maguire Affidavit, para. 19, Motion Record, Tab 3, p. 28.

³⁶ Maguire Affidavit, para. 17, Motion Record, Tab 3, p. 27.

³⁷ Maguire Affidavit, paras. 22-24, Motion Record, Tab 3, pp. 29-30.

³⁸ Maguire Affidavit, para. 22, Motion Record, Tab 3, pp. 29-30.

³⁹ Maguire Affidavit, para. 22, Motion Record, Tab 3, pp. 29-30.

B. The Purchase Price is Fair and Reasonable Taking into Account Market Value of the Purchased Assets

38. As noted above, the Vendors obtained the Appraisals in May and September 2009. Both appraisals included, *inter alia*, the following opinions:⁴⁰

- (a) commercial real estate prices in the Red Deer market were impacted negatively due to the market downturn, with lease rates impacted proportionally;
- (b) vacancy rates had risen in Red Deer from approximately 3% to 5%;
- (c) the typical purchaser for the Red Deer Property would likely be a single use owner/operator of the property as the size of the Building, configuration, location and lack of an elevator would potentially discourage use as an investment property; and
- (d) the Red Deer Property could be expected to be exposed to the market for a significant length of time prior to the completion of a sale (estimated at 3-6 months in the Colliers Appraisal and 6-12 months in the Soderquist Appraisal).

39. In terms of the pricing opinions, the estimate of “fair market value” in the Colliers Appraisal was approximately 25% greater than the estimate of “fair market value” in the Soderquist Appraisal.⁴¹ The difference in valuations is attributable, in part, to the differences in assumptions and comparables utilized by Colliers and Soderquist.⁴²

40. More importantly, however, and as the Monitor has concluded in its Eighth Report, the Purchase Price to be paid by the Purchaser for the Purchased Assets is within or slightly below the “fair market value” range in the Colliers Appraisal and is significantly higher than the “fair market value” estimated in Soderquist Appraisal.⁴³

⁴⁰ Maguire Affidavit, para. 20, Motion Record, Tab 3, pp. 28-29.

⁴¹ Maguire Affidavit, para. 21, Motion Record, Tab 3, p. 29.

⁴² Eighth Report of the Monitor, para. 22, p. 7.

⁴³ Eighth Report of the Monitor, para. 30, pp.10-11.

41. Indeed, while the Purchase Price is within the range of both Appraisals, the CMI Entities submit that, for the following reasons, the Soderquist Appraisal is likely more indicative of the true “fair market value” of the Red Deer Property:

- (a) the Colliers Appraisal relied, in part, on data from the City of Calgary and the City of Edmonton, while the Soderquist Appraisal relied exclusively on data from the City of Red Deer itself;
- (b) the Colliers Appraisal used a number of industrial real estate comparables, as opposed to the Soderquist Appraisal which exclusively used commercial real estate comparables; and
- (c) the Soderquist Appraisal identified the immediate need to replace the heating, ventilation and air conditioning system in the Building, whereas the Colliers Appraisal did not.⁴⁴

42. Accordingly, the CMI Entities submit that, based on the fact that the Purchase Price is within the range of the “fair market value” estimates in the Appraisals (and notably higher than the Soderquist Appraisal which is likely more indicative of the Red Deer real estate market), and the fact that no other formal expressions of interest were received by the CMI Entities in respect of the Red Deer Property at any time during or after the *E!* Station sales process, the consideration to be obtained for the Purchased Assets is fair and reasonable.

C. The Monitor Supports the Transaction

43. In its Eighth Report, the Monitor has recommended approval of the Offer to Purchase by this Honourable Court. In arriving at this recommendation, the Monitor has concluded that (i) the Vendors have acted in good faith to maximize value in attempting to divest the Red Deer Property; (ii) the Vendors made satisfactory efforts to obtain the best price and have not acted improvidently; and (iii) based on the Colliers Appraisal and the Soderquist

⁴⁴ Maguire Affidavit, para. 21, Motion Record, Tab 2, p. 29.

Appraisal, the sale of the Red Deer Property under a bankruptcy would not be more beneficial to the creditors and the CMI Entities.⁴⁵

D. Other Creditors were Consulted

44. Notwithstanding that the CMI Entities are expressly permitted to dispose of the Red Deer Property pursuant to section 5(h) of the Use of Cash Collateral and Consent Agreement, the Vendors have had discussions with counsel to the Ad Hoc Committee of 8% Senior Subordinated Noteholders (the “**Ad Hoc Committee**”) in respect of the Property Sale.⁴⁶ The Ad Hoc Committee has indicated that it supports the Property Sale.⁴⁷

45. The CMI Entities have also had discussions with CIT Business Credit Canada Inc. (“**CIT**”) in respect of the Property Sale. CIT has advised that it does not object to the Property Sale.⁴⁸

46. Furthermore, the CMI CRA (as defined in the Initial Order) and Canwest MediaWorks Ireland Holdings have advised that they are supportive of the Property Sale.⁴⁹

47. Thus, while not every creditor of the CMI Entities has been consulted in respect of the Property Sale, all of the CMI Entities’ most significant creditor groups have been involved in the discussions and, in the case of the Ad Hoc Committee and CMIH, have indicated that they support the Property Sale, and in the case of CIT, has indicated that it does not object. Accordingly, significant interests of creditors have been represented.

E. Other Factors in Support of Approval

48. Finally, the CMI Entities submit that the following additional factors also support the granting of the Approval and Vesting Order:⁵⁰

⁴⁵ Eighth Report of the Monitor, paras. 33-34, pp. 11-12.

⁴⁶ Maguire Affidavit, para. 36, Motion Record, Tab 3, pp. 34-35.

⁴⁷ Eighth Report of the Monitor, para. 34, pp. 11-12.

⁴⁸ Maguire Affidavit, para. 37, Motion Record, Tab 4, p. 35.

⁴⁹ Eighth Report of the Monitor, para. 34, pp. 11-12.

- (a) there is no prejudice to the creditors of the CMI Entities;
- (b) it divests the Vendors of an asset that was non-core to their business;
- (c) it recognizes the longstanding business relationship that exists between the Purchaser and the Vendors;
- (d) it avoids the expense of listing the Red Deer Property for sale and/or engaging in an unnecessary and costly and potentially lengthy listing process that is unlikely to locate a purchaser who is willing to offer more for the Red Deer Property;
- (e) it negates the possibility of losing significant rental revenue during a lengthy listing process as the Lease will have expired; and
- (f) it takes advantage of the fact that the Purchaser is a motivated buyer as it would be costly for the Tenant to relocate.

49. In addition, as the Offer to Purchase is simply the monetization of a hard asset and does not contemplate the transfer of employees or pension plans to the Purchaser (or otherwise touch on employee issues), the CMI Entities submit that section 36(7) of the CCAA has no application to the present motion.

50. In the alternative, if this Honourable Court does not agree and concludes that section 36(7) is applicable to all asset sales – irrespective of whether employees and pension plans are to be transferred with the purchased assets – the CMI Entities have advised the Monitor that they can and will make the payments that are required under 6(5)(a) or 6(6)(a) of the CCAA.⁵¹

⁵⁰ Maguire Affidavit, para. 35, Motion Record, Tab 4, p. 34.

⁵¹ Eighth Report of the Monitor, para. 37, p. 12. Section 36(7) of the CCAA states that “The Court may grant 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.” The reference to paragraph 6(4)(a) appears to be an error, as there is no section 6(4)(a) in the CCAA. It is submitted that the intended reference is to sections 6(5)(a) and 6(6)(a) of the CCAA.

51. Finally, the CMI Entities have given notice of this motion to the secured creditors who are likely to be affected by the Property Sale.⁵²

52. The CMI Entities therefore submit that, in the circumstances, and with regard to the factors listed in section 36(3) of the CCAA, it is appropriate for this Honourable Court to grant the Approval and Vesting Order.

SEALING THE CONFIDENTIAL SUPPLEMENT

53. As a general rule, Court proceedings should be public. However, the Courts have and will depart from this principle where it is demonstrated that openness would cause a serious harm or injustice. As the Supreme Court of Canada stated in *MacIntyre v. Nova Scotia (Attorney General)*:⁵³

Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

54. Section 137(2) of the *Courts of Justice Act* provides that:

A Court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

55. In *Sierra Club of Canada v. Canada (Minister of Finance)*⁵⁴, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:⁵⁵

A confidentiality order under Rule 151 should only be granted when:

(a) such an 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; and

⁵² Eighth Report of the Monitor, para 35, p.12.

⁵³ (1982), 132 D.L.R. (3d) 385 (S.C.C.) at 405, Applicants' Book of Authorities, Tab 1.

⁵⁴ [2002] 2 S.C.R. 522, Applicants' Book of Authorities, Tab 7.

⁵⁵ *Ibid.*, at para 55.

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

56. In *Sierra Club*, Iacobucci J. stated that the risk in question must be real and substantial, and pose a serious threat to the commercial interest in question.⁵⁶

57. In the present case, the Confidential Supplement contains (i) copies of the Appraisals; and (ii) an unredacted copy of the Offer to Purchase which discloses the Purchase Price.

58. The CMI Entities submit that if the Appraisals and/or the unredacted Offer to Purchase are made available to the public and the Property Sale does not close, the CMI Entities will be at a competitive disadvantage, as disclosure of the appraised value of the Red Deer Property and the consideration that the Vendors are willing to accept for the Red Deer Property would significantly weaken the Vendors' ability to bargain with other third parties who may later express an interest in the Red Deer Property.⁵⁷

59. Accordingly, it is submitted that the preservation of this confidential and commercially sensitive information constitutes a sufficiently important commercial interest to pass the first branch of the Sierra test.

60. With respect to the second branch of the Sierra test, it is submitted that the salutary effects of sealing the Confidential Supplement outweighs the possible deleterious effects. In the normal course, absent these CCAA proceedings, property appraisal information and the purchase price would be kept strictly confidential and would not find its way into the public domain. Keeping this information confidential in this CCAA proceeding will not have any deleterious effects.

61. It is therefore submitted that that this Honourable Court ought to order that the Confidential Supplement be sealed from and not form part of the public record.


⁵⁶ *Ibid.*, at para 54.


⁵⁷ Maguire Affidavit, paras. 21 and 24, Motion Record, Tab 3, pp. 29-30.

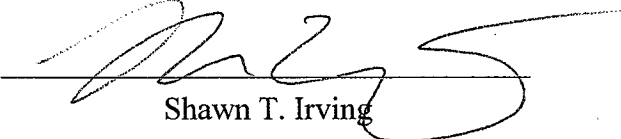
PART IV – NATURE OF THE ORDER SOUGHT

62. The CMI Entities therefore request an Order substantially in the form of the draft Order attached to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


Lyndon A.J. Barnes


Jeremy Dacks


Shawn T. Irving

Schedule "A"

Applicants

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands) B.V.
18. CGS International Holdings (Netherlands) B.V.
19. CGS Debenture Holding (Netherlands) B.V.
20. CGS Shareholding (Netherlands) B.V.
21. CGS NZ Radio Shareholding (Netherlands) B.V.
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.
24. 30109, LLC
25. CanWest MediaWorks (US) Holdings Corp.

Schedule "B"

Partnerships

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

Schedule "C" - Statutory References

COMPANIES' CREDITORS ARRANGEMENT ACT

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

s. 11(1) General power of court - Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. In respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Restriction on disposition of business assets

36. (1) 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.

Notice to creditors

(2) 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.

Factors to be considered

(3) 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.

Additional factors — related persons

(4) 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.

Related persons

(5) 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).

Assets may be disposed of free and clear

(6) 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.

Restriction — employers

(7) 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.

COURTS OF JUSTICE ACT
R.S.O. 1990, c. C-43, as amended

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Schedule "D"

LIST OF AUTHORITIES

1. *MacIntyre v. Nova Scotia (Attorney General)* (1982), 132 D.L.R. (3d) 385 (S.C.C.)
2. *Re CanWest Global Communications Corp. et al.* [2009] O.J. No. 4286 (Ont. S.C.J.)
3. *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.)
4. *Re Lehndorff* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.) [Commercial List]
5. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.)
6. *Re Royal Oak Mines Inc* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div.)
7. *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522

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

Court File No: CV-09-8396-00CL

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

APPLICANTS

Ontario

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS

(Red Deer Property Sale – Returnable December 8, 2009)

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