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## • CANWEST GLOBAL CASE FURTHER CONSIDERS NEW CCAA •

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The December issue of the Cassels Brock e-communicé considered Justice Pepall's October 13, 2009 decision, [2009] O.J. No. 4286, to grant *Companies' Creditors Arrangement Act* [CCAA], R.S.C. 1985, c. C-36, protection to Canwest Global Communications Corporation and a number of related entities. As noted, the decision functions as an excellent guide to the recent legislative amendments affecting the grant of an initial order.

In a more recent decision, [2009] O.J. No. 4788, in the *Canwest CCAA* proceedings, Pepall J. had the opportunity to consider the scope and application of new CCAA s. 36. Section 36, which came into force on September 18, 2009, requires Court approval in circumstances where a debtor company under CCAA protection proposes to sell or dispose of assets "outside of the ordinary course of business."

The new asset sale provisions provide the Court with a list of non-exclusive factors to consider in determining whether to approve of a 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 sale, and the Court may only grant authorization if it is satisfied that the company can and will make certain pension and employee-related payments.

In *Canwest Global*, Pepall J. was asked to approve what was described as a "Transition and Reorganization Agreement" by and among various Canwest entities, not all of which were in CCAA protection. The purpose of the agreement was a restructure that was described as "inter-entity arrangements," which included the transfer of the assets and the business of The National Post Company.

In considering the new s. 36, Pepall J. first considered the meaning of the term "ordinary course of business." As the term is not defined in the CCAA, Her Honour approved of a common sense approach to the term that considers the circumstances of each case and takes into account the type of business and normal business dealings of the particular seller.

Justice Pepall also took into account the stated Industry Canada objective of the s. 36 reform, which was to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse. Referring to possible abuses by "phoenix corporations," Her Honour noted that not every internal corporate reorganization escapes the purview of s. 36: "a phoenix corporation to one may be an internal corporate reorganization to another."

Here, Pepall J. accepted the applicants' submission that s. 36 was inapplicable. Noting that the CanWest entities were highly integrated and inter-

dependant companies with a business structure that required a re-alignment of services and assets to rationalize business structure, Pepall J. held that it would be commercially unreasonable to require that CanWest entities engage in the sort of third party sales processes contemplated by s. 36.

Justice Pepall went on to rule that in cases where s. 36 is inapplicable, Court approval should still be sought in circumstances where the proposed 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. Even if the court confirms that the proposed transaction is in the ordinary course of business, and therefore outside the ambit of s. 36,

the provisions of s. 36 may still be considered in assessing fairness.

In *Canwest*, findings were made that the arrangement was reached after extensive negotiations and consultation, was supported by all major creditors, preserved value for stakeholders, and maintained employment. The Transition and Reorganization Agreement was accordingly approved.

[*Editor's note:* David Ward is a partner in the firm's Insolvency & Restructuring Group. David has a litigation emphasis to his insolvency practice, with a particular focus on creditors' rights and remedies in reorganizations and liquidations under Canada's major insolvency and corporate statutes.]