

**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"**

**FACTUM OF THE MONITOR
FTI CONSULTING CANADA INC.**

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TO: THE SERVICE LIST

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CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS
LISTED ON SCHEDULE "A"**

Applicants

**FACTUM OF THE MONITOR
(Motion Returnable March 6, 2012)**

PART I - INTRODUCTION¹

1. This motion is being brought by FTI Consulting Canada Inc. ("FTI") in its capacity as the Court-appointed monitor (the "Monitor") of Canwest Global Communications Corp. and certain of its subsidiaries (collectively, the "Remaining CMI Entities") for approval and sealing of the Minutes of Settlement and Release (the "Settlement Agreement") dated February 23, 2012 between the Monitor, the Core CMI Entities, the Shaw Entities, and Canada Revenue Agency on behalf of the Minister of National Revenue ("CRA").
2. Canwest carried on business through a number of subsidiaries and at one time was Canada's largest publisher of English language daily and non-daily newspapers. Canwest directly or indirectly owned, operated and/or held substantial interests in free-to-air television stations and subscription-based specialty television channels, and websites in Canada.

¹ All capitalized terms used but not defined herein shall have the meaning ascribed to them in the Twenty-Seventh Report of the Monitor dated February 28, 2012 (the "Report").

Report, Motion Record, Tab 2, para. 2

3. Relief in the CCAA Proceedings was obtained by: Canwest Global, its principal operating subsidiary CMI, certain subsidiary corporations and partnerships of CMI that owned and operated Canwest's free-to-air television broadcast business and certain Canadian subscription-based specialty television channels and The National Post Company/La Publication National Post (now Legacy NPC Partnership).

Report, Motion Record, Tab 2, para. 3

4. On October 6, 2009, the CMI Entities were held to be insolvent and obtained the Initial Order which provided for a stay of proceedings until November 5, 2009 (the "Stay Period").

Report, Motion Record, Tab 2, para. 4

5. 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 on July 16, 2010, concerning, affecting and involving Canwest Global, CMI, Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd. (now 4514858 Canada Inc.), The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc., as may be amended (the "Plan").

Report, Motion Record, Tab 2, para. 5

6. On July 19, 2010, an excess of the majority in number and two-thirds in value of the Affected Creditors of the Plan Entities with Proven Voting Claims (as these terms are defined in the Plan) present and voting at the creditors' meetings voted in favour of approving the Plan. On July 28, 2010, this Court granted an Order sanctioning the Plan (the "Plan Sanction Order").

Report, Motion Record, Tab 2, para. 6

7. The Plan was successfully implemented on October 27, 2010. The Monitor delivered and filed with the Court its certificate required under the Plan stating, inter alia, that the Plan Implementation Date (as defined in the Plan) has occurred.

Report, Motion Record, Tab 2, para. 7

8. By Orders dated October 30, 2009, January 21, 2010, March 29, 2010, June 8, 2010, and September 8, 2010, the Stay Period was extended until November 5, 2010. Following the Plan Implementation Date, the Stay Period with respect to Canwest Television GP Inc. (now Shaw Television GP Inc.), Canwest Television Limited Partnership (now Shaw Television Limited Partnership), Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc. (now Shaw Global Broadcasting Inc.), Fox Sports World Canada Holdco Inc., and Fox Sports World Canada Partnership (the "CTLP Plan Entities") was terminated. By Orders dated November 2, 2010, May 3, 2011, September 29, 2011, and

December 9, 2011, the Stay Period with respect to the Remaining CMI Entities (as defined in the Plan) was extended until March 31, 2012.

Report, Motion Record, Tab 2, para. 8

9. Under the Plan, the Plan Sanction Order, and the Plan Emergence Agreement all proceeds from the liquidation of any of the assets of the Remaining CMI Entities not transferred to New Canwest (formally 7509014 Canada Inc. and now Shaw Media Global Inc.) pursuant to the Plan are to be contributed to the Plan Implementation Fund.

Report, Motion Record, Tab 2, para. 9

10. Pursuant to Sections 5.3 and 5.12 of the Plan Emergence Agreement, as amended, any refunds of any Taxes (as defined in the Plan Emergence Agreement) payable to, among others, Canwest Global and CMI are to be deposited by the Monitor into the Plan Implementation Fund.

Report, Motion Record, Tab 2, para. 10

11. Under the terms of the Plan Emergence Agreement, any residual funds remaining in the Plan Implementation Fund following completion of the Monitor's duties under the CCAA, the Plan Sanction Order and the Plan Emergence Agreement and the issuance of an order discharging the Monitor, shall be remitted to New Canwest (now Shaw Media Global Inc.).

Report, Motion Record, Tab 2, para. 11

12. Pursuant to the order of the Court dated September 27, 2010 (the “**September 27 Order**”), the Monitor was, among other things, authorized, empowered and directed to:

- (a) exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order (as defined below), including, without limitation, revise, reject, accept, settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor (as defined in the Plan) or any other person, and (ii) consulting with the Chief Restructuring Advisor and the CMI Entities; and (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims; and
- (b) take such additional actions and execute such documents, in the name of and on behalf of any of Canwest Global and the Canwest Subsidiaries (as defined in the Plan) (other than the CTLP Plan Entities), as the Monitor considers necessary or desirable in order to perform its functions and fulfill its obligations under that Order, the Plan and to facilitate the completion of the CCAA proceedings and the winding up of the estates of Canwest Global and the Canwest Subsidiaries (other than the CTLP Plan Entities).

Report, Motion Record, Tab 2, para. 12

13. As authorized by the Order dated October 21, 2011, on October 25, 2011, CMI made an assignment into bankruptcy and FTI Consulting Canada Inc. was appointed as trustee in bankruptcy. The Order dated October 21, 2011 also limited the duties of CMI’s trustee

in bankruptcy and provided that the Monitor shall continue to be authorized and empowered to perform and exercise its various duties and powers as provided for in, *inter alia*, the Plan, the Plan Sanction Order and the September 27 Order.

Report, Motion Record, Tab 2, para. 13

PART II - THE FACTS

14. On November 19, 2009, CRA filed a claim against certain CMI Entities (including without limitation Canwest Global, CMI and CTLP) pursuant to the Claims Procedure Order as an unsecured creditor in an unquantified amount (the “**Pre-Filing Marker Claim**”).

Report, Motion Record, Tab 2, para. 20

15. As reported in, among other things, the Monitor's Twenty-Third Report, the Monitor and its counsel engaged in extensive discussions and negotiations to resolve the Pre-Filing Marker Claim and all other tax related issues between CRA and the CMI Entities as expeditiously as reasonably possible.

Report, Motion Record, Tab 2, para. 21

16. Following intensive and extensive negotiations, the Monitor and CRA reached an agreement to settle all issues relating to the Pre-Filing Marker Claim and all other tax related claims between CRA and the CMI Entities and on February 23, 2012, the

Monitor, each of the Core CMI Entities, each of the Shaw Entities and CRA entered into the Settlement Agreement.

Report, Motion Record, Tab 2, para. 22

17. Pursuant to the Settlement Agreement, CRA has agreed to withdraw its Pre-Filing Marker Claim and to settle all other tax related issues between CRA and the CMI Entities.

Report, Motion Record, Tab 2, para. 23

18. A copy of the Settlement Agreement is attached as **Appendix "A"** to the Confidential Supplement to the Twenty-Seventh Report of the Monitor (the "**Confidential Supplement**") and requested to be sealed pending further Order of this Court.

Report, Motion Record, Tab 2, para. 26

19. The withdrawal of the Pre-Filing Marker Claim can only benefit the *pro rata* distributions to the Ordinary Creditors.

Report, Motion Record, Tab 2, para. 27

20. The only parties affected by the resolution of all other tax related issues between CRA and the CMI Entities in the Settlement Agreement are the Shaw Entities. The Shaw Entities are signatories to the Settlement Agreement and support its approval.

Report, Motion Record, Tab 2, para. 28

PART III - ISSUES

21. The issues on this motion are as follows:
- (a) Should this Court approve the Settlement Agreement?
 - (b) Should this Court seal the Confidential Supplement containing the Settlement Agreement?

PART IV - LAW AND ARGUMENT

A. Settlement Agreement Should be Approved

22. The Settlement Agreement can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period.

Re Canadian Red Cross Society, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]), ["Red Cross"]

Re Air Canada, (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List]), ["Air Canada"]

Calpine Canada Energy Ltd. (Re), [2007] A.J. No. 923, (Ata. Ct. of Q.B.)

23. In *Air Canada, supra*, Justice Farley, in the course of the restructuring, was asked to approve Global Restructuring Agreements. He cited *Red Cross, supra*, as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring. He commented at para. 9 that:

... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

[Emphasis added]

Air Canada, supra, para. 9

24. In the case at bar, the withdrawal of the Pre-Filing Marker Claim by CRA pursuant to the Settlement Agreement can only benefit the *pro rata* distributions to the Ordinary Creditors and will finally enable the Monitor to make distributions to the Ordinary Creditors. The only parties affected by the resolution of all other tax related issues between CRA and the CMI Entities in the Settlement Agreement are the Shaw Entities who support its approval.
25. Accordingly, it is respectfully submitted that the Settlement Agreement is “fair and reasonable and will be beneficial” to the CMI Entities and their stakeholders generally and, therefore, should be approved.

B. The Confidential Supplement Should be Sealed

26. The Monitor is requesting that this Court seal the Confidential Supplement, which contains a copy of the Settlement Agreement.
27. This Court has the discretion, pursuant to s. 137(2) of the *Courts of Justice Act*, to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2).

28. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 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:

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

(a) such an order is necessary in order to prevent 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

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the 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.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 at para. 53, Commercial List Authorities Book, Tab 15.

29. Orders sealing confidential supplements containing confidential information have been granted by this Court on a number of occasions.

Canwest Publishing Inc. (Re) (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J.[Comm. List]) [*“Canwest Publishing”*] at para. 65, Commercial List Authorities Book, Tab 8.

30. The Settlement Agreement provides that all the parties thereto shall maintain the confidentiality of all matters contained in the Settlement Agreement. The only aspect of the Settlement Agreement affecting any stakeholders of the CMI Entities is the withdrawal of CRA’s Pre-filing Marker Claim (as disclosed in the Report). In addition,

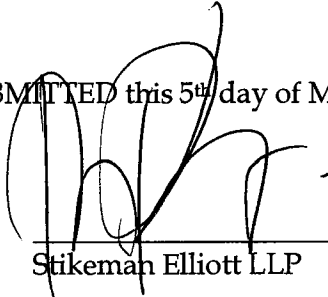
there are aspects of the Settlement Agreement which affect the Shaw Entities which are not Applicants in these proceedings.

31. Accordingly, it is respectfully submitted that this Court should order that the Confidential Supplement be sealed pending further Order of this Court.

PART V - ORDER REQUESTED

32. The Monitor respectfully requests an Order in the form attached at Tab 3 to the Monitor's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2012.



Stikeman Elliott LLP

Lawyer for the Monitor

Schedule "A"**The Applicants**

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

SCHEDULE "B"
LIST OF AUTHORITIES

1. *Re Canadian Red Cross Society*, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List])
2. *Re Air Canada*, (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List])
3. *Calpine Canada Energy Ltd. (Re)*, [2007] A.J. No. 923, (Ata. Ct. of Q.B.)
4. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
5. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List])

SCHEDULE "C"
RELEVANT STATUTES

Courts of Justice Act, R.S.O., c. C.43

Documents public

137.(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

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.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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

Court File No: CV-09-8396-CL

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

**ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL
LIST**

Proceeding commenced at Toronto

**FACTUM OF THE MONITOR
(RETURNABLE MARCH 6, 2012)**

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