CITATION: Re: Canwest Global Communications Corp. 2009 ONSC 3537
COURT FILE NO.: CV-09-8396-00CL
DATE: 20100623

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 11 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 AND THE OTHER APPLICANTS

BEFORE: Pepall J.

COUNSEL: *Lyndon Barnes, Jeremy Dacks and Shawn Irving* for the CMI Entities
David Byers and Marie Konyukhova for the Monitor
M.P. Gottlieb and Vince Mercier for Shaw Communications Inc.
Robert Staley, Derek Bell and Jonathan Bell for the Shareholder Group
Mario Forte for the Special Committee of the Board of Directors
Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders
Hugh O'Reilly for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

REASONS FOR DECISION
GRANTED JUNE 23, 2010

[1] The Initial Order granting CCAA protection to the CMI Entities was granted by me on October 6, 2009. Unlike the sister restructuring of the LP Entities, this CCAA proceeding has experienced certain significant problems and hurdles. As will be discussed, many if not all of these have been overcome. The CMI Entities now seek an order amongst other things: (i) accepting the filing of a Plan based on the Amended Shaw Transaction; (ii) authorizing the CMI Entities to establish two classes of creditors and to call meetings of those creditors to vote on the Plan; and (iii) approving certain documentation relating to the Amended Shaw Transaction.

[2] A shareholder group consisting of members of the Asper family, the Asper Foundation, Blott Asset Management LLC, two U.S. equity funds and four unnamed Canadian individuals

objected to the relief requested. They call themselves the Ad Hoc Group of Canwest Shareholders (the "Shareholder Group").

[3] They complained about a variety of things including the canvassing of the market, the value received and the absence of a "fiduciary out" provision. They also stated that the process was unfair to shareholders and disregarded the promise of 2.3% equity value for the shareholders.

[4] As mentioned, on October 6, 2009, I granted an Initial Order under the CCAA. In the materials filed in support of the motion, the Applicants stated that they were insolvent and I so found. This is a prerequisite to an Initial Order under the CCAA[1].

[5] I do not propose to review the entire history of these proceedings which has been discussed before in various reasons for decision rendered by me, however, I will mention a few significant facts.

[6] The CCAA filing on October 6, 2009, was described as a prepackaged filing and was based on a Support Agreement entered into with members of the Ad Hoc Committee of 8% Senior Subordinated Noteholders (the "Ad Hoc Committee"). The filing and the original recapitalization transaction ("ORT") described therein contemplated that the current debt of the CMI Entities would be converted into equity of a restructured Canwest Global. As part of that transaction, the Ad Hoc Committee agreed to reduce its allocated recovery by 2.3% of the equity of a restructured Canwest Global and to allow it to be distributed to the existing shareholders.

[7] The ORT proposed that one or more Canadians would invest at least $65 million for a minimum 20% of the equity of a restructured Canwest Global. It was also a condition that the CW Investments Co. Shareholders Agreement between CMI, 4414616 Canada Inc., Goldman Sachs Capital Partners and certain of its affiliates (the "GS Parties") and CW Investments Co. be amended or restated or otherwise dealt with in a manner acceptable to CMI and the Ad Hoc Committee.

---

[1] In addition to the provisions of the definition of debtor company found in s.2 (1) of CCAA

[8] Others who were not CCAA applicants included CW Investments Co. In August, 2007, Canwest Global and the GS Parties jointly acquired through CW Investments Co. and its subsidiaries a portfolio of 17 specialty television channels from Alliance Atlantis Communications Inc. The relationship of the Canwest Global and GS Parties was governed by the aforementioned Shareholders Agreement. The purchase from Alliance Atlantis Communications Inc. and the terms of the Shareholders Agreement were agreed upon at the peak of the financial markets and economic cycle in 2007.

[9] As described in the June 7, 2010, affidavit of Mr. Strike of the CMI Entities, the GS Parties adopted an adversarial position in the CCAA proceedings. They challenged various transactions and sought a declaration that would prevent the CMI Entities from disclaiming their obligations under the Shareholders Agreement. On December 8, 2009, I stayed the GS Parties' request for relief.

[10] For reasons discussed before, both the Monitor and the CMI Entities took the position that the Ad Hoc Committee had a veto over a CCAA restructuring plan[2]. Similarly, the Shareholders Agreement continued to be a thorny problem without an obvious solution absent a consensual resolution.

[11] On November 2, 2009, RBC Capital Markets commenced an equity solicitation process. This process has already been described by me in my reasons approving the original Shaw Transaction.

[12] Ultimately the Shaw Communications Inc. ("Shaw") bid was considered to be the best overall offer received. It contemplated that the company would be private and not public. The principal elements of the Shaw transaction were:

- the investment of $95 million in a restructured Canwest Global representing a 20% equity interest and an 80% voting interest;

---

[2] In addtition, the 8% Senior Subordinated Noteholders provided the liquidity to the CMI Entities under the Use of Cash Collateral and Consent Agreement to permit the CMI Entitties to continue to operate.

- a portion of the net cash proceeds would be distributed to the 8% Senior Subordinated Noteholders pursuant to a Plan in connection with the partial payment of the secured intercompany note and the balance would be used for working capital purposes;

- Shaw would subscribe for an additional amount of equity shares of a restructured Canwest Global to fund certain cash payments that would be made to Affected Creditors;

- existing shareholders would receive a cash payment. The Monitor stated that this represented approximately $11 million.

[13] It was a condition of each party's obligation to consummate the Shaw transaction that the Shareholders Agreement be amended or restated or otherwise addressed in a manner to be agreed by Shaw, Canwest Global and the Ad Hoc Committee of Noteholders or disclaimed. As such the issues with the GS Parties continued to be unresolved.

[14] On February 19, 2010, the CMI Entities brought a motion seeking approval of the Shaw transaction. The GS Parties opposed the relief sought and requested an adjournment of the motion which I refused. I granted the order and approved the Shaw transaction agreements. In my reasons, I stated that:

- during the course of initial discussions between RBC Capital Markets and potential investors, it was recognized that alternative proposals would be considered;

- the list of potential investors included both strategic and financial investors and qualified high net worth individuals in Canada;

- RBC Capital Markets had fully canvassed the market and there was overwhelming evidence of an extensive market canvas;

- there was a level playing field;

- the CMI Entities had made a sufficient effort to obtain the best offer;

- the interests of all parties were considered; and

- a major objective underpinning the initial CCAA filing had now been accomplished.

[15] The GS Parties then sought leave to appeal my decision from the Court of Appeal.

[16] Although the equity solicitation had been successful, the dispute with the GS Parties was without resolution. This in spite of the fact that in my reasons for decision both with respect to the contested stay motion and the contested approval motion, I expressed my view that a commercial and negotiated resolution was in the best interests of all concerned.

[17] If the CMI Entities had been required to seek approval to disclaim the Shareholders Agreement, protracted, expensive and uncertain litigation would have resulted regardless of who was successful. If the GS Parties were successful, the CMI Entities would have been unable to meet the condition provided for in both the Shaw transaction and the Support Agreement they had entered into with the Ad Hoc Committee. If the GS Parties were unsuccessful, the GS Parties would have had a substantial and complicated damages claim that may have given them a blocking position in the restructuring. As such, absent a resolution, this going concern restructuring was at an impasse with unattractive potential consequences.

[18] Discussions had reached a stalemate.

[19] In the face of what appeared to be an insoluble problem, the Monitor and the CMI Entities requested a court supervised mediation. Given the importance of the restructuring in Canada, the need to identify a judge with stature and superlative mediation skills, and the fact that at least one leave to appeal motion was before the Court of Appeal, I inquired as to whether Chief Justice Winkler was prepared to conduct a mediation. Chief Justice Winkler conducted the mediation which resulted in an acceptable conceptual framework. In my view, absent this mediation, this restructuring was in serious difficulty. As noted in Mr. Strike's June 7, 2010 affidavit:

> "The CMI Entities and the CMI CRA had unsuccessfully expended all commercially reasonable efforts to achieve a consensual renegotiation of the Shareholders Agreement with Goldman Sachs. Moreover, the CMI Entities and their stakeholders required certainty with respect to the path forward, particularly as the time to negotiate new programming agreements with the U.S. television studios was approaching, as was the period for upfront selling to advertisers of the 2010-2011 program schedules of the television channels and stations of CTLP and CW Investments.
>
> The CMI Entities, the CMI CRA and the Monitor also recognized that if the parties continued to proceed down a litigation track in

> respect of any or all of (i) a potential request to disclaim or resiliate the Shareholders Agreement, (ii) the Leave Motion and, if leave was granted, the appeal of the Shaw Approval Order itself, and/or (iii) the 4414616 Transaction, the CMI Entities would be required to incur significant litigation costs, divert many hundreds of hours of senior management time to the litigation effort at one of the most critical times of the restructuring and, based upon even the most optimistic view, would likely not be able to complete a going concern recapitalization transaction for a significant period of time, likely well into 2011, if at all (assuming all lower court decisions were appealed). This would have put the Shaw Transaction in jeopardy as, under the terms of the Amended Support Agreement, the Original Shaw Support Agreement and the Original Shaw Subscription Agreement, creditor approval of the proposed plan of arrangement or compromise was required to be obtained by April 15, 2010, and the plan of arrangement or compromise itself was required to be implemented by no later than August 11, 2010 (unless such dates were extended by Shaw and Canwest Global). It would also have put the DIP facility provided by CIBC Asset-Based Lending Inc. (formerly CIT Business Credit Canada Inc.) in jeopardy, which, if terminated, would have had a detrimental effect on the CMI Entities' ongoing liquidity."

[20] The Court and in my view, stakeholders should be grateful to Chief Justice Winkler for the result he was instrumental in achieving.

[21] Ultimately the GS Parties agreed to sell to Shaw certain shares in CW Investments Co. and to provide an option to purchase the remainder for $709 million. Shaw would replace the GS Parties as a party to the Shareholders Agreement. Under the amended Shaw transaction, Shaw would become the sole shareholder of a restructured Canwest Global. Shaw would pay US$440 million to be allocated to the 8% Senior Subordinated Noteholders and $38 million to Affected Creditors not including the Noteholders[3]. Under this arrangement, the shareholders would not receive any cash or equity interest, contrary to what the shareholders may have expected to receive when the prepackaged filing was first announced. In addition, all equity

---

[3] Subject to a pro rata increase in that amount for any restructuring period claims directly referable to the Amended Shaw Transaction, in certain circumstances.

compensation plans would be terminated as would outstanding options, restricted share units and other equity based awards.

[22] In response to this development, amongst other things, Mr. Leonard Asper stated that the fundamental term of the CCAA prepackaged filing which was relied upon by him and others had been breached.

[23] Attempts by the CMI Entities (the Special Committee Chair, Derek Burney) and the CMI CRA to reinstate the shareholders' recovery did not meet with success.

[24] On the return of the Applicants' motion, I encouraged the parties to attempt to resolve their dispute which they did.

[25] I am satisfied that the order requested by the CMI Entities should be approved. In that regard, I make the following observations. The new Shaw transaction amends the definitive documentation in respect of the Shaw transaction I already approved to reflect the successful resolution of the express condition regarding the need to resolve the treatment of the Shareholders Agreement. I agree with the statements found in the factum of counsel for the CMI Entities:

> "... the Amended Shaw Transaction represents a number of significant advances in this process relative to the Approved Shaw Transaction. In particular:
>
> (a) the Amended Shaw Transaction is the only transaction available to the CMI Entities that satisfies both of the principal commercial conditions necessary to ensure that the CMI Entities will be able to emerge from the CCAA proceeding as going-concern entities:
>
> (i) Restructured Canwest Global will be owned by a "Canadian" in a manner compliant with the Direction; and
>
> (ii) the Shareholders Agreement has been addressed in a manner satisfactory to the CMI Entities, the Ad Hoc Committee and Shaw.

> (b) the Amended Shaw Transaction will provide long-term stability for the CMI Entities' employees, pensioners, suppliers of television content, customers and other stakeholders.
>
> (c) the Amended Shaw Transaction will provide enhanced value for the CMI Entities' Affected Creditors.
>
> One of the most important benefits of the Amended Shaw Transaction is the resolution of the treatment of the Shareholders Agreement and the release of all the claims of Goldman Sachs in relation to the matters that were the subject of ongoing litigation. The potential effect of a failure to resolve these issues cannot be overstated...
>
> Without a consensual resolution of the treatment of Goldman Sachs' rights under the Shareholders Agreement, the CMI Entities were essentially at an impasse in their efforts to emerge from this CCAA proceeding as a going-concern in the foreseeable future."

[26] The CMI Entities did run an auction of the equity interest they were empowered to sell. I approved both the process, the absence of a fiduciary out provision and the result. Shaw was entitled to exercise liquidity rights in relation to the purchase of other equity interests.

[27] Clear contractual commitments were made to the Noteholders by the CMI Entities. As a result of those commitments, no Plan can be approved without the support of the Noteholders; upon default under the Use of Cash Collateral and Consent Agreement, the Ad Hoc Committee can obtain an assignment of the Irish Holdco notes which would frustrate the viability of another plan which does not have Ad Hoc Committee support and would jeopardize the CMI Entities liquidity.

[28] As to the shareholders, they have made certain allegations relating to commitments made. In the interests of certainty, to avoid delay, and given the evidence and some of the proposed provisions of the Plan, I urged the parties to reach a resolution of their differences.

[29] I am fully supportive of the approval of the Shaw Transaction Agreements. They consist of the Amended Subscription Agreement, the Further Amended Support Agreement, the Amended Shaw Support Agreement as supplemented by the Minutes of Settlement entered into by the CMI Entities, the Shareholder Group, Shaw and the Ad Hoc Committee dated June 23, 2010. The Amended Shaw Transaction Agreement is fair and reasonable and I am pleased that

the parties considered section 6(8) of the CCAA with respect to the structure supporting the Minutes of Settlement and that the $38 million for the Affected Creditors is not impacted by this resolution.

[30] In conclusion, a negotiated resolution of the parties' differences is in the best interests of the CMI Entities and their stakeholders. No one opposed the requested order and it was supported by the Monitor, the Ad Hoc Committee, Shaw, and the Shareholders Group. I am approving the proposed order accepting the filing of a Plan based on the Amended Shaw Transaction, the proposed meeting provisions and approving the Amended Shaw Transaction Definitive Documents.

Pepall J.

Oral Reasons delivered June 23, 2010.
Transcribed Oral Reasons delivered July 12, 2010, with minor amendments.