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

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" (collectively the "APPLICANTS" or "Canwest")

FACTUM OF
GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.l and GS VI AA One Parallel Holding S.ar.l (collectively "GSCP")

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PART I – OVERVIEW

1. The Court has been asked to consider approval of the Shaw Definitive Documents in an expedited manner despite both an incomplete record as well as significant issues about the integrity of the process which led to the proposed transaction and whether the best available transaction has emerged. Any consideration of the Shaw transaction under the settled legal principles applicable to proposed sales under the CCAA is accordingly at best premature, and at worst unsupportable on the current record.

2. GSCP has kept an open mind about the proposed Shaw transaction and has stood by ready and willing to engage in meaningful discussions with any and all transaction participants. The transaction, however, has followed the remarkable theme extant from the inception of these proceedings whereby GSCP has been completely excluded at the behest of the Ad Hoc Committee. Critical aspects of the transaction and process have yet to be made public and GSCP's own access even to redacted transaction documents is being held hostage to onerous standstill demands.

3. What is in the public record about the proposed transaction, however, raises significant concerns. No "fiduciary out" provision is included. Over half of the potential bidders solicited were artificially excluded from the process rather than sign overreaching non-disclosure agreements which would have barred them from aligning themselves with any alternative proposal supported by GSCP. At least one bid was excluded whose proposal was clearly attractive and required no amendment or disclaimer of the CWI Agreement. GSCP was completely shut out from the process yet again, even though any restructuring transaction must ultimately contend with GSCP's rights and interests in CW Investments Co. ("CWI").

4. A huge cloud hangs over the process and requires careful scrutiny. Like all other aspects of these proceedings, the transaction structure appears to have been controlled by the Ad Hoc Committee to serve its own interests. It cannot be a coincidence that the Shaw transaction would enable the Ad Hoc Committee to extract certain minimum cash levels immediately, nor can there be any question that the severe restrictions intended to isolate GSCP are part of the Committee's ongoing efforts to place maximum pressure on GSCP in connection with the endgame of dealing with GSCP in any restructuring.

5. The applicable legal principles are designed to ensure the integrity of a sale process as a basis for the court to conclude that a proposed transaction represents the best available agreement taking into account the interests of all stakeholders. It would be premature to apply these principles on this record, given the concerns crying out from what is already in the public domain. For the same reasons, if that test is applied now, the Shaw transaction cannot pass it.

PART II – THE FACTS

Context

6. There are essentially two businesses at issue in these proceedings. Canwest Global owns the conventional television business. The specialty television business is owned by CWI, of which Canwest Media Inc. ("CMI") has a 67% voting interest and a 35% equity interest, with the balance being owned by GSCP.

7. The specialty television business was acquired in 2007 from Alliance Atlantis. Canwest Global could not have acquired this strategically important business without the financial assistance of GSCP. Fundamental to these proceedings is an attempt by the Ad Hoc Committee to improve their recovery by moving economic value from GSCP by disclaimer or amendment of the agreement among CWI, GSCP, CMI and 441 regarding CWI (the "CWI Agreement"). This attempted appropriation of value is by disclaimer or threat of disclaimer. GSCP will vigorously contest any attempted disclaimer.

8. GSCP's understanding is that the Ad Hoc Committee acquired their Notes in the context of the Canwest Global insolvency. The largest noteholder acquired its interest in October 2009. Other members of the Ad Hoc Committee acquired their interests earlier in 2009. These notes were not acquired at par. The Ad Hoc Committee are speculators who have not created value except for themselves. They now control Canwest Global which must do their bidding and which cannot keep secrets from them.

The Importance of the Use of Collateral and Consent Agreement and the Support Agreement

9. In considering the motion to approve the Shaw Definitive Documents, it is appropriate to understand the serious constraints placed on the Applicants during the equity investment solicitation process.

10. Prior to the Initial Order, the Applicants entered into two important agreements, namely the Use of Collateral and Consent Agreement and the Support Agreement. Some of the terms of these agreements will be described subsequently. Sections 52 and 53 of the Initial Order require that the Applicants perform their obligations under these agreements.

11. In there are onerous economic consequences to breach of the Use of Collateral and Consent Agreement. Specifically, CMI has given a Secured Senior Promissory Note in the amount of $187,263,126.45 and an unsecured Promissory Note in the amount of $430,556,189.08 to its subsidiary Canwest Mediaworks Ireland Holdings (the "Irish Holdco"). These two obligations, totalling $617,819,315.53, become due and payable if an Event of Default occurs under the Use of Collateral and Consent Agreement.

12. In summary, the Applicants have powerful incentives to strictly adhere to the terms of the Use of Collateral and Consent Agreement and the Support Agreement. If there is a breach, the Applicants face (i) the consequences for breach of contract, (ii) consequences for breach of a court order and (iii) acceleration of the $617,819,315.53 due under Secured Senior Promissory Note and a unsecured Promissory Note.

Obligations under the Use of Collateral and Consent Agreement and the Support Agreement

13. The Use of Collateral and Consent Agreement and the Support Agreement commit the Applicants to the Recapitalization Transaction as set out in the Recapitalization Transaction Term Sheet.

Reference: Use of Collateral and Consent Agreement, s. 5(c) and 5(s)

Support Agreement, s. 5(b)(i), (ii) and (iii)

14. The Use of Collateral and Consent Agreement and the Support Agreement commit the Applicants not to pursue any restructuring transaction except as agreed with the Ad Hoc Committee.

Reference: Use of Collateral and Consent Agreement, s. 5(h), 5(q), 5(t)

Support Agreement, s. 5(b)(iv)

15. The Support Agreement requires that the Applicants have approval of the Ad Hoc Committee in respect of all Court filings in these proceedings.

Reference: Support Agreement, s. 5(c)

16. The Use of Collateral and Consent Agreement and the Support Agreement prohibit the Applicants from having any material discussions except as fully disclosed to the Ad Hoc Committee.

Reference: Use of Collateral and Consent Agreement, s. 5(a)(viii), 5(p)

Support Agreement, s. 5(f)

17. It can be fairly said that the Applicants have had no choice but try to find a New Investor strictly on the basis contemplated by the Recapitalization Transaction Term Sheet.

18. These agreements and arrangements were entered into without any notice to, or consultation with, GSCP. Indeed, the Initial Order approving these agreements was obtained without notice to GSCP despite the obvious importance of GSCP as a stakeholder.

The Recapitalization Transaction Term Sheet

19. It is useful to understand the effect of the proposed Recapitalization Transaction in order to understand the impact of approving the Shaw Definitive Documents.

20. The principal amount owing under the Notes is U$393,197,106 and approximately U$30.4 million on account of a missed interest payment. The total owing on the Notes was about U$423.6 million on October 6, 2009 (approximately C$460 million).

Reference: Affidavit of John E. Maguire sworn October 5, 2009, paras. 99 & 102

21. The Recapitalization Transaction requires that $85 million be paid to the Noteholders. This payment will result in a reduced indebtedness to the Noteholders of about $375 million.

Reference: Recapitalization Transaction Term Sheet, paras. A(4) and B(k)

22. The remaining equity in a restructured Canwest Global (i.e. excluding the equity allocated to a New Investor) is essentially to be allocated in three buckets:

(a) The Noteholders are to receive 15.9 % of the remaining equity;

Reference: Recapitalization Transaction Term Sheet, s. A(5)(v)

(b) Affected creditors of Canwest Global and CMI are to receive 38.5% of the remaining equity and the Noteholders are deemed to be creditors in this bucket in the amount of U$761 million (i.e. about C$ 827 million) – nearly twice the amount of their debt.

Reference: Recapitalization Transaction Term Sheet, s. A(5)(iii) & (iv)

(c) Affected creditors of Canwest Television Limited Partnership are to receive 45.6% of the remaining equity and the Noteholders are deemed to be creditors in this bucket in the amount of $800 million – more than twice the amount of their debt;

Reference: Recapitalization Transaction Term Sheet, s. A(5)(iv) & (iv)

(d) The Noteholders who entered into the Support Agreement are entitled to a further share of the remaining equity worth U$5 million;

Reference: Recapitalization Transaction Term Sheet, s. C(5)

(e) In any event, the equity entitlement of affected creditors other than the Noteholders cannot exceed 18.5% of Restructured Canwest.

Reference: Recapitalization Transaction Term Sheet, s. B(i)

23. The Ad Hoc Committee has yet to explain how the Noteholders would be entitled to such a recovery on the basis of indebtedness of $375 million.

24. In order to see the effect of these provisions, assuming:

(a) another creditor of CMI owed $375 million (i.e., what the Noteholders will be owed after the $85 million payment);

(b) no other material creditors; and

(c) 20% of the equity of Restructured Canwest is reserved for the New Investor

the Noteholders would receive 70.4% of Restructured Canwest and the other creditor of the same size would receive 9.6% of Restructured Canwest.

25. Clearly, the treatment of the Noteholders' claims is proposed to be very different than the treatment of other affected creditors.

26. In addition to providing these advantageous terms for the Noteholders, the Recapitalization Transaction Term Sheet targeted GSCP's rights and interests in the CWI Agreement from the outset. Specifically, it is a condition of the Recapitalization Transaction that the CWI Agreement "shall have been amended and restated or otherwise addressed in a manner agreed to by CMI and the Ad Hoc Committee".

Reference: Recapitalization Transaction Term Sheet, s. B(z)

The December Stay Motion

27. As disclaimer or amendment of the CWI Agreement is fundamental to the Shaw Definitive Documents, Justice Pepall's decision of December 8, 2009 is also important context for this motion. In her endorsement, Justice Pepall wrote that:

> [47] A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states: ...
>
> [48] Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

28. Justice Pepall accepted the submissions of the Applicants and the Ad Hoc Committee that it was premature to determine the issues relating to disclaimer. Yet, the transaction now before the Court is conditioned on disclaimer or a consensual amendment leveraged by the threat of disclaimer.

29. The view of the Monitor on this motion, with which Justice Pepall found it "difficult to disagree", was "that a commercial resolution was the best way to resolve the GS Parties' issues". However, the reality with which GSCP has had to contend is that the CCAA process generally and this process in particular have been structured to foreclose anyone other than the Ad Hoc Committee having any negotiations with GSCP.

No consultation with GSCP prior to service of this motion despite ongoing negotiations

30. There have been recent without prejudice negotiations between the Ad Hoc Committee and GSCP. It was GSCP's understanding that these negotiations were on the basis of a standstill agreement which provided that, until negotiations were terminated on seven days notice, neither the Ad Hoc Committee nor GSCP would "initiate, or encourage any other person (including CanWest) to initiate, or accept, approve, or provide any consent to the initiation of, any proceeding ... in any court with respect to the insolvency proceeding of CanWest."

Reference: Affidavit of Gerald Cardinale

31. When the motion materials were served by the Applicants on February 12, 2009, with the consent and approval of the Ad Hoc Committee, the negotiations between GSCP and the Ad Hoc Committee were ongoing. GSCP was shocked at this apparent breach of the standstill agreement. However, counsel for the Ad Hoc Committee has asserted that, because of a supposed computer glitch, this proposed provision was not known to the Ad Hoc Committee when the proposed negotiation terms were accepted by the Ad Hoc Committee.

Reference: Affidavit of Gerald Cardinale

32. In any event, it is unproductive and inappropriate for this motion to have been served without prior disclosure and discussion in the midst of negotiations. This is characteristic of the way that GSCP has been treated and targeted during this CCAA process. Especially given GSCP's understanding that a standstill was in place, this lack of disclosure and discussion has substantially impaired the ability of GSCP to place an alternative to the Shaw transaction before the Court.

Reference: Affidavit of Gerald Cardinale

This process was not approved or supervised by the Court

33. It is noteworthy that the process leading up to this motion was not a sale process pre-approved by the Court. The Court has not approved or supervised this process. The Monitor's involvement was limited to periodic updates. This process and its result are not entitled to deference by this Court and should be carefully scrutinized.

Reference: Affidavit of Thomas C. Strike, para. 11

Has there been a sufficient effort to get the agreement available? Has there been improvidence?

34. The Court cannot conclude on the evidence available that there has been a sufficient effort to get the best agreement available. The Applicants have failed to provide sufficient evidence from which to so conclude. GSCP has been denied access to the agreements for which approval is sought even on a redacted basis. The condition imposed on GSCP to obtain access was both unreasonable and unacceptable, as it would require GSCP to enter into a standstill agreement which would effectively prevent any alternative proposal supported by GSCP to be presented or considered.

Reference: Letters from Oslers dated February 15 and 16, 2010

35. However, even based on the limited information that has been made available, there is much cause for concern.

36. Consistent with the obligations of the Applicants to the Ad Hoc Committee, RBC Capital Markets ("RBC") set out to find an equity investor interested in making a minimum 20% equity investment in a Restructured Canwest.

Reference: Affidavit of Thomas C. Strike, para. 12 and 40

37. RBC provided a "teaser document" to potential participants which indicated that "The Company is seeking at least $65 million in new equity from a Canadian party or parties for a minimum of 20% of the equity in a restructured Canwest".

Reference: "Teaser Document" produced by the Applicants in response to a Request to Inspect

38. Shaw has agreed to make a minimum 20% equity investment. While the Affidavit of Thomas C. Strike does not disclose the price to be paid by Shaw for this 20%, the price will no doubt exceed $65 million and may well be sufficient to fund the $85 million payment to the Noteholders publicly disclosed as a requirement under the Recapitalization Transaction Term Sheet.

39. RBC set out to find an investor willing to invest on the basis contemplated by the Recapitalization Transaction Term Sheet. The Shaw transaction, which is consistent with the Recapitalization Transaction Term Sheet, was the result of this focussed process.

40. That which has been found is that which was sought. There can be no comfort taken from this process that other restructuring alternatives can not be discovered as there has been no attempt to find them.

41. Only 22 of 52 interested potential investors were prepared to execute the mandated form of non-disclosure agreement ("NDA"). This raises a serious concern whether the form of NDA restricted interest. GSCP has been advised by potential investors that this form of NDA prohibited communication with GSCP and that this restriction affected their willingness to participate in the process.

Reference: Affidavit of Thomas C. Strike, para. 12

Affidavit of Gerald Cardinale

42. Given the majority economic interest of GSCP in the specialty television business, the potential for heated litigation regarding disclaimer and the need for any commercially rational bidder to engage with GSCP so as to make necessary economic decisions , it is not surprising that serious players would not choose to become involved in the process. Many sensible potential investors would no doubt want to be able to have discussions with GSCP before committing themselves to their best offer (or any offer).

43. The NDA required that information disclosed to participants be used "only for the Purpose" (as defined below) and "not for any other purpose whatsoever". The Purpose was defined in a recital to the NDA as follows:

> WHEREAS the Support Agreement contemplates that one or more Canadians (as defined in the Direction to the CRTC (Ineligibility of Non-Canadians)) will subscribe for equity in the capital of the Disclosing Party in connection with its emergence from CCAA on terms that are acceptable to CMI and the Ad Hoc Committee (the "Purpose");

Reference: Form of NDA produced by the Applicants in response to a Request to Inspect

44. From the outset, participants in this process had to accept that they could only make proposals "in connection with [Canwest Global's] emergence from CCAA on terms that are acceptable to CMI and the Ad Hoc Committee". In the context of CMI having firmly bound itself to the Ad Hoc Committee as described above and given the potential for serious disputes between the Ad Hoc Committee and GSCP in light of the threat of disclaimer, this form of NDA forced potential

investors, at the very outset of the process, to irrevocably ally themselves with the Ad Hoc Committee. While some potential investors were prepared to do so, others were not prepared to commit as a price of being considered. This constraint limited participation in the process.

Reference: Affidavit of Gerald Cardinale

45. Furthermore, the NDA required a standstill agreement for up to 12 months from any participant. The effect of this standstill is that any participant would be prohibited from *inter alia*:

(a) acquiring or agreeing to acquire, by purchase or otherwise, any equity or debt securities of Canwest Global, CW Investments or any of their subsidiaries where, after giving effect to an acquisition or proposed acquisition, Recipient Party would beneficially own or control, directly or indirectly, in the aggregate, 5% or more of any outstanding class of such securities or publicly propose any of the foregoing;

(b) except as provided for in subparagraph (a), acquiring or agree to acquire, by purchase or otherwise, any debt obligations of the Companies or CW Investments.

Reference: Form of NDA produced by the Applicants in response to a Request to Inspect

46. These standstill provisions restricted participation in the process to potential investors who were prepared to undertake not acquire any material part of GSCP's interest in CWI and not to make any material acquisition of Canwest Global equity or debt without written consent. The effect of these provisions must have been to restrict the number of potential investors prepared to participate in the process to those who were prepared to consider only what was on offer from the Ad Hoc Committee, thereby focusing the range of possible outcomes on the preferred result of Ad Hoc Committee.

47. The NDA also prohibited:

> entering into, offering or agreeing to enter into or engaging in any discussions with any person other than its Representatives with respect to any acquisition or other business combination transaction relating to the Disclosing Party, CW Investments or any of their subsidiaries, or any acquisition transaction relating to all or any material part of the assets of the Disclosing Party, CW Investments, any of their subsidiaries or any of their respective businesses, or publicly propose any of the foregoing.

As such, any participant in the process was prohibited from engaging in discussions with GSCP as a condition of participation. Specifically, the NDA prohibited potential investors from engaging in any discussions with anyone, with respect to any acquisition or other business combination

transaction relating to Canwest Global, CWI or any of their subsidiaries or their respective businesses. This constraint limited participation and also isolated GSCP from this process.

48. It is important to note that the NDA also prohibits participants in the process from purchasing shares or other securities of CWI that do not belong to the Applicants and their subsidiaries. Clearly, the NDA is also designed to prohibit purchase of CWI shares from GSCP thereby reducing the possibility of alternate proposals.

49. Also, the fact that a potential investor was excluded from the process for failure to execute this onerous NDA raises a further concern about this process.

Reference: Affidavit of Thomas C. Strike, para. 16

Consideration of the interests of all parties.

50. There has been no consideration of the interests of GSCP. Subject to one limited exception, potential investors have not been permitted to speak with GSCP. When GSCP reached out to Shaw, GSCP was informed that Shaw was not now permitted to speak with GSCP. In stark contrast, the "Phase 2 Participants" were provided the "opportunity to meet with members of the Ad Hoc Committee prior to submitting their proposals".

Reference: Affidavit of Thomas C. Strike, para. 18

51. GSCP was not consulted about the decisions leading up to the selection of Shaw nor has GSCP been provided with any information regarding the process and the decision beyond that disclosed in the Affidavit of Thomas Strike. Indeed, when GSCP sought to inspect the nearly thirty documents mentioned in the Affidavit of Thomas Strike, only two documents were produced.

Reference: Affidavit of Gerald Cardinale
Affidavit of Susan Kraker

52. GSCP has a legitimate interest in who ultimately controls Canwest Global given that control of Canwest Global results in control of CWI and the speciality television business. This interest has been ignored. While it is possible that, after discussions with Shaw, GSCP could reasonably

conclude that Shaw would be an appropriate controlling partner for GSCP in the specialty television business, any such discussion has been prohibited prior to approval of the Shaw transaction.

53. Of no less importance is the fact that GSCP's rights and interests were targeted by the process described by Mr. Strike and are targeted in the agreements sought to be approved. Apparently, RBC communicated to the Phase 2 Participants that confirmation was sought that the proposed investor "would be willing to proceed with its investment on the basis that [the CWI Agreement] would be amended on terms acceptable to the proposed investor".

Reference: Affidavit of Thomas C. Strike, para. 21(i)

54. In the result, it is a condition of the Shaw Transaction that the CW Agreement be disclaimed or amended in a manner agreed to by Canwest Global, the Ad Hoc Committee and Shaw.

Reference: Affidavit of Thomas C. Strike, para. 51

55. The exclusion of GSCP from this process, the targeting of the rights and interests of GSCP under the CWI Agreement and the prohibition of discussions between GSCP and Shaw before court approval are all fundamental failures to consider the legitimate interests of GSCP. It is particularly telling that GSCP is not even permitted to be informed of Shaw's perspective or to negotiate with Shaw prior to approval of these agreements.

56. Especially in this context, the fact that the Shaw Subscription Agreement does not contain a "fiduciary out" is of grave concern given that amendment or disclaimer of the CW Agreement is a material condition of the proposed Shaw Transaction.

Reference: Tenth Monitor's Report, paras. 31, 38 and 39

57. The failure to require a "fiduciary out" is entirely consistent with the obvious intent of the Ad Hoc Committee to ensure that no alternative can be found or considered. The Ad Hoc Committee has controlled this process throughout and continues to do so. The inevitable inference is that no "fiduciary out" was required in negotiation because the Ad Hoc Committee prefers to foreclose the opportunity for alternative transactions. As court approval of the Shaw Transaction is

required, the directors no doubt perceive that they can not criticized, as could be the case in an ordinary M&A transaction, for failure to require a "fiduciary out".

58. The advantage to the Ad Hoc Committee in there being no "fiduciary out" is plain. It will later be said that disclaimer should be permitted by this Court because, absent disclaimer, there will be no available alternative and that this restructuring will fail. The goal of moving value from GSCP to the Ad Hoc Committee is served by there being no alternative available when disclaimer is sought. The same goal is served by maximizing leverage against GSCP in negotiating amendments to the CWI Agreement.

59. The positions taken before Justice Pepall in December are better understood in this context. In December, Justice Pepall was asked to conclude that issues of disclaimer were premature as disclaimer had not yet been sought. However, at the same time, an equity solicitation process was in progress which presumed disclaimer absent amendment acceptable to the Ad Hoc Committee.

60. It suited the purposes of the Ad Hoc Committee to ensure that disclaimer issues remained open so that the equity solicitation process would result in disclaimer being a condition of any resulting agreement and so, ultimately, it could be argued that restructuring would fail absent disclaimer.

61. In this context, the unexplained failure to insist on a "fiduciary out" fundamentally fails to consider the interests of GSCP. Indeed, this decision causes this restructuring to be put at material risk.

Consideration of the efficacy and integrity of the process by which offers are obtained.

62. Given the lack of detail provided to this Court, it is not reasonably possible to consider the efficacy and integrity of the process. The degree of control exercised over the process and secrecy imposed simply leaves the court in the position of having to trust, or not, the conclusions reached by the Special Committee and Canwest Global. The court is not provided with any comparison of the offers considered nor provided with any specific information as to why the Shaw Transaction was selected.

63. There are reasons to be concerned about the efficacy and integrity of the process. Peter Farkas, a senior and experienced Restructuring Professional, has reviewed the information disclosed by the Applicants for consideration by the court and by stakeholders. As Mr. Farkas testifies:

(a) There is much undisclosed information that would normally be known in order to assess the commercial reasonableness of the process;

(b) Approval of the Shaw transaction will limit the ability to explore options which might be available if full details of the RBC marketing process were known;

(c) Time and authority should be allowed to permit discussions with GSCP before approval is considered by the Court in light of the importance of the CWI Agreement and the potential for a negotiated outcome that is more favourable to all stakeholders;

(d) There is important information which should be made available about the Shaw transaction and about the anticipated position of the Noteholders in the anticipated plan;

(e) There does not appear to be any genuine urgency given that the Applicants are generating positive cash flow, are able to meet their operating obligations, have not drawn on their DIP facility and there is no evidence in the record of any adverse effect of delayed approval; and

(f) The agreements sought to be approved were months in development. To expect an informed position on the merits to be developed on such short notice is not realistic, particularly given the absence of key information.

Reference: Affidavit of Peter P. Farkas

64. While GSCP has attempted to obtain further information by way of a request to inspect documents and otherwise, the position of the Applicants is that only limited redacted information will be provided and then only on the basis of yet another onerous confidentiality agreement which includes a standstill agreement effectively preventing any alternative being proposed that is supported by GSCP.

Consideration of unfairness in the working out of the process.

65. As described previously, this equity solicitation process has been conducted so as to exclude and isolate GSCP notwithstanding the legitimate interest of GSCP in the identity of any new controlling partner in the specialty television business and notwithstanding the targeting of the rights and interests of GSCP under the CWI Agreement. This is obviously unfair.

66. The targeting of GSCP's rights and interests and foreclosing of any other alternative which does not involved disclaimer or amendment is fundamentally unfair to GSCP. The progressive limitation of alternatives is obviously designed both to leverage amendments from GSCP and to place this court in the position, on a disclaimer motion, whereby the alternative to disclaimer will be said to be disastrous. All of this is obviously by design of the Ad Hoc Committee.

67. In the end, this process should be seen for what it is – a scheme designed to maximize the return enjoyed by recent purchasers of Notes at a discount. There is simply no other effect. The business and operations of Canwest Global are unaffected. This scheme is designed, pure and simple, to take value from GSCP and to destroy the basis upon which the specialty television business was acquired from Alliance Atlantis.

PART III – THE LAW

68. In *Royal Bank of Canada v. Soundair Corp.*, the Court of Appeal considered "the duties which a court must perform when deciding whether a receiver who has sold a property acted properly."

Reference: *Royal Bank of Canada v. Soundair Corp et al* (1991), 4 O.R. (3d) 1

69. Specifically, it was concluded that the Court::

(a) should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

(b) should consider the interests of all parties.

(c) should consider the efficacy and integrity of the process by which offers are obtained.

(d) should consider whether there has been unfairness in the working out of the process.

Reference: *Royal Bank of Canada v. Soundair Corp et al* supra.

70. *Soundair* has recently been applied in court approvals of sales under the CCAA.

Reference: *Eddie Bauer of Canada, Inc (Re)*, 2009 CanLII 48527 at paras. 18 to 23

Intertan Canada Ltd. (Re), 2009 CanLII at paras. 9 to 11.

71. However, the application of the *Soundair* principles assumes that a sale process has previously been approved by the Court and that it is the subsequent actions of the court officer that are subject to approval. This sale process has not been previously approved by the Court and was undertaken by the Applicants rather than a court officer. Accordingly, the *Soundair* principles are only a starting point in this case and greater scrutiny is appropriate.

72. Justice Morawetz recently addressed the factors to be considered on the approval of a sale process under the CCAA as follows:

> I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:
>
> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
>
> (d) is there a better viable alternative?
>
> I accept this submission.

Reference: *Nortel Networks Corporation (Re),* (2009), 55 C.B.R. (5th) 229 at para. 49

73. It is noteworthy that these factors were considered by Justice Morawetz to be applicable in the consideration of a proposed sale process on the expectation that the result of the sales process would be later judged on the *Soundair* principles.

Reference: *Nortel Networks Corporation (Re),* supra. at para. 53

74. It is accordingly submitted that the approval sought by the Applicants is now properly tested against factors set out in both *Nortel* as the *Soundair*.

75. It is submitted that the Shaw Transaction is (i) premature as it is premised on a disclaimer that has not yet been (and may never be) approved by this Court; (ii) designed to benefit the Ad Hoc Committee and not the entire economic community, (iii) designed to close doors so as to achieve with the intended result of disclaimer to which GSCP has a bona fide objection and (iv) the result of a process which did not seek alternatives other than an equity investment premised on disclaimer or amendment of the CWI Agreement.

76. As previously submitted, application of the *Soundair* does not now permit approval of the Shaw Transaction.

PART IV – ORDER SOUGHT

77. GSCP seeks:

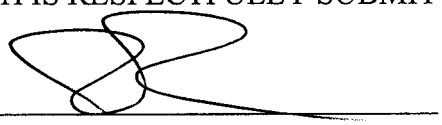
(a) an adjournment of the motion by the Applicants for at least two weeks;

(b) directions permitting discussion between GSCP and Shaw as well as between GSCP and the Applicants without the requirement that the Ad Hoc Committee participate or have disclosure of what is discussed; and

(c) directions permitting GSCP access to information relating to the process leading up to Shaw Definitive Documents and to the Shaw Definitive Documents without being required to enter into the form of agreement now required by the Applicants.

78. Alternatively, GSCP asks that the motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Kevin McElcheran

Malcolm Mercer