

**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 EXHIBIT "A"**

FACTUM OF THE AD HOC COMMITTEE

(Motions Returnable December 8, 2009)

December 6, 2009

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PART I – OVERVIEW

1. This factum is filed by the *ad hoc* committee of holders of the 8% Senior Subordinated Notes issued by Canwest Media Inc. in support of the motion by the CMI Entities (the “**Canwest Motion**”) for, *inter alia*, a declaration that certain relief sought in the Notice of Motion of the GS Parties dated November 2, 2009, as amended by the Amended Notice of Motion of the GS Parties dated November 19, 2009 (collectively the “**Goldman Motion**”), is stayed by operation of the Initial Order.¹

2. This factum is also filed in opposition to the cross-motion of the GS Parties dated December 3, 2009, pursuant to which Goldman is seeking leave to lift the stay of proceedings in respect of the CMI Entities to allow the GS Parties to pursue the relief sought in the Goldman Motion (the “**Goldman Cross-Motion**”).

¹ All capitalized terms used but not otherwise defined herein have the meaning ascribed to them in the affidavit of Thomas C. Strike sworn November 24, 2009.

3. The Canwest Motion should be granted because the relief sought by the GS Parties in the Goldman Motion is clearly stayed. The Goldman Cross-Motion should be dismissed because there are no grounds for lifting the stay.

PART II – THE FACTS

A. Background

4. 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 order of this Honourable Court, dated October 6, 2009 (the “**Initial Order**”). FTI Consulting Canada Inc. was appointed as monitor of the CMI Entities (the “**Monitor**”).

5. The Initial Order provided a comprehensive stay of proceedings in favour of the Canwest Entities until November 5, 2009. The stay of proceedings was subsequently extended until January 22, 2010.

Initial Order, para 15; Order of Pepall J. dated October 30, 2009, para 11.

6. On October 14, 2009, this Honourable Court granted an order setting out a procedure for the identification, adjudication and final determination of all claims against the CMI Entities (the “**Claims Procedure Order**”). Creditors of the CMI Entities who are stayed by the Initial Order are permitted to prove their claims against the CMI Entities using the process set forth in the Claims Procedure Order.

Order of Pepall J. dated October 14, 2009.

7. The CMI Entities intend to pursue a plan of arrangement under the CCAA (the “**Plan**”) in respect of a recapitalization of the CMI Entities on the basis of a term sheet (the “**Term Sheet**”)

that was negotiated and agreed to by the CMI Entities and an *ad hoc* committee (the “**Ad Hoc Committee**”) of holders of approximately 72% of CMI’s 8% senior subordinated notes due 2012 (the “**8% Notes**”). The holders of the 8% Notes who support the Term Sheet have executed a support agreement pursuant to which they have agreed to vote in favour of the Plan at any meeting of CMI’s creditors, subject to satisfaction of certain conditions and milestone dates, including a requirement that the CMI Entities obtain approval of the Plan from the requisite majorities of creditors prior to January 30, 2010. The Support Agreement and Term Sheet represent the culmination of extensive arm’s length negotiations between the CMI Entities and the Ad Hoc Committee. The Term Sheet is conditional upon the satisfaction or waiver of certain conditions precedent, including a requirement that the Shareholders Agreement (as hereinafter defined) be amended and restated or otherwise addressed in a manner satisfactory to CMI and the Ad Hoc Committee.

Affidavit of John Maguire sworn October 5, 2009 (the “Maguire Affidavit”), para. 18 and 175.

Term Sheet, attached at Exhibit “O” to the Maguire Affidavit.

B. The Shareholders Agreement and 4414616 Canada Inc.

8. The Canwest Parties and the GS Parties are party to an amended and restated shareholders agreement dated as of August 15, 2007 (the “**Shareholders Agreement**”) in respect of CW Investments Co. (“**CW Investments**”), the company through which they jointly own their interests in the Specialty TV Business. The rights of the Canwest Parties and the GS Parties under the Shareholders Agreement are unsecured rights.

Strike Affidavit, para 17.

Shareholders Agreement, attached as Exhibit “C” to the Strike Affidavit.

9. 4414616 Canada Inc. (“441”) was one of the Canwest Parties originally party to the Shareholders Agreement. 441 was not a critical party to the Shareholders Agreement. CW Investments is a Nova Scotia unlimited liability company. Accordingly, CMI chose at its discretion to hold its shares in CW Investments through a wholly owned subsidiary corporation, 441, so that 441 would serve as a “blocker” company that insulated CMI from potential exposure as a shareholder in the event of a liquidation or bankruptcy of CW Investments. That was always subject to CMI’s express rights under the Shareholders Agreement to cause 441 to transfer its CW Investments shares to CMI or other permitted affiliates.

Strike Affidavit, para. 22, 23 and 25.

Shareholders Agreement, attached as Exhibit “C” to the Strike Affidavit.

10. The Shareholders Agreement was intensely and carefully negotiated by two highly sophisticated commercial parties. The parties were scrupulously conscious of the need to protect their own interests under various scenarios, and every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Shareholders Agreement.

Among other things:

- (a) Section 6.5(a) of the Shareholders Agreement expressly provided that 441 could transfer its CW Investments shares to CMI at any time, by gift, assignment or otherwise, whether or not for value.
- (b) The Canwest Parties and the GS Parties chose carefully which entities in the CW Investments corporate structure could and could not be dissolved. In that regard, the Shareholders Agreement provided that a certain specified entity within the CW Investments corporate structure could not be dissolved, but contained no such prohibition on the dissolution of 441.
- (c) The operative obligations of the Canwest Parties are obligations of CMI, not 441. Other than certain voting obligations carried out at the direction of CMI, 441 had

only generic obligations under the Shareholders Agreement that were applicable to all parties.

- (d) The parties to the Shareholders Agreement recognized that CMI was in fact the force and substance behind 441, as evidenced by the fact that CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

Strike Affidavit, para. 17 and 21.

Shareholders Agreement, attached as Exhibit "C" to the Strike Affidavit.

C. Transfer of Shares from 441 to CMI and Dissolution of 441

11. On October 5, 2009, 441 transferred its shares in CW Investments to CMI in compliance with the terms of the Shareholders Agreement. CMI undertook to pay and discharge all of 441's liabilities and obligations. 441 was subsequently dissolved in compliance with the *Canada Business Corporations Act* R.S.C. 1985, c. C-44 (the "CBCA").

Strike Affidavit, para 57.

12. CMI's interest in CW Investments is a significant portion of its overall enterprise value and therefore critical to any successful restructuring or recapitalization of the CMI Entities. CMI effected the share transfer and dissolution to protect a valuable asset in the interests of the CMI Entities and all of their stakeholders. In compliance with the terms of the Shareholders Agreement, the CMI Entities took valid steps to ensure that the shares were held by CMI at the time of the CCAA filing so as to be protected by the stay ordered by this Honourable Court, and thus available to play a part of the long-term future of the restructured or recapitalized CMI Entities.

Strike Affidavit, para 8, 74 and 78.

13. For the purpose of the Canwest Motion and the Goldman Cross-Motion only, the parties have agreed that the Court should assume that the transfer of the shares from 441 to CMI and the dissolution of 441 was intended by CMI to provide CMI with the benefit of all the provisions of the CCAA proceedings in relation to those shares and contractual obligations pertaining to those shares.

Agreement Among Counsel Re Certain Motions, dated December 3, 2009.

D. Purported Revival of 441

14. On November 11, 2009, the GS Parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities are of the view that the purported revival of 441 was a violation of the stay of proceedings in the Initial Order.

Strike Affidavit, para 66.

E. Goldman Motion

15. The GS Parties brought the Goldman Motion on November 2, 2009, subsequently amended on November 19, 2009. Paragraph 1 of the Goldman Motion seeks an Order, *inter alia*:

- (a) setting aside and declaring void the transfer of the shares from 441 to CMI;
- (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
- (c) setting aside or amending paragraph 59 of the Initial Order of Pepall J, dated October 6, 2009 to the extent that it purports to declare that certain pre-filing transactions entered into by the Applicants do not constitute fraudulent

preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law;

- (d) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer described in (a) above;
- (e) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer described in (a) above, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
- (f) if necessary, a trial of the issues arising from the foregoing.

Goldman Motion, para 1.

F. Canwest Motion

16. On November 24, 2009, the CMI Entities brought the Canwest Motion pursuant to which they are seeking, *inter alia*, an order consensually resolving the matters raised in paragraph 1(c) of the Goldman Motion and a declaration that all other relief sought in the Goldman Motion is stayed by the Initial Order.

Canwest Motion para 1 and 2.

G. Goldman Cross-Motion

17. On December 3, 2009, Goldman brought the Goldman Cross-Motion pursuant to which it is seeking leave, if necessary, to allow the GS Parties to pursue the relief sought in the Goldman Motion.

Cross-motion of the GS Parties dated December 3, 2009, para 1.

PART III – ISSUES AND THE LAW

A. The Stay of Proceedings applies to the relief sought in the Goldman Motion

18. Paragraphs 15 and 16 of the Initial Order provide a comprehensive stay of proceedings on the following terms:

NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY

15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order [currently January 21, 2010] (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the CMI Entities ... or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA ... or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. ...

NO EXERCISE OF RIGHTS OR REMEDIES

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the CMI Entities ... or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA ... or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

Initial Order, paragraphs 15 and 16.

Paragraphs 1(a), 1(b) and 1(d) of the Goldman Motion

19. The relief sought by the GS Parties paragraphs 1(a), 1(b) and 1(d) of the Goldman Motion clearly contravenes the terms of paragraphs 15 and 16 of the Initial Order.

20. The GS Parties' request in paragraph 1(a) of the Goldman Motion for an order setting aside and declaring void the transfer of the Shares from 441 to CMI constitutes an effort to remove valuable property from CMI. The court proceedings necessary to achieve such a result are clearly proceedings against the CMI Entities affecting the CMI Business and the CMI Property. Such proceedings are expressly prohibited from being commenced pursuant to paragraph 15 of the Initial Order.

21. Moreover, the GS Parties assert certain rights and remedies as the basis for the relief sought in paragraph 1(a) of the Goldman Motion, including unnamed rights under the Shareholders Agreement and remedies for allegedly oppressive conduct. These are rights and remedies against the CMI Entities affecting the CMI Property and the CMI Business that are expressly stayed by paragraph 16 of the Initial Order.

22. Paragraphs 1(b) and 1(d) of the Goldman Motion, though differently worded, both seek to obtain Orders against CMI that would require it to perform certain contractual obligations. As such, these paragraphs seek relief that would constitute the exercise of a right or remedy against CMI and would affect the CMI Business and the CMI Property in violation of paragraph 16 of the Initial Order. Moreover, the court proceedings necessary to cause CMI to perform these obligations are plainly proceedings against the CMI Entities affecting the CMI Business and the CMI Property, which are stayed by paragraph 15 of the Initial Order.

Paragraph 1(e) of the Goldman Motion

23. As for the GS Parties' request in paragraph 1(e) of the Goldman Motion for an order declaring that CMI cannot repudiate certain of the obligations it assumed from 441, this is essentially a request for the Court to create and give effect to a right in favour of the GS Parties

to deprive CMI of the opportunity to invoke the machinery in s. 32 of the CCAA, which deals with the ability of a debtor company to disclaim or resiliate a contract. The right sought by the GS Parties is not the right to contest such a disclaimer or resiliation under s.32 of the CCAA. Rather, the GS Parties seek to enforce an alleged freestanding right outside the CCAA to prevent CMI's resort to the CCAA's provisions. Leaving aside whether such a right could exist, the enforcement of such a right by the GS Parties would clearly violate paragraph 16 of the Initial Order.

The GS Parties cannot avoid the stay by purportedly seeking relief with in the CCAA

24. There is no merit to the GS parties' contention that the relief they seek is not stayed simply because they seek it by way of a motion in the CCAA proceedings. Paragraphs 24 and 25 of the *Campeau* decision do not support the GS Parties' contention. It is the substance of the GS Parties' claims, not the form, which must govern the ability to pursue them. The claims, in substance, are claims that are stayed by the Initial Order.

B. Purpose of the Stay of Proceedings

25. The stay of proceedings is the mechanism that enables a debtor company to facilitate a restructuring of its affairs under the CCAA. Its fundamental purpose is to provide a debtor company with the opportunity to negotiate a viable compromise or arrangement with its creditors without having to devote time and scarce resources to defending legal actions against it.

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) ["*Campeau*"] at para. 20.

26. In *Campeau v. Olympia & York Developments Ltd.*, Blair J. described the purpose of the stay of proceedings as follows:

By its formal title, the CCAA is known as an “Act to facilitate compromises and arrangements between companies and their creditors”. To ensure the effective nature of such a “facilitative” process it is essential that the debtor company be afforded a respite from litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

Campeau at para. 17.

27. A second fundamental purpose of the stay of proceedings is to preserve a level playing-field among creditors of the debtor company so that no one creditor will have an advantage over other creditors while the company is attempting to restructure its affairs.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 at para. 12.

28. The relief being sought by the GS Parties in the Goldman Motion offends both fundamental purposes of the CCAA stay of proceedings.

The Goldman Motion would undermine the objective of protecting the CMI Entities from litigation that would impair the restructuring

29. If the Goldman Motion were permitted to proceed, the CMI Entities would be required litigate multiple issues of significant magnitude, including contract interpretation issues as well as allegations of fraudulent conveyances, abuse of process and oppression.

Goldman Motion para 1(a).

30. Compliance with the GS Parties’ documentary requests in respect of the Goldman Motion alone would take hundreds of hours and would cost the CMI Entities, at a minimum, hundreds of thousands of dollars. Furthermore, the individuals who would be required to direct and participate in any litigation arising from the Goldman Motion would be the same individuals who are responsible for advancing the CMI Entities’ restructuring and recapitalization efforts.

Strike Affidavit para. 86.

31. The fundamental purpose of the CCAA stay of proceedings would be eviscerated if the GS Parties were able to proceed with the Goldman Motion.

Proceeding with the Goldman Motion would undermine the objective of maintaining fairness among creditors

32. All creditors of the CMI Entities are stayed from pursuing their claims against the CMI Entities and the CMI Property. Any creditors with such claims are instead required to prove their claims as part of the process set forth in the Claims Procedure Order.

Initial Order para. 15 and 16; Claims Procedure Order.

33. Allowing the GS Parties to pursue the Goldman Motion while all other creditors are stayed and forced to submit to the terms of the Claims Procedure Order would confer a privileged status on the GS Parties relative to the CMI Entities' other creditors.

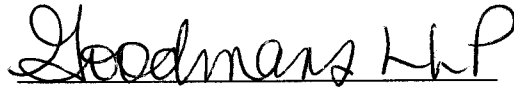
34. The GS Parties should not be given any special treatment relative to other creditors of the CMI Entities with respect to their claims.

PART IV – RELIEF REQUESTED

35. In light of the foregoing, the Ad Hoc Committee supports the CMI Entities' request for an Order declaring that the relief sought in paragraphs 1(a), 1(b), 1(d) and 1(e) of the Goldman Motion is stayed by operation of the Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 6, 2009


GOODMANS LLP

Counsel for the Ad Hoc Committee

SCHEDULE "A" – LIST OF AUTHORITIES

AUTHORITY

1. *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).
2. *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C).

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

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