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

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"

APPLICANTS

FACTUM OF THE APPLICANTS
(Approval of Subscription Agreement
Returnable February 19, 2010)

PART I – NATURE OF THIS MOTION

1. This factum is filed by Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed on Schedule "A" hereto (the "**Applicants**") and the Partnerships listed on Schedule "B" hereto (the "**Partnerships**" and, together with the Applicants, the "**CMI Entities**") seeking an Order (the "**Approval Order**") approving certain agreements related to the proposed equity investment by Shaw Communications Inc. in a Restructured Canwest Global (the "**Shaw Transaction**").

2. The CMI Entities submit that the Shaw Transaction is fair and reasonable and that it is beneficial to the stakeholders of the CMI Entities, viewed as a whole. It is the product of a comprehensive equity investment solicitation process conducted by a sophisticated financial advisor and of the exercise of the business judgement of the Board of Directors of Canwest Global, on the recommendation of the Special Committee and the CMI CRA, as to the best interests of the CMI Entities.

3. GS Capital Partners VI Fund, L.P., GSCP VI AA One Holding S.ar.l and GSCP VI AA One Parallel Holding S.ar.l. (collectively, "**Goldman Sachs**"), on the basis of its status as counterparty with Canwest Media Inc. ("**CMI**") to the CW Investments Shareholders Agreement

(the "**Shareholders Agreement**"), now objects and seeks to delay this Honourable Court's approval of the Shaw Transaction on several bases.

4. Despite the fact that Goldman Sachs has no contractual or legal right to dictate the terms of the equity investment solicitation process, Goldman Sachs complains that it should have been consulted and allowed to participate in the process. Effectively, Goldman Sachs is advancing these objections in order to obtain further negotiating leverage in relation to the resolution of the manner in which the Shareholders Agreement will be addressed in this CCAA proceeding. In the absence of any legal right to dictate the equity holdings of a Restructured Canwest Global, Goldman Sachs' attempt to secure a negotiating advantage for itself simply cannot be a valid obstacle to this Honourable Court's approval of the Shaw Transaction.

5. No rights of Goldman Sachs will be affected or confiscated if the Shaw Transaction is approved. In fact, the situation is quite the opposite. The Shaw Transaction provides: (i) that the parties will jointly pursue a consensual amendment to the Shareholders Agreement; (ii) that the parties are not required to pursue disclaimer of the Shareholders Agreement; and (iii) that the Ad Hoc Committee and the CMI Entities can pursue an agreement to amend the Shareholders Agreement with Goldman Sachs that is not agreed to by Shaw (a Termination Fee is payable to Shaw in these circumstances). The Shaw Transaction does not change matters with respect to Goldman Sachs. It does, however, satisfy a crucial step in the restructuring by satisfying a key condition of the Recapitalization Transaction.

6. Goldman Sachs seeks to allow its own desire for negotiating power to trump the interests of the CMI Entities' stakeholders overall and to override the judgement of the Board of Canwest Global, Senior Management of Canwest Global, the CMI CRA, RBC and the Monitor. In the absence of any evidence that Goldman Sachs has legitimate rights that are being confiscated by the Shaw Transaction, it is respectfully submitted that this Honourable Court should not allow Goldman Sachs' self-interest to put the Shaw Transaction at risk, to the detriment of the CMI Entities' stakeholders as a whole.

PART II – FACTS

7. The facts with respect to this Motion are more fully set out in the Affidavit of Thomas C. Strike sworn on February 12, 2010 (the "**Strike Affidavit**"). Capitalized terms in this Factum not otherwise defined have the same meanings as in the Strike Affidavit.

Background

8. On October 5, 2009, the CMI Entities entered into a Support Agreement with the members of the Ad Hoc Committee. The Support Agreement had attached to it the Restructuring Term Sheet that set out the summary terms and conditions of a consensual Recapitalization Transaction. The Support Agreement and Restructuring Term Sheet represented the culmination of many months of arm's length negotiations between the CMI Entities and the Ad Hoc Committee.[1]

9. The Support Agreement provided that the CMI Entities would pursue the Plan on the terms set out in the Restructuring Term Sheet in order to implement the Recapitalization Transaction as part of this CCAA proceeding. The Restructuring Term Sheet provided, *inter alia*, that creditors of the CMI Entities whose claims are compromised under the Plan, including the 8% Senior Subordinated Noteholders, would receive shares of a Restructured Canwest Global which would be a publicly-listed company on the TSX.[2]

10. The Restructuring Term Sheet also provided that one or more Canadians (the "**New Investors**") (as defined in the CRTC Direction) would invest at least $65 million in Restructured Canwest Global. It was acknowledged that any New Investors must qualify as Canadians in order to satisfy ownership requirements that apply to broadcasters operating under licence from the CRTC. The equity investment in Restructured Canwest Global had to be acceptable to the Ad Hoc Committee.[3]

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1 Strike Affidavit, para. 7.

2 Strike Affidavit, para. 8.

3 Strike Affidavit, para. 9.

The Equity Investment Solicitation Process

11. On or about December 10, 2008, Canwest Global, on behalf of itself and its subsidiaries, entered into an agreement with RBC, relating to RBC's provision of investment banking services to Canwest Global and its subsidiaries. Since that time, the CMI Entities have worked closely with RBC in developing the proposed Recapitalization Transaction. During the course of its engagement, RBC has developed detailed and intimate knowledge of the business of the CMI Entities and has been uniquely positioned to design and conduct an equity investment solicitation process on behalf of the CMI Entities to attract the New Investors required to implement the Recapitalization Transaction.[4]

12. On or about November 2, 2009, RBC commenced an equity investment solicitation process required to implement the Recapitalization Transaction and, in particular, to identify potential New Investors that, among other things, would satisfy the requirement of being Canadian for purposes of the CRTC Direction. RBC conducted the equity investment solicitation process in two phases. The CMI CRA was actively involved in all aspects of the equity investment solicitation process. The Monitor was provided with periodic updates during the process.[5]

13. In Phase 1 of the equity investment solicitation process, RBC contacted approximately 90 potential investors to inquire whether they would be interested in making a minimum 20% equity investment in Restructured Canwest Global. During the course of initial discussions with potential investors that indicated an interest in an alternative transaction, 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 and was generated by RBC through its own internal sources and in consultation with the CMI Entities, the CMI CRA and the Ad Hoc Committee. In total, 52 potential investors expressed interest in the investment opportunity and were sent a "teaser" document and a form of NDA. The "teaser" was based upon public information and provided a high-level overview of the investment opportunity and the equity investment solicitation process, and was designed to assist potential investors in determining whether to execute a NDA and receive more detailed and

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4 Strike Affidavit, para. 10.

5 Strike Affidavit, para. 11.

confidential information regarding the CMI Entities. Ultimately, 22 potential investors executed NDAs and received a more comprehensive confidential information memorandum and access to an internet-based data room containing further confidential information including financial models and operational information. Throughout the equity investment solicitation process, RBC and the CMI Entities continued to update the internet-based data room to ensure that accurate and timely information was provided to the participants in the process.[6]

14. Potential investors that executed a NDA were invited to submit non-binding proposals, along with a mark-up of a proposed equity investment term sheet provided to them by RBC on behalf of the CMI Entities, by no later than December 2, 2009. Potential investors were advised to specifically raise significant proposed modifications to the proposed equity investment term sheet, and it was recommended that RBC be given advance notice of significant structuring issues or other significant changes that potential investors were going to propose to the term sheet. RBC also advised the potential investors that any party seeking to pursue a potential equity investment in Restructured Canwest Global was expected to prepare and submit a non-binding Initial Proposal. Potential investors were informed that Canwest Global would favour investors that placed the highest equity value on Restructured Canwest Global and demonstrated the ability and willingness to complete due diligence and documentation within the required timeline.[7]

15. Participants in Phase 1 were also informed that if an interested party's Initial Proposal met Canwest Global's objectives, then that party would be invited to commence the next phase of the process, and would be allowed to perform confirmatory due diligence and would have the opportunity to meet with Canwest Global's senior management team.[8]

16. As of December 2, 2009, six potential investors submitted Initial Proposals as part of the equity investment solicitation process. Based upon the recommendation of RBC, five of

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6 Strike Affidavit, para. 12.

7 Strike Affidavit, para. 13.

8 Strike Affidavit, para. 15.

the six potential investors that submitted Initial Proposals as part of the formal process were invited to participate in Phase 2 of the equity investment solicitation process.[9]

17. RBC commenced Phase 2 shortly after the receipt of the non-binding Initial Proposals. As part of Phase 2, the CMI Entities' senior management team, together with RBC, met with and provided each Phase 2 Participant with a detailed management presentation as well as further detailed and confidential information regarding the investment opportunity to facilitate each party's ongoing due diligence. The management presentations provided the opportunity for Phase 2 Participants to ask RBC and senior management of the CMI Entities specific questions about the business and the investment opportunity. Further, RBC arranged, to the extent required, for additional business and legal due diligence sessions with the CMI Entities' management and their legal and financial advisors as part of Phase 2. The CMI Entities continued to add further information to the internet-based data room in response to information requests from the Phase 2 Participants.[10]

18. On December 22, 2009, RBC informed the Phase 2 Participants that the deadline for the submission of final binding offers would likely be during the latter half of January 2010. RBC informed the Phase 2 Participants that, in addition to ongoing access to the CMI Entities' senior management team and RBC, they would also have the opportunity to meet with members of the Ad Hoc Committee prior to submitting their proposals. In advance of any such meetings, RBC requested that Phase 2 Participants provide certain additional information, including the status of due diligence and any further information requests and their then current thinking on the proposed ownership/governance structure of Restructured Canwest Global, taking into account CRTC requirements.[11]

19. Four of the five Phase 2 Participants met with the CMI Entities, RBC, the CMI CRA and certain representatives of the Ad Hoc Committee to discuss the potential equity

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9 Strike Affidavit, para. 16.

10 Strike Affidavit, para. 17.

11 Strike Affidavit, para. 18.

investment. The fifth Phase 2 Participant withdrew from the equity investment solicitation process.[12]

20. On January 20, 2010, RBC informed the four remaining Phase 2 Participants that final binding offers were required to be received by 5:00 p.m. on January 27, 2010. The Phase 2 Participants were provided with a copy of a proposed equity subscription agreement together with an attached term sheet for the proposed equity investment. The attached term sheet was based upon the form of term sheet provided in Phase 1, amended to be consistent with the provisions incorporated in the proposed subscription agreement. [13]

21. In order to assist the parties with their Formal Bids, RBC communicated to Phase 2 Participants a number of criteria that Canwest Global and RBC would consider in evaluating any offers (many of which were similar to the criteria communicated prior to the receipt of the Initial Proposals), including, *inter alia*, confirmation that the proposed investor would be willing to proceed with its investment on the basis that the Shareholders Agreement would be amended on terms acceptable to the proposed investor.[14]

22. Two Formal Bids were received from Phase 2 Participants by RBC prior to the January 27, 2010 deadline, one of which was the Formal Bid from Shaw Communications. Both Formal Bids included mark-ups of the proposed equity subscription agreement and subscription term sheet for the proposed equity investment. RBC and the CMI Entities, in consultation with the Ad Hoc Committee and the CMI CRA, proceeded to discuss each Formal Bid with each of the Formal Bidders in an attempt to reach an agreement with a prospective New Investor that would secure the best possible transaction in the circumstances and which would allow the CMI Entities to proceed to finalize the Plan and seek to emerge from CCAA protection as a viable going concern business.[15]

23. Over the next several days, numerous follow-up discussions were held with RBC, the CMI Entities, the CMI CRA, the Ad Hoc Committee and Shaw and their respective advisors

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[12] Strike Affidavit, para. 19.

[13] Strike Affidavit, para. 20.

[14] Strike Affidavit, para. 21.

[15] Strike Affidavit, para. 22.

to negotiate the terms of the Subscription Agreement (together with the Subscription Term Sheet), Amended Support Agreement and Shaw Support Agreement (the "**Shaw Transaction Documents**"). The Monitor and its counsel were provided with drafts of the documents and participated in discussions with the advisors to the CMI Entities. The CMI Entities also provided information to Shaw to allow it to complete its confirmatory due diligence. At the same time, discussions were also held between RBC, the CMI Entities, the Ad Hoc Committee and the other Formal Bidder and their respective advisors, in respect of the other Formal Bid.[16]

The Shaw Transaction

24. On February 11, 2010, after many days of extensive, arm's length negotiations between RBC, the CMI Entities, the Ad Hoc Committee and the Formal Bidders and their respective advisors, the Special Committee of Canwest Global met to consider the Formal Bids. The Special Committee duly considered the Formal Bids, having regard to the best interests of Canwest Global. After due consideration, the Special Committee recommended to the board of directors of Canwest Global that it approve, and the Board approved, the Shaw Transaction Documents. The CMI Entities' senior management, the CMI CRA, and the Ad Hoc Committee support the entering into of such agreements. The Shaw Transaction Documents have been executed by the respective parties thereto (including, in the case of the Shaw Support Agreement and the Amended Support Agreement, by the members of the Ad Hoc Committee) and, should the Approval Order requested of this Honourable Court be granted, such agreements will become effective and legally binding on the parties thereto [17]

25. The basic elements of the equity investment made by Shaw, as reflected in the Shaw Transaction Documents, are as follows:

(a) Rather than restructure Canwest Global as a public company, Restructured Canwest Global will be a private company, the shareholders of which will be comprised of Shaw Communications or a direct or indirect wholly-owned subsidiary of Shaw Communications that is Canadian as defined in the CRTC Direction (Shaw Communications and any such designated wholly-owned

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16 Strike Affidavit, para. 26.

17 Strike Affidavit, para. 28.

subsidiary being collectively referred to herein as "**Shaw**") and those 8% Senior Subordinated Noteholders and other creditors of Canwest Global that elect to receive equity shares of Restructured Canwest Global and that will hold at least 5% of the equity shares of Restructured Canwest Global following the completion of the proposed Recapitalization Transaction (collectively, the "**Participating Creditors**");[18]

(b) Creditors that will hold less than 5% of the equity shares of Restructured Canwest Global upon completion of the Recapitalization Transaction (the "**Non-Participating Creditors**") and Existing Shareholders will receive cash payments (rather than equity shares of Restructured Canwest Global) to extinguish their interests to be affected pursuant to the Plan;[19]

(c) the amount of cash to be distributed to each Non-Participating Creditor will be equal to the value of the equity they would otherwise have received under the Recapitalization Transaction as originally proposed but using the higher implied equity value contained in the Shaw Transaction Documents;[20]

(d) Shaw will subscribe for that number of Class A Voting Shares in the capital of Restructured Canwest Global that will represent a 20% minimum equity subscription by Shaw in the capital of Restructured Canwest Global in a specified amount and an 80% voting interest in Restructured Canwest Global immediately following completion of the Recapitalization Transaction (the "**Minimum Shaw Commitment**");[21] and

(e) in addition to the Minimum Shaw Commitment, Shaw will subscribe for an additional commitment of equity shares of Restructured Canwest Global at the same price per share (the "**Additional Commitment**") in order to fund cash payments which would be made to the Non-Participating Creditors and the

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18 Strike Affidavit, para. 23.

19 Strike Affidavit, para. 23.

20 Strike Affidavit, para. 23.

21 Strike Affidavit, para. 25(a).

Existing Shareholders pursuant to the Recapitalization Transaction (as amended), subject to the right of the members of the Ad Hoc Committee to elect to participate *pro rata* (based upon the *pro forma* ratio of equity in Restructured Canwest Global allocated to Shaw to equity allocated to the Ad Hoc Committee) with Shaw in the funding of the Additional Commitment.[22]

26. The Subscription Agreement contains certain customary deal protection provisions, including an "exclusivity" provision and a "termination fee" provision in favour of Shaw.[23]

27. The "termination fee" provisions require Canwest Global to pay a termination fee in the amount of $5 million to Shaw and to reimburse Shaw for certain out-of-pocket fees and expenses up to $2.5 million in the event that Canwest Global fails to satisfy certain conditions in favour of Shaw or if Canwest Global terminates the Shaw Support Agreement under certain circumstances. The Expense Reimbursement is also payable to Shaw upon closing of the Recapitalization Transaction.[24]

28. The Subscription Agreement also requires the proposed Approval Order to provide for a charge over all of the assets, property and undertaking of the CMI Entities (as defined in the Initial Order) ranking after all existing charges at the date thereof to secure the payment of the Termination Fee and the Expense Reimbursement.[25]

29. The Amended Support Agreement amends and restates a number of the terms of the Support Agreement and the Restructuring Term Sheet so that each will conform with the Subscription Agreement.[26]

30. The Shaw Support Agreement sets out the conditions under which Shaw and the Ad Hoc Committee are obligated to support the Recapitalization Transaction.[27]

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22 Strike Affidavit, para. 25(c).

23 Strike Affidavit, para. 30.

24 Strike Affidavit, paras. 35-36.

25 Strike Affidavit, para. 38.

26 Strike Affidavit, para. 46.

PART III – ISSUES AND THE LAW

Shaw Transaction is Fair and Reasonable

31. The CMI Entities submit that this Honourable Court should approve the Shaw Transaction on the basis that it is fair and reasonable, that it benefits the stakeholders of the CMI Entities viewed as whole, and that it does not result in any confiscation of rights held by Goldman Sachs.

32. Courts frequently approve significant transactions and agreements that occur in the course of CCAA proceedings on the basis that the transaction meets the above criteria. For example, in *Re Calpine Canada Energy Ltd.*[28], the Alberta Court of Queen's Bench approved a complex settlement agreement that resolved a number of competing cross-border claims. Romaine J. held that:

> the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.[29]

33. Romaine J. further noted that the Court has the jurisdiction to approve settlements or major transactions during the CCAA stay period.[30] In accepting this proposition, Romaine J. cited the decision of Farley J. in *Re Air Canada*[31] in which he approved certain "Global Restructuring Agreements" during the course of the Air Canada CCAA proceeding.

34. In *Re Air Canada*, Farley J. noted that the approval of agreements during a CCAA process was to be carried out based on the following principles:

> ... approval of the Court may be given where there is consistency with the purpose and spirit of that legislation [the CCAA], a conclusion by the Court that

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27 Strike Affidavit, para. 49.

28 2007 ABQB 504 [*Re Calpine*].

29 *Re Calpine, supra* at para. 58.

30 *Re Calpine, supra* at para. 56.

31 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.) [*Re Air Canada*]

> as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally...[32]

35. In *Re Air Canada,* Farley J. cited his own earlier decision in *Re Sammi Atlas Inc.*[33] for the proposition that in determining whether an agreement is "fair and reasonable", it is necessary to look at the creditors as a whole (*i.e.*, generally) and to the objecting creditors specifically to see if rights are compromised in an attempt to balance interests, as opposed to a confiscation of rights. Although *Re Sammi Atlas* was a decision sanctioning a plan of compromise and arrangement involving the debtor company, Farley J. indicated that he was of the view that similar principles should apply in circumstances where the court is asked to approve a major agreement during the CCAA stay period.[34]

36. The CMI Entities submit that the Shaw Transaction meets these criteria. Among other things, the Shaw Transaction provides the following:[35]

(a) significant value to Restructured Canwest Global in exchange for the equity investment;

(b) affected creditors the opportunity to receive cash distributions from a Plan as opposed to shares in Restructured Canwest Global; and

(c) a long-term solution and stability for Restructured Canwest Global through the involvement of a strategic investor with significant experience in the media industry.

37. It is also an important step in the path towards the development of a viable restructuring plan, for the benefit of all creditors.[36]

38. In approving the Shaw Transaction, on the recommendation of the Special Committee, the Board of Canwest Global was validly exercising its business judgement. In *Re*

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32 *Re Air Canada, supra* at para. 9.

33 (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

34 *Re Air Canada, supra* at para. 9.

35 Strike Affidavit, para. 27.

36 Strike Affidavit, para. 56.

Stelco,[37] the Ontario Court of Appeal acknowledged that it is well-established that court's will show deference to decisions made by directors and officers in the exercise of their business judgement when managing the business and affairs of the corporation.

39. Furthermore, the Shaw Transaction does not result in the confiscation of any legal or economic rights that legitimately accrue to Goldman Sachs. In fact, Goldman Sachs is in essentially the same position as it would be in the absence of the Shaw Transaction. As noted in Goldman Sachs' factum, one of the conditions to the original Restructuring Term Sheet was that the Shareholders Agreement was required to be revised in a manner agreed to by CMI and the Ad Hoc Committee, subject to CRTC approval if required.[38] Similarly, it is a condition of the Shaw Support Agreement that:[39]

(a) the Shareholders Agreement shall have been amended and restated or otherwise addressed in a manner agreed to by Shaw, Canwest Global and the Ad Hoc Committee, subject to CRTC approval, if required; or

(b) the Shareholders Agreement shall have been disclaimed or resiliated in accordance with the provisions of the CCAA and the CMI Claims Procedure Order and, if applicable, the Court issues an Order that such agreement be disclaimed or resiliated, and such Order shall not have been amended, varied or stayed and all appeal periods shall have expired or, in the event of an appeal, a final determination dismissing such appeal shall have been made,

provided that neither Canwest Global nor the Consenting Noteholders are obligated to pursue a disclaimer or resiliation of the Shareholders Agreement.

40. The Shaw Transaction simply recognizes the current landscape – the parties to the Shaw Transaction Documents know that, in order to complete the Recapitalization Transaction, the parties must seek to negotiate new arrangements with Goldman Sachs in order to establish an economically viable relationship going forward. The parties to the Shaw Support Agreement have agreed to jointly pursue in good faith an amendment to the Shareholders Agreement. The

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37 (2005), 75 O.R. (3d) 5 (C.A.).

38 Goldman Sachs' Factum, para. 26.

39 Strike Affidavit, para. 51.

alternative is for the CMI Entities to seek to disclaim the Shareholders Agreement, subject to the approval of the Monitor and/or this Honourable Court, and to address the potential damages claim (whatever its magnitude) in the Plan. Under either scenario, the CMI Entities cannot avoid the necessity of addressing the rights of Goldman Sachs under the Shareholders Agreement and to deal with the implications of these rights in these proceedings.

41. The Shaw Transaction does not change the status quo. Either the conditions in the Shaw Transaction Documents will be fulfilled, or the transaction will not close. In either event, Goldman Sachs is not compelled to sacrifice any of its rights that would not already be at stake simply by virtue of the fact that the CMI Entities are insolvent and under the protection of the CCAA. In particular, even without the Shaw Transaction, the CMI Entities have the ability to seek to disclaim the Shareholders Agreement, and to seek this Honourable Court's approval to do so. The CMI Entities have not indicated an intention to do so at this stage, and any consideration of this possibility remains premature. In any event, the Shaw Transaction does not compel the CMI Entities or the Ad Hoc Committee to disclaim the Shareholders Agreement[40], nor does it interfere with this Honourable Court's ability to evaluate whether any disclaimer, if the Shareholders Agreement is ultimately disclaimed, meets the statutory criteria in section 32 of the CCAA.

42. The CMI Entities, on the other hand, are in a far better position as a result of the Shaw Transaction. After a comprehensive equity solicitation process, the CMI Entities have found an investor that is willing to "fill the hole" required by the Restructuring Term Sheet and make an equity investment in a Restructured Canwest Global should this Honourable Court approve the Shaw Transaction Documents. The CMI Entities are one step closer to successfully emerging from CCAA protection as a going concern entity.

43. Goldman Sachs argues that it has somehow been deprived of the right to participate in the equity investment solicitation process that resulted in the Shaw Transaction. However, this has never been a right that is reserved to Goldman Sachs. Goldman Sachs' rights with respect to the CMI Entities derive entirely from the Shareholders Agreement, which was negotiated between highly sophisticated parties, with the benefit of legal advice.

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[40] Strike Affidavit, para. 52 and 53.

44. Furthermore, to the extent that Goldman Sachs felt excluded from the process, it had ample opportunity to try to integrate itself in the process. CMI first approached Goldman Sachs in February 2009 concerning a proposed renegotiation of the Shareholders Agreement to reflect 2009 economic market conditions. Goldman Sachs was unreceptive to any such proposed renegotiation. Instead, Goldman Sachs indicated they would allow the CMI Entities to buy them out for $900 million. The CMI Entities met with representatives of Goldman Sachs in March 2009 in a further effort to persuade Goldman Sachs that a renegotiation of the Shareholders Agreement to reflect the commercial realities of 2009 was in the interests of both Goldman Sachs and the CMI Entities because it would maximize the enterprise value of CW Investments, facilitate keeping CMI out of CCAA proceedings and avoid operational disruption to the both the CTLP TV Business and the Specialty TV Business. The terms of the CMI Entities' proposal to renegotiate the Shareholders Agreement were rejected by Goldman Sachs. Goldman Sachs responded with a counter-proposal that was, if anything, more one-sided in their favour than the current Shareholders Agreement.[41] The CMI Entities ultimately entered into the Note Purchase Agreement with the members of the Ad Hoc Committee in May 2009 and the Restructuring Term Sheet in October 2009.

45. Like all stakeholders, Goldman Sachs was or ought to have been aware that the CMI Entities were conducting an equity investment solicitation process. Not only did the CMI Entities identify the fact that one of the conditions under the original Restructuring Term Sheet was to locate a New Investor, but the CMI Entities made full disclosure of the fact that they were in the midst of the equity solicitation process in their recent motion seeking to extend the stay of proceedings to March 31, 2010. In that motion, the CMI Entities noted that RBC had commenced an equity solicitation process in order to identify a potential New Investor(s). [42] In the endorsement extending the stay of proceedings, this Honourable Court stated that the CMI Entities "appear to have acted and continue to act in good faith and with due diligence".[43] Interestingly, Goldman Sachs did not raise an objection or note concern at the time that "only" 22 of the 52 potential investors who were provided with a "teaser" and form of NDA elected to execute an NDA and continue in the equity investment solicitation process.

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41 Affidavit of Thomas C. Strike sworn November 24, 2009 at paras 48-53.

42 Affidavit of John E. Maguire sworn January 18, 2010 at paras 18-21.

46. Goldman Sachs has no right under the Shareholders Agreement to dictate the equity structure of Canwest Global, nor the right to dictate the equity structure of the Restructured Canwest Global. Goldman Sachs may claim to be "interested" in who controls Restructured Canwest Global because Restructured Canwest Global will be the parent of CMI, the counterparty to the Shareholders Agreement. However, this "interest" does not translate into any legal entitlement. There was therefore no obligation to consult or involve Goldman Sachs on some exclusive basis or to give Goldman Sachs special access to information before Canwest Global could pursue the Shaw Transaction or the equity investment solicitation process in general.

47. Goldman Sachs attempts to impugn the Shaw Transaction by suggesting that the CMI Entities had no choice but to find a New Investor strictly on the basis contemplated in Restructuring Term Sheet. The fact of the matter is that the members of the Ad Hoc Committee are the CMI Entities' largest creditor group. Without the liquidity provided by the Consenting Noteholders under the Cash Collateral and Consent Agreement, which was intended to allow the CMI Entities to continue to operate pending a restructuring under the CCAA, the CMI Entities would have been unable to continue as going concerns.[44] If the CMI Entities hope to emerge from this restructuring successfully, the members of the Ad Hoc Committee must necessarily vote in favour of the Plan.

48. In *Re Canadian Airlines Corp.*, in response to claims by a creditor that they were excluded from negotiations involving the debtor, Paperny J. stated that negotiations with certain key creditors who may facilitate a plan of arrangement are to be encouraged, not perceived as conspiratorial vis-a-vis other creditors:

> Negotiations with certain key creditors in advance of this CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.[45]

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[43] Endorsement of the Honourable Madam Justice Pepall dated January 21, 2010.

[44] Affidavit of John E. Maguire sworn October 5, 2009, para. 20.

[45] *Re Canadian Airlines Corp.* 2000 CarswellAlta 662 (Alta. Q.B.), at para 152.

Equity Investment Solicitation Process was Fair and Reasonable

49. In its factum, Goldman Sachs complains of the "secrecy" involved in the equity investment solicitation process, citing the decision of the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*[46] This case set out certain criteria to be applied by a court in granting approval for a sale of assets by a court-appointed receiver. Under the *Soundair* criteria, the Court should consider:

(a) whether the receiver has made sufficient effort to obtain the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.[47]

50. CCAA Courts have accepted that they can look to these criteria in determining whether to approve a sale of assets of a debtor company prior to the development and approval of a plan of compromise and arrangement.[48] All of the cases cited by Goldman Sachs in its factum involve asset sales, rather than equity solicitations or other transactions in the context of CCAA proceedings.[49] The CMI Entities submit that the *Soundair* criteria are generally applicable in the context of an asset sale because the debtor company (or a receiver, as the case may be) is proposing to take assets that might otherwise be available to creditors out of the debtor company's estate, in exchange for cash. As a result, it is necessary to be scrupulous in ensuring that the receiver or the debtor has obtained the best price, and the integrity of the process for soliciting offers, as well as objective valuations, assist in demonstrating that the best price has been obtained.

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46 [1991] O.J. No. 1137 [*Soundair*]

47 *Soundair, supra* at para. 16.

48 See *eg. Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.).

49 *Re Eddie Bauer of Canada Inc.*, 2009 CarswellOnt 5450 (S.C.J.) (approval of an asset purchase agreement for the debtor's Canadian assets); *Re Intertan Canada Ltd.*, 2009 Carswell 1489 (S.C.J.) (approval of a going concern asset sale of the debtor company's business to a purchaser); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 (S.C.J.) (approval of an asset sale agreement, in the form of a "stalking horse bid", in relation to a going-concern sale of one branch of the debtor company's business).

51. The CMI Entities submit that in the equity investment solicitation context, this Honourable Court should approve a proposed transaction based on the general fairness and lack of confiscation of rights of objecting creditors considerations identified by the Ontario Court in *Re Air Canada* and by the Alberta Court in *Re Calpine*. There are no assets that can be valued in order to determine that the "best price" has been obtained. The formalistic approach set out in *Soundair* does not directly fit this situation.

52. In any event, the CMI Entities submit that *Soundair* does not establish that only one type of process can satisfy the fairness and "integrity" requirements that are key elements of the *Soundair* test. In *Soundair*, Galligan J.A. accepted that it might be appropriate to negotiate only with the most likely bidders in situations where a full auction process did not make sense. He indicated that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.[50]

53. The CMI Entities submit that Canwest Global did, in fact, adopt a just and reasonable process for soliciting equity investors in the circumstances. As noted in the affidavit of Richard M. Grudzinski sworn February 18, 2010 (the "**Grudzinski Affidavit**"), it is RBC's belief that the potential market for Canadian equity investors to invest in Restructured Canwest Global to satisfy the condition dealing with the New Investors (as defined in the Restructuring Term Sheet) has been fully and properly canvassed and that the Shaw Transaction represents the best transaction available to Canwest Global in the circumstances.[51]

54. Among other things (and contrary to the suggestions and inferences made by Peter Farkas), Mr. Grudzinski also noted:

(a) the form of NDA provided to potential equity investors was standard for investment banking processes such as the equity investment solicitation process;[52]

(b) it is standard practice for requests for "confidential information" to be made directly to a financial advisor such as RBC with responsibility for running the process and not to any other party; [53]

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[50] *Soundair*, *supra* at para. 15.

[51] Grudzinski Affidavit, para. 11.

(c) provisions in NDAs restricting trading in the company's securities and communications with officers, directors, agents, employees, creditors, securityholders, customers, suppliers or other entities with relationships to the company in question are commonplace in NDAs;[54]

(d) having 22 out of 52 parties who received a copy of the teaser document and NDA execute such NDA represents a percentage take-up generally in line with similar investment processes;[55]

(e) a significant number of potential investors who elected not to execute a NDA provided legitimate "business reasons" for not continuing to participate in the process, as opposed to concerns with the NDA or the process itself;[56]

(f) the vast majority of prospective investors who chose to not continue in the equity investment solicitation process and who communicated their reasons to RBC, indicated that they chose not to continue in the process on the basis of the due diligence they conducted and upon an exercise of their business judgment; [57] and

(g) restrictions on discussions with individuals or entities that are involved with the business in question are commonplace in investment banking processes. Without such restrictions, it is not practicable to run a process with specified guidelines and parameters to be followed by the potential investors that maintains confidentiality and a level playing field for the participants in the process.[58]

55. The CMI Entities further submit that there is no magic to the presence or absence of a "fiduciary out" clause in a transaction such as the Shaw Transaction. It is merely one out of

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52 Grudzinski Affidavit, para. 6.

53 Grudzinski Affidavit, para. 6.

54 Grudzinski Affidavit, para. 6.

55 Grudzinski Affidavit, para. 7.

56 Grudzinski Affidavit, para. 7.

57 Grudzinski Affidavit, para. 8.

58 Grudzinski Affidavit, para. 10.

a number of mechanisms designed to provide assurance that the most favourable transaction has been obtained. If the Court is otherwise satisfied with respect to the process used to arrive at the Shaw Transaction, the lack of "fiduciary out" clause should therefore not constitute an obstacle to approving the Shaw Transaction. Having regard to the recommendations of RBC and the CMI CRA, and having given consideration to the features of the Shaw Transaction Documents, including the lack of "fiduciary out", the Monitor was prepared to provide its support for the Shaw Transaction.[59] In addition, Canwest Global and the Ad Hoc Committee have the right under section 8 of the Shaw Support Agreement to enter into an agreement amending the Shareholders Agreement and, if the proposed amending agreement is not acceptable to Shaw, then Canwest Global may enter into the proposed amending agreement provided that immediately prior to entering into such GS Amending Agreement, Canwest Global shall immediately terminate the Shaw Support Agreement and the Subscription Agreement and shall pay the Termination Fee and Expense Reimbursement to Shaw.[60]

56. When the interests of all of the parties have been considered, it is also clear that the *Soundair* test is satisfied in this case. The Shaw Transaction benefits the stakeholders of the CMI Entities overall. The prospects of a going concern outcome can only be improved as a result of the Shaw Transaction.

57. Goldman Sachs objects to the approval of the Shaw Transaction. But what are its interests? It is not a creditor of any of the CMI Entities. At the moment, it is a counterparty to the Shareholders Agreement with CMI, which is honouring its obligations under the Shareholders Agreement while negotiations are underway to determine the basis on which Goldman Sachs' rights are to be addressed in this CCAA proceeding. Goldman Sachs would like to preclude the CMI Entities from disclaiming the Shareholders Agreement. But the CMI Entities have the right to disclaim the Shareholders Agreement (subject to approval by the Monitor and/or the Court) regardless of whether the Shaw Transaction proceeds. Goldman Sachs' unhappiness with the prospect that the CMI Entities could disclaim the Shareholders Agreement (with all its attendant consequences) therefore cannot be a basis for derailing the Shaw Transaction.

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[59] Tenth Report of the Monitor, para. 47.

[60] Strike Affidavit, para. 54.

58. Goldman would also like to obtain greater negotiating leverage in these CCAA proceedings. However, it has no inherent right to such leverage. It has not bargained for such leverage. The desire for greater negotiating power therefore also cannot be a basis for putting the Shaw Transaction at risk.

59. The Shaw Transaction requires court approval by February 19, 2010. It is supported by the CMI Entities' senior management, the CMI CRA, the Ad Hoc Committee and the Monitor. In *Re Air Canada*, Farley J. identified the commercial risks associated with delaying approval of a particular transaction in the hopes that the counterparty would improve the terms of the transaction, rather than simply walking away. Farley J. favoured an approach that fostered certainty and that did not place an existing transaction in unnecessary jeopardy.[61]

60. The CMI Entities' submit that there is nothing unfair or unbalanced about the process used to select the Shaw Transaction. All potential bidders had equal access to information, provided that they agreed to enter into the same confidentiality and standstill agreement. As noted above, 22 potential bidders were willing to execute NDAs and were therefore provided access to confidential information.

61. Moreover, there is nothing unfair or unbalanced about the manner in which the CMI Entities were prepared to provide the Shaw Transaction Documents to Goldman Sachs. In fact, the "condition" imposed by the CMI Entities on Goldman Sachs to obtain access to the Shaw Transaction Documents (*i.e.*, having to sign a confidentiality and standstill agreement) was the same "condition" that was imposed on every other party on the service list.[62]

62. The other documents requested by Goldman Sachs (referred to in paragraph 50 of Goldman Sachs' factum) subsequent to the service of the CMI Entities' motion record were documents that were either (i) only provided to parties in the equity investment solicitation process after they signed a non-disclosure agreement or (ii) provided by such parties on the basis that they were participating in a confidential equity solicitation process.[63] All of these documents were confidential and commercially sensitive.

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61 *Air Canada, supra* at para. 11.

62 Tenth Report of the Monitor, para. 26.

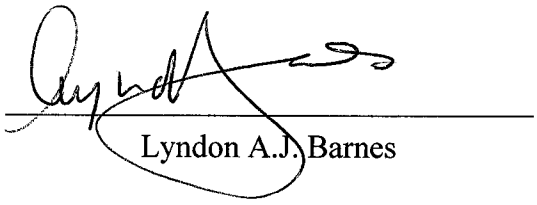
63 Exhibit "B" to the Affidavit of Susan Kraker sworn February 18, 2010.

63. In summary, therefore, the CMI Entities submit that there is no legitimate basis for delaying approval of the Shaw Transaction. Goldman Sachs has no valid justification for impeding a transaction that will benefit the CMI Entities' stakeholders in order to further its own agenda.

PART IV – NATURE OF THE ORDER SOUGHT

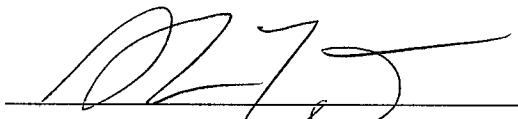
64. The CMI Entities therefore request an Order substantially in the form of the draft Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Lyndon A.J. Barnes

Jeremy Dacks



Shawn T. Irving

Schedule "A"

Applicants

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

Schedule "B"

Partnerships

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

Schedule "C" - Statutory References

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, as amended

Disclaimer or resiliation of agreements

32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;
(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;
(b) a collective agreement;
(c) a financing agreement if the company is the borrower; or
(d) a lease of real property or of an immovable if the company is the lessor.

Schedule "D"

LIST OF CASES

1. *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).
2. *Re Calpine Canada Energy Ltd.* 2007 ABQB 504.
3. *Re Canadian Airlines Corp.* 2000 CarswellAlta 662 (Alta. Q.B.).
4. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.).
5. *Re Eddie Bauer of Canada Inc.*, 2009 CarswellOnt 5450 (S.C.J.).
6. *Re Intertan Canada Ltd.*, 2009 Carswell 1489 (S.C.J.).
7. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 (S.C.J.).
8. *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.).
9. *Re Stelco* (2005), 75 O.R. (3d) 5 (C.A.).
10. *Royal Bank of Canada v. Soundair Corp.* [1991] O.J. No. 1137