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 CMI ENTITIES

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 (i) accepting the filing of a plan of compromise or arrangement (the "**Plan**") based on the Amended Shaw Transaction (as described below); and (ii) authorizing the CMI Entities to call and conduct meetings (the "**Creditors' Meeting**") of Affected Creditors (as defined in the Plan) to consider and vote on a resolution approving the Plan. As part of this motion, the CMI Entities seek approval of the Definitive Documentation (as defined below) in respect of the Amended Shaw Transaction.

2. The Amended Shaw Transaction is the result of a robust court-supervised and directed process and the concerted efforts by the CMI Entities, the members of an *ad hoc* committee (the "**Ad Hoc Committee**") representing holders of CMI's 8% senior subordinated notes due 2012 (the "**8% Senior Subordinated Noteholders**") and Shaw Communications Inc. ("**Shaw**"), with the assistance of the Monitor (as defined below), to satisfy certain business-critical conditions necessary for the CMI Entities to emerge from their proceedings under the CCAA on a going-concern basis.

3. In particular, the Amended Shaw Transaction (which is the direct result of a successful mediation conducted by the Chief Justice of Ontario, the Honourable Justice Warren Winkler) resolves the major outstanding roadblock to a viable going-concern restructuring of the businesses of the CMI Entities – namely, the treatment of the rights and obligations that were formerly held by Goldman Sachs Capital Partners VI Fund, L.P. and certain of its affiliates (together, "**Goldman Sachs**") pursuant to the Shareholders Agreement (as defined below) which sets out the manner in which the specialty television businesses operated by CW Investments Co. and its subsidiaries were and are to be governed.

4. It is not an understatement to say that the prospect of expensive and protracted litigation with Goldman Sachs necessary to resolve the treatment of its rights under the Shareholders Agreement, which may have resulted in a damages claim of sufficient magnitude to give Goldman Sachs a veto position in relation to the Plan, would have significantly impaired the ability of the CMI Entities to restructure their businesses for the benefit of all of their stakeholders. Indeed, from the outset of this proceeding, this Honourable Court and all stakeholders have been aware that the Shareholders Agreement would need to be dealt with in order to allow the CMI Entities to restructure their businesses.

5. The CMI Entities submit that the Amended Shaw Transaction is fair and reasonable and that it is in the best interests of the stakeholders of the CMI Entities, viewed as a whole. It amends the Approved Shaw Transaction (as defined below), as expressly permitted in the Original Shaw Subscription Agreement. The Approved Shaw Transaction, which resulted from a comprehensive equity investment solicitation process (the "**Equity Solicitation**"), was approved by this Honourable Court on February 19, 2010 on the basis (*inter alia*) that the CMI Entities and their financial advisor, RBC Capital Markets ("**RBC**") "fully canvassed the market".

6. If the Plan is approved by the Affected Creditors and sanctioned by this Honourable Court, the Amended Shaw Transaction will provide enhanced recoveries for Affected Creditors beyond those previously contemplated under the Approved Shaw Transaction. As a result, the CMI Entities submit that it is entirely appropriate to accept the filing of the Plan and to authorize the CMI Entities to hold the Creditors' Meeting with a view to securing the requisite voting approval of Affected Creditors for the Plan.

7. The CMI Entities submit that the objections that have been filed by the recently-constituted *ad hoc* group (the "**Shareholder Group**") of existing shareholders of Canwest Global (the "**Shareholders**") should be soundly rejected. It is trite law that the shareholders of an insolvent company have no right to recovery unless the creditors are being paid in full. This result reflects the inherent risks associated with holding an equity interest in a company. While this principle was formerly reflected in the case law, it is now codified in the CCAA. The Monitor has advised that it will not support any recovery provided to the Shareholders at the expense of the Affected Creditors.

8. The evidence is clear that the CMI Entities are insolvent and cannot pay their creditors in full. The only reason that the CMI Entities have been able to reach this stage of their restructuring is due to the liquidity provided by the 8% Senior Subordinated Noteholders, which permitted the CMI Entities to continue operating within the CCAA proceeding. The original Support Agreement with the Ad Hoc Committee and the Approved Shaw Transaction both contemplated a recovery for the Shareholders of 2.3% of the equity of a restructured Canwest Global, which was to come out of the recovery allocated to the 8% Senior Subordinated Noteholders. This allocation of a portion of the recovery that the 8% Senior Subordinated Noteholders would otherwise have been entitled to receive was originally predicated on certain aspects of the original Support Agreement that, due to the evolution of the restructuring, are no longer relevant under the Amended Shaw Transaction. In particular, it was originally thought that the Shareholders could potentially provide assistance in the successful recapitalization of the CMI Entities. Moreover, the allocation of some equity to existing shareholders would facilitate the listing of a restructured Canwest Global as a public company and provide liquidity for creditors who would be receiving equity in exchange for their claims. Based on the terms of the Amended Shaw Transaction, including that Restructured Canwest Global will be a private company and the 8% Senior Subordinated Noteholders will be receiving cash rather than equity in the restructured company, the Ad Hoc Committee is no longer prepared to agree to reduce the recovery of the 8% Senior Subordinated Noteholders to provide a recovery for the Shareholders.

9. The Shareholder Group asserts that it is impossible to know whether the Amended Shaw Transaction is the best transaction available for the CMI Entities' stakeholders because the CMI Entities did not conduct an auction for 100% of the equity of a restructured Canwest Global. The Shareholder Group ignores the fundamental commercial reality facing the CMI

Entities, namely that they do not have, and they have never had, the unfettered ability to sell 100% of the equity or the assets of a restructured Canwest Global.

10. Even if it was possible to reopen the CMI Entities' restructuring process to conduct an auction for 100% of the equity or assets of a restructured Canwest Global – and the CMI Entities submit, factually, that it is not – such a course of action would potentially be devastating for the ability of the CMI Entities to restructure on a going-concern basis. Effectively, the Shareholder Group would require the CMI Entities to throw away a "bird in the hand" (the Amended Shaw Transaction), in a situation in which there is no committed bidder for 100% of the equity or assets of a restructured Canwest Global, after the Equity Solicitation has already been conducted and after months of painstaking negotiations to achieve the current resolution of the significant roadblocks to a successful restructuring, with the sole purpose of attempting to achieve some imaginary value for the Shareholders.

11. This desire of the Shareholder Group to take the CMI Entities back to "square one" in an attempt to recover value for themselves, thereby jeopardizing the going-concern restructuring that has been achieved for the clear benefit of other stakeholders, including Affected Creditors, employees, pensioners, and suppliers, simply ignores the economic and business realities facing the CMI Entities. It also reflects a fundamental misunderstanding of the subordinate role that shareholders of a debtor company play when that company is insolvent. The position of the Shareholder Group should be viewed as no more than what it is – an ill-founded, last ditch attempt by the existing Shareholders to grab some value for themselves, even at the expense of the creditors and other stakeholders of the CMI Entities.

PART II – FACTS

12. The facts with respect to this Motion are more fully set out in the Affidavits of Thomas C. Strike sworn on June 7, 2010 (the "**June 7th Affidavit**"), June 14, 2010 (the "**June 14th Affidavit**") and June 16, 2010 (the "**June 16th Affidavit**"). Capitalized terms in this Factum not otherwise defined have the same meanings as in the June 7th Affidavit.

Background

13. 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 initial order (the "**Initial Order**") of this Honourable Court dated October 6, 2009 (the "**Filing Date**"). At that time, this Court approved the appointment of FTI Consulting Canada Inc. to act as monitor (the "**Monitor**") in these CCAA proceedings.[1] The stay of proceedings under the Initial Order has been extended on several occasions.[2]

The Support Agreement

14. On October 5, 2009, immediately prior to the Filing Date, the CMI Entities agreed to enter into a Support Agreement with the members of the Ad Hoc Committee, which was to form the basis of a consensual restructuring of the businesses of the CMI Entities under the CCAA (the "**Original Recapitalization Transaction**"). The Support Agreement, which had attached to it a recapitalization term sheet (the "**Original Restructuring Term Sheet**"), provided that the CMI Entities would pursue a plan of compromise or arrangement on the terms set out in the Original Restructuring Term Sheet.[3]

15. The central role of the Ad Hoc Committee in the CMI Entities' restructuring reflects the objective reality that, due to the significant amount of debt owed by the CMI Entities to the 8% Senior Subordinated Noteholders, the support of the Ad Hoc Committee is essential to any consensual recapitalization of the CMI Entities under the CCAA.[4] As this Honourable Court noted in its reasons approving the Approved Shaw Transaction (the "**Shaw Approval Reasons**"), the 8% Senior Subordinated Noteholders have a "blocking" position in any restructuring of the CMI Entities' business.[5] Most importantly, the Ad Hoc Committee provided the liquidity to the CMI Entities under the Use of Cash Collateral and Consent Agreement (as

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1 June 7th Affidavit, para. 10, Motion Record of the Applicants [Applicants' Motion Record], Tab 1, p. 14.

2 June 7th Affidavit, para. 11, Applicants' Motion Record, Tab 1, p. 14.

3 June 7th Affidavit, para. 21, Applicants' Motion Record, Tab 1, p.17.

4 June 7th Affidavit, para. 21, Applicants' Motion Record, Tab 1, p. 17.

5 *Re Canwest Global Communications Corp.*, 2010 ONSC 1176 (S.C.J.) [*Shaw Approval Reasons*] at para. 42. The significance of this "blocking" position was also recognized by the Monitor in its Supplement to the Monitor's Tenth Report, February 19, 2010.

amended, the "**Cash Collateral and Consent Agreement**") that was essential to permit them to continue to operate within the CCAA proceeding.[6]

16. Under the Original Restructuring Term Sheet, it was proposed, *inter alia*, that the creditors of the CMI Entities whose claims were to be compromised, including the 8% Senior Subordinated Noteholders, would receive shares of a restructured Canwest Global, which would be a publicly-listed company on the Toronto Stock Exchange. It was contemplated that 2.3% of the equity shares of a restructured Canwest Global would be issued to the Shareholders. However, it was specifically stated in the Original Restructuring Term Sheet that those shares were not to dilute the recovery that would otherwise be received by Affected Creditors (that were to receive up to 18.5% of the outstanding equity shares). In other words, the equity shares allocated to the Shareholders were to be funded out of the recoveries that would otherwise flow to the 8% Senior Subordinated Noteholders.[7]

17. From the outset, it was clear that the Original Recapitalization Transaction was contingent upon the satisfaction of (among others) two business-critical conditions:

(a) identifying one or more Canadians (as defined in the *Direction to the CRTC (Ineligibility of Non-Canadians)*) that would invest at least $65 million in Restructured Canwest Global;[8] and

(b) amending and restating or otherwise addressing the Shareholders Agreement governing the operation of CW Investments Co. ("**CW Investments**") (which is described further below) in a manner acceptable to CMI and the Ad Hoc Committee.[9]

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6 June 14th Affidavit, para. 13, Supplementary Motion Record of the Applicants [Applicants' Supplementary Motion Record], Tab 1, p. 7.

7 June 7th Affidavit, para. 22, Applicants' Motion Record, Tab 1, p. 17.

8 June 7th Affidavit, para. 23, Applicants' Motion Record, Tab 1, p. 18. Pursuant to the Support Agreement, the equity investment in Restructured Canwest Global had to be acceptable to the CMI Entities and the Ad Hoc Committee.

9 June 7th Affidavit, para. 23, Applicants' Motion Record, Tab 1, p. 18. As submitted below, this second condition was not only critical, but difficult to achieve.

18. Failure to satisfy these two business-critical conditions would entitle the 8% Senior Subordinated Noteholders to terminate the Support Agreement, thereby triggering an event of default under the Cash Collateral and Consent Agreement. The ability of the 8% Senior Subordinated Noteholders to exercise their default remedies under the Cash Collateral and Consent Agreement would be extremely detrimental to the liquidity of the CMI Entities.[10] Without the continued support of the 8% Senior Subordinated Noteholders, the entire restructuring of the CMI Entities' businesses would be in serious jeopardy.

19. At the time of the original Support Agreement, the Original Recapitalization Transaction was determined to be the best alternative for the long-term interests of the CMI Entities, their employees, suppliers, customers and others.

The Shareholders Agreement

20. In or about August 2007, Canwest Global and Goldman Sachs jointly acquired through CW Investments and its subsidiaries, a portfolio of subscription-based specialty television channels (the "**Specialty TV Portfolio**") from Alliance Atlantis Communications Inc.[11] CRTC approval was obtained in December 2007.[12]

21. The manner in which the affairs of CW Investments were to be (and continue to be) governed is set out in an amended and restated shareholders agreement (the "**Shareholders Agreement**") between CMI, 4414616 Canada Inc. ("**4414616**"), Goldman Sachs (now replaced by Shaw, as discussed below) and CW Investments. The Shareholders Agreement was negotiated and entered into at the peak of the financial markets and economic cycle in 2007. It contemplates that CMI will combine the Specialty TV Portfolio with the portfolio of free-to-air television stations and subscription-based specialty television channels currently owned by CTLP in 2011.[13]

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[10] June 7th Affidavit, para. 23, Applicants' Motion Record, Tab 1, p. 18. Had an event of default under the Cash Collateral and Consent Agreement occurred, the Ad Hoc Committee could have sought to obtain an assignment of the Secured Intercompany Note in the amount of over $187 million.

[11] June 7th Affidavit, para. 13, Applicants' Motion Record, Tab 1, p. 14.

[12] June 7th Affidavit, para. 13, Applicants' Motion Record, Tab 1, p. 14.

[13] June 7th Affidavit, paras. 16 and 17, Applicants' Motion Record, Tab 1, pp. 15 and 16

22. The Shareholders Agreement also provides for put and call rights for Goldman Sachs (now Shaw) and the CMI Entities, respectively, as well as providing Goldman Sachs (now Shaw) with certain other liquidity rights. These put and call rights and liquidity mechanisms were originally inserted in the Shareholders Agreement in order to facilitate the exit of Goldman Sachs from its investment in CW Investments. They would have permitted Goldman Sachs to require a sale of CW Investments or effect an initial public offering of the shares of CW Investments owned by Goldman Sachs, if following the exercise in full of Goldman Sachs' put rights, CW Investments was unable to acquire all of Goldman Sachs' voting and equity interests in CW Investments. In addition, the Shareholders Agreement provides for certain "drag-along" rights which, when the Shareholders Agreement was originally entered into, permitted Goldman Sachs to effect a sale of its interest in CW Investments, and to compel a concurrent sale of CMI's interest in CW Investments, upon the occurrence of an Insolvency Event (as defined therein).[14]

23. Prior to October 5, 2009, Canwest Global held its approximately 35% equity interest and approximately 67% voting interest in CW Investments through 4414616, its indirect wholly-owned subsidiary.[15] On October 5, 2009, CMI caused 4414616 to transfer all of the voting and equity shares of CW Investments to CMI (the "**4414616 Transaction**"). The 4414616 Transaction was carried out with a view to preventing Goldman Sachs from effecting a forced sale of the CMI Entities' interest in CW Investments pursuant to the "drag along" rights provided to Goldman Sachs under the Shareholders Agreement. In the view of the CMI Entities, such a forced sale of its interest in CW Investments would have materially prejudiced any hope of a successful restructuring of the CMI Entities. As a result of the 4414616 Transaction, CMI secured all of the rights and assumed all of the obligations of 4414616 under the Shareholders Agreement.[16]

24. Goldman Sachs' conduct from the outset of the CCAA filing made it clear that it was adopting an adversarial position in relation to the CMI Entities, and that it was prepared to engage in repeated and protracted litigation in order to defend its perceived entitlements under the Shareholders Agreement. To this end, the 4414616 Transaction was challenged by Goldman Sachs by means of a motion in November 2009 seeking various relief, including setting aside the

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[14] June 7th Affidavit, paras. 16 and 17, Applicants' Motion Record, Tab 1, pp. 15 and 16.

[15] June 7th Affidavit, para. 14, Applicants' Motion Record, Tab 1, p. 15.

[16] June 7th Affidavit, para. 18, Applicants' Motion Record, Tab 1, p. 16.

4414616 Transaction (with a view to permitting Goldman Sachs to exercise its 'drag-along' rights) and seeking a declaration that would prevent the CMI Entities from disclaiming their obligations under the Shareholders Agreement.[17]

25. The CMI Entities successfully obtained a declaration at a motion held on December 8, 2009 (the "**Stay Motion**") that the Goldman Sachs motion for relief in relation to the 4414616 Transaction was subject to the stay of proceedings under the Initial Order, and that the stay should not be lifted to permit Goldman Sachs to pursue its relief. This Honourable Court declined to grant the declaration requested by Goldman Sachs to prevent the CMI Entities from disclaiming the Shareholders Agreement.[18]

26. Subsequently, Goldman Sachs objected to the approval of the Approved Shaw Transaction by this Honourable Court, supporting a late-breaking competing bid by The Catalyst Capital Group Inc. ("**Catalyst**"). The Catalyst offer contemplated that, among other things, the Asper Family, who are members of the Shareholder Group, would participate in the proposed equity investment. This Honourable Court approved the Approved Shaw Transaction, and dismissed the objections of Goldman Sachs and Catalyst. Goldman Sachs then sought leave to appeal to the Ontario Court of Appeal from this Honourable Court's decision to approve the Approved Shaw Transaction (the "**Leave Motion**").[19]

27. In addition, Goldman Sachs was, at all times following the Stay Motion, vocal about its intentions to resist any attempts to disclaim the Shareholders Agreement.

The Approved Shaw Transaction

28. On February 11, 2010, the board of directors of Canwest Global (the "**Board**") approved, subject to approval by this Honourable Court, the entering into of a subscription agreement (with an attached subscription term sheet) and certain other related documentation with Shaw pursuant to which Shaw agreed to subscribe for, and Canwest Global, as restructured, agreed to issue, equity shares in the capital of a restructured Canwest Global (the "**Approved Shaw Transaction**"). The Approved Shaw Transaction was the end result of the Equity

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[17] June 7th Affidavit, para. 19, Applicants' Motion Record, Tab 1, p. 16.

[18] June 7th Affidavit, para. 20, Applicants' Motion Record, Tab 1, p. 17.

[19] June 7th Affidavit, para. 35, Applicants' Motion Record, Tab 1, p. 23.

Solicitation, which was commenced in November 2009 by Canwest Global, with the assistance of RBC.[20] The details of the Equity Solicitation were scrutinized and approved by this Honourable Court prior to granting approval on February 19, 2010 of the entering into of the Approved Shaw Transaction.

29. Although the Equity Solicitation was directed towards finding a "Canadian" investor that could make a minimum 20% equity investment in a restructured Canwest Global for at least $65 million, potential investors were advised by RBC that alternative proposals would be considered. Potential investors that proceeded to the second phase of the Equity Solicitation were advised that they should specifically raise significant modifications to the proposed subscription agreement (including a proposed subscription term sheet) which was provided to them by Canwest Global. The binding offer that was received from Shaw was, in fact, an alternative proposal, in that it represented a significant modification from the investment contemplated in the proposed subscription agreement and subscription term sheet that were provided to it by Canwest Global.[21]

30. The principal elements of the Approved Shaw Transaction were:

(a) an investment by Shaw, or a wholly-owned direct or indirect subsidiary of Shaw, in the amount of $95 million in a restructured Canwest Global, representing a 20% equity interest and an 80% voting interest in a restructured Canwest Global, immediately following completion of the proposed recapitalization transaction (the "**Minimum Shaw Commitment**");

(b) a portion of the net cash proceeds received from the Minimum Shaw Commitment would be distributed to the 8% Senior Subordinated Noteholders pursuant to a plan of arrangement or compromise in connection with the partial payment of the Secured Intercompany Note and the balance would be used by restructured Canwest Global for working capital purposes; and

(c) in addition to the Minimum Shaw Commitment, Shaw would subscribe for an additional amount of equity shares of a restructured Canwest Global at the same

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[20] June 7th Affidavit, para. 25, Applicants' Motion Record, Tab 1, p. 19.

[21] June 7th Affidavit, para. 25, Applicants' Motion Record, Tab 1, p. 19.

price per equity share (the **"Additional Commitment"**) in order to fund cash payments that would be made to Affected Creditors that would otherwise hold less than 5% of the equity shares of a restructured Canwest Global upon completion of the proposed recapitalization transaction and to the existing shareholders of Canwest Global, subject to the right of the members of the Ad Hoc Committee to elect to participate *pro rata* with Shaw in funding the Additional Commitment.[22]

31. It was a condition of each party's obligation to consummate the Approved Shaw Transaction that, among other things (a) the Shareholders Agreement be amended and restated or otherwise addressed in a manner to be agreed by Shaw, Canwest Global and the Ad Hoc Committee; or (b) the Shareholders Agreement be disclaimed or resiliated in accordance with the provisions of the CCAA and the Claims Procedure Order.[23] As a result, the Approved Shaw Transaction left unresolved the outstanding dispute between the CMI Entities and Goldman Sachs regarding the treatment of the Shareholders Agreement, a fundamental obstacle to the restructuring of the CMI Entities which had existed from (and before) the Filing Date.[24] As described below, the Amended Shaw Transaction amends the Approved Shaw Transaction to reflect the satisfaction of this outstanding condition.

Negotiations with Goldman Sachs

32. Commencing shortly after the issuance of the Initial Order, the CMI Entities, the CMI CRA and the Ad Hoc Committee, with the assistance of the Monitor, encouraged and participated in direct and indirect, bilateral and multilateral negotiations with Goldman Sachs in an attempt to reach a consensual resolution regarding the treatment of the Shareholders Agreement.[25] Following approval of the Approved Shaw Transaction, the CMI Entities engaged in further discussions with Shaw, the Monitor, the Ad Hoc Committee and Goldman Sachs again with a view to reaching a mutually agreeable resolution of the treatment of the Shareholders

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22 July 7th Affidavit, para. 28, Applicants' Motion Record, Tab 1, p. 20.

23 June 7th Affidavit, para. 31, Applicants' Motion Record, Tab 1 at p. 22.

24 June 7th Affidavit, paras. 37 to 38, Applicants' Motion Record, Tab 1, at p. 24.

25 June 7th Affidavit, para. 39, Applicants' Motion Record, Tab 1, p. 24

Agreement and the other issues that were contentious among the parties. These negotiations with Goldman Sachs eventually reached an impasse.[26]

33. In light of the impasse and the fact that time-consuming, expensive litigation appeared inevitable, at the request of the CMI Entities and the Monitor, this Honourable Court directed the parties to participate in a confidential, court-supervised mediation (the "**Mediation**") before Chief Justice Winkler. The Mediation commenced on March 29, 2010. On March 31, 2010, Chief Justice Winkler directed an adjournment of approximately two weeks. On April 16, 2010, Chief Justice Winkler, through the Monitor, advised the CMI Entities that Goldman Sachs, Shaw and the Ad Hoc Committee had negotiated a framework to resolve the outstanding condition in the Approved Shaw Transaction regarding the Shareholders Agreement, in order to permit the CMI Entities to go forward with a consensual restructuring.[27]

The Amended Shaw Transaction

34. The Amended Shaw Transaction is the direct result of the Mediation and the discussions that took place during its subsequent adjournment. The CMI Entities were not directly involved in the discussions that occurred during the adjournment, which were conducted among and between Chief Justice Winkler, Shaw, the Ad Hoc Committee and Goldman Sachs.[28]

35. The definitive documentation for the Amended Shaw Transaction (the "**Definitive Documentation**") reflects the framework that was achieved at the Mediation to resolve the outstanding condition under the Approved Shaw Transaction, and takes the form of amendments to the agreements developed in relation to the Approved Shaw Transaction that were negotiated in the subsequent discussions. The Definitive Documentation was signed on May 3, 2010 following approval by the CMI Entities and Shaw.[29]

36. The details of the Amended Shaw Transaction are set out in the June 7th Affidavit. The key aspects of the Amended Shaw Transaction are as follows:

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[26] June 7th Affidavit, para. 39, Applicants' Motion Record, Tab 1, p. 25.

[27] June 7th Affidavit, para 43-44, Applicants' Motion Record, Tab 1, pp. 26-27.

[28] June 7th Affidavit, para. 43, Applicants' Motion Record, Tab 1, p. 26.

[29] June 7th Affidavit, para. 48, Applicants' Motion Record, Tab 1, p. 28.

(a) Shaw or a wholly-owned subsidiary of Shaw will be the sole shareholder of a restructured Canwest Global ("**Restructured Canwest Global**");[30]

(b) Shaw will pay US$440 million in cash (plus the Continued Support Payment, if applicable) to satisfy the claims of the 8% Senior Subordinated Noteholders against the CMI Entities and $38 million to satisfy the claims of the CMI Entities' other Affected Creditors, subject to a *pro rata* increase in that amount for any restructuring period claims directly referable to the Amended Shaw Transaction;

(c) the Shareholders will not be entitled to any distributions under the Plan or other compensation on account of their equity interests in Canwest Global in connection with or as a result of the transactions contemplated in the Plan; and

(d) all equity compensation plans of Canwest Global will be terminated, and any outstanding options, restricted share units or other equity-based awards outstanding thereunder will be terminated and cancelled, and the participants therein will not be entitled to any distributions under the Plan or any other compensation on account of their equity interests in Canwest Global in connection therewith.[31]

37. Concurrently with the execution of the Definitive Documentation, Shaw and Goldman Sachs entered into an agreement (the "**Share and Option Purchase Agreement**") pursuant to which Shaw acquired on that date from Goldman Sachs 299 Class A preferred shares in the capital of CW Investments, representing approximately 29.9% of the total voting shares of CW Investments, and 499,000 Class B common shares, representing approximately 49.9% of the total equity shares of CW Investments. Shaw also obtained an option, subject to CRTC approval, to purchase the remaining 34 Class A preferred shares and 148,014 Class B common shares in the capital of CW Investments held by Goldman Sachs, representing 3.4% of the total voting shares of CW Investments and 14.8% of the total equity shares of CW Investments. The

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[30] June 7th Affidavit, para. 56, Applicants' Motion Record, Tab 1, p. 31.

[31] June 7th Affidavit, para. 31, Applicants' Motion Record, Tab 1, p. 31; June 16th Affidavit, para 12(e), Second Supplementary Motion Record of the Applicants.

aggregate cash consideration paid and payable by Shaw for Goldman Sachs' shares of CW Investments (including the option shares) was $709 million.[32]

38. In addition, on May 3, 2010, Canwest Global, CMI, CW Investments, Shaw and Goldman Sachs executed a full and final mutual release (the "**Mutual Release**") in relation to the litigation challenging the 4414616 Transaction and the sale of Canwest Global's indirect share interest in Ten Network Holdings Limited (which had been the subject of Goldman Sachs' motion in November 2009), as well as in relation to Goldman Sachs' challenge to the approval of the Approved Shaw Transaction, including the Leave Motion.[33]

39. If the Plan is implemented, the Amended Shaw Transaction will see Shaw own outright all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by CTLP and its subsidiaries and all of the interests in the Specialty TV Portfolio currently owned by CW Investments and its subsidiaries, as well as certain related assets of the CMI Entities.

Shareholder Recovery

40. As noted above, the Amended Shaw Transaction does not result in any recovery for the Shareholders. It is not disputed that the Original Recapitalization Transaction and the Approved Shaw Transaction both contemplated that the Shareholders would receive approximately 2.3% of the equity (or its monetary equivalent, representing approximately $11 million) of a restructured Canwest Global, which was to have been funded out of the recovery that was to otherwise be allocable to the 8% Senior Subordinated Noteholders. Receipt of this recovery was, at all times, subject to successfully completing the Original Recapitalization Transaction (and thereafter the Approved Shaw Transaction) and obtaining approval of this Honourable Court in implementing a recovery for Canwest Global's Shareholders in circumstances when Affected Creditors would not be paid their claims in full.[34]

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[32] This transaction took effect on May 3, 2010 in response to Goldman Sachs' requirement for payment, in part, by that date.

[33] June 7th Affidavit, para. 52, Applicants' Motion Record, Tab 1, p. 30.

[34] June 7th Affidavit, paras. 73 to 74, Applicants' Motion Record, Tab 1, pp. 36 to 37.

41. When the CMI Entities were negotiating the Original Recapitalization Transaction with the Ad Hoc Committee in the summer of 2009, some modest shareholder recovery was viewed as beneficial to the restructuring because:

(a) it was thought that a broad distribution of shareholders constituting the public "float" for a restructured Canwest Global would be necessary to implement the original Support Agreement given that it was contemplated at that time that restructured Canwest Global would be a public company; and

(b) cooperation from the Shareholders, particularly the Asper Family, could potentially assist the CMI Entities in obtaining CRTC approval in connection with the implementation of the Support Agreement, in light of the fact that most of the 8% Senior Subordinated Noteholders were not Canadian.[35]

42. Given the evolution of these CCAA proceedings and the nature of the negotiated resolution that was achieved with Shaw, the Ad Hoc Committee and Goldman Sachs at the Mediation, these considerations are simply no longer relevant.[36] Despite the efforts of the CMI Entities following the announcement of the Amended Shaw Transaction to reinstate the recovery for the Shareholders, neither Shaw nor the Ad Hoc Committee agreed that such value should continue to be available to the Shareholders. The 8% Senior Subordinated Noteholders were not prepared to allocate a shareholder recovery from their fixed cash settlement amount negotiated as part of the Mediation. The Monitor will not support a Plan that would see the recovery of Affected Creditors (other than the 8% Senior Subordinated Noteholders) diluted by the 2.3% recovery for the Shareholders.[37]

43. The Amended Shaw Transaction provides an enhanced recovery for Affected Creditors as compared to the Original Recapitalization Transaction which, as noted in paragraph 19 above, was viewed as the best alternative available to the CMI Entities and their stakeholders.[38]

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35 June 7th Affidavit, para. 72, Applicants' Motion Record, Tab 1, p. 36.

36 June 7th Affidavit, para. 75, Applicants' Motion Record, Tab 1, p. 37.

37 June 7th Affidavit, para. 46, Applicants' Motion Record, Tab 1, p. 27.

38 June 14th Affidavit, para. 26, Applicants' Supplementary Motion Record, Tab 1, p. 12.

PART III – ISSUES AND THE LAW

44. This motion raises one main issue:

(a) Should this Honourable Court accept the CMI Entities' filing of the Plan based on the Amended Shaw Transaction and authorize the CMI Entities to call and hold the Creditors' Meeting to approve the Plan? In that regard, should this Honourable Court approve the Definitive Documentation?

The Threshold for Meeting Order/Plan Filing is Low

45. Section 4 of the CCAA provides that:

> Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.[39]

46. The threshold that a debtor company must satisfy in order to call a meeting of creditors is low. In *Nova Metal Products Inc.* v. *Comiskey (Trustee of)*, Doherty J.A. stated:

> I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: Edwards, "Reorganizations under the Companies' Creditors Arrangement Act' [citation omitted]. *I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset.* As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the court very uncertain at the time the initial application is made.[40] [emphasis added]

47. The Nova Scotia Trial Court in the recent case of *Re ScoZinc* articulated the test as follows:

> In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would

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[39] Section 5 of the CCAA contains identical wording in relation to meeting(s) of secured creditors.

[40] *Nova Metal Products Inc. v. Comiskey (Trustee of)*, (1990), 41 O.A.C. 282 (Ont. C.A.) at p. 316.

> be approved by the creditors, or if it was approved by the creditors, it would not, for some other reason, be approved by the Court.[41]

48. These authorities indicate, therefore, that this Honourable Court does not need to pronounce at this stage on whether the Plan is fair and reasonable, or whether it is likely to be accepted by the Affected Creditors. If it is not clearly "doomed to failure" and there is hope for its approval, this Honourable Court should order the Plan to be presented at the Creditors' Meeting for approval.

49. Although it is not necessary at this stage to pronounce on whether the Plan is fair and reasonable, in the interests of certainty as the CMI Entities proceed to the next stage of their restructuring, the CMI Entities seek this Honourable Court's approval of the Definitive Documentation for the Amended Shaw Transaction, which forms the basis for the Plan. Furthermore, it is necessary to address the objections of the Shareholder Group since the Shareholder Group is seemingly seeking to reopen the restructuring efforts of the CMI Entities.

The Amended Shaw Transaction is Fair and Reasonable

50. The Amended Shaw Transaction is the result of intense efforts by all parties to reach a commercial, negotiated resolution of the outstanding disputes with Goldman Sachs and was achieved only as a result of the Mediation conducted by Chief Justice Winkler. The Monitor and the CMI CRA support the Amended Shaw Transaction.[42] As a result of the successful resolution of the treatment of Goldman Sachs' rights under the Shareholders Agreement, which was an express condition to the consummation of the Approved Shaw Transaction, the definitive documentation with respect to the Approved Shaw Transaction was amended, pursuant to the express amending provisions in those documents, to reflect the terms that were agreed upon in satisfaction of that condition.[43]

51. The CMI Entities submit that the Definitive Documentation in respect of the Amended Shaw Transaction should be approved based on the same legal test that applied to the

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41 *Re ScoZinc Ltd.*, 2009 NSSC 163 at para. 7.

42 June 7th Affidavit, para. 7, Applicants' Motion Record, Tab 1, p. 13.

43 June 7th Affidavit, para. 30. Section 9.5(e) of the Original Shaw Subscription Agreement provided that it may be modified, amended or supplemented as to any matter by Canwest Global and Shaw. Similar amendment provisions were included in the Amended Support Agreement and the Original Shaw Support Agreement.

approval of the Approved Shaw Transaction. As this Honourable Court held at the time, it is appropriate to apply the test set out by the Ontario Court of Appeal in *Royal Bank of Canada* v. *Soundair Corp.*[44] This test requires the Court to consider:

(a) whether the CMI Entities have made a sufficient effort to get the best price and have not acted improvidently;

(b) the interests of all of the 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.[45]

52. In addition, it is necessary to consider the opinion of the Monitor.[46]

53. This Honourable Court made the determination that the Approved Shaw Transaction satisfied all four of the *Soundair* criteria. In particular, this Honourable Court made the following key findings of fact in the Shaw Approval Reasons:

(a) "It is clear that the CMI Entities did make a sufficient effort to obtain the best offer."[47]

(b) During the course of initial discussions between RBC and potential investors, "it was recognized that alternative proposals would be considered".

(c) The list of potential investors "included both strategic and financial investors and qualified high net worth individuals in Canada."

(d) "RBC fully canvassed the market. It is unnecessary for the court to be given the identity of the prospective investors in the face of the overwhelming evidence of an extensive market canvas."[48] (emphasis added)

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[44] (1991), 4 O.R. (3d) 1 (C.A.) [Soundair]. See *Shaw Approval Reasons* at paras. 34 to 36.

[45] *Soundair, ibid.* at para. 16

[46] *Shaw Approval Reasons,* para. 36, Applicants' Motion Record, Tab F at pp. 215 to 216.

[47] *Shaw Approval Reasons*, para. 42, Applicants' Motion Record, Tab F, at p. 218.

[48] *Shaw Approval Reason.*, para. 42, Applicants' Motion Record, Tab F, p. 218.

(e) The interests of all parties were considered.[49]

(f) "There was a fair and thorough canvass of the market and a level playing field."[50]

(g) There was a reasonable basis for the support of the Approved Shaw Transaction by the Monitor, the Special Committee, the Board, the CMI CRA and the Ad Hoc Committee due to (i) Shaw's experience in the media industry, (ii) financing not being an issue; (iii) the substantial amount of the Shaw offer; and (iv) the higher implied equity value of the Approved Shaw Transaction in comparison to the Catalyst Term Sheet.[51]

(h) "...subject to closing, a major objective underpinning the initial CCAA filing has now been accomplished. The transaction provides some confidence that the CMI Entities will be able to continue as going concerns."[52]

(i) "... the amounts of the termination fee and the expense fee and the proposed charge itself are fair and reasonable in the circumstances."[53]

54. This Honourable Court also expressed the clear view at the time that, in relation to the outstanding disputes with Goldman Sachs regarding the treatment of the Shareholders Agreement, "a commercial and negotiated resolution of that issue is in the best interests of all concerned."[54]

55. The CMI Entities submit that nothing in the Amended Shaw Transaction should alter this Honourable Court's conclusions regarding the fairness of the Equity Solicitation and regarding the benefits of the Approved Shaw Transaction to the restructuring prospects of the CMI Entities. The Amended Shaw Transaction simply amends the definitive documentation in respect of the Approved Shaw Transaction to reflect the successful resolution of the express condition in the Approved Shaw Transaction regarding the need to resolve the treatment of the

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49 *Shaw Approval Reasons*, para. 43, Applicants' Motion Record, Tab F, p. 218.

50 *Shaw Approval Reasons,* para. 44, Applicants' Motion Record, Tab F, p. 219.

51 *Shaw Approval Reasons,* para. 45, Applicants' Motion Record, Tab F, p. 219.

52 *Shaw Approval Reasons,* para. 45, Applicants' Motion Record, Tab F, p. 219

53 *Shaw Approval Reasons*, para. 45, Applicants' Motion Record, Tab F, p. 219.

54 *Shaw Approval Reasons*, para. 47, Applicants' Motion Record, Tab F, p. 200.

Shareholders Agreement. It is not a new deal that should require this Court to revisit its earlier conclusions under the *Soundair* test.

56. Moreover, the Amended Shaw Transaction represents a number of significant advances in this process relative to the Approved Shaw Transaction. In particular:

(a) the Amended Shaw Transaction is the only transaction available to the CMI Entities that satisfies both of the principal commercial conditions necessary to ensure that the CMI Entities will be able to emerge from the CCAA proceeding as going-concern entities:

(i) Restructured Canwest Global will be owned by a "Canadian" in a manner compliant with the Direction; and

(ii) the Shareholders Agreement has been addressed in a manner satisfactory to the CMI Entities, the Ad Hoc Committee and Shaw.

(b) the Amended Shaw Transaction will provide long-term stability for the CMI Entities' employees, pensioners, suppliers of television content, customers and other stakeholders.

(c) the Amended Shaw Transaction will provide enhanced value for the CMI Entities' Affected Creditors.[55]

57. One of the most important benefits of the Amended Shaw Transaction is the resolution of the treatment of the Shareholders Agreement and the release of all the claims of Goldman Sachs in relation to the matters that were the subject of ongoing litigation. The potential effect of a failure to resolve these issues cannot be overstated.

58. Given the adversarial stance adopted by Goldman Sachs throughout this CCAA proceeding, if a negotiated solution in respect of the Shareholders Agreement had not been achieved, the CMI Entities may have been required to seek approval to disclaim or resiliate the Shareholders Agreement in order to satisfy the conditions under the Original Support Agreement and/or the Approved Shaw Transaction. This course of action would have resulted in protracted,

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[55] June 7th Affidavit, para. 78, Applicants' Motion Record, Tab 1, p. 38.

expensive litigation with Goldman Sachs, including inevitable appeals, with uncertain results for the restructuring prospects of the CMI Entities' businesses.[56]

59. Even if the CMI Entities were successful in disclaiming the Shareholders Agreement, this would likely have resulted in a significant and complicated damages claim by Goldman Sachs. Depending on the outcome of the litigation and of any subsequent valuation, there was a material risk that such a damages claim could have been sufficiently large to give Goldman Sachs a "blocking" position in relation to any restructuring solution available to the CMI Entities that did not satisfy Goldman Sachs.

60. By the same token, failure to obtain approval to disclaim or resiliate the Shareholders Agreement would have put both the Approved Shaw Transaction and the Further Amended Support Agreement with the Ad Hoc Committee at risk, the termination of which would have undermined any ability of the CMI Entities to restructure. Without a consensual resolution of the treatment of Goldman Sachs' rights under the Shareholders Agreement, the CMI Entities were essentially at an impasse in their efforts to emerge from this CCAA proceeding as a going-concern in the foreseeable future.

No Basis for Shareholder Group Objection

61. The Shareholder Group objects to approval of the Amended Shaw Transaction on the basis that, unlike the Original Recapitalization Transaction and the Approved Shaw Transaction, the Shareholders will not receive any recovery under the Amended Shaw Transaction. The Shareholder Group takes the position that this Honourable Court should refuse to approve the Amended Shaw Transaction on this basis (thereby jeopardizing both the Amended Shaw Transaction and the Further Amended Support Agreement), and by extension should require the CMI Entities to conduct an entirely new process – an auction for 100% of the equity of a restructured Canwest Global – for the sole purpose of securing recovery for themselves.

62. The Shareholder Group pays "lip service" to the interests of ordinary creditors, baldly stating that the Amended Shaw Transaction is not fair to unsecured creditors.[57] It is

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[56] See June 7th Affidavit, para. 41, Applicants' Motion Record, Tab 1, p. 25.

[57] Affidavit of Leonard Asper, sworn June 10, 2010 [Asper Affidavit] at para. 6(c), Responding Motion Record of the Shareholder Group [Responding Motion Record], Tab 1, p. 4.

abundantly clear from the fact that the Shareholder Group's objection has only surfaced since the recovery for the Shareholders was removed from the Approved Shaw Transaction structure that the Shareholder Group is acting solely in its own economic interests and that it prepared to sacrifice the recoveries achieved for unsecured creditors in the pursuit of those interests.

63. Essentially, this Honourable Court must consider whether to allow the Shareholder Group to require the CMI Entities to reopen all of the restructuring efforts undertaken by the CMI Entities to date, in the vague hope that a bidder for 100% of the equity or assets of Canwest Global could be found at a price which would result in payment in full of the claims of all the Affected Creditors, and therefore some recovery for the Shareholders.

(i) Subordinate Role of Shareholders under the CCAA

64. The objection of the Shareholder Group must be considered with a clear eye on the subordinate role of shareholders in an insolvency. This subordinate role has been codified in the CCAA in the recent amendments. In particular, it is now expressly stated in the CCAA that:

(a) shareholders of a debtor company do not have the right to vote on a CCAA plan;[58] and

(b) no plan under the CCAA can be sanctioned if it provides for shareholder recovery unless all other creditors are being paid in full.[59]

65. This principle has also been affirmed by CCAA courts in numerous cases prior to the amendment of the CCAA. In particular, in *Cable Satisfaction*, the Quebec Superior Court recently dealt with an almost identical challenge to a CCAA plan by shareholders of the insolvent debtor. The shareholders were contesting the fairness of a determination by the

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[58] Section 6(1) of the CCAA provides that "If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be – *other than, unless the court orders otherwise, a class of creditors having equity claims* – present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement...". "Equity claim" is broadly defined in section 2 of the CCAA to mean "any claim in respect of an equity interest...".

[59] Section 6(8) of the CCAA provides that "No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid."

debtor's noteholders to delete a provision in the debtor's plan which would have allowed some recovery for the debtor's shareholders.[60] The court stated:

> From the representations made, the Court understands that the shareholders are not investing nor participating in the arrangement or the reorganization.
>
> The Amended Plan does take away the 2% participation which had been proposed for the shareholders. However, the creditors who will suffer an important shortfall have decided that since the shareholders bring nothing to the efforts being made to revitalize the company, they should get nothing.[61]

66. In reaching its conclusion that the plan should be sanctioned despite the removal of the shareholder recovery, the Quebec Superior Court cited the language of Paperny J. in *Re Canadian Airlines Corp.*:

> [143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. *Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where the creditors' claims are not being paid in full.* It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no realistic prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company. [citations omitted]
>
> ...
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> [145] It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups *is a function of the insolvency and not of oppressive conduct in the operation of the CCAA.*[62] [emphasis added]

67. In the context of a motion to sanction the plan in Stelco's CCAA proceeding, Farley J. cited the above-noted passage from *Canadian Airlines* in response to objections from

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60 *Cable Satisfaction International Inc.* v. *Richter & Associes Inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.) [*Cable Satisfaction*]

61 *Cable Satisfaction, ibid.* at paras. 49 to 50.

62 *Cable Satisfaction, ibid.* at para. 53. *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) at paras. 143 and 145, leave to appeal refused 2000 ABCA 238 (In Chambers); affirmed 2001 ABCA 9, leave to appeal to SCC refused [2001] S.C.C.A. No. 60 (Jul 13, 2001). See also para. 170 of *Canadian Airlines*: "Where secured creditors have compromised their claims and unsecured creditors are accepting 13 cents on the dollar in a potential pool of unsecured claims totally possibly in excess of $1 billion, it is not unfair that shareholders receive nothing."

certain existing shareholders of Stelco whose shares were to be eliminated under the plan.[63] The existing shareholders sought to require the monitor to conduct a sale of the entire Stelco enterprise as a going concern through a sale of the common shares or assets of Stelco and to adjourn the sanction hearing to allow a sales process to be implemented. As in this proceeding, the existing shareholders argued that there was sufficient value in Stelco to fully satisfy the claims of affected and unaffected creditors and to provide at least some value to existing shareholders. The existing shareholders tendered expert evidence in an attempt to demonstrate that the market for such an auction existed.[64]

68. Farley J. noted that throughout the capital raising and sale processes that had already been conducted, no concrete offer had surfaced, despite talk of an equity financing by certain shareholders. Furthermore, he cautioned that the determination as to whether the shares had economic value should be conducted on a reasonable and probable basis, not based on wishful thinking, noting the proverbial saying, "if wishes were horses, then beggars would ride."[65] Farley J. was of the view that the objection of the existing shareholders had no valid substance, and that the evidence presented was a "chimera".[66] As a result, he dismissed the objections of the shareholders and sanctioned the plan.

69. Farley J. was faced with a very similar situation to the situation presented to this Honourable Court, and the principles he applied in rejecting the shareholder objections in the Stelco decision are relevant to this Honourable Court's task as well. However, it is also important to bear in mind that, unlike in this CCAA proceeding, Farley J.'s decision in *Stelco* did not deal with the kind of additional practical and legal impediments (enumerated below) that would stand in the way of an auction of 100% of the equity of Restructured Canwest Global.

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63 *Re Stelco Inc.* (2006), 17 C.B.R. (5th) 78 (Ont. S.C.J.) [*Stelco*].

64 *Stelco, ibid.* at para. 6.

65 *Stelco , ibid.* at paras. 17 and 19.

66 *Stelco, ibid.* at para. 20.

(ii) Alternative Restructuring Path Not Open to CMI Entities

70. The Shareholder Group's position in this case completely ignores the commercial realities that the CMI Entities, as insolvent debtors, are faced with in this CCAA proceeding and is premised on the CMI Entities having rights which, in reality, they do not have.

71. The CMI Entities are precluded by the terms of the Further Amended Support Agreement, the terms of the Approved Shaw Transaction and by the order of this Honourable Court approving the Approved Shaw Transaction from entering into any other restructuring initiative, including an auction of 100% of the equity or assets of Canwest Global. Under the terms of the Support Agreement, the CMI Entities must pursue the Recapitalization Transaction. As submitted earlier, it was the 8% Senior Subordinated Noteholders who provided the liquidity that permitted the CMI Entities to continue to operate during the CCAA proceeding, in order to pursue the Recapitalization Transaction.[67] Quite simply, the CMI Entities cannot propose a plan of compromise or arrangement that is based upon a transaction that is not supported by the Ad Hoc Committee, as such plan would be doomed to fail.[68] Furthermore, following the entering into of the definitive documentation in relation to the Approved Shaw Transaction and the approval of this Honourable Court on February 19, 2010, the CMI Entities are now contractually obliged to pursue the Approved Shaw Transaction, which does not contain a "fiduciary out" provision and therefore does not allow the CMI Entities to pursue an alternative transaction.

72. The CMI Entities have never had, and still do not have the "unfettered" ability to sell 100% of the equity of a restructured Canwest Global.[69] In an auction scenario which included the entire ownership interest in the Specialty TV Portfolio (*i.e.*, including 100% voting and equity interests in CW Investments), the CMI Entities would have had to compel Goldman Sachs (now Shaw) to sell its 65% equity interest in CW Investments, despite the lack of any legal basis under the Shareholders Agreement for this course of action. This difficulty existed when Goldman Sachs was a party to the Shareholders Agreement, and continues to exist now that Shaw has replaced Goldman Sachs.[70] In addition, the CMI Entities were in no position (and are still in no position) to compel the other equity owners in the specialty television channels that are

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67 June 14th Affidavit, para. 13, Applicants' Supplementary Motion Record, Tab 1, p. 7.

68 June 14th Affidavit, para. 3, Applicants' Supplementary Motion Record, Tab 1, p. 2

69 June 14th Affidavit, para. 3, Applicants' Supplementary Motion Record, Tab 1, p. 2.

held in the Specialty TV Portfolio and certain of the specialty television channels held by CTLP to sell their equity interests in those specialty television channels.

73. In an auction scenario which purports to sell only the 35% equity interest in CW Investments held by the CMI Entities, any such sale requires the support of the Ad Hoc Committee. At no time has there been support from the members of the Ad Hoc Committee for conducting such an auction. Prior to the Mediation, the members of the Ad Hoc Committee were seeking to convert their claims into equity interests in a restructured Canwest Global. The members of the Ad Hoc Committee now support the Amended Shaw Transaction, which will result in distributions under the Plan in satisfaction of the claims of the 8% Senior Subordinated Noteholders. It cannot be forgotten that the 8% Senior Subordinated Noteholders have a blocking vote in this proceeding. As this Honourable Court stated in the Shaw Approval Reasons, "..., no Plan can be approved by the creditors of the CMI Entities without the support of the Ad Hoc Committee". This position results from the magnitude of the debt owed to them, and is simply an objective fact that must be taken into account in considering any restructuring options for the CMI Entities.

No Other Unfairness to Shareholders

(i) Reliance on Recovery

74. The CMI Entities submit that from the outset, recovery of the 2.3% equity interest allocated to the Shareholders (or its monetary equivalent) was subject to a number of conditions precedent, including the satisfaction of the two "business-critical" conditions under the Support Agreement.[71] There were no guarantees that these conditions could be satisfied, or that they could be satisfied in a manner that guaranteed recovery to the Shareholders.

75. As a result, the Shareholder Group is effectively complaining that the risks that they took in reliance on the contemplated shareholder recovery have not paid off. Given the subordinate role played by shareholders in an insolvent company, this is not a basis on which to block the restructuring efforts that have been achieved to date for the benefit of all of the other

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[70] June 14th Affidavit, para. 6, Applicants' Supplementary Motion Record, Tab 1, p. 3.

[71] June 14th Affidavit, para. 22, Applicants' Supplementary Motion Record, Tab 1, p. 10. These conditions involved finding an investor who qualified as "Canadian" and resolving the issues under the Shareholders Agreement.

stakeholders of the CMI Entities. Those Shareholders who acquired their shares on the strength of the Approved Shaw Transaction were necessarily gambling on the ability of the CMI Entities to resolve the outstanding issues with Goldman Sachs in a manner that preserved the contemplated recovery of 2.3% for the Shareholders. They were also gambling on the ability of the CMI Entities to obtain the approval of this Honourable Court of a plan of compromise or arrangement that included this recovery.

76. It was always abundantly clear that the issues with Goldman Sachs remained a substantial roadblock to the ability of the CMI Entities to consummate the Approved Shaw Transaction. If nothing else, Goldman Sachs' very public objections to the Approved Shaw Transaction and litigation posture sent strong signals in this regard. Furthermore, no plan of arrangement or compromise contemplating recovery for the Shareholders had been drafted, let alone filed with this Honourable Court, voted upon by Affected Creditors or sanctioned as fair and reasonable. Until that time, any purchase of shares based upon the Approved Shaw Transaction was speculative at best. The losses of speculators whose recovery is at the bottom of the priority "ladder" simply cannot be a basis for derailing an otherwise beneficial restructuring.

(ii) Lack of "Fiduciary Out"

77. The evidence of James E. Kofman, tendered by the Shareholder Group, raises issues regarding the lack of a "fiduciary out" in the Amended Shaw Transaction, indicating that it is "extremely rare" in public company transactions for there not to be a "fiduciary out" and that the lack of a "fiduciary out" is, in the circumstances, detrimental to stakeholders. Even this expert acknowledges, however, that there are circumstances in which a lack of "fiduciary out" would be appropriate – namely, where the directors are satisfied beyond doubt that there has been a full and informed auction process.[72]

78. When this Honourable Court granted its approval for the Approved Shaw Transaction, this Honourable Court weighed the fairness of the Shaw Transaction taking into account the lack of a "fiduciary out" clause. Pepall J. noted that "ideally" a "fiduciary out" would not have been negotiated away. However, Pepall J. went on to conclude that:

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[72] Kofman Affidavit, paras. 12 to 13, Responding Motion Record, Tab 2(b), pp. 199-200.

> this did not constitute unfairness in the working out of the process or a lack of efficacy or integrity in the process. The evidence before me suggests that there were good faith efforts made by RBC, the CMI Entities and the Ad Hoc Committee to maintain that provision, but Shaw successfully negotiated for its omission. On balance, all of them were of the view that the merits of the Shaw Transaction outweighed the benefit of insisting on the inclusion of the fiduciary out provision.[73]

79. The Ontario Court of Appeal's decision in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, recognizes the utility of a "fiduciary out" clause in enabling directors to comply with their fiduciary duties.[74] However, the Court of Appeal rejected the argument that there could be no limit on the ability of directors to consider superior proposals.[75]

80. There is no basis in the context of this motion to revisit the assessment of this Honourable Court that the absence of a "fiduciary out" is not *per se* unfair. In fact, it is the Shareholder Group's position that is simply unrealistic. It is commercially absurd to expect that once the negotiated resolution of the issues involving the Shareholders Agreement and the disputes with Goldman Sachs had been achieved through, *inter alia*, additional payments from Shaw and amendments to the Approved Shaw Transaction, the CMI Entities should have indicated at that point that the "deal protection" provisions in the transaction documents (which had already been approved by this Court) should be renegotiated to allow the CMI Entities to pursue an alternative transaction that would see Shaw ousted in favour of another bidder.

Deference to the Board's Business Judgement

81. It is a fundamental tenet that a decision with respect to whether to accept a particular investment transaction is a business decision to be made in the business judgement of the board of directors. Even if this Honourable Court disagrees with the informed business judgement of a corporate board of directors, the law is clear that the Court will not substitute its own judgement for the judgement of the board.[76]

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[73] *Shaw Approval Reasons,* para. 44, Applicants' Motion Record, Tab F, p. 219.

[74] (2007), 85 O.R. (3d) 254 (C.A.) [*Ventas*] at para. 53.

[75] *Ventas, ibid. at para. 54.*

[76] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461 at paras. 64 to 67. See also *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69 at para. 40: "Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see Maple Leaf Foods Inc. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.); Kerr v. Danier Leather Inc., [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who

82. As the Ontario Court of Appeal recently held in Stelco's CCAA proceedings:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities... Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.[77] [italics in original, underlining added]

83. In *Maple Leaf Foods Inc.* v. *Schneider Corp.*, Weiler J.A. held that the court should not interfere in a business decision made by a board so long as the decision taken is within "a range of reasonableness":

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.[78] [Emphasis added; italics in original; references omitted.]

84. The CMI Entities submit that, in the present case, the Board exercised its business judgement when it approved the Amended Shaw Transaction. The Board's decision to approve the Amended Shaw Transaction was made honestly, prudently, in good faith and on reasonable grounds.

85. When the Definitive Documentation was presented to the Board for approval, the Board was faced with two choices: pursuing a consensual going concern, recapitalization transaction in the form of the Amended Shaw Transaction with the support of Shaw and the Ad Hoc Committee, and with the Goldman Sachs issues having been consensually resolved, or pursuing some type of hypothetical, uncertain alternative transaction (as suggested by the

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are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation."

[77] *Re Stelco Inc.*, (2005), 75 O.R. (3d) 5 (C.A.) at para. 44.

[78] (1998), 42 O.R. (3d) 177 (C.A.) at p. 192.

Shareholders) in a hostile environment involving opposition from the Ad Hoc Committee, Shaw and Goldman Sachs, notwithstanding the fact that the market had already been "fully canvassed" by RBC.

86. Had the Board refused to implement the resolution facilitated by Chief Justice Winkler at the Mediation, including a consent to the CW Investments Transaction, as the Shareholders seem to suggest it should have, the CMI Entities would be back to "square one" in that:

(a) the CMI Entities would still have been faced with the issues presented by Goldman Sachs and the Shareholders Agreement and the prospect of expensive, time consuming and distracting litigation with Goldman Sachs;

(b) the condition in the Approved Shaw Transaction with respect to the Shareholders Agreement would have remained unsatisfied, with no prospect of timely resolution, in circumstances where the Approved Shaw Transaction had to be implemented by no later than August 11, 2010. This would have put the entire Approved Shaw Transaction in jeopardy;

(c) the continued support of the restructuring efforts of the CMI Entities by the members of the Ad Hoc Committee would have been in jeopardy as the terms of the Amended Support Agreement that were in effect at the time required that creditor approval of a plan of compromise or arrangement occur by April 15, 2010. The Ad Hoc Committee could have terminated the Support Agreement and taken steps to cause the forced sale or liquidation of the company through an enforcement of the Secured Intercompany Note;

(d) the CMI Entities and their employees would continue to face operational disruption and uncertainty with respect to whether the businesses operated by the CMI Entities could continue on a going concern basis; and

(e) the CMI Entities would owe approximately US$458.4 million including accrued and default interest (as at August 31, 2010) to the 8% Senior Subordinated Noteholders and at least approximately $110 million to other Affected Creditors

(which amount could significantly increase in respect of unresolved claims through the course of the claims procedure).[79]

87. In reality, the Board had no basis to pursue a remarketing of its "shop worn" assets, with the Goldman Sachs issues being unresolved, and without the support of the Ad Hoc Committee and Shaw. The CMI Entities would have been in a much worse position than they were when the equity investment solicitation process began in November 2009, as they would have not had any assurances of having enough liquidity to continue as a going concern while their assets were being remarketed.

88. The CMI Entities submit that they will be faced with all of these same issues, in addition to potential litigation with Shaw, as Goldman Sachs' successor to the Shareholders Agreement, as well as the Ad Hoc Committee if their restructuring efforts are reopened at this time.

Conclusion

89. It is well-recognized that the CCAA is a flexible instrument and that the process of a restructuring is fluid and constantly evolving as the parties negotiate solutions to the issues standing in the way of emergence from the CCAA. While the Shareholder Group may understandably be disappointed at the outcome of the Amended Shaw Transaction from the perspective of their own economic interests, this outcome is the product of the very flexibility that is at the heart of the CCAA, together with the inherent risks associated with holding equity in an insolvent company.

90. The Amended Shaw Transaction is in the best interests of the CMI Entities and its stakeholders. By entering into the Amended Shaw Transaction, the CMI Entities have achieved a going concern outcome for their businesses that fully and finally deals with Goldman Sachs, the Shareholders Agreement and the defaulted 8% Senior Subordinated Notes. It provides stability for the CMI Entities' employees, pensioners, suppliers, customers and other stakeholders. It will also provide significant value for the CMI Entities' Affected Creditors and enable the businesses

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[79] June 14th Affidavit, para. 11, Applicants' Supplementary Motion Record, Tab 1, pp. 5-6.

operated by the CMI Entities to continue on a going concern basis as a viable and competitive participants in the Canadian television broadcasting industry.

PART IV – NATURE OF THE ORDER SOUGHT

91. The CMI Entities therefore request an Order substantially in the form of the draft Order attached to the June 15th Affidavit.

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)
18. CGS International Holdings (Netherlands)
19. CGS Debenture Holding (Netherlands)
20. CGS Shareholding (Netherlands)
21. CGS NZ Radio Shareholding (Netherlands)
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" – List of Authorities

1. *Cable Satisfaction International Inc. v. Richter & Associes Inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.)

2. *Maple Leaf Foods Inc.* v. *Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.)

3. *Nova Metal Products Inc.* v. *Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.)

4. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461

5. *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69

6. *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), leave to appeal refused 2000 ABCA 238 (In Chambers); affirmed 2001 ABCA 9, leave to appeal to SCC refused [2001] S.C.C.A. No. 60 (July 13, 2001)

7. *Re Canwest Global Communications Corp.*, 2010 ONSC 1176 (S.C.J.)

8. *Re ScoZinc Ltd., 2009 NSSC 163*

9. *Re Stelco Inc.*, (2005), 75 O.R. (3d) 5 (C.A.)

10. *Re Stelco Inc.* (2006), 17 C.B.R. (5th) 78 (Ont. S.C.J.)

11. *Royal Bank of Canada* v. *Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)

12. *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.)

Schedule "D" - Statutory References

Definitions

2. (1) In this Act,

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

Compromise with unsecured creditors

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromise with secured creditors

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.