Court File No. M38955

COURT OF APPEAL FOR ONTARIO

IN THE MATTER of Section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER of a plan of compromise or arrangement of Canwest Global Communications Corp. and other Applicants

AND IN THE MATTER of a plan of compromise or arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

Applicants

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GLUSKIN SHEFF + ASSOCIATES INC.

PART I - SYNOPSIS

1. This is a motion by Gluskin Sheff + Associates Inc. (**"GS+A"**) under Rule 61.03.1 for leave to appeal from an order made by Justice Pepall on June 17, 2010 in these CCAA proceedings.

2. In January 2010, GS+A commenced an action in the Superior Court of Justice, Court File No. 10-8547-00CL (the **"Action"**) for payment of investment management and performance fees from certain pension plan assets administered by the Applicants Canwest Media Inc. and Canwest Publishing Inc. (collectively, **"Canwest"**, or the **"Canwest Entities"**). It named the Canwest Entities as defendants solely in their capacity as administrators of the plans under Rule 9.01.

3. By Notice of Motion dated April 20, 2010, GS+A moved before Justice Pepall in the Canwest CCAA proceedings for (i) a declaration that the stays in these proceedings did not apply to the Action, or (ii) alternatively, an order lifting the stays, on the basis that its claim is against the pension plans with which GS+A had contracted, not Canwest.

4. The Action is based upon an "Investment Management Agreement" (the **"IMA"**) which governed the terms of GS+A's retainer to manage the plans' assets.

5. It is clear from the language of the IMA that GS+A contracted with Canwest *as agent for* the pension plans, and not as principal. The first page of the IMA specifically identifies the counter-parties as the Canwest Entities, acting "*on behalf of*" the pension plans.

6. The meaning of "on behalf of" is not ambiguous. According to the jurisprudence these words are "conclusive" evidence that the signatory intended to contract as agent, not as principal.

7. Contrary to that jurisprudence, in her decision of June 17, 2010 Justice Pepall concluded that GS+A had contracted directly with the Canwest Entities, and not the plans. As a result, she held that GS+A's claims in the Action represented pre-filing debts of Canwest and were subject to compromise in the CCAA proceedings. This is a clear error.

8. Premised at least in part on her erroneous conclusion that GS+A had contracted directly with Canwest, Justice Pepall also ruled that:

   (i) the stays in the CCAA proceedings applied to GS+A's claims in the Action; and

   (ii) the stays should be lifted only for those claims in the Action in respect of services provided by GS+A after Canwest's CCAA filings (which represent about 3.5% of the monetary value of GS+A's claims).

9. This motion seeks leave to appeal from Justice Pepall's decision that the Canwest Entities were contracting parties to the IMA, and that the fees claimed in the Action were pre-filing debts and subject to compromise. Because the CCAA proceedings are essentially complete, no purpose would be served in asking this Court to set aside Justice Pepall's findings with respect to the application of the stays.

10. GS+A submits that the consideration for granting leave to appeal are met, as:

- the proposed appeal is *prima facie* meritorious;

- the decision involved a pure question of law, and is not entitled to deference from the reviewing court, as is typically the case for CCAA decisions;

- the proposed appeal is of significance to the parties, as the effect of Justice Pepall's decision is to summarily dismiss GS+A's Action and leave it with no effective remedy, given that the claims procedure process has been completed;

- the proposed appeal has broader significance, as it raises serious questions about the legal relationship between pension plan members, plan administrators, and those who perform services for the plans;

- permitting the Action to proceed would have no impact on the CCAA proceedings, which are almost completed; and

- permitting the Action to proceed will have no impact on Canwest's assets post-CCAA.

PART II - THE FACTS

The Parties

11. The Canwest Entities are the sponsors and administrators of numerous defined benefit and defined contribution pension plans. In accordance with applicable legislation a pension trust fund was established for each pension fund.

Reasons for Decision of Pepall J., dated July 19, 2010 ("Reasons of Pepall J."), para. 3, Motion Record Tab 3, p. 9

12. As administrators the Canwest Entities are responsible for investing the assets of the funds in a reasonable and prudent fashion and in accordance with applicable legislation.

Reasons of Pepall J., para. 4, Motion Record Tab 3, p. 9

13. The Canwest Entities appointed RBC Dexia Investor Services Trust ("RBC Dexia") as the custodian of each pension plan pursuant to a Master Trust Agreement dated August 10, 2007. The Agreement provides that RBC Dexia holds title to all of the assets

comprising the Master Trust Fund but does so only in accordance with the instructions of Canwest or investment managers appointed by Canwest.

Reasons of Pepall J., para. 5, Motion Record Tab 3, p. 9

14. Clause 8.2 of the Master Trust Agreement specifically authorizes the Canwest Entities to appoint and instruct investment managers to manage the assets of the Plans.

Hassenrueck Affidavit, Exhibit "C", Motion Record Tab 6C, p. 182

15. GS+A is an investment management firm which was retained in March 2006 to invest and manage assets of certain of the pension plans (the **"Plans"**) sponsored and administered by Canwest.

Reasons of Pepall J., para. 7, Motion Record Tab 3, p. 10

The Investment Management Agreement

16. GS+A's management of the Plans' investments is governed by the IMA.

Reasons of Pepall J., para. 7, Motion Record Tab 3, p. 10

17. The IMA specifically states on the first page that the contracting parties are GS+A and "[the Canwest Entities] *on behalf of* [the Plans]".

***Investment Management Agreement*, Freedman Affidavit, Exhibit "A", Motion Record Tab 5A**

18. The Hassenrueck Affidavit filed by Canwest in response to GS+A's motion does not allege that Canwest contracted personally with GS+A rather than on behalf of the Plans.

Hassenrueck Affidavit, paras. 22-24, Motion Record Tab 6, p. 116

19. The IMA contains the following terms:

(a) The subject matter of the IMA (namely the money to be managed) is an asset which belongs to the Plans, and which is on deposit in a specifically identified trust account (the **"Account"**);

(b) the Account is to be registered as a pooled pension fund;

(c) the Account is in the custody of RBC Dexia as custodian;

(d) withdrawal of funds from the Account was subject to "any fees owing to GS+A";

(e) GS+A is to be paid a monthly management fee based on the value of the assets in the Account; and

(f) GS+A is to be paid an annual performance fee equal to 25% of the net appreciation of the assets in the Account in excess of a specified hurdle. Such performance fee, if earned, was to be payable immediately following the fiscal year end of the Account, which was June 30.

***Investment Management Agreement*, Freedman Affidavit, Exhibit "A", Motion Record Tab 5A**

20. GS+A always issued invoices for its management fees and performance fees to the Canwest Entities. These invoices were always paid directly from the Plans' funds within the Account, by direction provided by Canwest to RBC Dexia.

Hassenrueck Affidavit, paras. 29 & 30, Motion Record Tab 6, p. 117

The Dispute

21. The IMA contemplated that the Account would be invested in a diversified portfolio of income trusts.

Freedman Affidavit, para. 10, Motion Record Tab 5

22. On October 31, 2006, the Federal Government announced its intention to introduce legislation that would make income trusts less attractive. The number of available income trusts securities shrank and became highly concentrated in specific economic sectors. To reduce risk, GS+A began to include other income oriented securities in the Account.

Reasons of Pepall J., para. 9, Motion Record Tab 3

23. In 2007 and 2008 GS+A communicated directly with Canwest and the Plans' Pension Committee to discuss these changes in the portfolio. No objection was made to GS+A's handling of the Account.

Freedman Affidavit, para. 16, Motion Record Tab 5

24. In June, 2009 a conference call took place between Canwest and GS+A to discuss the composition of the Account. At the end of that call Canwest instructed GS+A to sell certain U.S. non-income trust securities then part of the Account but to continue to hold other Canadian non-income trust securities.

Freedman Affidavit, paras. 17-18, Motion Record Tab 5

25. In July, 2009 GS+A issued an invoice for its management fees for the quarter ended June 30, 2009 and for its performance fee for 2009, totalling $809,718.72.

Freedman Affidavit, para. 22, Exhibit "C", Motion Record Tab 5, p. 38 and Tab 5C, p. 61

26. In September, 2009 Canwest questioned the propriety of the performance fee, given that it was to be measured against an income trust index.

Freedman Affidavit, para. 23, Motion Record Tab 5

27. On October 8, 2009 GS+A issued a further invoice for management fees for the period ending September 30, 2009.

Reasons of Pepall J., para. 13, Motion Record Tab 3, p.13

28. During September and October, 2009 discussions took place between GS+A and Canwest over GS+A's mandate, with Canwest suggesting that GS+A draft language for the wording of the mandate on a "go forward" basis, and on the appropriate performance benchmark. In one conversation Canwest assured GS+A that it had "no issues" with the management fees in the quarter ended September 30, 2009.

Freedman Affidavit, paras. 25, 30, Motion Record Tab 5

29. The initial Order in these CCAA proceedings was made on October 6, 2009. A claims procedure Order was made October 14, 2009 pursuant to which proof of claim forms were provided to the Canwest Entities' known creditors.

Reasons of Pepall J., para. 17, Motion Record Tab 3, p. 14

30. Canwest did not provide GS+A with a proof of clam and never advised GS+A that it was considered a creditor for purposes of the CCAA proceedings. Canwest's own material acknowledges that "we did not discuss the ongoing CCAA proceeding one way or the other".

Hassenrueck Affidavit, para. 36, Motion Record Tab 6

Freedman Affidavit, para. 28, Motion Record Tab 5, p. 39

Reasons of Pepall J., para. 17, Motion Record Tab 3, p. 14

31. Canwest in fact directed the June 30, 2009 management fee to be paid out of the Account on October 28, 2009, a date well after the CCAA filing, as it had always done in the past.

Freedman Affidavit, para. 29, Motion Record Tab 5, p. 39

32. Canwest terminated GS+A's appointment as investment manager of the plans on December 23, 2009 and refused to pay the performance fee for 2009 and the outstanding management fees. Nothing in the termination letter suggested that the dispute fell within the CCAA proceedings or that GS+A had to advance a claim for its outstanding fees in those proceedings.

Freedman Affidavit, para. 40, Motion Record Tab 5, p. 41

33. In January 2010, GS+A initiated the Action for $849,648.51 in unpaid performance and management fees.

***Statement of Claim*, Freedman Affidavit, Motion Record Tab 5J**

34. It was only after the Action had been commenced that Canwest first took the position that the claim was caught by the CCAA orders and was subject to compromise as a claim "against or in respect of" the Canwest Entities.

Freedman Affidavit, para. 45, Exhibit "K", Motion Record Tab 5, p. 41 and Tab 5K

35. Once GS+A became aware of Canwest's position, it immediately brought a motion before Justice Pepall to have her determine the issue.

Freedman Affidavit, para. 45, Motion Record Tab 5, p. 41

The Claim in the Action

36. The Action is against the Canwest Entities solely in their representative capacities as administrators of the Plans, and seeks recovery only from the Plans' assets, and not from Canwest.

37. This is clear from a plain reading of the Statement of Claim, which:

(a) specifies in the style of cause that each of Canwest Media and Canwest Publishing is a defendant "solely in its capacity as Administrator of the [Plans]";

(b) claims the outstanding fees from the assets of the Plans; and

(c) seeks no damages or other payment from Canwest. [1]

38. Procedurally, naming Canwest as a defendant, and not the large number of Plan members who are the beneficiaries of the Plans, is authorized by Rule 9.01(1), which permits an action to be brought against an "administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties".

Rule 9.01, Rules of Civil Procedure

The Motion before Justice Pepall

39. By Notice of Motion dated April 20, 2010, GS+A moved before Justice Pepall in the CCAA proceedings, seeking:

(a) a declaration that the stays articulated in the initial orders in the Canwest CCAA proceedings did not apply to the Action;

(b) in the alternative, an order granting leave to GS+A to continue the Action against Canwest in a representative capacity; and

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[1] On the motion before Justice Pepall, Canwest contended that the Statement of Claim does not restrict the relief sought to the Plans' assets. At the hearing, GS+A's counsel agreed the claim would be so restricted to the extent it is not clear from the Statement of Claim.

(c) in the further alternative, an order under Rule 10.01 of the Rules of Civil Procedure appointing one or more persons other than Canwest to represent the members of the Plans in the Action and permitting the Action to proceed in the ordinary course.

GS+A Notice of Motion dated April 20, 2010, Motion Record Tab 4

40. In her Order of June 17, 2010, Justice Pepall concluded that the Stays applied to the Claim, and with one minor exception, refused to lift them.

41. Central to Justice Pepall's decision was her conclusion that the Canwest Entities, and not the Plans, were the contracting parties to the IMA. This conclusion is reflected in paragraph 35 of the Reasons:

> The Custodian, RBC Dexia, is the trustee who held legal title to the assets in the fund. Canwest Parties contracted for and acquired the services of GSA. Although by statute, the fees could be paid from the Account, the plan trusts were not liable for payment; the Canwest Parties were. The Canwest Parties approved payments to GSA and then authorized the Custodian to pay them out of the Account. The Custodian had no responsibility or requirement for investment management services; the Canwest parties did. The Canwest Parties were described as contracting on behalf of the plans but this simply reflects their role as administrator. ... **[Emphasis Added]**

Reasons of Pepall J., para. 35, Motion Record Tab 3, pp. 20-21

42. In support of this conclusion, Justice Pepall noted that Canwest was not the trustee of the pension funds and in its capacity as administrator "had the ability to engage investment advisors in the discharge of their responsibilities". Further, Justice Pepall relied upon *General Motors Canada Limited v. Canada*, [2009] F.C.J. No. 447 (F.C.A.) holding that the administrator (GMC) had not entered into an investment management agreement as agent for certain pension plans and was entitled to claim an input tax credit to offset goods and services tax payable on investment management fees.

Reasons of Pepall J., paras. 32 & 33, Motion Record Tab 3, pp. 19-20

43. Justice Pepall concluded that the Action was caught by the Stays, i.e. that it is "in respect of" or "affects" Canwest's business or property, because:

(a) the IMA, on which the Action is premised, is with Canwest, not the Plans;

(b) Canwest's administration of the Plans are important aspects of Canwest's business; and

(c) for those Plans which are defined benefit plans, Canwest would ultimately be responsible for any deficiencies in those plans' assets, including those resulting from the claims in the Action.

Reasons of Pepall J., paras. 28 – 38, Motion Record Tab 3, pp. 17-21

44. Justice Pepall ruled that the Stays should not be lifted because, since in her view the Canwest Entities (and not the Plans) were contractually responsible for GS+A's fees, lifting the stay would permit the exact type of manoeuvring that the CCAA was designed to avoid. She was critical of GS+A's decision to commence the action in face of the court ordered stays and characterized GS+A's position as unfair to other creditors who had submitted claims in the CCAA process.

Reasons of Pepall J., paras. 39-43, Motion Record Tab 3, pp. 21-24

45. Most significantly, for the purpose of this motion, Justice Pepall's conclusion that GS+A contracted directly with the Canwest Entities, and not the Plans, led her to conclude that GS+A's claims for fees was "pre-filing debt" and subject to compromise by the CCAA proceedings.

46. As expressed by Justice Pepall at paragraphs 35 and 44 of her Reasons:

> **The performance fee and the management fees are pre-filing debt with respect to the LP Entities and subject to compromise**. The same is true for the CMI Entities with the exception of the October 1, 2009 to December 23, 2009 management fee attributable to them which is arguable recoverable for post-filing services rendered pursuant to section 11.2 of the CCAA. I am lifting the stay for the limited purpose of permitting a claim by GSA for that amount which I estimate would be less than $30,000. **[Emphasis Added]**

Reasons of Pepall J., para. 44, Motion Record Tab 3, p. 24

47. The effect of this decision was to summarily extinguish GS+A's claims in the Action (with the exception of the small amount found by Justice Pepall to be "post-filing" debt). Because GS+A had not filed a claim in either CCAA proceeding within the time period

set out in the claims procedure orders (having never been notified that it was a creditor of Canwest) Justice Pepall's order left it without any effective remedy.

48. GS+A's claims in the Action were effectively extinguished pursuant to the terms of two Claims Procedure Orders:

(a) the Claims Procedure Order for Canwest Global Communications Corp. entities, dated October 14, 2009, approving a Claims Bar Date of **November 19, 2009** for both known and unknown creditors (for certain of the known creditors this date was subsequently extended to December 17, 2009); and

(b) the Amended Claims Procedure Order dated May 17, 2010 for Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc., approving a Claims Bar Date of **May 7, 2010** for all creditors;

> ***see* Claims Procedure Order dated October 14, 2009 – Canwest Global Communications Corp., *found at* <http://cfcanada.fticonsulting.com/cmi/courtOrders.htm>**
>
> ***see* Amended Claims Procedure Order dated May 17, 2010 – Canwest Publishing Inc. et. al., *found at* <http://cfcanada.fticonsulting.com/clp/courtOrders.htm>**

PART III - THE PROPOSED QUESTION TO BE DETERMINED ON APPEAL

49. The proposed question to be determined on appeal is:

(a) Did Justice Pepall err in law in concluding that Canwest Entities were parties to the IMA, rather than the Plans, such that the claims in the Action are pre-filing debt subject to compromise in the CCAA proceedings?

PART IV - ISSUES & ARGUMENT

The Test for Leave

50. As Justice Pepall's orders were made in proceedings under the CCAA, leave to appeal under section 13 of the CCAA is required.

51. The test for leave under section 13 of the CCAA has commonly been expressed as involving four considerations:

(a) whether the appeal is *prima facie* meritorious;

(b) whether the appeal will unduly hinder the CCAA process;

(c) whether the appeal is of significance to the action / parties; and

(d) whether the appeal is of significance to the practice.

52. These considerations are a means of determining what has been described as the single criterion for leave to appeal – that there must be serious and arguable grounds that are of real and significant interest to the parties.

> ***Edgewater Casino., Re*, 2009 CarswellBC 213 (B.C.C.A.) at para. 23, referring to *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A.), GS+A Brief of Authorities, Tab 1**
>
> ***Resort Funding LLC v. Fairmont Resort Properties Ltd.*, [2009] A.J. No. 839(Alta. C.A.) at para. 5, GS+A Brief of Authorities, Tab 2**

53. Ultimately, the question of whether leave should be granted is one of discretion for the court to be exercised according to the circumstances of each case. The interests of justice are always the overriding consideration.

> ***Steinberg Inc. (Re)*, [1993] Q.J. No. 860 (Q.C.A.) at p.2 (Q.L.), GS+A Brief of Authorities, Tab 3**
>
> ***Cliffs Over Maple Bay Investments v. Fisgard Capital Corp.*, 2008 CarswellBC 1756 (B.C.C.A.) at para. 19, GS+A Brief of Authorities, Tab 4**

54. Where as in this case the decision from which leave is sought is not a discretionary one, an appellate court will be more inclined to intervene in the CCAA context.

> ***Edgewater Casino., Re, supra*, at paras. 24 & 25, GS+A Brief of Authorities, Tab 1**

55. Where as in this case the issue pertains to the legal interpretation of a document, the standard of review is correctness and the decision below should be subject to that standard.

***Resort Funding LLC v. Fairmont Resort Properties Ltd., supra* at para. 6, GS+A Brief of Authorities, Tab 2**

56. In *Morneau Sobeco Partnership v. Aon Consulting Inc.*, the issue was whether officers and directors of a company which had undergone CCAA proceedings could not be sued because they were protected by a claims bar order issued in those proceeding. The order barred claims against persons who were sued in their capacity as directors and officers of the company.

***Morneau Sobeco Partnership v. Aon Consulting Inc.*, [2008] O.J. No. 1022, (C.A.), , GS+A Brief of Authorities, Tab 8**

57. A motions judge had struck a third party claim against former officers, directors and employees of the company. The Court of Appeal allowed an appeal from that decision, thereby permitting the third party claim to proceed, because it was not against the Applicant's officers and directors in their capacity as such, but rather in their capacity as agents and employees of the company as administrator of the pension plans.

58. The respondents on the appeal asserted that leave was required to bring the appeal, and accordingly brought a motion to quash the appeal.

59. In dealing with that position, the Court of Appeal ruled:

> "... if leave to appeal is necessary I would grant leave. It follows that I would dismiss the motion to quash"

***Morneau, supra* at para. 49, GS+A Brief of Authorities, Tab 8**

60. Clearly a similar issue to that at issue in this case – whether a CCAA order applies irrespective of the capacity in which a proposed defendant is acting - was sufficient to attract the appellate Court's review in *Morneau*. As in this case, the failure to grant leave would have been the summary dismissal of the third party claim at issue in that case.

The Merits

61. GS+A submits that it has a strong case on the merits; and indeed that Justice Pepall made a clear error in law in concluding that GS+A contracted with Canwest personally rather than as agent for the Plans.

The Jurisprudence

62. It is trite law that a principal may contract through an agent with a third party:

> Under the law of agency, a principal may contract with another party through an agent. **In such circumstances, even though the contract is negotiated between the agent and the third party (and may even be signed by the agent, not the principal), the contract which comes about is held to be between the principal and the third party, not the agent and the third party.**
>
> ...
>
> The true party is the principal; the agent is only a sort of amanuensis or instrument. The consideration is furnished by the principal; it is only transmitted on his behalf by the agent. ... [emphasis added]
>
> **G.H.L. Fridman, *The Law of Contract in* Canada, (Carswell, 5th Edition) at pp. 191-193, GS+A Brief of Authorities, Tab 5**

63. The law regarding whether a party to a contract is to be construed to be with the person who signed it or another person as principal is well settled.

64. The ordinary principles of construction are to be followed: where the contract clearly indicates that the signatory is acting "on behalf of" another person, that other person is construed as the contracting party.

65. In the Supreme Court of Canada decision in *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, Justice McLachlin (as she then was) adopted the following proposition from the seminal U.K. case *Bridges & Salmon, Ltd. v. The Swan*, [1968] 1 Lloyd's Rep. 5:

> ...if he [the agent] **states in the contract**, or indicates by an addition to his signature, **that he is contracting as agent only on behalf of a principal**, he is not liable, unless the rest of the contract clearly involves his personal capacity, or unless he is shown to be the real principal. [emphasis added]
>
> ***Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683 (S.C.C.) at para. 20, GS+A Brief of Authorities, Tab 6**

66. Also in *Q.N.S. Paper Co.*, Justice L'Heureux-Dube referred with approval to another passage from *The Swan*, which specifically addressed the significance of the words "on behalf of":

> **Where it is stated in the contract that a person makes it** "as agent for", or "on account of", or **"on behalf of"**, or simply "for", **a principal**, or where words of that kind are added after such person's signature, **he is not personally liable**: Gadd v. Houghton and Another, (1876) 1 Ex. D. 357; Universal Steam Navigation Company Ltd. v. James McKelvie & Co., [1923] A.C. 492; Kimber Coal Company Ltd. v. Stone and Rolfe, Ltd., [1926] A.C. 414; (1926) 24 Ll.L.Rep. 429
>
> ***Q.N.S. Paper Co. v. Chartwell Shipping Ltd., supra*, at para. 89 , GS+A Brief of Authorities, Tab 6**

67. Similarly, in the more recent decision in *Rothwell Corporation v. Amstel Brewery Canada Limited*, Justice Montgomery ruled that the words "on behalf of" mean that the signatory was acting only as agent for the person on whose behalf the contract was signed. Justice Montgomery relied on the same U.K. authorities approved in *Q.N.S*:

> The first defence raised is, an agent who signs on behalf of a principal cannot sue on his own behalf. G.H.L. Fridman, The Law of Agency, 6th ed. (Toronto: Butterworths, 1990), states at p. 224:
>
> > General rule. It has earlier been pointed out that the normal, general, effect of the making of a contract by the agent **on his principal's behalf** is that the agent is not a party to the relationships created by such contract. He cannot be sued by the third party on the contract **he has made for his principal**, nor can he sue the third party on such contract....
>
> Halsbury's Laws of England, 4th ed., vol. 1(2) (London: Butterworths, 1990), at pp. 116 and 117, addresses issues between agents and third parties.
>
> ...
>
> > Prima facie a party is personally liable on a contract if he puts his unqualified signature to it. In order, therefore, to exonerate the agent from liability, **the contract must show, when construed as a whole, that he contracted as agent only, and did not undertake any personal liability. ... If he states in the contract, or indicates by an addition to his signature, that he is contracting as agent only on behalf of a principal, he is not liable**, unless the rest of the contract clearly involves his personal liability, or unless he is shown to be the real principal.
> >
> > **The words** "as agents", "on account of", **"on behalf of"**, and "for" **are conclusive when qualifying the signature to negative responsibility of the signatory as principal** whether the identity of the actual principal is disclosed or not, **and notwithstanding that the contract may impose active obligations upon the agent towards the other contracting party**...
>
> ...

The principle was adopted by Lord Goddard C.J. in Lester v. Balfour Williamson Merchant Shippers Ltd., [1953] 2 Q.B. 168, [1953] 1 All E.R. 1146 (D.C.), at pp. 175-76 Q.B., at pp. 1148-49 E.R.:

> ... **It does not matter whether the qualification of his liability, if he be only an agent, is found only in the body of the document or whether it is found by words added afterwards for signature.** Atkin, L.J. put it extremely clearly in Ariadne S.S. Co., Ltd. v. J. McKelvie & Co. ([1922] 1 K.B. 535):
>
> > ... Signature unconditionally appended is proof of unconditional assent to the terms recorded in the body of the contract. If the body of the contract records that the signer is a party, or leaves the name of the party to be inferred from the signature, the signature will be proof that the signer has assented to a contract made with him. The contract may, however, record that the contract is made between A. and B. acting by his agent C. and may be signed by C., in which case C. has assented to a contract between A. and not C. but C.'s principal B. **But the assent signified by the signature may be qualified so as to show that the signer is not assenting unconditionally to the contract, but is assenting in a representative capacity on behalf of a principal** . . .What words in the body of the contract are sufficient to negative personal liability, and what words qualifying signature are sufficient to negative assent as principal were, up to 1876, in doubt. But since June, 1876, when the case of Gadd v. Houghton was decided in the Court of Appeal by James, Mellish and Baggallay, L.JJ. and Quain and Archibald, JJ., **I have always understood the law to be that the words on account of' and the words as agents' are conclusive, when qualifying the signature to negative liability as principal**, and that whether the actual principal is disclosed or not.

...

As Lord Justice James said in Gadd v. Houghton (1876), 1 Ex. D. 357 (C.A.), at p. 359:

> **When a man says that he is making a contract "on account of" some one else, it seems to me that he uses the very strongest terms the English language affords to shew that he is not binding himself, but is binding his principal.**

...

It is clear that, throughout, Rothwell acted as agent and not as principal. The issue of liability depends upon the terms in which the agent contracted. **By adding the qualification to the signature of the president of Rothwell "on behalf of an investor group", Rothwell has made it clear it is contracting as agent only.** [emphasis added]

***Rothwell Corp. v. Amstel Brewery Canada Ltd.*, [1991] O.J. No. 2218 (Gen. Div.) at paras. 19-27, GS+A Brief of Authorities, Tab 7**

68. The first page of the IMA, which states that the agreement is with Canwest "on behalf of the [Plans]" is, in the language of the governing authorities referred to above, "conclusive" evidence that the Plans, not Canwest, are the contracting parties.

69. This interpretation is completely logical, given Canwest's limited role as administrator. To say otherwise would be to acknowledge that Canwest is personally liable to pay GS+A's fees, or for any failure to comply with the terms of the IMA.

70. It is also consistent with Canwest's conduct throughout. Canwest always directed that GS+A's fees be paid out of the Account. In the period after the Initial CCAA Order Canwest did not treat GS+A as a creditor (contingent or otherwise) for purposes of the proceedings, but continued to deal with GS+A in the ordinary course of business.

71. The fact that RBC Dexia is the custodian in no way precludes another party from acting as agent to the Plans.

72. In point of fact, the Master Trust Agreement which governs the "Master Pension Trust Fund" uses precisely the same language as the IMA. It refers to the agreement as being between RBC Dexia and Canwest "*on behalf of*" the identified pension funds. Canwest could not seriously suggest that it intended to enter into this agreement as principal.

Amended and Restated Master Trust Agreement, Hassenrueck Affidavit, Exhibit "C", Motion Record Tab 6C, p. 160

73. Further, it is respectfully submitted that CCAA stay orders such as the one at bar should be interpreted in the context of the capacity in which parties act and are sued. For example, in *Morneau Sobeco Limited Partnership v. Aon Consulting Inc.*, the Ontario Court of Appeal ruled that a CCAA order did not bar a claim against officers and directors which alleged wrongdoing in their roles as agents to a pension plan, rather than in their capacities as officers and directors of the debtor company.

74. As expressed by the Court of Appeal in *Morneau*:

> Paragraph 15 of the Termination Order protects the directors and officers from claims arising from their service as directors and officers. In the Proposed Third Party Claims, the Slater Personnel are not being sued in their capacity as directors and officers of Slater. Rather, the claims are made against them as individuals, in their capacity as agents and employees of Slater qua administrator.
>
> ...
>
> If the Slater Personnel are treated solely as directors and officers, they were in an impossible position. They could not fulfill their duties both to Slater and to the Plans' members. That impossibility is obviated if the roles played by the Slater Personnel are kept separate. Viewed in this way, although the Slater Personnel were appointed to the Audit Committee by virtue of their positions as directors and officers, when making decisions in respect of the Plans' administration they did so as agents and employees of Slater qua administrator - not as directors and officers.
>
> Accordingly, the Proposed Third Party Claims would not be barred by the CCAA orders because those claims do not relate to the Slater Personnel in their roles of directors and officers but, rather, as individuals who were the agents and employees of Slater, the Plans' administrator. Consequently, leave would not be necessary to bring the Proposed Third Party Claims and there would be no need to lift the stay.
>
> ***Morneau Sobeco Partnership v. Aon Consulting Inc., supra*, at paras. 31, 35, 36 [emphasis added], GS+A Brief of Authorities, Tab 8**

75. It is submitted that the reasoning of the Court of Appeal in *Morneau* is sound and applies equally to the motion before the Court: Since GS+A does not sue Canwest in its corporate capacity, the Action is not barred by the Stay and no leave should be necessary.

Justice Pepall's Mistaken Reliance on the* General Motors *case

76. In reaching her conclusion that Canwest was personally a party to the IMA, Justice Pepall erroneously relied on the decisions of the Tax Court of Canada and the Federal Court of Appeal in *General Motors of Canada Ltd. v. Canada*.

77. At issue in that case was whether GMC, the administrator of its employees pension plans, was eligible for input tax credits in respect of GST paid to investment managers of its pension plans.

78. According to the three part test under the *Excise Tax Act*, GMC was required to show that (i) it acquired the investment management services, (ii) GST was payable on those services, and (iii) the services were acquired by GMC for use in the course of its commercial activities.

79. The Crown argued that the acts performed by GMC in acquiring the services of the investment managers were deemed by the *Excise Tax Act* to be the acts of the plan trusts, such that the test was not met. The Tax Court and the Court of Appeal concluded otherwise, ruling that GMC satisfied the test under the Act, largely based on the non-contentious finding (unlike in the present case) that the investment management services contracts were directly with GMC, rather than the plans.

80. Unlike the present situation, the agreements in *General Motors* did not stipulate that they were made "on behalf of" the plans. To the contrary, the Tax Court decision referred to (i) the agreement as a "separate written agreement between GM Canada and the Investment Manager"; (ii) testimony from GMC's Chartered Accountant that "the legal agreements for the management of the funds are between GMCL and the Investment Managers"; and (iii) testimony from one of the investment managers that "General Motors is [our] client and they are the ones who paid us to do this."

> ***General Motors of Canada Ltd. v. Canada*, [2008] T.C.J. No. 80 (T.C.C.) at paras. 20, 22, 24, upheld at [2009] F.C.J. No. 447 (F.C.A.), GS+A Brief of Authorities, Tab 9**

81. *General Motors* was completely distinguishable from the case before Justice Pepall, because in *General Motors* the investment management agreement was between the employer in its personal capacity and the manager. It did not specify that General Motors of Canada Ltd. was contracting on behalf of its pension plans, as does the IMA.

82. There is nothing in the reasoning in *General Motors* to suggest that investment management contracts for pension plan assets must always be construed as being directly with the administrator of the plan, irrespective of the wording of the agreement, or that the ordinary principles of contractual interpretation should be abandoned or modified in any respect.

83. Justice Pepall also appears to have drawn considerable support for her conclusion that GS+A contracted directly with Canwest from findings of the Tax Court in *General Motors* that:

(i) the roles of GMC as administrator, and Royal Trust (which held title to the plan assets as trustee) were separate; and

(ii) the invoices were issued solely to GMC pursuant to the investment management agreements.

84. That Canwest does not hold title to the Plans' assets is utterly irrelevant to the question of whether, as agent, it contracted with GS+A on behalf of the Plans. Again, the fact that RBC Dexia is the custodian in no way precludes another party from acting as agent to the Plans.

85. It is also irrelevant that GS+A sent its invoices directly to Canwest (rather than to RBC Dexia), as this is entirely consistent with GS+A having viewed Canwest as acting as agent to the Plans with respect to investments (and, unlike in *General Motors*, the IMA does not stipulate that invoices be issued to the company).

86. In sum, Justice Pepall's reliance on *General Motors* is both illogical and an improper departure from the proper contractual interpretation approach she was required to undertake.

87. It is also noteworthy, as indicated in Part II above, that the claims in the Action are pleaded as against and in respect of the Plans and their members, not Canwest. Canwest is named in the Action solely as a representative of the Plans and their Members.

88. Procedurally, naming Canwest as defendant in the Action, and not the voluminous number of Plan members who are the beneficiaries of the Plans, is authorized by Rule 9.01(1), which permits an action to be brought against an "administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties".

Rule 9.01, Rules of Civil Procedure

89. Further, there was no evidence on the motion to suggest that GS+A, if successful in the Action, would be unable to recover from plan assets, thereby requiring Canwest to itself make payments to ensure that unfunded plan liabilities were met (as it would be obliged to do under statute).

90. Finally, with respect, Justice Pepall's characterization of GS+A's conduct as "manoeuvering" was misplaced. Canwest, throughout, treated GS+A as entirely unaffected by the CCAA proceedings, consistent with GS+A's position that it was contracting as agent for Plan members. Once GS+A became aware that Canwest's position had changed, it promptly sought the appropriate relief from Justice Pepall with respect to the Action.

91. In any event, GS+A's alleged motivation is entirely irrelevant to the legal issue which Justice Pepall decided – The capacity in which Canwest contracted with GS+A.

Other Considerations in Decision to Grant Leave to Appeal

92. As referred to in paragraphs 38 and 39 above, the question of whether leave should be granted is ultimately in the court's discretion, to be exercised in the interests of justice.

93. GS+A submits that the significance of the error made by Justice Pepall – which did not involve the exercise of discretion and which was an error in law involving the interpretation of a contract – is sufficient to warrant the granting of leave.

94. In any event, the other three considerations referred to in paragraph 38 above support the same conclusion.

95. On the question of the significance of the appeal to the action / parties, the effect of Justice Pepall's decision is to summarily extinguish GS+A's claims in the Action, without the benefit of a trial. Clearly this is of significance to GS+A.

96. This issue also has broader significance for all organizations that enter into legal relationships with pension plan administrators. The law in this area needs to be clarified so that the rules are clear for all those involved. It is likely that many Canadian companies which bring applications under the CCAA have sponsored or administered

pension plans with their employees and contractual arrangements with managers that are similar to this one.

97. The question of how claims against pension plans should be dealt with in a CCAA proceeding is likely to affect many other CCAA applications. Clarity on the issue in respect of which leave is sought will serve to develop the law applicable to CCAA proceedings generally.

98. Lastly, on the question of the impact of the appeal to the CCAA process, as noted above, the Plan Sanction Order in the Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. proceeding was issued on June 18, 2010, and the Plan Sanction Order in the Canwest Global Communications Corp. proceeding was issued on July 28, 2010. In other words, the Canwest CCAA proceedings are, for all intent and purposes, complete.

See for example: *Edgewater Casino, supra* at para. 24, GS+A Brief of Authorities, Tab 1

99. Further, because GS+A is not seeking any relief from Canwest in the Action (and only from the Plans' assets), there is no possible impact to Canwest or the restructuring process. The Plans' assets are distinct from Canwest's assets and are insulated from claims by Canwest creditors.

100. Notably, this same rationale has been applied to lift stays in analogous circumstances, where any judgment against the CCAA debtor company would be satisfied by an insurer, and not the company.

See for example:

***Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 (C.A.), in which leave to appeal was granted and the appeal was allowed, GS+A Brief of Authorities, Tab 10**

***Carey Canada Inc.*, [2006] O.J. No. 4905 (S.C.J.), paras. 6-10, 16, GS+A Brief of Authorities, Tab 11**

***United Properties Ltd (Re)*, [2005] B.C.J. No. 3012 (B.C.S.C.) at para. 12, GS+A Brief of Authorities, Tab 12**

PART V - ORDER REQUESTED

101. GS+A requests an order granting it leave to appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 30, 2010

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SCHEDULE "A"

1. *Edgewater Casino., Re*, 2009 CarswellBC 219 (B.C.C.A.)
2. *Resort Funding LLC v. Fairmont Resort Properties Ltd.*, [2009] A.J. No. 839 (Alta. C.A.)
3. *Steinberg Inc. (Re)*, [1993] Q.J. No. 860 (Q.C.A.) at p.2 (Q.L.)
4. *Cliffs Over Maple Bay Investments v. Fisgard Capital Corp.*, 2008 CarswellBC 1756 (B.C.C.A.)
5. G.H.L. Fridman, *The Law of Contract in Canada*, pp. 191-193 (Carswell, 5th Edition)
6. *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683 (S.C.C.)
7. *Rothwell Corp. v. Amstel Brewery Canada Ltd.*, [1991] O.J. No. 2218
8. *Morneau Sobeco Limited Partnership v. Aon Consulting Inc.*, [2008] O.J. No. 1022 (Ont. C.A.)
9. *General Motors Canada Limited v. Canada*, [2009] F.C.J. No. 447 (F.C.A.)
10. *Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 (C.A.)
11. *Carey Canada Inc.*, [2006] O.J. No. 4905 (S.C.J.)
12. *United Properties Ltd (Re)*, [2005] B.C.J. No. 3012 (B.C.S.C.)

SCHEDULE "B"

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Rule 9.01

9.01 (1) A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties. R.R.O. 1990, Reg. 194, r. 9.01 (1).

Exceptions

(2) Subrule (1) does not apply to a proceeding,

(a) to establish or contest the validity of a will;

(b) for the interpretation of a will;

(c) to remove or replace an executor, administrator or trustee;

(d) against an executor, administrator or trustee for fraud or misconduct; or

(e) for the administration of an estate or the execution of a trust by the court. R.R.O. 1990, Reg. 194, r. 9.01 (2).

Executor, Administrator or Trustee Refusing to be Joined

(3) Where a proceeding is commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent. R.R.O. 1990, Reg. 194, r. 9.01 (3).

Beneficiaries and Others Added by Order

(4) The court may order that any beneficiary, creditor or other interested person be made a party to a proceeding by or against an executor, administrator or trustee. R.R.O. 1990, Reg. 194, r. 9.01 (4).

IN THE MATTER of Section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER of a plan of compromise or arrangement of Canwest Global Communications Corp. and other Applicants

AND IN THE MATTER of a plan of compromise or arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

Court File No. M38955

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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