

**COURT OF APPEAL FOR ONTARIO**

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 RESPONDING PARTY,  
THE CATALYST CAPITAL GROUP INC.**

**(Motion for Leave to Appeal Brought by GSCP)**

March 12, 2010

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TO: THE SERVICE LIST

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THE CATALYST CAPITAL GROUP INC.  
(Motion for Leave to Appeal)**

**PART I - OVERVIEW**

1. The Catalyst Capital Group Inc. ("Catalyst") supports the motion brought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.l and GS VI AA One Parallel Holding S.ar.l (collectively, "GSCP") for leave to appeal the orders (the "Orders") of Madam Justice Pepall (the "Motions Judge") issued February 19, 2010.
2. Catalyst appeared on the motion below and made submissions to the Motions Judge. In this motion for leave to appeal, Catalyst relies on and adopts the submissions of fact and law made by GSCP in its factum. Catalyst will not repeat those submissions, but instead will focus on those facts particular to the Catalyst Offer (defined below) and the legal implications of the Orders.
3. Catalyst submits that there is a fundamental error in the Orders that requires appellate intervention. The Motions Judge failed to apply cardinal tenets of the CCAA process, which are

that the process must be fair, must be perceived to be fair, and must depend upon effective judicial supervision. The Orders below are a product of a process that was procedurally unfair and that produced a result that is substantively unfair.

4. The proposed appeal is important not only for the parties, but for the practice as a whole. The timing of the motion was coercive to the Motions Judge and gave the parties insufficient time to cross-examine or even consider the various positions. The Court of Appeal needs to make clear to counsel and the business community in general that such coercive tactics will not be countenanced.

5. In addition, the proposed appeal is important for the practice as a whole because the Orders approved a transaction that contained no "fiduciary out" and which followed a process that expressly excluded any "white knight" bidders (such as Catalyst) from emerging. Such a transaction flies in the face of this Court's decision in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, which stated that there was "no doubt" that directors had a fiduciary obligation to maximize value in a process such as this. While the Court was not willing to go as far as some American authorities, which would prohibit any limitations on "fiduciary outs", this is a case where there was no "fiduciary out" *at all*. The Motions Judge erroneously found that such a process did not constitute "unfairness in the working out of the process", which is a clear legal error.

6. Catalyst submits that the motion for leave to appeal should be granted.

## PART II - FACTS

7. Catalyst is a private equity firm specializing in investments in distressed companies. It has experience in the media and telecommunications business through, among other investments, its investments in AT&T Canada, Call-Net and Cable Satisfaction International Inc.

**Affidavit of Gabriel De Alba, sworn February 19, 2010 ("De Alba Affidavit"), page 2, para. 3, GSCP Motion Record, Tab "4".**

### **Phase 1 of the Equity Investment Solicitation Process**

8. On or about November 2, 2009, RBC Capital Markets ("RBC") commenced an equity investment solicitation process in order to identify potential New Investors. The Monitor was not involved in the creation or administration of this process and only received periodic updates from time to time. Approval was not sought from the Court for the process or for any of its constituent steps.

**Affidavit of Thomas C. Strike, sworn February 12, 2010 ("Strike Affidavit"), para. 11, GSCP Motion Record, Tab "10".**

9. During the first phase of the process, RBC contacted approximately 90 potential investors to enquire whether they would be interested in making a minimum 20% equity investment in a restructured Canwest Global Communications Corp. ("Canwest Global"). 52 potential investors, including Catalyst, expressed interest. They were sent a "teaser" document and a form of non-disclosure agreement (the "NDA").

**Strike Affidavit, para. 12, GSCP Motion Record, Tab "10".**

**De Alba Affidavit, page 2, para. 5, GSCP Motion Record, Tab "4".**

10. Neither the "teaser" document nor the NDA gave any indication that the process would contemplate a transaction that had no "fiduciary out". There is no evidence that RBC ever communicated to any participants that the Applicants were contemplating transactions that did not have a fiduciary out. Therefore, this was not an auction wherein participants were told to "get your best offer in" or where value could be maximized with an expectation that there would be no successive rounds of bidding.

**Affidavit of Susan Kraker, sworn February 18, 2010 ("Kraker Affidavit"), Exhibit "E", GSCP Motion Record, Tab "7".**

**Kraker Affidavit, Exhibit "F", GSCP Motion Record, Tab "7".**

11. Non-binding proposals were due by no later than December 2, 2009.

**Strike Affidavit, para. 13, GSCP Motion Record, Tab "10".**

### **The Initial Catalyst Proposal**

12. On December 2, 2009, Catalyst sent a letter attaching the terms and conditions of Catalyst's proposed \$65 million investment (the "Initial Catalyst Proposal") to Canwest Global and RBC. The Initial Catalyst Proposal was fully funded and unconditional. It fully complied with the Support Agreement. It did not require any due diligence, and importantly, did not require any amendment to the Amended and Restated Shareholders Agreement (the "CW Shareholders Agreement") with GSCP.

**De Alba Affidavit, page 2, paras. 5 - 7, GSCP Motion Record, Tab "4".**

**De Alba Affidavit, Exhibit "A", GSCP Motion Record, Tab "4".**

13. The Initial Catalyst Proposal is the only proposal that was not conditional on amendments to the CW Shareholders Agreement.

**De Alba Affidavit, page 3, para. 8, GSCP Motion Record, Tab "4".**

14. The Initial Catalyst Proposal contained a "fiduciary out" in return for a break fee of three percent (3%) of the enterprise value of Restructured Canwest Global.

**De Alba Affidavit, Exhibit "A", GSCP Motion Record, Tab "4".**

15. While RBC apparently commenced Phase 2 of the process "shortly after the receipt of the non-binding Initial Proposals", RBC did not contact Catalyst. Catalyst made numerous efforts to open a dialogue with RBC, but RBC did nothing more than acknowledge receipt of the Initial Catalyst Proposal. It was not until December 21, 2009 – after the Initial Catalyst Proposal expired – that Richard Grudzinski ("Grudzinski") of RBC contacted Catalyst to advise in vague terms that the Initial Catalyst Proposal was not acceptable. There is no evidence of the Applicants' Chief Restructuring Advisor (the "CRA") or any members of Canwest Global's Special Committee having considered the Initial Catalyst Proposal and having made that determination.

**De Alba Affidavit, para. 10, GSCP Motion Record, Tab "4".**

16. No evidence was led to explain why the Initial Catalyst Proposal was deemed by RBC to not be "acceptable". It satisfied each of the seven criteria set out by RBC, in that:

- (a) It specified the dollar amount being proposed to be invested in cash on the date of emergence of the Applicants from the CCAA proceeding (\$65 million);
- (b) It set out the proposed equity ownership stake to be acquired by the potential investor (25%);

- (c) It described the entity that would be making the proposed equity investment (Catalyst) and confirmed that the investing entity would be a "Canadian" as defined in the CRTC Direction;
- (d) It set out the anticipated sources of capital and the steps and associated timing to obtain the capital (the Initial Catalyst Proposal was fully funded and contained no financing condition);
- (e) It set out the additional due diligence that would be required (none);
- (f) It set out the additional corporate or other internal approvals required prior to executing a definitive agreement (none); and
- (g) It set out the regulatory approvals, consents or other conditions (other than CRTC approval) necessary to complete the investment (none).

**Strike Affidavit, paras. 14(a) - (g), GSCP Motion Record, Tab "10".**

**De Alba Affidavit, Exhibit "A", GSCP Motion Record, Tab "4", page 45.**

17. Notwithstanding that Catalyst neither received any Confidential Information, nor did it intend to receive any Confidential Information in the future (as a result of waiving further due diligence), RBC took the unusual position that Catalyst could only participate in Phase 2 of the process if it signed an NDA. The NDA was more than just a confidentiality agreement: it also would have prohibited Catalyst from having discussions with a number of parties, including GSCP, with or without any confidential information. Such a provision was not "market" for this particular type of process and was inserted to reduce the flexibility of potential bidders to work other than



within the very strict controls to which they were being subjected in the non-court-supervised process that has been admitted to be subject to control of the Noteholders.

**De Alba Affidavit, page 3, paras. 10 - 11, GSCP Motion Record, Tab "4".**

### **Phase 2 Commenced Without Catalyst**

18. As stated above, Phase 2 commenced without Catalyst's involvement, sometime shortly after Phase 1 bids were due on December 2, 2009. Four of the five participants chosen by RBC to participate in Phase 2 met with various of the Applicants, RBC, and others. Formal bids were required by January 27, 2010.

**Strike Affidavit, paras. 17, 20, GSCP Motion Record, Tab "10".**

19. One of the five chosen participants dropped out of the process sometime before January 20, 2010. Another two dropped out sometime between January 20 and January 27, 2010.

**Strike Affidavit, para 20, GSCP Motion Record, Tab "10".**

### **Shaw's Conditional Bid is Chosen**

20. The Formal Bid submitted by Shaw Communications Inc. ("Shaw") was selected by RBC as the better of the two offers that were allowed by RBC to proceed through the process. The offer was conditional on there being an amendment or disclaimer of the CW Shareholders Agreement. It was also conditional on additional confirmatory due diligence with respect to certain matters identified by Shaw.

**Strike Affidavit, paras. 25, 27, GSCP Motion Record, Tab "10".**

21. The Shaw bid did not contain a "fiduciary out", notwithstanding the fact that the draft subscription agreement provided to each of the four Phase 2 bidders contained one. Notwithstanding the absence of a "fiduciary out", the Shaw bid still contained a termination fee of \$5 million, plus \$2.5 million in out-of-pocket fees and expenses relating to the transaction. Notwithstanding that this represented 7.5% of the cash payment by Shaw (normal break fees are in the 2% to 4% range), this was described by Canwest Global's affiant as being merely "customary deal protection".

**Affidavit of Peter Farkas, sworn February 18, 2010, para. 24(c), GSCP Motion Record, Tab "8".**

**Strike Affidavit, para. 30, GSCP Motion Record, Tab "10".**

22. On February 11, 2010, the Special Committee of Canwest Global met to consider the two bids, and recommended to the Board of Canwest Global that it approve the Shaw bid. Thereafter, the Board approved the transaction. There is no evidence that the Special Committee was ever aware of the existence of a credible bid (Catalyst's) that would not have required amendments to the CW Shareholders Agreement.

**Strike Affidavit, para. 28, GSCP Motion Record, Tab "10".**

#### **Approval Motion Scheduled on Short Notice**

23. The Shaw bid approved by the Board of Canwest Global contained a term that required court approval to be obtained by February 19, 2010. There was no explanation in the evidence as to how that date was chosen or why it was particularly important, and, as discussed below, the Motions Judge recognized the impropriety of a bidder scheduling court approval on the same day as a self-imposed deadline.

**Reasons for Decision of Justice Pepall, para. 32, GSCP Motion Record, Tab "3".**

24. The motion material was served on the Service List after hours on February 12, 2010, the Friday before a long weekend.

**Affidavit of Gerald J. Cardinale, sworn February 18, 2010, para. 1, GSCP Motion Record, Tab "6".**

**The Second Catalyst Proposal**

25. Throughout Phase 2 of the process, Catalyst (directly and through its counsel) complained to RBC on a number of occasions about the process. However, as the process was not being overseen by the Court and there were no set dates for any approval hearing, Catalyst had no recourse until the next time the process was referred to the Court, which was the February 19 motion (see additional discussion on this below).

**De Alba Affidavit, para. 13, GSCP Motion Record, Tab "4".**

26. On February 19, 2010, when it finally became clear that an opportunity to overcome the hurdles that had been placed before it and to have the Court see its offer, Catalyst submitted a superior second proposal (the "Second Catalyst Proposal") to be the New Investor. Like the first proposal, the Second Catalyst Proposal was fully funded and unconditional. It proposed an investment of \$120 million, representing 32% of the total equity of Restructured Canwest Global.

**De Alba Affidavit, Exhibit "B", GSCP Motion Record, Tab "4".**

27. Importantly, the Second Catalyst Proposal was overall superior to the Shaw bid in that it did not require an amendment or disclaimer of the CW Shareholders Agreement.

**De Alba Affidavit, Exhibit "B", GSCP Motion Record, Tab "4".**

28. The Monitor had insufficient time to review the Second Catalyst Proposal and make a proper recommendation to the Court. The Monitor advised the Motions Judge that it would need two days to review the Second Catalyst Proposal and to report back to the Court. The Motions Judge instead gave the Monitor a few hours to come up with something. The requirement of the production of a Monitor's report, especially on such a crucial issue, within hours is unprecedented and casts a pall over this entire process.

29. The report prepared by the Monitor in those two hours stated that the Shaw bid had a higher implied equity value, but the Monitor was unable to quantify the damage claim that GSCP would have in the event that the CW Shareholders Agreement were disclaimed. The Monitor, therefore, was unable to quantify the additional value conferred by the Second Catalyst Proposal, and in particular, the fact that no amendment to the CW Shareholders Agreement would be required. For example, it was not in a position to analyze and quantify the diminution of value to be suffered relative to the Shaw bid if GSCP refused to amend the CW Shareholders Agreement or if GSCP would only agree to do so for monetary compensation. In other words, it was and is highly likely that the final "price" of the Shaw bid will be substantially lower than the face value.<sup>1</sup> This is a completely different issue than the claim that would have resulted from a successful disclaimer of the CW Shareholders Agreement.

**Supplementary Report of FTI Consulting Canada Inc., in its Capacity  
as Monitor of the Applicants, dated February 19, 2010, paras. 11-14,  
GSCP Motion Record, Tab "14".**

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<sup>1</sup> In addition, the structure of the Catalyst bid would save significant CRTC imposed costs. To compare the bids properly, the financial impact of these key components of the Catalyst bid required careful consideration and quantification by the Monitor and the Applicants. The adjournment refusal made this impossible.

30. Notwithstanding the Monitor's inability to quantify the additional value conferred by the Second Catalyst Proposal in the time required, the uncontradicted evidence before the Motions Judge was that the Second Catalyst Proposal clearly added value for creditors well in excess of its nominal stated value, by eliminating the cost, delay and significant legal risk associated with proceeding in a way unacceptable to GSCP.

**De Alba Affidavit, para. 15, GSCP Motion Record, Tab "4".**

### **Further Potential Bidders Emerge**

31. While the Monitor was preparing its report, it was advised by Quebecor Media Inc. (another participant who, like Catalyst, was unwilling to sign the unfair and overly restrictive NDA) that it would be prepared to consider an alternative proposal if the solicitation process was reordered, transparent, and court-supervised.

**Reasons for Decision of Justice Pepall, para. 5, GSCP Motion Record, Tab "3".**

**Letter from Quebecor dated February 19, 2010, Exhibit "A" to the Supplement to the Tenth Report of the Monitor dated February 19, 2010**

### **Potential Dissenting Views of Noteholders Emerge**

32. Toward the end of the hearing, counsel not yet retained by certain Noteholders that were not represented by the Ad Hoc Committee attended in court to advise that his potential clients might disagree with the position of the Ad Hoc Committee. It is not known how many other creditors would have emerged if an adjournment had been granted.

**Reasons for Decision of Justice Pepall, note 2, GSCP Motion Record, Tab "3".**

### **The Reasons of the Motions Judge**

33. The Motions Judge dismissed GSCP's motion for an adjournment and granted the Applicants' motion for approval of the Shaw Agreement.

34. The Motions Judge incorrectly found that the false urgency created by the Applicants and Shaw was in fact created by Catalyst and GSCP. She found that Catalyst "opted not to participate in RBC's and the CMI Entities' process", notwithstanding the evidence that was plainly before Her Honour that Catalyst made Herculean efforts to try to be a part of the process. The Motions Judge found that she did not accept that Catalyst "had no recourse to address process", notwithstanding the fact that the equity solicitation process was not subject to court supervision.

35. It is patently clear that the real reason for the urgency and "surreal time" litigation commented on by the Motions Judge was that this was part of a strategy adopted by Shaw and the Applicants. In this regard, as noted above, the Shaw bid required court approval by February 19, 2010, i.e., the day chosen by them to seek court approval.

36. In considering this aspect of the Shaw bid, the Motions Judge's reasons for decisions contained a rebuke commentary upon the inappropriateness of this practice for future reference:

The court did have some concerns with the deadline imposed by Shaw and agreed to by the CMI Entities and the Ad Hoc Committee. In future, absent compelling reasons, court hearings should not be scheduled for the same day that court approval is required.

**Reasons for Decision of Justice Pepall, para. 32, GSCP Motion Record, Tab "3".**

37. There were no compelling reasons (or any reasons at all) offered in this case to justify why February 19 was chosen as a deadline, or why this inappropriate practice was followed. Rather than insist upon an extension of this deadline (not surprisingly, Shaw declined an invitation to extend its

bid), the Motions Judge proceeded to hear the motion, blaming GSCP and Catalyst for the false urgency.

38. The Motions Judge granted the Applicants' motion to approve the Shaw transaction by applying the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), and finding that it was "clear" that the CMI Entities made sufficient effort to obtain the best offer, notwithstanding the absence of a "fiduciary out", notwithstanding the tactics adopted which totally froze GSCP from the process, and notwithstanding the exclusion of Catalyst throughout the process. In so doing, the CMI Entities failed to follow the principle that due consideration of *all* stakeholder interests is required in CCAA proceedings.

***Nortel Networks Corporation (Re.)*, 2009 CanLII 39492 (Ont. S.C.J.).**

39. The Motions Judge found that "RBC fully canvassed the market", notwithstanding the evidence plainly before her that Catalyst was not canvassed, and apparently Quebecor was also interested but unwilling to sign the unusual NDA prepared by the Applicants. On the "fiduciary out", the Motions Judge found that:

[W]hile the Monitor favoured inclusion of a fiduciary out provision and while one may argue that ideally the fiduciary out provision would not have been negotiated away, this did not constitute unfairness in the working out of the process or a lack of efficacy or integrity in the process.

**Reasons for Decision of Justice Pepall, para. 44, GSCP Motion Record, Tab "3".**

40. The Motions Judge gave no consideration to the considerable additional economic value conferred by the Second Catalyst Proposal and in particular, the fact that no amendment or disclaimer of the CW Shareholders Agreement was necessary. The Motions Judge also ignored the

question of the true comparative value of the Shaw bid in light of the rights of GSCP. Instead, Her Honour looked singularly at the "substantially higher implied equity value" of the Shaw bid as compared to the Second Catalyst Proposal in order to find a "reasonable basis for this support".

**Reasons for Decision of Justice Pepall, para. 45, GSCP Motion Record, Tab "3".**

### III – ISSUES

41. The only issue on this motion is whether or not leave to appeal should be granted.
42. Catalyst supports GSCP's position that the four-part test for leave to appeal in a CCAA proceeding is met. Catalyst adopts GSCP's statement of the appropriate test and its submission on the relevant legal principles.
43. The issues addressed herein are only on the first [whether the point on appeal is of significance to the practice] and third [whether the appeal is *prima facie* meritorious] parts of the test for leave to appeal. In that respect, Catalyst submits there is a *prima facie* meritorious appeal that has significance to the practice in two important respects:
  - (a) The extent to which parties can schedule hearings in a coercive manner that deprives parties of the ability to properly consider the issues, conduct cross-examinations as appropriate, and otherwise have a hearing that accords with procedural fairness; and
  - (b) The extent to which CCAA debtors can be parties to a process for an equity solicitation conducted outside of the court process and control, which excludes bidders that meet the requirements of a *bona fide* offer, and which excludes all future topping bids through the elimination of a fiduciary out.



#### IV – LAW AND ARGUMENT

##### **The Coercive Nature of the Motion**

44. This Honourable Court and the Commercial List court have stated on a number of occasions the importance of fairness in CCAA proceedings. Where there is a sales process, there must be transparency to that process.

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

*Stelco Inc. (Re.)* (2005), 75 O.R. (3d) 31 (C.A.).

*Ivaco Inc. (Re.)* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J.) [Commercial List].

45. Cases in the Commercial List in general, and CCAA proceedings in particular, are generally described as "real-time litigation". But "real-time litigation" does not mean that the court should deprive parties of procedural fairness, nor does it obviate the harm caused by short service. As Justice Farley, one of the lead proponents of "real-time litigation" once noted:

This motion was adjourned in light of the obvious prejudice caused by such service. I would again remind the profession and the public that the Commercial List is not a hurry-up court but rather a scheduled court which takes into account the realities of real time litigation (as opposed to autopsy litigation).

*Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, 2000 CarswellOnt 3117 (S.C.J.) [Commercial List], at para. 2.

46. The motion was brought by the Applicants on short service and the hearing was inexplicably scheduled on the very day that court approval was required. The "process" run by RBC had been ongoing for more than three months. The Shaw transaction was not scheduled to close until August 11, 2010. There was no explanation for the importance of the February 19 date provided to the

Motions Judge, and when the Motions Judge asked Shaw for just a few days to allow the Monitor to properly consider the Second Catalyst Proposal, Shaw refused in order to continue to exert inappropriate pressure on the Motions Judge.

47. The reasons of the Motions Judge reflect the inappropriateness of the artificial pressure and coercion imposed by the Applicants and Shaw. Having found that it was inappropriate to schedule the approval hearing on the same day that approval was required (absent compelling reasons, none of which existed here), the Motions Judge should have granted the adjournment requested. This is particularly the case where it became plainly apparent that the process was affecting other parties:

- (a) The Monitor requested two days to consider the Second Catalyst Proposal, which was not provided;
- (b) GSCP requested more time to cross-examine on the affidavits filed in support of the Applicants' motion, which was not allowed;
- (c) Some creditors were emerging during the course of the hearing expressing potential disagreement with the position taken by the Ad Hoc Committee, a result that was reasonably expected in light of the lack of prior disclosure of the terms or the process; and
- (d) Other prospective bidders were emerging during the course of the hearing expressing potential interest in making a bid if the process was court supervised and transparent.

48. The Motions Judge's criticism of the timing of the opposition by GSCP and the offer by Catalyst was completely unfair. Having found that GSCP "might reasonably have believed that there was a seven day standstill", it was manifestly unfair to subsequently criticize GSCP and

Catalyst for not serving materials earlier. Moreover, the suggestion that Catalyst could somehow have taken a step earlier to challenge the non-court-supervised process (through an injunction, one assumes) is completely artificial. Any injunction motion would have been immediately met with a prematurity response and irreparable harm would have been difficult if not impossible to establish. The only proper route (beyond voicing its objections to RBC, which Catalyst did) was to wait for something to materialize from the equity solicitation process and object at whatever hearing sought approval of the outcome of that process. That is what Catalyst did.

49. In other words, instead of following the aggressive course of attacking the process in court on its own motion at a time when it was only one of numerous potential bidders, Catalyst chose to continue working on its bid. Catalyst did so with the expectation that its bid would be considered fairly and in an orderly process, when the Court was asked to consider competing bids at a later date. This was an entirely reasonable approach.

50. GSCP has established a *prima facie* case that there has been unfairness in the working out of the process, as that phrase is used in *Soundair* and progeny. In addition to the unfairness in the equity solicitation process (discussed in greater detail below), the scheduling of the motion itself – with insufficient notice being given to interested parties and the denial of cross-examinations – resulted in the "unfairness in the working out of the process", as that phrase is used in *Soundair* and progeny.

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

51. If the motion for leave to appeal is granted, it will provide the Court of Appeal with the opportunity to make clear to counsel and the business community in general that the courts will not

countenance the inappropriate pressure being imposed on the judiciary for artificial reasons. This is an issue that transcends the interests of the immediate parties.

### **The Defective Equity Solicitation and Elimination of the Fiduciary Out**

52. GSCP has established a *prima facie* case that the CMI Entities have not made sufficient effort to get the best price and have acted improvidently. It has also established a *prima facie* case that there were defects in the integrity of the equity solicitation process. The CMI Entities did not make sufficient effort to get the best price through the arbitrary and unexplained exclusion of Catalyst past Phase 1 of the process, and have acted improvidently by dealing away the "fiduciary out" that could have allowed topping bids for the benefit of all creditors (some of whom were beginning to emerge by the end of the hearing day to voice dissent).

53. There was no legitimate basis for RBC to exclude Catalyst from the process. No explanation has been provided as to why RBC did not contact Catalyst after Catalyst had made its bid, and no explanation has been provided as to why the First Catalyst Proposal was allowed to lapse. No details have been provided about anyone from Canwest Global's Special Committee being consulted on that decision, let alone having made that decision. At a time when there were only five other offerors (only two of whom ultimately made binding proposals), the exclusion of Catalyst, when its offer met all of the criteria set by RBC, is inexplicable.

54. Similarly, given that the Second Catalyst Proposal eliminated the enormous litigation risk of dealing with GSCP and the CW Shareholders Agreement and the likelihood of the payment of up to \$7.5 million as a break fee, it ought to have been given far greater consideration by the Applicants than was provided.

55. Finally, there is a significant problem with the Shaw proposal ultimately approved by the Board of Canwest Global: the elimination of the "fiduciary out". Canwest Global never told bidders that this was a "no fiduciary out auction", whereby all bidders would get their best bid in first. Indeed, the First Catalyst Proposal contained such a "fiduciary out", and the draft subscription agreements provided to the Phase 2 participants also contained "fiduciary outs".

56. This decision to eliminate the possibility of a topping bid directly engages the extent to which this Court's decision in *Ventas* can be stretched. In that case, it was suggested to the Court that the target had "contracted away" its fiduciary duties by tying the hands of certain of the bidders in an auction. The Court stated:

There is no doubt that the directors of a corporation that is the target of a takeover bid – or, in this case, the Trustees – have a fiduciary obligation to take steps to maximize shareholder (or unitholder) value in the process. [...] That is the genesis of the "fiduciary out" clauses in situations such as the case at hand. They enable directors or trustees to comply with their fiduciary obligations by ensuring that they are not precluded from considering other *bona fide* offers that are more favourable financially to the shareholders or unitholders than the bid in hand.

*Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.), at para. 53 (citations omitted).

57. The appellant in *Ventas* put forward U.S. cases that stood for the proposition that any limitation on a "fiduciary out" agreed to by a Board would be invalid. The Court rejected adopting that line of caselaw, stating:

It is not necessary – nor would it be wise, in my view – to go as far as HCPI suggests this court might go, and adopt the principle gleaned from some American authorities, that the target vendor can place no limits on the directors' right to consider superior offers and that any provision to the contrary is invalid and unenforceable.

*Ventas, supra*, at para. 54 (emphasis added).

58. The Court in *Ventas* found that it was acceptable to create an auction that would elicit the "best price" in an initial round, subject to a "fiduciary out" that would apply to anyone who had not been limited to a prior standstill:

The Trustees did not contract away their fiduciary obligations. Rather, they complied with them by setting up an auction process, in consultation with their professional advisers, that was designed to maximize the unit price obtained for Sunrise's assets, in a fashion resembling a "shotgun" clause, by requiring bidders to come up with their best price in the second round, subject to a fiduciary out clause that allowed them to consider superior offers from anyone save only those who had bound themselves by a Standstill Agreement in the auction process not to make such a bid. In this case, that turned out to be only HCPI.

*Ventas, supra* at para. 55 (emphasis added).

59. The present case takes *Ventas* one step further, and the Orders below stand for the proposition that an equity solicitation process that contains *no* "fiduciary out", which was *not* designed to elicit the "best bid first", is perfectly acceptable and not "improvident", as that term is used in *Soundair*. There is a *prima facie* meritorious appeal on the correctness of that decision.

**V – ORDER REQUESTED**

60. Catalyst respectfully requests that this Honourable Court grant the order for leave to appeal sought by GSCP.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

March 12, 2010



*per* S. RICHARD ORZY



*per* GAVIN H. FINLAYSON

Lawyers for The Catalyst Capital Group

## SCHEDULE "A"

1. *Nortel Networks Corporation (Re.)*, 2009 CanLII 39492 (Ont. S.C.J.).
2. *Stelco Inc. (Re.)* (2005), 75 O.R. (3d) 5 (C.A.).
3. *Stelco Inc. (Re.)* (2005), 75 O.R. (3d) 31 (C.A.).
4. *Ivaco Inc. (Re.)* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J.) [Commercial List].
5. *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, 2000 CarswellOnt 3117 (S.C.J.) [Commercial List].
6. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).
7. *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.).



**SCHEDULE "B"**

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"

Court File No. M38600

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**FACTUM OF THE RESPONDING PARTY,  
THE CATALYST CAPITAL GROUP INC.**  
(Motion for Leave to Appeal)

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