Court File No.

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" (collectively the "APPLICANTS" or "Canwest")

Applicants

FACTUM OF 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")

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel. (416) 601-7730
Fax: (416) 868-0673

Malcolm Mercer LSUC# 23812W
Tel: (416) 601-7659
Fax: (416) 868-0673

Lawyers for GSCP

INDEX

PART I—OVERVIEW

1. In this motion, the moving parties, 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"), seek leave to appeal two orders (the "Orders") issued from the bench by the Honourable Madam Justice Pepall on February 19, 2009, with written reasons delivered on March 1, 2010 (the "Written Reasons"):

(a) The first order (the "Adjournment Order") dismissed the GSCP adjournment motion (the "Adjournment Motion") in which GSCP sought to adjourn the Applicants' motion for approval of a Subscription Agreement between Shaw Communications Inc. ("Shaw") and Canwest Global (the "Shaw Agreement").

(b) The second order (the "Shaw Approval Order") granted the Applicants' motion (the "Shaw Approval Motion") for approval of the Shaw Agreement and the transactions with Shaw.

Importance of Granting Leave to Appeal

2. This CCAA restructuring proceeding, including the challenged rulings, has involved a remarkable abuse of the CCAA's process and a total failure of Canwest's corporate governance for the purpose of extracting the most value possible for the Noteholders (defined below), rather than an effort to produce the most viable restructuring consistent with applicable CCAA protocols and the interests of other constituencies.

3. The Noteholders, some of which provided financing used to buy out Canwest's secured lenders in exchange for control of any restructuring, have functionally held a hammer over Canwest's directors, resulting in the Noteholders dictating every move, rather than the directors fulfilling their fiduciary duties to manage Canwest's affairs to achieve the best restructuring plan for the long term.

4. Even before these proceedings, certain Noteholders (the "12% Lenders") extracted an initial payout to the detriment of the estate and its constituencies by directing Canwest to cause its subsidiary CMIH to sell its interest in Ten Holdings (defined below), generating more than $630

million of proceeds, of which almost $400 million was sent immediately prior to the CCAA filing to pay the unsecured holdings of the Noteholders.

5. Ultimately, however, the Noteholders recognize that the key to their maximum return is not in Canwest's insolvent Conventional TV Business (defined below), but rather in the specialty tv business (the "Specialty TV Business") owned by Canwest's affiliate CW Investments Co. ("CWI"). They also recognize, however, that an existing CW Shareholders Agreement forms a barrier to any Noteholder windfall by conferring specific contractual rights and fixed rates of return upon GSCP, which invested in CWI to facilitate CWI's strategic acquisition of the Specialty TV Business in 2007, before the Noteholders obtained their positions.

6. Accordingly, the Noteholders' commercial objective is to force GSCP to surrender value or else to force a CCAA disclaimer of the CW Shareholders Agreement. These CCAA proceedings have therefore become the vehicle, not for a bona fide restructuring of Canwest, but for the Noteholders to achieve that commercial objective.

7. The Noteholders gained virtually absolute control of the restructuring process under a CCAA Support Agreement by agreeing to permit Canwest to retain approximately $65 million of the Ten Holdings sale proceeds to fund its restructuring. In turn, the CCAA Support Agreement requires Canwest to negotiate amendments to the CW Shareholders Agreement (to date, Canwest has proposed no amendments) or to disclaim the CW Shareholders Agreement to confiscate value from GSCP.

8. Correspondingly, on the eve of commencing these CCAA proceedings, for the sole benefit of the Noteholders and with no prior notice to GSCP, on October 5, 2009 (the day before the Initial Order) Canwest caused its solvent wholly owned subsidiary 4414616 Canada Inc. ("441") to transfer its shares in CWI to the insolvent CMI, and CMI assumed 441's obligations under the CW

Shareholders Agreement. In fact, CMI assumed 441's obligations not to perform them, but rather to effect a CCAA stay of GSCP's rights so that GSCP could not invoke its right to sell its shares, and ultimately to disclaim 441's obligations under the CCAA if GSCP fails to succumb to the Noteholders' demands for commercial concessions.

9. It is against that backdrop that the matters for appeal arise. These CCAA proceedings have simply continued the pattern and theme of the Noteholders' manipulation and the Canwest directors' abdication of their fiduciary duties in favor of the Noteholders' dictates. Unfortunately, the CCAA Court has not stopped these abuses, declining last December to address the transfer of solvent 441's shares in solvent CWI to insolvent CMI, and more recently approving the Shaw Agreement after an "equity solicitation" process that was predicated on foreclosing potential investors from any contact with GSCP and attracting only proposals consistent with the Noteholders' objective of extracting value from GSCP.

10. Indeed, the court approved the Shaw Agreement in the expedited fashion sought by Canwest at the Noteholders' behest despite its absence of any "fiduciary out" and provision of a "break up" fee and despite a viable and fully funded alternative proposal made by Catalyst Capital Group Inc. ("Catalyst") that involved no amendment to or repudiation of the CW Shareholders Agreement. The court declined even to adjourn its approval hearing to facilitate the Canwest directors' consideration of the Catalyst proposal to fulfill their fiduciary duties, instead requiring the Monitor to appraise the competing proposal in just two hours and condemning GSCP and Catalyst for coming forward too late with the proposal and their objections to approval of the Shaw Agreement (albeit only a few days after details of the Shaw Agreement were publicly disclosed).

11. The Catalyst Offer (defined below), if objectively considered by Canwest and its board of directors, is superior to the Shaw Agreement for the following main reasons:

(a) It accepts the CW Shareholders Agreement for what it is, an opportunity to combine the Specialty and Conventional TV Businesses;

(b) It eliminates any requirement to disclaim the CW Shareholders Agreement and avoids the inevitable litigation and the GSCP claim that would result from any attempted repudiation of GSCP's rights;

(c) It prevents dilution of Canwest creditor recovery because, without disclaimer, GSCP would not have a creditor claim; and

(d) It simplifies any necessary CRTC application because Catalyst is a Canadian company and because Leonard Asper would continue as chairman.

12. It is critical that the Court of Appeal intervene at this stage of the restructuring process to (i) stop the abusive use of the CCAA to serve the Noteholders' interests, (ii) to re-empower Canwest's board of directors to perform its fiduciary duty and (iii) to instruct Canwest to negotiate with Catalyst to document a binding subscription agreement as an alternative to the Shaw Agreement. Without Court of Appeal intervention, this matter will continue down a path of acrimonious and time-consuming litigation in which GSCP will ultimately prevail against any attempted disclaimer of the CW Shareholders Agreement. Indeed, unless this Court acts, the error-infected course of this case to date risks establishing a gravely harmful precedent for the conduct of future CCAA proceedings.

13. As described further below, the test for leave to appeal is met. There are serious and arguable grounds of appeal that are of real and significant interest to the parties, the insolvency practice and this proceeding. The appeals are *prima facie* meritorious and hearing the appeals will not unduly hinder the progress of this proceeding.

14. This appeal, if leave is granted, will allow the Court of Appeal to intercede now before it is too late to put this restructuring back on course by making an order as follows:

(a) Setting aside the approval of the Shaw Agreement;

(b) Directing Canwest and its officers and directors to consider alternative restructuring

proposals that were wrongly rejected in the RBC Process;

(c) Directing Canwest and its officers and directors to negotiate a subscription agreement with Catalyst consistent with the Catalyst Offer;

(d) Directing the Monitor to report fully on the restructuring alternatives available to Canwest; and

(e) Permitting full disclosure and examination of all evidence relevant to a renewed motion to approve a new investment in Canwest.

PART II—FACTS

Background: GSCP and the Acquisition of the Specialty TV Business

15. GSCP is an essential party in the Canwest restructuring and an important Canwest stakeholder.[1]

16. The Specialty TV Business is solvent, profitable and not part of these proceedings. It is financed separately from CMI.[2]

17. At the request of Canwest, GSCP provided financial assistance to enable CWI to acquire the Specialty TV Business in 2007. Canwest could not have acquired this strategically important business without the financial assistance of GSCP.[3] The Noteholders contributed nothing to the acquisition of Canwest's controlling interest in CWI.

18. The financial assistance provided by GSCP took three basic forms:

(a) GSCP acquired for its own account the other "non-growth" businesses that Alliance Atlantis insisted be included in the deal and that Canwest neither wanted nor could afford to purchase itself;[4]

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[1] Affidavit of Gerald J. Cardinale, sworn February 18, 2010 ("Cardinale February Affidavit"), GSCP Motion Record, Tab 6, para. 3.

[2] Affidavit of John Maguire, sworn October 5, 2009 (Maguire Affidavit.), GSCP Motion Record, Tab 12, paras. 7 and 59.

[3] Affidavit of Gerald J. Cardinale, sworn November 2, 2009 ("Cardinale November Affidavit"), GSCP Motion Record, Tab 11, para. 12; Cardinale February Affidavit, GSCP Motion Record, Tab 11, para. 3.

[4] Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. (12)(i)(i).

(b) GSCP contributed more than US$500 million of equity capital to CWI to fund its pro rata share of the equity financing for the acquisition;

(c) GSCP arranged debt financing for CWI.[5]

19. The acquisition of the Specialty TV Business by CWI was subject to the consent of the CRTC and to its "Canadian control" requirements. [6] Accordingly, while GSCP has the largest financial interest in CWI, 441, a wholly owned subsidiary of CMI, held a larger percentage of CWI voting shares. The shares of CWI were issued in the following amounts:

(a) to 441, shares representing a 35% economic interest but a 66 2/3% voting interest; and

(b) to holding companies of GSCP Funds, shares representing a 65% economic interest but a 33 1/3% voting interest.[7]

20. Taking into account the above structure and the CRTC requirements, CMI, 441, GSCP, GSCP's two holding companies and CWI entered into the CW Shareholders Agreement to set out the terms of the co-ownership of CWI by GSCP and 441. Among others, the following heads of agreement are included in the CW Shareholders Agreement:

(a) CMI agreed to cause the sale of the Conventional TV Business to CWI by at least August 15, 2011 (the "Vend-in Obligations");[8]

(b) 441 agreed that

(i) GSCP would have basic governance rights providing for GSCP representation on CWI's board of directors;[9] and

(ii) If CMI became insolvent, GSCP could sell its shares of CWI without consent and could require 441 to sell its shares on the same terms (the "Shareholder

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[5] Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 12(i).

[6] *Ibid*, para. 12(k).

[7] Cardinale November Affidavit, GSCP Motion Record, Tab 11, paras. 12(l) and (m).

[8] CW Shareholders Agreement, s. 5.2, Exhibit B to the Cardinale November Affidavit, GSCP Motion Record, Tab 11.

[9] *Ibid.*, s. 4.1.

Obligations"); [10]

(c) CWI agreed that CWI and its subsidiaries would not take certain listed actions without GSCP consent; [11]

(d) CWI granted options that entitle GSCP to require CWI to purchase GSCP's shares in accordance with the CW Shareholders Agreement during the period commencing in 2011 and ending in 2013 (the "CW Put Obligations"). [12]

21. GSCP would not have made its investment in CWI or otherwise participated in the acquisition without the benefit of the CW Shareholders Agreement, including the ongoing benefit of the Vend-in Obligations, the Shareholder Obligations and the CW Put Obligations. [13]

Canwest Insolvency: Canwest Cedes Control of the Restructuring Process to the Noteholders

22. CMI, which owns the Conventional TV Business through subsidiaries that are insolvent and Applicants in these proceedings, issued the Notes in the total principal amount of approximately US$760 million, long before the Specialty TV Business was acquired with the financial assistance of GSCP. The other Applicants and CMIH guaranteed the Notes. [14]

23. Because of the insolvency of the Applicants and business reversals that primarily affected the Conventional TV Business, CMI defaulted on its obligations under the Notes approximately one year ago, in March, 2009. [15]

24. Subsequently, in May, 2009, Canwest entered into a 12% Note Purchase Agreement with the 12% Lenders and arranged new secured financing from CIT Business Credit (the "May

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[10] *Ibid.*, s. 6.10.

[11] *Ibid.*, ss. 4.7(b) and 4.12.

[12] CW Shareholders Agreement, s. 6.7, Exhibit B to the Cardinale November Affidavit, GSCP Motion Record, Tab 11.

[13] Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 12(d).

[14] Maguire Affidavit, GSCP Motion Record, Tab 12, para. 93.

[15] Maguire Affidavit, GSCP Motion Record, Tab 12, paras. 11-12.

Refinancing").[16]

25. The proceeds of the May Refinancing repaid CMI's secured bank debt and provided working capital but came at the cost of a drastic transfer of control over the restructuring process from Canwest and its board of directors to the Ad Hoc Committee. [17]

26. From the May Refinancing onward, Canwest has been prohibited from speaking with GSCP without giving prior notice to either the 12% Lenders or, subsequent to the Initial Order in these proceedings, the Ad Hoc Committee, and without permitting the 12% Lenders or the Ad Hoc Committee to participate in any meeting or discussion.[18]

27. Due apparently to these restrictions, Canwest did not initiate any meeting or discussion with GSCP prior to the Initial Order, and since the Initial Order has requested that GSCP only enter settlement discussions directly with the Ad Hoc Committee. [19]

28. Since the May Refinancing, Canwest and its board have taken no material step in Canwest's restructuring process without the consent and approval of either the 12% Lenders or the Ad Hoc Committee. In giving up control of this restructuring to the Noteholders, Canwest's board has failed to honour its fiduciary duties and duties of care in failing to seek out restructuring alternatives that would benefit Canwest and give due consideration to the interests of its stakeholders.

The Pre-filing Transactions

29. In September 2009, the Ad Hoc Committee directed or permitted Canwest to cause its subsidiary CanWest MediaWorks Irish Holdings ("CMIH") to sell its majority interest in Ten Network Holdings Limited ("Ten Holdings") for CDN$634 million. CMIH is a guarantor of the

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[16] Note Purchase Agreement, Exhibit "A" to the Cardinale November Affidavit, GSCP Motion Record, Tab 11.
[17] Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 6.
[18] Cardinale February Affidavit, GSCP Motion Record, Tab 6, para. 25.
[19] Cardinale February Affidavit, GSCP Motion Record, Tab 6, paras. 5 and 8.

Notes, has no other material obligations and is not an Applicant in these CCAA proceedings. [20]

30. Under the direction of the Ad Hoc Committee, CMIH advanced the net proceeds of the sale of Ten Holdings to CMI in return for the issuance of two notes: a Secured Intercompany Note in the amount of US$94,916,583 (to repay in full the 12% Notes) plus $85 million (for working capital), and an Unsecured Promissory Note in the amount of US$399,625,199 (to pay down the Notes). [21]

31. On October 5, 2009, the day before the CCAA proceedings were commenced, without notice to GSCP, CMI

(a) caused 441 to transfer its shares to CMI,

(b) assumed the obligations of 441 under the CW Shareholders Agreement, including the Shareholder Obligations, and

(c) applied to have 441 dissolved under the CBCA (these actions collectively, the "Wind Up of 441"). [22]

32. On October 6, 2009, without any notice to GSCP, the Applicants applied for relief under the CCAA, including a stay of all of GSCP's rights against CMI under the CW Shareholders Agreement.[23]

33. The Wind Up of 441

(a) had no apparent legitimate business purpose,

(b) was a fraudulent conveyance to insolvent CMI, which had no intention to perform the Shareholder Obligations it assumed,

(c) was intended to give the Noteholders direct access to the CWI shares owned by 441

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[20] Maguire Affidavit, GSCP Motion Record, Tab 21, para. 15; Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 60.

[21] Maguire Affidavit, GSCP Motion Record, Tab 12, para. 17; Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 60-61.

[22] Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 51.

[23] Cardinale November Affidavit, GSCP Motion Record, Tab 11, para. 4.

(which is not a guarantor of the Notes),

(d) was intended to interfere with and prevent enforcement of the contractual rights of GSCP under the CWI Shareholders Agreement,

(e) constituted a flagrant breach of the clear terms of the CW Shareholders Agreement,

(f) was oppressive of the rights of GSCP and

(g) unfairly prejudiced the rights of GSCP as a co-shareholder with 441 in CWI. [24]

34. GSCP brought a motion in the CCAA Proceedings regarding the Wind-Up of 441 (the "441 Motion"), which Justice Pepall stayed at the request of the Applicants (with the support of the Ad Hoc Committee). [25]

35. Justice Pepall expressly contemplated in her reasons for staying the 441 Motion that it will be renewed if the Applicants attempt to disclaim the Shareholder Obligations.[26]

The CCAA Support Agreement and Recapitalization Term Sheet

36. The Initial Order made by Justice Pepall in these proceedings approved a CCAA Support Agreement between Canwest and the Noteholders who make up the Ad Hoc Committee. [27]

37. The CCAA Support Agreement, particularly as it has been subsequently amended, further expunges any vestige of control Canwest had over its own restructuring process and places that control in the hands of the Ad Hoc Committee. [28]

38. In the CCAA Support Agreement, Canwest agreed that it would pursue a recapitalization plan

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[24] Cardinale November Affidavit, GSCP Motion Record, Tab 11, paras. 45-57.

[25] Notice of Motion of GSCP on the 441 Motion, GSCP Motion Record, Tab 17; Written Reasons of Pepall J., *Re Canwest Global Communications Corp.*, 2009 CanLII 70508 (ON S.C.), GSCP Motion Record, Tab 19.

[26] Written Reasons of Pepall J., *Re Canwest Global Communications Corp.*, 2009 CanLII 70508 (ON S.C.), GSCP Motion Record, Tab 19, para. 37 ("441 Reasons").

[27] CCAA Initial Order of Pepall J., dated October 6, 2009, GSCP Motion Record, Tab 20, para. 52.

[28] Support Agreement (the "Support Agreement"), Exhibit "H" to the Affidavit of Susan Kraker, sworn February 18, 2010 (the "Kraker Affidavit"), GSCP Motion Record, Tab 7.

only in the form set out in a Recapitalization Term Sheet required by the consenting Noteholders.[29]

39. The Recapitalization Term Sheet included a condition that the CW Shareholders Agreement be "amended and restated or otherwise addressed in a manner agreed to by CMI and the Ad Hoc Committee.[30]

40. As demonstrated by the Catalyst Offer (as defined and described below), amendments to the CW Shareholders Agreement are not necessary for the restructuring of Canwest; and serve only to transfer value from GSCP to the Noteholders.

41. In addition, the CCAA Support Agreement did not contain any "fiduciary out" provision but instead required Canwest to pursue only the restructuring transaction required by the consenting Noteholders and the Ad Hoc Committee.[31]

The RBC Process

42. The Applicants retained RBC to assist them, and in November 2009, RBC commenced a solicitation process—without seeking the approval of the CCAA Court and without active supervision by the Monitor—in which potential investors were invited to acquire a 20% interest in Canwest if it was successful in completing its restructuring (the "RBC Process").[32]

43. The RBC Process was flawed in many ways, notably in that:

(a) although notionally being open to a variety of investment options, it was, in fact, directed to identifying only an equity sponsor prepared to invest at least $65 million for a 20% equity stake, with the Noteholders converting their remaining debt for most of the remaining equity;[33]

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[29] Support Agreement, *supra*, GSCP Motion Record, Tab 7, para. 1.

[30] Recapitalization Term Sheet, Exhibit "I" to the Kraker Affidavit, GSCP Motion Record, Tab 7, para. 11(g).

[31] Support Agreement, *supra*, GSCP Motion Record, Tab 7.

[32] Affidavit of Thomas C. Strike, sworn February 12, 2010 ("Strike Affidavit"), GSCP Motion Record, Tab 10, paras. 10-12.

[33] Strike Affidavit, GSCP Motion Record, Tab 10, para. 12; Affidavit of Peter Farkas, sworn February 18, 2010 ("Farkas Affidavit"), GSCP Motion Record, Tab 9, para. 29.

(b) all interested parties were required to sign a non-disclosure agreement ("NDA") before proceeding to the second phase of the RBC Process and as a requirement of consideration, whether or not the parties intended to request any confidential information; [34]

(c) the NDA contained standstill provisions that prohibited potential investors from communicating with GSCP and restricted all signatories from dealing with shares in CWI (even those owned by GSCP) for a period of 12 months;[35] this restriction reflects the ulterior motive of the Ad Hoc Committee to prevent discussion between offerors and GSCP of the latter's legitimate interests in the restructuring process and—in furtherance of the ulterior motive—effectively eliminated from the process a number of qualified bidders, including Catalyst, Quebecor, and a number of well known and well capitalized pension funds, private equity funds and strategic media companies;[36]

(d) to qualify for the third phase of the RBC Process, potential investors were required to agree that their offer would be made on the basis that the CW Shareholders Agreement would be amended (or otherwise dealt with) in a manner acceptable to the Noteholders – a euphemism for stripping away the CW Put Obligations; [37] and

(e) the interference of the Ad Hoc Committee skewed the RBC Process to pursue only one objective: the identification of an investor who was prepared to champion the requirements of the Ad Hoc Committee such that only investment proposals that involved the confiscation of value from GSCP would be considered.[38]

44. The RBC Process was thus fatally flawed, as it disregarded the best interests of Canwest and did not give due consideration to the legitimate interests of its stakeholders, restricting itself instead only to proposals that served the Noteholders' scheme.

45. None of the Monitor, the Applicants, the Ad Hoc Committee or RBC provided GSCP with

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[34] Strike Affidavit, GSCP Motion Record, Tab 10, para. 13.

[35] *Ibid.*; Farkas Affidavit, GSCP Motion Record, Tab 9, para. 15.

[36] Cardinale February Affidavit, GSCP Motion Record, Tab 6, paras. 25-26.

[37] Strike Affidavit, GSCP Motion Record, Tab 10, para. 21(i).

[38] Farkas Affidavit, GSCP Motion Record, Tab 9, para. 29.

any information concerning the RBC Process. [39] As they have done throughout this restructuring process, the Applicants and the Ad Hoc Committee purposefully kept GSCP in the dark about the RBC Process and isolated GSCP from any discussion with potential investors (who would control CWI in the proposed restructuring plan).

46. It is no answer to say that inclusion of GSCP would have unduly complicated the RBC Process. The rights of GSCP as the co-shareholder of CWI and party to the CW Shareholders Agreement are of fundamental importance to any restructuring of Canwest. Any solicitation process that excluded GSCP was, by definition, incomplete. By proceeding with the RBC Process excluding GSCP, Canwest and the Ad Hoc Committee ignored the directions given by Justice Pepall in her reasons for staying the 441 Motion.[40] Further, as the submission of the Catalyst Offer makes plain, GSCP would have made a positive contribution to Canwest's swift emergence from these CCAA proceedings through a fair and consensual plan.

47. Moreover, GSCP invited negotiations with Canwest and the Ad Hoc Committee to discuss amendments to the CW Shareholders Agreement that Canwest or the Ad Hoc Committee might propose.[41]

48. Instead of proposing amendments to the CW Shareholders Agreement for consideration by GSCP, Canwest advised GSCP that it must negotiate directly with the Ad Hoc Committee. GSCP asked the Ad Hoc Committee to propose any amendments it sought in the CW Shareholders Agreement for GSCP's consideration, but the Ad Hoc Committee refused.[42]

49. Finally, in late December and early January, GSCP and the Ad Hoc Committee apparently

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[39] Cardinale February Affidavit, GSCP Motion Record, Tab 6, para. 5.
[40] 441 Reasons, *supra*, GSCP Motion Record, Tab 19, para. 52.
[41] Cardinale February Affidavit, GSCP Motion Record, Tab 6, para. 12.
[42] *Ibid*, para. 16.

agreed on the terms for meeting to discuss amendment of the CW Shareholders Agreement. [43]

50. A critical component of that agreement for GSCP was a "hiatus" from litigation while negotiations between the Ad Hoc Committee and GSCP continued. [44]

51. In a series of conversations and an exchange of e-mails between counsel, terms were apparently agreed. The terms understood by GSCP and set out in its counsel's e-mail required the parties to give 7 days written notice that the negotiations had terminated before bringing or supporting any motion (the "Standstill").[45]

52. GSCP, in good faith, engaged in negotiations with the Ad Hoc Committee pursuant to these terms and continued negotiations up until it was surprised by the unexpected service of the Shaw Approval Motion, without the Ad Hoc Committee providing the required notice under the Standstill.[46] The Shaw Approval Motion was served on extraordinarily short service, particularly considering its significance in Canwest's insolvency proceeding, on the evening of Friday, February 12, 2010, before the long week end in February (in both Ontario and the United States) and just 3 juridical days prior to the hearing date.[47]

53. Under the Rules of Civil Procedure, the effective time of the service of notice of the motion was Tuesday, February 16, 2010. Service in accordance with the Rules of Civil Procedure should have been given a week earlier, on Tuesday, February 9, 2010.[48]

54. In addition, when GSCP objected to the failure of the Ad Hoc Committee to comply with the Standstill, counsel for the Ad Hoc Committee denied the existence of the Standstill, claiming that a

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[43] Cardinale February Affidavit, GSCP Motion Record, Tab 6, para. 17.

[44] *Ibid.*, paras. 18 and 25.

[45] Exhibits A-K, Affidavit of Robert J. Chadwick, sworn February 19, 2010 ("Chadwick Affidavit)", GSCP Motion Record, Tab 5.

[46] Cardinale February Affidavit, GSCP Motion Record, Tab 6, paras. 16-19.

[47] *Ibid.*, para. 1.

[48] Rule 37.07 and 3.01, Ontario Rules of Civil Procedure.

computer glitch prevented counsel from seeing it.[49] No explanation was provided, however, as to how counsel for the Ad Hoc Committee could have not understood through its conversations with counsel for GSCP that the standstill was the essence of the agreement to enter into negotiations and that GSCP had refused to proceed with discussions without the standstill in place, nor why members of the Ad Hoc Committee would not have seen, and thus been bound by, the Standstill.

55. The only reason for this complete disregard for the Rules of Civil Procedure, the Standstill and due process was to prejudice GSCP's ability to respond and to prevent any alternative proposal from being presented. The short service was a part of the Noteholders' scheme.

56. In addition to short service, the Shaw Approval Motion record served on GSCP was incomplete. The most relevant evidence, the Shaw Agreement and most of its economic terms, was not served on GSCP and was filed only with the Court with a request that they be sealed.[50]

57. When asked for disclosure of the evidence in support of the Shaw Approval Motion, GSCP was informed that it would be required to sign an NDA containing standstill provisions that would prevent it from supporting any deal other than the Shaw Agreement, thereby defeating the entire purpose of the requested disclosure by mooting any ability to object to the Shaw Approval Motion.[51]

The Catalyst Offer

58. Despite the short notice provided for the Shaw Approval Motion and the failure of the Ad Hoc Committee to comply with the Standstill, an alternative bid was developed and presented by Catalyst with the support of GSCP, in the early morning on the day of the hearing, February 19, 2010. [52]

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[49] Chadwick Affidavit, GSCP Motion Record, Tab 5, para. 8.

[50] Notice of Motion of the Applicants (Shaw Approval Motion), GSCP Motion Record, Tab 15, paras. 24-27.

[51] Cardinale February Affidavit, GSCP Motion Record, Tab 6, paras. 6-10.

[52] Affidavit of Gabriel de Alba, sworn February 19, 2010 ("Alba Affidavit"), GSCP Motion Record, Tab 4, para. 14.

59. Catalyst had previously submitted an expression of interest to RBC but had been expelled from the RBC Process because Catalyst refused to sign the NDA which would prevent it from having discussions with GSCP. Catalyst viewed such a prohibition as counterproductive, given that the proposed investment involved co-ownership of the Specialty TV Business with GSCP. [53]

60. Catalyst complained about this aspect of the process and the lack of transparency and appearance of fairness in the selection of bidders in the process. [54]

61. After the Shaw Transaction was announced, Catalyst delivered a second investment proposal. The Affidavit evidence submitted by Catalyst to the Court below indicated that this proposal (the "Catalyst Offer") "contemplates a fully funded unconditional investment of $120 million," which Catalyst was confident could be completed expeditiously. [55]

62. The Catalyst Offer is clearly superior to the Shaw Agreement because it:

(a) can be closed expeditiously, as it does not provoke certain litigation;

(b) offers comparable net value to Canwest's creditors;

(c) includes a proven management team; and

(d) offers a smoother path through any regulatory oversight. [56]

The Decisions to be Appealed

63. In the face of the evidence demonstrating the flawed RBC Process leading to the selection of the Shaw bid and the negotiation of the Shaw Agreement, the breach of GSCP's reasonable expectation that it would receive 7 days notice before motions were served, and the new Catalyst Offer, among other things, GSCP brought a motion to adjourn the Shaw Approval Motion. The motion was designed to permit:

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[53] Alba Affidavit, GSCP Motion Record, Tab 4, paras. 4-12.
[54] Alba Affidavit, GSCP Motion Record, Tab 4, para. 13.
[55] Alba Affidavit, GSCP Motion Record, Tab 4, para. 14.
[56] Alba Affidavit, GSCP Motion Record, Tab 4, para. 15.

(a) appropriate time, consistent with the hiatus in the Standstill, to allow GSCP to propose an alternative to the Shaw Agreement or permit discussions between Shaw and GSCP;

(b) on the submission of the Catalyst Offer (defined below), time to consider the benefits of the Catalyst Offer compared to the Shaw Agreement;

(c) further consideration of expressions of interest refused in the RBC Process; and

(d) cross-examination of the affidavits filed in support of the Shaw Approval Motion.[57]

64. Further supporting an adjournment, the Monitor advised the Court that it would require 2 days to review the Catalyst Offer, compare it to the Shaw Agreement and report to the Court.[58]

65. Notwithstanding that the Shaw Approval Motion was brought on short notice and on incomplete evidence, that there were serious concerns with the RBC Process that had not been tested by cross examination, and that the Monitor advised that it needed time to properly assess the Catalyst Offer, on February 19, 2010 Justice Pepall issued an order from the bench refusing to grant the GSCP Adjournment Motion.[59]

66. Instead, Justice Pepall directed the Monitor to review the Catalyst Offer over a matter of a few short hours and to return to Court that very afternoon with a recommendation that considered the Catalyst Offer, resulting in a hastily prepared, incomplete and ill-considered supplementary report.[60]

67. Subsequently, Justice Pepall issued a further order from the bench granting the Shaw Approval Motion for reasons that were released on March 1, 2010.[61]

68. GSCP seeks leave to appeal the Adjournment Order and the Shaw Approval Order made by Justice Pepall on February 19, 2010.

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[57] Notice of Motion of GSCP Parties (Motion to Adjourn), GSCP Motion Record, Tab16.

[58] Oral Submissions of the Monitor to the Court, February 19, 2010.

[59] Written Reasons, GSCP Motion Record, Tab 3, para. 5.

[60] *Ibid*, GSCP Motion Record, Tab 3, paras. 5-6; Supplementary Report of the Monitor dated February 19, 2010, GSCP Motion Record, Tab 14.

[61] Order of Pepall J. Approving Shaw Support Agreement, Subscription Agreement and Amended Support Agreement, dated February 19, 2010, GSCP Motion Record, Tab 2.

PART III—ISSUES

69. **Should leave to appeal be granted? Yes.** The four-part test for leave to appeal in a CCAA proceeding is met.

PART IV—LAW AND ARGUMENT

70. To determine whether leave to appeal should be granted, the Court will assess whether there are "serious and arguable grounds that are of real and significant interest to the parties," considering the following well-established test:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is *prima facie* meritorious or frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.[62]

71. In this case, the test for leave to appeal both Orders is met. There are serious and arguable grounds of appeal that are of real and significant interest to the parties, the insolvency practice and this proceeding, and the appeal is *prima facie* meritorious and will not unduly delay the progress of the action.

Overview of Relevant Legal Principles

72. In this case, the CCAA Court has fundamentally failed in its duty to ensure that Canwest and the Special Committee of its board of directors seek out and consider all reasonable alternatives for the restructuring of Canwest.

73. The CCAA Court has permitted Canwest, the Ad Hoc Committee and Shaw to establish a restructuring process that stifled opposition and prevented alternatives from being presented for consideration by Canwest, its Special Committee and the Court.

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[62] *Re Country Style Food Services Inc.*, (2002) 158 O.A.C. 30 (Ont. C.A.), GSCP Brief of Authorities, Tab 1 ("Country Style"); *Re Stelco Inc.* (2005), 2 B.L.R. (4th) 238 (Ont. C.A.) at para. 24, GSCP Brief of Authorities, Tab 2 ("Stelco").

74. Unless the Orders are reversed on appeal, Canwest will be deprived of the opportunity to negotiate and implement a restructuring proposal that will avoid unnecessary and unproductive litigation and would permit Canwest to re-emerge quickly from these restructuring proceedings to continue its viable businesses.

75. The only way to fix this corrupted restructuring process is to re-empower the Special Committee of Canwest's board of directors to give fair consideration to all of the restructuring alternatives that are available to Canwest. That consideration takes time, which Justice Pepall should have given Canwest and its Special Committee, along with the authority to consider alternatives to Shaw, including the Catalyst Offer.

76. In making the Orders, the Court has utterly failed in its duty to ensure that basic principles of fair play and procedural due process are respected in these CCAA proceedings. Because of that failure, GSCP did not receive a fair opportunity to respond to the Shaw Approval Motion and the important and complex issues it raises did not receive the full hearing they deserve.

77. The violation of GSCP's right to test the evidence adduced, compounded by problems of inadequate notice and incomplete service of motion materials, are central to the issues that the Court of Appeal should address in this case.

78. CCAA litigation in this jurisdiction is understood to be "real time" litigation in which, as mandated by the CCAA, the Court must **supervise** the restructuring process **as it is unfolding** to ensure fairness. For that precise reason the CCAA Court is charged with a heightened responsibility, subject to review by this Court, to ensure that in the on-going "real time" process basic principles of fairness and due process to all CCAA stakeholders are honored rather than sacrificed.

79. When, as in this case, moving parties serve surprise motions on short notice with incomplete evidence intending to pressure respondents and the Court with false urgency, the CCAA Court ***must***

intervene to prevent injustice and protect the integrity of the Courts of Ontario. If the CCAA Court does not intervene, the Court of Appeal must do so.

Critical Errors

80. Justice Pepall erred in principle by failing to adjourn to permit consideration of the Catalyst Offer and cross –examinations to be conducted and by failing to follow the well settled tests for Court approval of important transactions in CCAA proceedings.

(a) Justice Pepall failed to apply the Accepted Tests

81. In *Royal Bank of Canada v. Soundair Corp.*, the Court of Appeal highlighted the following "duties which a Court must perform when deciding whether a receiver who has sold a property acted properly":

(a) The Court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

(b) The Court should consider the interests of all parties.

(c) The Court should consider the efficacy and integrity of the process by which offers are obtained.

(d) The Court should consider whether there has been unfairness in the working out of the process. [63]

82. In *Nortel Networks Corporation,* these tests were amplified and adapted for application in CCAA proceedings as a series of questions that the Court should answer when considering a motion to approve a solicitation process as follows:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

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[63] *Royal Bank of Canada v. Soundair Corp et al* (1991), 4 O.R. (3d) 1 (Ont. C.A.), GSCP Brief of Authorities, Tab 3.

(d) Is there a better viable alternative?[64]

83. When the process has not previously obtained Court approval, as in the present case, the Court must consider critically, and for the first time, whether the process adopted by the debtor complied with these accepted principles.

84. In this case, the RBC Process was not previously approved or considered;[65] consequently, the burden of proving that the RBC Process complied with the tests was on Canwest and the Ad Hoc Committee.

85. Justice Pepall failed to consider the evidence that plainly demonstrated (even without cross-examination) that:

(a) the RBC Process was designed to prejudice GSCP by limiting participants to only those who would agree not to speak to GSCP and who would insist on amendment or disclaimer of the CW Shareholders Agreement;

(b) the Shaw Agreement was too conditional to be approved as it was subject to (i) amendments of the CW Shareholders Agreement that had not been proposed or discussed or (ii) contested disclaimer proceedings that had not been commenced;

(c) the Catalyst Offer demonstrated that disclaimer or amendment of the CW Shareholders Agreement was neither necessary nor advantageous to the restructuring of Canwest;

(d) the Catalyst Offer and the letter from Quebecor Inc. submitted by the Monitor confirmed that legitimate potential investors had been expelled from the RBC Process for no good reason.[66]

86. At the same time, moreover, the Court had no evidence before it that the board of directors of CMI gave any consideration to the Catalyst Offer which the board was required to do in the discharge

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[64] *Re. Nortel Networks Corporation*, (2009), 55 C.B.R. (5th) 229 (ON S.C.), para. 49, GSCP Brief of Authorities, Tab 4.

[65] Farkas Affidavit, GSCP Motion Record, Tab 9, para. 13.

[66] Supplemental Report of the Monitor, GSCP Motion Record, Tab 14, para. 25.

of its duties. In light of the decisions of the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise*[67] and *BCE Inc. v. 1976 Debentureholders*[68], for the Court to approve the Shaw Offer in such circumstances amounts to an error of law.

87. Rather than considering the deficiencies of the RBC Process and the best interests of the "whole economic community" affected by the Shaw Agreement, Justice Pepall erred by concluding that the Shaw Agreement should be approved because she wrongly concluded that the GSCP parties "are in no worse position with respect to the CW Shareholders' Agreement."[69]

88. In fact, the whole economic community of Canwest is in a worse position because, by approving the Shaw Agreement, the Court has launched this restructuring on a course of inevitable, time-consuming and costly litigation, which the Catalyst Offer would avoid.

89. Justice Pepall compounded her error in failing to consider the evidence demonstrating that the RBC Process did not meet the established standards for approval by relying upon the Monitor's ill-considered, hastily prepared and incomplete assessments included in its supplementary report.

90. Moreover, Justice Pepall erred by inappropriately criticizing the Catalyst Offer for apparent 'incompleteness' given her finding that GSCP had reasonably relied on the Standstill. Because that expectation was breached, any incompleteness of the Catalyst Offer was a direct result of the constricted timeframe that was forced upon GSCP as a result of the failure to comply with the Standstill and short notice of the Shaw Approval Motion.

(b) Failure to allow Cross-Examination

91. Justice Pepall further erred in law in failing to provide GSCP an opportunity to cross-examine on the affidavit evidence filed, including affidavits sworn and submitted on the day of the Shaw

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[67] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, GSCP Brief of Authorities, Tab 5.

[68] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, GSCP Brief of Authorities, Tab 6.

[69] Written Reasons, GSCP Motion Record, Tab 3, para. 43.

Approval Motion.[70]

92. Among other things, GSCP was deprived of the opportunity to:

(a) test the Shaw claim that it was unwilling to extend its strategically selected deadline;

(b) test the conflicting statements in the Chadwick affidavit;

(c) test the evidence of Richard Grudzinski, which conflicted with the expert evidence of RSM Richter.

93. In each case, without the test of cross examination on contested factual issues, Justice Pepall compounded her errors by:

(a) Accepting at face value that Shaw's deadline was real;

(b) Finding that there was no "meeting of the minds" about the Standstill; and

(c) Concluding that the self serving statements of Mr. Grudzinski should be accepted even when they conflicted with the expert evidence of Mr. Farkas of RSM Richter.

(c) Undue Weight Given to Tactical Shaw "Deadline"

94. Justice Pepall also erred in principle in giving undue weight to the refusal of Shaw to agree to extend its requirement that the Shaw Agreement be approved by the Court on or before February 19, 2010 and did not recognize that Shaw's refusal was entirely tactical.

95. In exercising the Court's supervisory role in restructuring proceedings under the CCAA, the Court is required to exercise judgment. In this circumstance, Justice Pepall erred by accepting Shaw's tactical statement on the spot and at face value without questioning or testing it. Given the tactical purpose of the deadline - to pressure the Court to ignore due process and approve the Shaw Agreement - it was hardly surprising that Shaw, when asked to extend, "maintained its position".[71]

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[70] *Ferguson v. Imax Systems Corp.* (1984), 52 C.B.R. (N.S.) 255 (ON S.C. (Div. Ct.)), paras. 30-32, GSCP Brief of Authorities, Tab 7.

[71] Written Reasons, GSCP Motion Record, Tab 3, para. 5.

96. Justice Pepall erred by allowing Shaw's artificial deadline to override GSCP's procedural rights and her obligation to supervise the CCAA process in a fair and even handed manner.

(d) Insufficient Time for Monitor's Assessment

97. Justice Pepall further erred in principle by failing to adjourn the Shaw Approval Motion to provide the Court appointed Monitor with sufficient time to properly and adequately assess the Catalyst Offer.

98. The Monitor advised that it would need two days to review the Catalyst Offer, compare it to the Shaw Agreement and report to the Court. Given the materials filed and the importance of the matters at issue, this amount of time was appropriate and should not have been denied to the Monitor.

99. However, Justice Pepall required the Monitor to produce the report in two hours instead of the two days required. The resulting supplementary report was hastily prepared, incomplete and ill-considered.

100. The CCAA process allows the Court to rely heavily on the business judgment of the Monitor. Because of the reliance of the Court on the Monitor's judgment and the corresponding influence of the Monitor in CCAA proceedings, it was a grave error for Justice Pepall to have forced the Monitor to compromise its business judgment by hastily preparing a report on which she then relied in approving an agreement that fundamentally affects the course of the restructuring.

(e) Standstill Violated

101. Justice Pepall found that GSCP "reasonably believed" that the Ad Hoc Committee had agreed to the standstill provisions set out in the e-mail agreement among counsel.[72] Nevertheless, the motion was commenced in violation of the Standstill.

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[72] Written Reasons, GSCP Motion Record, Tab 3, para. 22.

102. Having found that GSCP reasonably believed the Standstill had been agreed upon, Justice Pepall erred in principle in failing to grant the adjournment requested. Her finding that counsel for the Ad Hoc Committee did not consider itself bound by such an agreement provides no basis to disregard the Standstill. Refusing the adjournment failed entirely to give effect to the reasonable belief of GSCP with respect to an important right.

103. Counsel for the Ad Hoc Committee denied the existence of a Standstill based on technical reasons set out in the affidavit of Robert Chadwick (the "Chadwick Affidavit").[73] As discussed further below, GSCP was deprived of the opportunity to cross-examine Mr. Chadwick on his affidavit in which he sets out the apparent technical error that led Justice Pepall to find that there was "no meeting of the minds" with respect to the Standstill.

104. Among other important points that went untested was why the Chadwick Affidavit states that the Standstill Provision did not appear in the e-mail Mr. Chadwick received from Mr. Girvan on December 18, 2010 when the Goodmans' memo attached as an exhibit to Mr. Chadwick's affidavit clearly states that there were at least two records of the e-mail in Mr. Chadwick's e-mail inbox that ***did*** indeed contain the Standstill Provision,[74] and exploring the Ad Hoc Committee's intent in agreeing to an arrangement that was stated in the form of e-mail produced by Mr. Chadwick to be premised upon a "hiatus period."[75] Moreover, there was no evidence provided with respect to whether the Ad Hoc Committee itself was able to view the key provision.

105. Having found that GSCP reasonably expected compliance with the Standstill and in the face of conflicting evidence submitted by the Ad Hoc Committee with respect to their understanding of

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[73] Chadwick Affidavit, GSCP Motion Record, Tab 5, para. 8.

[74] Goodmans' Memo, Exhibit "C" to the Chadwick Affidavit, GSCP Motion Record, Tab 5, (II)(B)(d) and (e).

[75] Page 3 of the Goodmans' Memo, Exhibit "C" to the Chadwick Affidavit, GSCP Motion Record, Tab 5, makes clear that a copy of the December 18th e-mail containing the Standstill Provision appeared in Mr. Chadwick's e-mail inbox. The Standstill Provision also appeared in Mr. Chadwick's e-mail inbox in an e-mail forwarded to Mr. Chadwick by David Byers of Stikeman Elliott LLP.

the Standstill, Justice Pepall erred in failing to grant an adjournment to allow the Standstill period to run and/or to allow cross-examinations on the Chadwick Affidavit.

(f) Late Service by the Moving Party

106. Justice Pepall erroneously held that the motion materials were served on February 12, 2010. However, as set out above, the materials were actually served (in accordance with the Rules of Civil Procedure) on February 16, 2010. The Rules of Civil Procedure require that motions be made on 7 days notice, excluding days when the Courts are not open.

107. Following the late service, GSCP was forced to prepare and deliver materials on this significant motion in just two days after the incomplete motion record was served. GSCP in fact filed a fact affidavit, expert affidavit and factum on the Thursday afternoon, two days after service of the Shaw Approval Motion. In addition to preparing motion materials during that time, GSCP worked with Catalyst to prepare and present an alternative offer.

108. Justice Pepall erred in principle in failing to ensure that GSCP had the benefit of the standards of due process required by the Rules of Civil Procedure. In exercising jurisdiction to abridge the time for service of the Shaw Approval Motion, Justice Pepall entirely failed to give any weight to GSCP's procedural rights.

109. As a result, in the face of GSCP's reasonable belief in the existence of the Standstill, even if Justice Pepall was not inclined to give effect to the Standstill (as she ought to have done), at minimum the Rules of Civil Procedure ought to have been followed.

(g) Incomplete Motion Materials

110. When the motion materials were served late and contrary to the Standstill, they were also incomplete. The most relevant evidence, the Shaw Agreement, was filed only with the Court with a

request that it be sealed and was not served upon GSCP.[76]

111. GSCP, in accordance with the Rules of Civil Procedure, formally sought production of documents relevant to the Shaw Approval Motion. Rather than complying with their procedural obligations, the Applicants refused to produce the required documents unless GSCP executed an NDA that, if executed, would have materially prejudiced GSCP's substantive position in responding to the Shaw Approval Motion.

112. By condoning the complete disregard by the Applicants of their obligations under the Rules of Civil Procedure, Justice Pepall prejudiced the rights of GSCP and made a fundamental error in principle.

113. Justice Pepall's Written Reasons demonstrate an utter disregard for the factors that should have governed the exercise of her discretion in allowing the Shaw Approval Motion to proceed on short notice and dismissing GSCP's motion for an adjournment.

114. Justice Pepall did not criticize the Applicants and the Ad Hoc Committee for:

(a) excluding and isolating GSCP from the RBC Process,

(b) spending months negotiating with potential champions of the Ad Hoc Committee's confiscation scheme without any communication with GSCP;

(c) choosing Shaw as the sponsor of the restructuring without any consultation with GSCP;

(d) agreeing with Shaw to obtain Court approval of the Shaw Agreement by an artificial deadline of February 19th in a clear attempt to stymie any opposition;

(e) short-serving GSCP with a surprise Shaw Approval Motion;

(f) refusing to provide production of documents and other evidence to GSCP that the Applicants are required to disclose under the Rules of Civil Procedure; and

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[76] Notice of Motion of the Applicants (Shaw Approval Motion), GSCP Motion Record, Tab 15, paras. 24-27.

(g) filing the Applicant's factum on February 19th, the day of the hearing.

115. Instead, she unfairly criticized GSCP for filing fact and expert evidence and a factum 2 days after effective service of the Shaw Approval Motion.

Importance of the Appeal

116. The points raised by the appeals of the Orders are of significance to the insolvency practice in Ontario and the proceeding itself.

(a) Importance to the insolvency practice as a whole

117. The following points, which are of importance to the insolvency practice as a whole, are raised on this appeal:

(a) It is important that Courts supervising CCAA restructuring process do not completely disregard, as Justice Pepall has done in this case, the Rules of Civil Procedure and the basic protections of due process that they provide.

(b) It is important that the Court of Appeal ensure that Courts supervising restructuring proceedings under the CCAA maintain a level playing field among the stakeholders and not permit or encourage one stakeholder group to hijack the process to pursue its own strategic purposes at the expense of other stakeholders who equally deserve the consideration of the supervising Court.

(c) It is important the board of directors of the debtor company be permitted to fulfill their fiduciary duties by freely considering alternative restructuring opportunities rather than simply following orders issued by an unofficial and unnamed ad hoc committee of creditors;

(d) It is important that parties be able to rely upon agreements and reasonable expectations concerning the terms under which they will negotiate the acceptable basis of a restructuring. The Orders disregard the Standstill and GSCP's reasonable reliance on the Standstill and, therefore, discourage negotiations that are critical to a fair restructuring process.

(e) It is important that Court officers are permitted to effectively supervise the

restructuring and have sufficient time to analyze facts and draw conclusions before making recommendations to the Court.

(f) It is important that the Court of Appeal consider and make a clear statement rejecting solicitation processes in CCAA proceedings that, like the RBC process, are aimed to benefit one affected constituency of the restructuring process at the expense of another.

118. The result of the failure of the supervising Court to maintain an even playing field inevitably results in the loss of confidence of affected parties in the restructuring process. Without such confidence, the restructuring process will disintegrate into litigation and conflict rather than the consensus building that is necessary for a successful restructuring.

(b) Importance for this proceeding

119. This appeal is also of significant importance for this proceeding. In particular, the Orders under appeal change the face of this restructuring by effectively destroying the possibility of the Catalyst Offer or any other proposal that would benefit the Applicants and their stakeholders being considered or approved.

120. The Orders unnecessarily close another door of opportunity for Canwest and force it into litigation with its co-shareholder in CWI, GSCP.

121. Instead of closing doors, the supervising court should have opened the door to permit consideration of the Catalyst Offer.

Appeal will not Unduly Delay the Proceeding

122. The appeal will not unduly delay the proceeding.

123. Other than the self-serving threats made by Shaw to rescind the Shaw offer if not approved immediately, there is no reason to believe that a proper process cannot be followed in this case.

124. First, there has been no explanation given to suggest that the strategic selection of the

February 19, 2010 date by Shaw has any meaning whatsoever. There was certainly insufficient evidence to suggest that the motion should proceed on short service to accommodate Shaw's ultimatum.

125. Second, the Catalyst Offer and the interest of Quebecor demonstrate continuing interest of qualified investors, further undermining the urgency suggested by Shaw.

126. Third, the Applicants have sufficient liquidity to operate the Conventional TV Business. Allowing for a proper process and assessment of offers will not unduly hinder the proceeding.

127. Finally, if necessary, the appeal process can be expedited and leave to appeal considered together with the appeal itself.

PART V— ORDER SOUGHT

128. For the reasons set out above, GSCP respectfully seeks an order granting leave to appeal the Adjournment Order and the Shaw Approval Order in order to seek an order of the Court of Appeal:

(a) Setting aside the approval of the Shaw Agreement;

(b) Directing Canwest and its officers and directors to consider alternative restructuring proposals that were wrongly rejected in the RBC Process;

(c) Directing Canwest and its officers and directors to negotiate a subscription agreement with Catalyst consistent with the Catalyst Offer;

(d) Directing the Monitor to report fully on the restructuring alternatives available to Canwest; and

(e) Permitting full disclosure and examination of all evidence relevant to a renewed motion to approve a new investment in Canwest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Kevin McElcheran/ Malcolm Mercer

SCHEDULE "A" – List of Authorities

1. *Re Country Style Food Services Inc.*, (2002) 158 O.A.C. 30 (Ont. C.A.)
2. *Re Stelco Inc.* (2005), 2 B.L.R. (4th) 238 (Ont. C.A.)
3. *Royal Bank of Canada v. Soundair Corp et al* (1991), 4 O.R. (3d) 1 (C.A.)
4. *Re. Nortel Networks Corporation*, (2009), 55 C.B.R. (5th) 229 (ON S.C.)
5. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68
6. *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69
7. *Ferguson v. Imax Systems Corp.* (1984), 52 C.B.R. (N.S.) 255 (ON S.C. (Div. Ct.))

SCHEDULE "B" – Relevant Legislation

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, (Courts of Justice Act)

COMPUTATION

3.01 (1) In the computation of time under these rules or an order, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used;

(b) where a period of seven days or less is prescribed, holidays shall not be counted;

(c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday. R.R.O. 1990, Reg. 194, r. 3.01 (1); O. Reg. 394/09, s. 3; O. Reg. 438/08, s. 4.

(2) Where a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally. R.R.O. 1990, Reg. 194, r. 3.01 (2).

[…]

SERVICE OF NOTICE

Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

Where Not Required

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (3).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

Minimum Notice Period

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.07 (6); O. Reg. 171/98, s. 12; O. Reg. 438/08, s. 33.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. ET AL.

Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF GSCP

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel. (416) 601-7730
Fax: (416) 868-0673

Malcolm Mercer LSUC# 23812W
Tel: (416) 601-7659
Fax: (416) 868-0673

Lawyers for GSCP
#1091600