

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 EXHIBIT "A"**

**FACTUM OF THE RESPONDING PARTY,
THE AD HOC COMMITTEE**

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PART I – OVERVIEW

1. The committee of holders of the 8% senior subordinated notes issued by Canwest Media Inc. (the "**Ad Hoc Committee**") represents the largest creditor group by dollar value in these insolvency proceedings of Canwest Global Communications Corp. ("**Canwest**"), Canwest Media Inc. ("**CMI**") and certain of their affiliates (collectively the "**CMI Entities**").
2. The Ad Hoc Committee opposes the motion 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 the "**GS Parties**") for leave to appeal the following two Orders of the Honourable Justice Pepall (the "**CCAA Judge**"):
 - (a) the Order approving the equity subscription transaction (the "**Shaw Transaction**") agreed to between Shaw Communications Inc. ("**Shaw**") and Canwest (the "**Shaw Approval Order**"); and
 - (b) the Order dismissing the GS Parties' request to adjourn the CMI Entities' motion for Court approval of the Shaw Transaction (the "**Adjournment Order**").
3. The GS Parties' motion for leave to appeal is being supported by Catalyst Capital Group Inc. ("**Catalyst**"). The GS Parties and Catalyst are participants in a competing investment offer (the

“**Catalyst Offer**”) that was made at 3:38 a.m. on the morning of the motion for approval of the Shaw Transaction (the “**Shaw Approval Motion**”) and that did not comply with the CMI Entities’ equity solicitation process.¹ Neither the GS Parties nor Catalyst are creditors of the CMI Entities.

4. The GS Parties’ motion for leave to appeal makes wide-ranging attacks on the corporate governance of Canwest, the judgement of the Monitor, the propriety of the equity solicitation process, the objectives of the Ad Hoc Committee and what the GS Parties refer to as various “critical errors” made by the CCAA Judge in the impugned decisions specifically and her supervision of these proceedings in general. None of these allegations provide a proper basis for the GS Parties’ request for leave to appeal.

5. First, certain of the GS Parties’ wide-ranging allegations ought simply to be ignored because they pertain to matters that have already been the subject of Orders in these proceedings, which the GS Parties did not appeal and which they cannot now collaterally attack by means of the appeal for which they seek leave.

6. Second, certain of the GS Parties’ allegations are complaints about matters that the GS Parties suggest may occur in the future, but which have not yet occurred and which can only occur under circumstances where the GS Parties will have full rights to be heard pursuant to procedures set out in the *Companies’ Creditors Arrangement Act* (“CCAA”). The GS Parties cannot by means of the proposed appeal prematurely litigate these matters.

7. Third, to the extent that the GS Parties complain about the approval of the Shaw Transaction, it is important to note that the GS Parties and Catalyst are, together with certain others, participants in the

¹ Catalyst Factum; Catalyst Offer, attached as Exhibit “B” to the Affidavit of Gabriel De Alba, sworn February 19, 2010, Motion Record of the GS Parties, Tab 4(b).

Catalyst Offer. In that sense, they are merely unsuccessful competing bidders. This gives them no status to complain about the equity solicitation process or the approval of the Shaw Transaction. The GS Parties are also parties to a contract with CMI. However, the CCAA Judge expressly found as a fact that the GS Parties are “in no worse position” with respect to that contract as a result of the approval of the Shaw Transaction.² Accordingly, the GS Parties’ complaints about the approval of the Shaw Transaction are not viable.

8. The grounds advanced by the GS Parties do not meet the test for leave to appeal. They raise no important legal issues. The appeal, if granted, could have the effect of severely disrupting the CMI Entities’ going concern restructuring efforts, at the expense of all other stakeholders, for the sole purpose of enhancing the GS Parties’ leverage with respect to their contractual relationship with CMI. Accordingly, the GS Parties’ motion should be dismissed.

PART II – THE FACTS

A. Background

9. The CMI Entities were granted protection from their creditors under the CCAA pursuant to an Order of the CCAA Judge dated October 6, 2009 (the “**Initial CCAA Order**”).³ The CMI Entities intend to pursue a going concern recapitalization pursuant to a plan of arrangement under the CCAA (the “**Recapitalization**”) on the basis of a term sheet (the “**Term Sheet**”) that was negotiated and agreed to by the CMI Entities and the Ad Hoc Committee. The Recapitalization contemplates an investment by a Canadian investor of at least \$65 million and the compromise of creditor claims in exchange for cash or equity of the restructured Canwest. The Recapitalization is designed to enable the CMI Entities to

² Endorsement of the CCAA Judge, dated March 1, 2010 at para. 43, Motion Record of the GS Parties, Tab 3.

³ Affidavit of Thomas C. Strike, sworn February 12, 2010 (the “**Strike Affidavit**”) at para. 3, Motion Record of the GS Parties, Tab 10.

emerge from their insolvency as a going concern, thus preserving value for the CMI Entities' stakeholders and saving jobs for as many of their employees as possible.⁴

10. The Ad Hoc Committee represents holders of over 72% of the aggregate principal amount of the 8% senior subordinated notes issued by CMI (the "Notes"). Due to the significant amount of the debt owed by the CMI Entities on account of the Notes, the support of the Ad Hoc Committee is essential to any successful plan of compromise or arrangement under the CCAA.⁵

11. Unlike the members of the Ad Hoc Committee, the GS Parties are not creditors of the CMI Entities. They are contractual counter-parties of CMI pursuant to the amended and restated shareholders agreement dated as of August 15, 2007 (the "Shareholders Agreement") in respect of CW Investments Co. ("CW Investments"), a company through which CMI and the GS Parties jointly hold interests in certain specialty television networks.⁶

B. Matters raised by the GS Parties that were addressed previously in these proceedings

Allegations by the GS Parties concerning the role of the Ad Hoc Committee

12. The GS Parties challenge the role of the Ad Hoc Committee in these proceedings and assert that the Ad Hoc Committee is not interested in a *bona fide* restructuring of the CMI Entities.⁷ To the contrary, the Ad Hoc Committee has been a steadfast supporter of the CMI Entities throughout their

⁴ Affidavit of John Maguire, sworn October 5, 2009 (the "Maguire Affidavit") at paras. 18 and 22, Motion Record of the GS Parties, Tab 12.

⁵ Maguire Affidavit at para. 14, Motion Record of the GS Parties, Tab 12.

⁶ Affidavit of Thomas C. Strike, sworn November 24, 2009 (the "November Strike Affidavit") at paras. 11, 17 and 19, Motion Record of the CMI Entities, Tab 1.

⁷ Factum of the GS Parties at para. 6.

restructuring efforts and, more importantly, its role in the restructuring is specifically contemplated in the Initial CCAA Order.⁸

13. In the months prior to the settlement of the Term Sheet and throughout these proceedings, the Ad Hoc Committee provided the CMI Entities with various forms of support:

- (a) for nearly six months prior to the commencement of the CCAA proceedings, the members of the Ad Hoc Committee agreed to forbear on enforcement rights that were available to them under the trust indenture governing the Notes;⁹
- (b) in May 2009, certain members of the Ad Hoc Committee provided the CMI Entities with \$100 million in interim financing to enable the CMI Entities to continue to operate in the ordinary course while they developed a restructuring plan;¹⁰
- (c) in September 2009, the members of the Ad Hoc Committee permitted the CMI Entities to use \$85 million from the sale of assets against which the Noteholders held the sole claim to allow the CMI Entities to commence their CCAA restructuring on a secure financial footing;¹¹
- (d) on October 5, 2009, the members of the Ad Hoc Committee and certain other Noteholders agreed to enter into a Support Agreement (the “**Support Agreement**”) with the CMI Entities pursuant to which the applicable Noteholders agreed to support the Recapitalization, subject to certain conditions;¹² and
- (e) to date, the Ad Hoc Committee has endeavoured to support the CMI Entities’ efforts to successfully complete the Recapitalization so they can emerge from the CCAA protection as soon as possible.

14. The involvement of the Ad Hoc Committee in restructuring discussions was disclosed by the CMI Entities in numerous press releases commencing as early as March 11, 2009.¹³ Indeed, agreements

⁸ Initial CCAA Order, Motion Record of the GS Parties, Tab 19.

⁹ Maguire Affidavit at para. 12, Motion Record of the GS Parties, Tab 12.

¹⁰ Maguire Affidavit at para. 13, Motion Record of the GS Parties, Tab 12.

¹¹ Maguire Affidavit at para. 17, Motion Record of the GS Parties, Tab 12.

¹² Maguire Affidavit at paras. 18 and 175, Motion Record of the GS Parties, Tab 12.

¹³ November Strike Affidavit at para. 54, Motion Record of the CMI Entities, Tab 1.

were reached by the CMI Entities to obtain the support of the Ad Hoc Committee for the restructuring of the CMI Entities' affairs after the GS Parties were approached but failed to present a commercially reasonable alternative.¹⁴

15. The terms of the Recapitalization and the role of the Ad Hoc Committee in the CMI Entities' restructuring efforts were disclosed in the materials filed in support of the CMI Entities' CCAA application.¹⁵ The recapitalization transactions agreed to between the CMI Entities and the Ad Hoc Committee are the very foundation upon which these CCAA proceedings and the Initial CCAA Order are based.¹⁶ The Initial Order requires the CMI Entities to comply with their obligations under the Support Agreement, which attaches the Term Sheet setting out the terms of the Recapitalization.¹⁷ The GS Parties did not appeal the Initial CCAA Order. Both in terms of contract and in terms of value, the support of the Ad Hoc Committee is critical to the successful completion of the Recapitalization.

16. The GS Parties may feel that they would have more clout or leverage in these proceedings if the Ad Hoc Committee were not involved. However, the GS Parties cannot by an appeal of the Shaw Approval Order and the Adjournment Order advance a belated and unfounded collateral attack on the role of the Ad Hoc Committee in these proceedings.

Wind-up of 4414616 Canada Inc.

17. The GS Parties allege that the Ad Hoc Committee compelled CMI to take certain actions with respect to CMI's interest in CW Investments as part of an attempt to confiscate value from the GS

¹⁴ November Strike Affidavit at paras. 49-53, Motion Record of the CMI Entities, Tab 1.

¹⁵ Maguire Affidavit, Motion Record of the GS Parties, Tab 12.

¹⁶ *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) at para. 58, Book of Authorities of the Ad Hoc Committee, Tab 1.

¹⁷ Initial CCAA Order, at para. 53 in Motion Record of the GS Parties, Tab 19.

Parties. In particular, the GS Parties allege that, in advance of its CCAA filing, CMI improperly insulated its interest in CW Investments from rights held by the GS Parties under the Shareholders Agreement by winding-up the holding company through which CMI held its interest in CW Investments, 4414616 Canada Inc. (“441”), and transferring the shares in CW Investments held by 441 to CMI.¹⁸

18. The GS Parties have made these allegations previously in these CCAA proceedings. In November and December 2009, the GS Parties brought motions to challenge the wind-up of 441 and, if necessary, to lift the CCAA stay of proceedings to the extent that the CCAA stay affected the GS Parties’ right to pursue this challenge. On December 15, 2009, the CCAA Judge rendered a decision that (i) found that there was a good arguable case that the wind-up of 441 was permitted by the Shareholders Agreement, (ii) granted an Order declaring that the CCAA stay of proceedings applied to the GS Parties’ motion to challenge the wind-up of 441 (in other words, the GS Parties had tried to attack this transaction in violation of the stay of proceedings provided in the Initial CCAA Order), and (iii) dismissed the GS Parties’ request to lift the CCAA stay (the “**GS Stay Order**”).

19. The GS Parties did not seek leave to appeal the GS Stay Order. The GS Parties cannot, by means of the appeal they now seek to bring, criticize and collaterally attack the GS Stay Order, which they did not appeal.

Sale of the Ten Shares

20. The GS Parties allege that the sale of Canwest’s interest in Ten Networks Holdings Limited (“**Ten Networks**”) in September 2009 was carried out for the benefit of and at the direction of the Ad Hoc Committee. The GS Parties previously sought certain amendments to the Initial CCAA Order to

¹⁸ November Strike Affidavit at paras. 57 and 75, Motion Record of the CMI Entities, Tab 1.

make it clear that the Court had not foreclosed a review of the Ten Networks transaction.¹⁹ However, the GS Parties have not actually challenged the Ten Networks transaction to date, and the stay of proceedings in the Initial CCAA Order prevents any such challenge without the stay being lifted, which has not occurred.

21. The allegations of the GS Parties in respect of the Ten Networks transaction cannot support the GS Parties' request for leave to appeal the Shaw Approval Order and the Adjournment Order and, in fact, have nothing at all to do with those Orders.

C. Matters raised by the GS Parties that have not yet occurred

The Disclaimer of the Shareholders Agreement

22. The GS Parties raise the spectre that the CMI Entities will attempt to disclaim the Shareholders Agreement under the process contemplated in Section 32 of the CCAA and allege that the CCAA Judge has facilitated an abuse of the CCAA by allowing these proceedings "to continue down a path of acrimonious and time-consuming litigation" in which the GS Parties will "ultimately prevail against any attempted disclaimer of the ... Shareholders Agreement". The GS Parties pre-suppose both the eventual disclaimer of the Shareholders Agreement and their success in challenging such a disclaimer in support of their allegations that the CCAA proceedings are "error infected".²⁰

23. However, the disclaimer of the Shareholders Agreement is not presently in issue. The CMI Entities *have not* sought to disclaim the Shareholders Agreement, nor has the Monitor provided its view with respect to whether it would consent to the disclaimer of the Shareholders Agreement as it would be

¹⁹ *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7882 (Ont. S.C.J.) at para. 15, Ad Hoc Committee's Book of Authorities, Tab 2.

²⁰ Factum of the GS Parties at para. 12.

required to do under Section 32 of the CCAA. The Recapitalization and the Term Sheet *do not* require the CMI Entities to disclaim the Shareholders Agreement, although they are conditional on the Shareholders Agreement being amended and restated or otherwise dealt with in a manner satisfactory to the CMI Entities and the Ad Hoc Committee.²¹ The Shaw Transaction does not alter that result as it also *does not* require the CMI Entities to disclaim the Shareholders Agreement, although it is likewise conditional on the Shareholders Agreement being amended, restated or otherwise addressed in a manner satisfactory to the CMI Entities, the Ad Hoc Committee and Shaw.²²

24. The CCAA Judge found as fact that (a) the Shareholders Agreement is unaffected by the Shaw Transaction, and (b) the GS Parties are in no worse position in respect of the Shareholders Agreement following the approval of the Shaw Transaction than they were before.²³

25. Section 32 of the CCAA provides a complete code for the process of disclaiming a contract under the CCAA. It allows contractual counter-parties to challenge in court any attempt to disclaim their contracts. If the CMI Entities attempt to disclaim the Shareholders Agreement pursuant to the CCAA at some point in the future, the GS Parties will be able to exercise all their rights at that time to challenge the disclaimer pursuant to Section 32 of the CCAA.

26. Accordingly, nothing about a possible disclaimer of the Shareholders Agreement in the future can support the GS Parties' request for leave to appeal the Shaw Approval Order or the Adjournment Order.

²¹ Maguire Affidavit at para. 175, Motion Record of the GS Parties, Tab 12.

²² Strike Affidavit at para. 53, Motion Record of the GS Parties, Tab 10.

²³ Endorsement of the CCAA Judge, dated March 1, 2010 at para. 43, Motion Record of the GS Parties, Tab 3.

D. The Shaw Approval Motion

Restructuring Discussions with the GS Parties

27. The GS Parties rely on an allegation that the Shaw Approval Motion was brought contrary to a “standstill” provision agreed to in an exchange of emails between counsel for the Ad Hoc Committee and counsel for the GS Parties (the “**Counsel Agreement**”) that set out the terms of without prejudice discussions between the GS Parties and the Ad Hoc Committee. The CCAA Judge rejected the argument that a standstill was agreed to between the parties. Instead, she found that the standstill did not form part of the Counsel Agreement, and even if there had been a standstill in place, the GS Parties received effectively as much notice of the Shaw Approval Motion as if the Counsel Agreement were terminated pursuant to its terms.²⁴ The CCAA Judge’s findings were factual and give rise to no appealable issues.

28. The standstill provision on which the GS Parties rely purportedly appeared in an email sent by counsel to the GS Parties to counsel for the Ad Hoc Committee on December 18, 2009 (the “**December 18 Email**”).²⁵ However, the standstill provision *does not* appear in the December 18 Email as received by counsel for the Ad Hoc Committee and *does not* appear in the copy of the December 18 Email that was forwarded to the members of the Ad Hoc Committee.²⁶ The Ad Hoc Committee was not aware of and did not agree to any standstill provision in the Counsel Agreement that would have restricted its ability to support Canwest’s motion for approval of the Shaw Transaction.²⁷

²⁴ Endorsement of the CCAA Judge, dated March 1, 2010 at para. 31, Motion Record of the GS Parties, Tab 3.

²⁵ Affidavit of Robert J. Chadwick, sworn February 19, 2010 (“**Chadwick Affidavit**”) at para. 6, Motion Record of the GS Parties, Tab 5.

²⁶ Chadwick Affidavit at para. 9(c), Motion Record of the GS Parties, Tab 5.

²⁷ Chadwick Affidavit at para. 15, Motion Record of the GS Parties, Tab 5.

29. The CCAA Judge expressly found that “there was no meeting of the minds with respect to any standstill agreement between the GS Parties and the Ad Hoc Committee,”²⁸ and further found that:

While the GS Parties might reasonably have believed that there was a seven day standstill, once the materials were served on February 12, 2010, it was obvious that at least one party did not consider itself bound to any such agreement. Inexplicably, the GS Parties waited until the afternoon of February 18 to serve their materials and Catalyst waited until the wee hours of February 19 to serve its materials. It seems to me that the mayhem of the moment and the false urgency was largely created by the GS Parties and Catalyst.²⁹

30. There is clearly nothing in this issue – especially given that it has been addressed squarely by factual findings of the CCAA Judge – that would support the GS Parties’ request for leave to appeal on this ground.

The Equity Solicitation Process

31. With respect to the GS Parties’ complaints regarding the CMI Entities’ equity solicitation process, the Ad Hoc Committee accepts as correct the facts referred to in the Factum of the CMI Entities.

32. Neither the GS Parties nor Catalyst were deliberately excluded as potential bidders from the equity solicitation process as alleged. The non-disclosure agreement (“NDA”) that the GS Parties and Catalyst complain of was standard for investment banking processes such as the equity solicitation process. The impugned provisions of the NDA are customary provisions in equity process NDAs that are designed to maintain a level playing field among participants.³⁰

²⁸ Endorsement of the CCAA Judge, dated March 1, 2010 at para. 31, Motion Record of the GS Parties, Tab 3.

²⁹ *Ibid.* at para. 31.

³⁰ Grudzinski Affidavit at paras. 6 and 10, Motion Record of the GS Parties, Tab 8.

33. Further, despite their knowledge and, in Catalyst's case, active involvement in the equity solicitation process, the GS Parties and Catalyst made no formal objection to the process until the eleventh hour objections filed immediately prior to the Shaw Approval Motion.³¹

34. The evidence from RBC Capital Markets itself was that its equity solicitation process fully and properly canvassed the applicable market and that the resulting transaction, the Shaw Transaction, represented the best option available to Canwest in the circumstances.³²

The Shaw Transaction

35. With respect to the Shaw Transaction, the Ad Hoc Committee accepts as correct the response to the GS Parties' complaints in the Factum of the CMI Entities. The terms of the Shaw Transaction do not prejudice the GS Parties in any way. The Shaw Transaction does not require the CMI Entities to take any steps towards the disclaimer or resiliation of the Shareholders Agreement.³³ The CCAA Judge found as a fact that, from the perspective of the GS Parties as contractual counter-parties of CMI, the Shaw Transaction leaves the GS Parties in no worse position than they were in prior to the approval of the Shaw Transaction.³⁴

The Catalyst Offer

36. With respect to the Catalyst Offer, the Ad Hoc Committee accepts as correct the facts referred to in the Factum of the CMI Entities and highlights the following facts.

³¹ Endorsement of the CCAA Judge, dated March 1, 2010 at para. 42, Motion Record of the GS Parties, Tab 3.

³² Grudzinski Affidavit at para. 11, Motion Record of the GS Parties, Tab 8.

³³ Strike Affidavit at para. 53, Motion Record of the GS Parties, Tab 10.

³⁴ Endorsement of the CCAA Judge, dated March 1, 2010 at para. 43, Motion Record of the GS Parties, Tab 3.

37. The Catalyst Offer was conditional on implementation by way of a CCAA plan of arrangement. The Ad Hoc Committee does not support the Catalyst Offer and would be unwilling to vote in favour of any CCAA plan of arrangement based on the Catalyst Offer.³⁵ As noted above, due to the significant amount of debt owed by the CMI Entities to the Noteholders, the support of the Ad Hoc Committee is essential to any plan of arrangement involving the CMI Entities under the CCAA.³⁶ Accordingly, contrary to the submission of the GS Parties that the Catalyst Offer could be closed expeditiously, it would not in fact be possible to complete a transaction based on the Catalyst Offer.

38. The problems with the Catalyst Offer are manifest. It was not supported by the Ad Hoc Committee and therefore could not, under any circumstances, form the basis of a consensual restructuring plan for the CMI Entities. It had an implied equity value of \$100 million less than the Shaw Transaction. It remained subject to the negotiation of definitive documentation. Furthermore, the fact that the Catalyst Offer was not conditional on an amendment of the Shareholders Agreement, a feature on which the GS Parties rely heavily, has little practical significance given that the Ad Hoc Committee's support for a restructuring plan is subject to such a condition.³⁷

39. The GS Parties assert that the judge erred in relying on the business judgement of the Monitor because the real-time assessment of the Catalyst Offer resulted in an "ill considered report" from the Monitor.³⁸ Other than the fact that the GS Parties disagree with the conclusions of the Monitor's Supplement to the Tenth Report, there is no evidence that the report was "ill considered". Moreover, it

³⁵ Supplement to the Tenth Report of the Monitor at para. 16, Motion Record of the GS Parties, Tab 14.

³⁶ Maguire Affidavit at para. 14, Motion Record of the GS Parties, Tab 12.

³⁷ Supplement to the Tenth Report of the Monitor at paras. 11-16, Motion Record of the GS Parties, Tab 14; Catalyst Offer, attached as Exhibit "B" to the Affidavit of Gabriel De Alba, sworn February 19, 2010, Motion Record of the GS Parties, Tab 4(b).

³⁸ Factum of the GS Parties at paras. 97-100.

is not for the GS Parties to complain that the Monitor had insufficient time to assess the Catalyst Offer when it was served at 3:38 a.m. on the day of the Shaw Approval Motion.

PART III – ISSUES AND THE LAW

A. The Role of the GS Parties and Catalyst Do Not Support Granting Leave to Appeal

40. In considering the two Orders from which the GS Parties are, with Catalysts' support, seeking leave to appeal, it is important to consider their role in this restructuring. Catalyst is a disappointed bidder. The GS Parties are participants in that failed bid. They have no standing from that perspective to attack the approval of the Shaw Transaction.

41. Nor does the GS Parties' additional role as contractual counter-parties of CMI under the Shareholders Agreement improve their basis for seeking leave to appeal, especially in circumstances where the CCAA Judge found as a fact that the approval of the Shaw Transaction left the Shareholders Agreement unaffected.³⁹

42. In *BDC Venture Capital Inc. v. National Convergence Inc.*,⁴⁰ the Court of Appeal considered a contested receivership sale approval motion with facts similar to those put before the CCAA Judge in this case. In particular:

- (a) the debtor company had received court approval of a sale of its assets to a successful bidder;
- (b) a contractual counter-party of the debtor objected to the sale on the basis that the sale would affect its contractual rights;
- (c) the contractual counter-party made a late competing offer for the assets, which was rejected by the receiver; and

³⁹ Endorsement of the CCAA Judge, dated March 1, 2010 at para. 43, Motion Record of the GS Parties, Tab 3.

⁴⁰ 2009 ONCA 665, Ad Hoc Committee's Book of Authorities, Tab 3.

- (d) the issue before the Court of Appeal was whether the contractual counter-party / failed bidder had standing to pursue an appeal of the order approving the sale to the successful bidder.⁴¹

43. The Court of Appeal held that, unlike creditors of the debtor company, the contractual counter-party / failed bidder did not have standing to challenge the sale approval order.⁴²

44. The Court of Appeal cited with approval its previous decision in *Skyepharma plc v. Hyal Pharmaceutical Corp.*⁴³ for the following key propositions of law:

- (a) the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale, primarily being the creditors;
- (b) only parties with a legal or proprietary interest in the property being sold have an interest in the sale approval order;
- (c) the examination of the integrity and fairness of the sale process should be focussed on those for whose benefit the sale process has been conducted (i.e. the creditors of the insolvent company);
- (d) there is a sound policy reason for restricting the involvement of failed bidders in sale approval motions: there is often a measure of urgency to complete the court approved sales. When failed bidders become involved, there is a potential for greater delay and additional uncertainty, which may create commercial leverage in the hands of a failed bidder that could be counter-productive to the best interests of those for whose benefit the sale is intended (i.e. the creditors of the insolvent company).⁴⁴

45. These cases derive from the receivership context, but there is no reason why the underlying law and policy should not apply equally to the CCAA context.

⁴¹ *Ibid.* at paras. 4 - 7.

⁴² *Ibid.* at para. 8.

⁴³ [2000] 47 O.R. (3d) 234 (C.A.), Ad Hoc Committee's Book of Authorities, Tab 4.

⁴⁴ *Ibid.* at paras. 25 - 30.

46. The sound policy reason for denying failed bidders standing, namely to prevent them from gaining commercial leverage that could be counter-productive to the best interests of the creditors of the CMI Entities, ought to inform the analysis of whether the GS Parties should be granted leave to appeal. Certainly, the support of Catalyst, a pure failed bidder, should be seen as adding nothing to the GS Parties' case.

B. Deference to the CCAA Judge's Exercise of Discretion Under the CCAA

47. A second factor informing the analysis of whether the GS Parties have met the test for leave is that the Orders sought to be appealed were made in the exercise of judicial discretion by the supervising judge of these CCAA proceedings. Deference is to be accorded to a judge's decisions in CCAA proceedings where the judge is acting in a supervisory capacity over the proceedings:

...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. ...

...Orders depend on a careful and delicate balance of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.⁴⁵

48. Similarly, this Honourable Court has held:

Decisions in the CCAA context must be made quickly. They are, as in this case, usually made by a judge with considerable expertise in the area who has been managing the CCAA proceedings and is intimately familiar with the context and issues at stake.⁴⁶

49. Deference to the CCAA supervisory judge is especially appropriate where the decisions at hand involve the exercise of judicial discretion:

⁴⁵ *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) at paras. 28-30, Ad Hoc Committee's Book of Authorities, Tab 5.

⁴⁶ *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.) at para. 16, Ad Hoc Committee's Book of Authorities, Tab 6.

Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way.⁴⁷

50. The CCAA Judge is an experienced Commercial List judge who has been the judge seized of the CMI Entities' CCAA proceedings since the proceedings were commenced. She has had the advantage of reviewing all materials filed and overseeing all motions in the CCAA proceedings to date. Accordingly, she is familiar with the complex array of issues facing the CMI Entities as they seek to achieve a viable restructuring. In particular, she is intimately aware of the financial realities facing the CMI Entities, the delicate balance that must be maintained in order to hold together the existing restructuring plan, as well as the interests and concerns of various stakeholders who have participated in the CCAA proceedings to date, including the GS Parties.

C. High Threshold for Obtaining Leave to Appeal

51. Against this backdrop, the complaints raised by the GS Parties do not meet the test for leave to appeal. Leave to appeal should not be granted unless there are serious and arguable grounds that are of real and significant interest to the parties and the practice. A party seeking leave to appeal must meet a high threshold based on the following criteria:

- (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.⁴⁸

⁴⁷ *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149 at paras. 35, Ad Hoc Committee's Book of Authorities, Tab 7.

⁴⁸ *Re Stelco* (2005), 75 O.R. (3d) 5 (C.A.) at para. 24, Ad Hoc Committee's Book of Authorities, Tab 8.

52. The grounds of appeal raised by the GS Parties do not meet these criteria. Many of the GS Parties' complaints are irrelevant to the matters at hand. The remainder simply impugn the CCAA Judge's findings of fact, her exercise of discretion and her application of the facts to the established legal tests. They do not raise uncertain questions of legal principle that require illumination by the Court of Appeal.

No significance to the insolvency practice as a whole

53. As the matters raised by the GS Parties are fact-specific to this case, they are not important to the practice of insolvency law as a whole.

No significance to the CCAA proceedings

54. The further consideration of the Catalyst Offer by the CMI Entities, which is the stated goal of the GS Parties' appeal, is not important to the CCAA proceedings given that, among other things, the Catalyst Offer cannot give rise to a viable restructuring transaction because it is not supported by the Ad Hoc Committee.

Points of appeal are not prima facie meritorious

55. None of the points of appeal advanced by the GS Parties are *prima facie* meritorious for the reasons set out above and in the factum of the CMI Entities.

Delay and hindrance of the CCAA proceedings

56. The approval of the Shaw Transaction represents an important step towards a viable going concern restructuring of the CMI Entities. However, the time and delay involved in an appeal of the matters raised by the GS Parties could hinder the CMI Entities in materially advancing their restructuring efforts while the appeal remains pending. The bringing of an appeal could jeopardize both

the Shaw Transaction and the Recapitalization, both of which are conditional on the Recapitalization transaction occurring on or before August 11, 2010.⁴⁹

PART IV – RELIEF REQUESTED

57. In light of the foregoing, the Ad Hoc Committee respectfully requests that this court dismiss the GS Parties' motion for leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Benjamin Zarnett per: LW

Benjamin Zarnett

Willis

Logan Willis

⁴⁹ Strike Affidavit, at paras. 34 and 47, Motion Record of the CMI Entities, Tab 10.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.)
2. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7882 (Ont. S.C.J.)
3. *BDC Venture Capital Inc. v. National Convergence Inc.*, 2009 ONCA 665
4. *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, [2000] 47 O.R. (3d) 234 (C.A.)
5. *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.)
6. *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.)
7. *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149
8. *Re Stelco* (2005), 75 O.R. (3d) 5 (C.A.)

SCHEDULE "B" – STATUTORY REFERENCES

Section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Disclaimer or resiliation of agreements

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

Court may prohibit disclaimer or resiliation

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

Court-ordered disclaimer or resiliation

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

Factors to be considered

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

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

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

Loss related to disclaimer or resiliation

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

Reasons for disclaimer or resiliation

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

Exceptions

(9) This section does not apply in respect of

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

2005, c. 47, s. 131; 2007, c. 29, s. 108, c. 36, ss. 76, 112.

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

Court File No.: M38600

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 OF APPEAL FOR ONTARIO

**FACTUM OF THE RESPONDING PARTY,
THE AD HOC COMMITTEE**

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