Court File No. CV-09-8396-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

FACTUM OF THE APPLICANTS

(Plan Sanction Motion returnable July 28, 2010)

July 23, 2010

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TO: **THE SERVICE LIST**

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PART I – NATURE OF THIS MOTION

1. This factum is filed by Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed on Schedule "A" hereto (the "**Applicants**") and the Partnerships listed on Schedule "B" hereto (the "**Partnerships**" and, together with the Applicants, the "**CMI Entities**") seeking this Honourable Court's sanction of the Restated Consolidated Plan of Compromise, Arrangement and Reorganization dated as of June 23, 2010 in respect of certain of the CMI Entities (the "**Plan**") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("**CCAA**").

2. The CMI Entities submit that this Honourable Court should exercise its discretion to sanction the Plan because the CMI Entities meet the statutory pre-conditions for this Honourable Court's approval of the Plan. Furthermore, the Plan is fair and reasonable to all stakeholders.

3. The Plan is likely the only available alternative to a going concern liquidation/sale or bankruptcy, which would result in less recovery for the CMI Entities' unsecured creditors. A liquidation or bankruptcy could also result in the loss of employment for a substantial number of the CMI Entities' 1700 full-time equivalent employees, as well as the other economic and social costs associated with the loss of a going-concern business. A bankruptcy would also put at risk

the Canadian public's access to and choice of news, public and other information and entertainment programming.

4. The board of directors of Canwest Global (the "**Board**"), the senior management of the CMI Entities, the Ad Hoc Committee (as defined below), the CMI Entities' Chief Restructuring Advisor (the "**CMI CRA**") and the Monitor (as defined below) all support the Plan and its sanction by this Honourable Court.

5. The Plan received the overwhelming approval of the Affected Creditors (as defined below) at the Creditor Meetings held on July 19, 2010.

PART II – FACTS

6. The facts with respect to this Motion are more fully set out in the Affidavit of Thomas C. Strike sworn on July 20, 2010 (the "**Strike Affidavit**"). All of the capitalized terms in this factum have the same meaning as set out in the Plan, unless otherwise indicated.

Background

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

Original Recapitalization Transaction

8. Immediately prior to filing for creditor protection under the CCAA, the CMI Entities entered into a support agreement dated October 5, 2009 (the "**Support Agreement**") with the members of an *ad hoc* committee (the "**Ad Hoc Committee**") who collectively held in excess of 70% of the outstanding principal amount of Canwest Media Inc.'s ("**CMI**") 8% senior subordinated notes due 2012 (the "**8% Senior Subordinated Notes**"). The Support Agreement had attached to it a recapitalization transaction term sheet (the "**Original Recapitalization Term**

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1 Strike Affidavit, para. 13, Motion Record of the Applicants [Applicants' Motion Record], Tab 2, p. 18.

2 Strike Affidavit, para. 14, Applicants' Motion Record, Tab 2, p. 18.

Sheet") that set out the summary terms and conditions of a proposed consensual going concern recapitalization transaction involving the CMI Entities (the "**Original Recapitalization Transaction**"). The Support Agreement provided that the CMI Entities would pursue a plan of arrangement or compromise on the terms set out in the Original Recapitalization Term Sheet in order to implement the Original Recapitalization Transaction as part of this CCAA proceeding.[3]

9. The central role of the Ad Hoc Committee in the CMI Entities' restructuring reflects the objective reality that, due to the size of the indebtedness owing to the holders of the 8% Senior Subordinated Notes (the "**8% Senior Subordinated Noteholders**") and the proportion of the 8% Senior Subordinated Notes held by the members of the Ad Hoc Committee, the support of the Ad Hoc Committee is essential to any consensual recapitalization of the CMI Entities under the CCAA. At the time the CMI Entities entered into the Support Agreement, CMI owed in excess of US$393 million in principal and approximately US$33.7 million in accrued but unpaid interest and default interest to the 8% Senior Subordinated Noteholders in respect of the 8% Senior Subordinated Notes on which CMI had defaulted in March 2009, and several of the other CMI Entities were also liable to the 8% Senior Subordinated Noteholders for the amounts owing pursuant to guarantees of CMI's obligations in respect of the 8% Senior Subordinated Notes. [4] As this Honourable Court noted in its reasons (the "**Original Shaw Approval Reasons**") approving the Original Shaw Transaction (as defined below), the 8% Senior Subordinated Noteholders have a "blocking" position in any restructuring of the CMI Entities' business.[5] In addition, the Ad Hoc Committee provided the liquidity to the CMI Entities under the Use of Cash Collateral and Consent Agreement (as amended, the "**Cash Collateral and Consent Agreement**") that was essential to permit the CMI Entities to continue to operate within the CCAA proceeding.[6]

10. Under the Original Recapitalization Transaction, creditors of the CMI Entities whose claims were to be compromised, including the 8% Senior Subordinated Noteholders, would receive shares of a restructured Canwest Global which would be a publicly-listed

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3 Strike Affidavit, para. 17, Applicants' Motion Record, Tab 2, pp. 18-19.

4 Strike Affidavit, para. 17, Applicants' Motion Record, Tab 2, p. 18-19.

5 *Re Canwest Global Communications Corp.* [2010] O.J. No. 789 (S.C.J.) at para. 42 [Original Shaw Approval Reasons]. The significance of this "blocking" position was also recognized by the Monitor in its Supplement to the Monitor's Tenth Report, February 19, 2010.

6 Strike Affidavit, para. 69, Applicants' Motion Record, Tab 2, p. 38.

company on the Toronto Stock Exchange. The Original Recapitalization Transaction contemplated that no more than 18.5% of the outstanding equity shares of a restructured Canwest Global would be issued to affected creditors (other than the 8% Senior Subordinated Noteholders) and that the existing shareholders of Canwest Global ("**Existing Shareholders**") would receive in the aggregate 2.3% of the shares of a restructured Canwest Global (the "**Shareholder Recovery**"). The Original Recapitalization Term Sheet specifically provided that the Shareholder Recovery was not to dilute the recovery that would otherwise be received by the affected creditors (other than the 8% Senior Subordinated Noteholders). In other words, the equity shares allocated to the Existing Shareholders were to be funded out of the recoveries that would otherwise flow to the 8% Senior Subordinated Noteholders.[7]

11. The Original Recapitalization Transaction was contingent upon, *inter alia*, the satisfaction of the following conditions:

(a) identifying one or more "Canadians" within the meaning of the *Direction to the CRTC (ineligibility of Non-Canadians)* that would invest at least $65 million in a restructured Canwest Global representing an equity interest that was acceptable to CMI and the Ad Hoc Committee (the "**Equity Investor**"); and

(b) the shareholders agreement (the "**Shareholders Agreement**") between CMI, 4414616 Canada Inc., Goldman Sachs Capital Partners VI Fund, L.P. and certain of its affiliates (together, "**Goldman Sachs**") and CW Investments Co. ("**CW Investments**") that governs the affairs of CW Investments being amended and restated or otherwise dealt with in a manner acceptable to CMI and the Ad Hoc Committee, subject to CRTC approval if required.[8]

12. Failure to satisfy these two business-critical conditions would have entitled the 8% Senior Subordinated Noteholders to terminate the Support Agreement, thereby triggering an event of default under the Cash Collateral and Consent Agreement. The ability of the 8% Senior Subordinated Noteholders to exercise their default remedies under the Cash Collateral and Consent Agreement would have been extremely detrimental to the liquidity of the CMI Entities.

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7 Strike Affidavit, para. 18, Applicants' Motion Record, Tab 2, p. 19.

8 Strike Affidavit, para. 19, Applicants' Motion Record, Tab 2, pp. 19-20.

Without the continued support of the 8% Senior Subordinated Noteholders, the entire restructuring of the CMI Entities' businesses would be in serious jeopardy. [9]

The Original Shaw Transaction

13. In early November 2009, Canwest Global, with the assistance of its financial advisor, RBC Capital Markets, commenced an equity investment solicitation process in order to identify the Equity Investor(s), as contemplated in the Original Recapitalization Term Sheet. The equity investment solicitation process was conducted over the course of three months. Strategic and financial investors were initially solicited to determine whether they would be interested in making a minimum 20% equity investment in a restructured Canwest Global for at least $65 million. Potential investors were advised that alternative proposals would be considered. Ultimately, two formal binding offers were received from potential investors by the January 27, 2010 deadline, one of which was from Shaw Communications Inc. ("**Shaw**"). It was Canwest Global's view, which was supported by RBC Capital Markets and the CMI CRA, that the formal offer submitted by Shaw was the best overall offer received by the CMI Entities. [10]

14. On February 11, 2010, Canwest Global entered into an agreement with Shaw (the "**Original Shaw Subscription Agreement**") pursuant to which Shaw agreed to subscribe for, and Canwest Global, once restructured, agreed to issue, equity shares in the capital of a restructured Canwest Global.[11] The details of the equity investment solicitation process were scrutinized and approved by this Honourable Court prior to granting approval on February 19, 2010 of the entering into of the Original Shaw Transaction.

15. The Original Shaw Subscription Agreement contemplated, *inter alia*, that:

(a) Shaw, or a wholly-owned direct or indirect subsidiary of Shaw, would invest a minimum of $95 million in a restructured Canwest Global (the "**Minimum Commitment**"), representing a 20% equity interest and an 80% voting interest in

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[9] Affidavit of Thomas C. Strike sworn June 7, 2010, para. 23. Had an event of default under the Cash Collateral and Consent Agreement occurred, the Ad Hoc Committee could have sought to obtain an assignment of the Secured Intercompany Note in the amount of over $187 million.

[10] Strike Affidavit, para. 22, Applicants' Motion Record, Tab 2, p. 20.

[11] Strike Affidavit, para. 23, Applicants' Motion Record, Tab 2, p. 21.

a restructured Canwest Global immediately following the completion of the proposed recapitalization transaction (the "**Original Shaw Transaction**").

(b) Rather than restructure Canwest Global as a public company (as was contemplated in the Original Recapitalization Term Sheet), Canwest Global would become a private company the shareholders of which would be comprised of Shaw and those 8% Senior Subordinated Noteholders and other participating creditors of the CMI Entities (together, the "**Participating Creditors**") that elected to receive equity shares of a restructured Canwest Global and that would hold at least 5% of the equity of a restructured Canwest Global following the completion of the Original Shaw Transaction.

(c) affected creditors of the CMI Entities that would hold less than 5% of the equity shares of a restructured Canwest Global upon completion of the Original Shaw Transaction (the "**Non-Participating Creditors**") would receive cash payments to extinguish their interests to be affected pursuant to a plan of compromise or arrangement. The amount of cash to be distributed to the Non-Participating Creditors would be equal to the value of the equity they would otherwise have received under the Original Recapitalization Transaction but using the higher implied equity value contained in the Original Shaw Subscription Agreement.

(d) In addition to the Minimum Commitment, Shaw would subscribe for an additional commitment of equity shares of a restructured Canwest Global at the same price per share (the "**Additional Commitment**") in order to fund the cash payments which would be made to the Non-Participating Creditors and the Existing Shareholders pursuant to the Original Recapitalization Transaction (as amended), subject to the right of the members of the Ad Hoc Committee to elect to participate *pro rata* (based upon the *pro forma* ratio of equity in a restructured Canwest Global allocated to Shaw to equity allocated to the Ad Hoc Committee) with Shaw in the funding of the Additional Commitment.[12]

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[12] Strike Affidavit, para. 23, Applicants' Motion Record, Tab 2, pp. 21-22.

16. The Original Shaw Subscription Agreement maintained the Shareholder Recovery, albeit in a different form. It provided that each of the Existing Shareholders would, in exchange for their existing shares of Canwest Global, receive a cash payment equal to such shareholder's *pro rata* entitlement to the amount obtained by multiplying (i) the implied equity value of restructured Canwest Global (*i.e.*, $475 million) by (ii) the percentage of the implied equity value that was to be allocated to the Existing Shareholders as set out in the Original Recapitalization Term Sheet (*i.e.*, 2.3%). The cash payment to the Existing Shareholders was to have been funded out of the recovery that would otherwise have been allocable to the 8% Senior Subordinated Noteholders.[13]

17. It was a condition of each party's obligation to complete the Original Shaw Transaction that, among other things (a) the Shareholders Agreement be amended and restated or otherwise addressed in a manner to be agreed by Shaw, Canwest Global and the Ad Hoc Committee; or (b) the Shareholders Agreement be disclaimed or resiliated in accordance with the provisions of the CCAA and the Claims Procedure Order.[14] As a result, the Original Shaw Transaction left unresolved the outstanding dispute between the CMI Entities and Goldman Sachs regarding the treatment of the Shareholders Agreement, a fundamental obstacle to the restructuring of the CMI Entities which had existed from (and before) the Filing Date.

18. Although the definitive documents in respect of the Original Shaw Transaction were entered into on February 11, 2010, by their terms they were not legally binding or effective until approved by this Honourable Court. To that end, the CMI Entities served materials on February 12, 2010 in support of a motion (to be heard on February 19, 2010) seeking approval of the agreements entered into in respect of the Original Shaw Transaction. In the afternoon of February 18, 2010, Goldman Sachs served motion materials opposing the relief sought in the motion, citing concerns about the integrity of the CMI Entities' equity investment solicitation process and whether the best available transaction had emerged from that process. At 3:38 a.m. on February 19, 2010, the day of the hearing of the approval motion in respect of the Original Shaw Transaction, the CMI Entities were served with an affidavit by counsel for Catalyst Capital

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[13] Strike Affidavit, para. 24, Applicants' Motion Record, Tab 2, p. 22.

[14] Strike Affidavit, para. 26, Applicants' Motion Record, Tab 2 at pp. 22-23.

Group Inc. (**"Catalyst"**) enclosing a competing offer to make an equity investment in a restructured Canwest Global.[15]

19. By Order dated February 19, 2010 (the **"Original Shaw Approval Order"**), this Honourable Court approved the agreements that were entered into in respect of the Original Shaw Transaction. Among other things, this Honourable Court noted that a "major objective underpinning the initial CCAA filing [had] now been accomplished."[16]

20. On March 9, 2010, Goldman Sachs filed a notice of motion and factum seeking leave to appeal the Original Shaw Approval Order (the "**Leave Motion**"). On March 12, 2010, Catalyst served a responding factum in support of the Leave Motion. On March 22, 2010, the CMI Entities and the Ad Hoc Committee served responding facta in opposition to the Leave Motion. As described below, the Leave Motion was ultimately abandoned by Goldman Sachs following the Mediation (as defined below).[17]

Negotiations with Goldman Sachs

21. Commencing shortly after the issuance of the Initial Order, the CMI Entities, the CMI CRA and the Ad Hoc Committee, with the assistance of the Monitor, encouraged and participated in direct and indirect, bilateral and multilateral negotiations with Goldman Sachs in an attempt to reach a consensual resolution regarding the treatment of the Shareholders Agreement. Following approval of the Original Shaw Transaction, the CMI Entities engaged in further discussions with Shaw, the Monitor, the Ad Hoc Committee and Goldman Sachs again with a view to reaching a mutually agreeable resolution of the treatment of the Shareholders Agreement and the other issues that were contentious among the parties. These negotiations with Goldman Sachs eventually reached an impasse.[18]

22. In light of the impasse and the fact that time-consuming, expensive litigation appeared inevitable, at the request of the CMI Entities and the Monitor, this Honourable Court directed the parties to participate in a confidential, court-supervised mediation (the "**Mediation**")

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[15] Strike Affidavit, para. 28, Applicants' Motion Record, Tab 2, p. 23.

[16] Strike Affidavit, para. 29, Applicants' Motion Record, Tab 2, p. 23.

[17] Strike Affidavit, para. 30, Applicants' Motion Record, Tab 2, pp. 23-24.

[18] Strike Affidavit, para. 32, Applicants' Motion Record, Tab 2, p. 24.

before Chief Justice Winkler. The Mediation commenced on March 29, 2010. On March 31, 2010, Chief Justice Winkler directed an adjournment of approximately two weeks. On April 16, 2010, Chief Justice Winkler, through the Monitor, advised the CMI Entities that Goldman Sachs, Shaw and the Ad Hoc Committee had negotiated a framework to resolve the outstanding condition in the Approved Shaw Transaction regarding the Shareholders Agreement, in order to permit the CMI Entities to go forward with a consensual restructuring.[19]

The Amended Shaw Transaction

23. The CMI Entities, Shaw, the Ad Hoc Committee and Goldman Sachs subsequently proceeded to negotiate the definitive documents among them following the framework that had been agreed to by Shaw, the Ad Hoc Committee and Goldman Sachs at the Mediation, including the value that would be paid to the affected creditors (other than the 8% Senior Subordinated Noteholders) as part of the Plan.[20]

24. Final transaction terms were established and definitive documentation (the "**Definitive Documentation**") amending the Original Shaw Transaction (the "**Amended Shaw Transaction**") and evidencing the Amended Shaw Transaction was ultimately signed by the parties on May 3, 2010, following respective board approvals by Canwest Global and Shaw.[21]

25. The Amended Shaw Transaction will see a wholly-owned subsidiary of Shaw acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("**CTLP**") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities, when the Plan is implemented (the "**Plan Implementation Date**"). Shaw will pay to CMI US$440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount, referred to as the "Continued Support Payment", of US$2.9 million per month will be paid to CMI by Shaw and allocated by CMI to

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[19] Strike Affidavit, paras. 33-37, Applicants' Motion Record, Tab 2, pp. 25-26.

[20] Strike Affidavit, para. 38, Applicants' Motion Record, Tab 2, p. 26.

[21] Strike Affidavit, para. 39, Applicants' Motion Record, Tab 2, p. 26-27.

the 8% Senior Subordinated Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the Claims of the Affected Creditors (as defined below) (other than the 8% Senior Subordinated Noteholders), subject to a *pro rata* increase in that cash amount for certain restructuring period claims in certain circumstances (the "**Restructuring Period Claims**").[22]

26. Concurrently with the execution of the Definitive Documentation, Shaw and Goldman Sachs entered into a Share and Option Purchase Agreement pursuant to which Shaw acquired on that date from Goldman Sachs 299 Class A preferred shares in the capital of CW Investments, representing approximately 29.9% of the total voting shares of CW Investments, and 499,000 Class B common shares, representing approximately 49.9% of the total equity shares of CW Investments. Shaw also obtained an option to purchase, subject to CRTC approval, the remaining 34 Class A preferred shares and 148,014 Class B common shares in the capital of CW Investments held by Goldman Sachs, representing 3.4% of the total voting shares of CW Investments and 14.8% of the total equity shares of CW Investments. The aggregate cash consideration paid and payable by Shaw for Goldman Sachs' shares of CW Investments (including the option shares) was $709 million.[23]

27. In addition, Canwest Global, CMI, CW Investments, Shaw and Goldman Sachs executed a full and final mutual release dated May 3, 2010 with respect to the various matters that had been the subject of litigation between the parties, including the Leave Motion.[24]

The Shareholder Group Complaint

28. Following the execution of the Definitive Documentation, the CMI Entities proceeded to negotiate and draft the Plan. The CMI CRA, the Monitor, Shaw and the Ad Hoc Committee also participated in the negotiation and drafting of the Plan. The CMI Entities subsequently brought a motion (the "**June 22nd Motion**") seeking an order (the "**Meeting Order**"), *inter alia*, (i) accepting the filing of the Plan based on the Amended Shaw Transaction,

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22 Strike Affidavit, para. 40, Applicants' Motion Record, Tab 2, p. 27.

23 Strike Affidavit, para. 41, Applicants' Motion Record, Tab 2, p. 27.

24 Strike Affidavit, para. 42, Applicants' Motion Record, Tab 2, p. 27.

(ii) authorizing the CMI Entities to call and conduct the Creditor Meetings, and (iii) approving the Definitive Documentation. The motion was returnable on June 22, 2010.[25]

29. In response to the June 22nd Motion, an *ad hoc* group (the "**Shareholder Group**") of the Existing Shareholders filed materials in opposition to the relief sought at the motion. The Shareholder Group claimed that, among other things, the Amended Shaw Transaction was improper because it did not include the Shareholder Recovery (which was contemplated by the Original Recapitalization Transaction and the Original Shaw Transaction).[26]

30. At the commencement of the June 22nd Motion, this Honourable Court urged the CMI Entities, Shaw, the Ad Hoc Committee and the Shareholder Group, in the interests of certainty and to avoid delay, to seek to resolve their differences. On June 23, 2010, after many hours of negotiation, and with the assistance of the Monitor, the parties, through their counsel, entered into minutes of settlement (the "**Minutes of Settlement**") wherein it was agreed by the parties that Canwest Global would complete a reorganization of capital (the "**Reorganization**") under section 191 of the *Canada Business Corporations Act* ("**CBCA**") pursuant to which the Existing Shareholders would receive from Shaw an aggregate payment of $11 million (representing an amount approximately equivalent to the amount of the Shareholder Recovery contemplated by the Original Recapitalization Transaction and the Original Shaw Transaction) upon the implementation of the Plan. The parties also agreed, *inter alia*, that the Shareholder Group would be reimbursed in respect of the documented costs of their advisors in connection with the June 22nd Motion on implementation of the Plan in an amount to be agreed upon by the parties.[27]

31. Following the entering into of the Minutes of Settlement, this Honourable Court granted the Meeting Order, which included approval of the Definitive Documentation. In Reasons for Decision granted June 23, 2010 in connection with the June 22nd Motion (the "**June 23rd Reasons**"), this Honourable Court stated that it was "fully supportive of the approval of the

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25 Strike Affidavit, para. 43, Applicants' Motion Record, Tab 2, p. 28.

26 Strike Affidavit, para. 44, Applicants' Motion Record, Tab 2, p. 28.

27 Strike Affidavit, para. 45, Applicants' Motion Record, Tab 2, p. 28.

Shaw Transaction Agreements" and that the Amended Shaw Transaction is "fair and reasonable".[28]

The Plan

32. The Plan, in its then current form, was filed with this Honourable Court shortly after the Meeting Order was granted on the afternoon of June 23, 2010.[29]

33. Creditors of the Plan Entities shall either be affected (the "**Affected Creditors**") or unaffected by the Plan. In order to vote on the Plan, a creditor had to be a holder of an affected claim against a Plan Entity that has been finally determined for the purposes of voting in accordance with the Claims Procedure Order (a "**Proven Voting Claim**"). In respect thereof, and in accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes: (a) the 8% Senior Subordinated Noteholders (the "**Noteholders Class**") and (b) creditors with Affected Claims (the "**Ordinary Creditors Class**") that are neither 8% Senior Subordinated Noteholders nor creditors with Affected Claims against a Plan Entity that are valued at less than $5,000 or that elect to value their claims at $5,000 for the purposes of voting on and receiving distributions under the Plan ("**Convenience Class Creditors**"). The Convenience Class Creditors whose claims (or the elected amount of whose claims) are being paid in full were deemed to vote in favour of the Plan as members of the Ordinary Creditors Class.[30]

34. The Plan provides that it will become effective at the Effective Time on the Plan Implementation Date. It is contemplated in the Amended Shaw Transaction that the Plan will be implemented by no later than September 30, 2010, subject to extension under certain circumstances. The Plan includes the following key elements:[31]

(a) 7316712 will acquire all of the shares of CW Investments owned by CMI, all of the shares of a new corporation ("**New Canwest**") recently incorporated as a subsidiary of CMI under the CBCA, which will in turn own all of the limited

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28 Strike Affidavit, para. 46, Applicants' Motion Record, Tab 2, pp. 28-29.

29 Strike Affidavit, para. 47, Applicants' Motion Record, Tab 2, p. 29.

30 Strike Affidavit, para. 48, Applicants' Motion Record, Tab 2, pp. 29-30.

31 Strike Affidavit, para. 49, Applicants' Motion Record, Tab 2, pp. 30-31.

partnership interests of CTLP and the shares of Canwest Television GP Inc. ("**GP Inc.**"), the general partner of CTLP, and certain other assets of the CMI Entities;

(b) US$440 million plus the amount of the Continued Support Payment, if any, will be allocated for distribution on account of the Claims of the 8% Senior Subordinated Noteholders;

(c) $38 million, subject to a *pro rata* increase in such amount for certain Restructuring Period Claims in certain circumstances, will be allocated in satisfaction of the Claims of Affected Creditors (other than the 8% Senior Subordinated Noteholders);

(d) Unaffected Claims, including the claims of certain Persons that are the subject of the Court Charges, will be paid on the Plan Implementation Date or otherwise satisfied from a Plan Implementation Fund mainly consisting of Cash of the Plan Entities (other than the Cash of CTLP and GP Inc. and their subsidiaries) (excluding the consideration paid by Shaw in accordance with the Amended Shaw Transaction);

(e) the Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global;

(f) all equity compensation plans of Canwest Global will be extinguished, and any outstanding options, restricted share units or other equity-based awards outstanding thereunder will be terminated and cancelled, and the participants therein shall not be entitled to any distributions under the Plan; and

(g) the Court Charges will be released except for the Administration Charge which will continue to attach to the Ordinary Creditors Pool (as defined below) and the Plan Implementation Fund.

35. On a Distribution Date to be determined by the Monitor following the Plan Implementation Date, all Affected Creditors with Proven Distribution Claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction)

from the Plan Sponsor in accordance with the Plan. The Directors and Officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan Implementation Date.[32]

36. Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the Multiple Voting Shares, Subordinate Voting Shares and Non-Voting Shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound up, dissolved, placed into bankruptcy or otherwise abandoned.[33]

Distributions under the Plan

37. Under the Plan, the funds to be distributed to the 8% Senior Subordinated Noteholders will be held by CMI in a pool designated for distribution to the 8% Senior Subordinated Noteholders (the "**Noteholder Pool**"). The Noteholder Pool will be equal to US$440 million (plus the amount of any Continued Support Payment). On or after the Plan Implementation Date, each 8% Senior Subordinated Noteholder shall receive its *pro rata* share of the Noteholder Pool pursuant to a distribution by CMI to the Indenture Trustee (as defined below) for and on behalf of the 8% Senior Subordinated Noteholders.[34]

38. The funds to be distributed to creditors in the Ordinary Creditors Class shall be held by the Monitor in a pool designated for distribution to the Ordinary Creditors (the "**Ordinary Creditors Pool**"). The Ordinary Creditors Pool will be equal to $38 million, together with a *pro rata* increase for certain Restructuring Period Claims in certain circumstances, minus the Convenience Class Pool. The Plan provides that on one or more Distribution Dates (as determined by the Monitor), the Monitor shall distribute to each Convenience Class Creditor from the Convenience Class Pool an amount in cash equal to the lesser of $5,000 and the value

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32 Strike Affidavit, para. 51, Applicants' Motion Record, Tab 2, p. 32.

33 Strike Affidavit, para. 52, Applicants' Motion Record, Tab 2, p. 32.

34 Strike Affidavit, para. 59, Applicants' Motion Record, Tab 2, p. 35.

of such Convenience Class Creditor's claim.[35] Distributions to Ordinary Creditors from the Ordinary Creditors Pool is described in greater detail below.

39. The Monitor will be empowered under the Plan to complete the claims process under the Claims Procedure Order and to effect distributions to the Ordinary Creditors and the Convenience Class Creditors. As well, the Monitor will also be empowered to effect the liquidation, wind-up or dissolution or bankruptcy of Canwest Global and certain of its remaining Subsidiaries after the Plan Implementation Date.[36]

Reorganization of the Articles of Canwest Global

40. In furtherance of the Minutes of Settlement that were entered into with the Shareholder Group in connection with the June 22nd Motion, on the Plan Implementation Date, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares (the "**New Multiple Voting Shares**"), new subordinated voting shares (the "**New Subordinated Voting Shares**") and new non-voting shares (the "**New Non-Voting Shares**"); and (b) an unlimited number of new non-voting preferred shares (the "**New Preferred Shares**"), the terms of which will provide for the mandatory transfer to a designated entity affiliated with Shaw (the "**Shaw Designated Entity**") of the New Preferred Shares held by the Existing Shareholders for an aggregate amount of $11 million to be paid to the Existing Shareholders upon delivery by Canwest Global of the transfer notice (the "**Transfer Notice**") to the transfer agent (the "**Transfer Agent**").[37] The terms of the New Preferred Shares provide that on the Plan Implementation Date, in accordance with the provisions of the Plan, including the sequence of actions and events set out in section 5.5 thereof, Canwest Global shall cause the transfer to occur through the delivery by Canwest Global of the Transfer Notice to the Transfer Agent.[38]

41. At the Effective Time, each issued and outstanding multiple voting share of Canwest Global held by an Existing Shareholder will be changed into one New Multiple Voting

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35 Strike Affidavit, para. 60, Applicants' Motion Record, Tab 2, p. 35.

36 Strike Affidavit, para. 64, Applicants' Motion Record, Tab 2, p. 36.

37 Strike Affidavit, para. 75, Applicants' Motion Record, Tab 2, pp. 40-41.

38 See section 5.5(w) of the Plan, Exhibit "I" to the Strike Affidavit, Applicants' Motion Record, Tab 2(I), p. 314.

Share and one New Preferred Share, each issued and outstanding subordinate voting share of Canwest Global held by an Existing Shareholder will be changed into one New Subordinate Voting Share and one New Preferred Share, and each issued and outstanding non-voting share of Canwest Global held by an Existing Shareholder will be changed into one New Non-Voting Share and one New Preferred Share. Following delivery of the Transfer Notice, the Shaw Designated Entity will purchase all of the New Preferred Shares held by the Existing Shareholders in consideration for the payment of $11 million to be delivered to the Transfer Agent for payment to the holders of the New Preferred Shares as of the Effective Time. The Shaw Designated Entity will then donate and surrender the New Preferred Shares acquired by it to Canwest Global for cancellation.[39]

The Plan Emergence Agreement

42. In connection with the Plan and its implementation, and in accordance with the Amended Shaw Transaction, Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into an agreement (the "**Plan Emergence Agreement**") dated June 25, 2010 detailing certain steps that will be taken prior to, upon or following implementation of the Plan, which are related to the funding of various costs that are payable by the CMI Entities on emergence from this CCAA proceeding, including payments that will be made (or may be made) by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The payments that are to be made by the CMI Entities or the Monitor will be in accordance with the provisions of the Plan Emergence Agreement and the form of schedule of costs appended thereto (the "**PIF Schedule**"). The PIF Schedule has not yet been finalized and will be settled by the parties to the Plan Emergence Agreement between now and the Plan Implementation Date.[40] A copy of the Plan Emergence Agreement is attached as Appendix "D" to the Monitor's Sixteenth Report.

Mailing of the Meeting Notice and Meeting Materials

43. The Meeting Order authorized the CMI Entities to conduct the Creditor Meetings on July 19, 2010 at which time Affected Creditors in the Noteholder Class and Affected

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[39] Strike Affidavit, para. 76, Applicants' Motion Record, Tab 2, p. 41.

[40] Strike Affidavit, paras. 5 and 79, Applicants' Motion Record, Tab 2, pp. 15 and 42.

Creditors in the Ordinary Creditors Class would consider and vote on a resolution (the "**Resolution**") to approve the Plan.[41]

44. On or about June 30, 2010, pursuant to the terms of the Meeting Order, the CMI Entities delivered copies of (i) the Information Circular; and (ii) beneficial owner ballot ("**Beneficial Noteholder Ballot**" and with the Information Circular, the "**Noteholder Meeting Materials**") to Broadridge Investor Communications Solutions, Canada, who then, in turn, delivered the Meeting Materials to those 8% Senior Subordianted Noteholders who beneficially held the 8% Senior Subordinated Notes on the Noteholder Voting Record Date (the "**Beneficial Noteholders**") through an intermediary or, in some instances, through a participant. In addition, pursuant to the terms of the Meeting Order, the Monitor sent copies of the Information Circular and the Ordinary Creditors' Proxy (the "**Ordinary Creditors Meeting Materials**" and together with the Noteholder Meeting Materials, the "**Meeting Materials**") to each Ordinary Creditor and Convenience Class Creditor by July 2, 2010. An electronic copy of the Meeting Materials was also posted on the Monitor's website maintained for this CCAA proceeding.[42]

45. Furthermore, the Monitor published notice of the Creditor Meetings in the *National Post*, *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal* on June 30, 2010 and July 2, 2010.[43]

The Creditor Meetings

46. The Creditor Meetings were held on July 19, 2010 in the Governor General Room at the Hilton Toronto Hotel in Toronto, Ontario. The meeting of the Noteholder Class (the "**Noteholder Meeting**") was held at 9:30 a.m. and the meeting of the Ordinary Creditors Class (the "**Ordinary Creditors Meeting**") was held at 11:30 a.m.[44]

(a) The Noteholder Meeting

47. Pursuant to the terms of the Meeting Order, only those Beneficial Noteholders as of the Noteholder Voting Record Date were entitled to vote or provide instructions relating to

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41 Strike Affidavit, para. 92, Applicants' Motion Record, Tab 2, p. 47.

42 Strike Affidavit, para. 93, Applicants' Motion Record, Tab 2, pp. 47-48.

43 Strike Affidavit, para. 94, Applicants' Motion Record, Tab 2, p. 48.

44 Strike Affidavit, para. 95, Applicants' Motion Record, Tab 2, p. 48.

voting at the Noteholder Meeting. The Beneficial Noteholders indicated their instructions with respect to voting for or against the Resolution by completing a Beneficial Noteholder Ballot and sending such Beneficial Noteholder Ballot to their intermediary who subsequently delivered a master ballot (each, a "**Master Ballot**") to the Monitor. All Master Ballots that were received from intermediaries by the Monitor by 5:00 p.m. on July 18, 2010 were counted for voting purposes at the Noteholder Meeting.[45]

48. At least one vote was included on a Master Ballot that was counted for voting purposes at the Noteholder Meeting, thereby satisfying the requirement of a quorum of the Beneficial Noteholders at the Noteholder Meeting. No Beneficial Noteholders attended the Noteholder Meeting in person. The Chair of the Noteholder Meeting declared that the Noteholder Meeting was properly constituted.[46]

49. According to the results of the Monitor's tabulation, in total, 100% in number representing 100% in value of the Beneficial Noteholders that provided instructions for voting at the Noteholder Meeting approved the Resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding 8% Senior Subordinated Notes validly voted at the Noteholder Meeting. Pursuant to the Meeting Order and the CCAA, the Resolution was required to be approved by a majority in number and two-thirds in value of the 8% Senior Subordinated Noteholders holding Proven Voting Claims that provided a proxy, ballot or other instruction for voting or otherwise validly voted at the Noteholder Meeting (the "**Required Noteholder Majority**"). The Required Noteholder Majority voted in favour of the Resolution and therefore approved the Plan.[47]

(b) The Ordinary Creditors Meeting

50. Pursuant to the terms of the Meeting Order, Ordinary Creditors were permitted to attend the Ordinary Creditors Meeting in person or could appoint another person to attend as its proxyholder. Seven (7) Ordinary Creditors attended in person with Proven Voting Claims and the Chair of the Ordinary Creditors Meeting held at least one proxy from an Ordinary Creditor with a Proven Voting Claim, thereby satisfying the requirement that a quorum of Ordinary

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45 Strike Affidavit, para. 96, Applicants' Motion Record, Tab 2, p. 48.

46 Strike Affidavit, para. 97, Applicants' Motion Record, Tab 2, p. 48.

47 Strike Affidavit, para. 98, Applicants' Motion Record, Tab 2, p. 49.

Creditors be present either in person or by proxy. The Chair of the Ordinary Creditors Meeting declared that the Ordinary Creditors Meeting was properly constituted. [48]

51. According to the results of the Monitor's tabulation, in total, in excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding Proven Voting Claims that were present in person or by proxy at the Ordinary Creditors Meeting voted (or were deemed to vote pursuant to the Plan and the Meeting Order in the case of Convenience Class Creditors) to approve the Resolution. Pursuant to the Meeting Order and the CCAA, the Resolution was required to be approved by a majority in number and two-thirds in value of the Ordinary Creditors holding Proven Voting Claims that were present and voting at the Ordinary Creditors Meeting (or were deemed to vote pursuant to the Plan and the Meeting Order) (the "**Required Ordinary Creditor Majority**"). The Required Ordinary Creditor Majority voted in favour of the Resolution and therefore approved the Plan. [49]

PART III – ISSUES AND THE LAW

52. The issues in respect of this motion are as follows:

(a) Should this Honourable Court sanction the Plan as fair and reasonable?

(b) Should this Honourable Court approve the Plan Emergence Agreement?; and

(c) Should this Honourable Court approve the Reorganization?

Test for Sanctioning a Plan

53. Section 6(1) of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite "double majority" vote. The effect of the Court's approval is to bind the company and its creditors:

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

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[48] Strike Affidavit, para. 99, Applicants' Motion Record, Tab 2, p. 49.

[49] Strike Affidavit, para. 100, Applicants' Motion Record, Tab 2, p. 49.

> arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
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> > *(a)* on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> >
> > *(b)* in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-Up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

54. The criteria that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the Plan must be fair and reasonable.[50]

Compliance with all Statutory Requirements

55. Under this first branch of the test for sanctioning a CCAA plan, the Court typically considers factors such as whether: (a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant or affiliated debtor companies have total claims in excess of $5 million; (c) the notice of meeting was sent in accordance with the order of the Court; (d) the creditors were properly classified; (e) the meetings of creditors were properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority or majorities.[51]

56. In this case, the CMI Entities submit that they have satisfied all of the requirements set out in the preceding paragraph. In particular,

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[50] *Re Canadian Airlines Corp.*, 2000 ABQB 442 [*Canadian Airlines*] at para. 60, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001; *Re Sammi Atlas Inc.*, (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.) [*Sammi Atlas*], at para. 2.

[51] *Canadian Airlines*, *supra*, at para. 62.

(a) in granting the Initial Order, this Honourable Court determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that the Applicants have total claims against them exceeding $5 million;[52]

(b) in accordance with the Meeting Order, the Noteholder Meeting Materials were sent to the Beneficial Noteholders on or about June 30, 2010, the Ordinary Creditors Meeting Materials were sent to the Ordinary Creditors on or before July 2, 2010, and an electronic copy of the Meeting Materials was posted on the Monitor's website maintained for this CCAA proceeding. In addition, the Monitor published notice of the Creditor Meetings in the *National Post*, *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal* on June 30, 2010 and July 2, 2010. The CMI Entities, on their own or through the Monitor, complied with all of the requirements imposed on them by the Meeting Order to disseminate materials concerning the Plan and the Creditor Meetings to the Affected Creditors and all other interested persons[53];

(c) Affected Creditors were classified for the purposes of voting and receiving distributions under the Plan. In particular, at the time the Meeting Order was granted, this Honourable Court approved the classification of Affected Creditors into two classes for voting purposes – the Noteholder Class and the Ordinary Creditors Class. The classification of Affected Creditors was not opposed at the hearing to approve the Meeting Order or thereafter. The Meeting Order was not appealed;

(d) The Noteholder Meeting and Ordinary Creditor Meeting were both properly constituted and the voting in each was carried out properly[54]; and

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52 *Re Canwest Global Communications Corp.*, (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.). Pepall J. stated: "The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the Bankruptcy and Insolvency Act definition and under the more expansive definition of insolvency used in *Re Stelco*. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns" (para 25).

53 Strike Affidavit, paras. 92-94, Applicants' Motion Record, Tab 2, pp. 47-48.

54 Strike Affidavit, paras. 97 and 99, Applicants' Motion Record, Tab 2, pp. 48 and 49.

(e) 100% in number representing 100% in value of the Noteholder Class that voted on the Resolution voted in favour of the Plan and in excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors Class voting in person or by proxy voted in favour of the Resolution to approve the Plan.[55]

57. Sections 6(3), 6(5) and 6(6) of the CCAA contain additional statutory restrictions on the terms of a plan of compromise or arrangement. These sections provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of the Plan provides that the Claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from the Plan Implementation Fund within six months after the date of the Sanction Order. Paragraph (l) of the definition of "Unaffected Claims" means any Claims in respect of any payment referred to in sections 6(3), 6(5) and 6(6) of the CCAA.

58. Accordingly, the CMI Entities submit that the prerequisites to the sanction of the Plan as established in section 6 of the CCAA have been satisfied.

No Unauthorized Steps taken by the CMI Entities

59. In *Re Canadian Airlines*, Paperny J. noted that this criterion has not received much discussion in the authorities. It has been held that in making a determination as to whether anything has been done – or is purported to have been done – that is not authorized by the CCAA, the Court should rely on the parties and their stakeholders and the reports of the Monitor.[56]

60. The CMI Entities submit that no unauthorized steps have been taken in this CCAA proceeding and that this Honourable Court has been kept apprised of all of the key issues facing the CMI Entities throughout the restructuring. In particular, the CMI Entities made full and timely disclosure of, among other things: (i) the negotiations and entering into of the Original Recapitalization Transaction, (ii) the various asset sales conducted by the CMI Entities, (iii) the need for and progress of the claims procedure; (iv) the equity investment solicitation

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[55] Strike Affidavit, paras. 98 and 100, Applicants' Motion Record, Tab 2, p. 49.

[56] *Canadian Airlines*, *supra*, at para. 64, citing *Olympia & York Developments Ltd.* v. *Royal Trust Co.* [1993] O.J. No. 545 (Gen. Div.) [*Olympia & York*] and *Re Cadillac Fairview Inc.*, [1995] O.J. No. 274 (Gen. Div.).

process conducted by RBC Capital Markets, (v) the negotiating and entering into of the Original Shaw Transaction in February 2010, (vi) the issues and disputes pertaining to Goldman Sachs and the need to address the Shareholders Agreement, (vii) the negotiations with Goldman Sachs and the request for the Mediation, (viii) the outcome of the Mediation, (ix) the entering into of the Amended Shaw Transaction in May 2010, and (x) the resolution of the Shareholder Group complaint on June 23, 2010.

61. In addition, the CMI Entities submit that all material filed with this Honourable Court and all steps taken by the CMI Entities were authorized by the CCAA and the Orders of this Honourable Court. The CMI Entities have kept the Monitor informed of all relevant matters in relation to these CCAA proceedings. In its Sixteenth Report, the Monitor has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any Order of this Honourable Court.[57]

62. It is important to note that the Reorganization under section 191 of the CBCA is not a distribution under the Plan and therefore section 6(8) of the CCAA does not apply. Section 6(8) of the CCAA provides:

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

63. In this case, the claims of Affected Creditors are not being paid in full. The Plan specifically provides that the Existing Shareholders will not be entitled to any distributions under the Plan or any other compensation from the CMI Entities on account of their equity claims in connection with or as a result of the transactions contemplated by the Plan. In addition, on the Plan Implementation Date, all equity compensation plans of Canwest Global will be terminated and any outstanding options, restricted share units or other equity-based awards outstanding thereunder will be terminated and cancelled and the participants will not be entitled to any distributions under the Plan or any other compensation in connection therewith.[58]

64. The purchase by Shaw of the New Preferred Shares held by the Existing Shareholders for $11 million in respect of the Reorganization is the result of an arm's length

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[57] Monitor's Sixteenth Report, para. 125.

[58] Strike Affidavit, para. 49(e) and (f), Applicants' Motion Record, Tab 2, p. 31.

agreement between Shaw and the Existing Shareholders.[59] In its Sixteenth Report, the Monitor states that the settlement with the Shareholder Group does not, in any way, impact the anticipated recovery to the Affected Creditors of the CMI Entities.[60]

65. In the June 23rd Reasons, this Honourable Court stated that it was "pleased the parties considered section 6(8) of the CCAA with respect to the structure supporting the Minutes of Settlement and that the $38 million for the Affected Creditors is not impacted by this resolution" and that "a negotiated resolution of the parties' differences is in the best interests of the CMI Entities and their stakeholders".[61]

The Plan is Fair and Reasonable

66. The requirement to demonstrate that a plan is fair and reasonable must be understood within the context of the CCAA. Canadian courts have repeatedly emphasized that when considering whether a plan is fair and reasonable, perfection is not required. Rather, courts will consider the relative degrees of prejudice that would flow from granting or refusing to grant relief sought under the CCAA. As Paperny J. stated in Canadian Airlines:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[62]

67. Paperny J. further notes in Canadian Airlines that the meaning of "fairness" and "reasonableness" are "necessarily shaped by the unique circumstances of each case, within the context of the CCAA and accordingly can be difficult to distil and challenging to apply".[63] The court's discretion is to be guided by the purpose of the CCAA – namely, to facilitate the reorganization of the debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

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59 Strike Affidavit, para. 77, Applicants' Motion Record, Tab 2, p. 41.

60 Monitor's Sixteenth Report, para. 122; Strike Affidavit, para. 77, Applicants' Motion Record, Tab 2, p. 41.

61 *Re Canwest Global Communications Corp.* [2010] O.J. No. 2984 (S.C.J.) at para 29 [June 23rd Reasons].

62 *Canadian Airlines, supra,* at para. 3.

63 *Ibid.*, at para. 94.

68. Under the CCAA, it is clearly contemplated that the majority can bind the minority, subject only to a determination by the Court that the plan does not bind the minority to terms that are unfair or unconscionable.

69. In addition, there is a heavy onus on parties seeking to upset a plan that the required majority has supported. Generally speaking, the court will not second-guess the business decisions made by the stakeholders as a body:

> ... A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e., generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights...
>
> Those voting on the Plan (and I noted there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said a p. 510 of Olympia & York Developments Ltd.:
>
> > As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.
>
> The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests...[64]

70. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation.[65] In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

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[64] *Sammi Altas, supra*, at pp. 173-174, per Farley J., citing *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.), *Re Northland, infra*, and *Olympia & York, supra.*

[65] *Canadian Airlines, supra*, at para. 95, citing *Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.* [1989] 2 W.W.R. 566 at 574 (Alta. Q.B.); *Northland Properties Ltd.* v. *Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (BCCA) [*Re Northland*].

(b) what creditors would receive on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

Affected Creditors were properly Classified

71. In developing the Plan, the CMI Entities have sought to achieve a fair and reasonable balance between all of the Affected Creditors while providing for the financial stability and future economic viability of their businesses. To reflect the commonality of interests, the Plan separates Affected Creditors into two classes for voting purposes: (a) the Noteholder Class and (b) the Ordinary Creditors Class. The Meeting Order contemplated two separate creditor meetings for the purposes of voting on the Resolution to approve the Plan – one meeting for the Noteholder Class and one meeting for the Ordinary Creditors Class.[66]

72. With respect to distributions, in order to fairly distribute the amounts held in the Ordinary Creditors Pool to the Ordinary Creditors and to ensure that the distributions reflect the relative values of the assets held by the Plan Entities to which the Affected Claims of Ordinary Creditors relate, the Plan divides the Ordinary Creditors Pool into two sub-pools. The first sub-pool (the "**Ordinary CTLP Creditors Sub-Pool**") comprises two-thirds of the value of the Ordinary Creditors Pool and is in respect of the Affected Claims held by Affected Creditors against the CTLP Plan Entities. The Affected Creditors with Proven Distribution Claims against the CTLP Plan Entities shall receive their *pro rata* share of the funds in the Ordinary CTLP Creditors Sub-Pool. The second sub-pool (the "**Ordinary CMI Creditors Sub-Pool**") comprises one-third of the value of the Ordinary Creditors Pool and will be used to satisfy the Affected Claims held by Affected Creditors against the Plan Entities other than the CTLP Plan Entities.

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[66] Strike Affidavit, para. 92, Applicants' Motion Record, Tab 2, p. 47.

The Affected Creditors with Proven Distribution Claims classified as sharing in the Ordinary CMI Creditors Sub-Pool will receive their *pro rata* share of the funds in this sub-pool.[67]

73. As noted above, the classification of Affected Creditors was not opposed at the hearing to approve the Meeting Order or thereafter. The Meeting Order was not appealed and therefore the classification of Affected Creditors cannot be revisited at this stage of the proceedings.

74. In addition, the Monitor has indicated in its Sixteenth Report that it performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries available to Affected Creditors of each group in a going concern liquidation of the CMI Entities' assets and operations and that, based on this analysis, it is fair and reasonable that Affected Creditors of the CTLP Plan Entities share *pro rata* in two-thirds of the Ordinary Creditors Pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share *pro rata* in one-third of the Ordinary Creditors Pool.[68]

An Overwhelming Majority of Affected Creditors Voted to Approve the Plan

75. One of the most important considerations militating in favour of sanction of a plan is its approval by affected creditors. As Paperny J. held in Canadian Airlines:

> Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position than the courts to gauge business risk.[69]

76. That said, sanction of a plan of compromise or arrangement is "not a rubber stamp process" even where a plan has received the requisite approval prescribed by section 6 of the CCAA. The Court will, however, accord a certain degree of deference to the judgment of creditors, as expressed by the approval of a plan by the requisite majority, with regard to the fairness of the plan.

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[67] Strike Affidavit, para. 61, Applicants' Motion Record, Tab 2, p. 36.

[68] Monitor's Sixteenth Report, para. 58.

[69] *Canadian Airlines*, *supra*, para. 97.

77. It is also well-established law that a plan of compromise or arrangement is a contract between a debtor and its creditors. Although a plan is subject to court sanction, the parties should be permitted to incorporate any terms into a plan that could be lawfully incorporated into any contract.[70]

78. In this case, 100% in number representing 100% in value of the Noteholder Class that voted at the Noteholder Meeting voted in favour of the Plan. At the Ordinary Creditors Meeting, in excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors Class that voted at the Ordinary Creditors Meeting voted in favour of the Plan.[71] As such, the Required Noteholder Majority and the Required Ordinary Creditor Majority have approved the Plan.

79. Accordingly, the CMI Entities submit that the near unanimous support shown in favour of the Plan by Affected Creditors that validly voted at the Creditor Meetings supports the inference that the Plan is fair and reasonable.

Quantum of the Noteholder Pool is fair and reasonable

80. Under the Plan, distribution of the Noteholder Pool is expected to result in recovery to the 8% Senior Subordinated Noteholders of all of the principal and pre-filing interest owing in respect of the 8% Senior Subordinated Notes and a portion of the post-filing accrued and default interest. Under the Plan, the range of recoveries for Ordinary Creditors will be less, as detailed in Appendix "C" to the Monitor's Sixteenth Report.

81. There is precedent for CCAA Courts to sanction a plan of compromise or arrangement which provides for an unequal distribution of assets between certain creditors of the debtor company.

82. In *Re Armbro Enterprises Inc.*[72], Blair J. (as he then was) approved a plan of compromise which had as a component to it an uneven allocation of consideration flowing to a single major creditor (RBC), over the objection of certain other creditors. Blair J. noted that

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70 *Olympia & York, supra*, at para. 74.

71 Strike Affidavit, paras. 98 and 100, Applicants' Motion Record, Tab 2, p. 49.

72 (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.).

without RBC's co-operation throughout the CCAA proceeding, the proposed plan, or any plan, could not work:

> I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. *RBC's co-operation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the Applicants to finance the proposed re-organization.*[73] [Emphasis Added.]

83. Similarly, in *Re Uniforêt Inc.*[74], the Quebec Superior Court sanctioned a plan of arrangement which provided for an unequal distribution of assets between certain creditors of the debtor company. In that case, six secured creditors from one (Class 2) of the seven classes of affected creditors opposed the sanction hearing on the basis that the proposed plan treated some unsecured creditors more favourably than the secured creditors in Class 2. In particular, the opposing creditors objected to the fact that the Class 4 unsecured creditors would receive a 75% distribution under the plan whereas the Class 2 secured creditors would only receive a distribution equivalent to 51% under the proposed plan. In addition, the opposing creditors objected to the fact that the proposed plan contemplated that one unsecured creditor (Jolina) would receive the entire amount of both its $5.4 million loan and its $3.5 million advance towards the acquisition and installation of a planer at one of Uniforêt's sawmills.

84. In sanctioning the plan as fair and reasonable, the Quebec Superior Court acknowledged that certain unsecured creditors had received "generous treatment" under the plan. However, the Court held that the generous treatment was justified in the circumstances because, in the case of Jolina, Jolina had (a) financed a new planer for the sawmill; (b) had provided certain funding to Uniforêt as part of Uniforêt's initial attempt to rationalize its debt; and (c) had helped to backstop an $11 million short-term or bridge loan from the Bank of Montreal to pay wages and other pressing payables. In addition, the Court noted that Jolina was Uniforêt's largest and most important creditor and that Uniforêt's plan could not succeed without Jolina's support:

> ..., Jolina is Uniforêt's largest and most important creditor, quite apart from being a major shareholder. Plans of arrangement cannot hope to succeed

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[73] *Ibid.*, at para 6.

[74] (2003), 43 C.B.R. (4th) 254 (Que. S.C.).

> without the approval of such a creditor. The Plan proposes, in effect, to make Jolina more or less whole, at least eventually.
>
> For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debentureholders (Class 6). It does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. *A plan can be more generous to some creditors and still fair to all creditors.* A creditor like Jolina that has stepped into the breach on several occasions to keep Uniforêt afloat in the 4 years preceding the filing of the First Plan warrants special treatment.[75] [Emphasis Added.]

85. Recently, in the SemCanada Group CCAA proceedings, the Alberta Court of Queen's Bench and the US Bankruptcy Court for the District of Delaware simultaneously sanctioned concurrent and integrated plans of arrangement in Canada and the United States pursuant to which, among other things, the holders of US$600 million notes were entitled to a higher share of the distribution of assets than the ordinary unsecured creditors.[76] To date, the Alberta Court has not yet issued written reasons in connection with the sanction motion. However, in reasons for decision granted in connection with an earlier motion seeking approval to hold the meetings of creditors, Romaine J. explained the rationale for the differential treatment in the plans as follows:

> The holders of the US$600 million bonds (the "Noteholders") are entitled to receive common shares and warrants in the restructured corporate group, plus an interest in the litigation trust and certain trustee fees, for an estimated recovery of 8.34% on their claims of US$610 million under the U.S. plan, assuming all classes of Noteholders approve the plan and no value is given to the litigation trust. Depending on certain contingencies, the range of recovery is 0.44% to 11.02% of their claim. *Noteholders are treated more advantageously under the plans than general unsecured creditors in recognition that the Senior Notes are jointly and severally guaranteed by 23 U.S. debtors and the Canadian debtors, while in most instances only one SemGroup debtor is liable with respect to each ordinary unsecured creditor.* In addition, the Noteholders have waived their right to receive distributions under the Canadian plans.[77] [Emphasis Added.]

86. And later:

> The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such

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75 *Ibid.*, at para. 21.

76 See Orders of Madam Justice Romaine dated October 26, 2009 in the matter of a plan of compromise or arrangement of SemCanada Crude Company, SemCams ULC, SemCanada Energy Company, A.E. Sharpe Ltd., CEG Energy Options, Inc., and 1380331 Alberta ULC.

77 (2009), 57 C.B.R. (5th) 205 at para. 12.

> difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors.[78]

87. The CMI Entities submit that the recovery for the 8% Senior Subordinated Noteholders under the Plan, relative to the other Affected Creditors, is amply justified and, in the circumstances, fair and reasonable. The quantum of the Noteholder Pool is reflective of the fact that CMI's obligations under the 8% Senior Subordinated Notes were guaranteed by several of the CMI Entities, meaning that the 8% Senior Subordinated Noteholders had multiple concurrent claims against the CMI Entities, including certain claims that have structural priority to the claims of the Ordinary Creditors. In addition, the distribution of the Noteholder Pool to the 8% Senior Subordinated Noteholders recognizes the objective reality that, had it not been for the continued support of the Ad Hoc Committee both prior to and during these CCAA proceedings, the CMI Entities would not have had the opportunity to pursue a going concern restructuring of their businesses.

88. In particular, the 8% Senior Subordinated Notes are guaranteed by all of the CMI Entities (other than Canwest Global and 30109, LLC), in addition to CanWest MediaWorks Ireland Holdings ("**CMIH**") and Canwest Ireland Nominee Limited (collectively, the "**Guarantors**"). The guarantees provided by the Guarantors entitled the 8% Senior Subordinated Noteholders, upon default by CMI under the 8% Senior Subordinated Notes, to call upon the guarantees and seek immediate repayment from any or all of the Guarantors, including CMIH. In that regard, the 8% Senior Subordinated Noteholders had direct claims not just against CMI but against all of the Plan Entities.[79]

89. Had the 8% Senior Subordinated Noteholders exercised their right to call upon the guarantee of CMIH when CMI first defaulted under the 8% Senior Subordinated Notes in March 2009, the 8% Senior Subordinated Noteholders could have taken steps to appoint an administrator over the estate of CMIH. If the 8% Senior Subordinated Noteholders were successful in doing so, the administrator would likely have been required to force a sale of CMIH's only material asset at the time, namely its controlling interest in Ten Network Holdings Limited ("**Ten Holdings**"). As the 8% Senior Subordinated Noteholders are (and were) the only

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[78] *Ibid.*, at para. 26.

[79] Strike Affidavit, para. 67, Applicants' Motion Record, Tab 2, p. 37.

significant creditor of CMIH, the 8% Senior Subordinated Noteholders would have therefore been entitled to recover all of the proceeds of such a sale. The effect of this action would have been to significantly harm the businesses of Canwest Global and its subsidiaries and prejudice the other creditors of the CMI Entities.[80]

90. Instead of doing so, when CMI first defaulted under the 8% Senior Subordinated Notes, the Ad Hoc Committee entered into a series of forbearance agreements with CMI whereby the Ad Hoc Committee agreed not to demand immediate repayment of the amounts outstanding under the 8% Senior Subordinated Notes (and would therefore be unable to call upon the guarantee provided by CMIH and force a liquidation of CMIH's interest in Ten Holdings) in order to allow the CMI Entities and the Ad Hoc Committee to negotiate a creditor-sponsored "pre-packaged" recapitalization transaction.[81]

91. When all of the shares of Ten Holdings owned by CMIH were ultimately sold for approximately $634 million (the "**Ten Proceeds**") in late September 2009 in anticipation of the CMI Entities entering into the Support Agreement, the 8% Senior Subordinated Noteholders once again agreed not to demand immediate repayment of the amounts owing to them despite their direct priority claims to the Ten Proceeds. Instead, the 8% Senior Subordinated Noteholders agreed that CMIH could loan the net amount of the Ten Proceeds to CMI in the form of the Secured Intercompany Note (in the amount of $187.3 million) and the Unsecured Intercompany Note (in the amount of $430.6 million), pursuant to the Cash Collateral and Consent Agreement, notwithstanding their direct claims against CMIH on account of its guarantee of the 8% Senior Subordinated Notes. The proceeds advanced to CMI pursuant to the Secured Intercompany Note were used to repay in full all amounts outstanding under the 12% senior secured notes issued by CMI in April 2009 (US$94.9 million) and to fund general liquidity and operating costs of the CMI Entities ($85 million). The proceeds advanced to CMI by CMIH pursuant to the Unsecured Intercompany Note were then deposited by CMI with the trustee in respect of the 8% Senior Subordinated Notes (the "**Indenture Trustee**"). The Indenture Trustee, in accordance with instructions received from a majority of the holders of the 8% Senior Subordinated Notes in accordance with the indenture governing the 8% Senior Subordinated Notes (the "**Indenture**"),

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[80] Strike Affidavit, para. 68, Applicants' Motion Record, Tab 2, p. 37.

[81] Strike Affidavit, para. 69, Applicants' Motion Record, Tab 2, pp. 37-38.

applied such amounts in payment of outstanding interest (other than an interest payment due September 15, 2009) and to reduce the principal amount outstanding under the 8% Senior Subordinated Notes. Following the distribution of the Ten Proceeds, the outstanding principal amount owing under the 8% Senior Subordinated Notes was approximately US$393 million. Interest at that time amounted to approximately US$33.7 million and, under the terms of the Indenture, has accrued at a rate of 8% per annum since that time. The total amount presently owing in respect of the 8% Senior Subordinated Notes (inclusive of accrued and default interest to August 31, 2010) is approximately US$458.4 million. The Secured Intercompany Note and Unsecured Intercompany Note are guaranteed by all of the CMI Entities.[82]

92. In recognition of the structural priority rights indirectly held by the 8% Senior Subordinated Noteholders under the CMIH guarantee, the Cash Collateral and Consent Agreement included certain restrictions on actions that could be taken by CMIH and/or the CMI Entities without the consent of the Ad Hoc Committee. Specifically, the Cash Collateral and Consent Agreement provides, among other things, that (i) CMIH will not amend the terms of the Secured Intercompany Note or the Unsecured Intercompany Note; and (ii) if the Secured Intercompany Note becomes due and payable, and following demand by the Ad Hoc Committee, CMIH will assign the Secured Intercompany Note to the Indenture Trustee or a designee of the Ad Hoc Committee (subject to the lien held by CIBC).[83]

93. Following the sale of Ten Holdings and the entering into of the Cash Collateral and Consent Agreement, the CMI Entities entered into the Support Agreement with the members of the Ad Hoc Committee. If implemented, the Original Recapitalization Transaction would have seen the 8% Senior Subordinated Noteholders convert their indebtedness into equity of a restructured Canwest Global. Because of the amount of the indebtedness owing to the 8% Senior Subordinated Noteholders and the structural priority of the claims held by the 8% Senior Subordinated Noteholders under the CMIH Guarantee, the Original Recapitalization Transaction contemplated that the 8% Senior Subordinated Noteholders would receive the majority of the equity of a restructured Canwest Global, which was to have been a public company.[84]

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[82] Strike Affidavit, para. 69, Applicants' Motion Record, Tab 2, pp. 37-38.

[83] Strike Affidavit, para. 70, Applicants' Motion Record, Tab 2, p. 39.

[84] Strike Affidavit, para. 71, Applicants' Motion Record, Tab 2, p. 39.

94. As noted above, when the CMI Entities entered into the Original Shaw Transaction with Shaw and the Ad Hoc Committee in February 2010, it was contemplated that Participating Creditors would receive shares of a restructured Canwest Global whereas Non-Participating Creditors would receive a cash payment equal in dollar value (based upon the implied equity value of a restructured Canwest Global under the Original Shaw Subscription Agreement) to their *pro rata* entitlement to the equity shares of a restructured Canwest Global that they would have otherwise received under the Original Recapitalization Transaction in satisfaction of their claims. In addition, as was contemplated by the Original Recapitalization Transaction, it was contemplated in the Original Shaw Subscription Agreement that $85 million of the subscription proceeds received from Shaw would be distributed to the 8% Senior Subordinated Noteholders in connection with a partial repayment of the Secured Intercompany Note.[85]

95. Ultimately, with the assistance of Chief Justice Winkler at the Mediation, Shaw agreed as part of the consideration payable under the Amended Shaw Transaction to, in effect, pay US$440 million (plus the amount of any Continuing Support Payment) to the 8% Senior Subordinated Noteholders in order to acquire the equity interests of a restructured Canwest Global which were contractually allocated to the 8% Senior Subordinated Noteholders under the Original Recapitalization Transaction and then subsequently under the Original Shaw Transaction.[86] In part, the Noteholder Pool reflects this agreement.

96. Finally, it is important to note that no issue with respect to the validity of the guarantees or the Indenture has been raised at any time during this CCAA proceeding. The guarantees provided by the Guarantors made each of the Guarantors jointly and severally liable for the full amounts of the indebtedness owing to the 8% Senior Subordinated Noteholders under the 8% Senior Subordinated Notes. Accordingly, there is no legal justification for precluding the 8% Senior Subordinated Noteholders from claiming under their respective guarantees and the magnitude of these claims reflects, in part, the nature of the rights that the 8% Senior Subordinated Noteholders contracted for.

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85 Strike Affidavit, para. 72, Applicants' Motion Record, Tab 2, pp. 39-40.

86 Strike Affidavit, para. 73, Applicants' Motion Record, Tab 2, p. 40.

The only alternative to the Plan is a liquidation or sale under CCAA or BIA

97. The CMI Entities have been under CCAA protection for nine months and have been in default under the Indenture for over fifteen months. The CMI Entities have been exploring strategic alternatives since February 2009.[87] Between November 2009 and February 2010, RBC Capital Markets conducted the equity investment solicitation process. In the Original Shaw Approval Reasons, this Honourable Court made the following findings of fact in respect of the equity investment solicitation process:

(a) RBC Capital Markets had "fully canvassed the market";

(b) there was "overwhelming evidence of an extensive market canvas";

(c) there was a "fair and thorough canvassing of the market and a level playing field"; and

(d) the CMI Entities had made a "sufficient effort to obtain the best offer".[88]

98. Other than the Amended Shaw Transaction, no concrete offer for 100% of the equity of Canwest Global has surfaced over the past fifteen months. In addition, other than Shaw, no bidder has offered to satisfy the claims of the 8% Senior Subordinated Noteholders, let alone offering to inject sufficient funds into the CMI Entities to provide a meaningful recovery with respect to the claims of the other Affected Creditors. The CMI Entities therefore submit that there is no other alternative transaction that will provide greater recovery to the unsecured creditors of the CMI Entities than the recoveries contemplated in the Plan.

99. In its Sixteenth Report, the Monitor has concluded that there is no reason to believe that re-starting the equity investment solicitation process or marketing 100% of the CMI Entities' assets again would result in a better (or even equally desirable) outcome. In addition, the Monitor has stated that restarting the equity investment solicitation process may lead to

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[87] Affidavit of John E. Maguire sworn October 5, 2009, para. 164, Exhibit "C' to the Strike Affidavit, Tab 2(C), p. 151.

[88] Original Shaw Approval Reasons, *supra*, para. 44.

operational difficulties, including issues with the CMI Entities' large studio suppliers and advertisers.[89]

100. The Courts have held that, "when presented with a plan, affected stakeholders must weigh their options in light of commercial reality.[90] It is always possible to imagine that a different, better plan could be put forward if the plan presented to creditors is voted down. However, as Paperny J. held in Canadian Airlines:

> If not put forward, a hope for a different or more favourable plan is not an option and no basis on which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future.[91]

101. As noted above, there are no other options available, other than the Plan. The theoretical possibility that a better or more advantageous plan could be developed if the Plan is not sanctioned is, as Paperny J. has said, no basis for assessing fairness. Accordingly, the CMI Entities submit that there are no other alternatives, other than a liquidation/sale of the assets of the CMI Entities through the CCAA or the BIA. The Monitor has confirmed that it is unlikely that the recovery for a going concern liquidation/sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities.[92]

There is No Oppression of the Rights of Creditors

102. The CMI Entities submit that, for all the reasons expressed herein, the Plan treats all Affected Creditors fairly and that there is no oppression of creditor rights associated with the consolidation of the assets and liabilities of the Plan Entities in the Plan.

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89 Monitor's Sixteenth Report, para. 121.

90 *Canadian Airlines*, *supra*, at para. 137.

91 *Ibid.*, at para. 137. See also *Re T. Eaton Co.* [1999] 14 C.B.R. (4th) 288 (Ont. S.C.J.) at para. 6.

92 Monitor's Sixteenth Report, para. 122.

No Unfairness to Shareholders

103. There is also no unfairness to Existing Shareholders in connection with the Plan. To the contrary, as a result of the resolution of the Shareholder Group complaint, and pursuant to the Minutes of Settlement, Canwest Global has agreed to complete the Reorganization pursuant to which the Existing Shareholders will receive from Shaw an aggregate payment of $11 million (representing an amount approximately equivalent to the amount of the Shareholder Recovery contemplated by the Original Recapitalization Transaction and the Original Shaw Transaction) upon the implementation of the Plan.[93]

104. As discussed above, the Reorganization is not a distribution under the Plan and therefore section 6(8) of the CCAA does not apply. The purchase by Shaw of the New Preferred Shares is the result of an arm's length agreement between Shaw and the Existing Shareholders.[94]

It is in the Public Interest to Approve the Plan

105. Finally, the CMI Entities submit that sanction of the Plan also serves the broader public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the businesses of the CTLP Plan Entities that fully and finally deals with Goldman Sachs, the Shareholders Agreement and the defaulted 8% Senior Subordinated Notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities. It will also provide stability for the CMI Entities' pensioners, suppliers, customers and other stakeholders.

106. In addition, if implemented, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. The *Global Television Network* broadcasts many of the most popular entertainment programs in Canada, many world class sporting events, and Canada's only dinner-hour national newscast, *Global National*. It is estimated that the *Global Television Network* reaches approximately 32.2 million individuals (which comprise approximately 98% of the total Canadian television audience). The subscription-based specialty television channels held by CTLP and CW

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93 Strike Affidavit, para. 45, Applicants' Motion Record, Tab 2, p. 28.

94 Strike Affidavit, para. 77, Applicants' Motion Record, Tab 2, p. 41.

Investments also reach millions of Canadians. The broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a devastating impact on the Canadian public.

107. In sum, the sanction of the Plan secures a going concern outcome for the businesses of the Plan Entities, preserves the jobs and benefits for substantially all of the Plan Entities' employees and produces a realization for the Affected Creditors. Throughout the course of the CCAA proceeding, the CMI Entities have complied with the terms of all Orders and the general requirements of law and the CCAA. The Board, the senior management of the CMI Entities, the Ad Hoc Committee, the CMI CRA and the Monitor all support sanction of the Plan.

108. Accordingly, the CMI Entities submit that this Honourable Court should accept the reasonably made decision of the Required Noteholder Majority and the Required Ordinary Creditor Majority and sanction the Plan.

Section 36 of the CCAA does not apply to asset dispositions and transfers in a Plan

109. Section 36 of the CCAA was added in the recent amendments to the CCAA which came into force on September 18, 2009.[95] The relevant clauses of section 36 are as follows:

> 36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> 36(2) A company that applies to the court for authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;

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[95] S.C. 2005, c. 47, s. 128, as amended by S.C. 2007, c. 36, s. 65.

> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> 36(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

110. Since section 36 is a relatively new provision, there is little jurisprudence considering its application, particularly in the context of asset dispositions arising as part of or in respect of a plan of compromise or arrangement.

111. In an Industry Canada brief discussing the purpose of section 36, it was stated that, "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse." In particular, subsection 36(4), which applies specifically to sales or other dispositions of assets to a related party and imposes certain mandatory criteria for court approval, was designed to:

> ...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.[96]

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[96] Industry Canada "Bill C-55: Clause by Clause Analysis – Bill Clause No. 131 – CCAA Section 36", available at the Industry Canada website: http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00828.html. Although commentary of a legislator does not represent a definitive guide to the interpretation of a statutory provision, it can be a useful indicator of specific legislative intent and it is admissible by a court for this purpose. Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th Edition (Markham, LexisNexis Canada: 2008) at pp. 608 to 615.

112. In the present case, the Plan provides that certain assets will be transferred and assigned to CMI, New Canwest, the Shaw Designated Entity or 7316712, as the case may be, on the Plan Implementation Date. The assets to be transferred include, among other things, (i) all of the assets, rights and properties held by 4501063 Canada Inc., MBS Productions Inc. and Global Centre Inc., including in the case of 4501063 Canada Inc., the shares it holds of GP Inc.; (ii) all of the assets, properties and undertakings listed in Schedule D.1 of the Plan; (ii) all of the issued and outstanding shares of New Canwest, the New Canwest Note and the shares of CW Investments held by CMI. The assets to be transferred and assigned will be vested free and clear of any liens, charges and encumbrances, including the Court Charges granted in the Initial Order and the Existing Security (as defined in the Initial Order), pursuant to certain vesting provisions in the proposed Sanction Order.

113. In light of the fact that the transfers contemplated in the Plan are merely steps that are required in order to implement the Plan, and therefore required to facilitate the restructuring of the Plan Entities' businesses, the CMI Entities submit that s. 36 does not apply. In that regard, as the CMI Entities are seeking approval of the Plan itself, there is no risk of abuse. Moreover, the Plan (and therefore the asset transfers contemplated therein) has been voted on and overwhelmingly approved by Affected Creditors.

114. In the alternative, the CMI Entities submit that they have complied with the provisions in s. 36 of the CCAA. In particular:

(a) the Plan (and the transfers contemplated therein) is designed to facilitate the restructuring of the Plan Entities into a viable and competitive industry participant and to allow the businesses operated by the Plan Entities to continue as going concerns. This will preserve value for stakeholders and maintain employment for substantially all of the CTLP Plan Entities' employees;[97]

(b) the Plan (and the transfers contemplated therein) was entered into after extensive negotiations and consultations between the CMI Entities, Shaw, the Ad Hoc

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[97] Strike Affidavit, para. 8, Applicants' Motion Record, Tab 2, pp. 16-17.

Committee, the CMI CRA, and the Monitor, and their respective legal and financial advisors. As such, significant interests have been represented; [98]

(c) the transfers contemplated in the Plan will not result in prejudice to the major creditors of the CMI Entities. To the contrary, the overwhelming majority of the Affected Creditors have voted to approve the Plan; [99]

(d) the Monitor has indicated that it supports the Plan (and therefore the transfers contemplated in the Plan); [100]

(e) the Monitor has indicated that it believes that the Plan will produce a more favourable result for the Affected Creditors of the Plan Entities than a further sales process or liquidation of the CMI Entities' assets under the CCAA or the BIA;[101]

(f) the CMI Entities have made good faith efforts to restructuring their businesses. The Plan (and the transfers contemplated therein) represents the culmination of those efforts; and

(g) the basis of the Plan is the Amended Shaw Transaction. This Honourable Court has held that the Amended Shaw Transaction (and by implication the aggregate subscription price set out therein) is fair and reasonable.[102]

115. In addition, the CMI Entities have provided notice of this motion to all creditors whose rights will be affected by the vesting provisions in the proposed Sanction Order.[103]

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98 Strike Affidavit, para. 107, Applicants' Motion Record, Tab 2, p. 52.

99 Strike Affidavit, paras. 98 and 100, Applicants' Motion Record, Tab 2, p. 49.

100 Monitor's Sixteenth Report, para. 126.

101 Monitor's Sixteenth Report, para. 118.

102 June 23rd Reasons, *supra*, para. 29.

103 Strike Affidavit, para. 103, Applicants' Motion Record, Tab 2, p. 50.

Plan Emergence Agreement is Fair and Reasonable

116. Courts frequently approve significant agreements that occur in the course of CCAA proceedings and that facilitate restructurings.[104] For example, in *Re Calpine Canada Energy Ltd.*[105], the Alberta Court of Queen's Bench approved a complex settlement agreement that resolved a number of competing cross-border claims. Romaine J. held that:

> the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.[106]

117. Romaine J. further noted that the Court has the jurisdiction to approve settlements or major transactions during the CCAA stay period.[107] In accepting this proposition, Romaine J. cited the decision of Farley J. in *Re Air Canada*[108] in which he approved certain "Global Restructuring Agreements" during the course of the Air Canada CCAA proceeding.

118. In *Re Air Canada*, Farley J. noted that the approval of agreements during a CCAA process was to be carried out based on the following principles:

> ... approval of the Court may be given where there is consistency with the purpose and spirit of that legislation [the CCAA], a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally...[109]

119. In *Re Air Canada,* Farley J. cited his own earlier decision in *Sammi Atlas Inc.*[110] for the proposition that in determining whether an agreement is "fair and reasonable", it is necessary to look at the creditors as a whole (*i.e.*, generally) and to the objecting creditors specifically to see if rights are compromised in an attempt to balance interests, as opposed to a confiscation of rights. Although *Sammi Atlas* was a decision sanctioning a plan of compromise and arrangement involving the debtor company, Farley J. indicated that he was of the view that

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[104] *Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (Ont. S.C.J.) at para. 37.

[105] (2007), 35 C.B.R. (5th) 1 [*Calpine*].

[106] *Ibid.*, at para. 58.

[107] *Ibid.*, at para. 56.

[108] (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.) [*Air Canada*]

[109] *Ibid.*, at para. 9.

[110] *Sammi Atlas, supra.*

similar principles should apply in circumstances where the court is asked to approve a major agreement during the CCAA stay period.[111]

120. The CMI Entities submit that the Plan Emergence Agreement is fair and reasonable and will be benefit the CMI Entities stakeholders when viewed as a whole. The Plan Emergence Agreement outlines certain steps that will be taken prior to, upon or following implementation of the Plan. In that regard, the Plan Emergence Agreement is merely a necessary corollary of the Plan. The Plan Emergence Agreement does not confiscate the rights of any creditors.

Reorganization of the Articles is Fair and Reasonable

121. As noted above, on the Plan Implementation Date, the articles of Canwest Global will be amended pursuant to section 191 of the CBCA to facilitate the settlement reached with the Shareholder Group.

122. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or dissent rights:

> **191.** (1) In this section, "reorganization" means a court order made under
>
> (*a*) section 241;
>
> (*b*) the *Bankruptcy and Insolvency Act* approving a proposal; or
>
> (*c*) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
>
> **Powers of court**
>
> (2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.
>
> [...]
>
> **No dissent**
>
> (7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

123. The courts have held that the CCAA is an "other Act of Parliament that affects the rights among the corporation, its shareholders and creditors".[112]

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[111] *Air Canada, supra* at para. 9.

124. Section 191(2) of the CBCA gives substantive, not simply procedural, powers to amend the articles of a CBCA corporation.[113] The court may amend the articles to effect any change that might lawfully be made by an amendment under s. 173 of the CBCA. Sections 173(1)(e) and (h) of the CBCA provide that:

> 173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> [...]
>
> (e) create new classes of shares;
>
> [...]
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

125. Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

126. In exercising its discretion to approve a reorganization under s. 191 of the CBCA, the court must be satisfied that the reorganization meets the same (or similar) criteria that are applicable to the sanction of a plan of compromise or arrangement under the CCAA, namely that:

(a) there must be compliance with all statutory requirements;

(b) the debtor company must be acting in good faith; and

(c) the capital restructuring is fair and reasonable.[114]

127. In the present case, the proposed Reorganization under s. 191 of the CBCA will see Canwest Global reorganize the authorized capital of Canwest Global into (a) an unlimited

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[112] *Beatrice Foods* v. *Merrill Lynch Capital Partners Inc.* (1996), 43 C.B.R. (4th) 10 (Ont. C.J.) at para. 15 [*Beatrice*]; *Re Laidlaw Inc.* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.) at para. 8.

[113] *Beatrice*, *supra*, at para. 16.

[114] *Mei Computer Technology Group Inc. (Arrangement relatif à)* [2005] Q.J. No. 22993 at para. 9; *Re A&M Cookie Co. Canada* [2009] O.J. No. 2427 (S.C.J.) at para. 8.

number of New Multiple Voting Shares, New Subordinated Voting Shares and New Non-Voting Shares; and (b) an unlimited number of New Preferred Shares. At the Effective Time, each issued and outstanding multiple voting share of Canwest Global held by an Existing Shareholder will be changed into one New Multiple Voting Share and one New Preferred Share, each issued and outstanding subordinate voting share of Canwest Global held by an Existing Shareholder will be changed into one New Subordinate Voting Share and one New Preferred Share, and each issued and outstanding non-voting share of Canwest Global held by an Existing Shareholder will be changed into one New Non-Voting Share and one New Preferred Share. Following delivery of the Transfer Notice, the Shaw Designated Entity will purchase all of the New Preferred Shares held by the Existing Shareholders in consideration for the payment of $11 million to the holders of the New Preferred Shares. The Shaw Designated Entity will then donate and surrender the New Preferred Shares acquired by it to Canwest Global for cancellation.

128. The CMI Entities submit that they have satisfied all of the criteria set out in the above-noted test for the approval of a reorganization. First, the CMI Entities submit that all statutory requirements have been met, as the contemplated Reorganization clearly falls within the conditions provided for in sections 191 and 173 of the CBCA.

129. Second, the CMI Entities submit that Canwest Global and the other CMI Entities have been acting in good faith in proceeding with the proposed Reorganization. In particular, at the request of this Honourable Court, the CMI Entities participated in the settlement discussions with the Shareholder Group that took place on June 22 and 23, 2010. The CMI Entities acted at all times in good faith in the context of those discussions and ultimately in helping to resolve the Shareholder Group complaint.

130. Third, the CMI Entities submit that, for all of the reasons expressed above, the Reorganization is fair and reasonable. The Reorganization is a necessary step in the implementation of the Plan, in that it facilitates the agreement that was reached on June 23, 2010 whereby Shaw will pay $11 million in the aggregate to the Existing Shareholders to resolve the Shareholder Group complaint.

Third Party Releases

131. Section 7.3 of the Plan provides that on the Plan Implementation Date, Canwest Global, the CMI Entities and the Canwest Subsidiaries and each of their respective present and former shareholders, financial and legal advisors, the Directors and Officers, members of the Special Committee or any pension or other committee or governance counsel, the CMI CRA, the Monitor and its counsel, the Initial Directors, the Retiree Representative Counsel, the Retiree Representatives, CIBC and the Plan Sponsor and the present and former directors, officers and agents of each (collectively, the "**Released Parties**") will be released and discharged from all claims and other matters that any Person may be entitled to assert, whether known or unknown, based upon any act or omission, transaction or other occurrence existing or taking place on or before the Plan Implementation Date relating to, arising out of or in connection with any claim arising out of (i) the restructuring, disclaimer, resiliation, breach or termination of any contract, lease, agreement or other arrangement, whether oral or written, (ii) the business and affairs of the CMI Entities or any of the Canwest Subsidiaries, (iii) the administration or management of the CH Plan or any other pension or benefit plans, (iv) the Plan, (v) the CCAA proceedings, (vi) any transaction referenced in the Support Agreement (and all subsequent amendments thereto), the Original Subscription Agreement (and all subsequent amendments thereto), the Original Shaw Support Agreement (and all subsequent amendments thereto), the CTLP Partnership Agreement or the Plan Emergence Agreement, and (vii) the Canwest Global Articles of Reorganization, provided however that nothing in Section 7.3 will release or discharge:

(a) Canwest Global or any of the Canwest Subsidiaries (other than the CTLP Plan Entities) from or in respect of (x) any Unaffected Claim or (y) its obligations to Affected Creditors under the Plan or under any Order;

(b) a Released Party if such party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct, or to have been grossly negligent or, in the case of Directors, in respect of any claim referred to in section 5.1(2) of the CCAA;

(c) any Claim (other than a Claim of an 8% Senior Subordinated Noteholder or the Indenture Trustee) against a CMI Entity which is not a Plan Entity; and

(d) claims of creditors against Canwest Subsidiaries which are not CMI Entities.[115]

132. Section 7.3 of the Plan goes on to provide that all Claims, including all Restructuring Period Claims, filed against the Directors and Officers will be discharged, released and forever barred with prejudice, and the Directors and Officers shall have no further liability in respect thereto.[116]

133. Section 5.5(e) of the Plan further provides that all Claims relating to guarantees granted by any CMI Entity or any other Canwest Subsidiary (including CMIH and Ireland Nominee) to the 8% Senior Subordinated Noteholders and/or the Indenture Trustee, such guarantees and any other security granted by such CMI Entity or Canwest Subsidiary to the 8% Senior Subordinated Noteholders and/or the Indenture Trustee, and all rights of indemnity and subrogation arising thereunder, will be released and discharged, and, in consideration of such release of CMIH, each of CMIH and the Collateral Agent shall be deemed to have released and discharged any security granted to it or for its benefit in respect of the Secured Intercompany Note, and CMIH shall further be deemed to have released with prejudice CMI from its obligations to pay any interest then accrued and unpaid on the Secured Intercompany Note and the Unsecured Intercompany Note. CMIH has consented to the Plan and to the draft Sanction Order.[117]

134. In addition, the Plan also contains a provision releasing and discharging the 8% Senior Subordinated Noteholders, the Ad Hoc Committee, the Indenture Trustee and each of their respective present and former shareholders, officers, directors, legal counsel, agents and financial advisors (collectively, the "**Noteholder Released Parties**") from all demands, claims, actions, causes of action, and other matters that any Person may be entitled to assert, whether known or unknown, based in whole or in part upon any act or omission, transaction, dealing or other occurrence existing or taking place on or before the Effective Time relating to, arising out of or in connection with the 8% Senior Subordinated Notes (including any guarantee obligations under the 8% Senior Subordinated Notes or the indenture governing the 8% Senior Subordinated Notes (the "**Indenture**")), the recapitalization of the CMI Entities, the Plan, the CCAA

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[115] Strike Affidavit, para. 53, Applicants' Motion Record, Tab 2, pp. 32-33.

[116] Strike Affidavit, para. 54, Applicants' Motion Record, Tab 2, p. 33.

[117] Strike Affidavit, para. 56, Applicants' Motion Record, Tab 2, pp. 33-34.

proceedings, the Support Agreement (and all subsequent amendments thereto), and the Original Shaw Support Agreement (and all subsequent amendments thereto) and any other actions or matters related directly or indirectly to the foregoing. The Noteholder Released Parties will not be released from any matter where the Noteholder Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct, or to have been grossly negligent.[118]

135. Canadian courts have held that they have jurisdiction to sanction plans containing releases in favour of third parties notwithstanding the fact that the CCAA does not expressly contemplate or authorize third party releases. As noted by Ground J. in *Re Muscletech Research and Developments Inc.*: "...it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made."[119]

136. Recently, in *Metcalfe* v. *Mansfield Alternative Investments II Corp. (Re)*[120], the Ontario Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases:

> The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.[121]

137. The Court of Appeal in Metcalfe held that the release in question must be justified as part of the compromise or arrangement between the debtor and its creditors:

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[118] Strike Affidavit, para. 57, Applicants' Motion Record, Tab 2, p. 34.

[119] *Re Muscletech Research and Development Inc.* [2006] O.J. No. 4087 (S.C.J.) at para. 8.

[120] *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) [*Metcalfe*].

[121] *Ibid.*, at para 61.

> In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.[122]

138. Courts considering whether to approve releases in favour of third parties have noted that some of the factors to be considered by the court in such circumstances include:

(a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) Whether the plan could succeed without the releases;

(d) Whether the parties being released were contributing to the plan;

(e) Whether the release benefitted the debtors as well as the creditors generally;

(f) Whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and

(g) Whether the releases were fair and reasonable and not overly broad.[123]

139. The third party releases provided under the Plan protect the Released Parties and the Noteholder Released Parties against any potential Claims that may be made in the future based on conduct prior to the implementation of the Plan. The Released Parties and the Noteholder Released Parties will not be immune, however, from Claims based on fraud, wilful misconduct or gross negligence.

140. The Released Parties and the Noteholder Released Parties are and have been essential to the success of the CMI Entities' restructuring efforts. The releases provided to the Released Parties and the Noteholder Released Parties were essential to the development of the Plan. Without the CMI Entities' commitment to include provisions in the Plan to protect the

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[122] *Ibid.*, at para 70.

[123] *Metcalfe, supra*, at para 71. See also *Re Nortel Networks Corporation*, [2010] O.J. No. 1232 (Ont. S.C.J.) at paras 79-82, leave to appeal refused [2010] O.J. No. 2361 (Ont. C.A.).

Released Parties and the Noteholder Released Parties, it is unlikely that certain of such parties would have been prepared to support the Plan. The continued presence of the Released Parties and the Noteholder Released Parties was indispensible to direct the CMI Entities through the reorganization process up to the Plan Implementation Date and to enable the CMI Entities to put forward and implement the Plan.[124]

141. With respect to Noteholder Released Parties in particular, the CMI Entities would not have been able to restructure without materially addressing the 8% Senior Subordinated Notes and developing a Plan satisfactory to the 8% Senior Subordinated Noteholders. The 8% Senior Subordinated Noteholders not only held a "blocking vote" but also provided the liquidity that was required by the CMI Entities to restructure as a going concern.[125]

142. The CMI Entities further submit that the releases provided to the Released Parties and the Noteholder Released Parties are adequately broad to accomplish their purpose of facilitating the implementation of the Plan without being so broad as to offend public policy. The release of claims against the Released Parties and the Noteholder Released Parties is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made (i) the Plan, (ii) the Information Circular; (iii) the motion materials served in connection with the Meeting Order; and (iv) the Strike Affidavit.

143. In the Sixteenth Report, the Monitor has stated that it was involved in the development of the scope of the releases provided for in the Plan and considers the releases to be "fair and reasonable".[126]

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[124] Strike Affidavit, para. 58, Applicants' Motion Record, Tab 2, pp. 34-35.

[125] Strike Affidavit, para. 58, Applicants' Motion Record, Tab 2, pp. 34-35.

[126] Monitor's Sixteenth Report, para. 77.

PART IV – NATURE OF THE ORDER SOUGHT

144. The CMI Entities therefore request an Order substantially in the form of the draft Sanction Order and an Order substantially in the form of the draft Post-Filing Claims Procedure Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Lyndon A.J. Barnes

Jeremy Dacks

Shawn T. Irving

Schedule "A"

Applicants

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands) B.V.
18. CGS International Holdings (Netherlands) B.V.
19. CGS Debenture Holding (Netherlands) B.V.
20. CGS Shareholding (Netherlands) B.V.
21. CGS NZ Radio Shareholding (Netherlands) B.V.
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.
24. 30109, LLC
25. CanWest MediaWorks (US) Holdings Corp.

Schedule "B"

Partnerships

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

Schedule "C" - Statutory References

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, as amended

Definitions

2. (1) In this Act,

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

[...]

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[...]

Compromises to be sanctioned by court

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

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accord- ance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

> (a) subsection 224(1.2) of the Income Tax Act;
>
> (b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or

employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

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

[...]

Restriction on disposition of business assets

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

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CANADA BUSINESS CORPORATIONS ACT
R.S.C. 1985, c. C-44, as amended

Amendment of articles

173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(a) change its name;

(b) change the province in which its registered office is situated;

(c) add, change or remove any restriction on the business or businesses that the corporation may carry on;

(d) change any maximum number of shares that the corporation is authorized to issue;

(e) create new classes of shares;

(f) reduce or increase its stated capital, if its stated capital is set out in the articles;

(g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;

(i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;

(k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(l) revoke, diminish or enlarge any authority conferred under paragraphs (j) and (k);

(m) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112;

(n) add, change or remove restrictions on the issue, transfer or ownership of shares; or

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

[...]

Definition of "reorganization"

191. (1) In this section, "reorganization" means a court order made under

(a) section 241;

(b) the Bankruptcy and Insolvency Act approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

Powers of court

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

Further powers

(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

Articles of reorganization

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of reorganization

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

Effect of certificate

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

No dissent

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

Schedule "D"

LIST OF CASES

1. *Beatrice Foods* v. *Merrill Lynch Capital Partners Inc.* (1996), 43 C.B.R. (4th) 10 (Ont. C.J.)
2. *Mei Computer Technology Group Inc. (Arrangement relatif à)* [2005] Q.J. No. 22993
3. *Olympia & York Developments Ltd.* v. *Royal Trust Co.* [1993] O.J. No. 545 (Gen. Div.)
4. *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.)
5. *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.)
6. *Re A&M Cookie Co. Canada* [2009] O.J. No. 2427 (Ont. S.C.J.)
7. *Re Calpine Canada Energy Ltd.* (2007), 35 C.B.R. (5th) 1
8. *Re Canwest Global Communications Corp.*, (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.)
9. *Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (Ont. S.C.J.)
10. *Re Canwest Global Communications Corp.* [2010] O.J. No. 789 (S.C.J.)
11. *Re Canwest Global Communications Corp.* [2010] O.J. No. 2984 (S.C.J.)
12. *Re Canadian Airlines Corp.*, 2000 ABQB 442, leave to appeal to Alberta Court of Appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001
13. *Re Laidlaw Inc.* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.)
14. *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.)
15. *Re Muscletech Research and Developments Inc.* [2006] O.J. No. 4087 (S.C.J.)
16. *Re Nortel Networks Corporation*, [2010] O.J. No. 1232 (Ont. S.C.J.), leave to appeal refused [2010] O.J. No. 2361 (Ont. C.A.)
17. *Re Sammi Atlas Inc.*, (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.)
18. *Re SemCanada Crude Company* (2009), 57 C.B.R. (5th) 205
19. *Re T. Eaton Co.* [1999] 14 C.B.R. (4th) 288 (Ont. S.C.J.)
20. *Re Uniforêt Inc.* (2003), 43 C.B.R. (4th) 254 (Que. S.C.)

LIST OF AUTHORITIES

1. Industry Canada "Bill C-55: Clause by Clause Analysis – Bill Clause No. 131 – CCAA Section 36", available at the Industry Canada website: http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00828.html

2. Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th Edition (Markham, LexisNexis Canada: 2008)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

Court File No: CV-09-8396-00CL

Ontario

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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(Plan Sanction Motion returnable July 28, 2010)

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