

**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
(Motion Returnable December 8, 2009)

December 7, 2009

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PART I – NATURE OF THIS MOTION

1. On October 6, 2009, Canwest Global Communications Corp. ("**Canwest Global**"), Canwest Media Inc. ("**CMI**") 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**") applied for and were granted protection under the *Companies Creditors Arrangement Act* ("**CCAA**"). At that time, this Court imposed a broad stay of proceedings (the "**Initial Order**") against the CMI Entities. The Initial Order contains typical language precluding all court proceedings against the CMI Entities, and the exercise of any rights and remedies affecting the property or business of the CMI Entities.

2. In the face of this broad stay and without seeking leave of this Honourable Court, the GS Parties (as defined below) served the CMI Entities with a notice of motion (the “**GS Parties’ Motion**”) on November 2, 2009 seeking relief against the CMI Entities, including certain rights or remedies in respect of property now owned by CMI. In addition, again without leave of this Honourable Court, the GS Parties took the unilateral action of reviving a subsidiary of CMI which had been dissolved by CMI just prior to obtaining the Initial Order.

3. The CMI Entities respectfully request this Honourable Court to declare that the relief sought in the GS Parties’ Motion is subject to the broad stay of proceedings granted in the Initial Order and that the GS Parties must respect this stay. In addition, the GS Parties’ cross-motion (the “**Cross Motion**”) for an order that the stay be lifted so that the GS Parties can pursue the GS Parties’ Motion must be denied as it discloses no accepted legal basis for lifting the stay.

4. If the GS Parties’ Motion is allowed to proceed, it will cause enormous prejudice to the CMI Entities’ restructuring efforts. The stay applies equally to all stakeholders of the CMI Entities, regardless of the nature of the rights or remedies that these parties would otherwise seek to exercise against the CMI Entities or the CMI Property. The stay is performing the essential function of keeping all such stakeholders at bay in order to give the CMI entities a reasonable opportunity to develop a restructuring plan for the benefit of all its stakeholders. The GS Parties have not articulated any prejudice they are suffering as a result of the stay, and in any event any such prejudice is far outweighed by the significant prejudice to the CMI Entities and its other stakeholders of allowing the GS Parties’ motion to proceed at this stage of the restructuring..

PART II – FACTS

5. The facts with respect to this Motion are more fully set out in the Affidavit of Thomas C. Strike sworn November 24, 2009 (the “**Strike Affidavit**”), to which was attached as

an exhibit the Affidavit of John E. Maguire sworn October 5, 2009 in support of the Initial Order (the “**Initial Order Affidavit**”). Capitalized terms in this Factum not otherwise defined have the same meaning as in the Strike Affidavit.

Canwest’s Television Business

6. Canwest is one of the largest owners and operators of commercial free-to-air television stations and specialty television channels in Canada. Canwest’s television broadcast business can be notionally divided between the CTLP TV Business (as described below) and the Specialty TV Business.¹

7. The CTLP TV Business is comprised of (i) 12 free-to-air television stations that are wholly owned and operated by CTLP, and (ii) a portfolio of subscription-based specialty television channels that are owned by CTLP either in whole or in part (as further described at paragraph 49 of the Initial Order Affidavit).²

8. The Specialty TV Business is comprised of a portfolio of specialty television channels which were acquired jointly with Goldman Sachs from Alliance Atlantis in August 2007. In particular, the Specialty TV Business consists of: (i) 13 wholly-owned and partially-owned specialty television channels that are operated by CMI for the account of CW Investments and its subsidiaries and (ii) 4 other specialty television channels in which CW Investments and its subsidiaries have 50% or lesser ownership interests and do not operate.³

¹ Strike Affidavit, para 9. Motion Record of the Applicants (the “Motion Record”), p. 11.

² Strike Affidavit, para. 10, Motion Record, p. 11.

³ Strike Affidavit, para. 11, Motion Record, p. 12.

CW Investments

9. In January 2007, CMI and Goldman Sachs entered into a binding term sheet (the “**Term Sheet**”) pursuant to which they agreed to acquire the business of Alliance Atlantis, including the Specialty TV Business, through a jointly owned acquisition company, which later became CW Investments.

10. The Term Sheet contemplated that the parties would enter into a shareholders agreement (the “**Shareholders Agreement**”) to record their agreement (as outlined in the term sheet) as to the manner in which the affairs of CW Investments and the management and operations of the Specialty TV Business would be conducted.⁴

11. CMI held its shares in CW Investments (the “**Shares**”) through a wholly subsidiary, 4414616 Canada Inc (“**441**”). The sole purpose of 441 was to insulate CMI from any liabilities of CW Investments. CW Investments is a Nova Scotia Unlimited Liability Corporation (“**NSULC**”). Although creditors of a NSULC have no direct rights against a NSULC’s shareholders and cannot sue its shareholders while the NSULC exists, shareholders of an NSULC may face exposure if the NSULC is liquidated or becomes bankrupt.⁵

12. The GS Parties consist of GS Capital Partners VI Fund, L.P., GSCP VI AA one Holdings S.à.r.l and GSCP VI AA one Parallel Holdings S.à.r.l. The latter two entities are “blockers” put in place for the same reason that 441 was put in place⁶.

⁴ Strike Affidavit, para. 16, Motion Record, p. 13.

⁵ Strike Affidavit, para. 22, Motion Record, p. 15.

⁶ Strike Affidavit, para. 24, Motion Record, p. 15

13. The Shareholders Agreement provides the GS Parties with certain means of exiting the Shareholders Agreement. For example, the Shareholder Agreement provides for a series of put and call options that are designed to allow the GS Parties to exit from its investment in CW Investments and that are exercisable in 2011, 2012, and 2013.⁷

14. The Shareholder Agreement further provides, in section 6.10, that in the event of an insolvency of CMI, the GS Parties have the ability to effect a sale of their interest in CW Investments and require a sale, or “drag-along”, of CMI’s interest.⁸ Section 6.10(a) of the Shareholder Agreement provides as follows:

(a) Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm’s Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing potential purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

Transfer of the Shares and the Dissolution of 441

15. Pursuant to a Dissolution Agreement between 441 and CMI, as part of the winding-up and distribution of its property, 441 transferred all of its property (which consisted of

⁷ Strike Affidavit, paras. 40-42, Motion Record, p. 18-19.

⁸ Strike Affidavit, para. 69, Motion Record, p. 25-26.

the Shares) to CMI effective as of the close of business on October 5, 2009 and CMI undertook to pay and discharge all of 441's liabilities and obligations.⁹

16. The dissolution of 441 was accompanied by various other documents, including a consent to transfer the Shares granted by 441 effective October 5, 2009 and delivered to CW Investments and articles of dissolution, all of which were filed on October 6, 2009 pursuant to the CBCA.¹⁰

17. The parties have agreed, for the purposes of the CMI Entities' motion and the GS Parties' cross motion only, that the Court should assume the following:

The transfer of the shares of C.W. Investments Co. from 4414616 Canada Inc. to CMI and the dissolution of 4414616 Canada Inc., prior to the commencement of these CCAA proceedings, was intended by CMI to provide CMI with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares.

18. CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities¹¹. If the GS Parties were able to effect a sale of CW investments at this time, and on terms that suit the GS Parties, it would be disastrous to the CMI Entities and their stakeholders¹². Even the overhanging threat of a sale of CW Investments is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities¹³. Accordingly, in order to preserve enterprise value and in the best interests of all of its

⁹ Strike Affidavit, para. 57, Motion Record, p. 23.

¹⁰ Strike Affidavit, para. 57, Motion Record, p. 23.

¹¹ Strike Affidavit, para. 68, Motion Record, p. 25

¹² Strike Affidavit, para. 71, Motion Record, p. 26

¹³ Strike Affidavit, para. 73, Motion Record, p. 27

stakeholders, CMI transferred the shares from 441 to CMI, so as to ensure that its interest in CW Investments would be protected by the stay of proceedings if it filed for creditor protection¹⁴.

The Stay of Proceedings

19. Pursuant to the Initial Order, a stay of proceedings (the “Stay”) in favour of the CMI Entities was put in place until November 5, 2009 (the “Stay Period”). By further Order of the Honourable Madam Justice Pepall dated October 30, 2009 (the “October 30 Order”), the Stay Period was extended to January 22, 2010.

20. Sections 15 and 16 of the Initial Order define the scope of the Stay as follows:

15. NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY

THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc. [emphasis added]

16. NO EXERCISE OF RIGHTS OR REMEDIES

THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the

¹⁴ Strike Affidavit, paras. 74 and 75, Motion Record, p. 27

Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien. [emphasis added]

21. The Initial Order defines “CMI Property” as the CMI Entities’ “respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof”. The Initial Order defines “CMI Business” as the respective businesses of the CMI Entities.

22. The Stay, the definition of CMI Property and the definition of CMI Business conform, in all material respects, to the standard form order (the “**Model Order**”) promulgated by the Commercial List Users Committee and are therefore entirely typical in a CCAA proceeding.

The GS Parties’ Motion

23. The GS Parties’ Motion, in effect, seeks to undo the transfer of the Shares from 441 to CMI or, in the alternative, require CMI to perform, and not to disclaim, the Shareholders Agreement essentially as though the Shares had not been transferred. The GS Parties also sought relief concerning paragraph 59 of the Initial Order. However, that aspect of the GS Parties’ Motion has been resolved on consent.

24. In paragraph 1 of the GS Parties’ Amended Notice of Motion they request an order:

(a) setting aside and declaring void the transfer of the Shares from 441 to CMI;

(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by the CCAA Proceedings.

(d) in the alternative to (a) and (b), directing CMI to perform all of the obligations that bound 441 immediately prior to transfer of the Shares; and

(e) in the alternative to (a) and (b), declaring that the obligations that bound 441 immediately prior to the transfer of the Shares may not be disclaimed.

25. The GS Parties' Motion does not request a lifting of the Stay, and it is remarkable that neither the notice of motion nor the affidavits filed in support of the motion make any mention of the Stay.

26. After it became clear that the GS Parties intended to proceed on the basis that they were not subject to the Stay, the CMI Entities brought this motion for a declaration that the GS Parties' Motion is stayed on November 24, 2009. Subsequently, on December 3, 2009, the GS Parties served a cross motion (the "**GS Cross Motion**") in which, "if required", they seek an order giving the GS Parties leave to proceed with the GS Parties' Motion.

The GS Parties Revive 441

27. On or about November 10, 2009, the GS Parties revived 441 (the "**Revival**") by filing Articles of Revival with the Director appointed under the *Canada Business Corporations Act*, who thereupon issued a certificate of revival. The CMI Entities were not notified or consulted prior to this course of action. Nor did the GS Parties seek leave of this Court to take this step.

28. The Revival had the legal effect of restoring 441 as a wholly-owned subsidiary of CMI and thus *prima facie* affects the CMI Business and CMI Property. At a minimum, 441 will

now have all of the legal and other obligations of any corporation such as mandatory corporate filings and the filing of tax returns. 441 will be unable to pay for such obligations without financial support from CMI as the sole shareholder of 441. CMI will also be required to devote financial and other resources to deal with any other legal, business and financial matters resulting from the Revival which is a significant distraction from its restructuring efforts. Further, the Revival may result in negative tax consequences for CMI.¹⁵

PART III – ISSUES

29. The CMI Entities raise the following issues in their motion:
- (a) The relief sought in paragraphs 1(a), 1(b), 1(d) and 1(e) of the GS Parties' Motion, is clearly stayed based on the plain meaning of the words of the Initial Order; and
 - (b) In any event, the relief sought in paragraph 1(e) of the Amended Notice of Motion of the GS Parties is improper, vexatious and an abuse of process, and should be struck out.
30. The CMI Entities raise the following issues in relation to the GS Cross-Motion:
- (a) The GS Parties have asserted no accepted basis for lifting the Stay and permitting the GS Parties' Motion to proceed.

PART IV – LAW AND ARGUMENT

The GS Parties' Motion is Clearly Stayed

31. There is no question that the GS Parties' motion is a "proceeding" that is subject to the Stay under clause 15 of the Initial Order, which prohibits the commencement of all

¹⁵ See Exhibit "F" to Strike Affidavit, Motion Record, p. 269-270.

proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. In addition, the relief sought by the GS Parties would, if granted, unquestionably involve “the exercise of any right or remedy affecting the CMI Business or the CMI Property”, which is stayed under clause 16 of the Initial Order. In fact, the actions of the GS Parties in carrying out the Revival have already violated this prohibition. It cannot seriously be argued that the GS Parties, or the GS Parties’ Motion, are somehow exempt from this language.

32. It has been recognized on numerous occasions that the power of the Court to grant a stay is the key element of the CCAA process.¹⁶ As the Ontario Court of Appeal held in *Re Stelco Inc.*: “The sec. 11 discretion [to grant a stay of proceedings] is the engine that drives the broad and flexible statutory scheme” of the CCAA.¹⁷

33. The principles governing the CCAA stay are uncontroversial, and have been affirmed in numerous trial and appellate decisions, only a few of which are cited below. These principles include:

- (a) The purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. It is remedial legislation that is entitled to a liberal interpretation.¹⁸
- (b) The power to grant the stay is to be interpreted broadly, in order to permit the CCAA to accomplish its legislative purpose. It applies not only to all creditors,

¹⁶ *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1 (Atl. Q.B.) (hereinafter “*Canadian Airlines*”)

¹⁷ (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

¹⁸ *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.) at p. 31 (hereinafter “*Lehndorff*”).

but to all non-creditors and other parties who could potentially jeopardize the success of the plan and therefore the continuance of the company.¹⁹

- (c) The stay of proceedings created by section 11 restrains judicial or extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to concentrate its efforts on the negotiating of compromises and arrangements.²⁰ A stay of proceeding is not limited to actions by a creditor, but encompasses all actions by parties that may threaten a compromise or arrangement, including the exercise of contractual rights.²¹
- (d) A key purpose of the stay is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor (or other stakeholder) an advantage to the prejudice of others who are less aggressive. In turn, such manoeuvres can undermine the company's financial position, making it less likely that a restructuring will succeed.²²
- (e) The possibility that one or more creditors (or other stakeholders) might be prejudiced by a stay of proceedings does not affect the court's exercise of

¹⁹ *Lehdorff, supra* at 33.

²⁰ *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at 309.

²¹ *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1; Jannis P. Sarra, *Houlden and Morawetz Bankruptcy and Insolvency Law of Canada* (Toronto: Thomson Reuters, 2009) at 11-114.

²² *Lehdorff, supra* at p. 32.

authority in granting the stay, because such prejudice is offset by the benefit to all creditors and the company of facilitating a reorganization.²³

- (f) Other than certain specific exemptions set out in the CCAA, which are not relevant here, there is nothing in the CCAA which exempts any creditors of the debtor company from its provisions. The all-encompassing scope of the CCAA is underscored by section 8 of the CCAA, which precludes parties from contracting out of the CCAA.²⁴
- (g) The CCAA serves a broad constituency, including investors, creditors and employees.²⁵ As such, the restructuring process should be conducted in the general interest of all the creditors (and other stakeholders), which should always be preferred over the particular interests of individual creditors.²⁶

34. The terms of the Stay are typical. They are identical in all material respects to the language of the Model Order. The Stay provides the CMI Entities with the usual protections that are demonstrably necessary in order to permit the CMI Entities to focus on a restructuring or recapitalization of the business for the benefit of all of their stakeholders.

35. The GS Parties seem to want to proceed on the basis that the Stay simply does not or should not apply to them. In fact, they have already proceeded on this basis in relation to the Revival.

²³ *Lehdorff, supra* at p. 32.

²⁴ *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* [1990] B.C.J. No. 2385 (C.A.) at p. 4. Section 8 of the CCAA provides that: "This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument."

²⁵ *Chef Ready Foods, ibid.* at p. 7.

36. An examination of the specific relief sought in the GS Parties' Motion makes it clear that the relief is subject to the Stay:

- (a) *Order setting aside the transfer of the Shares from 441 to the CMI Entities* (para. 1(a) of the GS Parties' Motion): Since the Shares have been transferred to the CMI Entities, the relief sought under this subparagraph is relief "affecting the CMI Property".
- (b) *Declaration that the Rights and Remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA Proceedings* (para. 1(b) of the GS Parties' Motion): On its face, this relief is directed at permitting the GS Parties to enforce any and all rights and remedies against the CMI Entities – including the right to require the CMI Entities to tender the Shares to a sale under section 6.10 – that could have been enforced against 441. This relief would clearly affect the CMI Entities and the CMI Property in the same manner as an order directly transferring the Shares back to 441.
- (c) *Order Directing CMI to Perform all of the Obligations that Bound 441 Prior to the Transfer* (para. 1(d) of the GS Parties' Motion): This is essentially the same relief sought in 1(b), phrased as a demand for specific performance.
- (d) *Order declaring that the Obligations that Bound 441 Prior to the Transfer May Not Be Disclaimed* (para. 1(e) of the GS Parties' Motion): This is another slight variation on the relief sought in 1(b).

²⁶ *Re Boutiques San Francisco Inc.* (2004), 5 C.B.R. (5th) 174 at para. 21.

37. The CMI Entities submit that the GS Parties' Motion is exactly the type of proceeding that is intended to be caught by the stay. It is the type of proceeding that should be caught in order to (a) achieve the purpose of the CCAA of facilitating the restructuring of the CMI Entities, (b) prevent the GS Parties from gaining an unfair advantage over other stakeholders of the CMI Entities, and (c) ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders, rather than diverting those resources to address proceedings that can only benefit the GS Parties at the expense of other stakeholders. Many such stakeholders may also have contractual claims or other rights that they will be pursuing through the claims process ordered by this Honourable Court. The GS Parties have articulated no reason, and there is no reason, why their claim should be treated any differently.

38. CMI's interest in CW Investments is a significant portion of its enterprise value. The GS Parties' attempt to exercise rights to force a sale of CW Investments to a third party has had and (if they are allowed to pursue it) will have a profound destabilizing effect on CMI's ongoing restructuring and recapitalization efforts. If the GS Parties' Motion proceeds, the potential loss of CMI's interest in CW Investments would materially prejudice any hope of a successful restructuring of the CMI Entities.²⁷

39. The GS Parties make various allegations regarding an "abuse of the CCAA" and a breach of their contractual rights. This motion is not the proper forum for canvassing the merits of the GS Parties' complaints against the CMI Entities. The only issue on this motion is whether the GS Parties should be permitted to proceed with the GS Parties' Motion, despite the Stay. However, when it is the proper time for considering the merits, the CMI Entities intend to argue

²⁷ Strike Affidavit, para. 8, Motion Record, p. 11.

strenuously that their actions in dissolving 441, transferring the Shares to the CMI Entities and causing the CMI Entities to assume the obligations of 441 under the Shareholder Agreement were not in breach of any term of the Shareholder Agreement.

40. In any event, since the days of “instant” debentures, it has long been accepted that debtor companies can organize their affairs in order to benefit from the CCAA stay.²⁸ Moreover, even if the GS Parties can ultimately establish that the loss of its rights to force a sale of the Shares to a third party under section 6.10 of the Shareholder Agreement is a breach of their contractual rights under the Shareholder Agreement, the GS Parties have provided no basis for concluding that this loss cannot be valued and treated as a monetary claim in the CCAA proceedings of the CMI Entities. Put at its highest, the GS Parties claim will be that they have been deprived of an opportunity to effect a sale of their interest in CW Investments on a “drag along” basis. Any such loss can be quantified, in exactly the same way that claims for lost opportunity are routinely valued in complex commercial cases. Nor have the GS Parties established a basis for treating such potential breach differently from any other breach of contract that might be alleged against the CMI Entities, all of which are subject to the Stay and all of which will be dealt with through the claims process and, as the restructuring or recapitalization proceeds, dealt with in a plan of compromise or arrangement.

This Honourable Court Should Strike Out Paragraph 1(e)

41. In paragraph 1(e) of the GS Parties’ Motion, the GS Parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the

²⁸ See *Lehndorff*, *supra* at p. 30, citing a number of earlier cases.

Shares to CMI and that have been assumed by the CMI Entities. If this relief is not stayed, it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper.²⁹

42. The recent amendments to the CCAA have added a detailed procedure for addressing the disclaimer of agreements. Under section 32 of the CCAA, a debtor company may, on notice the other parties to an agreement and the monitor, disclaim any agreement to which the debtor company is a party.³⁰ The monitor must approve the proposed disclaimer. If the monitor does not give its approval, the debtor is required to make an application to the Court for an order that the agreement be disclaimed.³¹ Even where the monitor approves the disclaimer, the counterparty will have 15 days to make an application to the Court to opposing the disclaimer.³² The court is required to consider specific factors in determining whether to approve the disclaimer, which include potential prejudice to the GS Parties.³³

43. In paragraph 1(e) of the Amended Notice of Motion, the GS Parties are effectively seeking to preclude the CMI Entities from relying upon section 32 of the CCAA. There is no language in section 32 that would permit this Court to grant such an order. The GS Parties assert that the Court should determine when and how section 32 applies before the monitor is asked to approve a disclaimer or resiliation. In fact, section 32(4) requires the Court, when considering a proposed disclaimer, to consider whether the monitor has approved it. The approach advocated by the GS Parties is the opposite of the approach required by section 32.

²⁹ Rule 25.11 provides that: “The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document ... (b) is scandalous, frivolous or vexatious, or (c) is an abuse of the process of the court.” Notices of motion are “pleadings or other documents” for the purpose of this section: see *George v. Harris*, [2000] O.J. No. 1762 at para. 19.

³⁰ CCAA section 32(1)

³¹ CCAA sections 32(1) and 32(3)

³² CCAA section 32(2)

44. The relief sought in paragraph 1(e) of the Amended Notice of Motion amounts to an abuse of the process because it is an attempt to circumvent the statutory framework within which the CMI Entities are entitled to attempt to restructure their affairs for the benefit all stakeholders. It is submitted, therefore, this paragraph should be struck out.

45. The CMI Entities fully recognize that if they determine that the Shareholder Agreement will be disclaimed, and assuming the monitor approves such disclaimer, they may have to contend with the objections of the GS Parties to such disclaimer. If that happens, and not before, the issues surrounding such disclaimer and any potential prejudice to the GS Parties can be fully canvassed, in the manner and on the terms mandated by Parliament under section 32 of the CCAA.

The Stay Should Not Be Lifted

46. The case law recognizes certain very limited bases on which a CCAA stay should be lifted. It is incumbent on the GS Parties to satisfy this Court that a basis for lifting the Stay exists in this case.

47. In *Canadian Airlines*, Paperny J. listed six factors that would lead a court to lift the stay in a CCAA proceeding.³⁴ These are as follows:

- (a) When the plan is likely to fail;
- (b) The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

³³ CCAA, section 32(3).

³⁴ *Canadian Airlines*, *supra* citing from *Canadian Commercial Reorganization: Preventing a Bankruptcy* (Aurora: Canada Law Book, looseleaf) at pp. 342 and 343.

(c) The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and jeopardize the debtor company's existence);

(d) The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

(e) It is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

(f) After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.³⁵

48. Most of these grounds are manifestly not applicable to this case.

49. With respect to the balancing of prejudices required by (d) above, the GS Parties have identified no basis on which they are more prejudiced than any other creditor or stakeholder who is precluded from exercising rights under a contract. The essence of the GS Parties' complaint is that they are not happy that the Shares, and certain contractual obligations relating to the Shares, are subject to the Stay. The GS Parties are in no worse position than any other stakeholder who is precluded from relying upon rights that arise upon an insolvency default. It is well established that a CCAA stay applies to preclude a contractual counterparty of the debtor company from frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to the CCAA proceedings.³⁶

50. On the other hand, the prejudice to CMI by allowing the GS Parties' Motion to proceed at this stage of its restructuring would be debilitating. The resources of CMI need to be

³⁵ *Canadian Airlines*, *supra* at para. 20.

³⁶ *San Francisco Gifts Ltd. (Re)* 5 C.B.R. (5th) 92 at para. 37. See also *Norcen Energy*, *supra* in which one of the debtor's joint venture partners was enjoined from relying on an insolvency clause to replace the operator under a petroleum operating agreement.

devoted to its restructuring.³⁷ Recently, Morawetz J. found this factor to be determinative in refusing to lift the stay to allow a particular proceeding against the Nortel directors to proceed because to do so would result in a significant distraction of resources on account of document production, litigation strategizing, etc. at a time when that could be least afforded.³⁸

51. Already the GS Parties have signalled the potential to cause enormous disruption to the CMI Entities' ongoing restructuring and recapitalization efforts.³⁹ In pursuit of their Motion, the GS Parties have made sweeping requests for documents. For the CMI Entities to respond to such requests, they would need to develop appropriate search parameters, locate and catalogue responsive documents, and appropriately redact them for privilege, which would take hundreds of hours and cost, at a minimum, hundreds of thousands of dollars.⁴⁰ In addition to the costs of such an exercise, the efforts required by the employees of the CMI Entities to respond to the GS Parties demand for documents would be immense. The CMI Entities can ill afford to expend the time or resources to respond to the GS Parties' document requests.

52. Further, the individuals who would be required to respond to the document request are the very same individuals who are spearheading the CMI Entities' restructuring and recapitalization efforts.⁴¹ As Mr. Strike, the Chief Recapitalization Officer of Canwest Global, put it, he and the other proposed witnesses are working flat out on the restructuring, and the last

³⁷ Strike Affidavit, para. 84-87, Motion Record, p. 29-30

³⁸ *Nortel Networks Corp. Re* 57 C.B.R. (5th) 232 at para. 36. See also *Re Smurfit-Stone Container Canada Inc.*, [2009] O.J. No. 4375 (S.C.J.), in which Pepall J. indicated that the discretion of the Court in deciding whether to lift a CCAA stay should be exercised with the purposes of the CCAA in mind (citing *Chef Ready Foods, supra*).

³⁹ Strike Affidavit, paras. 84-85, Motion Record, p. 29.

⁴⁰ Strike Affidavit, para. 86, Motion Record, p. 29.

⁴¹ Strike Affidavit, para. 86, Motion Record, p. 29.

thing they should be doing is preparing for a forensic examination of events that took place over the last several months⁴².

53. Most importantly, the evidence is that the threat of the GS Parties' Motion is having a severely destabilizing effect, and is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities⁴³. Lifting the Stay to allow the GS Parties' Motion to continue would undoubtedly further prejudice the restructuring, and imperil the speedy exit from creditor protection that would benefit the CMI Entities and stakeholders generally.

54. With respect to (e) above, the GS Parties cannot point to any reason why their rights will be lost by the passage of time. The GS Parties still own their shares in CW Investments. The Specialty TV Business is still being operated by CMI in a manner calculated to maximize its economic value, as it is required to do under the Shareholders Agreement⁴⁴. CMI has always had the operative obligations with respect to the management and operation of CW Investments. CMI cannot sell the Shares or otherwise dispose of them without the involvement of the Court and the Monitor. The risk that CMI might disclaim the Shareholders Agreement was a possibility that would have existed regardless of the transfer of the Shares, since CMI has been a party to the Shareholders Agreement since its inception.

55. In summary, therefore, the GS Parties have not satisfied their onus to demonstrate that lifting the Stay is appropriate in this case.

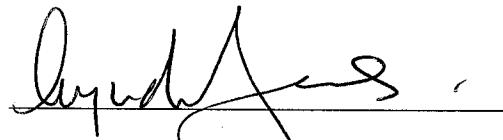
⁴² Strike Affidavit, para. 88, Motion Record, p. 30

⁴³ Strike Affidavit, para. 73, Motion Record, p. 27, para. 85, Motion Record p. 30

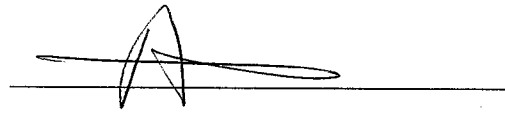
PART IV – NATURE OF THE ORDER SOUGHT

56. The CMI Entities therefore request an Order declaring that the relief sought in paragraph 1(a), 1(b), 1(d) and 1(e) of the GS Parties' Motion, is stayed by operation of the Initial Order. The CMI Entities also therefore submit that the Cross Motion should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

A handwritten signature in black ink, appearing to read 'Lyndon A.J. Barnes', written over a horizontal line.

Lyndon A.J. Barnes

A handwritten signature in black ink, appearing to read 'Alexander F.L. Cobb', written over a horizontal line.

Alexander F.L. Cobb

⁴⁴ Strike Affidavit, paras. 26-30, Motion Record, p. 16

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Disclaimer or resiliation of agreements

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

Court may prohibit disclaimer or resiliation

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

Court-ordered disclaimer or resiliation

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

Factors to be considered

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

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

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

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

COURTS OF JUSTICE ACT

R.S.O. 1990, c. C.43

Declaratory Orders

97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

RULES OF CIVIL PROCEDURE

R.R.O. 1990, Regulation 194

Striking out a pleading or other document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of the process of the court.

Schedule "D"

LIST OF CASES

1. *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.)
2. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1991), 51 B.C.L.R. (2d) 84 (C.A.)
3. *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.)
4. *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.)
5. *Nortel Networks Corp. Re* 57 C.B.R. (5th) 232 (S.C.J.)
6. *Re Boutiques San Francisco Inc.* (2004), 5 C.B.R. (5th) 174 (QCCS)
7. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)
8. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.J.)
9. *Re Smurfit-Stone Container Canada Inc.*, [2009] O.J. No. 4375 (S.C.J.)
10. *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.)
11. *San Francisco Gifts Ltd. (Re)* 5 C.B.R. (5th) 92 (Alta. Q.B.)

LIST OF SECONDARY SOURCES

1. Jannis P. Sarra, *Houlden and Morawetz Bankruptcy and Insolvency Law of Canada* Looseleaf (Toronto: Thomson Reuters, 2009)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c.C-36,
AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST
GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON
SCHEDULE "A"

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

APPLICANTS

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Motion Returnable December 8, 2009)

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