

COURT OF APPEAL FOR ONTARIO

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

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

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PART I – OVERVIEW

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

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

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

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

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

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

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

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

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

PART II – THE FACTS

A. Background

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

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

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

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

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

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

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

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

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

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

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

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

⁷ Factum of the GS Parties at para. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

Wind-up of 4414616 Canada Inc.

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

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

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

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

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

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

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

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

Sale of the Ten Shares

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

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

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

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

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

The Disclaimer of the Shareholders Agreement

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

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

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

²⁰ Factum of the GS Parties at para. 12.

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

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

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

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

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

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

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

D. The Shaw Approval Motion

Restructuring Discussions with the GS Parties

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

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

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

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

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

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

