Court of Appeal File No. M38600

COURT OF APPEAL FOR ONTARIO

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

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

Applicants

RESPONDING FACTUM OF THE APPLICANTS
(Motion for Leave to Appeal)

March 22, 2010

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TO: **THE SERVICE LIST**

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PART I – OVERVIEW

1. This factum is filed by Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed in Schedule "A" hereto and the Partnerships listed on Schedule "B" hereto (collectively, the "**CMI Entities**") in response to the motion for leave to appeal filed 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 (the "**GS Parties**"). The motion for leave to appeal is supported by The Catalyst Capital Group Inc. ("**Catalyst**").

2. The motion seeks leave to appeal from the orders (the "**Orders**") of the Honourable Madam Justice Pepall (the "**CCAA Judge**") dated February 19, 2010 (i) granting court approval for an equity investment transaction embodied in a Subscription Agreement and certain other transaction documents (the "**Shaw Transaction**") pursuant to which, if consummated, Shaw Communications Inc. ("**Shaw**") will become an equity investor in a restructured Canwest Global (the "**Shaw Approval Order**"); and (ii) refusing a request by the GS Parties to adjourn the motion to approve the Shaw Transaction (the "**Adjournment Order**"). The CCAA Judge delivered written reasons on March 1, 2010. Effectively, the GS Parties seek to overturn the results of a comprehensive equity investment solicitation process (the "**Solicitation**

Process") which was conducted for over three months by the CMI Entities, through their financial advisor, in favour of an "out-of-time and process" equity investment term sheet which was submitted by Catalyst with the support of the GS Parties (the "**Catalyst Term Sheet**"), in the early hours of the morning on the date of the hearing (the "**Approval Hearing**") to approve the Shaw Transaction.

3. The CMI Entities submit that leave to appeal from the Orders should be denied. When the hyperbole that permeates the GS Parties' submissions is stripped away, it is clear that the GS Parties raise no arguable basis on which this appeal could succeed. This case is, in essence, no different from numerous other cases in which this Court has declined to allow the results of a formal bid process to be overturned in favour of a disappointed bidder making a "late-breaking" offer outside that process. In this regard, the GS Parties (who happen to be equity participants in the proposal framed by the Catalyst Term Sheet) raise no points of law that require resolution by this Honourable Court. Instead, they invite this Court to second-guess the application of well-settled legal principles to the evidence before the CCAA Judge, to substitute its own exercise of discretion for the discretion already exercised by the CCAA Judge, and to second-guess the business judgement of the Board of Directors of Canwest Global (the "**Board**"), the Special Committee of Canwest Global (the "**Special Committee**"), the financial advisor of the CMI Entities, the Chief Restructuring Advisor of the CMI Entities (the "**CMI CRA**") and the court-appointed Monitor in these CCAA proceedings.

4. The GS Parties' motion for leave to appeal should be rejected for the following reasons, all of which are explained in greater detail in this factum:

(a) the GS Parties raise belated and unfounded objections to the fairness of the Solicitation Process, despite their failure to object to the Solicitation Process until the day before the Approval Hearing;

(b) the GS Parties raise issues regarding the alleged "bias" of the Solicitation Process, alleging a "remarkable abuse of the CCAA's process" due to the involvement of an ad hoc committee (the "**Ad Hoc Committee**") representing approximately 70% of the holders of CMI's 8% Senior Subordinated Notes (the "**8% Noteholders**"), despite the fact that the CMI Entities are required under the Initial Order (defined below) to comply with their obligations under a Support Agreement (as defined below) entered into with the Ad Hoc Committee that forms the basis for a consensual restructuring of the CMI Entities' businesses under the CCAA;

(c) the GS Parties make entirely unsupported and inflammatory allegations to the effect that the Special Committee and the Board have abdicated their fiduciary duties and duties of care owed to Canwest Global (described in the GS Parties' factum as a "total failure of Canwest's corporate governance"), including an unsupported suggestion that neither the Special Committee nor the Board fulfilled their duties in considering whether the contrived delivery of the Catalyst Term Sheet at 3:38 A.M. on the morning of the Approval Hearing should alter the decision to proceed with the Approval Hearing;

(d) the GS Parties raise irrelevant considerations (including the dissolution of Canwest Global's indirect subsidiary, 4414616 Canada Inc. ("**441**")), effectively implying that the CCAA Judge has condoned abuses of the CCAA, despite the fact that these issues are not germane to the Orders appealed from or to the issues raised in the Approval Hearing, were fully disclosed to the CCAA Judge in prior court materials, and have been the subject of earlier proceedings before the CCAA Judge that were not appealed by the GS Parties;

(e) the GS Parties raise issues of procedural unfairness leading up to the Approval Hearing, despite clear findings of fact by the CCAA Judge that the Solicitation Process was fair and that the difficulties allegedly experienced by the GS Parties and Catalyst in relation to the Approval Hearing were largely caused by their own actions; and

(f) among other things, the GS Parties request extraordinary relief in the form of an order requiring the Board to negotiate a subscription agreement with Catalyst, which would be an unprecedented interference by a Canadian Court in the business affairs of a corporation, let alone a corporation that is under close supervision by a CCAA court.

5. In short, the GS Parties have used this motion as a platform to impugn the integrity of the CCAA Judge (the presiding judge of the Commercial list), the Monitor, the Special Committee and the Board. The CMI Entities submit that this motion is just the most recent among a series of calculated steps taken by the GS Parties as part of a deliberate and obstructionist litigation strategy designed not only to gain leverage in negotiations within these CCAA proceedings, but to frustrate the efforts of the CMI Entities to successfully restructure their businesses. It is respectfully submitted that the GS Parties have not met the stringent test for leave to appeal that has been recognized by this court and, accordingly, leave to appeal should be dismissed for all of the reasons set out in this factum.

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 February 12, 2010 (the "**Strike Affidavit**").

Background

7. The CMI Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**"), pursuant to an initial order (the "**Initial Order**") of the CCAA Judge dated October 6, 2009 (the "**Filing Date**"). At that time, the CCAA Judge approved the appointment of FTI Consulting Canada Inc. to act as monitor (the "**Monitor**") in these CCAA proceedings.[1] Since the Initial Order was issued, all motions in these CCAA proceedings have been heard by the CCAA Judge, who is seized of this matter.

Contractual Relationship with the GS Parties

8. In January 2007, Canwest Media Inc. ("**CMI**") (a wholly-owned subsidiary of Canwest Global) and Goldman Sachs Capital Partners AA Investment LLC ("**Goldman Sachs**") entered into a binding term sheet (the "**Term Sheet**") pursuant to which they agreed to acquire the business of Alliance Atlantis Communications Inc. ("**Alliance Atlantis**"), through a jointly-owned acquisition company, now known as CW Investments Co. ("**CW Investments**"). The Term Sheet contemplated that the parties would enter into a shareholders agreement (the "**Shareholders Agreement**") to record their agreement as to the manner in which the affairs of CW Investments would be conducted. The Shareholders Agreement was entered into on August 15, 2007 between CMI, 441, CW Investments and the GS Parties and was later amended.[2]

9. CMI held its shares in CW Investments (the "**Shares**") through 441. Goldman Sachs holds its shares through the GS Parties. Immediately prior to the Filing Date, 441 was dissolved by CMI and the Shares distributed to CMI. All of 441's obligations under the Shareholders Agreement are now being performed by CMI.[3] This transaction was not in issue before the CCAA Judge at the Approval Hearing and has no relevance whatsoever to the Orders

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1 Strike Affidavit, para. 3, Motion Record of the GS Parties (the "**GS Motion Record**"), Tab 10, p. 241.

2 Affidavit of Thomas C. Strike sworn November 24, 2009 (the "**November Affidavit**"), paras 15 to 19, Motion Record of the CMI Entities (the "**Responding Motion Record**"), Tab 1, pp. 5-6.

granted at the Approval Hearing. There is no provision in the Shareholders Agreement that gives the GS Parties the right to determine which parties can invest in Canwest Global.

10. The actions of CMI in dissolving 441 and the treatment of the Shareholders Agreement were the subject of proceedings before the CCAA Judge on December 8, 2009 (the "**Stay Motion**").[4] In her decision in the Stay Motion, the CCAA Judge held that a motion brought by the GS Parties seeking various forms of relief in relation to the dissolution of 441 was subject to the CCAA stay of proceedings and that the stay should not be lifted in order to allow the GS Parties' motion to proceed. At the time, the CCAA Judge indicated that the CMI Entities had a good arguable case that the dissolution of 441 was permitted under the Shareholders Agreement.[5] Furthermore, the CCAA Judge rejected the attempt by the GS Parties to obtain an Order precluding the CMI Entities from disclaiming the Shareholders Agreement under section 32 of the CCAA.[6] The GS Parties did not seek leave to appeal the determinations on the Stay Motion and the appeal period in respect of the Stay Motion has expired.

The Support Agreement

11. On October 5, 2009, immediately prior to the Filing Date, the CMI Entities agreed to enter into a Support Agreement with the members of the Ad Hoc Committee, which was to form the basis of a consensual restructuring of the businesses of the CMI Entities under the CCAA (the "**Recapitalization Transaction**"). The Support Agreement, which had attached to it a recapitalization term sheet (the "**Restructuring Term Sheet**"), provided that the CMI Entities would pursue a plan of compromise or arrangement (the "**Plan**") on the terms set out in the Restructuring Term Sheet. The Support Agreement and the Restructuring Term Sheet represented

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3 November Affidavit, para 57, Responding Motion Record, Tab 1, p. 15.

4 *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7882 (S.C.J.) (WL) ("**Canwest Stay Motion**"), GS Motion Record, Tab 18. The facts surrounding the relationship between the CMI Entities and the GS Parties are set out in further detail in the reasons of the CCAA Judge in the Stay Motion.

5 Canwest Stay Motion, *ibid.* at para. 42, GS Motion Record, Tab 18, p. 679.

6 Canwest Stay Motion, *ibid.* at paras. 40 and 47, GS Motion Record, Tab 18, p. 678 and 680.

the culmination of many months of arm's length negotiations between the CMI Entities and the Ad Hoc Committee.[7] The central role of the Ad Hoc Committee in the CMI Entities' restructuring reflects the objective reality (which the GS Parties continually seek to discount or ignore) that, due to the significant amount of debt owed by the CMI Entities to the 8% Noteholders on account of the 8% Notes, the support of the Ad Hoc Committee is essential to any consensual recapitalization of the CMI Entities under the CCAA. In other words, the 8% Noteholders have a "blocking" position or "functional veto" in any restructuring of the CMI Entities' business.[8]

12. Among other things, the Restructuring Term Sheet provided that one or more Canadians (as defined in the *Direction to the CRTC (Ineligibility of Non-Canadians)*) (the "**New Investors**") would invest at least $65 million in a restructured Canwest Global ("**Restructured Canwest Global**"). Pursuant to the Support Agreement, the equity investment in Restructured Canwest Global had to be acceptable to the Ad Hoc Committee.[9]

13. The Initial Order was granted, in part, on the basis of this "pre-arranged" restructuring agreement. The terms of these arrangements were fully disclosed in the materials filed in support of the Initial Order and the CCAA Court required the CMI Entities to comply with their obligations under the Support Agreement.[10] The GS Parties did not seek leave to appeal the Initial Order. The CCAA Proceedings have been operating on the basis of these arrangements since October 2009. Allegations by the GS Parties that these arrangements somehow constitute an "abuse of the CCAA process" are baseless and effectively represent an unjustified and inappropriate collateral attack on the integrity of the CCAA process and specifically on the CCAA Judge.

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7 Strike Affidavit, para. 7, GS Motion Record, Tab 10, p. 242.

8 The significance of this "blocking" position is recognized by the Monitor in its Supplement to the Monitor's Tenth Report, February 19, 2010 (the "**Monitor's Supplement**"), at para. 18, GS Motion Record, Tab 14, p. 636.

9 Strike Affidavit, para. 9, GS Motion Record, Tab 10, p. 242.

10 *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) (QL) at para. 58.

The Solicitation Process

14. On or about November 2, 2009, the CMI Entities, through their financial advisor RBC Capital Markets ("**RBC**"), commenced the Solicitation Process with a view to identifying the New Investor(s). The Solicitation Process was conducted in two phases, with periodic updates being provided to the Monitor.[11]

15. In the first phase of the Solicitation Process, RBC contacted approximately 90 potential investors, made up of strategic and financial investors, and qualified high net worth individuals in Canada. In total, 52 potential investors expressed interest in the investment opportunity and were sent "teaser" documents, as well as a form of Non-Disclosure Agreement ("**NDA**"), the execution of which was a prerequisite to obtaining more detailed and confidential information regarding the CMI Entities. Potential investors were informed that Canwest Global would favour investors that placed the highest equity value on Restructured Canwest Global and demonstrated the ability and willingness to complete due diligence and documentation within the required timeline. Although the Solicitation Process was framed on the basis that Canwest Global was seeking an equity investor in the context of a public company structure, it was made clear by RBC to participants that alternate structures would be considered.[12]

16. Ultimately, 22 potential investors executed NDAs and received a more comprehensive confidential information memorandum and access to an internet-based data room.[13] The CCAA Judge had evidence before her that this level of "take-up" in an equity investment solicitation process of this nature was reasonable.[14]

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11 Strike Affidavit, para. 11, GS Motion Record, Tab 10, p. 243. The details of the Solicitation Process are set out in considerable detail in the Strike Affidavit, which was before the CCAA Judge at the Approval Hearing.

12 Strike Affidavit, para. 13 and 21(d), GS Motion Record, Tab 10, p. 244 and 247.

13 Strike Affidavit, para. 12, GS Motion Record, Tab 10, pp. 243-244.

14 Affidavit of Richard M. Grudzinski, sworn February 18, 2010 (the "**Grudzinski Affidavit**"), para. 7, GS Motion Record, Tab 8, pp. 227-228.

17. Six potential investors submitted initial non-binding proposals ("**Initial Proposals**") as part of the Solicitation Process. Based upon the recommendation of RBC, five of these investors were invited to participate in the second phase of the Solicitation Process, four of whom (the "**Phase 2 Participants**") met with the CMI Entities, RBC, the CMI CRA and certain representatives of the Ad Hoc Committee (the remaining prospective investor withdrew from the process). On January 20, 2010, RBC informed the remaining Phase 2 Participants that final binding offers ("**Formal Bids**") were required to be received by 5:00 p.m. on January 27, 2010.[15]

18. Two Formal Bids were received from Phase 2 Participants prior to the January 27, 2010 deadline, one of which was from Shaw. Over the next several days, numerous follow-up discussions were held with RBC, the CMI Entities, the CMI CRA, the Ad Hoc Committee and Shaw and their respective advisors to negotiate the terms of the Subscription Agreement (together with the Subscription Term Sheet), Amended Support Agreement and Shaw Support Agreement (the "**Shaw Transaction Documents**"). The Monitor and its counsel were provided with drafts of the documents and participated in discussions with the advisors to the CMI Entities and the Ad Hoc Committee, respectively. At the same time, discussions were also held between RBC, the CMI Entities, the CMI CRA, the Ad Hoc Committee and the other formal bidder and their respective advisors, in respect of the other Formal Bid.[16]

19. It is significant to note that Catalyst initially participated in the Solicitation Process in early December 2009. In an email enclosing an Initial Proposal, Catalyst stated that it adopted "the terms and the fact that the Board, management and the other stakeholders have set up a process and the terms of a Plan which we certainly support".[17] However, when Catalyst was informed that, like all participants in the Solicitation Process, it would need to sign a NDA in

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15 Strike Affidavit, para. 20, GS Motion Record, Tab 10, p. 246.
16 Strike Affidavit, para. 26, GS Motion Record, Tab 10, p. 250.

order for its proposal to be considered, Catalyst refused to sign a NDA.[18] As a result, Catalyst did not receive further confidential information regarding the CMI Entities, and did not participate in the second phase of the Solicitation Process. Despite the allegations by the GS Parties and Catalyst regarding the provisions of the NDA, the CCAA Judge had evidence that these terms were standard for an equity investment solicitation process of this nature.[19] These terms in no way singled out either Catalyst or the GS Parties.[20]

The Shaw Transaction

20. On February 11, 2010, after many days of extensive, arm's length negotiations between RBC, the CMI Entities, the Ad Hoc Committee and the Formal Bidders and their respective advisors, the Special Committee met to consider the Formal Bids. The Special Committee duly considered and compared the Formal Bids. RBC advised the Special Committee that, in its view, the Formal Bid submitted by Shaw was the best overall offer received considering various criteria. In particular, the Shaw Transaction provided (i) significant value to Restructured Canwest Global in exchange for the equity investment; (ii) affected creditors the opportunity to receive cash distributions from a Plan as opposed to shares in Restructured Canwest Global; and (iii) a long-term solution and stability for Restructured Canwest Global through involvement of a strategic investor with significant experience in the media industry.[21]

21. After due consideration of the Formal Bids including the views of the Company's legal and financial advisors, the Special Committee recommended to the Board that it approve, and the Board approved, the Shaw Transaction Documents. The CMI Entities' senior

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17 Email from Gabriel De Alba dated December 2, 2009, Exhibit A to the Affidavit of Gabriel De Alba, sworn February 19, 2010 (the "**De Alba Affidavit**"), GS Motion Record, Tab 4, p. 46.

18 De Alba Affidavit, at paras. 4 to 11, GS Motion Record, Tab 4, pp. 40-42.

19 Grudzinski Affidavit, para. 6, GS Motion Record, Tab 4, p. 40.

20 See Grudzinski Affidavit, para 10, GS Motion Record, Tab 8, p. 228, wherein Grudzinski states, "restrictions on discussions with individuals or entities that are involved with the business in question are commonplace in investment banking processes. Without such restrictions, it is not practicable to run a process with specified guidelines and parameters to be followed by potential investors that maintains confidentiality and a level playing field for the participants in the process".

management, the CMI CRA and the Ad Hoc Committee supported the entering into of such agreements. The Shaw Transaction Documents were executed by the respective parties thereto on February 11, 2010.[22] Canwest Global covenanted and agreed in the Subscription Agreement to use its commercially reasonable efforts to obtain court approval of the Shaw Transaction Documents by no later than February 19, 2010. The remainder of the Shaw Transaction Documents would not become legally binding unless and until the order sought in the Approval Hearing was granted.[23]

22. The Shaw Transaction contemplates that, rather than restructure Canwest Global as a public company as contemplated in the Support Agreement, Canwest Global will become a private company whose shareholders will be comprised of Shaw and those 8% Noteholders and other participating creditors of Canwest Global that elect to receive shares of Restructured Canwest Global and that would hold at least 5% of the equity of Restructured Canwest Global following the completion of the Recapitalization Transaction. Creditors that would hold less than 5% of the equity shares of Restructured Canwest Global upon completion of the Recapitalization Transaction (the "**Non-Participating Creditors**") and existing shareholders of Canwest Global (the "**Existing Shareholders**") will receive a cash payment as consideration for the compromise of their interests to be affected pursuant to the Plan. The amount of cash to be distributed to each Non-Participating Creditor will 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 Shaw Transaction.[24]

23. The Monitor, in its Tenth Report, expressed its support for the approval of the Shaw Transaction.[25]

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21 Strike Affidavit, para. 27, GS Motion Record, Tab 10, p. 250.
22 Strike Affidavit, para. 28, GS Motion Record, Tab 10, pp. 250-251.
23 Strike Affidavit, para. 29, GS Motion Record, Tab 10, pp. 251-252.
24 Strike Affidavit, para. 23, GS Motion Record, Tab 10, p. 248.
25 Monitor's Tenth Report, para. 47, GS Motion Record, Tab 13, p. 584.

The Approval Hearing

24. The CMI Entities served their motion record in support of the Approval Hearing on the service list at 7:00 P.M. on the evening of February 12, 2010 via email (as permitted by the Initial Order), a mere three hours past the time provided in the Ontario *Rules of Civil Procedure* for regular service of motion materials, for a motion returnable on February 19, 2010.[26] Earlier that afternoon, the Monitor had advised the service list that the CCAA Court had reserved February 19, 2010 for the motion to approve the Shaw Transaction and that motion materials and the Monitor's Tenth Report were expected to be served later that day or the next morning. Counsel for the GS Parties are on the service list.[27]

25. The CMI Entities did not include the Shaw Transaction Documents in their motion materials in respect of the Approval Hearing. Disclosure of the full Shaw Transaction Documents, including the key financial terms, was not provided to the service list on the basis, *inter alia,* that it would significantly weaken the ability of Canwest Global to bargain with other potential investors if the Shaw Approval Order was not granted.[28] However, as the CCAA Judge found, all material non-financial terms of the Shaw Transaction were disclosed in the Strike Affidavit.[29] In addition, in its Tenth Report, the Monitor noted that redacted versions of the Shaw Transaction Documents (removing the economic terms of the transaction) would be made available prior to the Approval Hearing to parties who first agreed to appropriate confidentiality and standstill restrictions. These restrictions would apply only until the CCAA court made its determination at the Approval

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26 In the Shaw Approval Order, the CCAA Judge granted the request of the CMI Entities to abridge the time for service of their motion materials (Shaw Approval Order, para. 1, GS Motion Record, Tab 2, p. 9).

27 In fact, in its Tenth Report, para. 34, GS Motion Record, Tab 13, p. 580, the Monitor notes that "Following finalization and service of the CMI Entities' motion materials in connection with their motion to, inter alia, approve the Transaction Agreements and shortly before the Monitor was going to deliver [its] report, the Monitor received correspondence from counsel for the GS Parties wherein the GS Parties raised concerns regarding the equity solicitation process, *the timing of the motion and the length of notice of same given to the GS Parties*" [Emphasis Added.]. See also letter dated February 13, 2010 attached as Appendix "B" to the Tenth Report, GS Motion Record, Tab 13, p. 622.

28 Strike Affidavit, para. 29, GS Motion Record, Tab 10, p. 251-252.

29 Reasons of Pepall J., para. 32, GS Motion Record, Tab 3, p. 31: "The material non-financial terms of the Shaw Definitive Documents were disclosed in the materials before the court but the Definitive Documents themselves were filed on a confidential basis."

Hearing.[30] Accordingly, contrary to the assertion of the GS Parties in their factum,[31] the standstill requirement did not, in any way, prevent the GS Parties from objecting to the approval of the Shaw Transaction. In fact, its stated purpose was to allow the recipient party to "assess the material non-financial terms" of the Shaw Transaction Documents. The standstill would, however, prevent them from preparing a "topping" bid based on information that was not disclosed to those potential investors who actually participated in the Solicitation Process. It was therefore designed to maintain the "level playing field" established in the Solicitation Process. In any event, on February 17, 2010, the CMI Entities provided the GS Parties with an excerpt of provisions contained in the Shaw Transaction Documents that specifically dealt with the treatment of the GS Parties' interests under the Shareholders Agreement.[32]

26. The GS Parties served motion materials objecting to the approval of the Shaw Transaction in the afternoon on February 18, 2010, the day before the Approval Hearing.

27. At 3:38 A.M. on February 19, 2010, the morning of the Approval Hearing, the CMI Entities were served with an affidavit enclosing the Catalyst Term Sheet which, as the CCAA Judge noted, was clearly presented outside the Solicitation Process.[33] The 6-page Catalyst Term Sheet was expressly conditional upon "the completion by legal counsel to Catalyst and agreed to by all applicable parties of documents containing representations and warranties, terms and provisions in each case as are customary of transactions of this type or deemed appropriate by Catalyst for this transaction in particular".[34]

28. The Approval Hearing took place on February 19, 2010. At the commencement of the Approval Hearing, the GS Parties sought a minimum two-week adjournment of the Approval

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30 Monitor's Tenth Report, para. 26, GS Motion Record, Tab 13, pp. 577-578.
31 Factum of the GS Parties, para. 57.
32 Osler letter dated February 17, 2010, Exhibit "D" to the Cardinale Affidavit, GS Parties' Motion Record, Tab 7(d), p. 121.
33 Reasons of Pepall J., paras. 3 and 20, GS Motion Record, Tab 3, p. 21 and 27.

Hearing in order for the Monitor, the CCAA Judge and interested parties to review the terms of the Catalyst Term Sheet. Shaw advised the CCAA Judge, however, that it was not prepared to waive the condition in the Shaw Transaction Documents requiring court approval by February 19, 2010.[35]

29. After hearing the adjournment arguments, the CCAA Judge exercised her discretion to refuse the request of the GS Parties for the adjournment, finding that the "late breaking flurry of activity" was "unnecessary" and that "the mayhem of the moment and the false urgency was largely created by the GS Parties and Catalyst."[36] However, the CCAA Judge did not dismiss the Catalyst Term Sheet out of hand. Instead, she requested that the Monitor prepare a Supplementary Report expressing its views with respect to the Catalyst Term Sheet. In the meantime, the CCAA Judge heard submissions from the parties regarding the motion to approve the Shaw Transaction.

30. The Monitor's Supplementary Report, delivered later that afternoon, indicated that the Monitor's support for the Shaw Transaction was unaffected by the Catalyst Term Sheet. In reaching this conclusion, the Monitor noted, among other things, that the Shaw Transaction had a higher implied equity value than the Catalyst Term Sheet and that the Catalyst Term Sheet would be subject to approval pursuant to a Plan which must be approved by a majority of the CMI Entities' creditors, including the Ad Hoc Committee which holds a blocking vote with respect to any Plan and had indicated that it would not support a Plan based on the Catalyst Term Sheet.[37]

31. Upon receipt of the Supplementary Report, and based on the extensive evidence before her regarding the nature of the Solicitation Process and the benefits of the Shaw

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34 Catalyst Term Sheet, Exhibit "B" to the De Alba Affidavit, GS Parties' Motion Record, Tab 4(b), p. 60. In her Reasons, the CCAA Judge noted that this condition was waived by Catalyst (Reasons of Pepall J., footnote in para. 28).

35 Reasons of Pepall J., para. 5, GS Motion Record, Tab 3, p. 22.

36 Reasons of Pepall J., para. 4 and 31, GS Motion Record, Tab 3, p. 21 and p. 31.

37 The Monitor's Supplement, paras. 11 to 17 and 28, GS Motion Record, Tab 14, pp. 634-636 and p. 639.

Transaction, the CCAA Judge granted the Shaw Approval Order.[38] The specific findings of the CCAA Judge are referred to in greater detail in the next section below.

PART III – ISSUES AND THE LAW

Stringent Test for Leave to Appeal Must Be Satisfied

32. The Ontario Court of Appeal has affirmed the following four-part test in deciding whether leave to appeal should be granted in a CCAA proceeding:

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

(b) whether the point raised is of significance to the proceeding itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.[39]

33. As the Alberta Court of Appeal has held:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.[40]

34. The British Columbia Court of Appeal has advocated an equal degree of caution in considering leave motions under the CCAA:

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one...
> ...

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38 Reasons of Pepall J., para. 7, GS Motion Record, Tab 3, p. 22.

39 *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) at para. 2, Book of Authorities of the Applicants (the "**Applicants' BOA**"), Tab 9, citing *Re Blue Range Resource Corp.* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.) at para. 4, Applicants' BOA, Tab 6.

40 *Re Smoky River Coal Ltd.* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.) at para. 61, Applicants' BOA, Tab 17.

> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the CCAA. I do not say that leave will never be granted in a CCAA proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.[41]

35. The test for leave to appeal under the CCAA has been recognized to be particularly stringent where the order that is to be appealed involved the exercise of discretion of the CCAA judge.[42] This is because the decisions of judges exercising a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference.[43] Furthermore, one of the principal functions of a CCAA judge is to balance the interests of various stakeholders during the reorganization process and it will often be inappropriate to consider an exercise of discretion by the supervising CCAA judge in isolation of other exercises of discretion by the CCAA judge in endeavouring to balance the various interests.[44]

36. This Court has emphasized on numerous occasions that leave to appeal should not be granted unless the Court is satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties."[45] In *Re Air Canada*, this Court affirmed this test in refusing to grant leave to appeal from an order of Farley J. approving an agreement which was the product of an equity solicitation process. In a situation which was very similar to the facts raised on this motion, the Court deferred to Farley J.'s determination that the process followed leading to the selection of the bid was fair and reasonable, and also deferred to his decision not to grant an adjournment to allow consideration of a competing proposal.[46]

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41 *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) at p. 272, Applicants' BOA, Tab 16, cited with approval in *Re Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at para. 8, Applicants' BOA, Tab 5.

42 See, for example, *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 4583 (C.A.) (QL) at para. 2, Applicants' BOA, Tab 14.

43 *Algoma Steel Inc.* v. *Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (C.A.) [*Algoma*] at para. 16, Applicants' BOA, Tab 1.

44 *Re Edgewater Casino Inc.*, 2009 BCCA 40, 51 C.B.R. (5th) 1 at para. 20, Applicants' BOA, Tab 12.

45 *Re Air Canada* (2003), 45 C.B.R. (4th) 163 (Ont. C.A.) [*Air Canada*] at para. 2, Applicants' BOA, Tab 4, citing *Re Country Style Food Services Inc.*, [2002] O.J. No. 1377 (C.A.), 158 O.A.C. 30 at para. 15, Applicants' BOA, Tab 11.

46 *Air Canada*, *ibid.* at para. 9, Applicants' BOA, Tab 4.

37. In *Re Consumers Packaging Inc.*, this Court also denied leave to appeal in very similar circumstances to those raised by the GS Parties in this motion. In that case, this Court was invited to second-guess (i) the determination by a CCAA judge that the debtor had followed a fair and reasonable process in selecting a purchaser for its business; and (ii) the business judgement of the debtor company's board of directors and the monitor with respect to acceptance of the purchaser's bid. This Court stated:

> In our opinion, leave should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly [citation to *Algoma* omitted]. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA.[47]

Catalyst Does Not Have Standing in this Motion

38. In *Re Consumers Packaging*, this Court noted that a "bitter bidder" does not have standing to appeal or seek leave to appeal from orders approving a sale to another bidder. As this Court stated:

> There is authority from this court that an unsuccessful bidder has no standing to appeal or seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order".[48]

39. In this motion, Catalyst is unquestionably a "bitter bidder" and therefore has no standing to make submissions in support of the GS Parties' motion. In fact, it is arguably in an even more tenuous position than the "bitter bidder" referred to in *Re Consumers Packaging.* Catalyst seeks to object to the fairness of a process, the terms of which it initially supported[49], but

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47 *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.) [*Consumers Packaging*] at para. 5, Applicants' BOA, Tab 10.

48 *Consumers Packaging, ibid.* at para. 7, Applicants' BOA, Tab 10, citing *Skyepharma PLC* v. *Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (Ont. C.A.) at paras. 10 and 30, Applicants' BOA, Tab 20.

49 See email from Gabriel De Alba dated December 2, 2009, Exhibit "A" to the De Alba Affidavit, GS Motion Record, Tab 4(a), p. 46.

later declined to participate in and did not challenge until the date of the Approval Hearing[50] and it urges this Court to overturn the Shaw Approval Order, which approves a fully negotiated and documented transaction, in favour of its 6-page term sheet, which was made outside the established process, effectively on the courthouse steps.

40. In addition, as the GS Parties are also equity participants in the proposal framed by the Catalyst Term Sheet (which fact is not disclosed in their factum), this Court should scrutinize their submissions carefully.

Test for Leave Not Satisfied in this Case

41. The CMI Entities submit that the stringent test for leave to appeal is not met in this case and the motion should be dismissed. In particular, and as described in greater detail below:

(a) the GS Parties raise no issue of law that requires resolution by this Honourable Court, let alone any issue that is of significance to the practice. In essence, the GS Parties' complaints involve either the manner in which the CCAA Judge exercised her discretion based on the evidence before her or the manner in which she applied well-established principles of law to the facts of this case;

(b) the proposed appeal will inject considerable uncertainty into, and therefore unduly hinder, these CCAA proceedings which have been operating on the basis of the Support Agreement for over six months, under the oversight of the CCAA Judge, as well as potentially jeopardizing the Shaw Transaction, which is the product of extensive arms's length negotiations following an intensive Solicitation Process; and

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[50] In her Reasons, the CCAA Judge states that she did not find Catalyst's rationale for not participating in the Solicitation Process to be very persuasive (Reasons of Pepall J., para. 32, GS Motion Record, Tab 3, p. 31).

(c) the relief sought by the GS Parties (namely an order requiring the Board and the CMI Entities to negotiate with Catalyst) is unprecedented in Canadian corporate and insolvency law and could not be granted by this Honourable Court without undermining basic principles of corporate law, including deference to the business judgement of a board and special committee, that have been affirmed by both this Court and the Supreme Court of Canada.

A. Proposed Appeal is not of Significance to the Practice and is not "*Prima Facie*" Meritorious

42. The GS Parties cannot point to any real issue of law that must be resolved by this Court. They make a number of allegations that purport to be "legal" in nature but which can be quickly dismissed on the basis that it is abundantly clear that the GS Parties simply want this Court to tell the CMI Entities to accept the Catalyst Term Sheet because that is the proposal that the GS Parties support. Furthermore, all of the allegations discussed below raise issues on which the CCAA Judge would be accorded high levels of deference by this Court.[51] Thus, for example:

(a) the GS Parties allege that the CCAA Court has "fundamentally failed in its duty to ensure Canwest and the Special Committee" seek out and consider all reasonable alternatives for the restructuring of the CMI Entities.[52] However, this is not a legal issue. This is simply a challenge to the determination by the CCAA Judge that, based on all the evidence, including the conduct of the Solicitation Process and the relative merits of the Shaw Transaction and the Catalyst Term Sheet, an adjournment was not warranted and the Shaw Transaction should be approved;

(b) the GS Parties allege that the CCAA Court "utterly failed" in its duty to ensure that basic principles of fair play and due process are respected in these CCAA

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51 *Algoma, supra* at para. 16, Applicants' BOA, Tab 1.

proceedings, objecting that it did not have a fair opportunity to respond to the Approval Hearing.[53] At worst, this allegation is an implicit attack on the integrity of the CCAA Judge in her role as supervisory judge of these CCAA proceedings. At best, this is an attempt to revisit the determination of the CCAA Judge, based on all the evidence before her, that the "late breaking flurry of activity" was "unnecessary", that "the mayhem of the moment and the false urgency was largely created by the GS Parties and Catalyst" and that the GS Parties knew on February 12, 2010 that the Approval Hearing would take place on February 19, 2010;[54]

(c) the GS Parties allege that it was an "error in principle" for the CCAA Judge to fail to adjourn the Approval Hearing to permit consideration of the Catalyst Term Sheet and to permit cross-examinations to be conducted.[55] This is also not a legal issue. The CCAA Judge simply exercised her discretion, based on all the evidence before her, and determined that an adjournment was not appropriate in the circumstances.[56] There is also clear precedent from this Court supporting the view that the integrity of a bidding process should be maintained and that such a process should not be turned into an auction conducted by the CCAA Court on the basis of "late breaking" bids received outside the process;[57]

(d) the GS Parties allege that the CCAA Court had "no evidence that the board of directors of CMI gave any consideration to the Catalyst offer", implying that the

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52 Factum of the GS Parties, para. 72.
53 Factum of the GS Parties, paras. 76 to 79.
54 Reasons of Pepall J., para. 4, 22 and 31, GS Motion Record, Tab 3, p. 20, 28 and 31.
55 Factum of the GS Parties, para. 80. Interestingly, at no time did either the GS Parties or Catalyst request cross-examination of any of the affiants who swore affidavits in support of the motion seeking approval of the Shaw Transaction.
56 Reasons of Pepall J., para. 31, GS Motion Record, Tab 3, p. 31: "Having heard extensive submissions, I decided not to grant the adjournment requested by Catalyst and the GS Parties."
57 *Soundair, infra* at para. 30, Applicants' BOA, Tab 19.

Board somehow breached its fiduciary duties and that the CCAA Court erred in law by approving the Shaw Transaction in the absence of such evidence.[58] This allegation is entirely unsubstantiated by anything in the record before this Court[59];

(e) the GS Parties allege that the CCAA Judge gave insufficient weight to the refusal of Shaw to extend the deadline for court approval of the Shaw Transaction past February 19, 2010, unfairly implying that the CCAA Judge failed to exercise any judgement at all on this issue.[60] The GS Parties ignore the fact that it is entirely within the rights of Shaw to negotiate terms of a deal with Canwest Global that Shaw was prepared to accept. The evidence before the CCAA Judge was clear that the Shaw Transaction was the subject of extensive arm's length negotiations.[61] Shaw advised the CCAA Judge that it did not wish to be a stalking horse in these CCAA proceedings and would not extend the deadline of its offer beyond February 19, 2010. It was the CCAA Judge's function to weigh the risks to the CMI Entities and their stakeholders of not taking Shaw's position at face value, and there is absolutely no basis for asserting that she failed to do so;

(f) the GS Parties make the startling allegation that the Monitor "compromised its business judgement" and delivered a "hastily prepared, incomplete and ill-considered" supplement to its Report to address the Catalyst Term Sheet.[62] There is no basis for these allegations. The CMI Entities submit that there is ample precedent entitling deference to the Monitor's business judgement in proceedings

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58 Factum of the GS Parties, para. 86.

59 In fact, during the Approval Hearing, counsel to the Special Committee advised the Court that the Chairman of the Board had instructed the CMI Entities earlier that morning to proceed to seek approval of the Shaw Transaction, notwithstanding the Catalyst Term Sheet.

60 Factum of the GS Parties, para. 94.

61 Strike Affidavit, para. 28, GS Motion Record, Tab 10, p. 250-251.

62 Factum of the GS Parties, paras. 97 to 100.

such as the Approval Hearing,[63] and that the GS Parties have raised no serious or arguable ground for questioning the weight given by the CCAA Judge to the Monitor's judgement, in accordance with such precedent; and

(g) Catalyst complains that the Solicitation Process "lacked transparency".[64] However, it is clear that Catalyst were aware of the Solicitation Process in December 2009 when Catalyst delivered its Initial Proposal.[65] Neither Catalyst nor the GS Parties availed themselves of any opportunity to challenge the Solicitation Process before the CCAA Court. Furthermore, although Catalyst complains that it had no recourse to the CCAA Court to raise issues about the perceived unfairness in the Solicitation Process prior to the Approval Hearing, this assertion is untrue and was clearly and unequivocally rejected by the CCAA Judge.[66]

43. Certain additional issues raised by the GS Parties and/or Catalyst are addressed in more detail below.

(i) <u>The CCAA Judge Applied the Correct Test</u>

44. The GS Parties allege that the CCAA Judge failed to follow the well-settled tests for Court approval of important transactions in CCAA proceedings. A plain reading of the CCAA Judge's written reasons, however, indicate that this allegation is completely unfounded and that

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63 See for example, *Re Grant Forest Products Inc.* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.) at paras. 18 and 19, Applicants' BOA, Tab 13 (citing *Soundair*, infra), affirming the principle both that the Court should defer to the business judgement of the debtor company's directors and indicating that the views of the Monitor and Chief Restructuring Advisor should be accorded "great weight" and should not lightly be second-guessed.

64 De Alba Affidavit, para. 12, GS Motion Record, Tab 4, p. 42.

65 Exhibit "A" to the De Alba Affidavit, GS Parties' Motion Record, Tab 4(a) p. 46. A description of the Solicitation Process was also contained in the Affidavit of John E. Maguire sworn January 18, 2010 in relation to the CMI Entities' motion returnable on January 21, 2010 seeking to extend the stay period in these CCAA proceedings, Responding Motion Record, Tab 2, pp. 30-31.

66 Reasons of Pepall J., para. 32, GS Motion Record, Tab 3, p. 31: "Catalyst opted not to participate in RBC's and the CMI Entities' process. I do not find Catalyst's rational for not having done so to be very persuasive. <u>I do not accept that it had no recourse to address process</u>. ..." (emphasis added).

the real complaint of the GS Parties is that they do not like the results of the CCAA Judge's application of the tests to the evidence.

45. The four-part test articulated in *Royal Bank v. Soundair Corp.*[67] has long been accepted in the jurisprudence as applicable in the context of a sale of assets by a receiver, and has been accepted on numerous occasions as the appropriate test for a CCAA judge to apply to the sale of assets and similar transactions in a CCAA proceeding. The *Soundair* test requires the Court to consider: (a) whether the debtor has made sufficient effort to get the best price and has not acted improvidently; (b) the interests of all parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the working out of the process.[68]

46. Recently, in a decision in the Nortel CCAA proceeding involving the going-concern sale of part of the debtor's business, the Ontario Superior Court of Justice raised several additional factors that might be considered, including: (a) is a sale transaction warranted at this time?; (b) will the sale benefit the whole "economic community"?; and (c) is there a better viable alternative?[69]

47. Despite the fact that the CMI Entities invited the CCAA Judge to apply a more general test based on "fairness and reasonableness" to the approval of an equity investment,[70] she expressly declined to do so, indicating that the stricter *Soundair* test was more appropriate:

> The cases referred to by counsel did not deal with equity solicitations. Given the nature and extent of the equity solicitation in this case, it seems to me that a fair and reasonable test is too limited and the principles in *Soundair* are more appropriate. To these principles I would add that the court should consider the position of the Monitor. This is a factor to be considered when approval of an asset sale outside the ordinary course of business is sought pursuant to s. 36 of

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67 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) [*Soundair*], Applicants' BOA, Tab 19.

68 *Soundair, ibid.* at para. 16, Applicants' BOA, Tab 19, cited at para. 34 of the Reasons of Pepall J.

69 *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.) [*Nortel*] at para. 49, Applicants' BOA, Tab 15, cited at para. 35 of the Reasons of Pepall J.

70 This invitation is acknowledged by the CCAA Judge: see Reasons of Pepall J. at para. 33, GS Motion Record, Tab 3, p. 31.

> the CCAA. In my view, this is a useful factor to consider in the circumstances such as those before me in this case.[71] [emphasis added.]

48. The GS Parties argue that there is an issue of law with respect to whether certain additional factors that were considered by the CCAA Court in *Re Nortel Networks*[72] should have been held to be applicable by the CCAA Judge. However, no issue of law requiring resolution by this Court arises in this regard. The CCAA Judge expressed the view that the *Nortel* factors do not add anything to the *Soundair* test because they are effectively subsumed under it,[73] which is apparent from a common-sense reading of the *Nortel* factors in light of the *Soundair* factors. More importantly, however, the CCAA Judge concluded that even if the *Nortel* factors should also be considered, she was of the view that both the *Soundair* factors and the *Nortel* factors had been met on the facts.[74]

49. The CCAA Judge therefore granted the Shaw Approval Order based on the strictest test for fairness set out in the case law – the test that was the most favourable to the GS Parties and Catalyst. Even on this test, taken at its highest, she concluded based on the evidence before her that the Solicitation Process was fair and reasonable, and that the Shaw Transaction should be approved. There is no legal issue to resolve here and therefore this point is of no significance to the practice and the appeal is not *prima facie* meritorious.

50. At best, the GS Parties are asking this Court to re-weigh the evidence and factors considered by the CCAA Judge in determining, in her view, that the tests had been satisfied. In this regard, the CCAA Judge made the following critical findings of fact, all of which would have to be "second-guessed" by this Court in order to grant the relief sought by the GS Parties:

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71 Reasons of Pepall J., para. 36, GS Motion Record, Tab 3, pp. 32-33.
72 *Nortel, supra* at para. 49, Applicants' BOA, Tab 15.
73 Reasons of Pepall J., para. 36, GS Motion Record, Tab 3, pp. 32-33.
74 Reasons of Pepall J., para. 36, GS Motion Record, Tab 3, pp. 32-33: "...even if I were to consider the *Nortel* process approval factors, I would reach the same conclusion."

(a) "It is clear that the CMI Entities did make a sufficient effort to obtain the best offer."[75]

(b) There was nothing stopping the GS Parties and Catalyst from either challenging the Solicitation Process or participating in it at an earlier stage.[76]

(c) "RBC fully canvassed the market. It is unnecessary for the court to be given the identity of the prospective investors in the face of the overwhelming evidence of an extensive market canvas."[77] (emphasis added)

(d) The interests of all parties were considered.[78]

(e) "There was a fair and thorough canvass of the market and a level playing field."[79]

(f) There was a reasonable basis for the support of the Shaw Transaction by the Monitor, the Special Committee, the Board, the CMI CRA and the Ad Hoc Committee due to (i) Shaw's experience in the media industry, (ii) financing not being an issue; (iii) the substantial amount of the Shaw offer; and (iv) the higher implied equity value of the Shaw Transaction in comparison to the Catalyst Term Sheet.[80]

(ii) Interests of the GS Parties Unaffected

51. One of the CCAA Judge's key findings of fact was that the interests of the GS Parties are not materially affected by the approval of the Shaw Transaction Documents.[81] This finding was amply supported by the evidence before the CCAA Judge. The CCAA Judge concluded that:

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75 Reasons of Pepall J., para. 42, GS Motion Record, Tab 3, p. 35.
76 Reasons of Pepall J., para. 42, GS Motion Record, Tab 3, p. 35.
77 Reasons of Pepall J., para. 42, GS Motion Record, Tab 3, p. 35.
78 Reasons of Pepall J., para. 43, GS Motion Record, Tab 3, p. 35.
79 Reasons of Pepall J., para. 44, GS Motion Record, Tab 3, p. 36.
80 Reasons of Pepall J., para. 45, GS Motion Record, Tab 3, p. 36.
81 Reasons of Pepall J., para. 43, GS Motion Record, Tab 3, p. 35.

(a) the GS Parties are in no worse position with respect to the Shareholders Agreement as a result of the Shaw Transaction;

(b) the GS Parties are not creditors;

(c) the Shaw Transaction Documents provide for the parties to enter into good faith negotiations to effect a consensual amendment to the Shareholders Agreement; and

(d) the Ad Hoc Committee and the CMI Entities can pursue an agreement to amend the Shareholders Agreement with the GS Parties that is not agreed to by Shaw.[82]

52. The Shaw Transaction Documents are clear that the CMI Entities are not required to pursue a disclaimer of the Shareholders Agreement.[83] In this regard, the position of the GS Parties before and after the granting of the Shaw Approval Order is exactly the same.

53. The Monitor has noted that a resolution of the outstanding issues with the GS Parties with respect to the Shareholders Agreement, whether through amendment or other means, is a material condition of the CMI Entities' successful emergence from CCAA protection on a going concern basis, whether pursuant to the original Recapitalization Term Sheet or the proposed Shaw Transaction.[84] This situation has not changed, and in fact, would not change even if the approval of the Shaw Transaction were overturned.

54. In short, therefore, the GS Parties have raised no serious or arguable grounds for disputing the CCAA Judge's determination that their interests were unchanged by the approval of the Shaw Transaction.

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82 Reasons of Pepall J., para. 43, GS Motion Record, Tab 3, p. 35.
83 Strike Affidavit, para. 52, GS Motion Record, Tab 10, p. 261.
84 Tenth Report of the Monitor, para. 31, GS Motion Record, Tab 13, p. 579.

(iii) Lack of "Fiduciary Out"

55. Catalyst raises an additional "legal" issue with respect to the lack of a "fiduciary out" clause in the Shaw Transaction Documents. By this term, Catalyst is referring to a clause allowing the Board to consider a superior proposal to the Shaw Transaction if the Board considers it in the best interest of the CMI Entities. To the extent that Catalyst has any standing to raise this issue at all, which the CMI Entities dispute, Catalyst raises no serious and arguable grounds on which this Court could grant leave to appeal on this issue.

56. It is ironic that Catalyst takes the position that the Shaw Transaction could not be "fair" in the absence of a "fiduciary out" clause, given that the Catalyst Term Sheet also did not contain a "fiduciary out" clause. This fact was expressly noted by the CCAA Judge.[85] By Catalyst's own logic, if the Shaw Transaction is unfair due to the lack of a "fiduciary out", the Catalyst Term Sheet is equally unfair. Furthermore, the CCAA Judge clearly weighed the fairness of the Shaw Transaction taking into account the lack of a "fiduciary out" clause. She noted that "ideally" a "fiduciary out" would not have been negotiated away. However, she went on to conclude that:

> this did not constitute unfairness in the working out of the process or a lack of efficacy or integrity in the process. The evidence before me suggests that there were good faith efforts made by RBC, the CMI Entities and the Ad Hoc Committee to maintain that provision, but Shaw successfully negotiated for its omission. On balance, all of them were of the view that the merits of the Shaw Transaction outweighed the benefit of insisting on the inclusion of the fiduciary out provision.[86]

57. The CCAA Judge followed well-established principles of law in giving weight to the support of the Monitor, the Special Committee, the Board and the CMI CRA in reaching her

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85 Reasons of Pepall J., para. 44, GS Motion Record, Tab 3, p. 36.
86 Reasons of Pepall J., para. 44, GS Motion Record, Tab 3, pp. 36.

determination, based on all the evidence, that the lack of a "fiduciary out" did not affect the fairness of the Shaw Transaction.[87]

58. Catalyst can point to no requirement of law that a "fiduciary out" must be included in a transaction such as the Shaw Transaction in order for such a transaction to be fair and to be consistent with the fiduciary obligations of a corporate board of directors. This Court's decision in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, which is cited by Catalyst on this issue, recognizes the utility of a "fiduciary out" clause in enabling directors to comply with their fiduciary duties.[88] Even Catalyst, however, is forced to recognize that this Court rejected the argument that there could be no limit on the ability of directors to consider superior proposals.[89] This is an understandable concession, in light of the lack of a "fiduciary out" in the Catalyst Term Sheet.

59. There is no basis for revisiting this Court's analysis in *Ventas*, nor is there any sense in which Catalyst could successfully argue that the principles in *Ventas* have been violated. Quite simply, the CCAA Judge noted the utility of a "fiduciary out" but was satisfied that the Board had obtained the best offer in the circumstances through the Solicitation Process despite the absence of a "fiduciary out." This is entirely consistent with the principles articulated in *Ventas* and therefore is of no significance to the practice and raises no *prima facie* ground of appeal, let alone a serious and arguable ground.

B. Appeal Will Unduly Hinder the Progress of the Restructuring

60. The approval of the Shaw Transaction was recognized by the CCAA Judge as the accomplishment of a "major objective" underpinning the original CCAA filing.[90] If the GS Parties are successful in obtaining leave to appeal, considerable uncertainty in the restructuring of the

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87 See *eg. Grant Forest, supra*, Applicants' BOA, Tab 13.

88 (2007), 85 O.R. (3d) 254 (C.A.) [*Ventas*] at para. 53, Applicants' BOA, Tab 21.

CMI Entities will be generated, to the potential detriment of all stakeholders of the CMI Entities. Furthermore, if successful on appeal, the GS Parties propose to reopen the Solicitation Process and recommence negotiations with a view to concluding a deal based on the Catalyst Term Sheet, thereby creating further delay and uncertainty, to the potential prejudice of the CMI Entities and their stakeholders. There is no guarantee that such negotiations would be successful. Moreover, without the support of the Ad Hoc Committee for the Catalyst Term Sheet – which was stated at the Approval Hearing not to be forthcoming – such a course of action would jeopardize the ability of the CMI Entities to restructure their businesses at all.

61. It is all very well for the GS Parties to assert that the CMI Entities have "sufficient liquidity" to operate their businesses, and that the relief sought by the GS Parties will not unduly hinder these CCAA proceedings.[91] The GS Parties simply ignore the fact that the only reason that the CMI Entities have sufficient liquidity to continue operating is because of the financial support of the 8% Noteholders.[92]

C. Relief Sought by GS Parties is Contrary to Law

62. Finally, the GS Parties request that this Court grant an order "Directing Canwest and its officers and directors to negotiate a subscription agreement with Catalyst consistent with the Catalyst Offer."[93] Such an order would be unprecedented in Canadian corporate or CCAA law. It would violate the fundamental tenet that a decision with respect to whether to accept a particular equity investment transaction (absent the CCAA) is a business decision to be made in the business judgement of a board of directors. Even if the Court disagrees with the informed business judgement of a corporate board of directors, the law is clear that the Court will not substitute its

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89 *Ventas, ibid.* at para. 54, Applicants' BOA, Tab 21.
90 Reasons of Pepall J., para. 45, GS Motion Record, Tab 3, pp. 36.
91 Factum of the GS Parties, para. 126.
92 See Use of Cash Collateral and Consent Agreement, GS Motion Record, Tab 7(g).
93 Factum of the GS Parties, para. 128.

own judgement for the judgement of the board.[94] In this case, the decision of the Board is subject to CCAA Court approval because of these CCAA proceedings, but the underlying role of the Board is not abrogated.

63. As this Court has recently held:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. ... Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.[95] (italics in original, underlining added)

64. Effectively, the GS Parties ask this Court to substitute its judgement not only for the business judgement of the Board and the Special Committee, but also for the business judgement of the Monitor and the CMI CRA, all of whom expressed support for the Shaw Transaction and not the Catalyst Term Sheet. There is no basis anywhere in either CCAA or corporate law on which such an Order could be made.

PART IV – NATURE OF THE ORDER SOUGHT

65. For all of the reasons above, the CMI Entities submit that the test for leave to appeal is manifestly not satisfied. Leave to appeal should therefore be denied with costs.

L. Barnes per ST
Lyndon A.J. Barnes

Jeremy Dacks per SL
Jeremy E. Dacks

Shawn T. Irving

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94 *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461 at paras. 64 to 67, Applicants' BOA, Tab 3 , citing *Maple Leaf Foods Inc.* v. *Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.), Applicants' BOA, Tab 2.

95 *Re Stelco Inc.*, (2005), 75 O.R. (3d) 5 (C.A.) at para. 44, Applicants' BOA, Tab 18.

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)
18. CGS International Holdings (Netherlands)
19. CGS Debenture Holding (Netherlands)
20. CGS Shareholding (Netherlands)
21. CGS NZ Radio Shareholding (Netherlands)
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"

List of Authorities

1. *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (C.A.)
2. *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.)
3. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461
4. *Re Air Canada* (2003), 45 C.B.R. (4th) 163 (Ont. C.A.)
5. *Re Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.)
6. *Re Blue Range Resource Corp.* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.)
7. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7882 (Ont. S.C.J.) (WL)
8. *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 (QL)
9. *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.)
10. *Re Consumers Packaging, Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
11. *Re Country Style Food Services Inc.* (2002), 158 O.A.C. 30
12. *Re Edgewater Casino Inc.*, 2009 BCCA 40, 51 C.B.R. (5th) 1
13. *Re Grant Forest Products Inc.* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.)
14. *Re Muscletech Research and Development Inc.*, [2006] O.J. No. 4583 (C.A.) (QL)
15. *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)
16. *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.)
17. *Re Smoky River Coal Ltd.* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.)
18. *Re Stelco Inc.*, (2005), 75 O.R. (3d) 5 (C.A.)
19. *Royal Bank v. Soundair Corp* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)
20. *Skyepharma plc v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (Ont. C.A.)
21. *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.)

Schedule "D" - Statutory References

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

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Court of appeal

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or

she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

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: M38600

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

RESPONDING FACTUM OF THE APPLICANTS
(Motion for Leave to Appeal)

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