Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the Other Applicants

[2010] O.J. No. 789

2010 ONSC 1176

64 C.B.R. (5th) 221

186 A.C.W.S. (3d) 19

2010 CarswellOnt 1077

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

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 1, 2010.

(47 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Proposals -- Monitors -- Reports -- Application by protected company for approval of subscription process with bidder, related documents and ancillary relief allowed -- Cross-application by opponents for adjournment dismissed -- Monitor supported bid, which was determined to be best received in equity solicitation process -- Opponents were a party to shareholder agreement and a private equity firm which made last-minute proposal -- Monitor stated that support was unaffected by opponents and adjournment could put bid at risk -- Opponents chose not to participate in process -- Clear effort made to obtain best offer; bid in interests of relevant parties.

Application by the protected company for approval of the subscription process between the bidder and the restructured company, related documents and ancillary relief. Cross-application by the opponents for an adjournment. The applicant had filed for protection with the intention to pursue a recapitalization transaction. The Monitor was in support of the bid that the applicant sought approval of. The opponents were a party to the shareholder agreement and a private equity firm that submitted a last-minute proposal to increase its equity. After the last-minute proposal was submitted, the Monitor submitted a supplementary report that stated it support for the bid was unaffected by the opponent's proposal, the bid had higher equity value and the opponent's proposal would not be agreed to by the creditors. The opponents argued that an adjournment was required to properly consider their arguments.

HELD: Application allowed. Cross-application dismissed. There was no meeting of the minds between the opponents and the applicant's ad hoc committee, nor were the opponents creditors. The opponents had waited until the last minute to file materials that could have been filed earlier. Furthermore, the opponents had opted not to participate in the equity solicitation process and granting an adjournment could put the bid at risk. The bid had been obtained through clear efforts to obtain the best offer. The bid was in the best interests of all relevant parties and had reasonable support.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. 36, s. 36

Counsel:

Lyndon Barnes, Jeremy Dacks and Shawn Irving, for the CMI Entities.

Mario Forte, for the Special Committee of the Board of Directors.

David Byers and Maria Konyukhova, for the Monitor, FTI Consulting Canada Inc.

Hilary Clarke, for the Administrative Agent of the Senior Secured Lenders' Syndicate.

Benjamin Zarnett and Logan Willis, for the Ad Hoc Committee of Noteholders.

Robin B. Schwill and Vincent A. Mercier, for Shaw Communication Inc.

Kevin McElcheran and Malcolm Mercer, for the GS Parties.

Gavin Finlayson and S.R. Orzy, for Catalyst Capital Group Inc.

Edmond Lamek, for Leonard Asper et al.

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, for Canwest Retirees/ Canadian Media Guild.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 When the CMI Entities filed for *Companies' Creditors Arrangement Act*[1] protection, their stated intention was to pursue a recapitalization transaction. The anticipated plan of arrangement or compromise would implement the recapitalization transaction and creditors compromised, including the 8% Senior Subordinated Noteholders, would receive shares in a restructured Canwest Global Corporation Corp. ("Canwest Global"). To that end, in November, 2009, the CMI Entities commenced an equity solicitation process. RBC Capital Markets ("RBC") assisted them with that process. The extensive process resulted in a bid from Shaw Communications Inc. ("Shaw") that was acceptable to the CMI Entities and others. The CMI Entities now seek approval of the subscription agreement dated February 11, 2010 between Shaw and Canwest Global and other related documents (the "Shaw Definitive Documents") and other ancillary relief. The approval motion was served on February 12, 2010 returnable February 19, 2010. If not approved by the court, the Shaw bid expired on February 19, 2010. The Monitor served its 10th Report on February 14, 2010. In its Report, the Monitor expressed support for the relief requested by the CMI Entities.

2 A condition of completion of the Shaw transaction is amendment or disclaimer of the CW Investments Shareholders' Agreement to which GS Capital Partners VI Fund L.P. and its affiliates (collectively the "GS Parties") and Canwest Media Inc. ("CMI") are parties. The GS Parties oppose any such amendment or disclaimer.

3 The GS Parties served materials opposing the relief sought in the late afternoon of February 18, 2010. In addition, in the wee hours of the morning of February 19, 2010 (3:38 a.m. to be exact according to the Monitor), counsel for Catalyst Capital Group Inc. ("Catalyst") served an affidavit enclosing a competing bid to that of Shaw. The Catalyst bid required no amendment or disclaimer of the CW Investments Shareholders' Agreement and was supported by the GS Parties.

4 Given the afternoon and twilight hour service of the GS Parties' and Catalyst materials, the CMI Entities and the Ad Hoc Committee of 8% Senior Subordinated Noteholders ("the Ad Hoc Committee") then responded with service of numerous affidavits and materials of their own including an affidavit of Richard Grudzinski of RBC and a factum from the CMI Entities. These were emailed to the court commencing at about 5:30 the morning of the motion. Such was the state of play when court commenced at 10 o'clock. Some might call this real time litigation; others

surreal time litigation. In my view, this late breaking flurry of activity was unnecessary.

5 Perhaps not surprisingly, the GS Parties and Catalyst requested an adjournment of the CMI Entities' approval motion for at least two weeks. The adjournment would allow the Monitor, the court and interested parties to review the terms of the Catalyst proposal with a view to determining whether the terms contained therein were superior to the terms of the Shaw subscription agreement. The CMI Entities, the Special Committee, the Ad Hoc Committee and Shaw all opposed the adjournment request. The Monitor took no position. I heard extensive argument on the request for an adjournment[2]. As mentioned, the Shaw bid was conditional on court approval by February 19, 2010, the date of the hearing. Shaw was not prepared to extend its deadline. The issue was expressly raised with Shaw in court but Shaw maintained its position. I refused the adjournment request but in the absence of evidence of the Monitor's position, asked the Monitor to provide evidence on its position with respect to the Catalyst proposal. Counsel could then make inquiries and submissions once the Monitor had done so. In a certain sense, so-called real time litigation begets more real time litigation.

6 The Monitor proceeded to prepare a supplementary Report. Perhaps in keeping with the subject matter of this CCAA proceeding, the supplementary Report contained more "late breaking news" including correspondence from Quebcor Media Inc. to the effect that it would be prepared to consider an alternative proposal if the solicitation process was reordered and transparent.

7 Following receipt of the Monitor's supplementary Report and completion of argument, I granted the relief requested with reasons to follow. These are they.

8 I do not propose to embark on a review of the history of the CMI Entities' CCAA proceeding nor the players all of which has been discussed in detail in past decisions. By way of introduction, it will be recalled that the CMI Entities entered into a Support Agreement with members of the Ad Hoc Committee and that Agreement had attached to it the Restructuring Term Sheet that set out the summary terms and conditions of a consensual recapitalization transaction. The Support Agreement provided that the CMI Entities would pursue a Plan on the terms set out in the Restructuring Term Sheet in order to implement the recapitalization transaction as part of the CCAA proceeding. An equity investment of at least $65 million was to be pursued. This brings me to the equity solicitation process.

Equity Solicitation

9 On November 2, 2009, RBC commenced the equity solicitation process to identify potential new investors. They had to be Canadian so as to satisfy the ownership requirements that apply to parent corporations of a corporation that is in receipt of a television license from the Canadian Radio-Television and Telecommunications Commission. It was contemplated that the new investment would amount to at least $65 million. The process was run by RBC, not the Monitor, although the Monitor did receive periodic updates during the process. RBC had been working with Canwest Global since December 10, 2008, and therefore had developed detailed and intimate

knowledge of the business of the CMI Entities.

10 The process proceeded in two phases. In the first phase, RBC contacted about 90 potential investors to inquire whether they would be interested in making a minimum 20% equity investment. During the course of initial discussions with potential investors, it was recognized that alternative proposals would be considered. The list of potential investors included both strategic and financial investors and qualified high net worth individuals in Canada and was generated by RBC through its own internal sources and in consultation with the CMI Entities, the CMI CRA, and the Ad Hoc Committee. 52 potential investors expressed interest and were sent "teaser" documents. These included an overview of the investment opportunity and a form of non-disclosure agreement ("NDA") to sign. According to Mr. Grudzinski of RBC, the form of NDA was standard for a process such as this equity solicitation and restrictions on discussions with entities involved in the business are commonplace. Ultimately, 22 potential investors executed NDAs, a take up Mr. Grudzinski viewed as being generally in line with similar investment processes. They then received a more comprehensive confidential information memorandum and access to an internet-based data room containing further confidential information. Those investors were then invited to submit non-binding proposals along with a markup of a proposed equity investment term sheet by December 2, 2009. By that date, six potential investors had submitted initial proposals, five of whom were invited to participate in phase two of the process.

11 Catalyst, a private equity firm specializing in investments in distressed companies, submitted a commitment letter on December 2, 2009. It reflected a $65 million investment representing 25% of the total equity of a restructured Canwest Global. Catalyst was prepared to increase the equity investment up to $165 million for an additional pro rata equity percentage acceptable to Catalyst in conjunction with potential transactions related to CW Investments Co. The cover email described the spirit of the deal as being "a fully funded, fully executable proposal in order to get the Estate out of insolvency protection as soon as possible" and that its transaction had "no due diligence requirement, no financing conditions and no CW Investments Co. condition." This latter reference presumably referred to the CW Investments Shareholders' Agreement with the GS Parties. The commitment was also stated to be in accordance with the Support Agreement negotiated between the CMI Entities and the Ad Hoc Committee. The cover e-mail enclosing the commitment letter stated: "We also understand and adopt 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." The proposal was to be considered withdrawn if Catalyst had not received an executed counterpart to the commitment letter by December 8, 2010.

12 Catalyst had not executed an NDA. Gabriel De Alba of Catalyst states that notwithstanding Catalyst's attempts to open a dialogue with RBC, its proposal expired and other than an acknowledgement of receipt, Catalyst was not contacted.

13 On December 21, 2009, Mr. Grudzinski of RBC advised Catalyst that it would not be permitted to participate further in the process unless it executed an NDA. Catalyst states that it

would not agree to this for two reasons. Firstly, its proposal was not conditional on due diligence and as it did not need confidential information, there was no reason for it to execute an NDA. Secondly, the NDA included "offensive and problematic provisions that did not appear appropriate as conditions precedent to submitting a bid including one that would have precluded Catalyst from having discussions with a number of parties, including the GS parties. Given the GS parties' importance to any deal involving Canwest Global, that provision was highly inappropriate in this context and would have severely limited the ability of Catalyst" ... "to complete a transaction."

14 RBC commenced phase two shortly after receipt of the non-binding initial proposals. As part of phase two, RBC and the senior management team of CMI Entities met with and provided each phase two participant with a detailed management presentation and confidential information and ongoing access to business and legal due diligence sessions. RBC also advised the phase two participants that they would have the opportunity to meet with members of the Ad Hoc Committee before submitting their proposals. One of the five participants withdrew. On January 20, 2010, RBC advised the remaining four that formal binding offers were required by January 27, 2010, and provided them with a proposed equity subscription agreement and attached term sheet. RBC also advised the phase two participants of criteria Canwest Global and RBC would consider in evaluating offers. These included confirmation that the proposed investor would be willing to proceed with its investment on the basis that the CW Shareholders' Agreement with the GS Parties would be amended on terms acceptable to the proposed investor.

15 Two bids were received by January 27, 2010, and RBC and the CMI Entities had discussions with those bidders.

16 Mr. De Alba of Catalyst states that Catalyst directly and through counsel complained to RBC about the process. He states that because the process was not being overseen by the court, Catalyst had no recourse until the next time the process was referred to the court which was this motion.

17 Ultimately, the CMI Entities selected Shaw's bid as the best overall offer received. The bid contemplates that:

- Canwest Global will be a private company the shareholders of which will be Shaw or its subsidiary and those noteholders and other creditors who elect to receive equity shares and who would hold at least 5% of the equity shares following completion of the transaction.
- Creditors holding less than 5% of the equity shares on completion of the recapitalization transaction (the "non-participating creditors") and existing shareholders would receive cash to extinguish their interests to be effected pursuant to the Plan. The cash the non-participating creditors would receive would be equal to the value of the equity they would have received under the originally proposed recapitalization transaction but using the higher implied equity value contained in Shaw's bid.

- Shaw will subscribe for Class A voting shares representing a 20% minimum equity subscription in the capital of a restructured Canwest Global and an 80% voting interest. A portion of the proceeds will be distributed to the noteholders pursuant to the Plan in partial payment of the secured intercompany note and the balance will be for working capital purposes.
- In addition to this amount, Shaw would subscribe for an additional commitment of shares at the same price per share to fund the cash payments to the non-participating creditors and the existing shareholders subject to the right of members of the Ad Hoc Committee to elect to participate *pro rata* with Shaw in funding this additional commitment.
- Shaw meets the Canadian requirement, has adequate financial resources on hand to complete the recapitalization transaction, and there are no financing conditions in favour of Shaw.
- A $5 million termination fee may be paid by Canwest Global to Shaw in certain circumstances. It is payable in the event that the Shaw subscription agreement is terminated by Shaw if the closing has not occurred on or before August 11, 2010, solely because of a failure to satisfy certain closing conditions. It is also payable if the agreement is terminated by Canwest Global prior to the implementation of the recapitalization transaction in order to enter into a definitive amendment and restatement of the CW Investment Shareholders' Agreement with the GS Parties that is acceptable to both Canwest Global and the Ad Hoc Committee but that is not acceptable to Shaw. In the event that a termination event has occurred, the Shaw subscription agreement provides that in addition to the termination fee, Canwest Global will reimburse Shaw in an amount of up to $2.5 million for any out-of-pocket fees and expenses relating to negotiation of the transaction. The subscription agreement contemplates that the termination fee and expense reimbursement fee will be secured by a charge over all of the assets, property and undertaking of the CMI Entities ranking after the existing charges.

18 RBC advised the CMI Entities that the bid submitted by Shaw was the best overall offer received considering various criteria. The bid provided significant value to Canwest Global in exchange for the equity investment, gave affected creditors the opportunity to get cash rather than shares, and provided a long-term solution and stability for a restructured Canwest Global through the involvement of a strategic investor with significant experience in the media industry.

19 The Special Committee of the Board of Directors of Canwest Global considered the bids having regard to the best interests of Canwest Global and recommended for approval the Shaw Definitive Documents to the Board of Directors of Canwest Global. The Board provided approval. All of the CMI Entities' senior management, the CMI CRA, and the Ad Hoc Committee supported

the entering into of the Shaw Definitive Documents.

20 Catalyst's late February 19, 2010 offer arose outside the process adopted by RBC and the CMI Entities. Catalyst's bid this time was stated to contemplate a fully funded unconditional investment of $120 million representing 32% of the total equity of a restructured Canwest Global. The proposal again did not require any amendment or disclaimer of the CW Investments Shareholders' Agreement.

21 In court on February 19, 2010, counsel for the CMI Entities, the Special Committee and the Ad Hoc Committee all expressed continued support for the Shaw Definitive Documents. Counsel for the Monitor advised that the CMI CRA also was in favour. In addition, an affidavit of Mr. Grudzinski of RBC was filed stating, amongst other things, that the Shaw transaction represented the best transaction available to Canwest Global in the circumstances. 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. The CMI Entities were of the view that disclosure would be extremely detrimental if the approval order was not provided.

Absence of Standstill Agreement

22 There had been recent without prejudice negotiations between the Ad Hoc Committee and the GS Parties. The GS Parties thought that the negotiations were subject to a standstill agreement which provided that absent seven days' notice, neither the Ad Hoc Committee nor the GS Parties would initiate or encourage any other person including Canwest Global to initiate any proceeding with respect to the insolvency proceeding of Canwest Global. Negotiations between the GS Parties and the Ad Hoc Committee were ongoing when the GS Parties were served with the CMI Entities' motion on February 12, 2009. In argument, counsel for the GS Parties did not press this point. It appeared from the materials filed by counsel for the Ad Hoc Committee that due to a computer glitch, agreement was not reached on any seven day standstill. It is fair to conclude from all of the evidence on this issue that firstly, the Ad Hoc Committee had not agreed to a seven day standstill and secondly, the GS Parties reasonably believed that it had. In any event, the GS Parties knew by February 12, 2010 that the CMI Entities were seeking approval of the Shaw Definitive Documents on February 19, 2010.

Monitor's 10th Report

23 The Monitor reported extensively on the Shaw transaction in its 10th Report. Dealing firstly with the subject of the CW Investments Shareholders' Agreement, the Monitor noted that Shaw, Canwest Global, and the Ad Hoc Committee had agreed to jointly pursue in good faith an amendment to the CW Investments Shareholders' Agreement with the GS Parties and to cooperate with each other in those negotiations. The Monitor also observed that a resolution of outstanding issues with the GS Parties is a material condition of the CMI Entities' successful emergence from CCAA protection on a going concern basis and that the introduction of other stakeholders may be a complicating factor.

24 Secondly, the Monitor stated that RBC had circulated to phase two participants a proposed form of subscription agreement that contained a fiduciary out provision that would allow Canwest Global to accept an offer that it determined in good faith to be superior to the offer submitted by the winning bidder and, following payment of a $2.5 million topping fee, be released from its obligations to the winning bidder under the subscription agreement. The Monitor observed that the Shaw subscription agreement did not include this fiduciary out provision.

25 The Monitor reported that the Shaw transaction if completed would satisfy one of the major requirements of the original recapitalization transaction, assist with the CMI Entities' successful emergence from CCAA protection, and allow them to continue operating on a going concern basis thereby preserving, *inter alia*, enterprise value for their numerous stakeholders.

26 The Monitor concluded by stating that it supported approval of the transaction agreements reflecting the Shaw proposal. At the time of the filing of the 10th Report, the February 19, 2010, Catalyst proposal had of course not yet been received by the Monitor.

Monitor's Supplementary Report

27 In its supplementary Report, the Monitor stated that its support of the Shaw transaction was unaffected by the Catalyst proposal.

28 The Monitor observed that the Shaw subscription agreement including the amount of the proposed equity investment had a higher implied equity value than did the Catalyst proposal. On the other hand, the Catalyst proposal did not require an amendment or disclaimer of the CW Investments Shareholders' Agreement which is a condition of the Shaw transaction. The Monitor noted that the Catalyst proposal was subject to the negotiation and entering into of definitive documentation.[3] The Catalyst proposal was subject to approval pursuant to a Plan which must be approved by the majority of the CMI Entities' creditors and the Ad Hoc Committee had informed the Monitor that it would not support any Plan that included Catalyst's proposal. The Monitor noted that no Plan can be approved by the creditors of the CMI Entities without the support of the Ad Hoc Committee because, amongst other things, it holds a blocking vote. The GS Parties have stated that the amount of their claim that would result from any disclaimer would result in the GS Parties holding a blocking vote in any vote on the Plan proposed by the CMI Entities. No request for the Monitor's consent to a disclaimer has been forthcoming and the Monitor was not in a position to estimate the quantum of any such claim by the GS Parties. The Monitor also reported that the Ad Hoc Committee disagrees with the GS Parties' assessment in this regard.

29 The Monitor also reported on the concerns it had expressed about the removal of the fiduciary out provision in the Shaw subscription agreement. Although each of the Ad Hoc Committee, RBC and the CMI Entities had used their best efforts to include such a provision in the Shaw subscription agreement, Shaw had refused to include such a provision. In spite of its absence, RBC, the CMI Entities' Board of Directors, the Special Committee and the Ad Hoc Committee all concluded that the Shaw subscription agreement was the best that had resulted from the process. The form of

subscription agreement with a fiduciary out provision was only provided to the four phase two participants so there could be no suggestion of reliance on same by Catalyst or the GS Parties. The Monitor noted Mr. Grudzinski's representation that the potential market for Canadian equity investors to invest had been fully canvassed. The Monitor also observed that the NDA requested to be executed by potential bidders was customary for an equity solicitation process. In spite of these factors, the Monitor continued to be supportive of the Shaw Definitive Documents.

Issues

30 The issues for me to consider were:

a) Should I grant the adjournment requested?
b) What is the applicable legal test for approval of the Shaw Definitive Documents?
c) Should I approve the Shaw Definitive Documents and the request for ancillary relief?

Adjournment

31 Having heard extensive submissions, I decided not to grant the adjournment requested by Catalyst and the GS Parties. Firstly, it was clear from the evidence before me that there was no meeting of the minds with respect to any standstill agreement between the GS Parties and the Ad Hoc Committee. As such, the Ad Hoc Committee was not obliged to give seven days' notice before the CMI Entities brought the approval motion. I also note that legitimately, counsel for the GS Parties did not press this argument. While the GS Parties might reasonably have believed that there was a seven day standstill, once the materials were served on February 12, 2010, it was obvious that at least one party did not consider itself bound to any such agreement. Inexplicably, the GS Parties waited until the afternoon of February 18 to serve their materials and Catalyst waited until the wee hours of February 19 to serve its materials. It seems to me that the mayhem of the moment and the false urgency was largely created by the GS Parties and Catalyst.

32 Furthermore, 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. I do not accept that it had no recourse to address process. The late breaking offer scenario could easily have been avoided by Catalyst. Additionally an adjournment could put the Shaw bid at risk. I concluded that an adjournment was not merited in the circumstances. At the court's request, the Monitor provided evidence to address the Catalyst proposal. In my view, this was a satisfactory approach to the conditions largely created by Catalyst. The court did have some concerns with the deadline imposed by Shaw and agreed to by the CMI Entities and the Ad Hoc Committee. In future, absent compelling reasons, court hearings should not be scheduled for the same day that court approval is required.

Legal Standard

33 The next issue to consider is the standard applicable to the relief requested. The CMI Entities submit in their factum that I should approve the Shaw subscription agreement and the related documents on the basis that they are fair and reasonable, benefit the stakeholders of the CMI Entities as a whole, and do not result in any confiscation of rights held by the GS Parties. In oral argument, without acknowledging that there has been any confiscation of rights, counsel for the CMI Entities refined the standard to the first two elements. In essence the CMI Entities submit that the court should approach the analysis from the perspective of approval of an agreement during a CCAA process. In that regard, they rely on *Re: Air Canada*[4], *Re: Calpine*[5] and *Re: Sammi Atlas Inc.*[6].

34 In contrast the GS Parties and Catalyst submit that although *RBC v. Soundair Corp.*[7] dealt with an asset sale, the principles set forth in that case are applicable. Specifically, a court should consider:

a) whether the CMI Entities have made a sufficient effort to get the best price and have 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.

35 In addition the GS Parties submit that approval should also be tested against the factors enumerated by Morawetz J. in *Nortel Networks Corp.*[8] dealing with approval of a sale process under the CCAA, namely:

a) Is a sale transaction warranted at this time?
b) Will the sale benefit the whole "economic community"?
c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
d) Is there a better viable alternative?

36 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 enunciated 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 the CCAA. In my view, this is a useful factor to consider in circumstances such as those before me in this case. I do not believe that the *Nortel* process approval factors need be addressed. They are either largely subsumed by the *Soundair* principles or are unhelpful where the result of the equity solicitation process is before the court for approval not the process itself. That said, even if I were to consider the *Nortel* process approval factors, I would reach the same conclusion.

<u>Approval</u>

(a) Parties' Positions

37 In brief, the parties' positions were as follows. The CMI Entities submit that the Shaw transaction is fair and reasonable and that it is beneficial to the stakeholders of the CMI Entities, viewed as a whole. It is the product of a comprehensive equity investment solicitation process conducted by a sophisticated financial advisor and reflects the exercise of the business judgment of the Board of Directors of Canwest Global on the recommendation of the Special Committee and the CMI CRA as to the best interests of the CMI Entities. The CMI Entities state that the GS Parties have no contractual or legal right to dictate the terms of the equity solicitation process and they are advancing objections to obtain further negotiating leverage. They are not creditors and none of their rights will be affected or confiscated if the Shaw Definitive Documents are approved. Those Documents expressly provide that the parties will jointly pursue any consensual amendment to the Shareholders' Agreement; the parties are not required to pursue disclaimer of the Shareholders' Agreement; and 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. The Shaw transaction satisfies a crucial step in the restructuring. The members of the Ad Hoc Committee are the CMI Entities' largest creditor group and if the CMI Entities hope to emerge from this restructuring successfully, the members of the Ad Hoc Committee must necessarily vote in favour of the Plan. There was nothing unfair or unbalanced about the process and all potential bidders had equal access to information.

38 The Special Committee, the Ad Hoc Committee, and Shaw all supported the position of the CMI Entities.

39 The GS Parties submit that approval is being sought on an incomplete record and in circumstances where there are significant issues about the integrity of the process and whether the best available transaction has emerged. It is premature to conclude that the Shaw transaction represents the best available agreement taking into account the interests of all stakeholders. They complain about the absence of a fiduciary out-provision. Furthermore, they state that they were completely shut out from the process even though any restructuring transaction must ultimately contend with their rights in CW Investments Co. The transaction structure appears to have been controlled by the Ad Hoc Committee to serve its own interests. The GS Parties state that the Shaw transaction enables the Ad Hoc Committee to extract certain minimum cash levels immediately. They also complain that the treatment of the noteholders' claims is proposed to be very different than the treatment of other affected creditors. There are powerful incentives for the CMI Parties to adhere to the terms of the agreements negotiated with the Ad Hoc Committee and in these circumstances, deference should not be given to the exercise of business judgment.

40 The GS Parties state that lack of disclosure and discussions have substantially impaired their ability to place an alternative to the Shaw transaction before the court. The process was never approved by the court and the Monitor's involvement has been limited to periodic updates. As such, the process and the result are not entitled to deference and should be carefully scrutinized. Others

were not prepared to sign the NDA and this constraint and others limited participation in the process. They were also prohibited from engaging in discussion with the GS Parties as a condition of participation. The GS Parties state that they have a limited interest in who ultimately controls Canwest Global given that control of Canwest Global results in control of CWI and the specialty television business. This interest has been ignored. Furthermore, it is a condition of the Shaw transaction that the CW Investments Agreement be disclaimed or amended in a manner agreed to by Canwest Global, the Ad Hoc Committee and Shaw. The exclusion of the GS Parties from the process, the targeting of the rights and interests of the GS Parties under the CWI Agreement, and the prohibition of discussions between the GS Parties and Shaw before court approval are all fundamental failures to consider the legitimate interest of the GS Parties.

41 Catalyst supported the position of the GS Parties.

(b) Discussion

42 It is clear that the CMI Entities did make a sufficient effort to obtain the best offer. RBC established and published a process with which the GS Parties and Catalyst now take issue. There was nothing stopping either of them from challenging the process at an earlier stage or alternatively, participating in it. Indeed, as evident from the email enclosing its first bid, Catalyst stated that: "We also understand and adopt the terms and the fact that the Board management and other stakeholders have set up a process and the terms of a Plan which we certainly support." RBC fully canvassed the market. It is unnecessary for the court to be given the identity of prospective investors in the face of the overwhelming evidence of an extensive market canvass.

43 As noted by the Monitor and many others, no Plan can be approved by the creditors of the CMI Entities without the support of the Ad Hoc Committee which holds a blocking vote. That said, I am also satisfied that the interests of all parties were considered. While one may reasonably question whether the strategy of postponement of the issues relating to the CW Investments Shareholders' Agreement and the GS Parties is or is not wise, the CW Investments Shareholders' Agreement is unaffected by the Shaw Definitive Documents. The GS Parties are in no worse position with respect to the CW Investments Shareholders' Agreement. The GS Parties are not creditors. In addition, the Definitive Documents provide that the parties will jointly pursue any consensual amendment to the Shareholders' Agreement; the parties are not required to pursue disclaimer of the Shareholders' Agreement; and 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. The evidence before me suggests that the CMI Entities did turn their minds to the interests of others and the Board of Directors concluded that the Shaw Definitive Documents were in the best interests of Canwest Global and by inference, given that it was an equity solicitation, its stakeholders.

44 As to the efficacy and integrity of the process by which offers were obtained, there was a fair and thorough canvass of the market and a level playing field. As to whether there has been

unfairness in the working out of the process, while the Monitor favoured inclusion of a fiduciary out provision and while one may argue that ideally the fiduciary out provision would not have been negotiated away, 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. It should also be noted that the Catalyst proposal does not include a fiduciary out provision. Furthermore, in spite of the lack of a fiduciary out provision, the Monitor is supportive of the Shaw Definitive Documents and was not critical of the process. Additionally, there is support from the Special Committee of the Board, the Board of Directors of Canwest Global, the CMI CRA and the Ad Hoc Committee.

45 I should also stress that there appears to be a reasonable basis for this support. Amongst other things, Shaw is experienced in the media industry, financing is not an issue, the offer is for a substantial amount and has a substantially higher implied equity value than that proposed by Catalyst. One should also not overlook the fact that the transaction is necessary at this time. The CMI Entities do not have unlimited time within which to conduct the equity solicitation process and, subject to closing, a major objective underpinning the initial CCAA filing has now been accomplished. The transaction provides some confidence that the CMI Entities will be able to continue as going concerns. I reiterate my view that the Shaw Definitive Documents should be approved and the ancillary relief granted. With respect to the latter, the amounts of the termination fee and the expense fee and the proposed charge itself are fair and reasonable in the circumstances. They are also consistent with giving the CMI Entities leeway to address outstanding issues with the GS Parties but in a manner that is fair to Shaw's commercial interests.

46 Lastly, among other representations and warranties given by Canwest Global to Shaw, Canwest Global has covenanted to use its commercially reasonable efforts to cause its affiliates to terminate the participation of any employee of Canwest LP, CCI and their subsidiaries in a pension or benefit plan of Canwest Global or its other subsidiaries and to terminate all intercompany plan participation agreements between a specified affiliate and Canwest Global and one of its subsidiaries. This covenant is intended to cause the CMI Entities to use commercially reasonable efforts to realign certain employees of the specified affiliates who, for various reasons, participate in a pension plan which is sponsored by the CMI Entities and enable those employees to participate in a pension plan which is sponsored by the specified affiliate. Counsel for the CMI Entities confirmed that they had no intention of terminating pension benefits; this was merely to realign the plans with the appropriate entities.

Conclusion

47 For these reasons, I granted the relief requested. A major question continues to revolve around the CW Investments Shareholders' Agreement and the relationship between the CMI Entities and

the GS Parties. As is evident from paragraph 75 of their factum and their counsels' submissions, the GS Parties' key concern is that the CCAA proceeding is designed by the Ad Hoc Committee to achieve a disclaimer of the CW Investment Shareholders' Agreement and to take value away from the GS Parties. I continue to be of the view that a commercial and negotiated resolution of that issue is in the best interests of all concerned. I have approved the Shaw Definitive Documents and ancillary relief. The parties must now move forward and have a reasonable dialogue.

S.E. PEPALL J.

1 R.S.C. 1985, c. C.36, as amended.

2 During which time counsel not yet retained by certain noteholders who are not represented by the Ad Hoc Committee appeared to advise the court that his potential clients might not agree with the position of the Ad Hoc Committee.

3 In argument, this condition was waived by Catalyst.

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.J.).

5 2007 ABQB 504.

6 (1998), 3 C.B.R. (4th) 171.

7 (1991), 4 O.R. (3d) 1.

8 (2009), 55 C.B.R. (5th) 229 at para. 49.

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