Canwest TV sale alleged unfair

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The exterior view of Canwest Broadcasting Corporate Office building at 121 Bloor Street East in Toronto

Aaron Lynett /National Post

Theresa Tedesco, Financial Post · Wednesday, Jun. 16, 2010

The proposed $2-billion sale of Canwest Global Communications Inc. to Shaw Communications Inc. was not the result of a "full and informed auction," and failed to fetch hundreds of millions of dollars in additional value the company is estimated to be worth, according to documents filed in an Ontario court.

In an affidavit filed in Ontario Superior Court this week, James Kofman, an independent financial advisor specializing in mergers and acquisitions, says the solicitation process conducted by RBC Capital Markets last fall contained a "material omission" because it didn't "expressly state that control and indeed 100% of Canwest would be available to interested parties.

"Experienced transaction advisors know that auctions that involve the sale of a majority stake in a company are likely to appeal to a different audience than the sale of a minority stake and are likely to yield a higher price by way of a control premium," Mr. Kofman states.At the same time, Glenn Bowman, managing partner at Capital Canada Ltd., filed documents with the court indicating that the calculated fair market value of Canwest Global was in the range of $2.36-billion to $2.58-billion.

The filings were made in support of a legal challenge by an ad hoc group of disgruntled Canwest Global shareholders.

The shareholders are asking the court to reject Shaw's proposed $2-billion acquisition and force a 30-day open auction for all of the company's television assets.

The group, which includes the founding Asper family, three U.S. investors, including Blott Asset Management LC in New York, and four unidentified Canadian investors, served notice that it intends to challenge Shaw's takeover at a hearing scheduled for June 22.

Criticizing the sale process as flawed, the "oppressed" shareholders, which represent 49% of the equity in Canwest Global and 88% of the voting rights, are balking because Shaw's bid does not provide consideration for Canwest's equity holders.

Under the terms of a deal announced on May 3, which was hammered out through mediation by Ontario Chief Justice Warren Winkler, Shaw agreed to pay $1.18-billion in cash and about $480-million to buy out Canwest's debtholders.

An additional $709-million has been paid to Goldman Sachs Group Inc., a joint shareholder of CW Investments Co., which controls 13 of the specialty channels acquired by Canwest when it bought Alliance Atlantis Communications Inc. in 2007.

The ongoing, controversial process is separate from a sale of Canwest's former newspaper assets, a deal approved by creditors

Monday.

At the same time, Canwest's shareholders, including the Aspers who once controlled the broadcasting company, will walk away empty-handed.

Shaw's original offer to acquire a 20% voting stake in Canwest would have given existing equity holders no less than 2.3% of the equity or the cash equivalent worth about $11-million, of a restructured Canwest. Ontario Justice Sarah Pepall blessed that proposal on Feb. 19.

"This is a fundamental recasting of events," declares Leonard Asper, former Canwest president and chief executive, in a 26-page affidavit filed with the court. "It was never an auction for 100% of the equity of a restructured Canwest, which is what Shaw ultimately obtained after a mediation in April, 2010."

Instead, Shaw's original offer to acquire a 20% voting stake in Canwest "somehow managed to emerge from a mediation with a deal for 100% of the equity of a restructured Canwest," Mr. Asper argues.

"No auction has taken place that demonstrates that the Shaw deal was the best that Canwest could have attained at the time when the Shaw deal was presented to Canwest in April, 2010," he said.

Canwest vigorously defends the sale process as a "comprehensive restructuring effort."

In legal papers filed in court, Thomas Strike, Canwest's chief restructuring officer, said that during the first phase of the solicitation process last fall, "potential investors were advised by RBC Capital Markets that alternative proposals would be considered."

Mr. Strike also said the 22 potential investors who signed non-disclosure agreements to receive confidential information about the company (from the 90 solicited), "were clearly advised that they should specifically raise significant modificatioin to the proposed subscription agreement..." In the end, two formal bids emerged, including the binding offer from Shaw.

Mr. Kofman says RBC's "teaser" document was confusing to potential suitors because it made clear it was only selling off a portion of Canwest, not all of the company. "A sale of the whole company is fundamentally different than what was being solicited and potential buyers would be unlikely to interpret an 'alternative transaction' as including an outright sale," he states in his affidavit.

A 13-year industry veteran, who has worked on dozens of deals said RBC's "failure" to explicitly state that 100% of Canwest would be available "could have had a significant negative impact on the outcome" of the sale.

He says many potential suitors are not interested in acquiring less than 100% and if the option were available, it "should have been a key selling point."

Mr. Kofman, a former managing director at UBS Securities Canada Inc., and former partner at Osler, Hoskin & Harcourt law firm in Toronto, concluded since "there was insufficient communication that control was available, it would be difficult to conclude that a full and informed auction had been conducted."

He also took issue with the "highly unusual" decision by Canwest's board of directors to waive the right to terminate its deal with Shaw if a higher bid emerged.

Noting its importance in protecting stakeholder interests, Mr. Kofman concluded that absence of a "fiduciary out" in the Shaw transaction "was detrimental to [Canwest] stakeholders."

It is widely expected that a successful legal challenge by the shareholder group will be supported by other potential bidders, including Rogers Communications Inc., who is crying foul over the way Shaw was able to buy Canwest outright in a private deal.

The ad hoc group is also upset a deal framework was in place by April 16 but the market was not informed about the proposed takeover, which would wipe out shareholders, until May 3. The original deal would have provided shareholders with 2.3% of the equity.

According to Mr. Asper's affidavit, about 14.4 million Canwest Global shares were traded during the two week period.

In his affidavit, Mr. Strike says Canwest's board was unaware that shareholders would not receive consideration until after the mediated deal had been brokered.

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