Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC.

Applicants

FACTUM OF COLISEUM CAPITAL PARTNERS, LP, COLISEUM CAPITAL PARTNERS II, LP AND BLACKWELL PARTNERS LLC

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Court File No.

ONTARIO
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B E T W E E N :

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

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FACTUM OF COLISEUM CAPITAL PARTNERS, LP, COLISEUM CAPITAL PARTNERS II, LP AND BLACKWELL PARTNERS LLC ("COLISEUM")

PART I - Overview

1. On the afternoon of Friday April 25, 2014, the Respondent, 0678786 B.C Ltd. (**McCann**), served a factum in which it, for the first time, set out the extensive relief it now claims to be seeking in response to this application. Among other things, McCann now seeks a $42 million first priority charge over all of the property and receivables of the Applicants to be granted to the third-party lenders (the **TPLs**). McCann also seeks to have any so-called TPL funds "frozen" as received and not re-lent, contrary to the Applicants' usual course of business. McCann may also be continuing to challenge the venue of the Application.

2. McCann has now been joined in some or all of this relief by Trimor Annuity Focus LP ("Trimor"). Trimor is the primary TPL by size of loan facility. It participated in the negotiation of the Amended and Restated Initial Order. Trimor has since advised the Court that it believes the protections it obtained at that time are insufficient. At minimum, Trimor is seeking to have all of "its" TPL funds frozen as received. This would, in one week alone, deprive the Applicants of approximately $1.3 million in loan funding.[1] Such a step risks seriously destabilizing the business of the Applicants. In addition to the

[1] According to recent estimates by the Company/Monitor.

freezing orders sought, the TPLs also appear to be seeking at least partial determinations of their legal claim to funds used pre-filing, as well as post-filing.

3. For the purpose of the hearing scheduled for Wednesday April 30, it is necessary to separate this evolving and unfixed list of demands by the TPLs into those that need immediate resolution and those that do not.

4. Any question of liability of funds dissipated pre-filing is not an immediate issue; it is forensic. The TPLs make various assertions that their funds used before filing were impressed with trusts or other legal protections. Those claims are denied. However, those claims are also protected. The TPLs were granted a charge in the Initial Order, equivalent to the amount of cash then on hand. That is the only source to which pre-filing obligations could be traceable.[2] Accordingly, while the TPLs' claim to improper dissipation is denied, it is also unnecessary to resolve immediately.

5. Moreover, the TPLs have put forward allegations of fraud, misappropriation of funds, and insufficient disclosure. McCann and Trimor gave late notice of such allegations, and have not been cross-examined upon them. The record already contains indicia to the contrary. In the circumstances, there is an insufficient basis for the Court to determine allegations of such severity against the Applicants.

6. With respect to the use of post-filing TPL loan receipts, the TPLs allege ongoing prejudice from the use of such funds. Coliseum submits:

(a) there is no additional prejudice; or

(b) in the alternative, the additional TPL protections proposed by the Bondholders (which go beyond those in the Initial Order) are fair and reasonable.

[2] They must also satisfy tracing requirements such as the lowest intermediate balance rule ("LIBR") to those funds.

7. The TPLs are no different from any pre-filing supplier, whose property a debtor is entitled to continue use of, subject to compliance with existing terms. The submissions the Court has already heard are unhelpful:

(a) the TPLs are not akin to an involuntary DIP lender;

(b) the TPLs are not being asked to extend further funding;

(c) the TPLs are not making fresh advances; and

(d) the terms of the Initial Order merely allow the Applicants to continue to use the cash supplied by the TPLs on the terms previously agreed by the parties.

8. If the TPLs obtain the relief they seek, the result will destabilize a precarious restructuring process and reduce the liquidity of an already struggling business. Significant prejudice will accrue to the Company if the TPLs' submissions are accepted.

9. Finally, at this point in time, neither the Monitor nor the CRO have reached any firm conclusion of the value of the current TPL business to the Applicants' future operations. The Court's discretion to impose terms should be exercised as minimally as possible, to allow that necessary analysis to continue. Depending on the outcome of that analysis, much of the current dispute may become moot.

PART II - FACTS

A. The Evolving TPL Claims for Relief

10. On April 22, 2014, McCann served two affidavits and various exhibits. McCann did not state the relief it intended to seek, at this hearing or otherwise. The service of these affidavits was evidently timed to the cross-examination of the Applicants' affiant, Steven Carlstrom, scheduled for that afternoon. Prior to the conduct of the cross-examination, McCann gave no notice of the purpose of its examination.

11. During the cross-examination of Steven Carlstrom held on April 22, 2014, the question of relief was addressed directly by counsel for the DIP Lender:

> MR. MERSKEY: Mr. Staley, could you clarify something. You said "the motion", and I haven't heard yet today which motion is being relied upon. Is it the motion that was previously filed before the commencement of the CCAA proceeding?
>
> MR. STALEY: Well, certainly there is a come-back in which we're entitled to challenge the initial order and seek change to the initial order. We haven't...we may also seek other relief. It's certainly in relation to the come-back.
>
> MR. MERSKEY: And that's the purpose for the examination today?
>
> MR. STALEY: Yes, it is.
>
> MR. MERSKEY: Are there particular provisions of the initial order that you're seeking that relief in connection with?
>
> MR. STALEY: We'll get instructions on that once we finish the cross-examination.
>
> MR. MERSKEY: Okay, and I take it you'll advise the company and the stakeholders of the position you intend to take and the time at which you intend to make it?
>
> MR. STALEY: We will provide appropriate notice to other parties at an appropriate time.[3]

12. Later on April 22, 2014, counsel to the Company wrote to McCann's counsel making further inquiries as to what, exactly, McCann was seeking. No response was given.

13. On April 24, 2014, McCann served an "application record" containing the affidavits previously served, and the transcripts and exhibits of the cross-examination. No application or notice of motion was provided and no relief was specified.

14. As noted by the Court in its April 23 endorsement, McCann had already had an opportunity to appear and at least give some preliminary expression of concern, before the Initial Order was granted on April 15, 2014.[4]

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[3] Cross-examination of Steven Carlstrom held April 22, 2014, Brief of Transcripts of the Respondent, qq. 212-216.

15. Instead, McCann waited until the afternoon of Friday April 25, to serve its factum. That factum contains serious allegations of misfeasance and fraud, and seeks a wide variety of relief. Little of this can reasonably be resolved at a hearing on short notice. The presumed purpose can only be to colour the record for the actual relief sought.

B. The TPL Allegations (1) - Business in Ontario

16. McCann goes to great lengths to present the fact that the Company has its registered headquarters in Toronto and its corporate headquarters in Edmonton as a fact that has been suppressed by the Company in its Application to date. As a question of substance, facts related to the locus of the business are only relevant to the choice of venue. The extent to which McCann seriously challenges venue is unclear at this point. As a question of immediate prejudice, the ongoing conduct of the CCAA proceedings in Ontario has no effect on the use (or not) of McCann's funds. Accordingly, for the purpose of the hearing scheduled for April 30, such allegations appear to be maintained for the sole purpose of colourable arguments regarding the Company's disclosure.

17. Those arguments have no merit. The details of the Company's business in each province were fully disclosed and discussed in the Company's Application Record. For example, at paragraph 38 of the Affidavit of Steven Carlstrom dated April 14, 2014 (the **Carlstrom Affidavit**), Mr. Carlstrom deposes as follows:

> Cash Store's corporate headquarters are located in Edmonton, Alberta and Cash Store Financial's registered office is located in Toronto, Ontario.[5]

18. Mr. Carlstrom's evidence on Cash Store's principal place of business was also rooted in concrete facts about the Company's presence in this province – namely, that Cash Store operates more stores (176) run by more employees (approximately 470) in Ontario than in any other province.[6] Moreover, he noted the regulatory concerns present in Ontario, explaining that "Cash Store's Chief Compliance and Regulatory

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[4] Endorsement of Morawetz, J. 2014 dated April 23, 2014 ONSC 2372 at para 9.
[5] Carlstrom Affidavit at para 38, Application Record, Tab 2 at 66.
[6] Carlstrom Affidavit at para 23, Application Record, Tab 2 at 60-61.

Affairs Officer is located in Toronto because Cash Store is facing its most significant regulatory challenges in Ontario".[7]

19. Mr. Carlstrom addressed directly the question of Cash Store's regulatory challenges in Ontario as they concern this province being Cash Store's primary place of business:

> The impact of court and regulatory decisions (discussed below) has significantly curtailed Cash Store's Ontario revenues. Addressing the Ontario regulatory issues will be one of the key aspects of Cash Store's proposed CCAA proceeding.[8]

20. Thus McCann misconstrues, deliberately or otherwise, the tone and tenor of the Carlstrom affidavit. There is no question that revenues in Ontario are greatly impaired because of its license status. That is more reason, not less, to focus on the role of Ontario in this restructuring.

21. Moreover, McCann itself has failed to disclose its connections to Ontario. The vast majority of loans made in relation to cash provided by McCann were made in Ontario. According to the Second Report of the Monitor, of McCann's $5.7 million of TPL loans, approximately $5.3 million – **93%** – are held in Ontario.[9] In other words, the relationship between McCann and the Company is **almost entirely based in Ontario**.

C. The TPL Allegations (2) - Co-Mingling TPL Cash with Corporate Accounts

22. The Carlstrom Affidavit was explicit and detailed in explaining how Restricted Cash has been commingled with the rest of the cash held by the Company:

> Any TPL Funds received by Cash Store as repayment for any brokered loan that are not currently deployed to Cash Store customers are deposited in Cash Store's bank accounts and are referred to in Cash Store's financial statements as "Restricted Cash". While the Broker

[7] Carlstrom Affidavit at para 23, Application Record, Tab 2 at 60-61.
[8] Carlstrom Affidavit at para 24, Application Record, Tab 2 at 61.
[9] Second Report of the Monitor, para 37(e).

> Agreements permit the TPLs to require Cash Store to hold the TPL funds in accounts designated for that purpose, no TPL has designated any account as a Designated Financier Bank Account or a Designated Broker Bank Account. **The Restricted Cash is commingled with all of Cash Store's other cash (the "Unrestricted Cash")…** Since all of these funds are commingled in multiple accounts, it is not possible to know which dollar represents Restricted Cash and which dollar represents Unrestricted Cash. Furthermore the exact amount of Restricted and Unrestricted Cash is not calculated by Cash Store until it completes its month-end reconciliation. The month end reconciliation is usually completed on or about the tenth day after month-end.[10] (emphasis added)

The fact that McCann has asserted unsubstantiated evidence to the contrary does not alter the lending facts, nor does it impugn the Company's disclosure.

23. In the Affidavit of Sharon Fawcett sworn April 22, 2014, Ms. Fawcett deposes for McCann that she understood that the TPL funds would be escrowed in a separate account designated for the TPLs:

> As indicated in my prior Affidavit, it was represented to me and Mr. McCann at the time the Broker Agreement was entered into, and it is a term of the Broker Agreement, that all Restricted Cash would be placed in a Designated Broker Bank Account, which would be separate and apart from Cash Store Financial's general operating account. It is my understanding from discussions with Cash Store Financial V.P. Financial Reporting at the time, Michael Zvonkovic, that such an account did exist at the time the Broker Agreement was entered into, that it was a trust account, and that the Bank required the names of the brokers who owned the money. [...][11]

24. While this is contrary to the Carlstrom Affidavit, it is also contradicted by contemporaneous documentary evidence. Ms. Fawcett attaches to her affidavit, in support of her statement, an e-mail exchange with a Cash Store representative named Michael Zvonkovic held between July 19, 2012 and July 23, 2012. In her originating message to Mr. Zvonkovic, Ms. Fawcett asks:

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[10] Carlstrom Affidavit at para 79, Application Record, Tab 2 at 79.
[11] Affidavit of Sharon Fawcett sworn April 22, 2014, Application Record of the Respondent, Tab 2 at 7.

> On the Broker Agreement funds, so you keep a separate "designated broker bank account" for each Financier such that all of the loans made using our funds are paid from and returned to that account, as well as all related interest and fees? I know that we spoke of a monthly reconciliation of our fund, **but wanted to clarify if they would also be tracked through a separate account. Please advise**.[12] (emphasis added)

25. On July 23, 2012, Mr. Zvonkovic replies to this note making clear that there are **no segregated accounts**:

> In the new agreement, **we've tried to combine all these accounts and not to have a designated broker bank account**. Your funds specifically would be tracked separately via our accounting system. (emphasis added)[13]

26. In addition to this direct confirmation, McCann received repeated monthly confirmations of co-mingling. Cash Stores provided regular reconciliations to McCann, demonstrating these very facts and Cash Store's practice of reconciling balances of Restricted Cash by assigning its own receivables to TPLs.[14] These transfers were set out in the monthly account statements and reconciliations that were provided to TPLs by Cash Store.[15] As the purpose of these reconciliations was solely to deal with the situation in which the Company's accounts held more Restricted Cash than total cash (and therefore indicating corporate expenses had been paid with Restricted Cash),[16] it was clear to all involved that funds had been co-mingled.

27. This state of affairs is set out explicitly in the Carlstrom Affidavit. In particular, Mr. Carlstrom explains the deficit of Restricted Cash in relation to total cash in the Company's accounts:

> Final accounting is not yet available as at March 31, 2014 however, it is estimated that the amount of Restricted Cash has increased to

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[12] Exhibit 2 to the Fawcett Affidavit sworn April 22, 2014, Application Record of the Respondent, Tab 2 at 17.
[13] Exhibit 2 to the Fawcett Affidavit sworn April 22, 2014, Application Record of the Respondent, Tab 2 at 17.
[14] Carlstrom cross-examination, Brief of Transcripts of the Respondent at qq. 327-330.
[15] Carlstrom cross-examination, Brief of Transcripts of the Respondent at qq. 327-330.
[16] Carlstrom Affidavit at para 80, Application Record, Tab 2 at 80.

> approximately $14.9 million and exceeded the total amount of cash in Cash Store's bank accounts.[17] […]
>
> The amount of Restricted Cash on Cash Store's balance sheet is expected to exceed the amount of total cash in Cash Store's bank accounts.[18] […]
>
> Cash Store does not have sufficient liquidity to fulfill these requests, as the amount of total cash as of March 31, 2014 was approximately $12.6 million.[19] […]
>
> Cash Store's liquidity has declined from $13.1 million of reported total cash at the end of February to $12.6 million at the end of March. As of close of business on April 11, 2014 the total cash in Cash Store's bank accounts was approximately $2.9 million.[20]

28. This evidence indicates that the Company was indebted to the TPLs by the amount of approximately $10 million – the cash that it did not have on hand.

D. Capital Protection and the TPL Expectations Regarding Use of Funds

29. The TPLs now state that they are at risk of asset deterioration because of re-lending of their funds. They are correct. But that is the risk of the pre-filing contract that the TPLs entered with the Company. To compensate the TPLs, and to encourage continuance of their agreements, the Company voluntarily paid to the TPLs, in its discretion, retention payments. Those payments were book entries, not cash collateral:

> Cash Stores has historically made voluntary retention payments to TPLs in order to lessen the impact of the loan losses. Since I have been at my role at the company the TPL funds have been managed in the following manner:
>
> (1) Monthly Lender Distributions: Cash Stores pays TPLs cash payments so that, when combined with portfolio returns (interest collected, net of losses), the TPLs receive approximately 17.5% return per year on the total TPL Funds.
>
> (2) Capital Protection: (a) Expensing Mechanism) – Cash Store provides protection to the TPLs in respect of losses arising from brokered loans that remain unpaid after 90

[17] Carlstrom Affidavit at para 83, Application Record, Tab 2 at 81.
[18] Carlstrom Affidavit at para 131, Application Record, Tab 2 at 98.
[19] Carlstrom Affidavit at para 133, Application Record, Tab 2 at 98.
[20] Carlstrom Affidavit at para 156, Application Record, Tab 2 at 106.

> days. The protections consists of crediting the TPLs with a retention payment as a book entry in the amount of the losses suffered by the TPLs. Cash Store in turn records these retention payments as an expense on its balance sheet. No cash is paid to the TPLs by the Cash Store in respect of these retention payments. The effect of these book entry retention payments is that (i) the TPL Funds are not eroded by losses; (ii) the Restricted Cash balance is increased by the amount of the retention payment; (iii) the Unrestricted Cash balance is decreased by the amount of the retention payment.[21]

30. The TPLs also claim they did not bargain upon the use of their funds in insolvency:

> The Broker Agreement provides that the cash cannot be loaned if Cash Store is insolvent and the reason is that this fact makes the loans much more risky than they are in the ordinary course. It is highly prejudicial to 0678786 to allow its cash to be continued to be loaned in these circumstances.[22]

31. But this prejudice is no different for any other supplier of the Company, nor is it different from any supplier who has advanced pre-filing supply to a company that becomes subject to a stay of proceedings pursuant to the *CCAA*. The demand for priority or repayment cannot be sustained where it is based primarily on the provision of pre-filing service properly subject to a stay.[23]

32. The fact is that the McCann funds, to which this statement relates, are already greatly at risk because they were loaned in Ontario, where operations were already under suspension pre-filing, due to regulatory issues. To the extent the TPLs had a general belief that they could terminate in insolvency, that is not an expectation any party is entitled to. The TPLs bargained for returns of 17.5%. In exchange they must have expected to be taking some significant risk.

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[21] Carlstrom Affidavit at para 84, Application Record, Tab 2 at 81-82.
[22] Fawcett Affidavit at para 10, Application Record of the Respondent, Tab 2 at 9.
[23] *Nortel Networks Corp (Re)*, [2009] OJ No 2558 (SCJ) at para 66.

PART III - ISSUES

33. The issues for the April 30 hearing are:

(a) what immediate protections are the TPLs entitled to, if any; and

(b) what, if any, other issues require immediate resolution.

PART IV - LAW AND ARGUMENT

A. Current Protections

34. The current protections are the proper balance of the *CCAA* Court's discretion, given:

(a) the provisions of and custom regarding the Broker Agreements; and

(b) the TPL negotiations leading up to the Initial Order.

35. It is a truism that in *CCAA* all interests are prejudiced. The TPLs are not being prejudiced to any greater extent, however, than provided for under their pre-existing arrangements.

36. The TPLs provided a good to the Company pre-filing – cash. The Company does not seek additional supply of such goods post-filing. Rather, it has sought to continue using that good, in accordance with the periodic terms of the applicable contracts. Despite the rhetoric of McCann, it is hardly an involuntary DIP lender without DIP protections. It makes no new advances. The cash it has supplied is already being used by the Applicants.

37. Thus, the TPLs are pre-filing lenders or suppliers, with all the potential prejudice that status implies. In this regard, the TPLs are no different than the supplier of a revolving line of credit that becomes fully drawn, shortly before filing. While the TPLs claim misappropriation pre-filing, this allegation is, at best, exaggerated. The Company provided regular reconciliations pre-filing. The reality is that the last reconciliation was

not made just before “the music stopped” at filing. Any other step by the Company was equally or more open to charges of misuse.

38. In addition, the Court cannot ignore that it is being asked to use its discretion to modify the terms of the Initial Order. That discretion should be exercised carefully, especially in circumstances in which some of the protesting parties participated in the negotiation of the Initial Order.

39. Coliseum acknowledges Trimor’s submission to the Court that it misunderstood or now differently understands the protection it received. Coliseum accepts this submission to be made in good faith. Nevertheless, this position contains an element of “re-trading” that the Court should be cautious of encouraging in come-back hearings. It has also, perhaps, been prompted by the vigour of the McCann opposition. Furthermore, because the protections negotiated are clearly better than the pre-filing practice, there is no basis upon which to now alter the terms of the Initial Order.

40. In this regard, Trimor’s current insistence that funds be frozen and not re-loaned at all is in stark contrast to the terms and practice regarding the Broker Agreements. Trimor has no reasonable expectation that its funds could be frozen, and is suffering treatment no different than its pre-filing contractual arrangements called for.

41. Finally, the TPL insistence on the freezing of funds is one-sided. It would grant to them the benefit of the Company’s operations, without the burden. The ongoing collection of TPL funds comes through the Company’s stores, at significant ongoing expense. The TPL position would have such collection occur for free – or indeed, at the expense of the other stakeholders.

B. Other Issues for Resolution on April 30

42. There are no other issues for resolution on April 30.

43. McCann has made serious allegations, sounding in fraud, that the Company made incomplete disclosure in its submissions to this Court. At this juncture, these allegations are simply colourable attempts to move the Court in favour of the relief

sought by McCann regarding its funds. They also fail to amount to even a prima facie case on non-disclosure, on the face of the existing record.

44. First, it is unreasonable to require a company seeking CCAA protection to meet the standard of disclosure set out in *United States v Friedland*.[24] The application did not seek a mareva injunction, nor can it really be said that it was an application brought *ex parte*. Furthermore, the Company is seeking to advise the court of all relevant aspects of its business, not just those narrow facts necessary to justify imposition of a mareva injunction. Given the manner in which the "first day" hearing extended over three days, McCann had ample opportunity to appear and express at least preliminary concerns, rather than engaging in ambush by factum on Friday at noon before the come-back hearing.

45. As this Court previously observed:

> [...] I am satisfied that counsel to McCann was aware of the Notice of Application on April 14, 2014 and that counsel had also received a copy of the draft initial order which requested an order for DIP financing on a priority basis. Counsel to McCann did not attend on April 14th or April 15th, 2014. I do note that although counsel to McCann is based in Alberta, the law firm involved has offices in Toronto and, in my view, counsel to McCann could have attended had they wished to do so.[25]

46. Given the breadth and depth of the affairs of Cash Store, for it to attempt to disclose literally every detail of its business to the Court would be prohibitively time-consuming and costly. Such a requirement would run contrary to the remedial purpose of the *CCAA* and would prevent timely applications and attempts at resolution. CCAA courts have held that the disclosure standard required in *ex parte* proceedings is one that is “realistic”.[26] Accordingly, the DIP Lenders instead submit that Cash Store was required to disclose the material information necessary for the Court to fairly adjudicate its request for an Initial Order, which it did.

47. Further, the submission that the Company failed to provide full and frank disclosure is simply wrong. Although McCann presents a number of complaints about

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[24] [1996] OJ No 4399 (Gen Div).
[25] Endorsement of Morawetz, J. 2014 dated April 23, 2014 ONSC 2372 at para 9.
[26] *Hayes Forest Services Ltd. (Re)*, 2008 BCSC 1256 at paras 6-11.

that disclosure in its factum, all of these issues are addressed directly in Mr. Carlstrom's affidavit in the record of this application. In particular:

(a) McCann complains that Cash Store "falsely represented" that its principal place of business is Ontario, even though all of the bases for that characterization are set out clearly in Mr. Carlstrom's affidavit, and facts tending to suggest Edmonton as a principal place of business are also disclosed;

(b) McCann submits that Ontario cannot or should not be considered Cash Store's principal place of business because of the regulatory challenges faced in Ontario and as it cannot currently operate in Ontario. But Mr. Carlstrom addressed this directly, explaining that the Company had deployed special resources and expertise in Ontario precisely to deal with these issues. The importance of these operations is underscored by the depth of Cash Store's investment in personnel and stores in Ontario, as compared to other provinces;

(c) McCann states that Cash Store's use of Restricted Cash for corporate expenses constitutes a misappropriation that was not disclosed to the Court. The characterization of these practices as "misappropriation" is problematic for several reasons, including the following:

(i) the Carlstrom affidavit fully sets out the practice of commingling and month-end reconciliations;

(ii) correspondence between Ms. Fawcett and Cash Store makes it clear that McCann was on notice that funds had been commingled and were no longer segregated as early as 2012;

(iii) McCann was provided with monthly account statements that often indicated transfers of assets had been made to top up the Restricted Cash on hand, which transfers only ever would have been necessary in the event that Restricted Cash resources were commingled with Company funds and used for corporate expenses; and

(iv) had Cash Store made the payments totalling over $15 million that had become payable to TPLs immediately prior to the commencement of these proceedings, in circumstances in which Cash Store is otherwise insolvent, such action could have constituted a preference as between creditors. Accordingly, it was prudent to retain those funds and seek CCAA protection.

48. McCann has had notice of the way in which the TPL funds were handled since, at latest, July 2012. It had the opportunity to terminate its Broker Agreement on June 19, 2013, on 60 days' written notice to Cash Store.[27] It elected not to terminate until recently, notwithstanding that it knew its funds were no longer segregated. For McCann to now decry Cash Store's methods as a misappropriation is an inaccurate characterization of the evidence in the record.

49. Without legitimate support and relying on an unfair presentation of the evidence, McCann advances the sort of argument to which significant consequences, including the outright denial of relief and solicitor-client costs, are typically attached. That it does so notwithstanding that it elected not to make any of these submissions at the Initial Order hearing makes this argument even more unreasonable.

C. Pre-filing Funds

50. There is neither a sufficient record nor sufficient urgency for the Court to reach a determination regarding the legal character of pre-filing funds, and their traceability. On a preliminary basis, however, there are *prima facie* difficulties in the position of the TPLs.

51. McCann's analogy to a securities brokerage in bankruptcy is strained and inapplicable. While the TPLs have repeatedly stated to this Court that the Company acts as a broker for the TPLs, that statement is contradicted by their own Broker Agreements. As set out in the recitals to the McCann Broker Agreement:

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[27] See Article 6 of the Broker Agreement dated June 19, 2012 between McCann Family Holding Corporation and the Cash Store Inc.

> WHEREAS the Broker [Cash Store] is in the business of acting **as broker for its customers** in obtaining short term loans for its customers;
>
> AND WHEREAS Financier [McCann] is prepared to consider providing loans to the Broker's customers; (emphasis added)

52. The Trimor Broker Agreement contains the same recitals. Given these facts, there is no basis for the assertion that the TPLs are similarly situated to the *customers* of a brokerage.

53. With respect to general arguments of trust or constructive trust, the facts are equally problematic. A true trust requires certainty of subject, certainty of object, and certainty of intent.[28] Any funds arguably "belonging" to the TPLs were commingled, as a long running practice, and with the direct or indirect acceptance of the TPLs. As a result, all three certainties are absent.

54. Claims to constructive trust are similarly unavailable. A constructive trust requires unjust enrichment – deprivation, enrichment, and absence of juristic reason.[29] The contractual TPL arrangements, as described, constitute a *prima facie* juristic reason for the manner in which the funds were handled, setting aside the question of enrichment and deprivation. In addition, a constructive trust cannot be granted to the prejudice of other stakeholders. To grant an *in rem* property right – an effective priority over every other creditor – where none previously existed, would be manifestly prejudicial.

55. Whether claimed as true trust or constructive, both remedies also generally require the traceability of the alleged property in question. It is already apparent on the face of the current record that the funds McCann asserted were improperly dissipated are entirely untraceable. They are gone – although properly so. The TPLs received the filing day protection that, to the extent they could establish claims against the cash held at that time, they would be protected by a charge. However, to establish that claim, the TPLs must demonstrate that "their" commingled funds never fell below the lowest

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[28] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 83.
[29] *Sorochan v Sorochan*, [1986] 2 SCR 38 at para 11.

intermediate balance in the Company's account.[30] Given the cash flow facts described in the Carlstrom Affidavit, it is equally unlikely this will be proven.

56. Indeed, the current evidence strongly suggests that on the receipt of funds by the Company from its customers, the agreed-to practices converted whatever "property" relationship had existed, if any, into a debtor-creditor relationship. The TPLs consented to the Company's use of "their" alleged funds in the normal course of operations. The TPLs did so by accepting the Company's use of Restricted Cash and the month-end reconciliation that was used to repay the liquidity provided by the TPLs to the Company. As such, the TPL claim – that they were not repaid monies owed – is simply a claim for breach of contract.

D. Conclusion

57. This hearing is taking place in all the chaos consequent in the early weeks of a difficult CCAA filing. Facts and events continue to unfold. At the business level, the CRO, the Monitor, and the Company are grappling with and analyzing the future necessity of the TPL funds and presence to the business. Much of what is now before the court may become irrelevant or less critical as the economics are assessed and business deals are made. In this interim period, this Court should intervene as little with the status quo as possible, or the breathing room mandated by the statute may become strained. To the extent the Court finds it necessary to intervene, it should be mindful that the arguments recently put forward in strong rhetoric by the TPLs are themselves subject to serious question.

[30] *Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)*, 2012 ONSC 3185 at paras 91-92.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April, 2014.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Nortel Networks Corp (Re)*, [2009] OJ No 2558 (SCJ).

2. *United States v Friedland*, [1996] OJ No 4399 (Gen Div).

3. *Hayes Forest Services Ltd*. *(Re)*, 2008 BCSC 1256.

4. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.

5. *Sorochan v Sorochan*, [1986] 2 SCR 38.

6. *Boughner v Greyhawk Equity Partners Limited Partnership (Millenium)*, 2012 ONSC 3185.

SCHEDULE “B”
RELEVANT STATUTES

N/A

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 THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC.

Court File No: CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

Proceeding commenced at Toronto

MEMORANDUM OF ARGUMENT OF THE DIP LENDER

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