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., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

FACTUM OF THE MOVING PARTY, 0678786 B.C. LTD. (FORMERLY THE MCCANN FAMILY HOLDING CORPORATION)
(returnable June 11, 2014)

Date: May 30, 2014

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TO: SERVICE LIST

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I. OVERVIEW

1. The moving parties, responding parties by cross-motion, are third-party lenders ("**TPLs**") which entrusted millions of dollars to the Applicants for the sole purpose of brokering loans between the TPLs and borrowers. At all times, the TPLs retained ownership of their funds and all of the loans ultimately brokered with those funds or otherwise purchased by or assigned to the TPLs. They also own any accounts receivable in respect of their loans and any amounts actually received by the Applicants from their customers in repayment of the loans. This arrangement was memorialized in written broker agreements.

2. 0678786 B.C. Ltd., formerly the McCann Family Holding Corporation ("**McCann**"), is a TPL. McCann made approximately $13,350,000 available to the Applicants under a broker agreement that expressly provided that McCann owned its funds, the loans and any receivables. In this motion, McCann requests a declaration that, among other things, McCann is the sole legal and beneficial owner of these funds, loans and receivables, as reflected in its broker agreement, before its property vanishes like the millions of dollars in cash and other assets that the TPLs entrusted to the Applicants.

3. Now, after the Applicants obtained an initial order under the CCAA, the DIP lenders wish to re-write history. In their cross-motion, the DIP lenders ask this Court to declare that McCann's property belongs to the Applicants, effectively locking McCann's property into a business which is taking no steps to collect on outstanding McCann loans, has huge realization costs and cannot reasonably be expected to maximize recoveries.

4. The DIP lenders do not articulate any plausible legal theory in support of their request. Rather, they simply insist in the face of overwhelming evidence to the contrary that the TPLs are mere unsecured creditors. This cross-motion is a transparent effort to appropriate assets to which they have no entitlement to secure repayment of their DIP loans.

5. The DIP lenders also attack ordinary-course transactions between the Applicants and the TPLs. This issue, however, is not properly before this Court. The right to impugn a transaction as a preference or transfer at undervalue belongs to the Monitor, and the Monitor has not challenged any of the transactions in question. Further, the period for reviewing transactions as possible preferences has lapsed. In any event, the evidence makes clear that the impugned transactions do not constitute preferences or transfers at undervalue. Rather, the TPL property is, and has always

been understood and intended to be, the property of the TPLs. These transactions were not intended to prefer, defraud or otherwise hinder the Applicants' other creditors, and the TPLs did not knowingly participate in any fraudulent scheme or preference. They were lending money to borrowers through brokerage arrangements which had been publicly disclosed by the Applicants.

6. The time to determine McCann's entitlement to its property is now, before that property loses any more of its value. Since the initial order in mid-April 2014, the TPLs have watched their loans and cash advanced to the Applicants plummet from a stated value of approximately $42 million to significantly less than half of that value.

7. If the ownership issue is not determined now and McCann is not permitted to mitigate its losses by using other means to collect its outstanding loans, McCann is extremely concerned that what little value its loans still possess will evaporate into a cloud of bad debts and fees. For these and other reasons, McCann respectfully requests that it be allowed to realize on its property. It also respectfully requests that the Applicants be required to pay McCann's legal and other professional fees to create a more even and fair playing field in what has essentially become a priority dispute over the TPL loans.

II. FACTS

A. Relevant Parties

8. McCann is a British Columbia corporation extra-provincially registered in Alberta.

> Affidavit of Sharon Fawcett, sworn April 11, 2014 (the "April 11 Fawcett Affidavit") at para 2, Exhibit 1 to the Affidavit of Sharon Fawcett, sworn April 22, 2014 (the "April 22 Fawcett Affidavit"), Application Record of 0678786 BC Ltd (the "McCann Application Record"), Tab 2, p 11.

9. The applicant The Cash Store Financial Services Inc. ("**Cash Store Financial**") is an Alberta corporation publicly listed on the Toronto Stock Exchange. The applicant The Cash Store Inc. ("**Cash Store**" and, together with Cash Store Financial and the other applicants, the "**Applicants**") is an Alberta corporation and a subsidiary of Cash Store Financial. Both Cash Store Financial and Cash Store were initially established in Edmonton, Alberta. They continue to have their head offices there.

> April 11 Fawcett Affidavit at para 3, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.
>
> Transcript of the Cross-Examination of Steven Carlstrom dated April 22, 2014 (the "Carlstrom Cross") at Qs 31-32, Brief of Transcripts of the Respondent 0678786 BC Ltd (the "Brief of Transcripts"), Tab 1, p 10.

10. Cash Store and Cash Store Financial appear to have the same officers, and they present financial statements on a consolidated basis. McCann does not know whether any separation is maintained between these corporations. However, McCann has always dealt with Cash Store Financial and its officers, and all correspondence has been from this entity.

> April 11 Fawcett Affidavit at para 4, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.

11. All of the Applicants are direct or indirect subsidiaries of Cash Store Financial.

> Affidavit of Steven Carlstrom sworn April 14, 2014 (the "Carlstrom Affidavit") at para 11, Application Record of the Applicants (the "Application Record"), Tab 2, p 55.

12. The moving parties by cross-motion are the lenders under the Applicants' Amended and Restated Debtor-in-Possession Term Sheet dated May 16, 2014 (collectively, the "**DIP Lenders**").

B. Broker Agreement

13. On or around June 19, 2012, McCann and Cash Store executed a Broker Agreement (the "**Broker Agreement**") under which McCann, as Financier, made $13,350,000 in funds available (the "**McCann Funds**") to Cash Store, as Broker, for the sole purpose of Cash Store brokering loans (the "**McCann Loans**") between McCann and Cash Store's customers (the "**Customers**").

> Broker Agreement, Exhibit H to the Carlstrom Affidavit, Application Record, p 508.

14. Before the McCann Funds could be loaned out, Cash Store was required to ensure that extensive loan criteria were met or to obtain specific approval from McCann. Further, the McCann Funds were to be used for no other purpose. This requirement was set out in article 2.10 of the Broker Agreement:

> 2.10 USAGE OF LOAN ADVANCES
>
> For greater certainty, funds from time to time advanced to Broker from Financier are solely intended to be utilized for the purposes of making advances to Broker Customers on Financier's behalf as contemplated hereunder. Broker agrees that any funds not otherwise being held by the Broker as a "float" in anticipation of Loan approvals shall not, without the consent of Financier, be advanced or utilized for any other purpose.

> April 11 Fawcett Affidavit at para 6, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.
>
> Broker Agreement, art 2.10, Exhibit H to the Carlstrom Affidavit, Application Record, p 508.

15. In discussions leading up to the Broker Agreement's execution and while Cash Store Financial was administering the McCann Funds on McCann's behalf, it was expressed to be important to McCann that its funds be kept separate and apart from Cash Store Financial's general operating funds in accordance with the Broker Agreement. Cash Store Financial assured McCann that the McCann Funds were—and would continue to be—segregated at all times.

April 11 Fawcett Affidavit at para 7, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 13.

16. In fact, Cash Store Financial represented to McCann, and it was a term of the Broker Agreement, that all of the McCann Funds would be placed in a "Designated Broker Bank Account", which would be separate and apart from Cash Store Financial's general operating account.

April 22 Fawcett Affidavit at para 3 and Exhibit 2, McCann Application Record, Tab 2, pp 7, 18.

17. At all times, the understanding was that Cash Store would act as a broker by arranging for loans between TPLs such as McCann and the Customers. Over the course of this arrangement and at all material times, it was understood that McCann owned both the McCann Funds and the McCann Loans and that its accounts would be administered on a segregated basis from Cash Store's funds and be pooled safely with other "broker only" monies.

Affidavit of Murray McCann sworn April 22, 2014 (the "McCann Affidavit") at para 4, McCann Application Record, Tab 1, p 1.

Carlstrom Cross at Qs 110-120, 139-143, 222-232, Brief of Transcripts, Tab 1, pp 26-29, 33-35, 51-54.

Email exchange confirming Designated Broker Bank Account, Exhibit 2 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 18.

18. Cash Store's former CEO, Gordon Reykdal, confirmed in discussions with Murray McCann, McCann's former president, that Cash Store was acting as a trustee of the McCann Funds, the McCann Funds would always be administered as monies held in trust, and Cash Store would not comingle the McCann Funds with monies in Cash Store's general operating account or otherwise. None of this was disclosed in the Carlstrom Affidavit.

McCann Affidavit at para 5, McCann Application Record, Tab 1, p 2.

19. McCann received numerous account statements from Cash Store. The "funding excess / deficiency" on these account statements provided a summary of the McCann Loans. When the McCann Funds exceeded the amount deployed as loans to Customers, Cash Store described the undeployed monies as the "funding excess / deficiency". At all times, McCann understood this amount to be held separate and apart from Cash Store's other accounts in accordance with the Broker Agreement and McCann's instructions. Cash Store Financial's public disclosure always showed the McCann Funds as McCann's property, not the property of Cash Store or Cash Store Financial.

McCann Affidavit at para 7, McCann Application Record, Tab 1, p 2.

20. In February 2014, after learning of the difficulties Cash Store had encountered in its Ontario operations, McCann requested an updated listing of its loan portfolio. It also advised Mr. Carlstrom that, given the suspension of the line of credit product in Ontario, McCann would prefer to reduce its loan portfolio balance as at February 12, 2014. Further, it advised Mr. Carlstrom that McCann's property should be returned as amounts were collected by Cash Store, along with the unexpended capital balance of the McCann Funds.

April 11 Fawcett Affidavit at para 9, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 13.

21. By returning the undeployed McCann Funds to McCann, Cash Store would avoid incurring interest and other costs in connection with holding funds that were neither its property nor generating interest or fees. This repayment arrangement was struck by Mr. McCann and Mr. Reykdal, and it was confirmed in writing on February 26, 2014. However, the McCann Funds were not repaid to McCann as agreed or at all.

April 11 Fawcett Affidavit at para 9, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 13.

22. As recently as mid-March 2014, Carlstrom assured McCann that undeployed portions of the McCann Funds were secure and remained available to McCann and that Cash Store was administering McCann's property in accordance with the Broker Agreement. During this period, Mr. Reykdal continued to assure Mr. McCann that the McCann Funds were segregated and safe. Mr. Reykdal reiterated this representation to Mr. McCann on March 24, 2014. In addition to representing that the McCann Funds were safe and properly segregated, Mr. Reykdal represented that the only reason McCann was not being repaid was instructions from the Special Committee. None of this was disclosed in the Carlstrom Affidavit.

> April 11 Fawcett Affidavit at paras 12-13, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 14.
>
> McCann Affidavit at paras 9-10, McCann Application Record, Tab 1, pp 2-3.

23. Based on all of the above, Carlstrom's assertion that McCann only belatedly sought segregation of its funds is simply incorrect. In fact, McCann sought and received assurances that the McCann Funds would be segregated from Cash Store's own funds. And it has always understood and been advised that the McCann Funds and the McCann Loans, as McCann's property, were trust monies provided to Cash Store as broker to be used for the sole purpose of, and in the manner stipulated in, the Broker Agreement.

> McCann Affidavit at para 18, McCann Application Record, Tab 1, p 4.

C. The Applicants Induce McCann to Make the McCann Funds Available

24. Under the Broker Agreement, McCann owned loans made in the name of TPLs which were brokered by Cash Store on behalf of the Customers using funds made available by McCann for that purpose. McCann also owned advances originated by Cash Store and subsequently purchased with the McCann Funds and certain loans and advances originated by Cash Store and

subsequently assigned to McCann as capital protection or otherwise. McCann was entitled to receive a stated rate of 59 per cent interest under these loans from the Customers.

> Transcript of the Cross-Examination of Sharon Fawcett dated May 21, 2014 (the "Fawcett Cross") at Q 131, Brief of Transcripts, Tab 2, p 34.
>
> Transcript of the Cross-Examination of J. Murray McCann dated May 21, 2014 (the "McCann Cross") at Qs 40-41, Brief of Transcripts, Tab 3, p 11.

25. By their nature, the McCann Loans were risky. Accordingly, Cash Store historically made inducement payments to TPLs—referred to by Cash Store as "retention payments"—to induce TPLs to continue to make their funds available to Cash Store which, in turn, enabled Cash Store to earn broker fees. In other words, these payments were intended to ensure that the TPLs were receiving a return commensurate with the considerable risk they were assuming.

> Fawcett Cross at Qs 131-132, Brief of Transcripts, Tab 2, p 34.

26. Cash Store made these inducement payments in the ordinary course on a monthly basis. Absent these payments, McCann would have elected to withdraw the McCann Funds, as was its right under the Broker Agreement.

> Fawcett Cross at Q 131, Brief of Transcripts, Tab 2, p 34.

D. The Applicants Misappropriate McCann's Property

27. Until March 2014, McCann received monthly statements indicating the cash that McCann had made available to Cash Store and the amount that was deployed in loans to Customers. The statement from February 2014 shows that $6,449,420 in undeployed cash remained available to McCann as at February 28, 2014. Subsequently, McCann was advised that a further $831,000 had been collected on McCann's third-party loan portfolio between March 1 and March 16, 2014. This increased McCann's undeployed cash balance to $7,280,420. Between March 17, 2014, and

the present, further collection would have occurred increasing McCann's undeployed cash balance accordingly.

> April 11 Fawcett Affidavit at para 10, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 14.

28. In the Carlstrom Affidavit, Carlstrom acknowledged that so-called "Restricted Cash" in Cash Store's bank account—that is, cash belonging to the TPLs—totaled $12,961,000 as at February 28, 2014. However, by close-of-business on April 11, 2014, this amount had dwindled to approximately $2.9 million.

> Carlstrom Affidavit at paras 48, 156, Application Record, pp 69, 106.

29. Carlstrom did not disclose in his affidavit that, in breach of the Broker Agreement and without the knowledge or consent of McCann and contrary to the multiple representations made to McCann, Cash Store had misappropriated the TPLs' monies and spent them on the Applicants' operating and professional costs leading up to the CCAA filing. This misappropriation was not disclosed to this Court in the evidence filed in support of the Initial Order and in support of the Amended and Restated Initial Order.

30. When the Applicants sought the Initial Order and the Amended and Restated Initial Order, they did not disclose to this Court that Cash Store was in breach of the broker agreements when they sought permission to continue to make advances using funds provided by TPLs.

> Carlstrom Affidavit at paras 76-86, Application Record, pp 78-83.

31. On cross-examination, Carlstrom admitted that, as at the end of March 2014 and up to the date of the CCAA filing, Cash Store had used monies advanced by the TPLs for the sole purpose of brokering loans to Customers for purposes not authorized by the TPLs. These purposes included, among other things, the payment of salaries, outside lawyers, consultants, advisors and

rent. Remarkably, Carlstrom estimated that approximately $10 million of the TPLs' monies had been used for these unauthorized purposes. This fact had not been disclosed to this Court when it issued the Initial Order or the Amended and Restated Order in this proceeding.

Carlstrom Cross at Qs 258-273, Brief of Transcripts, Tab 1, pp 61-63.

32. Moreover, and again undisclosed in the Carlstrom Affidavit, the Special Committee must have made the decision to use the McCann Funds knowing that Cash Store and Cash Store Financial were acting in breach of the Broker Agreement and that they had misrepresented that McCann's monies had been properly segregated.

April 22 Fawcett Affidavit at para 5, McCann Application Record, Tab 2, p 8.

33. The Special Committee took steps to ensure that the owners of the TPL funds, including the McCann Funds, were not apprised of the misrepresentations to enable Cash Store and Cash Store Financial to spend most of their funds. On or around March 31, 2014, the Special Committee instructed management not to speak with Sharon Fawcett or Murray McCann. Although a request was made on April 4, 2014, to allow PwC to inspect Cash Store's records on behalf of McCann pursuant to its rights under the Broker Agreement, PwC was not allowed access for inspection until after the Initial Order was obtained.

April 22 Fawcett Affidavit at para 6, McCann Application Record, Tab 2, p 8.

McCann Affidavit at para 11, McCann Application Record, Tab 1, p 3.

34. Digging into the numbers in the Carlstrom Affidavit and the Monitor's Pre-Filing Report exposes the depth of the problem and the extent to which Cash Store Financial and Cash Store have misappropriated the TPLs' funds. It is undisputed that Cash Store received approximately $42 million of TPL monies to broker. Nevertheless, in the Monitor's Pre-Filing Report, the Monitor reported that only $18.66 million of brokered loans were outstanding and that Cash

Store only had $2.94 million cash on hand. $18.66 million and $2.94 million equals $21.6 million. All or part of the remaining $20.4 million was misappropriated.

Carlstrom Affidavit at para 78, Application Record, p 79.

Monitor's Pre-Filing Report at para 28.

35. At paragraph 22 of the Monitor's Pre-Filing Report, the Monitor estimates that Cash Store's so-called "Restricted Cash" totaled approximately $14.7 million as at March 31, 2014. Given that actual cash on hand was only $2.94 million, this means that Cash Store Financial and Cash Store misappropriated at least $11.76 million—more than the $10 million estimated by Carlstrom during his cross-examination—of TPL monies to fund their operations and pay professional and other expenses not authorized by the TPLs, in breach of the broker agreements and their numerous representations that the TPLs' funds were safe, segregated and protected.

Monitor's Pre-Filing Report at para 22.

36. The remaining shortfall in TPL funds is explained at paragraph 22 of the Monitor Pre-Filing Report. At this paragraph, the Monitor states that there are amounts totaling approximately $8.5 million in loans to Customers under the broker agreements that the company considers "bad loans" and that the Monitor indicates have been outstanding since at least 2012. These loans are unlikely to be recovered, although they have not yet been written off. The fact that these losses were booked to the third-party lenders evidences Cash Store's view that the loans are property of the TPLs.

Monitor's Pre-Filing Report at para 22.

37. As referenced in the Carlstrom Affidavit, Cash Store had a consistent pre-filing practice of inducing the TPLs to continue to advance capital by protecting the TPLs' capital through either an expensing or purchasing mechanism that ultimately insulated the TPLs from "any

losses arising from brokered loans that remain unpaid after 90 days". On cross-examination, Carlstrom admitted that these two mechanisms were consistently applied to protect the capital of TPLs and had been applied since he had been at the company. In other words, the receivables and losses belonged to and were booked to the TPLs, subject to safeguards designed to protect the capital of the TPLs.

Carlstrom Affidavit at para 84(2), Application Record, p 32.

Carlstrom Cross at Qs 145-152, Brief of Transcripts, Tab 1, pp 35-37.

38. Given that Cash Store admittedly always made the TPLs whole from losses on bad loans that had remained unpaid after 90 days, they should have made the TPLs whole for the $8.5 million in "bad loans". Accordingly, this money ought to equally be added to the amount of Restricted Cash set out in paragraph 22 of the Monitor's Pre-Filing Report providing a true Restricted Cash Amount of $23.2 million (calculated by adding the $14.7 million reported by the Monitor to the $8.5 million in bad loans that would have been protected by Cash Store according to its own evidence). Given that there is only $2.94 million in cash on hand, Cash Store Financial and Cash Store actually misappropriated at least $20.26 of TPL monies.

39. Had McCann been notified earlier that its monies were being spent on Cash Store Financial's general operations or to fund other unauthorized expenses, it would have immediately attended at Court to protect its monies—as it ultimately did in the application it commenced in Alberta on April 11, 2014, to restrain the use of its funds. In fact, McCann engaged counsel and brought the application in Alberta as required by the Broker Agreement within three days of learning that Cash Store no longer regarded the McCann Funds as trust monies or segregated brokerage funds.

April 22 Fawcett Affidavit at paras 7-8, McCann Application Record, Tab 2, pp 8-9.

McCann Affidavit at para 13, McCann Application Record, Tab 2, p 3.

E. The May 13th Order Puts the TPLs at Further Risk

40. Paragraph 7 of the Order of this Court dated May 13, 2014 (the "**May 13th Order**"), approved the cessation of the Applicants' brokered loan business in all jurisdictions in which they operated that business. Also, the Chief Restructuring Officer (the "**CRO**"), in consultation with the Monitor, was authorized to take steps to conduct an orderly cessation of that business.

41. With recent legislative and policy changes which have negatively affected payday loan businesses and the rates that they can charge (including in Ontario), it is highly doubtful that Cash Store's operations will be as profitable as they once were or that a viable business is even possible, let alone probable. The brokered line of credit product has been discontinued in Ontario and no lending activity is currently occurring in Ontario due to issues regulatory compliance issues. Further, Cash Store is currently not making any active efforts to collect outstanding TPL loans in Ontario until after they mature 12 months after the loan was made, ostensibly to comply with the Ontario regulator's position on this issue.

Affidavit of William E Aziz sworn May 9, 2014 at paras 26, 36, Exhibit B to the Third Affidavit of William E Aziz, sworn May 15, 2014, Motion Record of the Applicants, Tab 2, pp 9, 13.

42. Not only did the TPLs not agree to allow their monies and receivables to be held and used by an insolvent Cash Store, the May 13th Order puts the TPLs in even greater jeopardy as it purports to create charges against the TPLs' property and treat it as if it is the Applicants' property. Paragraph 6 of the May 13th Order provides that the TPL Charge is capped at $2.94 million and ranks third (*parri passu* with the DIP Lenders) after the Administrative Charge and

the Directors' Charge (up to a maximum of $1,250,000). This increases the risk that the costs of these proceedings will be paid out of the TPLs' remaining monies, after many millions of dollars of TPL funds were already misappropriated by Cash Store for payment of costs not authorized by the TPLs leading up to the CCAA filing.

III. ISSUES

43. On this motion and cross-motion, this Court is asked to confirm that McCann owns the McCann Property and to permit McCann or its agents to assume administration of the McCann Loans to maximize realizations in accordance with McCann's contractual rights.

44. This Court is also asked to dismiss the DIP Lenders' cross-motion for a declaration that the Applicants are the beneficial owners of the McCann Funds and the McCann Loans and that transactions (occurring in the ordinary course for legitimate business reasons) between McCann and Cash Store constitute preferences under federal and provincial legislation.

IV. LAW AND ARGUMENT

A. Ownership of the McCann Property

1. McCann Owns the McCann Property

45. The DIP Lenders seek a declaration that the McCann Funds and the McCann Loans (together with accounts receivable in respect of the McCann Loans and the amounts actually received by Cash Store from its Customers in repayment of the McCann Loans, the "**McCann Property**") are beneficially owned by the Applicants. This transparent cash grab attempt by the DIP Lenders must fail.

46. The Broker Agreement expressly recognizes that ownership of the McCann Property remained with McCann at all times. This ownership arrangement is corroborated by the evidentiary record. In fact, Cash Store's own evidence, past statements, public filings and conduct leave little doubt that the McCann Property belongs to McCann. The DIP Lenders do not offer a single compelling legal theory for their claim that the Applicants are the beneficial owners of the McCann Property.

47. McCann advanced the McCann Funds to Cash Store for a single purpose: the brokering of loans to Customers. McCann always understood that the McCann Funds were segregated from Cash Store's operating funds. This understanding was grounded in the Broker Agreement, and it was reinforced by numerous representations by Cash Store and Cash Store Financial that the McCann Funds would be maintained in a designated TPL account separate and apart from Cash Store's operating funds.

> Broker Agreement, art 2.10, Exhibit H to the Carlstrom Affidavit, Application Record, p 508.
>
> April 11 Fawcett Affidavit at para 6, Exhibit 1 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 12.
>
> Email exchange confirming Designated Broker Bank Account, Exhibit 2 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 18.

48. Even if the McCann Property has been comingled with Cash Store's operating funds in breach of the Broker Agreement and without McCann's knowledge or consent, the McCann Funds have always been accounted for separately. The McCann Funds were treated as "Restricted Cash". The Applicants' creditors could always discern the amount of the McCann Funds that were deployed as loans to Customers or held as a float for future loans.

> Email exchange confirming Designated Broker Bank Account, Exhibit 2 to the April 22 Fawcett Affidavit, McCann Application Record, Tab 2, p 18.

Carlstrom Affidavit at paras 46, 48, 49, 56, Application Record Tab 2, pp 69, 72.

49. The DIP Lenders have always known the nature of the relationship between the Applicants and the TPLs. They lent funds in CCAA proceedings with full knowledge that the Applicants did not view the TPL loans as their property to which the DIP Lenders' charge could attach. It does not lie in their mouths to now argue that the TPL funds and loans are the Applicants' property and, thus, potentially subject to their security interests. Although this applies to all secured creditors of the Applicants, it applies *a fortiori* to the DIP Lenders which are transparently seeking to appropriate assets to which they have no entitlement to secure repayment of their DIP loans.

50. At all times, Cash Store was to *broker* the McCann Funds. For years, the Applicants' secured creditors, including the DIP Lenders in their respective capacities as holders of debt under the Senior Credit Agreement and Senior Secured Notes, benefitted from the broker fees paid by Customers on the McCann Loans. The DIP Lenders knew that these loans had been made with the McCann Funds. They cannot complain when things go badly, and they should not be permitted to benefit from Cash Store's breaches of the Broker Agreement.

2. *Indicia of Ownership*

51. By definition, a broker does not own the property in question but, rather, acts as an intermediary or agent between prospective buyers and sellers. A broker is not entitled to appropriate the property for its own use, and it breaches its duties as a broker if it does so. Just as an insolvent securities brokerage firm would not be entitled to use its clients' property to finance its restructuring or pay other creditors, the Applicants should not be permitted to use the McCann Property to finance their restructuring or pay other creditors.

Clarke v Baillie, [1911] 45 SCR 50 at paras 89-90, 1911 CarswellOnt 733.

52. Parliament has specifically addressed this issue in the context of an insolvent securities brokerage firm in Part XII of the *Bankruptcy and Insolvency Act* (the "**BIA**"). This part of the BIA provides that, other than "customer name securities" as defined in the BIA, all securities and cash held by a bankrupt securities firm are to be pooled in a "customer pool fund" and distributed among all customers of the firm on a *pro rata* basis. The customer pool fund is paid out before any creditors of the brokerage firm are paid at all. This part of the BIA is instructive: it reflects Parliament's clear intention to prevent brokerage firms from using their clients' property to satisfy their debts and pay their creditors.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, ss 253 (def'n of "customer name securities"), 261-262 [BIA].

53. While Cash Store may not be a securities firm for the purposes of Part XII of the BIA, the treatment of such brokerage businesses and property held by them on behalf of third parties is equally applicable. The property rights attending the broker-lender relationship between McCann and Cash Store can also be understood by way of analogy to a true consignment of goods or a true sale of receivables. In both instances, a secured creditor has no interest in the goods or receivables consigned or sold. Equally, the DIP Lenders and other secured creditors have no interest in the McCann Property in the present case.

54. The leading Canadian case considering when the transfer of financial assets constitutes a true sale or a loan is *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* ("***BC Tel***"). In this case, Justice Ground of this Court addressed whether an assignment of trade receivables was a true sale or a financing. Although this Court in not asked to do the same here, the indicia of ownership set out in *BC Tel* are instructive.

> *Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc* (2003), 30 BLR (3d) 288, 2003 CarswellOnt 168 (Sup Ct), rev'd on other grounds (2005), 75 OR (3d) 784, 5 BLR (4th) 251 (CA), leave to appeal to SCC ref'd [2005] SCCA No 379, 216 OAC 399 (note) ("*BC Tel*").

55. In this case, Justice Ground concluded that the assignment of receivables had been a true sale rather than a financing. In so concluding, Justice Ground considered six factors:

(a) *Intention of the Parties* – The intention of the parties as evidenced by the language of the agreement and subsequent conduct of the parties;

(b) *Ownership Risk and Recourse* – Whether the risks of ownership are transferred to the purchaser and the extent and nature of recourse to the seller;

(c) *Right to Surplus* – The right of the seller to surplus collections;

(d) *Determination of Price* – Certainty of determination of the purchase price;

(e) *Identification of Assets* – The extent to which the assets are identifiable; and

(f) *Collection of Receivables* – Whether the seller has a right to redeem the receivables on payment of a specified amount.

> *BC Tel* at paras 40, 41, 51, 57, 61, 67.

56. By applying these indicia of ownership to the broker-lender relationship between McCann and Cash Store, it becomes clear that McCann retained ownership of the McCann Property at all times.

57. In *BC Tel*, Justice Ground cautioned that courts must consider the intention of the parties as expressed in the written contract but also as revealed by "the factual matrix or the

circumstances existing at the time the contract was entered into". Courts must consider the substance of the transaction, not merely the form.

> *BC Tel* at paras 38, 40.

58. The Broker Agreement expressly limited the Applicants' permitted use of the McCann Funds to the brokering of loans to Customers. It also anticipated the segregation of these funds from the Applicants' other accounts. On cross-examination, Sharon Fawcett confirmed that McCann always expected and understood that its funds would be segregated, which understanding was reinforced by representations by the Applicants. The factual matrix of the Broker Agreement thus underscores the clear intention of both parties to the Broker Agreement that McCann would retain ownership of the McCann Property at all times. This was a brokering arrangement, not a financing.

> Fawcett Cross at Qs 33, 37, 75, 80 Brief of Transcripts, Tab 2, p 10, 11-12, 22-23, 23-24.

59. It is equally clear that McCann took the credit risk on the McCann Loans. It had so-called "bad loans" in its loan portfolio as evidenced by the Applicants' own records and account statements. In *BC Tel*, Justice Ground noted: "In any true sale transaction, there must be a transfer of ownership risk to the purchaser. In the case of the sale of accounts receivable, the risk with regard to the non-payment of the receivable must pass to the purchaser subject to whatever forms of recourse the purchaser may have against the vendor". Here, ownership risk was not contractually transferred to the Applicants.

> Carlstrom Affidavit at para 77, Application Record, Tab 2, p 78.
>
> *BC Tel* at para 41.

60. *BC Tel* also stands for the proposition that the absence of a right to retain the surplus from the collection of accounts receivable is not fatal to a determination that the transaction in question was a true sale. McCann received the principal and interest paid on the McCann Loans.

BC Tel at para 56.

61. Courts should consider all of the indicia of ownership set out in *BC Tel*. However, whether the seller has a right of redemption is the "ultimate test" to determine if a transaction is a true sale or a loan. Here, the Broker Agreement does not allow the Applicants to redeem the McCann Loans. To the contrary, it grants McCann the right to take back its funds at any time on 120 days notice and to take over the administration of the McCann Loans on the termination of the Broker Agreement.

BC Tel at para 67.

62. Justice Ground found in *BC Tel* that the fact that a seller acts as the collection agent is not inconsistent with interpreting a transaction as a true sale. As in *BC Tel*, the arrangement between McCann and Cash Store involving the latter acting as the collection agent was simply "logical and efficient" in the circumstances.

BC Tel at para 66.

63. Turning to the analogy of a true consignment, the supplier of the consigned goods in such a transaction retains legal title until those goods are sold and title passes directly from the consignor to the ultimate purchaser. Similarly, the Broker Agreement between McCann and Cash Store established a commercial and legal relationship pursuant to which McCann entered into a direct debtor-creditor relationship with each Customer.

64. In *Access Cash International Inc. v. Elliot Lake and North Shore Corporation for Business Development* ("***Access Cash***"), this Court identified various indicia that courts should consider in determining whether a transaction constitutes a consignment (which merely creates a security interest) or a true consignment (which involves the supplier of the consigned goods retaining legal title to those goods until sold to the ultimate purchaser). The indicia indicating a true consignment include the following:

- The goods are shown as an asset in the books and records of the supplier and are not shown as an asset in the books and record of the merchant;
- It is apparent in the merchant's dealings with others that the goods belong to the supplier rather than the merchant;
- Title of goods remains with the supplier;
- The supplier has the right to demand the return of the goods at any time;
- The merchant has the right to return unsold goods to the supplier;
- The merchant is required to segregate the supplier's goods from his own;
- The merchant is required to maintain separate books and records in respect of the supplier's goods;
- The merchant is required to hold sale proceeds in trust for the supplier;
- The supplier has the right to stipulate a fixed price or a price floor for the goods; and
- The merchant has the right to inspect the goods and the premises in which they are stored.

Access Cash International Inc v Elliot Lake & North Shore Corp for Business Development (2000), 1 PPSAC (3d) 209 at para 21, 2000 CarswellOnt 2824 (Sup Ct).

65. As with the indicia of ownership from *BC Tel*, the true consignment indicia identified in *Access Cash* strongly militate for interpreting the Broker Agreement as creating a relationship pursuant to which McCann retained ownership of the McCann Property at all material times.

McCann has the contractual right to demand the return of the McCann Funds, and Cash Store was required to hold the McCann Funds in a segregated account and to account for those funds separately. Further, the loan documentation evidences a direct debtor-creditor relationship between McCann and each Customer.

66. For all of these reasons, McCann is the sole legal and beneficial owner of the McCann Property and should be recognized as such by this Court.

3. McCann Should be Permitted to Realize on the McCann Loans

67. Since the Applicants have initiated an "orderly cessation" of their brokering business, they do not have any use—or any legitimate use—for the McCann Funds. Despite this fact, the DIP Lenders insist that the Applicants are entitled to collect the McCann Loans in circumstances in which the Applicants either cannot or will not make new loans available to Customers, in contrast to other potential servicers.

68. The Applicants admit that their inability to make new loans has "significantly impaired" their ability to collect outstanding accounts receivable. This significant impairment will apply to all jurisdictions in which the Applicants operated their brokering business, as confirmed in the Monitor's Third Report.

Carlstrom Affidavit at para 101, Application Record, Tab 2, p 87.

69. The Applicants are similarly unable to take all necessary steps to ensure that collections on the McCann Loans are maximized. The May 13th Order approved the cessation of the Applicants' brokered loan business in all jurisdictions in which it is currently carried out, and the CRO has been authorized to take all steps to conduct an orderly cessation of that business. The

brokered line of credit product has been discontinued in Ontario, and no lending activity is currently occurring in Ontario due to issues regarding compliance with regulatory requirements. The CRO has stated that Cash Store's ability to collect on Ontario brokered loans "has been curtailed" and that he can only take "reasonable steps to effect the receipt of outstanding brokered loan receivables in a manner that preserves, to the extent possible, the value of the [TPL] receivables". Cash Store is currently not making any active efforts to collect outstanding TPL loans in Ontario until after they mature.

> Affidavit of William E Aziz sworn May 9, 2014 at paras 26, 36, 38, Exhibit B to the Third Affidavit of William E Aziz, sworn May 15, 2014, Motion Record of the Applicants, Tab 2, pp 10, 13, 14.

70. The CRO owes duties to numerous stakeholders. He is thus understandably concerned with the costs and management resources necessary to preserve the value of the TPL loans, including the McCann Loans. But his refusal or inability to take all necessary steps to ensure that collections on the McCann Loans are maximized should not prejudice McCann when McCann is willing to take those steps.

71. McCann owns the McCann loans. It is therefore prepared to invest the time and resources necessary to maximize recoveries from those loans, which is in McCann's own interest. This will assist the CRO and the Applicants by eliminating the cost and related inconvenience of collecting the McCann Loans. If granted, the relief sought by McCann would relieve the Applicants, the CRO and the Monitor of this burden, and it would allow them to focus on restructuring those parts of the Applicants' business that the Applicants believe continue to be viable. It will also allow McCann to take the steps that it deems necessary to facilitate the orderly and efficient collection of, and to realize the maximum recovery from, the McCann Loans at McCann's own expense.

72. Under the Broker Agreement, McCann has the right to take over the administration of the McCann Loans. Unbelievably, the Applicants now seek to improperly retain the McCann Loans and to force McCann to allow them to realize on them despite the fact that the Applicants can neither maximize recoveries nor minimize costs.

73. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* ("*Cliffs*"), Justice Tysoe of the British Columbia Court of Appeal lucidly articulated the idea that, notwithstanding the broad scope of the CCAA, there are circumstances in which granting a stay or continuation of a stay will not be justified:

> [T]he ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancing, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose.
>
> *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 at para 26, 296 DLR (4th) 577.

74. In essence, the Applicants seek this Court's assistance to terminate the Broker Agreement and, at the same time, to block McCann from mitigating its damages by assuming administration of the McCann Loans, as is McCann's right pursuant to the Broker Agreement. The CCAA was not intended to accommodate conduct of this kind. The Court ought not to extend the CCAA stay to McCann's prejudice in these circumstances.

75. Recently, *Cliffs* was cited with approval by Justice Brown of the Ontario Superior Court of Justice in *Romspen Investment Corporation v. 6711162 Canada Inc.* In this decision, Justice Brown faced competing applications by, on the one hand, the secured creditors for the

appointment of a receiver and, on the other hand, the debtor company for an initial CCAA order. Justice Brown noted as follows:

> At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.
>
> I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well.
>
> *Romspen Investment Corporation v 6711162 Canada Inc*, 2014 ONSC 2781 at paras 72-73, 2014 CarswellOnt 5836.

76. Justice Brown concluded that the initial order should not be granted. He cited *Re Dondeb Inc.* in which Justice Campbell also determined that CCAA relief should not be granted to the applicant company. In reaching this conclusion, Justice Campbell made the following statement at the end of his reasons:

> The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.
>
> In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.
>
> *Re Dondeb Inc*, 2012 ONSC 6087 at paras 33-34, 2012 CarswellOnt 15528.

77. In his earlier decision in *Romspen Investment Corp. v. Edgeworth Properties*, Justice Campbell granted the applicant declaratory relief over the objections of investors who challenged the validity of the applicant's security with the following effect:

(a) The applicant, who held a mortgage over certain of the debtor company's real property, was effectively carved out of the CCAA proceeding;

(b) The validity and priority of the applicant's mortgage was recognized; and

(c) The applicant was permitted to proceed with judicial sale/foreclosure proceedings in respect of the real property subject to its security.

Romspen Investment Corp v Edgeworth Properties, 2012 ONSC 4693, 222 ACWS (3d) 854.

78. The Applicants do not intend to restructure their brokering business. Rather, they have shut down that business altogether, pursuant to the Order of this Court dated May 13, 2014. There is no benefit to the Applicants in continuing to administer the McCann Loans, whereas there is significant prejudice to McCann and the TPLs if the CCAA stay continues to obstruct the efficient and effective collection of their loans.

79. The prejudice to McCann includes, without limitation:

(a) the fact that Cash Store cannot broker new loans, which will "significantly impair" its ability to collect the McCann Loans;

(b) the fact that Cash Store intends to take no steps to collect in Ontario and only limited steps in other jurisdictions;

(c) the enormous professional fees and other expenses associated with any liquidation conducted under the CCAA; and

(d) the risk that the Applicants' restructuring is unsuccessful and that the task of collecting the McCann Loans will be left for yet another future (and potentially costly) insolvency proceeding.

80. The CCAA's fundamental purpose—namely, to facilitate compromises and arrangements between companies and their creditors—is not advanced by permitting the Applicants to continue administering the McCann Loans because there is no reasonable prospect that the brokering business will be restructured. McCann should therefore be permitted to realize on the McCann Loans at its own expense.

B. Preferences

1. The Preference Issue is not Properly Before this Court

81. The DIP Lenders seek a declaration that two categories of transactions which occurred between the TPLs and the Applicants constitute preferences:

(a) The designation by the Applicants of any advances or loans, including brokered loans, as advances or loans in the names of the TPLs; and

(b) Any assignment, whether as capital protection or otherwise, by the Applicants to the TPLs, or in their names, of non-brokered loans made in the name of the Applicants (together with (a), the "**Transactions**").

82. The preference issue is not properly before the Court, and so the DIP Lenders are not entitled to the relief requested. The only issue properly before the Court is the question of ownership of the TPLs' property.

83. Under sections 95 and 96 of the BIA, a trustee in bankruptcy has the right to impugn a payment or transaction as a preference or transfer at undervalue. Section 36.1 of the CCAA extends this right to a CCAA Monitor. It does not extend it to individual creditors of the CCAA estate. The Monitor has not challenged any transaction involving the TPLs as a preference, and the DIP Lenders have no right to the relief requested.

84. No Canadian court has allowed a preference challenge by a creditor in the context of a CCAA proceeding. The case law is clear that a trustee in bankruptcy is the only party who can bring a preference challenge in bankruptcy proceedings and, as a result, a monitor is the only party who can bring a preference motion in CCAA proceedings pursuant to section 36.1 of the CCAA. The DIP Lenders simply cannot arrogate to themselves the Monitor's statutory right to challenge transactions as preferences or transfers at undervalue.

> *Tucker v Aero Inventory (UK) Ltd*, 2011 ONSC 4223 at paras 65, 137, 151, 166, 338 DLR (4th) 577 (Sup Ct).
>
> *Verdellen v Monaghan Mushrooms Ltd*, 2011 ONSC 5820 at para 46, 207 ACWS (3d) 553 (Sup Ct).
>
> *Re Dilollo*, 2013 ONSC 578 at para 26, 97 CBR (5th) 182 (Sup Ct), aff'd 2013 ONCA 550, 117 OR (3d) 81.

85. The DIP Lenders clearly lack any status to request this relief under the CCAA. However, the DIP Lenders could not challenge the Transactions even if they had a right to do so. A "preference" is a payment made to one creditor to the prejudice of another creditor. When the

Transactions occurred, the DIP Lenders were not creditors of the Applicants as DIP Lenders. They could not therefore have been prejudiced by the Transactions as DIP Lenders.

86. The DIP Lenders are post-CCAA-filing lenders who lent money to the Applicants based on the Applicants' assets as at and after the CCAA filing date. By impugning the Transactions, which occurred prior to the CCAA filing date, the DIP Lenders are now trying to appropriate assets to which they have no entitlement to secure repayment of their DIP loans, including exorbitant fees and interest rates.

87. Since the CCAA filing date, McCann's property has essentially been frozen and no payment or transfer of any kind has been made to McCann. Therefore, no transaction involving McCann could possibly have worsened the DIP Lenders' position. This Court should not allow the motion for the return of the TPLs' property to be sidetracked by an improper motion by the post-CCAA-filing DIP Lenders.

2. The Transactions are not Void as Preferences or Otherwise

88. Even if the preference issue is properly before the Court, the Transactions are not preferences, transfers at undervalue or otherwise void under any legal theory advanced by the DIP Lenders in their cross-motion.

89. The DIP Lenders seek to void or set aside the Transactions as:

(a) preferences under section 95 of the BIA;

(b) transfers at undervalue under section 96 of the BIA; or

(c) void transactions under section 2 of Ontario's *Fraudulent Conveyances Act*, section 4 of Ontario's *Assignments and Preferences Act* and/or sections 2 and 3 of Alberta's *Fraudulent Preferences Act* (Alberta).

BIA, ss 95, 96.

Fraudulent Conveyances Act, RSO 1990, c F.29, s 2 ("FCA").

Assignments and Preferences Act, RSO 1990, c A.33, s 4 ("APA").

Fraudulent Preferences Act, RSA 2000, c F-24, ss 2, 3 ("FPA").

i. Section 95 of the BIA

90. Under section 95 of the BIA, a trustee in bankruptcy is empowered to attack a payment, transfer of property or provision of services by a debtor before the date of bankruptcy (or, in a CCAA proceeding, before the date on which the CCAA proceedings are commenced) that advantages one creditor (or multiple creditors) over others.

BIA, s 95.

91. A pre-CCAA-filing transaction is void under section 95 if three conditions are met:

(a) *Prescribed Period* – The transaction was made within the prescribed period before the date of bankruptcy;

(b) *Insolvent* – The debtor was insolvent on the date of the impugned payment; and

(c) *Dominant Intention* – The debtor intended to prefer one creditor over another.

Keith G Collins Ltd v Canadian Imperial Bank of Commerce, 2011 MBCA 41 at para 19, 268 Man R (2d) 30.

Touche Ross Ltd v Weldwood of Canada Sales Ltd, 48 CBR (NS) 83 at paras 3-7, 1983 CarswellOnt 214 (SC) [*Touche Ross*].

92. For the first condition, the prescribed period under section 95 depends on whether the creditor in question was arm's length or non-arm's length. For arm's length creditors, the prescribed period is three months before the date of the initial bankruptcy event. For non-arm's length creditors, the prescribed period is one year before the date of the initial bankruptcy event.

93. The third condition is called the "dominant intention" test. It requires an objective assessment of the debtor's intention at the time of the transaction. Justice Bastin furnished the quintessential statement of this test in *Re Holt Motors Ltd.*:

> The test which I consider should be applied is an objective and not a subjective one, that is to say, the intention which should be attributed to the parties will always be that which their conduct bears a reasonably construed and not that which, long after the event, they claim they believe was present in their minds.

> *Re Holt Motors Ltd* (1966), 57 DLR (2d) 180 at para 8, 56 WWR 182 (Man QB).
>
> *Thorne Riddell v Fleishman,* 47 CBR (NS) 233 at para 26, 1983 CarswellOnt 201 (Sup Ct).

94. Under section 95(2) of the BIA, the debtor's intention to prefer one creditor over another is presumed where the effect of the impugned transaction is to give the creditor a preference over other creditors.

> BIA, s 95(2).

95. In the present case, the Transactions were outside of the prescribed period. McCann is arm's length from the Applicants. The prescribed period is thus three months from the CCAA filing date—namely, April 15, 2014. McCann did not receive any payments or other transfers of property from the Applicants between January 15 and April 15, 2014. Even if McCann were a related party (which it is not) and the one-year period applied, most of the Transactions would still fall outside of the prescribed period and, thus, could not be challenged under section 95.

96. In addition, McCann denies that Cash Store was insolvent when the Transactions occurred. TPL monies were crucial to Cash Store's business. Without receipt of the payments to which McCann was entitled, McCann would have withdrawn its money.

97. In any event, the evidentiary record makes clear that the Applicants did not intend to prefer McCann through the Transactions. Further, McCann is and has always been the sole legal and beneficial owner of the McCann Property. Cash Store has confirmed this in numerous public statements and in evidence filed with this court, including the Carlstrom Affidavit and the cross-examination of Mr. Carlstrom on that affidavit. Accordingly, this is not a situation in which property of the debtor company's has been improperly transferred to McCann.

> Carlstrom Affidavit at paras 46, 48, 49, 56, Application Record Tab 2, pp 69, 72.
>
> Carlstrom Cross at Qs 110-120, Brief of Transcripts, Tab 1, pp 26-29.

98. Each and every one of the Transactions between Cash Store and McCann occurred in the ordinary course of business and pursuant to the Broker Agreement. This has been a decisive factor in cases under section 95 of the BIA.

> See e.g. *Touche Ross.*

99. Payments in the ordinary course of business are usually made so that the debtor company can take advantage of favourable payment terms or to secure a continued supply of goods or services so that the debtor company can continue in business. In such circumstances, the debtor company's expectation that the transaction would permit it to remain in business and buy some time to extricate itself from its financial difficulties will strongly militate against finding an intent to prefer.

> *Re AR Colquhoun & Son Ltd*, [1937] WWR 222, 18 CBR 124 (Sask KB).
>
> *Re Norris* (1994), 23 Alta LR (3d) 397 at para 7, 28 CBR (3d) 167 (QB), rev'd on other grounds (1996), 45 Alta LR (3d) 1, 193 AR 15 (CA).

100. Therefore, the DIP Lenders cannot rely on section 95 of the BIA to seek a declaration that the Transactions are void.

ii. Section 96 of the BIA

101. Section 96 of the BIA provides a trustee in bankruptcy with a mechanism for challenging a transaction involving a disposition of property or a provision of services for which either no consideration is received by the debtor company or for which the consideration received by the debtor company is conspicuously below fair market value. These transactions are referred to as "transfers at undervalue".

102. The BIA provides no definition as to the meaning of a conspicuous difference in value. Case law has construed "conspicuous" to mean plainly evident or attracting notice and hence eminent, remarkable or noteworthy. Whether there is a conspicuous difference in value depends on all of the circumstances, and it is not possible to say that any particular percentage difference will necessarily result in a finding of a conspicuous difference in value.

> *Skalbania (Trustee of) v Wedgewood Village Estates Ltd* (1988), 31 BCLR (2d) 184, 70 CBR (NS) 232 (SC), aff'd (1989), 37 BCLR (2d) 88, 60 DLR (4th) 43 (CA), leave to appeal to SCC ref'd (1989), 40 BCLR (2d) xxxiii (note), 62 DLR (4th) viii (note) (SCC).

103. The requirements of section 96 depend on whether the parties to the impugned transaction were dealing at arm's length. As discussed above in the context of section 95, the broker-lender relationship between McCann and Cash Store was arm's length at all times. Under section 96(1)(a) of the BIA, an impugned transaction between arm's length parties is void if three conditions are met:

(a) The transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy;

(b) The debtor was insolvent at the time of the transfer or was rendered insolvent by it; and

(c) The debtor intended to defraud, defeat or delay a creditor.

BIA, s 96(1)(a).

104. In *Conte Estate v. Alessandro*, Justice Rouleau outlined the proper approach to determining a debtor company's intent with respect to a transaction under section 95 of the BIA. He made the following comments:

> In this type of case it is unusual to find direct proof of intent to defeat, hinder or delay creditors. It is more common to find evidence of suspicious facts or circumstances from which the court infers a fraudulent intent.
>
> These suspicious facts or circumstances are sometimes referred to as the "badges of fraud." These badges of fraud are evidentiary indicators of fraudulent intent and their presence can form the *prima facie* case needed to raise a presumption of fraud...
>
> The presence of one or more of the badges of fraud raises the presumption of fraud. Once there is a presumption, the burden of explaining the circumstantial evidence of fraudulent intent falls on the parties to the conveyance.

Conte Estate v Alessandro, 2002 CarswellOnt 4507 at paras 20-22, [2002] OJ No 5080 (Sup Ct) [*Conte Estate*].

105. Justice Anderson's classic articulation in *Re Fancy* of the role of the "badges of fraud" analysis in determining intent under section 96 is frequently cited:

> Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.

Re Fancy (1984), 46 OR (2d) 153 at para 19, 8 DLR (4th) 418 (SC).

106. The Canadian case law identifies the following circumstances as badges of fraud for ascertaining the intention of the debtor company:

(a) The transferor has few remaining assets after the transfer;

(b) The transfer was made to a non-arm's length person;

(c) There are actual or potential liabilities facing the transferor, he is insolvent or he is about to enter upon a risky undertaking;

(d) The consideration for the transaction is grossly inadequate;

(e) The transferor remains in possession or occupation of the property for his own use after the transfer;

(f) The deed of transfer contains a self-serving and unusual provision;

(g) The transfer was effected with unusual haste; or

(h) The transaction was made in the face of an outstanding judgment against the debtor company.

Conte Estate at para 43.

Boudreau v Marler, 18 RPR (4th) 165 at para 70, 48 CBR (4th) 188 (CA).

Montor Business Corp (Trustee of) v Goldfinger, 2013 ONSC 6635 at para 262, 237 ACWS (3d) 296.

107. In the present case, the Transactions bear none of the badges of fraud which would tend to indicate the requisite intention to "defraud, defeat or delay a creditor".

108. The Applicants' secured creditors had notice of the business arrangements between Cash Store and McCann, including the fact that McCann retained ownership of the McCann Property. The secured creditors did not therefore suffer any prejudice. Rather, they understood (or reasonably should have understood) the risks of lending into a structure in which these TPL arrangements were in place. Indeed, the Applicants happily took the benefit of the broker fees earned on loans brokered to Customers with TPL monies, which were in turn used to make interest payments to Cash Store's secured creditors. The secured lenders cannot now seek to improperly appropriate the McCann Property simply because the inherent risks in their investments materialized into real losses.

109. As explored in more detail above, the evidence of the TPLs is that they are, and have always been, the sole legal and beneficial owners of the TPL property. The Applicants did not transfer their property to the TPLs. Further, there was a contract in place between the parties according to which the interest actually paid to the TPLs of 17.5 per cent was *below* the interest rate of 59 per cent to which the TPLs were entitled. Thus, in participating in the Transactions, the debtor company's intent was not to prefer McCann. Its intention was to make payments pursuant to a contractual relationship and established business practices in the ordinary course of business and without the intent to defraud, defeat or delay a creditor.

iii. The Provincial Statutes

110. To attack transactions as preferences or transfers at undervalue under the BIA, the transactions must have occurred within the prescribed period. If a transaction falls outside the prescribed period, it cannot be challenged as a preference or transfer at undervalue under sections 95 and 96 of the BIA.

111. Since McCann is at arm's length from the Applicants, the prescribed period in this case is three months before the CCAA filing date for challenges under section 95 and one year before the CCAA filing date for challenges under section 96.

112. The DIP Lenders cannot invoke sections 95 and 96 of the BIA to impeach the Transactions. Within the three-month period preceding the CCAA filing date, McCann did not receive any payments from the Applicants. Instead, the Applicants improperly used segregated funds belonging to McCann to fund exorbitant professional costs leading up to the CCAA filing date, without McCann's knowledge or consent. Within the one-year period preceding the CCAA filing date, any payments made to McCann were made in the ordinary course of business and pursuant to the Broker Agreement. Further, the DIP Lenders were not even creditors of the Applicants *qua* DIP Lenders when the Transactions occurred.

113. Unlike the BIA, Ontario's *Fraudulent Conveyances Act* (the "**FCA**") and *Assignments and Preferences Act* (the "**APA**") do not prescribe periods for challenging transactions. So long as actions are not statute barred under the applicable provincial limitations regime, it may be possible to challenge a transaction under one or both of these statutes.

> *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753, 72 DLR (3d) 500.
>
> *Re Garrett*, 30 CBR (NS) 150 at para 2, 1979 CarswellOnt 195 (SC).
>
> *Indcondo Building Corp v Sloan*, 2010 ONCA 890 at para 9, 103 OR (3d) 445.

114. Section 2 of the FCA provides:

> **2.** Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

FCA, s 2.

115. Section 2 of the FCA requires the DIP Lenders to prove intent to "defeat, hinder, delay or defraud" creditors. For conveyances made for good consideration, the DIP Lenders must prove the fraudulent intent of both parties to the transaction. For voluntary conveyances, the DIP Lenders need to prove the fraudulent intent of the maker of the conveyance.

> *Oliver v McLaughlin*, 24 OR 41, [1893] OJ No 11 (CA).
>
> *Bank of Montreal v Peninsula Broilers Ltd*, 177 ACWS (3d) 405 at para 88, 2009 CarswellOnt 2906 (Sup Ct).

116. Justice Sedgwick expanded on what is required to prove intent to "defeat, hinder, delay or defraud" creditors in *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.* as follows:

> If the court is satisfied that a conveyance is made with intent on the part of the grantor to defeat, hinder, delay or defraud creditors and others, the parties to the conveyance (the grantor and the grantees) must show that it was made for good consideration and good faith and to a person (or persons) who was (or were) without notice or knowledge of the grantor's fraudulent intent. *Bank of Montreal v. Jory* (1981), 39 C.B.R. (N.S.) 30 (B.C. S.C.). Otherwise, the conveyance is void against creditors of the grantor.
>
> *Dapper Apper Holdings Ltd v 895453 Ontario Ltd* (1996), 38 CBR (3d) 284 at para 57, 11 PPSAC (2d) 284 (Gen Div).

117. Section 4(1) of the APA provides:

> **4.** (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.
>
> APA, s 4(1).

118. Therefore, to set aside a transaction under this provision, the plaintiff must prove three elements:

(a) There was a conveyance of property;

(b) There was an intent to "defeat, hinder, delay or prejudice" creditors; and

(c) At the time of the transaction, the debtor company was insolvent or unable to pay his, her or its debts in full or knew that he, she or it was on the eve of insolvency.

119. Section 4(2) permits challenges to transactions intended to give a creditor an "unjust preference" over other creditors. There is a presumption of intention under section 4(3) if three elements are satisfied:

(a) The debtor was insolvent at the time of the transaction;

(b) The transaction had the effect of providing the creditor with a preference; and

(c) An action or proceeding was brought within sixty (60) days to impeach or set aside such transaction.

APA, s 4(2), 4(3).

120. In Alberta, the FPA sets out rules which are substantially similar to those in Ontario. Under section 2 of the FPA, the applicant must show that there was a transfer of property by a person who is insolvent (or on the eve of insolvency) to a creditor with the intent of giving that creditor a preference over other creditors. Where direct evidence of the debtor company's intent is insufficient, courts can consider the badges of fraud.

Burton v R & M Insurance Ltd (1977), 5 Alta LR (2d) 14, 9 AR 589 (SC TD).

Alberta (Director of Employment Standards) v Sanche, 134 AR 149, 5 Alta LR (3d) 243 (QB).

Dwyer v Fox, 190 AR 114 at para 26, 43 Alta LR (3d) 63 (QB).

121. Under section 3 of the FPA, a transaction is void if, within one year of the impugned transaction, an action is commenced to set it aside, the debtor company was in insolvent circumstances or unable to pay debts in full or was on the eve of insolvency, and the transaction had the effect of giving a creditor a preference.

> *Taylor & Associates Ltd v Louis Bull Tribe No 439*, 2011 ABQB 213 at paras 12-13, 46 Alta LR (5th) 182.
>
> *Maki Megbiz, KFT v Osprey Energy Ltd*, 2006 ABQB 630, 405 AR 165 (Master).

122. Again, the factual circumstances prove that there was no intention on the part of the Applicants to defeat, hinder, delay, defraud, prefer or prejudice their creditors. Further, to the extent that such a finding is necessary, the evidentiary record is clear that McCann had no such intent to defeat, hinder, delay, defraud, prefer or prejudice their creditors in participating in the Transactions.

123. Even if the requisite intent can be established as against the Applicants, the Transactions occurred upon good consideration, in good faith and without notice or knowledge of the Applicants' intent within the meaning of section 3 of the FCA.

124. The TPLs did not knowingly participate in any fraudulent scheme or preference. They were lending money to individual borrowers through contractual brokerage arrangements of which all of the secured creditors had notice.

C. McCann's Legal Fees

125. Historically, an administration charge was granted pursuant to the Court's inherent jurisdiction. Section 11.52 of the CCAA now provides statutory jurisdiction to grant an administration charge. It provides as follows:

> **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.

CCAA, s 11.52(1).

Re Canwest Publishing Inc/Publications Canwest Inc, 2010 ONSC 222 at para 53, 184 ACWS (3d) 684.

126. Pursuant to subsection (c) of this provision, the Initial Order should be varied or amended to require payments by the Applicants of McCann's legal and other professional fees incurred in or in connection with this CCAA proceeding. Further, it should be varied or amended to include McCann and its legal counsel as beneficiaries of the Administration Charge, as that term is defined in the Initial Order, ranking *pari passu* in priority with all other parties entitled to the benefit of the Administration Charge.

127. These orders are warranted and necessary to safeguard fairness in this CCAA proceeding. McCann is both a TPL and a holder of the first lien debt. There is no rational basis upon which other creditors, such as the bondholders, who rank behind McCann in respect of the first lien debt and in respect of the McCann Property, should have their professional fees paid while McCann does not. This creates an uneven and unfair playing field that allows the bondholders an advantage in what has essentially become a priority dispute over the TPL loans.

128. McCann has been forced to expend considerable time and money in seeking to protect its position by participating in this CCAA proceeding, often in connection with other parties to this proceeding seeking adjournments of the comeback hearing originally scheduled for April 25, 2014. The issues that McCann raised in connection with this initial hearing date have still not been heard, and they are now to be heard on June 11, 2014.

129. For these reasons, the Applicants should be required to pay McCann's legal and other professional fees incurred in or in connection with this CCAA proceeding to ensure an even and fair playing field moving forward.

V. ORDER REQUESTED

130. For all of the above reasons, McCann respectfully submits that it should be granted:

(a) an order granting a declaration that the McCann Property, including without limitation the McCann Property as defined in McCann's notice of motion dated May 15, 2014 (the "**Notice of Motion**"), is owned by McCann free of any interests or claims of any creditor of the Applicants including, without limiting the generality of the foregoing, any encumbrances or charges created by the Order of the Honourable Regional Senior Justice Morawetz dated April 14, 2014;

(b) an order that the Applicants shall forthwith execute and deliver such documentation as is necessary or desirable to evidence the fact that McCann is the sole legal and beneficial owner of the McCann Property;

(c) an order that the Applicants shall forthwith transfer the McCann Funds and the McCann Receipts, as defined in the Notice of Motion, to McCann;

(d) an order that the Applicants shall forthwith, at McCann's expense, provide such assistance to McCann as is necessary or desirable to facilitate the transfer of the administration of the McCann Loans and the McCann Accounts Receivable to another service provider;

(e) an order that McCann's legal and other professional fees incurred in or in connection with this CCAA proceeding shall be paid by the Applicants and shall be covered by the Administration Charge granted in the Initial Order;

(f) an order that the Applicants shall pay McCann's costs of this motion; and

(g) an order that McCann reserves all rights to assert any arguments and claims in this proceeding or otherwise in relation to claims (whether they be trust, proprietary or otherwise) it has against the Applicants and any other persons resulting from or relating to monies it advanced to make third party loans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2014.

BENNETT JONES LLP
Lawyers for 0678786 B.C. Ltd.

Tab A

SCHEDULE "A"
AUTHORITIES CITED

1. *Clarke v Baillie,* [1911] 45 SCR 50, 1911 CarswellOnt 733 (SCC).

2. *Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc* (2003), 30 BLR (3d) 288, 2003 CarswellOnt 168 (Sup Ct), rev'd on other grounds (2005), 75 OR (3d) 784, 5 BLR (4th) 251 (CA), leave to appeal to SCC ref'd [2005] SCCA No 379, 216 OAC 399 (note).

3. *Access Cash International Inc v Elliot Lake & North Shore Corp for Business Development* (2000), 1 PPSAC (3d) 209, 2000 CarswellOnt 2824 (Sup Ct).

4. *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, 296 DLR (4th) 577.

5. *Romspen Investment Corporation v 6711162 Canada Inc*, 2014 ONSC 2781, 2014 CarswellOnt 5836.

6. *Re Dondeb Inc*, 2012 ONSC 6087, 2012 CarswellOnt 15528.

7. *Romspen Investment Corp v Edgeworth Properties*, 2012 ONSC 4693, 222 ACWS (3d) 854.

8. *Tucker v Aero Inventory (UK) Ltd*, 2011 ONSC 4223, 338 DLR (4th) 577 (Sup Ct).

9. *Verdellen v Monaghan Mushrooms Ltd*, 2011 ONSC 5820, 207 ACWS (3d) 553 (Sup Ct).

10. *Re Dilollo*, 2013 ONSC 578, 97 CBR (5th) 182 (Sup Ct), aff'd 2013 ONCA 550, 117 OR (3d) 81.

11. *Keith G Collins Ltd v Canadian Imperial Bank of Commerce*, 2011 MBCA 41, 268 Man R (2d) 30.

12. *Touche Ross Ltd v Weldwood of Canada Sales Ltd*, 48 CBR (NS) 83, 1983 CarswellOnt 214 (SC).

13. *Re Holt Motors Ltd* (1966), 57 DLR (2d) 180, 56 WWR 182 (Man QB).

14. *Thorne Riddell v Fleishman,* 47 CBR (NS) 233, 1983 CarswellOnt 201 (Sup Ct).

15. *Re AR Colquhoun & Son Ltd*, [1937] WWR 222, 18 CBR 124 (Sask KB).

16. *Re Norris* (1994), 23 Alta LR (3d) 397, 28 CBR (3d) 167 (QB), rev'd on other grounds (1996), 45 Alta LR (3d) 1, 193 AR 15 (CA).

17. *Skalbania (Trustee of) v Wedgewood Village Estates Ltd* (1988), 31 BCLR (2d) 184, 70 CBR (NS) 232 (SC), aff'd (1989), 37 BCLR (2d) 88, 60 DLR (4th) 43 (CA), leave to appeal to SCC ref'd (1989), 40 BCLR (2d) xxxiii (note), 62 DLR (4th) viii (note) (SCC).
18. *Conte Estate v Alessandro*, 2002 CarswellOnt 4507, [2002] OJ No 5080 (Sup Ct).
19. *Re Fancy* (1984), 46 OR (2d) 153, 8 DLR (4th) 418 (SC).
20. *Boudreau v Marler*, 18 RPR (4th) 165, 48 CBR (4th) 188 (CA).
21. *Montor Business Corp (Trustee of) v Goldfinger*, 2013 ONSC, 237 ACWS (3d) 296.
22. *Robinson v Countrywide Factors Ltd* (1977), [1978] 1 SCR 753, 72 DLR (3d) 500.
23. *Re Garrett*, 30 CBR (NS) 150, 1979 CarswellOnt 195 (SC).
24. *Indcondo Building Corp v Sloan*, 2010 ONCA 890, 103 OR (3d) 445.
25. *Oliver v McLaughlin*, 24 OR 41, [1893] OJ No 11 (CA).
26. *Bank of Montreal v Peninsula Broilers Ltd*, 177 ACWS (3d) 405, 2009 CarswellOnt 2906 (Sup Ct).
27. *Dapper Apper Holdings Ltd v 895453 Ontario Ltd* (1996), 38 CBR (3d) 284, 11 PPSAC (2d) 284 (Gen Div).
28. *Burton v R & M Insurance Ltd* (1977), 5 Alta LR (2d) 14, 9 AR 589 (SC TD).
29. *Alberta (Director of Employment Standards) v Sanche*, 134 AR 149, 5 Alta LR (3d) 243 (QB).
30. *Dwyer v Fox*, 190 AR 114, 43 Alta LR (3d) 63 (QB).
31. *Taylor & Associates Ltd v Louis Bull Tribe No 439*, 2011 ABQB 213, 46 Alta LR (5th) 182.
32. *Maki Megbiz, KFT v Osprey Energy Ltd*, 2006 ABQB 630, 405 AR 165 (Master).
33. *Re Canwest Publishing Inc/Publications Canwest Inc*, 2010 ONSC 222, 184 ACWS (3d) 684.

Tab B

SCHEDULE "B"
STATUTORY REFERENCES

ASSIGNMENTS AND PREFERENCES ACT, RSO 1990, C A.33

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

Unjust preferences

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

When there is presumption of intention if transaction has effect of unjust preference

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period

beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

"clearing house"
« chambre de compensation »
"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member"
« membre »
"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor"
« créancier »
"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit"

« dépôt de couverture »
"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

Transfer at undervalue

96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values

on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of "person who is privy"

(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

[…]

Definitions

253. In this Part,

[…]

"customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered or recorded in the appropriate manner in the name of the customer or are in the process of being so registered or recorded, but does not include securities registered or recorded in the appropriate manner in the name of the customer that, by endorsement or otherwise, are negotiable by the securities firm;

[…]

Vesting of securities, etc., in trustee

261. (1) If a securities firm becomes bankrupt, the following securities and cash vest in the trustee:

(a) securities owned by the securities firm;

(b) securities and cash held by any person for the account of the securities firm; and

(c) securities and cash held by the securities firm for the account of a customer, other than customer name securities.

Establishment of a customer pool fund and a general fund

(2) Where a securities firm becomes bankrupt and property vests in a trustee under subsection (1) or under other provisions of this Act, the trustee shall establish

(a) a fund, in this Part called the "customer pool fund", including therein

(i) securities, including those obtained after the date of the bankruptcy, but excluding customer name securities and excluding eligible financial contracts to which the firm is a party, that are held by or for the account of the firm

(A) for a securities account of a customer,

(B) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the securities with the firm to assure the performance of the person's obligations under the contract, or

(C) for the firm's own account,

(ii) cash, including cash obtained after the date of the bankruptcy, and including

(A) dividends, interest and other income in respect of securities referred to in subparagraph (i),

(B) proceeds of disposal of securities referred to in subparagraph (i), and

(C) proceeds of policies of insurance covering claims of customers to securities referred to in subparagraph (i),

that is held by or for the account of the firm

(D) for a securities account of a customer,

(E) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the cash with the firm to assure the performance of the person's obligations under the contract, or

(F) for the firm's own securities account, and

(iii) any investments of the securities firm in its subsidiaries that are not referred to in subparagraph (i) or (ii); and

(b) a fund, in this Part called the "general fund", including therein all of the remaining vested property.

Allocation and distribution of cash and securities in customer pool fund

262. (1) Cash and securities in the customer pool fund shall be allocated in the following priority:

(a) for costs of administration referred to in paragraph 136(1)(b), to the extent that sufficient funds are not available in the general fund to pay such costs;

(b) to customers, other than deferred customers, in proportion to their net equity; and

(c) to the general fund.

Where property deposited with securities firm under an EFC

(1.1) Where

(a) a person has, under the terms of an eligible financial contract with the securities firm, deposited property with the firm to assure the performance of the person's obligations under the contract, and

(b) that property is included in the customer pool fund pursuant to paragraph 261(2)(a),

that person shall share in the distribution of the customer pool fund as if the person were a customer of the firm with a claim for net equity equal to the net value of the property deposited that would have been returnable to the person after deducting any amount owing by the person under the contract.

Distribution

(2) To the extent that securities of a particular type are available in the customer pool fund, the trustee shall distribute them to customers with claims to the securities, in proportion to their claims to the securities, up to the appropriate portion of their net equity, unless the trustee determines that, in the circumstances, it would be more appropriate to sell the securities and distribute the proceeds to the customers with claims to the securities in proportion to their claims to the securities.

Compensation in kind

(2.1) Subject to subsection (2), the trustee may satisfy all or part of a customer's claim to securities of a particular type by delivering to the customer securities of that type to which the customer was entitled at the date of bankruptcy. For greater certainty, the trustee may, for that purpose, exercise the trustee's power to purchase securities in accordance with section 259.

Allocation of property in the general fund

(3) Property in the general fund shall be allocated in the following priority:

(a) to preferred creditors in the order set out in subsection 136(1);

(b) rateably

(i) to customers, other than deferred customers, having claims for net equity remaining after distribution of property from the customer pool fund and property

provided by a customer compensation body, where applicable, in proportion to claims for net equity remaining,

(ii) where applicable, to a customer compensation body to the extent that it paid or compensated customers in respect of their net equity, and

(iii) to creditors in proportion to the values of their claims;

(c) rateably to creditors referred to in section 137; and

(d) to deferred customers, in proportion to their claims for net equity.

***COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, C. C-36**

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and 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 the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of 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.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[…]

Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

FRAUDULENT CONVEYANCES ACT, RSO 1990, C. F.29

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Where s. 2 does not apply

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.

FRAUDULENT PREFERENCES ACT, RSA 2000, C. F-24

Intent to prefer

2. Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

Preferential effect

3. Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,

is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

[...]

Bona fide transactions

6. Nothing in sections 1 to 5 applies to

(a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,

if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

Payment to creditor

7. When there is a valid sale of goods, securities or property and the consideration or part of it is paid or transferred by the purchaser to the creditor of the vendor under circumstances that would render the payment or transfer void if it were made by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

Restoration of security to creditor

8. When a payment that is void under this Act has been made and a valuable security has been given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to the creditor before or as a condition of the return of the payment.

Saving of payment to creditor

9. Nothing in this Act

(a) affects a payment of money to a creditor when the creditor by reason or on account of the payment has lost or been deprived of or has in good faith given up a valid security that the creditor held for the payment of the debt so paid, unless the value of the security is restored to the creditor,

(b) affects the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not lessened in value to the other creditors because of the substitution, or

(c) invalidates a security given to a creditor for the pre-existing debt when, by reason or on account of the giving of the security, an advance is made in money to the debtor by the creditor in the bona fide belief that the advance will enable the debtor to continue the debtor's trade or business and pay the debtor's debts in full.

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., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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