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 RESPONDENT, 0678786 B.C. LTD. (FORMERLY THE MCCANN FAMILY HOLDING CORPORATION)

MOTION FOR THE APPOINTMENT OF REPRESENTATIVE COUNSEL FOR THE CLASS ACTION (returnable June 11, 2014)

Date: June 3, 2014

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I. OVERVIEW

1. This motion and the relief requested by the moving party, Timothy Yeoman ("**Yeoman**"), a proposed representative plaintiff in an uncertified class action, is a waste of this Court's resources and time.

2. Yeoman is an unsecured contingent creditor of the Applicants (defined below), for an amount somewhere less than $150 dollars. On this motion, he asks this Court to exercise a rare discretion to appoint him the formal legal representative of members of his proposed class, which although Yeoman does not know, purportedly includes "thousands" of similarly situated unsecured contingent creditors. Yeoman also seeks an order that Harrison Pensa LLP be appointed his representative counsel and that Koskie Minsky LLP be appointed agent to Harrison Pensa LLP (collectively, "**Representative Counsel**"). Yeoman has temporarily "adjourned" his original request for this Court to order the Applicants to pay his counsel's legal costs relating to these proceedings.

3. Simply put, Yeoman's motion is premature. Thus far, given the approximately $150 million of secured creditor claims that must be satisfied first, these insolvency proceedings have not contemplated any recoveries for unsecured creditors let alone unsecured contingent creditors. To permit Yeoman's motion would prejudice these proceedings and the other parties, including secured creditors, third party lenders, such as the respondent McCann (defined below), through unnecessary cost, delay and diversion. Yeoman's motion could only be appropriate if and when these proceedings contemplate recoveries for unsecured creditors or, at least when a claims process for unsecured creditors is being considered.

4. On this basis, among others, the respondent McCann respectfully requests that this motion be dismissed.

II. FACTS

A. The Relevant Parties

5. Yeoman is an individual residing in Strathroy, Ontario. He is the proposed representative plaintiff in the proposed class action, *Timothy Yeoman v The Cash Store Financial Services Inc, et al,* in the Ontario Superior Court of Justice, bearing Court File No. 7908/12 CP (the "**Proposed Class Action**"). The Proposed Class Action names the Applicant, The Cash Store Financial Services Inc., and certain other Applicants, as defendants (hereafter, the "**Applicants**" or "**Cash Store**").

> Affidavit of Timothy Yeoman, sworn May 9, 2014 (the "May 9 Yeoman Affidavit") at para 1, Exhibit 2 to the Motion Record of Timothy Yeoman (the "Yeoman Motion Record"), Tab 2, p 16.
>
> Fresh as Amended Statement of Claim, Exhibit C to the May 9 Yeoman Affidavit, Yeoman Motion Record, Tab 2, p 76.

6. Pursuant to the terms of a Promissory Note, on April 24, 2012 Yeoman borrowed a payday loan in the amount of $400 from the Applicants. Yeoman promised to, and did, repay his loan and paid fees and interest totaling $147.32. This payday loan was his only transaction with the Applicants. In these proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("***CCAA***"), Yeoman personally asserts an unsecured contingent claim against the Applicants with respect to the $147.32 in fees and interest.

> Transcript of the Cross-Examination of Timothy Yeoman dated May 29, 2014 (the "Yeoman Cross") at Q 38-45, Brief of Transcripts of the Respondent 0678786 BC Ltd (the "Brief of Transcripts"), p 12-13.

Promissory Note and Disclosure of Costs, Exhibit B to the Affidavit of Timothy Yeoman, sworn January 29, 2014 (the "January 29 Yeoman Affidavit"), Exhibit D to the May 9 Yeoman Affidavit, Yeoman Motion Record, Tab 2, p 149.

7. The respondent, 0678786 B.C. Ltd., formerly the McCann Family Holding Corporation ("**McCann**"), is a British Columbia corporation extra-provincially registered in Alberta. McCann provided the Applicants millions of dollars in third-party lending ("**TPL**"), in connection with its brokered loan business.

Monitor's Pre-Filing Report at para 14, footnote 1.

8. As a result of TPL lending and brokered loan activities, the Applicants currently owe McCann millions of dollars. McCann's claim against the Applicants is secured by the TPL Charge, as defined in and under the Amended and Restated Initial Order dated April 15, 2014, as amended ("**Initial Order**"). This charge and the other charges granted by the Initial Order rank ahead of all Encumbrances, as defined in the Initial Order. McCann also holds, through a subsidiary, senior secured debt of the Applicants.

Amended and Restated Initial Order dated April 15, 2014, as amended ("Initial Order"), paras 30, 55.

Affidavit of Sharon Fawcett, sworn April 11, 2014 at para 14, Exhibit 1 to the Affidavit of Sharon Fawcett, sworn April 22, 2014, Application Record of 0678786 BC Ltd, Tab 2, pp 14-15.

B. The Proposed Class Action

9. Yeoman commenced the Proposed Class Action by filing the original Statement of Claim on August 1, 2012. Approximately a year later, and on August 27, 2013, Yeoman filed a Fresh as Amended Statement of Claim. His claim has not been amended since this time.

May 9 Yeoman Affidavit at paras 2, 3, Exhibit 2 to the Yeoman Motion Record, Tab 2, pp 16-17.

10. The certification motion for the Proposed Class Action has yet to occur and was scheduled for September 2014—nearly two years after the Proposed Class Action commenced. While Yeoman is unsure whether this has changed, he intends to represent the following class:

> All persons in Canada who entered into "payday loan" transactions with Cash Store Financial in Ontario between September 1, 2011 and the date of judgment (the "**Proposed Class**").

Notice of Motion at para 1, Exhibit 1 to the Yeoman Motion Record, Tab 1, pp 1-2.

11. Yeoman has no knowledge of how many people are included in the Proposed Class, has not made efforts to contact or identify putative members, nor does he have knowledge of the quantum of potential damages suffered by members of his Proposed Class. Yeoman does, however, seek to represent both persons who repaid loans (such as himself) advanced by the Applicants and those that did not.

Yeoman Cross at Qs 32-36, McCann Brief of Transcripts, pp 11-12.

12. The Proposed Class Action claims against the Applicants for: (i) extending payday loans contrary to Ontario provincial statutes and regulations; (ii) breaching federal competition legislation; (iii) conspiracy; and (iv) unjust enrichment. As relief, Yeoman seeks damages from the Applicants and relief from repayment of outstanding loans owed to the Applicants, among other things.

Fresh as Amended Statement of Claim, Exhibit C to the Yeoman Affidavit, Yeoman Motion Record, Tab 2, p 79.

C. Current Status of the Cash Store *CCAA* Proceedings

13. On April 14, 2014, the Applicants filed for protection under the *CCAA* and commenced these proceedings. At the time of filing, the Applicants had stated assets of approximately $176

million. The Applicants had stated liabilities of approximately $185 million, the vast majority of which is owed to secured creditors.

Monitor's Pre-Filing Report at paras 23-24.

14. The quality of the Applicants' assets remains unknown; moreover, assets have deteriorated since proceedings began. In particular, since commencing these proceedings the Applicants have ceased their brokered TPL lending business, reducing total assets. Similarly, the age of the Applicants' accounts receivables has increased since proceedings began, including receivables relating to McCann's brokered lending in Ontario. At the same time, the secured obligations of the Applicants, through DIP financing and other debts, have significantly increased since filing under the *CCAA*.

Monitor's Third Report at paras 29-36.

Supplement to the Monitor's Third Report at Schedule "A" – Collection Rate Table.

Order of the Honourable Regional Senior Justice Morawetz dated May 17, 2014 ("May 17 Order of Morawetz J"), at para 4.

15. Apparent from the above, these *CCAA* proceedings remain in their initial phases. Thus far, proceedings have focused on obtaining stay orders (which has stayed the Proposed Class Action), securing and resolving issues relating to DIP financing, resolving priority or ownership disputes among secured creditors and TPL lenders, and beginning processes to ascertain the realizable value of the Applicants' stated assets. These processes remain ongoing.

16. Notably, Rothschild Inc. is presently conducting a sale and investment process that will provide an accurate valuation of the Applicants' remaining assets. These processes remain in the due diligence phase and bids and binding proposals from potential buyers are not expected until late June or July 2014.

Monitor's Fourth Report at para 28.

17. Given that significant uncertainty remains regarding the nature of and extent of secured claims and realizable assets, no claims process has yet been contemplated—whether for secured claims or unsecured claims. When and if any such process will occur, especially with respect to unsecured claims, is unknown.

III. ISSUE

18. There is one issue on this motion:

(a) whether this Court should exercise its rare discretion under the *CCAA* to grant an order appointing Yeoman as the legal representative of the Proposed Class and appoint Representative Counsel as his counsel.

IV. LAW AND ARGUMENT

A. Representation Orders are Discretionary and Highly Fact-Specific

19. McCann does not dispute that a *CCAA* court has authority under section 11 of the *CCAA* to make a representation order. However, this authority is discretionary and its exercise is rare and highly fact specific.

20. In an appeal concerning a proposed representation order, for a uncertified class action, the Court of Appeal for Ontario described the highly fact-specific nature of this discretion:

> The arguments advanced by counsel ***demonstrate the very fact-specific nature of the motion judge's exercise of her discretion***. Her order is very much a product of her assessment of the fact situation before her. It does not purport to determine any legal issues of significance outside of the factual corners of this proceeding. [emphasis added]

Muscletech Research and Development Inc (Re), [2006] OJ No 4583 at para 5 (Ont CA), Brief of Authorities of the Respondent 0678786 BC Ltd ("McCann's Brief of Authorities"), Tab 1.

21. Furthermore, the exercise of discretion to grant a representation order remains exceptional—not the rule. Justice Pepall noted, and as quoted in Yeoman's factum, that "[d]esirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings."

Canwest Publishing Inc (Re), 2010 CarswellOnt 1344 at para 24 (Ont Sup Ct J), Yeoman's Brief of Authorities, Tab 15 ["*Canwest*"].

Factum of Timothy Yeoman (re: appointment of representative counsel for class action plaintiffs) ("Yeoman's Factum") at para 32.

B. Representation Orders for Proposed Class Actions are Extremely Rare

22. Not only are representation orders rare in *CCAA* proceedings generally, they appear rarest, if not non-existent, regarding uncertified class actions.

23. The leading authority concerning an uncertified class action is the decision of Justice Mesbur in the *Muscletech Research and Development Inc (Re)* insolvency ("***Muscletech I***"). In this case, a proposed representative plaintiff in an uncertified U.S. class action, alleging misrepresentations by Muscletech, sought a representation order. Justice Mesbur noted the lack of precedent for such orders:

> From the interplay of the sections of the *CCAA* and the *BIA*, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriquez and Guzman personally.
>
> ... ***As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted***. [emphasis added, footnotes omitted]

Muscletech Research & Development Inc (Re), 2006 CarswellOnt 4929 at paras 33-34 (Ont Sup Ct J) aff'd [2006] OJ No 4583 (Ont CA), McCann's Brief of Authorities, Tab 2 ["*Muscletech I*"].

24. In considering whether the facts supported the exercise of her discretion to grant the representation order, Justice Mesbur was persuaded by, among other things, that the claims process established in that proceeding had provided the proposed class members an opportunity to file individual claims but no putative members of the class had done so. She dismissed the motion.

Muscletech I at para 44, McCann's Brief of Authorities, Tab 2.

25. A later decision of Justice Ground in the *Muscletech* insolvency ("***Muscletech II***") is also a leading authority regarding representation orders in the context of proposed, uncertified class actions. This decision considered a proposed U.S. class action, alleging different misrepresentations. In considering whether to exercise his discretion and grant the order, Justice Ground remarked he "must consider the factual circumstances of the case and the equities between the parties."

Muscletech Research & Development Inc (Re), 2006 CarswellOnt 7877 at para 33 (Ont Sup Ct J), McCann's Brief of Authorities, Tab 3 ["*Muscletech II*"].

26. In view of facts and equities, Justice Ground dismissed the motion. The compelling facts and circumstances included that:

(a) there "appear[s] to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine"; and

(b) none of the proposed class members had filed or provided evidence of individual claims.

Muscletech II at para 35, McCann's Brief of Authorities, Tab 3.

27. These two decisions are absent from Yeoman's factum and are the most applicable authorities to this motion.

28. In fact, Yeoman has failed to cite *a single reported decision* where a *CCAA* court considered and granted a contested representation order, for a proposed uncertified class action.

29. By contrast, Yeoman badly asserts that courts have "issued representation orders for class action members in a number of insolvency cases such as *Muscletech, Canadian Red Cross,* and *Sino Forest.*" However, none of these authorities are instances of a *CCAA* court considering and granting a representation order to a proposed class action.

30. First, the *Muscletech* decision relied on by Yeoman is not that of Justice Mesbur or Justice Ground presented above. Rather, Yeoman refers to a February 6, 2006 endorsement of Justice Farley, which concerned extending a stay of proceedings. Justice Farley granted the stay despite its impact on contingent tort claimants. Yeoman mistakenly offers this decision as related to class actions, based on minimal remarks relating to the appointment of an "Ad Hoc Committee".

Yeoman's Factum at para 34.

Muscletech Research and Development Inc, Re, 2010 CarswellOnt 1344 at para 8 (Ont Sup Ct), Yeoman's Brief of Authorities, Tab 16 ["*Muscletech III*"].

Muscletech I at para 35, McCann's Brief of Authorities, Tab 2.

31. Second, and similarly, *Re Canadian Red Cross* did not grant a representation order. Rather, the Court considered whether to grant an order lifting the stay of proceedings, to permit a proposed representative plaintiff to commence a class action, and to permit the proposed representative plaintiff to file a "class proof of claim". Justice Blair declined to exercise his discretion and dismissed the motion. He remarked:

> This is not the case, in my view — because it is not necessary to do so — to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. ***There are apparently no examples in Canada yet where such a procedure has been permitted.*** In the United States, which has — as Mr. Wright's factum put it — "a lengthier history of class proceedings," class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the Matter of American Reserve Corp., 840 F.2d 487 (U.S. 7th Cir. Ill. 1988) (Feb. 18, 1988) (No. 87-1768), and Reid v. White Motor Corp., 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989). ***As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.*** [emphasis added]
>
> *Re Canadian Red Cross Society,* 1999 CarswellOnt 3234 at paras 10-11 (Ont Sup Ct J), Yeoman's Brief of Authorities, Tab 17.

32. The *Sino Forest* insolvency also fails to support Yeoman—in fact, Yeoman fails to even cite a decided *Sino Forest* decision. Instead, in the recent multi-billion dollar and international insolvency concerning Sino-Forest Corporation, and related entities, the parties settled issues regarding representation orders. In that case, limited representation status was granted at the time of the claims procedure, not prior.

33. The decisions provided by and relied on by Yeoman, which actually consider and grant representation orders, are of little assistance to the order requested on this motion. In particular, Yeoman relies on both *Nortel Networks Corporation (Re)* and *Canwest* as examples of *CCAA* courts granting representation orders with respect to "vulnerable" groups of persons. These cases

concerned representation orders for employees or former employees. It is trite, that the law, including bankruptcy and insolvency law, gives special regard and protections to the rights of employees.

> *Nortel Networks Corporation (Re),* 2009 CarswellOnt 3028 at para 2, Yeoman's Brief of Authorities, Tab 14 ["*Nortel*"].
>
> *Canwest* at para 1, Yeoman's Brief of Authorities, Tab 15.

34. Finally, Yeoman relies on various factors from *Canwest* as being the "test" applicable for how this Court should exercise its discretion on this motion. Those factors are, however, again specific or most relevant to the employee context. In *Canwest*, Justice Pepall referred to three precedent employee representation orders (*Nortel, Fraser Paper Inc* and *Canwest Global Communications*), on their basis concluded that these factors were the relevant ones.

> *Canwest* at paras 20-21, Yeoman's Brief of Authorities, Tab 15.

35. Instead of applying the so-called "Canwest Factors", relevant to the employment context, this Court must consider Yeoman's exceptional request for relief in view of the facts and circumstances raised in the *Muscletech I* and *Muscletech II* proposed class action decisions and in view of all "equities" before this Court.

C. The Relevant Facts, Circumstances and Equities indicate this Motion Should be Dismissed

1. A Representation Order is Premature

36. Prematurity is a well-established basis in many legal contexts (such as administrative law) for a court to decline to exercise a discretionary power. Furthermore, it is trite that *CCAA* proceedings only consider distributions to unsecured creditors once secured claims are satisfied

or accounted for. Indeed, courts have specifically warned against using the discretionary powers under the *CCAA* as means to usurp or defeat the rights of secured creditors in favour of unsecured creditors:

> The flexibility and breadth of the *CCAA* should not in my view be used to defeat a creditor that has security...
>
> Unsecured creditors should not in my view, through the mechanism of the *CCAA*, displace the security of another creditor simply because that security is unperfected.
>
> *TRG Services Inc, Re,* 2006 CarswellOnt 7024 at paras 69, 71 (Ont Sup Ct J), McCann's Brief of Authorities, Tab 4.

37. In these proceedings Yeoman is personally an unsecured contingent creditor, with a claim of less than $150 dollars. On this motion, he seeks to be appointed the legal representative of other unsecured contingent creditors, with claims that are also "relatively small".

> Yeoman Cross at Qs 47-48 Brief of Transcripts, p 14.
>
> Yeoman's Factum at para 37.

38. Such a representation order is unnecessary and premature. At present, it appears the claims of secured creditors will exceed the Applicants' realizable assets, as such, there may well be no claims process involving unsecured creditors (not to mention unsecured contingent creditors), or claims process at all.

> Monitor's Pre-Filing Report at paras 23-24.
>
> May 17 Order of Morawetz J at para 4.

39. Central to the current *CCAA* proceedings are the resolution or determination of ongoing disputes between secured creditors and TPL lenders, and ongoing sale and investment processes conducted by Rothschild Inc. Yeoman has no legitimate role to play in these activities. *Only if* the Cash Store proceedings result in potential unsecured creditor recoveries, or a claims process

for unsecured creditors is proposed, could this motion be appropriate for consideration by the Courts.

40. Right now, a representation order would be the exercise of discretionary *CCAA* powers in a manner that improperly interferes with the *CCAA* proceedings and the claims of secured creditors.

41. Furthermore, appointing Yeoman as legal representative of the Proposed Class would cause direct and tangible prejudice to these proceedings and interested parties. Yeoman's bald assertion that "no stakeholder...will be prejudiced" because he has agreed to "adjourn" his request for the funding of his legal costs, is misplaced. His *mere appointment* means formally adding a representative and class of persons, without any direct interest in current activities, to these proceedings. This insertion will increase costs, cause delay, and prejudice all other *bona fide* and directly interested stakeholders, as well as, this Court's resources.

Yeoman's Factum at para 45.

42. In *Campeau v Olympia & York Developments Ltd*, a case erroneously relied on by Yeoman, Justice Blair considered whether to lift a *CCAA* stay of proceedings, to permit certain actions (not class actions) to proceed against Olympia & York and a third party bank. Justice Blair declined to exercise his discretion to lift the stay, since: (i) the stay would cause the unsecured contingent claims to be addressed in the normal course of the *CCAA* proceedings; and (ii) the stay prevented "great prejudice to Olympia & York if its attention [was] diverted from the corporate restructuring process and it [was] required to expend time and energy in defending an action...".

Campeau v Olympia & York Developments Ltd, 1992 CarswellOnt 185 at para 24 (Ont Ct J), McCann's Brief of Authorities, Tab 5.

43. These concerns apply to this motion. Yeoman's appointment as a formal legal representative of the Proposed Class would, at this premature stage, only cause the Applicants and these proceedings to "divert attention" and waste time, energy and limited resources.

44. Finally, comments by Justice Pepall in *Canwest* regarding prematurity are distinguishable from the present motion. Again, and unlike the present motion, that case concerned unsecured claims of employees. More specifically, the determinative facts and circumstances in *Canwest* included:

(a) the proposed legal representation of 45 known and identifiable former employees and seven known and identifiable retirees, with established (not contingent) claims and rights, including some claims with statutory priority; and

(b) evidence that the monitor had "very extensive responsibilities", and accordingly, that it was "unrealistic to expect" the monitor to be "fully responsive to the needs and demands" of the employees and retirees.

Canwest at paras 4-5, Yeoman's Brief of Authorities, Tab 15.

45. These concerns plainly do not arise on the present motion.

46. Conversely, Yeoman is a contingent creditor with a small, unproven, unsecured contingent claim. He has admitted that he does not know "how many people" are in the Proposed Class, "how much their damages would be", and has not "been in contact with any other member" of the Proposed Class. Unlike in *Canwest*, Yeoman's representation order should be dismissible due to prematurity.

Yeoman Cross at Qs 32-36, Brief of Transcripts, p 11-12, 26.

2. The Proposed Class Action is Unlikely to be Certified

47. According to *Muscletech II*, an important consideration for whether to grant a representation order, for an uncertified proposed class action, is whether the action appears "certifiable". For Ontario class proceedings to be certified, they must meet the five criteria under section 5 of the *Class Proceedings Act 1992,* 1992, SO 1992, c 6. These criteria include that the proposed representative plaintiff would "fairly and adequately" represent the proposed class, or that the proposed representative would "vigorously and capably prosecute the interests of the class". Indeed, the duties of a representative plaintiff are "akin to [those] of a fiduciary".

Muscletech II at para 35, McCann's Brief of Authorities, Tab 3.

Class Proceedings Act, 1992, SO 1992, c 6, s 5(e).

Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46 at para 41, McCann's Brief of Authorities, Tab 6.

Brown v Canadian Imperial Bank of Commerce, 2012 ONSC 2377 at para 204 (citing *Hoffman v Monsanto*, 2005 SKQB 225 at para 336, aff'd 2007 SKCA 47, leave to appeal to SCC refused [2007] SCCA No 347), McCann's Brief of Authorities, Tab 7.

48. Certification also requires that the representative plaintiffs show they do "not have...an interest in conflict" with others in the proposed class and that the proposed class is otherwise free from internal conflicts of interest.

Class Proceedings Act, s 5(e).

49. In the words of Justice Ground, the evidence on this motion raises "substantial doubt" as to whether Yeoman's Proposed Class Action is certifiable.

50. First, there is serious doubt as to whether Yeoman is a suitable representative plaintiff. In particular, Yeoman has failed to materially advance the Proposed Class Action since

commencing it nearly two years ago. For instance, a certification motion has not yet occurred. Similarly, Yeoman has failed to inform himself of the interests he seeks to represent. Again, he still has no idea "how many people" are in his Proposed Class, "how much their damages would be", nor has he contacted a single person he seeks to represent.

Yeoman Cross at Qs 32-36, Brief of Transcripts, p 11-12, 26.

51. In addition, there is serious doubt as to whether Yeoman even knows the definition of his Proposed Class:

29. ...Do you know if that's still the proposed class?

A. I don't.

Yeoman Cross at Q 29, Brief of Transcripts, p 8-9.

52. Simply, Yeoman has proven himself incapable of vigorously and capably representing the unsecured contingent claims of the Proposed Class. He falls far short of the onerous duties of a fiduciary.

53. Second, Yeoman has a serious conflict of interest with members of his Proposed Class, and, his Proposed Class is internally and irreconcilably conflicted. The Proposed Class includes persons, who, like Yeoman, repaid their loans from the Applicants, but, also includes persons who have not (and who are therefore *debtors* of Cash Store *not creditors*). Moreover, the Proposed Class Action seeks as relief both the *payment of damages* by the Applicants and the *relief of debt* owed to the Applicants.

Yeoman Cross at Qs 103-110, Brief of Transcripts, p 26-28.

54. These claims result in a fatal conflict of interest, in the circumstances of the Applicants' insolvency.

55. On the one hand, Yeoman seeks on this motion, an order to participate in these proceedings, so he and members of his Proposed Class receive payment for their unsecured contingent claims. Yet, at the same time, Yeoman seeks to sabotage creditor recovery (including his own), by forgiving receivables owed to the Applicants. Despite this irreconcilable conflict, Yeoman readily admits to understanding that "creditors in insolvency benefit from maximizing the collection of accounts receivables".

Yeoman Cross at Qs 110-113, Brief of Transcripts, p 28.

56. In short, there are "serious doubts" as to whether Yeoman's Proposed Class Action is certifiable and accordingly this Court should decline to exercise its discretion.

3. This Motion is to Protect Class Counsel Fees Not Proposed Class Members

57. In his factum, Yeoman repeatedly and baldly asserts that his representation order is "necessary" to ensure the Proposed Class members are protected in these proceedings. However, Yeoman provides no evidence as to why this is the case, or why the normal protections for unsecured creditors under the *CCAA* are inadequate. In particular, the Monitor (FTI Consulting Canada Inc.) is responsible for protecting and representing the interests of all creditors, including unsecured contingent creditors. Yeoman provides no evidence as to why the Monitor is unable to protect the interests of the Proposed Class members in these proceedings.

CCAA, ss 23-25.

58. In fact, Yeoman admits he is "satisfied" with his representation thus far in these proceedings, through his counsel's attendance at hearings and monitoring of the progress of these proceedings.

Yeoman Cross at Qs 77-78, Brief of Transcripts, p 20.

59. In actuality, this motion is a poorly veiled attempt by Representative Counsel to improperly advance the Proposed Class Action through the use of the *CCAA* process, and potentially to obtain some recoupment of their fees, incurred regarding the Proposed Class Action over the past two years. On this motion, Yeoman originally sought to have the Applicants pay his legal costs in these proceedings. Although Yeoman has "adjourned" this request, he does so without prejudice to a future request and continues to believe the Applicants will eventually pay his costs:

> Q. And Mr. Yeoman, who do you propose pays Harrison Pensa and Koskie Minsky's fees if they are granted representative counsel status in this motion?
>
> A. I would think the people they are suing.

Notice of Motion at para 4, Exhibit 1 to the Yeoman Motion Record, Tab 1, p 2.

Yeoman's Factum at para 45.

Yeoman Cross at Q 99, Brief of Transcripts, p 24-25.

60. Moreover, Yeoman readily admits his original request for costs was Representative Counsel's idea:

> 94. Q. Okay, and whose idea was it to seek those legal fees? Yours or your lawyers?
>
> A. My lawyers. To get paid, yeah, of course.

Yeoman Cross at Q 94, Brief of Transcripts, p 24.

61. In view of Yeoman's and Representative Counsel's real motivations for this motion, equity points against a representation order.

4. In any event, the "Canwest Factors" Fail to Support Yeoman

62. In any event, and to the extent this Court determines Yeoman's alleged "Canwest Factors" are relevant to this motion, they also fail to advance his argument. This is apparent from the above analysis.

63. Furthermore and in particular:

(a) *The Proposed Class members are not a "vulnerable group", at risk of having their unsecured contingent claims "extinguished".* Contrary to Yeoman's assertions, the Monitor and this Court will protect the unsecured contingent claims of members of the Proposed Class, as they may become applicable. Moreover, such claimants will be entitled to file individual claims in any future claims process;

(b) *A representation order does not benefit the Applicants.* Unlike in other cases, the requested order will only cause prejudice to the Applicants, through increased cost, delay and distraction;

(c) *A representation order will not provide "social benefits".* Yeoman alleges his order promotes access to justice and deterrence. As noted above, a representation order at this point will only waste this Court's resources and thereby hinder

restructuring efforts by the Applicants, to the detriment of the Applicants, their employees and creditors;

(d) *There is no evidence a representation order will prevent a multiplicity of legal retainers.* At present, the Proposed Class Action is the only contingent claim pending against the Applicants—"multiple" claims do not exist. It is particularly telling that while Yeoman has not contacted any members of his Proposed Class, he remains the only claimant against the Applicants. Moreover, there is not yet any claims process or other issue in these proceedings which would require unsecured contingent creditors to participate and retain counsel; and

(e) *The balance of convenience points against an order.* This motion is fundamentally to obtain recoupment of Representative Counsel's fees, and as such, the balance of convenience favours dismissal.

64. For the reasons above, the remaining "Canwest Factors" also fail to advance Yeoman's argument.

V. ORDER REQUESTED

65. McCann respectfully requests an order:

(a) dismissing Yeoman's motion to appoint him the representative of the Proposed Class members and appointing Representative Counsel as his counsel; and

(b) costs of this motion, on a substantial indemnity, or other appropriate basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June, 2014.

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

SCHEDULE "A"
AUTHORITIES CITED

1. *Muscletech Research and Development Inc (Re),* [2006] OJ No 4583 at (CA).

2. *Canwest Publishing Inc (Re),* 2010 CarswellOnt 1344 (SCJ).

3. *Muscletech Research & Development Inc (Re),* 2006 CarswellOnt 4929 (SCJ) aff'd [2006] OJ No 4583 (CA).

4. *Muscletech Research & Development Inc (Re),* 2006 CarswellOnt 7877 (SCJ).

5. *Re Canadian Red Cross Society,* 1999 CarswellOnt 3234 (SCJ).

6. *Nortel Networks Corporation (Re),* 2009 CarswellOnt 3028 (SCJ).

7. *TRG Services Inc, Re,* 26 CBR (5th) 203, 2006 CarswellOnt 7024 (SCJ).

8. *Campeau v Olympia & York Developments Ltd,* 14 CBR (3d) 303, 1992 CarswellOnt 185 (Crt J).

9. *Western Canadian Shopping Centres Inc v Dutton,* 2001 SCC 46.

10. *Brown v Canadian Imperial Bank of Commerce*, 2012 ONSC 2377.

SCHEDULE "B"
STATUTORY REFERENCES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36.**

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Monitors
Duties and functions

23. (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Right of access

24. For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

Obligation to act honestly and in good faith

25. In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the Bankruptcy and Insolvency Act.

***Class Proceedings Act, 1992*, SO 1992, c 6**

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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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