

**COURT OF APPEAL FOR ONTARIO**

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

**JOINT FACTUM OF THE DIP LENDERS AND THE AD HOC COMMITTEE**  
(Motion For Leave To Appeal In Writing, Returnable Week Of September 8, 2014)

August 29, 2014

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(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
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<sup>1</sup> Bodnar et al. v. The Cash Store Financial Services Inc. et al., Supreme Court of British Columbia, Vancouver Reg. No. S041348;  
 Stewart v. The Cash Store Financial Services Inc. et al, Supreme Court of British Columbia, Vancouver Reg. No. S126361;  
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 Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen’s Bench, Winnipeg Reg. No. CI 10-01-66061;  
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**TAB 1**

## **PART I - OVERVIEW**

1. The Respondents oppose the motions of the TPLs (as defined below) for leave to appeal the August 5, 2014 order of Regional Senior Justice Morawetz of the Superior Court of Justice (Commercial List) (the **TPL Decision**).

2. The issue before the court below was clear: were the TPLs creditors of Cash Store or was the relationship principal-broker. The resolution of this question turned on the nature of the relationship between the TPLs and Cash Store at the time of the CCAA filing and was resolved by considering both the terms of the parties' contracts and the parties' practice.

3. Regional Senior Justice Morawetz found as a fact that the TPLs were creditors of Cash Store. On appeal, the TPLs now seek to re-characterize the dispute as an important issue of contract law. This obviously is not the case. The issue before the court below involved the application of settled law to the facts at hand.

4. The subject matter of the TPL Decision has been an ongoing and costly distraction in the Cash Store insolvency proceedings for several months and involved numerous appearances before Regional Senior Justice Morawetz to deal with TPL issues. It has now been comprehensively considered by the presiding CCAA judge, resolved and must be brought to an end. The motion for leave to appeal should be dismissed.

## PART II - FACTS

### The Parties and Their Relationship

5. The Applicants (**Cash Store**) are in the business of payday lending.<sup>1</sup> On April 14, 2014, Cash Store obtained an initial order (the **Initial Order**, subsequently amended and restated) pursuant to the CCAA allowing for, *inter alia*, a stay of proceedings while they pursue restructuring efforts.<sup>2</sup>

6. As part of Cash Store's business, it entered into a number of "Broker Agreements", whereby third party lenders (the **TPLs**) lent funds to Cash Store that Cash Store subsequently lent to retail customers. Trimor Annuity Focus LP #5 (**Trimor**) and 0678786 BC Ltd. (**McCann**), the moving parties, were among those TPLs.<sup>3</sup>

7. On paper, Cash Store obtained funds from the TPLs, which Cash Store, as broker, would lend to its brokered loan customers. On paper, those loans were assigned to the TPLs. On paper, the TPLs owned all payments received from the brokered loan customers.<sup>4</sup>

8. In practice, Cash Store borrowed money from the TPLs. In practice, the TPLs were ordinary creditors of Cash Store<sup>5</sup> and (until April of this year in connection with the commencement of the CCAA proceeding) receipts from the brokered loan business

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<sup>1</sup> Endorsement of Morawetz, RSJ. dated August 5, 2014, 2014 ONSC 4326 at para. 1, Motion Record of Trimor Annuity Focus Limited Partnership #5 (**Trimor Motion Record**) at Tab 13 (**Morawetz Endorsement**).

<sup>2</sup> Morawetz Endorsement at para. 12, Trimor Motion Record at Tab 13.

<sup>3</sup> Morawetz Endorsement at paras. 9 and 10, Trimor Motion Record at Tab 13.

<sup>4</sup> Morawetz Endorsement at para. 3, Trimor Motion Record at Tab 13.

<sup>5</sup> Morawetz Endorsement at paras. 126 - 127, Trimor Motion Record at Tab 13.

were regularly deposited into Cash Store's general account, consistent with past practice.<sup>6</sup>

9. At the commencement of the CCAA proceeding, a dispute arose over the entitlements of the TPLs and Cash Store to certain funds in the hands of Cash Store. At the core of this dispute is the question of whether (as Justice Morawetz found) the TPLs loaned their funds to Cash Store, which in turn made loans to its customers; or whether (as the TPLs asserted) the funds were loaned by the TPLs to Cash Store's customers, with Cash Store merely operating as a broker.

10. In April of this year, temporary measures were put in place by the CCAA court to segregate receipts from the brokered loan business pending determination of the dispute. Despite any suggestions that these protective measures evidenced the TPLs' entitlements to those segregated receipts, the protective measures were explicitly short-term steps to ensure that the parties' positions were preserved pending resolution of the matters that were the subject of the TPL Decision. These measures were without prejudice to the rights of the parties to assert any of the arguments made at the court below and remained subject to further order of the court.<sup>7</sup>

11. The TPLs brought motions for recovery of their alleged funds, claiming that the funds held by Cash Store were the property of the TPLs, or alternatively were trust property held by Cash Store for the TPLs.<sup>8</sup>

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<sup>6</sup> Morawetz Endorsement at paras. 5, 24, 27 – 30 and 127, Trimor Motion Record at Tab 13.

<sup>7</sup> Amended and Restated Initial Order of Morawetz RSJ. at paras. 30 – 35; Trimor Motion Record at Tab 11; Order (Additional TPL Protections) of Morawetz RSJ. at para. 6, Trimor Motion Record at Tab 12.

<sup>8</sup> Morawetz Endorsement at paras. 9, 10, 36 and 63, Trimor Motion Record at Tab 13.

## Justice Morawetz's Decision

12. On August 5, 2014, Justice Morawetz of the Commercial List issued an order dismissing the TPLs' motion.

13. Justice Morawetz reviewed extensive volumes of affidavit evidence and cross-examination transcripts and heard multiple days of oral submissions prior to issuing that decision. Further, the TPL issues had been the subject of several appearances before Justice Morawetz prior to the hearing that led to that decision.

14. Factual findings were made by Justice Morawetz in a 24 page decision about how the factual operating relationship between Cash Store and the TPLs significantly differed from the original description set out in the written agreements between Cash Store and the TPLs:

(a) while the written agreements anticipated that funds advanced by the TPLs were to be individually segregated, in practice those funds were not segregated from each other, or from operating cash. Rather, "there was one account and it is not possible to identify the source of the funds"<sup>9</sup>;

(b) Cash Store would make monthly "retention" payments to the TPLs to provide a 17.5% rate of return (the equivalent of interest) on funds advanced by the TPLs. The TPLs received these monthly payments from Cash Store regardless of the payment status of the loans made by Cash Store to its customers<sup>10</sup>; and

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<sup>9</sup> Morawetz Endorsement at para. 122, Trimor Motion Record at Tab 13.

<sup>10</sup> Morawetz Endorsement at paras. 4, 123 and 124, Trimor Motion Record at Tab 13.

(c) the TPLs were insulated from any credit risk from the Cash Store's customers as a result of the capital protections used by Cash Store.<sup>11</sup> These capital protections effectively indemnified the TPLs for any losses arising from underperforming loans designated as being held in the names of the TPLs.

15. In other words, the evidence showed that monies were advanced by the TPLs, commingled in the Cash Store general account, the TPLs received interest payments from Cash Store at a rate of 17.5% and the TPLs were not directly exposed to the credit risk of any of Cash Store's customers, only to Cash Store's credit risk. The TPLs were creditors of Cash Store, and not creditors of Cash Store's customers.

16. Justice Morawetz determined from these facts that the cash advanced by the TPLs to Cash Store for purposes of making loans was not the property of the TPLs. Instead, it was loaned to Cash Store and gave rise to a relationship of debtor and creditor as between Cash Store and the TPLs.<sup>12</sup>

### **Cash Store's Sale Process and Liquidity Position**

17. Cash Store has been engaged in a process to seek a sale of, or significant investment in, its business.<sup>13</sup> On June 16, 2014, the Chief Restructuring Officer for Cash Store obtained an order approving a sale process.<sup>14</sup>

18. According to the most recent report of the Monitor, it is presently anticipated that Cash Store will choose to accept one of the bids received in the sale process and seek

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<sup>11</sup> Morawetz Endorsement at para. 124, Trimor Motion Record at Tab 13.

<sup>12</sup> Morawetz Endorsement at paras. 126 and 130, Trimor Motion Record at Tab 13.

<sup>13</sup> Ninth Report of FTI Consulting Canada Inc., as Monitor, dated August 6, 2014 (**Ninth Report**), at para. 7, Joint Responding Motion Record of DIP Lenders and the Ad Hoc Committee (**Joint Motion Record**), Tab 5.

<sup>14</sup> Ninth Report at para. 8, Joint Motion Record, Tab 5.



Court approval of the selected transaction before the end of its most recent CCAA stay extension on September 30, 2014.<sup>15</sup>

19. Cash Store currently faces significant liquidity concerns. While an extension of the existing DIP facility was agreed to, which may provide additional limited liquidity, this facility is highly discretionary and funding on any particular advance is limited to Cash Store's cash requirements for a two-week period.<sup>16</sup>

20. The cash flow forecasts of Cash Store show that during a three week period from the last week of August to the end of the second week of September, Cash Store is operating with a liquidity cushion of less than \$500,000.<sup>17</sup>

21. Even if all potentially available interim financing is drawn under the existing interim financing facility, this only provides forecasted liquidity to the end of September<sup>18</sup> unless Cash Store is able to access the funds that the court below found Cash Store was free to use.

### **PART III - ISSUES AND LAW**

22. The sole issue to be determined on this motion is whether or not the TPLs should be granted leave to appeal the TPL Decision.

23. The Respondents ask that leave be denied.

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<sup>15</sup> Ninth Report at paras. 10 and 12, Joint Motion Record, Tab 5.

<sup>16</sup> Ninth Report at paras. 17, 18 and 20, Joint Motion Record, Tab 5.

<sup>17</sup> Ninth Report at Schedule "1", Joint Motion Record, Tab 5.

<sup>18</sup> Ninth Report at Schedule "1", Joint Motion Record, Tab 5.

## A. Leave To Appeal Test

24. Leave to appeal in a CCAA matter is to be granted selectively and sparingly.<sup>19</sup> CCAA matters require time sensitive resolution by the supervising judge. Those decisions should be interfered with only in clear cases.<sup>20</sup>

25. On this motion, the Court is to consider four factors:

- (a) Whether the point on the proposed appeal is of significance to the practice;
- (b) Whether the point is of significance to the action;
- (c) Whether the appeal is prima facie meritorious or frivolous; and
- (d) Whether the appeal will unduly hinder the progress of the action.<sup>21</sup>

26. Failure to satisfy even one of the above factors is sufficient for the court to conclude that leave to appeal should be refused.<sup>22</sup>

## B. The Point On The Proposed Appeal

27. The point decided by the court below – and therefore the point under appeal – was whether the commercial relationship between the TPLs and Cash Store was best characterized as:

- (a) a debtor-creditor relationship; or

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<sup>19</sup> *ROI Fund Inc. v. Gandi Innovations Ltd.*, [2012] O. J. No. 31 (ON CA) [*Gandi Innovations*]; at para. 6, Joint Book of Authorities (JBA) at Tab 1; *Blue Note Caribou Mines Inc. (Re)*, [2010] N.B.J. No. 267 (NB CA) [*Blue Note*], at para. 12, citing *Winnipeg Motor Express Inc (Re)*, [2008] M.J. No. 392 (Man. CA) [*Winnipeg Motor*], JBA, Tab 2.

<sup>20</sup> *Blue Note* at para. 12, citing *Winnipeg Motor*, JBA, Tab 2.

<sup>21</sup> *Gandi Innovations* at para. 6, JBA, Tab 1

<sup>22</sup> *Statoil Canada Ltd. (Arrangement relatif à)*, [2012] Q.J. No. 3234 (QC CA) [*Statoil*] at para. 4, JBA, Tab 4; *Hemosol Corp. (Re)*, [2007] O.J. No. 687 (ON CA) [*Hemosol*] at para. 9, JBA, Tab 5.

(b) a principal-broker relationship.

28. The exercise of judicial characterization required the application of settled legal principles to the facts before Justice Morawetz. The TPLs identified *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc. (BC Tel)* as the leading Canadian case considering when the transfer of financial assets constitutes a loan. The TPLs asserted that they were analogous to purchasers in a true sale of receivables, as in *BC Tel*. The TPLs asked the court to apply the indicia of ownership set out in *BC Tel*. As summarized by the TPLs themselves, those indicia are:

(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 [emphasis added].<sup>23</sup>

29. The TPLs themselves emphasized that the court was required to consider "... the substance of the transaction and not merely the form."<sup>24</sup> As stated by Trimor:

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<sup>23</sup> Factum of 0678786 B.C. Ltd. (formerly the McCann Family Holding Corporation), dated May 30, 2014, (**Factum of McCann**) at paras. 54 and 55, Joint Motion Record, Tab 1; Factum of Trimor Annuity Focus Limited Partnership #5, dated May 30, 2014, (**Factum of Trimor**) at paras. 50 – 52, Joint Motion Record, Tab 2.

<sup>24</sup> Factum of McCann at para. 57, Joint Motion Record, Tab 1; Factum of Trimor at para. 53(a), Joint Motion Record, Tab 2.

...in determining the issue of ownership, it is important to carefully consider the facts...<sup>25</sup>

...the DIP Lenders correctly note that Cash Store's legal relationship with the TPLs is not exhaustively defined by the Broker Agreements. The conduct of the parties is also relevant.<sup>26</sup>

30. The Respondents did not dispute the principles of *BC Tel* – only how they applied to the facts of the commercial relationship. The Respondents also referred to certain additional settled principles on indicia of debtor – creditor relationships including:

- (a) whether payments in the nature of interest were made; and
- (b) which party assumed all or partial risk of loss.<sup>27</sup>

31. The TPLs did not dispute the validity of these indicia either: only how they applied to the facts. As a result there is no direct discussion of these cases in the reasons below. Just their direct application to the facts. This is the type of decision that is regularly made in an insolvency proceeding to determine competing priorities to a finite pool of assets.

32. On their leave to appeal motions, the TPLs seek to re-write this history in a variety of ways. They have asserted that Justice Morawetz:

- (a) Improperly permitted parol evidence;
- (b) Failed to consider that the TPLs were bailees; and

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<sup>25</sup> Reply and Responding Factum of Trimor Annuity Focus Limited Partnership #5, dated June 5, 2014, (**Reply Factum of Trimor**) at para. 5, Joint Motion Record, Tab 4.

<sup>26</sup> Reply Factum of Trimor at para. 15, Joint Motion Record, Tab 4.

<sup>27</sup> Joint Factum of the DIP Lenders and Ad Hoc Committee, dated June 3, 2014, at paras. 52 and 54, Joint Motion Record, Tab 3.

(c) Failed to apply the proper test for the setting aside, rescission, or novation, of a written contract.

33. These legal issues are raised for the first time on appeal and were not put before Justice Morawetz by the TPLs. The TPLs now argue against the CCAA court's reliance on factors and evidence that they insisted the CCAA court should rely on.

34. Most fundamentally, these arguments appear designed to obtain leave and wrongly obscure the nature of the motion below. Ultimately the only point for any court on appeal would be the one that was before Justice Morawetz: were the TPLs in a debtor-creditor relationship with Cash Store, based upon the settled legal principles, the applicable facts at hand, and the voluminous record.

#### **I. The Point On The Proposed Appeal Is Not Of Significance To The Practice**

35. The matter on appeal must transcend the interests of the parties and be of significance to the practice generally.<sup>28</sup> The points raised on this motion do not meet this high threshold; they offer no precedential value or novel or important points.

36. The court below determined the nature of the relationship of the TPLs and the debtor at the time of the CCAA filing based on the facts before it.

37. Throughout a detailed 24 page judgment, the complex facts of the current case were applied to the law.

38. There was no argument on the applicable law. All parties accepted the indicia in *BC Tel* as well as the additional indicia presented by the DIP Lenders and the TPLs.

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<sup>28</sup> *Hemosol* at para. 9, JBA, Tab 5.

39. As reflected in *Blue Range Resource Corp. (Re)*<sup>29</sup> - an authority cited by the moving parties – a case that rests on well accepted legal principles, and raises only a question of how the facts of the proposed appellant’s case fit within those legal principles is not of significance to the practice.<sup>30</sup>

40. While the TPLs now seek to shift the characterization of their appeal to one involving variation or novation of contracts, this strategem does not assist. Setting aside the incorrect characterization, there is no authority to indicate that these principles are in flux or unsettled, such that appellate review would assist the practice. At best it is an allegation that the judge erred in law.

41. Because of the presence of a “non-waiver clause” Justice Morawetz did make brief reference to the law in that regard. Again, there is no suggestion that such jurisprudence is in dispute. The law is clear that conduct of the parties is relevant to the characterization of their relationship irrespective of the presence of a written agreement and the existence of a non-waiver clause.<sup>31</sup>

42. Finally, the TPLs have also attempted to revisit issues based upon Part XII of the BIA. The TPLs did make this particular argument to the court below in passing. It was and remains, however, clearly inapplicable to the current circumstances. Part XII applies only to a “securities firm”. A securities firm under the BIA is a party that carries on the business of buying and selling securities from, to or for a customer.<sup>32</sup> There is no evidence that Cash Store engaged in this type of business. All the evidence is clear that Cash Store was engaged in the business of payday lending.

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<sup>29</sup> [2001] A.J. No. 400 (AB CA), JBA, Tab 6.

<sup>30</sup> *Hemosol* at para. 9, JBA, Tab 5; *Blue Note* at para. 18, JBA, Tab 2; *Blue Range Resources Corp.*, [2001] A.J. No. 400 (AB CA) at paras. 2 and 3, JBA, Tab 6.

<sup>31</sup> *Colautti Construction Ltd. v. City of Ottawa* (1984), 46 O.R. (2d) 236 (C.A.) at page 242(h), JBA, Tab 7; *Dimensa Corp v Tx/Communications Canada Inc*, [1998] O.J. No. 1170 at paras. 17 and 20, JBA, Tab 8.

<sup>32</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended at s. 253.

43. There is no reason to conclude that bankruptcy principles related to a bankrupt securities firm have any application to the current case.

44. The TPLs raise concerns that the point on appeal is of significance to the brokerage industry generally. The TPL Decision does not have any general implications for parties engaged in principal-broker relationships. Every such relationship will be interpreted based upon its own facts and the application of the TPL Decision is restricted to the unique facts of this case.

## **II. The Point On The Proposed Appeal Is Not Significant To The Action**

45. This second branch of the test for leave to appeal is intended to ensure that any matter for which leave is granted must be of significance to the action, being the CCAA proceeding as a whole, and not just to the party that is seeking to appeal a lower court finding for its own benefit.

46. This is the only sensible approach to this factor. Every decision will be of significance to some individual party. As stated by the Alberta Court of Queen's Bench in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*:

[T]he Court acknowledges that the point on any potential appeal has significance to [the potential appellant]. Otherwise why would this matter have come before the Court? That, however, is not the nature of this factor. This factor requires the Court to look at the action as a whole.<sup>33</sup>

47. The TPLs have made no arguments to explain how their proposed appeal is of significance to the CCAA proceeding as a whole. They have focused solely upon their

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<sup>33</sup> *Royal Bank of Canada v Cow Harbour Construction Ltd*, [2010] A.J. No. 1177 (AB QB) at para. 38, JBA, Tab 9.

own recoveries from the CCAA proceeding and the significant amount of money that is at issue for them alone.

48. In substance, the current case is a dispute involving the priority rights of a single creditor group. Viewing the CCAA proceeding as a whole, the relative priority rights of one creditor group are not significant and serve as a distraction to the CCAA process.

### **III. The Proposed Appeal is not *Prima Facie* Meritorious**

49. The TPLs allege that had Justice Morawetz considered the evidence appropriately, he could not have arrived at the conclusion that the TPLs and Cash Store were in a relationship as debtor and creditor. The TPLs' appeal on these grounds is not prima facie meritorious.

#### **(a) Standard of Review**

50. Justice Morawetz applied settled legal principles to the facts of this case. As such, the matter decided by Justice Morawetz was a question of mixed fact and law and the appropriate standard of review is that of palpable and overriding error.<sup>34</sup> This more stringent standard is particularly applicable in the current case where it is not possible to extricate the legal indicia applied by the court from the facts of the case.

51. The motion decision was rendered by the Regional Senior Justice of the Superior Court of Justice (Commercial List), based on an extensive review of the facts of this case. A standard of review of palpable and overriding error of His Honour's decision aligns with the degree of deference to be afforded to the reasons of highly-qualified commercial court judges that are based on the results of comprehensive fact

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<sup>34</sup> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 37, JBA, Tab 10.



finding. This Court has specifically held that a judge exercising a supervisory function during a CCAA proceeding is owed considerable deference.<sup>35</sup>

52. This is particularly true in the current case where there have been numerous appearances before Justice Morawetz since the Initial Order was obtained, many of which concerned TPL issues and the relationship between the parties.<sup>36</sup> The TPL Decision is the culmination of several months of fact-finding and argument, all of which occurred before or at the direction of Justice Morawetz.

**(b) No palpable and overriding error in finding of relationship of debtor and creditor**

53. The focus of the proposed appeal by the TPLs is whether Justice Morawetz misapprehended the evidence before him in characterizing the relationship between Cash Store and the TPLs as one of debtor and creditor.

54. As identified by the TPLs and the Respondents at the court below, there is no bright line across which parties become debtor and creditor. There are only indicia of such a relationship.

55. Various factors will weigh in favour of a finding of a debtor-creditor relationship, or away from such a finding. For example:

A trustee must keep the assets of the trust distinct, but in the normal commercial transaction nothing specific is said about this. The duty to keep the assets distinct, if it exists, must be spelled out of the nature of the transaction, the environment in which the parties agree, the type of persons who are the holders of title and the transferor,

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<sup>35</sup> *Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-0, 2225-12 v. Royal Crest Lifecare Group Inc. (Trustee of)*, [2004] O.J. No. 174 at paras. 21 – 23, JBA, Tab 11.

<sup>36</sup> Ninth Report at paras. 2 and 3, Joint Motion Record, Tab 5.

and whether or not interest payments are to be made by the holder of the assets. If interest is to be paid, the relationship is nearly always that of creditor and debtor.<sup>37</sup>

56. Other facts, like the obligation to repay funds<sup>38</sup> or the balance of risk between the parties<sup>39</sup> may also inform whether a court considers a particular arrangement to be a debtor-creditor relationship or not. Similarly, the extent to which the creditor party can or does exercise control of the property at issue may inform whether a debtor-creditor relationship is present.<sup>40</sup>

57. There is no finite list of factors that must be considered in classifying a relationship such as that between Cash Store and the TPLs. A court must weigh the available facts, including any written agreement and the factual matrix and determine what the real substance of the arrangement is. Justice Morawetz described his task similarly:

In order to determine the issue, it is necessary to examine the relationship as originally set out in the Broker Agreements and to trace the relationship between the Applicants and the TPLs subsequent to the execution of the Broker Agreements.<sup>41</sup>

58. Justice Morawetz then went on to note the following in determining that the relationship between Cash Store and the TPLs was that of debtor and creditor:

(a) the disputed funds were commingled in Cash Store's general account;<sup>42</sup>

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<sup>37</sup> Donovan Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4<sup>th</sup> ed (Toronto: Thomson Reuters Canada Limited, 2012) at 92, JBA, Tab 12.

<sup>38</sup> A.H. Oosterhoff et al, *Oosterhoff on Trusts: Texts, Commentary and Materials*, 6<sup>th</sup> ed (Toronto: Thomson Canada Limited, 2004) at 104, JBA, Tab 13.

<sup>39</sup> *Outset Media Corp v Stewart House Publishing Inc*, [2003] OJ No 2558 (CA) at paras. 4 and 5, JBA, Tab 14.

<sup>40</sup> *Salo v Royal Bank of Canada (B.C.C.A.)*, [1998] B.C.J. No. 999 at page 2, JBA, Tab 15.

<sup>41</sup> Morawetz Endorsement at para. 118, Trimor Motion Record at Tab 13.

<sup>42</sup> Morawetz Endorsement at para. 122, Trimor Motion Record at Tab 13.

(b) the TPLs expected to receive, and did receive, a 17.5% monthly payment from Cash Store even though this was not a term of the written broker agreements;<sup>43</sup>

(c) the TPLs were insulated from any credit risk as a result of the capital protections used by Cash Store;<sup>44</sup>

(d) there was no evidence that, during the period in which Cash Store was making 17.5% payments to the TPLs, the TPLs ever made any complaint about these payments, which appeared to have been accepted as “ordinary course” payments by the TPLs;<sup>45</sup> and

(e) there was no evidence of the TPLs challenging why they were not receiving 59% interest.<sup>46</sup>

59. On the basis of these and other observations, including acknowledgement of the evidence cited by the TPLs as supporting their position, Justice Morawetz found that these 17.5% payments reflected a payment of interest and that the capital protections provided to the TPLs insulated them from the credit risk of Cash Store’s customers, exposing the TPLs only to Cash Store’s own credit risk. As a result, the relationship between Cash Store and the TPLs was one of debtor and creditor.<sup>47</sup> On the facts, Justice Morawetz found that the TPLs were creditors of Cash Store, and not creditors of Cash Store’s customers.

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<sup>43</sup> Morawetz Endorsement at paras. 123 and 124, Trimor Motion Record at Tab 13.

<sup>44</sup> Morawetz Endorsement at para. 124, Trimor Motion Record at Tab 13.

<sup>45</sup> Morawetz Endorsement at para. 125, Trimor Motion Record at Tab 13.

<sup>46</sup> Morawetz Endorsement at para. 125, Trimor Motion Record at Tab 13.

<sup>47</sup> Morawetz Endorsement at para. 126, Trimor Motion Record at Tab 13.

60. The TPLs' arguments on this motion make clear that their complaint is really in how Justice Morawetz weighed the evidence before him.<sup>48</sup> They plan to ask this Court to substitute its own factual findings on appeal and re-try this case because Justice Morawetz did not ascribe enough significance to the points the TPLs claim support their position. Justice Morawetz considered all of the facts and indicia presented to him and made his decision. The TPLs have not identified any palpable and overriding error.

**(c) Serious issue does not equate to a meritorious case**

61. Trimor, in its factum, argues that Justice van Rensburg found, on the motion for a stay pending leave to appeal brought by the TPLs, that the appeal is *prima facie* meritorious insofar as it raised a "serious issue" regarding when conduct will prevail over a written agreement.<sup>49</sup>

62. Justice van Rensburg made no finding with respect to the merits of the appeal, and indeed such a finding would have gone beyond the scope of the stay motion. An appeal that raises a serious issue is by no means necessarily meritorious. Without a persuasive argument and compelling supporting evidence, an appellant's position will lack merit. Indeed, Justice van Rensburg acknowledged these challenges in her endorsement:

A motion for a stay pending leave to appeal should not be transformed into a forum for arguing the appeal itself. [...] **It is not for this court at this stage to deny a stay on the basis that the applicants may well face other challenges in succeeding in their leave application or indeed in the appeal.**<sup>50</sup> (emphasis added)

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<sup>48</sup> Factum of Trimor Annuity Focus Limited Partnership #5, dated August 22, 2014 (Motion for Leave to Appeal in writing, returnable week of September 8, 2014), (Trimor Leave Factum) at para 47.

<sup>49</sup> Trimor Leave Factum at para. 30.

<sup>50</sup> Transcribed endorsement of Justice van Rensburg, August 15, 2014, Trimor Motion Record at Tab 16.

**(d) No error of law**

63. TPLs assert that the court below made certain errors of law in allowing the conduct of the parties to inform the nature of their commercial relationship. The TPLs do not, however, identify any relevant law that illustrates any such error.

64. Courts in this province have determined that:

[T]he law is clear that evidence which relates to the parties' conduct after signing the contract can be relevant to a determination as to whether the written contract should be enforced. The parol evidence rule does not affect this determination.<sup>51</sup>

65. The TPLs now cite *Blue Range Resource Corp. (Re)*<sup>52</sup> and *Technicore Underground Inc. v. Toronto (City)*.<sup>53</sup> Neither of these decisions were made in an insolvency context and neither are analogous to the TPL Decision. To the extent that they are relevant, both of these decisions reinforce the position that parties may by their conduct modify the nature of their commercial relationships.<sup>54</sup>

**IV. An Appeal Would Unduly Hinder The CCAA Proceeding**

66. The CCAA proceeding has now reached a critical stage. The court-approved sale process has progressed to the point that a successful bidder is expected to be identified in the near future. The completion of a going concern transaction in connection with such sale process would achieve the primary goal of this proceeding. To reach this stage, Cash Store has been relying on its debtor-in-possession financing that has been provided by other creditors of Cash Store.

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<sup>51</sup> *Dimensa Corp. v. Tx/Communications Canada Inc.*, [1998] O.J. No. 1170 at para. 17, JBA, Tab 8.

<sup>52</sup> [2001] A.J. No. 400 (AB CA), JBA, Tab 6.

<sup>53</sup> [2012] ONCA 597, JBA, Tab 16

<sup>54</sup> *Blue Range Resource Corp. (Re)*, [2000] A.J. No. 1622 at para. 17, JBA, Tab 17; *Technicore Underground Inc. v. Toronto (City)*, [2012] ONCA 597 at para. 67, JBA, Tab 16.

67. The proposed appeal hinders the primary goal of the CCAA proceeding by placing further strain on Cash Store's already challenging liquidity position and diverting unwarranted resources away from the goal of completing a going concern transaction.

68. Several key factors must be remembered when considering the progress of the Cash Store CCAA proceedings:

(a) Available remaining interim financing is highly discretionary and there is no guarantee that it will continue to be advanced in all circumstances.<sup>55</sup>

(b) The TPL Decision grants the Cash Store access to liquidity and remedies any uncertainty that Cash Store faces with respect to its liquidity position as a result of the discretionary nature of its DIP financing. This adds stability to the CCAA proceeding.

(c) During a three week period from the last week of August to the end of the second week of September, Cash Store is forecast to operate with a liquidity cushion of less than \$500,000.<sup>56</sup> Given the cash burn rate of Cash Store, this cushion is very limited.

(d) Even if all potentially available interim financing is drawn under the existing interim financing facility, this only provides forecasted liquidity to the end of September.<sup>57</sup>

69. The TPLs' assertion that any liquidity issues can be mitigated by interim financing until the appeal has been fully disposed of disregards the best interests of

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<sup>55</sup> Ninth Report at para. 20, Joint Motion Record, Tab 5.

<sup>56</sup> Ninth Report at Schedule "1", Joint Motion Record, Tab 5.

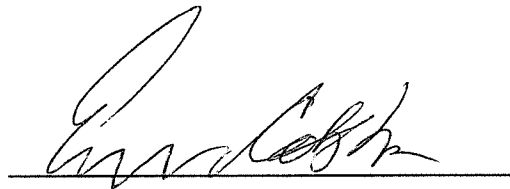
<sup>57</sup> Ninth Report at Schedule "1", Joint Motion Record, Tab 5.

Cash Store and all of its stakeholders collectively, as well as the efficient functioning of these CCAA proceedings. The TPLs' proposed course of action would see Cash Store continue to expend funds on further appeal steps and divert resources away from its sale process while at the same time running down its remaining funds to almost zero.

70. Cash Store should not be placed in this financial position and the other creditors who are the DIP lenders should not be pushed to advance further funds to a company that they have already supported financially for the past several months solely because the TPLs wish to continue to delay the Cash Store from accessing its own funds by asserting legal positions that, as noted above, are not meritorious and are not of significance to the practice or to the CCAA proceeding.

71. Cash Store cannot afford to expend further time and resources on this matter, which has been an ongoing distraction from the primary goals of this proceeding.

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

A handwritten signature in black ink, appearing to be "E. R. [unclear]", is written over a horizontal line.

Norton Rose Fulbright Canada LLP

Lawyers for the DIP Lenders, on behalf of  
the DIP Lenders and the Ad Hoc  
Committee.

**Tab “A”**



**SCHEDULE A**  
**LIST OF AUTHORITIES**

- 1        *ROI Fund Inc v Gandi Innovations Ltd*, [2012] O.J. No. 31 (ON CA)
- 2        *Blue Note Caribou Mines Inc (Re)*, [2010] N.B.J. No. 267 (NB CA)
- 3        *Winnipeg Motor Express Inc (Re)*, [2008] M.J. No. 392 (MN CA)
- 4        *Statoil Canada Ltd. (Arrangement relatif à)*, [2012] Q.J. NO. 3234 (QC CA)
- 5        *Hemosol Corp. (Re)*, [2007] O.J. No. 687 (ON CA)
- 6        *Blue Range Resources Corp. (Re)*, [2001] A.J. No. 400 (AB CA)
- 7        *Colautti Construction Co. v Ottawa (City)* (1984), 46 O.R. (2d) 236
- 8        *Dimensa Corp v Tx/Communications Canada Inc.*, [1998] O.J. No. 1170
- 9        *Royal Bank of Canada v Cow Harbour Construction Ltd.*, [2010] A.J. No. 1177 (AB QB)
- 10       *Housen v Nikolaisen*, [2002] 2 S.C.R. 235
- 11       *Canadian Union of Public Employees, Locasl 1712, 3009, 2225-05, 2225-06 and 2225-12 v Royal Crest Lifecare Group Inc. (Trustee of)*, [2004] O.J. No. 174
- 12       Donovan Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2012)
- 13       A.H. Oosterhoff *et al*, *Oosterhoff on Trusts: Texts, Commentary and Materials*, 6<sup>th</sup> ed (Toronto: Thomson Canada Limited, 2004)
- 14       *Outset Media Corp v Stewart House Publishing Inc*, [2003] O.J. No. 2558 (CA)
- 15       *Salo v Royal Bank of Canada (B.C.C.A.)*, [1998] B.C.J. No. 999
- 16       *Technicore Underground Inc. v. Toronto (City)*, [2012] O.J. No. 4235 (ON CA)
- 17       *Blue Range Resource Corp. (Re)*, [2000] A.J. No. 1622

**Tab “B”**

## SCHEDULE B RELEVANT STATUTES

*Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended at s. 253*

### PART XII

#### SECURITIES FIRM BANKRUPTCIES

##### Interpretation

##### Definitions

253. In this Part,

“customer”  
« *client* »

“customer” includes

(a) a person with or for whom a securities firm deals as principal, or agent or mandatary, and who has a claim against the securities firm in respect of a security received, acquired or held by the securities firm in the ordinary course of business as a securities firm from or for a securities account of that person

- (i) for safekeeping or deposit or in segregation,
- (ii) with a view to sale,
- (iii) to cover a completed sale,
- (iv) pursuant to a purchase,
- (v) to secure performance of an obligation of that person, or
- (vi) for the purpose of effecting a transfer,

(b) a person who has a claim against the securities firm arising out of a sale or wrongful conversion by the securities firm of a security referred to in paragraph (a), and

(c) a person who has cash or other assets held in a securities account with the securities firm,

but does not include a person who has a claim against the securities firm for cash or securities that, by agreement or operation of law, is part of the capital of the securities firm or a claim that is subordinated to claims of creditors of the securities firm;

“customer compensation body”  
« *organisme d'indemnisation des clients* »

“customer compensation body” means a prescribed body and includes, unless it is prescribed to be excluded from this definition, the Canadian Investor Protection Fund;

“customer name securities”  
« *valeur mobilière immatriculée* »

“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;

“deferred customer”  
« *client responsable* »

“deferred customer” means a customer whose misconduct, either in the customer’s capacity as a customer or otherwise, caused or materially contributed to the insolvency of a securities firm;

“eligible financial contract”

“eligible financial contract”[Repealed, 2007, c. 29, s. 101]

“hold”  
« *détenir* »

“hold”, in relation to a security, includes holding it in electronic form;

“net equity”  
« *capitaux nets* »

“net equity” means, with respect to the securities account or accounts of a customer, maintained in one capacity, the net dollar value of the account or accounts, equal to the amount that would be owed by a securities firm to the customer as a result of the liquidation by sale or purchase at the close of business of the securities firm on the date of bankruptcy of the securities firm, of all security positions of the customer in each securities account, other than customer name securities reclaimed by the customer, including any amount in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, less any indebtedness of the customer to the securities firm on the date of bankruptcy including any amount owing in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, plus any payment of indebtedness made with the consent of the trustee after the date of bankruptcy;

“open contractual commitment”  
« *contrat en cours* »

“open contractual commitment” means an enforceable contract of a securities firm to purchase or sell a security that was not completed by payment and delivery on the date of bankruptcy;

“securities firm”  
« *courtier en valeurs mobilières* »

“securities firm” means a person who carries on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal, or agent or mandatary, and includes any person required to be registered to enter into securities transactions with the public, but does not include a corporate entity that is not a corporation within the meaning of [section 2](#);

“security”  
« *valeur mobilière* » ou « *titre* »

“security” means any document, instrument or written or electronic record that is commonly known as a security, and includes, without limiting the generality of the foregoing,

(a) a document, instrument or written or electronic record evidencing a share, participation right or other right or interest in property or in an enterprise, including an equity share or stock, or a mutual fund share or unit,

(b) a document, instrument or written or electronic record evidencing indebtedness, including a note, bond, debenture, mortgage, hypothec, certificate of deposit, commercial paper or mortgage-backed instrument,

(c) a document, instrument or written or electronic record evidencing a right or interest in respect of an option, warrant or subscription, or under a commodity future, financial future, or exchange or other forward contract, or other derivative instrument, including an eligible financial contract, and

(d) such other document, instrument or written or electronic record as is prescribed.

1997, c. 12, s. 118; 2004, c. 25, s. 97(E); 2005, c. 47, s. 117; 2007, c. 29, s. 101.

Applicants

**COURT OF APPEAL FOR ONTARIO**  
Proceeding commenced at Toronto

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