Court of Appeal File No. M44123
M44124

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 RESPONDING MOTION RECORD
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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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"

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[1] 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;
Tschritter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1452 of 2012;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1453 of 2012

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Court of Appeal File No. M44123
M44124

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

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TAB 1

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

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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

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

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APPLICANTS

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

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.

M. Beaulne

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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TAB 2

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 TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5

(Motion returnable June 11, 2014)

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TO: SERVICE LIST

TABLE OF CONTENTS

PART I - OVERVIEW

1. Trimor Annuity Focus Limited Partnership #5 ("**Trimor**") seeks to assume administration of the Trimor Loans[1] and the Trimor Receipts[2] (collectively, the "**Trimor Loans and Receipts**") to ensure that they do not vanish like the millions of dollars in Trimor's cash that has already disappeared.

2. It is clear that Trimor owns the Trimor Loans and Receipts and other stakeholders should not be allowed to use nebulous preference claims as an excuse to lock the Trimor Loans and Receipts in a business with no future, which has huge realization costs and which, according to the Applicants' own evidence, cannot reasonably be expected to maximize recoveries. Trimor should be allowed to realize on its property in the most efficient and effective manner possible.

3. The Applicants say they have already initiated an "orderly cessation" of their brokering business. Accordingly, they have no use for the third party lenders' funds. They are nonetheless insisting that the Applicants be entitled to collect the Trimor Loans despite the fact that, unlike other potential servicers, they are unable or unwilling to make new loans available to their former customers.

4. The Applicants' own evidence is that their inability to make new loans in Ontario has resulted in their "ability to collect outstanding customer accounts receivable [being] ***significantly***

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[1] "Trimor Loans" means any loan in existence immediately prior to the effective time of the Initial Order (in accordance with paragraph 34 of the Amended and Restated Initial Order): i) for which Trimor is listed as the lender; ii) which are attributable to Trimor according to the Applicants' records; or (iii) which have been assigned to Trimor. (See paragraphs 3 and 4 of the April 30, 2014 Additional TPL Protection Order).

[2] "Trimor Receipts" means any amounts received by Cash Store from Customers in repayment of the Trimor Loans.

impaired".[3] In fact, collections on the Trimor Loans decreased by 75 percent in Ontario from January to March, 2014, and the proportion of Trimor Loans that are more than 30 days overdue increased from 0 percent as at January 31, 2014 to 39 percent as at April 13, 2014.[4] As highlighted in the Monitor's Third Report,[5] the difficulties in collecting on accounts in Ontario will now apply to all jurisdictions in which the Applicants previously operated the brokering business.

5. In addition to this significant impairment arising from the fact that the Applicants can no longer make new loans, the Applicants are also unable, or unwilling, to take all steps necessary to ensure collections on the Trimor Loans are maximized. The Chief Restructuring Officer (the "**CRO**") has indicated that Cash Store's "ability to collect on Ontario brokered loans ***has been curtailed***"[6] and that outside Ontario 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 [third party lender] receivables".[7] The CRO has duties to a number of stakeholders, and is understandably concerned with the costs and management resources necessary to preserve the value of the Trimor Loans. However, his reluctance to take the necessary steps to maximize realizations should not prejudice Trimor.

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[3] Affidavit of Steven Carlstrom sworn April 14, 2014 ("**Carlstrom Affidavit**") at para. 101; Motion Record of the Applicants at Tab 1.

[4] Report of PricewaterhouseCoopers dated May 14, 2014 (the "**PwC Report**") at p. 6 (internal); Motion Record of Trimor, Tab 4.

[5] Monitor's Third Report at para. 39(c)(i).

[6] Affidavit of William Aziz sworn May 9, 2014 (the "**Aziz Affidavit**") at para. 26; Motion Record of the Applicants at Tab 2. We understand that the CRO relies on the Applicants' interpretation of section 30.1 of the *Payday Loan Act, 2008* regulations for this position.

[7] Aziz Affidavit at para. 38.

6. Because Trimor owns the Trimor Loans, it is prepared to invest the time and resources necessary to maximize recoveries. Doing so will assist the CRO and the Applicants by eliminating the cost and management resources needed to collect the Trimor Loans. The relief sought by Trimor would relieve the Applicants, the CRO, and the Monitor of this burden and allow them to focus on restructuring the parts of the business that the Applicants believe continue to be viable. It will also allow Trimor to realize the maximum recovery from the Trimor Loans at its own expense.

7. In the past two months, the third party lenders have seen the stated value of their loans and restricted cash reduced from approximately $42 million to less than half of that amount. Trimor is extremely concerned that if the issue of ownership is not determined on a timely basis and administration of the loans is not assumed by an independent party with the capacity to make new loans in regulated jurisdictions, then what little value is left will simply evaporate in a cloud of bad debts and fees.

8. In light of the foregoing, Trimor respectfully requests that this Court grant a declaration that Trimor owns the Trimor Loans and Receipts, and order that Cash Store immediately transfer the Loans, and pay the Receipts, to Trimor or its designated administrator.

PART II - THE FACTS

9. Cash Store is a broker and lender of short-term loans. It also offers a range of other products and services to help its customers ("**Customers**") meet their day to day financial service needs.[8]

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[8] Carlstrom Affidavit at para 4.

10. Cash Store brokers loans on behalf of the Customers under broker agreements with third party lenders ("**TPLs**"), including Trimor. TPLs directly lend to Customers or purchase loans that Cash Store has made to Customers.[9]

11. Trimor transferred funds totalling $27,002,000 to Cash Store under the Broker Agreements (as defined below) and for the sole purpose of brokering the loans to Customers (the "**Trimor Funds**").[10] Other TPLs transferred funds to Cash Store for the purpose of brokering loans to Customers (the "**TPL Funds**").

The Broker Agreements

12. Trimor is a party to the following broker agreements with Cash Store (the "**Broker Agreements**"):[11]

(a) broker agreement between Trimor and The Cash Store Inc. ("**TCSI**") dated February 1, 2012 and made as of June 5, 2012; and

(b) broker agreement between Trimor and 1693926 Alberta Ltd. dated September 24, 2012 and made as of June 5, 2012.

The Broker Agreements are similar (if not identical) to the broker agreements that Cash Store has entered into with other TPLs, including 0678786 B.C. Ltd. ("**067**").

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[9] Carlstrom Affidavit at para. 76.

[10] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit**") at para. 9; Motion Record of Trimor, Tab. 2.

[11] Armstrong Affidavit, Exhibits "A" and "B".

Cash Store Expressly Stated that Trimor Owns the Trimor Loans and Receipts

13. In or about January 2012, TCSI offered $132.5 million in senior secured notes due in 2017 through a private placement (the "**Secured Note Offering**"). Cash Store's Confidential Preliminary Canadian Offering Circular dated January 12, 2012 ("**Circular**") for the Secured Note Offering advises potential investors that Cash Store "currently act[s] primarily as a broker of short-term advances between our customers and third-party lenders, ***the effect of which is that the loan portfolio we service is not financed on our balance sheet.***"[12] Cash Store further states that "***the advances provided by the third-party lenders are repayable by the customer to the third-party lenders and represent assets of the lenders;*** accordingly, they are not included on our balance sheet."[13]

14. Cash Store repeated this express statement in its recent financial statements: When the Company acts as a broker on behalf of income earning consumers seeking short-term advances, the funding of short-term advances is provided by independent third party lenders. "***The advances provided by the third party lenders are repayable by the customer to the third party lenders and represent assets of the lenders***; accordingly, they are not included on the

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[12] Second Armstrong Affidavit sworn May 8, 2014 ("**Second Armstrong Affidavit**"), Exhibit "A" - Preliminary TCSI Circular at p. 4 (internal); Motion Record of Trimor, Tab 3.

[13] Second Armstrong Affidavit, Exhibit "A" at p. 38 (internal).

Company's balance sheet."[14] At no time has Cash Store included the Trimor Loans as assets on its balance sheet.[15]

15. The Report of PricewaterhouseCoopers Inc. ("**PwC**") states that senior management of Cash Store expressly advised PwC that Cash Store has always considered the TPL Funds, such as the Trimor Funds, to be third party funds.[16]

Cash Store is Merely a Broker – Trimor is the Owner of the Trimor Loans and Receipts

16. When Trimor Funds are deployed as loans to Customers the creditor or lender is Trimor and Cash Store takes a brokerage fee. The supporting agreements and disclosure statements signed by Customers name Trimor as the credit grantor and the Customer as the borrower for the Trimor Loans.[17]

17. In its own financial statements and affidavit evidence filed in this and another proceeding, Cash Store describes its relationship with the TPLs and Customers as follows:

(a) Cash Store "acts as either a broker between the customer and the third-party lenders or as the direct lender to the customer;"[18]

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[14] Second Armstrong Affidavit, Exhibit "A" – Notes to the Consolidated Financial Statements for the twelve and fifteen months ended September 30, 2011 and September 30, 2010 at p. F-11; Exhibit "B" – Financial Statements of TCSI for the fifteen months ended September 30, 2010 and for the year ended June 30, 2009 at p. 8; Exhibit "C" – Management's Discussion and Analysis of TCSI for the three and twelve months ended September 30, 2011 at p. 26.

[15] PwC Report at p. 6 (internal). Affidavit of Murray McCann sworn April 22, 2014 (the "**McCann Affidavit**") at para. 4; Motion Record of Trimor, Tab 8.

[16] PwC Report at p. 6 (internal).

[17] PwC Report at p. 6 (internal).

[18] Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal).

(b) Cash Store "serves as an alternative to traditional banks, acting either as a broker between the customer and the third-party lenders or as the direct lender to the customer;"[19]

(c) Under the broker agreements, "the TPLs make loans to Cash Store's customers and Cash Store provides services to the TPLs related to the collection of documents and information from Cash Store's customers, as well as loan repayment services. Cash Store collects fees for brokering these transactions;"[20]

(d) "When an advance becomes due and payable, the [Broker Customer] must make repayment of the principal and interest owing to the lender through [Cash Store], which remits such amounts to the third party lender;"[21] and

(e) "[Cash Store] generates revenue by charging loan fees or broker fees and interest…The third party lenders earn revenue through the interest charged and collected on the short term advances to [Customers]."[22]

18. In the Circular, Cash Store describes the relationship as follows:

(a) "The TPL Funds are deployed by Cash Store to broker customers, subsequently received by Cash Store as repayment for such broker loans (subject to loan losses), and then redeployed, repeating the process;"[23]

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[19] Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal).

[20] Carlstrom Affidavit at para. 76.

[21] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 25.

[22] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 26.

(b) "Similar to what is described above for brokered payday loans, TPLs provide the funds for the line of credit, Cash Store arranges the line of credit, and Cash Store earns fees on these transactions;"[24] and

(c) In a chart setting out the relationship of certain stakeholders to Cash Store, the TPLs' amount is listed as $42.0 million with the following note: "Consisting of the TPL Funds originally advanced, including funds deployed in brokered loans, Restricted Cash, and cumulative losses."[25]

Trimor Could Refuse to Allow the Brokering of the Trimor Funds in its Sole Discretion

19. At any time during the term of the Broker Agreements, Trimor had the right to reduce the funds it was willing to make available to Customers on 120 days notice. In other words, Trimor could reduce the funds it made available for brokering to $0 and effectively terminate the Broker Agreements on 120 days notice to Cash Store.[26]

20. The Broker Agreements further provide that Trimor may give notice to Cash Store that Trimor Funds that have not yet been advanced as loans to Customers should not be advanced. In addition, Trimor is not obligated to approve any particular loan or amount of loans.[27] Lastly, as stated in more detail below, the Broker Agreements also provide Trimor with the right to transfer the Trimor Loans to another service provider.

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[23] Carlstrom Affidavit at para. 78.

[24] Carlstrom Affidavit at para. 34.

[25] Carlstrom Affidavit at para. 58.

[26] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2.

[27] Armstrong Affidavit at para. 13, Exhibits "A" and "B" at ss. 2.3.

21. In its Circular, Cash Store advised potential investors Trimor could reduce or withdraw the Trimor Funds. The Circular states that "... our business will remain dependant on third-party lenders who are willing to make funds available for lending to our customers. ***There are no assurances that the existing or new third-party lenders will continue to make funds available to our customers.***"[28]

22. The TPLs, including Trimor, only made the TPL Funds available as a result of representations that the funds were segregated, held in trust, and used for only a specific purpose.[29] The TPLs relied on these representations by the Company, and, to the extent that these representations were false, it should not be able to rely on those misrepresentations to Trimor and the other TPLs' detriment.

Trimor Assumed the Credit Risk of the Trimor Loans

23. Cash Store's own evidence filed in this application is that, under the Broker Agreements, "the TPLs are responsible for losses suffered due to uncollectible advances."[30] Section 7.1 of each of the Broker Agreements states that the TPLs assumed the credit risk of the loans (*i.e.* that Customers would not repay), unless a loan was not repaid as a result of Cash Store's improper performance under the Broker Agreements.[31]

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[28] Second Armstrong Affidavit, Exhibit "A" at p. 16 (internal).

[29] Second Armstrong Affidavit at para. 6, Exhibit "G" and Armstrong Cross-Examination Transcript, questions 58 – 64.

[30] Carlstrom Affidavit at para. 77.

[31] Armstrong Affidavit, Exhibits "A" and "B" at para. 7.1 and Exhibit "I", Affidavit of C. Warnock at para. 25.

24. If the interest received by the TPLs was less than 17.5 percent of the TPL funds, Cash Store would make a payment to bring cash received up to 17.5 percent (a "**Retention Payment**"). Cash Store made the Retention Payments as an inducement to ensure that TPLs were receiving a return that was commensurate with the risk of lending.[32]

25. In its Circular, Cash Store advised potential purchasers of its bonds that "we have made the decision to voluntarily make retention payments to the third-party lenders as consideration for continuing to advance funds to our customers."[33] Although the third-party lenders have not been guaranteed a return, "*the decision has been made to voluntarily make retention payments to the lenders to lessen the impact of loan losses experienced by the third-party lenders.*"[34]

26. Cash Store's practice of paying a retention payment to the TPLs implies that it recognized the need to compensate the TPLs for the use of their funds and to encourage the TPLs to continue to lend their funds to the Customers through Cash Store's brokerage.[35]

27. The DIP Lenders/Bond Holders were well aware of this practice and took no issue with it.

Cash Store Represented that it Would Not Fund Operating Expenses with Trimor Funds

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[32] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), questions 53 – 55; Motion Record of Trimor at Tab 6. Transcript of Cross-Examination of Sharon Fawcett on her affidavits sworn April 11 and 22, 2014 held on May 21, 2014 ("**Fawcett Cross-Examination Transcript**"), question 131; Motion Record of Trimor at Tab 7.

[33] Second Armstrong Affidavit, Exhibit "A" at p. 17 (internal).

[34] Second Armstrong Affidavit, Exhibit "A" at p. 38 (internal).

[35] PwC Report at p. 11 (internal).

28. Cash Store advised Trimor that it would not use Trimor Funds for any purpose other than advancing loans in accordance with the Broker Agreements, unless Cash Store first obtained Trimor's written permission.[36] Trimor always understood that Cash Store could not use Trimor Funds for the payment of Cash Store's general operating expenses.[37] Cash Store also advised Trimor that it had "never used [Trimor Funds] for any other purpose than loans to customers or maintaining a loan float."[38]

29. In a 2011 report to its auditors, the issue of using the Trimor Funds for operating expenses was raised by and Trimor made it clear that Trimor Funds "are only to be used for loans to broker customers."[39]

30. Further, Cash Store's sworn evidence in a proceeding relating to one TPL is that the TPL Funds would be accounted for as restricted cash and that "no operating expenses are funded from any cash in the restricted cash account."[40] Cash Store definitively stated that its "finance team monitors and reconciles the restricted and unrestricted cash accounts to ensure no operating expenses are funded by any cash in the restricted cash account."[41]

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[36] Armstrong Cross-Examination Transcript, questions 97, 98, 168 and Exhibits "1", "2", "3" and"9".

[37] Armstrong Cross-Examination Transcript, question 75.

[38] Armstrong Cross-Examination Transcript, Exhibit "3" and "9".

[39] Armstrong Cross-Examination Transcript, Exhibit "2".

[40] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 36.

[41] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at para. 36.

Trimor Funds Were Held in a Segregated Account

31. Any Trimor Funds or other TPL Funds that were not deployed as loans to Customers were to be held separate and apart from Cash Store's general operating account. The Broker Agreements provide that all funds advanced by Trimor are to be held in a Designated Broker Bank Account, which is a Cash Store bank account that is "designated by [Cash Store] for the purposes of temporarily receiving funds from [Trimor]... before they are advanced to a [Customer]."[42]

32. Similarly, all payments made by Customers on account of any Trimor Loans are to be deposited into a Designated Financier Bank Account, which is "the bank branch and account designated by [Trimor] from time to time where (and into which) deposits of cash and cheques received from [Customers], in respect of such [Trimor] funded loans, are to be cleared (deposited) from time to time."[43]

33. Cash Store advised another TPL, 067, that its funds would be held in an account that was separate and apart from Cash Store's own accounts and only contained TPL Funds.[44]

34. Until January 2014 a separate bank account was used for deposit of TPL Funds, including the Trimor Receipts, and the payment of Retention Payments.[45] Cash Store's own evidence filed in another proceeding provides that TPL Funds were "pooled with all funds received from third

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[42] Armstrong Affidavit, Exhibits A and B, s. 1.1(g) "Designated Broker Bank Account".

[43] Armstrong Affidavit, Exhibits A and B, s. 1.1(h) "Designated Broker Bank Account".

[44] Armstrong Affidavit at para. 17. Armstrong Cross-Examination Transcript, questions 39 – 41. Fawcett Cross-Examination Transcript, questions 33 – 38 and 48.

[45] PwC Report at p. 27 (internal).

party lenders" and were "segregated and accounted for in the general ledger restricted cash account."[46] Funds loaned directly to Customers by TPLs were drawn from the pool of available TPL Funds in the account and transferred to the Customers. Cash Store collected interest and loan repayments from the Customer on behalf of a TPL and deposited the funds into the pool."[47] Trimor understood that the Trimor Funds and Trimor Receipts were segregated and pooled in this manner.[48]

35. In addition, PwC has confirmed that when Trimor Receipts were collected, and not yet redeployed, they were segregated as restricted cash (the "**Restricted Cash**") on Cash Store's balance sheet.[49]

Cash Store Assured Trimor that it Held the Trimor Funds in Trust

36. Cash Store also assured Trimor that it would treat the Trimor Funds as being held in trust for Trimor's benefit. In an email from Michael Zvonkovic (former Vice-President, Financial Reporting at TCSI) dated November 9, 2011, Mr. Zvonkovic stated that Cash Store "have not use [*sic*] the [TPL Funds] for general operating expenses and is under the trust conditions as outlined in the [Broker Agreements]."[50] Trimor always understood that Cash Store agreed to

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[46] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 35 and 36.

[47] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 37 and 43.

[48] Second Armstrong Affidavit at para. 10.

[49] PwC Report at p. 6 (internal); Affidavit of Murray McCann sworn April 22, 2014 (the "**McCann Affidavit**") at para. 4; Motion Record of Trimor, Tab 8.

[50] Second Armstrong Affidavit at para. 6, Exhibit "G" – Email from Michael Zvonkovic dated November 9, 2011.

hold the Trimor Funds and Receipts in trust for its benefit.[51] Cash Store also represented to 067, another TPL, that it would hold 067's funds in trust and not co-mingle them with other funds.[52]

Broker Agreements are Terminated and Trimor is Entitled to Transfer Administration

37. The CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which the Cash Store operates.[53] Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements.

38. Upon termination of the Broker Agreements, Trimor has the option to allow the Applicants to continue to administer the Trimor Loans, transfer the administration of them to a new service provider, or sell the Trimor Loans to a third party. Paragraph 6.4 of the Broker Agreements provides that:

> Upon the ending of the Term:
>
> a. Unless [Trimor] determines to appoint a new broker (as contemplated by Subsection 6.4(b)), [Cash Store] shall continue to provide the Broker Services with respect to all Loans still outstanding as at the end of the Term;
>
> b. If [Trimor] notifies [Cash Store] that [Trimor] is designating a new broker to handle the Loan portfolio (or [Trimor] is going to administer the Loan portfolio directly or sell the Loan portfolio) and demands that [Cash Store] deliver the Records related to the Loan portfolio, ***[Cash Store] shall***, unless and to the extent that the [Cash Store] elects to otherwise transfer the same under Section 2.10, ***immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) all original Records related to all Loans and copies of all electronic files containing information relating to the Loans. [Trimor] (or any new broker***

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[51] Armstrong Cross-Examination Transcript, questions 64 and 95.

[52] McCann Affidavit at paras. 4 and 5.

[53] Aziz Affidavit at para. 29.

> ***or owner) shall be entitled to contact and carry out such realization actions against the borrowers of the Loans which [Trimor] (or any new broker or owner) determines in its complete discretion.*** The exercise by [Trimor] of this right shall not diminish [Trimor's] right to recover from [Cash Store] as a result of breaches of this Agreement by [Cash Store] and to recover from [Cash Store] under the indemnities set out in Article 7 (if applicable). [Emphasis added][54]

39. Trimor is accordingly entitled to treat the Broker Agreements as terminated and transfer the administration of the Trimor Loans immediately.

Significant Prejudice to Trimor if the Trimor Loans are not Transferred

40. Cash Store's inability to broker new loans has already had a devastating impact on its ability to collect payments due on the Trimor Loans. If Cash Store no longer brokers loans, there is little incentive for Customers to repay.[55] The CRO has already stated that the Applicants' "ability to collect on Ontario brokered loans has been curtailed."[56] Cash Store admits that "the TPLs will likely encounter some difficulty collecting outstanding loans, as the Ontario Cash Store branches are currently unable to broker new loans for customers"[57] and "its ability to collect outstanding customer accounts receivable has...been significantly impaired."[58]

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[54] Armstrong Affidavit, Exhibits "A" and "B" at paras. 6.4.

[55] Second Armstrong Affidavit at para. 12.

[56] Aziz Affidavit at para. 26.

[57] Carlstrom Affidavit at para. 175; Transcript of Cross-Examination of Steven Carlstrom held April 22, 2014, questions 286-292, 307 and 314; Motion Record of Trimor at Tab 6.

[58] Carlstrom Affidavit at para. 101.

41. In fact, both Trimor and 067 collections have been declining significantly since January 2014.[59] Trimor's collections in Ontario decreased by 75 percent from January to March, 2014, while its outstanding loan balance has only declined by 15 percent during this same period.

42. Trimor's loan position has also been declining rapidly since January 2014. The proportion of Ontario Trimor Loans that are more than 30 days overdue (the "**Overdue Loans**") increased from 0 percent as at January 31, 2014 to 39 percent as at April 13, 2014.[60] This decline was caused by Cash Store's inability to relend in Ontario and the same will occur in other jurisdictions now that the brokering business is being shut down.

No Evidence of Prejudice to the Applicants if Trimor Loans Transferred

43. There is no direct evidence of prejudice to the Applicants if Trimor takes the Trimor Loans, and the related customer information, and commences collection activities to preserve their value. In fact, the only evidence is that this is what the Applicants agreed to when they entered into the Broker Agreements.

44. As stated above, the Applicants have agreed that upon termination they would "immediately deliver to [Trimor] (or the new broker or owner designated by [Trimor]) ***all original Records related to all Loans and copies of all electronic files containing information relating to the Loans***. [Trimor] (or any new broker or owner) shall be ***entitled to contact and carry out such realization actions against the borrowers of the Loans*** which [Trimor] (or any

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[59] PwC Report at p. 19 (internal).

[60] PwC Report at pp. 6 and 15 (internal).

new broker or owner) determines in its complete discretion." Trimor is simply seeking to take the steps that the Applicants have agreed to. This is in no way prejudicial to the Applicants.

PART III - ISSUES AND LAW

45. On this motion, the Court is asked to confirm Trimor's ownership of the Trimor Loans and Receipts and to allow Trimor or its agent to assume administration of the Trimor Loans to maximize realizations in accordance with Trimor's contractual rights.

A. Trimor Owns the Trimor Loans

46. The evidence clearly demonstrates that Trimor owns the Trimor Loans and Receivables. The Trimor Funds were made available and lent directly to the Customers pursuant to the Broker Agreements. Cash Store merely facilitated and brokered the Trimor Loans on behalf of the Customers. Cash Store did not acquire an interest in the Trimor Loans.[61]

47. Although proceeds from the Trimor Loans and Receipts may have been co-mingled with other TPL Funds and Cash Store's general operating funds in breach of the terms of the Broker Agreements, the Trimor Funds have always been accounted for separately. The Trimor Funds were segregated with all funds received from third party lenders and accounted for as restricted cash. As a result, the Applicant's creditors and other stakeholders could always discern from

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[61] PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

public sources the amount of Trimor Funds that were deployed as loans to Customers or held as a float for future loans.[62]

48. The Bondholders, the DIP Lender, and the other secured lenders (collectively the "**Secured Creditors**") have always known the nature of the relationship between Cash Store and the TPLs. It is absurd for these parties to now claim that the Trimor Loans are property of Cash Store and thereby potentially subject the Secured Creditors' security interests.

49. The Secured Creditors have benefitted from the broker fees paid on TPL loans for years. They had knowledge that the TPL loans were being made with TPL Funds. They cannot complain about the state of affairs when things go badly for Cash Store. Further, the Secured Creditors should not be permitted to benefit from Cash Store's breaches of its Broker Agreements.

50. While the nature of the relationship between Trimor and Cash Store is not typical, the position of Trimor is analogous to that of a consignor of goods under a true consignment or a purchaser of a true sale of receivables. A secured creditor of a consignee of goods under a true consignment or of a purchaser of receivables under a true sale has no interest in the goods or receivables consigned or sold. Similarly, the Secured Creditors have no interest in the TPL Loans or their proceeds.

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[62] Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 35 to 37, 43.

i) True sale of receivables

51. The leading decision on the factors that a court should consider when determining whether a transfer of financial assets is a sale or loan is *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* ("***Metropolitan***").[63] In *Metropolitan*, the Court considered whether the assignment of certain trade receivables was a true sale or a financing. While the issue in the present motion is not the nature of an assignment, the indicia of ownership set out in *Metropolitan* provides guidance on the factors to be considered when determining ownership of the Trimor Loans.

52. The Court in *Metropolitan* set out the following factors as indicia of ownership:

(a) The intention of the parties as evidenced by the language of the agreement and subsequent conduct of the parties (para. 40);

(b) Whether the risks of ownership are transferred to the purchaser and the extent and nature of recourse to the seller (para. 41);

(c) The right of the seller to surplus collections (para. 51);

(d) Certainty of determination of the purchase price (para. 57);

(e) The extent to which the assets are identifiable (para. 61); and

(f) Whether the seller has a right to redeem the receivables on payment of a specified amount (para. 67).

53. With respect to those factors, the Court noted the following:

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[63] (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168 (Sup. Ct.) rev'd on other grounds (2005) 75 OR (3d) 784; 5 B.L.R. (4th) 251 (ONCA) leave to appeal to SCC refused.

(a) When interpreting a contract, one must look not only to the intention of the parties as expressed by the language of the contract itself but also to "the substance of the transaction and not merely to the form" (paras. 38 and 40).

The Broker Agreements and evidence of all parties involved in the implementation of those agreements demonstrate that it was a brokering arrangement, not a financing agreement. [64]

(b) "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" (para. 41).

Trimor took the credit risk on the Trimor Loans and has over $8 million in bad loans in its loan portfolio according to Cash Store's records.[65] The Secured Creditors take the position that any limited capital protection that Trimor was to receive from Cash Store was voluntary and, if they are to be believed, illusory.

(c) The absence of a right of the purchaser to retain the surplus from collection of accounts receivable is not fatal to the transaction being categorized as a true sale (para. 56).

Trimor received the principal and interest paid on the Trimor Loans.[66]

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[64] PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

[65] Carlstrom Affidavit at para. 77. Armstrong Affidavit, Exhibits "A" and "B" at para. 7.1 and Exhibit "I", Affidavit of C. Warnock at para. 25.

[66] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), questions 53 – 55; Motion Record of Trimor at Tab 6. Transcript

(d) While all the factors must be considered, whether the seller has a right of redemption is "the ultimate test to be applied to determine whether a particular transaction should be interpreted as a secured loan or as a true sale" (para 67).

> There is no provision in the Broker Agreements that allows the Applicants to redeem the Trimor Loans. Instead, under the Broker Agreements Trimor has the right both to take back its funds at any time on 120 days notice and to take over the administration of the Trimor Loans upon the termination of Broker Agreement.[67]

54. The Court also made it clear that the fact that the seller acts as the collection agent is not inconsistent with a finding that the transaction was a true sale (para. 66).

ii) Consignment of goods under a non-security "true" consignment

55. The relationship of a credit broker and credit grantor outlined in the Broker Agreements is analogous to that of a non-security consignment, otherwise known as a "true" consignment. In a true consignment the supplier of the consigned goods retains legal title until goods are sold and title passes directly from the consignor to the ultimate purchaser. Similarly, the Broker Agreements establish a commercial and legal relationship whereby the funds available for lending to the Customers are supplied by the TPLs, like Trimor, who enter directly into a debtor/creditor relationship with each of the Customers. In differentiating between a consignment, which is in substance a security interest, and a true consignment which is not, courts have set out several key indicia.

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of Cross-Examination of Sharon Fawcett on her affidavits sworn April 11 and 22, 2014 held on May 21, 2014 ("**Fawcett Cross-Examination Transcript**"), question 131; Motion Record of Trimor at Tab 7.

[67] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2 and 6.4.

56. In *Access Cash International Inc. v Elliot Lake and North Shore Corporation for Business Development*, the Court set out the following key indicia that differentiate a true consignment from a security consignment:[68]

a) The goods are shown as an asset in the books/records of the supplier and are not shown as an asset in the books/records of the merchant.

b) It is apparent in the merchant's dealings with others that the goods belong to the supplier rather than the merchant.

c) Title of goods remains with the supplier.

d) The supplier has the right to demand the return of the goods at any time.

e) The merchant has right to return unsold goods to the supplier.

f) The merchant is required to segregate the supplier's goods from his own.

g) The merchant is required to maintain separate books and records in respect of the supplier's goods.

h) The merchant is required to hold sale proceeds in trust for the supplier.

i) The supplier has the right to stipulate a fixed price or a price floor for the goods.

j) The merchant has the right to inspect the goods and the premises in which they are stored.

57. A number of the above indicia exist in respect of the relationship between Trimor and Cash Store, including the fact that Trimor has the right to demand the return of the Trimor Funds[69] and the fact that Cash Store is required to segregate the Trimor Funds and were only allowed to use them for brokering.[70] Further, the loan documentation in respect of the Trimor

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[68] (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824 at para. 21 (Sup. Ct.) [*Access Cash*].

[69] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2.

[70] Armstrong Affidavit, Exhibits "A" and "B" at ss. 1.1(g) and (h).

Loan is directly between the Customers and Trimor.[71] Paragraph 4 of the April 30, 2014 order makes it clear that any non-Ontario loans that were advanced after that Order was made belong to Trimor.

B. Trimor Should be Allowed to Realize on the Trimor Loans

58. The Broker Agreements make it clear that upon termination Trimor has the option to take over the administration of the Trimor Loans.[72] Despite this fact, the Applicants are seeking to trap the Trimor Loans with Cash Store and allow them to realize on the Trimor Loans in a situation where it is clear that Cash Store cannot maximize recoveries or minimize costs.

59. Although the CCAA is broad in scope, its scope it not limitless and there are circumstances, such as here in respect of the Trimor Loans, in which the granting of a stay or continuation of a stay is not justified.

60. As Justice Tysoe said on behalf of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* ("***Cliffs***"),[73]

> [...] the 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 refinancings, 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

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[71] PwC Report at p. 6 (internal). Second Armstrong Affidavit, Exhibit "A" - Preliminary TCSI Circular at p. 1 (internal). Second Armstrong Affidavit, Exhibit "I" – Affidavit of C. Warnock sworn September 30, 2013 at paras. 25 and 26. Carlstrom Affidavit at para. 76.

[72] Armstrong Affidavit, Exhibits "A" and "B" at ss. 6.4.

[73] 2008 BCCA 323, 2008 CarswellBC 1756 at para. 26.

fundamental purpose.

61. The Applicants are seeking the Court's assistance to allow them to effectively terminate the Broker Agreements, but at the same time refusing to allow Trimor to mitigate its damages by assuming administration of the Trimor Loans in accordance with the terms of the Broker Agreement. This is not conduct that the CCAA stay was intended to accommodate and the Court ought not to extend the ambit of the CCAA stay in this manner to the prejudice of Trimor.

62. *Cliffs* was cited with approval in a recent decision of the Ontario Superior Court in *Romspen Investment Corporation v. 6711162 Canada Inc.*,[74] where the Court was faced with competing applications by the secured creditor for the appointment of a receiver and the debtor company for an initial CCAA order. In coming to the conclusion that an initial order ought not to be granted, Justice Brown made the following observations:[75]

> 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

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[74] 2014 ONSC 2781, 2014 CarswellOnt 5836 [*Romspen*].

[75] *Romspen* at paras. 72 and 73.

> letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well [...].

63. In concluding that CCAA relief was not appropriate in the circumstances, the Court also cited the decision in *Dondeb Inc. (Re)* ("***Dondeb***"),[76] where the Court also determined that CCAA relief should not be granted to the applicant company. At the conclusion of his reasons in *Dondeb*, Justice Campbell stated as follows:[77]

> 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.

64. In his earlier decision in *Romspen Investment Corporation v. Edgeworth Properties et al.*,[78] Justice Campbell determined that a better alternative in that case was to carve the applicant, who held a mortgage over certain of the debtor companies' real property, out of the CCAA proceeding, to make a declaration as to the validity and priority of the applicant's mortgage, and to permit the applicant to proceed with judicial sale/foreclosure proceedings in respect of the real property subject to its security. Justice Campbell made this order over the objections of certain investors in the debtor companies who challenged the validity of the applicant's security.

65. Cash Store does not intend to carry out a restructuring of the brokering business. It intends to close that business down. In fact, it states in its materials that it has already

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[76] 2012 ONSC 6087, 2012 CarswellOnt 15528 [*Dondeb*].

[77] *Dondeb* at paras. 33 and 34.

[78] 2012 ONSC 4693, 2012 CarswellOnt 10902.

commenced that process without prior consultation with the TPLs. There is no benefit to Cash Store continuing to administer the TPL Loans. There is, however, significant prejudice to Trimor and the other TPLs if the CCAA stay continues to stand in the way of the efficient and effective collection of the TPL Loans. This prejudice arises from, among other things:

(a) the fact that the Cash Store cannot broker new loans, which will "significantly impair" its ability to collect the Trimor Loans;[79]

(b) the fact that the Cash Store intends to take no steps to collect in Ontario and only limited steps in other jurisdictions;[80]

(c) the potential for huge professional fees and other expenses associated with any liquidation conducted under the CCAA, and the projected fees for these proceedings in particular; and

(d) the risk that Cash Store's restructuring may not succeed and that the task of collecting the Trimor Loans will be left for yet another future (and potentially costly) insolvency proceeding.

66. The fundamental purpose of the CCAA is not advanced by permitting Cash Store to continue to administer the TPL loans as there is to be no restructuring of that business.

67. Trimor should be allowed to take over the administration of its loans at its cost.

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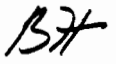
[79] Carlstrom Affidavit at para. 101.

[80] Aziz Affidavit at para. 38.

ORDER REQUESTED

68. For the reasons set out above, Trimor respectfully requests that this Court grant a declaration that Trimor owns the Trimor Loans and Receipts, and order that Cash Store immediately transfer the Loans, and pay the Receipts, to Trimor or its designated administrator.

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



Brett Harrison and Adam Maerov
McMillan LLP

Lawyers for Trimor Annuity Focus Limited Partnership #5

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Access Cash International Inc. v. Elliot Lake and North Shore Corporation for Business Development* (2000), 1 P.P.S.A.C. (3d) 209, 2000 CarswellOnt 2824.

2. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323, 2008 CarswellBC 1756.

3. *Dondeb Inc. (Re)*, 2012 ONSC 6087, 2012 CarswellOnt 15528.

4. *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168.

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

6. *Romspen Investment Corp. v. Edgeworth Properties*, 2012 ONSC 4693, 2012 CarswellOnt 10902.

SCHEDULE "B"
RELEVANT STATUTES

Payday Loans Act, 2008 regulations

30.1 (1) A licensee shall not request or require the borrower under a payday loan agreement to do any of the following or suggest to the borrower that the borrower do any of the following:

1. Repay or pay the advance or any part of it to the lender or anyone else until the end of the term of the agreement.

2. Pay the cost of borrowing or any part of it to anyone until the end of the term of the agreement.

(2) A licensee shall not, directly or indirectly on behalf of any other person, request or require the borrower under a payday loan agreement to do any of the actions described in paragraph 1 or 2 of subsection (1) or suggest to the borrower that the borrower do any of those actions.

(3) If a licensee contravenes subsection (1) or (2), the borrower is only required to repay the advance to the lender and is not liable to pay the cost of borrowing.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF TRIMOR ANNUITY FOCUS LP #5

(Motion returnable June 11, 2014)

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TAB 3

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 COLISEUM CAPITAL PARTNERS, LP, COLISEUM CAPITAL PARTNERS II, LP, BLACKWELL PARTNERS, LLC, ALTA FUNDAMENTAL ADVISORS MASTER LP, AND THE AD HOC COMMITTEE OF CASH STORE NOTEHOLDERS IN THEIR RESPECTIVE CAPACITIES AS DIP LENDERS, FIRST LIEN NOTEHOLDERS AND HOLDERS OF SENIOR SECURED NOTES

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[1] 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;
Tschritter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1452 of 2012;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1453 of 2012

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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 COLISEUM CAPITAL PARTNERS, LP, COLISEUM CAPITAL PARTNERS II, LP, BLACKWELL PARTNERS, LLC, ALTA FUNDAMENTAL ADVISORS MASTER LP, AND THE AD HOC COMMITTEE OF CASH STORE NOTEHOLDERS IN THEIR RESPECTIVE CAPACITIES AS DIP LENDERS, FIRST LIEN NOTEHOLDERS AND HOLDERS OF SENIOR SECURED NOTES

PART I - INTRODUCTION

1. This motion centres on the question of the ownership of funds emanating from Cash Store's "brokered loan business".

2. Trimor Annuity Focus Limited Partnership #5 (**Trimor**) and 0678786 B.C. Ltd. (**McCann**) (collectively, the **TPLs**) claim those funds to be their property. The TPLs base this assertion upon the framework of their original lending agreements with Cash Store. These documents were entitled broker agreements (**Broker Agreements**).

3. The DIP Lenders[1] – who are also all secured creditors under other instruments – disagree. The TPLs' actual practices with Cash Store established that the TPLs varied the Broker Agreements, and in fact entered into debtor-creditor, or lending, relationships with Cash Store.

[1] The moving parties are referred to hereinafter as the **DIP Lenders**.

4. Like various other creditors, the TPLs received a fixed rate of return on funds provided to Cash Store and did not directly bear the collection risk in respect of any individual customer loan made by the Cash Store.

5. Like various other creditors, the funds advanced by the TPLs were commingled with Cash Store's general operating cash from which customer loans were made. There was no way to determine which funds belonged to the TPLs or which loans were made with funds advanced by the TPLs. This became increasingly true as customer loans were repaid and funds were re-loaned by Cash Store on an ongoing basis.

6. The TPLs dispute the evidence that they were aware of the total nature of the changes in their relationship with Cash Store – and specifically commingling with general accounts. The TPLs concede at minimum that they believed all TPL funds were commingled with each other. It is uncontradicted that the funds were in fact commingled and used from general operating accounts.

7. The necessary consequence of these facts, regardless of evidentiary disputes, is that:

   (a) The TPLs became creditors and consented to Cash Store having use of all funds received back from customers – they became lenders to Cash Store. As a result, Cash Store continues to be entitled to all funds received back from customers; and

   (b) Any "transfer" of a receivable to a TPL by Cash Store, for loans made by Cash Store from these general accounts, was a transfer of property or value from Cash Store to the TPL, a creditor, at a time when Cash Store was insolvent. As such it is a preference. To permit such funds to be directed to the TPLs after receipt from customers now would further that preference and is improper.

8. The TPLs sought and received the benefit of gratuitous retention payments and capital protections paid by Cash Store. In so doing, they avoided the risk of their putative broker relationship. They also became creditors. The TPLs are not entitled to disavow that creditor relationship and return to the status of broker now that it is more convenient to do so.

PART II - THE FACTS

9. Understanding the true nature of the relationship between Cash Store and the TPLs starts with the Broker Agreements. It ends, however, with actual practice.

The Broker Agreements

10. Had the TPLs chosen to strictly follow their Broker Agreements, they could have had the benefit of specific fund segregation.

11. Each of the Broker Agreements contains a section entitled "Loan Funding by Financier" that details the means by which the Financier (the TPL) can provide the money used by Cash Store to make loans to customers. Those means include payments made:

(a) by wire transfer of funds to the Designated Broker Bank Account (for redirection/payment to, or for the benefit of, the Broker Customer); and

(b) by cheque drawn by Financier payable to Broker (Cash Store) for deposit to the Designated Broker Bank Account (for redirection/payment to, of for (*sic*) the benefit of, the Broker Customer).[2]

12. The Broker Agreements go on to define "Designated Broker Bank Account" as:

> [...] the bank account of Broker designated by Broker for the purposes of temporarily receiving funds from Financier (if loans are made by Financier way (*sic*) of cash advance) before they are advanced to a Broker Customer [...].

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[2] See Broker Agreement between Trimor and Cash Store dated February 1, 2012 at Art. 2.5, Motion Record of Trimor, Vol 1, Tab 2A at 22.

13. With respect to receipts, the Broker Agreements entitled the TPL to designate a bank account for receipt of funds directly from Cash Store customers:

> "Designated Financier Bank Account" means, the bank branch and account designated by Financier from time to time where (and into which) deposits of cash and cheques received from Broker Customers, in respect of such Financier funded loans, are to be cleared (deposited) to from time to time [...].[3]

14. The Broker Agreement also grants the TPLs the opportunity to audit the records of Cash Store:

> Financier shall have the right, at any time upon written demand made by Financier to Broker, to inspect, during normal business hours, all Records (wherever located). Qualified third party consultants, as determined by Financier at Financier's sole discretion, may be employed by Financier for the purpose of any such inspection. [...][4]

15. The TPLs did not exercise those rights. Instead, they chose to accept variations to these agreements by which they benefitted.

Brokered Loans in Practice

16. In practice, the third-party lending business of Cash Store functioned in the following way:

(a) the TPLs provided Cash Store with initial tranches of funds;[5]

(b) the funds were lent to Cash Store's customers, in the name of the TPL (in Trimor's case, but not McCann's);[6]

(c) Cash Store's customers, if not in default, repaid the borrowed funds to Cash Store, together with interest of 59%;[7]

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[3] Trimor Broker Agreement, Art. 1.1, Trimor Motion Record, Vol 1, Tab 2A at 18.
[4] Trimor Broker Agreement, Art. 5.1, Trimor Motion Record, Vol 1, Tab 2A at 28.
[5] Affidavit of Steven Carlstrom sworn April 14, 2014 at para 78, Motion Record of 0678786 BC Ltd, Tab 4 at 83; Cross-Examination of Jennifer Pede held May 27, 2014, Tab 5 of the Brief of Transcripts of 0678786 BC Ltd, at q. 30.
[6] Report of PricewaterhouseCoopers attached as Exhibit A to the Affidavit of Don MacLean sworn May 15, 2014 (**PwC Report**), at 6, Trimor Motion Record, Vol 3, Tab 4 at 624; Cross-Examination of Sharon Fawcett dated May 21, 2014, Transcript Brief, Tab 2 at qq. 54; Cross-Examination of Erin Veronica Armstrong dated May 21, 2014, Transcript Brief, Tab 4 at qq. 130-131.

(d) Cash Store deposited the returned funds and interest to a general account;[8]

(e) Cash Store made voluntary payment to the TPLs, from the general account, in order to ensure that the TPLs received a fixed 17.5% return;[9]

(f) Cash Store provided voluntary "capital protection" to the TPLs, insulating them for customer credit risk;[10]

(g) Cash Store made new loans to customers, from the general account, in the name of the TPL;[11] and

(h) Cash Store recorded a receivable for the TPL, with respect to the re-lent funds.[12]

17. Notably, Trimor and McCann were treated very differently under the loan documentation. When a customer took out a loan that was to be designated as being made on behalf of Trimor, the loan documentation explicitly stated that Trimor was the lender. When a customer took out a loan that was to be designated as being made on behalf of McCann, the loan documentation made no such specification. Rather, those loans listed another party as lender, and were then transferred into McCann's name.[13]

18. Each of the processes described above were accepted by the TPLs, with the disputed exception of the general account commingling.[14]

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[7] Carlstrom Affidavit at para 33, McCann Motion Record, Tab 4 at 68-69; PwC Report at 10, Trimor Motion Record, Vol 3, Tab 4 at 628.
[8] Carlstrom Affidavit at para 79, McCann Motion Record, Tab 4 at 83-84.
[9] PwC Report at 11-12, Trimor Motion Record, Vol 3, Tab 4 at 629-630.
[10] Carlstrom Affidavit at para 84, McCann Motion Record, Tab 4 at 85-86.
[11] Carlstrom Affidavit at para 78, McCann Motion Record, Tab 4 at 83.
[12] Pede Cross-Examination, Transcript Brief, Tab 5 at qq. 67-69.
[13] Pede Cross-Examination, Transcript Brief, Tab 5 at qq. 36-37 ; Fawcett Cross-Examination, Transcript Brief, Tab 2 at qq. 54, 106.
[14] Fawcett Cross-Examination, Transcript Brief, Tab 2 at qq. 54-63, 131-134 and 150; Armstrong Cross-Examination, Transcript Brief, Tab 4 at qq. 52-55, 124-139.

TPLs are creditors of Cash Store in practice

19. On their surface the Broker Agreements contemplate a pass-through principal-broker arrangement. In substance, however, the practices adopted by the parties with regard to payments made by Cash Store to the TPLs reflected a different reality. As explained by Mr. McCann in email correspondence to Cash Store, the TPLs in substance loaned funds to Cash Store and the TPLs were creditors of Cash Store:

> You mentioned you were meeting with Steve and Craig this morning to discuss our loan to back stop Ontario payday loan customers and the requirements for funds in regulated provinces. [...] As you know we went to considerable effort and legal cost to get the opinion and comfort that we required to assure that funds loaned to Cash Store were an ok investment because they were secured by loans and the promise of Cash Store for proper accounting of those loans.[15]
>
> I have attempted to contact you on numerous occasions and have left messages on your cell, office phone and with Sandy. Attemping to keep a creditor and friend in the dark by ceasing all communication is neither the way to treat a friend nor a creditor.[16]

Voluntary Interest Payments

20. In practice, the TPLs were effectively guaranteed a rate of return of 17.5% on their advances (though it appears that Trimor earned interest at a rate of 20.0% prior to May 2011[17]). Notwithstanding the actual fluctuations in payments of interest and principal seen by Cash Store's customers, the monthly reconciliations and interest schedule forwarded by Cash Store to each TPL calculate a simple return of 17.5% on the total principal advanced by each TPL.[18]

21. In order to make this guarantee possible, Cash Store made "retention payments" each month. The retention payments effectively made up any shortfall between actual amounts recovered from customers and the 17.5% interest owed to the TPLs. Ms. Erin Armstrong, the former

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[15] E-mail from J. Murray McCann to Gordon Reykdal dated March 14, 201, McCann Motion Record, Tab 3D at 50.
[16] E-mail from J. Murray McCann to Gordon Reykdal dated April 12, 2014, McCann Motion Record, Tab 3D at 52.
[17] Trimor Lender Disbursement Summary, March 2014 (CH0001838), Cross-Motion Record of the DIP Lenders at Tab 5.
[18] See, for example, McCann Lender Disbursement Summary, March 2014 (CH0001836), Cross-Motion Record of the DIP Lenders at Tab 3.

Chief Operating Officer of Trimor, stated on cross-examination that these retention payments were in fact a "top-up", to make sure Trimor received its expected interest payment each month.[19]

22. PwC describes the 17.5% retention payments as compensation for the use of the TPLs' funds,[20] or in substance interest. Sharon Fawcett, CFO of McCann, expressly describes the 17.5% payment as interest in her affidavit.[21] Ms. Fawcett also stated in email correspondence to Cash Store that a $7 million repayment to McCann of funds in Cash Store's possession would "stop the interest clock".[22]

23. The 17.5% interest rate provided to TPLs was significantly higher than the rates of return offered by Cash Store to holders of senior secured notes. For example, when it made its first direct advances of funds to Cash Store, McCann agreed that it was "loaning" funds to Cash Store and confirmed the interest terms as being "4 million at 12 percent under a gsa 1st lien security on Cash Store Financial and 4 million at 17.5 percent unsecured under our broker lender agreement."[23]

24. On cross-examination, J. Murray McCann, McCann's founder, agreed that the higher risk associated with the TPL lending justified a higher rate of return.[24]

25. Up to April 2014, Cash Store's retention payments or "top-up" ensured that McCann received total interest payments of $3,353,696.92[25] and Trimor received total interest payments of $7,839,676.14.[26]

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[19] Armstrong Cross-Examination, Transcript Brief, Tab 4 at q. 53.
[20] PwC Report at 11, Trimor Motion Record, Vol 3, Tab 4 at 629.
[21] Affidavit of Sharon Fawcett sworn April 11, 2014, Exhibit 1 to the April 22 Fawcett Affidavit, at para 9, McCann Motion Record, Tab 3A at 23-24.
[22] E-mail from Sharon Fawcett to J. Murray McCann dated March 4, 2014, Exhibit 3 to the April 22 Fawcett Affidavit, McCann Motion Record, Tab 3C at 35.
[23] E-mail chain ending June 18, 2012 involving Gord Reykdal and J. Murray McCann, Exhibit 2 of the Fawcett Cross-Examination, Tab 2B of the Transcript Brief.
[24] Cross-Examination of J. Murray McCann held May 21, 2014, Transcript Brief, Tab 3 at qq. 38-39.

Voluntary Capital Protections

26. In addition to compensating the TPLs with routine retention payments, Cash Store indemnified the TPLs for customer loan losses through use of a capital protection scheme to help the TPLs maintain the principal behind their loan portfolios. That scheme had two components:

(a) an expensing mechanism, whereby Cash Store would credit the TPLs with a book entry in the amount of any losses suffered by the TPLs on brokered loans that remain unpaid after 90 days. This protected the TPLs' advances of principal from being eroded by bad loans; and

(b) a purchasing mechanism (in Ontario and Manitoba), whereby Cash Store purchased past due brokered loans at face value from the TPLs. This practice also had the effect of allowing the TPLs to maintain the amounts of capital they had advanced to Cash Store.[27]

27. PwC reviewed the portfolios of Trimor and McCann as at April 13, 2014. It is notable that, in the summary of Trimor's holdings, the lines of credit assigned to Trimor are broken out by length outstanding, with 0% of Trimor's loans having been held for longer than 90 days.[28] As such, Cash Store had acquired all of Trimor's bad debt, insulating it completely from the credit risk of the payday lending products. Instead, the TPLs took on the risk of Cash Store's insolvency, and the concomitant effect on these gratuitous mechanisms.

28. McCann has in its factum recognized the debtor-creditor nature of the capital protection mechanism:

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[25] McCann Lender Disbursement Summary, March 2014 (CH0001836), Cross-Motion Record of the DIP Lenders at Tab 3.
[26] Trimor Lender Disbursement Summary, March 2014 (CH0001837), Cross-Motion Record of the DIP Lenders at Tab 2.
[27] Carlstrom Affidavit at para 84, McCann Motion Record, Tab 4 at 85-86.
[28] PwC Report at 14, Trimor Motion Record, Vol 3, Tab 4 at 632.

> 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".[29]

29. McCann has simply failed to acknowledge the unsecured nature of that mechanism.

30. In the end, the simple fact is that in each and every month of the TPLs' relationship with Cash Store, each TPL earned its constant rate of return and experienced little or no erosion of its "Restricted Cash" (as that term is explained below). In so doing, they converted their Broker Agreements into lending agreements, when it was rewarding to do so.

Commingling of Funds

31. It was always Cash Store's practice to hold funds related to third-party lending activities in its own corporate accounts, commingled with all of its other cash. No designated or segregated accounts were ever used or requested by the TPLs, notwithstanding each was entitled to use a designated account pursuant to the terms of the Broker Agreements. This practice was in Cash Store's view well known to the TPL's and fully disclosed to the Court on the CCAA filing:

> Any TPL Funds received by Cash Store as repayment for any brokered loan that are not currently deployed to Cash Store customers are deposited in Cash Store's bank accounts and are referred to in Cash Store's financial statements as "Restricted Cash". While the Broker Agreements permit the TPLs to require Cash Store to hold the TPL Funds in accounts designated for that purpose, no TPL has designated any account as a Designated Financier Bank Account or a Designated Broker Bank Account. The Restricted Cash is comingled with all of Cash Store's other cash (the "Unrestricted Cash"), and the aggregate of Cash Store's Restricted and Unrestricted Cash is the total cash reported on Cash Store's balance sheet. [...] Since all of these funds are comingled in multiple accounts, it is not possible to know which dollar represents Restricted Cash and which dollar represents Unrestricted Cash.[30]

32. In their original evidence, the TPLs strenuously claimed to believe that the funds were held in accounts designated to be used solely to receive each individual TPL's advances as set out in the Broker Agreements – notwithstanding that the TPLs were aware of and benefitted from

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[29] McCann Factum at para 38.
[30] Carlstrom Affidavit at para 79, McCann Motion Record, Tab 4 at 83-84.

other "extra-contractual" arrangements. That evidence also varied somewhat under cross-examination and in light of contemporaneous documentary evidence.

33. For instance, Ms. Fawcett for McCann first stated to the Court that a segregated bank account was represented to be in use:

> As indicated in my prior Affidavit, it was represented to me and Mr. McCann at the time the Broker Agreement was entered into, and it is a term of the Broker Agreement, that all Restricted Cash would be placed in a Designated Broker Bank Account, which would be separate and apart from Cash Store Financial's general operating account.[31]

34. However, Ms. Fawcett was clearly aware that McCann funds had been comingled with other funds. On July 19, 2012, Ms. Fawcett wrote to Michael Zvonkovic, former CFO of Cash Store, and asked whether McCann's funds were actually maintained in an individual segregated account:

> On the Broker Agreement funds, so you keep a separate "designated broker bank account" for each Financier such that all of the loans made using our funds are paid from and returned to that account, as well as all related interest and fees?[32]

35. In response, Mr. Zvonkovic explains that no such account was or would be used for McCann's funds:

> In the new agreement, we've tried to combine all these accounts and not to have a designated broker bank account. Your funds specifically would be tracked separately via our accounting system.[33]

36. Ms. Fawcett equivocated on cross-examination, stating for the first time that it was always her understanding that the Designated Broker Bank Account was to be used to hold the funds provided by or received for **all** TPLs, and not merely those related to McCann. She made this clarification notwithstanding the fact that her April 22, 2014 affidavit appears to refer to the capitalized, defined term "Designated Broker Bank Account". As set out above, that term as

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[31] Affidavit of Sharon Fawcett sworn April 22, 2014, at para 3, McCann Motion Record, Tab 3 at 17-18.
[32] E-mail from Sharon Fawcett to Michael Zvonkovic dated July 19, 2012, McCann Motion Record, Tab 3B at 28.
[33] E-mail from Michael Zvonkovic dated July 23, 2013, McCann Motion Record, Tab 3B at 28.

defined in the Broker Agreements contemplates only the receipt of funds for the contracting TPL, and not all other TPLs.

37. For its part, Trimor firmly asserted that it was assured its funds would be held in trust:

> [...] [Cash Store] consistently assured Trimor that Trimor's funds were not used for any purpose other than advancing loans in accordance with the Broker Agreement. In addition, [Cash Store] assured Trimor that it would treat the Trimor funds as being held in trust for Trimor's benefit.[34]

38. On cross-examination, Ms. Armstrong conceded that:

(a) this statement was made regarding an earlier form of Broker Agreement which did contain trust language;[35] and

(b) the current Broker Agreement contained no trust language whatsoever.[36]

39. In a similar overstatement, Trimor has argued that "until January 2014 a separate bank account was used for deposit of TPL Funds, including the Trimor Receipts, and the payment of Retention Payments."[37] Trimor derives support for this statement from the PwC Report, which says nothing about retention payments and appears to limit its scope to the two-month between October 2013 and January 2014:

> Prior to January 2014, this account was used to facilitate the cash receipts from, and payments made to the TPLs. Although this account was not specifically designated for third party funds, it appears to have been used for that purpose after October 2013.[38]

40. This evidence was all subject to further qualification during the cross-examination of Jennifer Pede on the PwC Report, when Ms. Pede admitted that the scope of PwC's review was

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[34] Affidavit of Erin Armstrong sworn May 8, 2014 at para 6, Trimor Motion Record, Vol 2, Tab 3 at 105
[35] Armstrong Cross-Examination, Transcript Brief, Tab 4 at qq. 58-62.
[36] Armstrong Cross-Examination, Transcript Brief, Tab 4 at qq. 65-66.
[37] Trimor Factum at para 34.
[38] PwC Report at 27, Trimor Motion Record, Vol 3, Tab 4 at 645.

restricted to the October 2013 – January 2014 time period,[39] and that those accounts were used for collection of pre-authorized payments from Cash Store customers:

> 40. Q. In one period of time Cash Stores used what you called a flow-through account, you've seen a month or two of that, to receive those funds, correct?
>
> A. We saw in some cases, yes, that those transactions would have been deposited to a flow-through account, but it's important to note we didn't do an audit of all of the transactions to have any sense as to whether that represents all of those funds repayments.
>
> 41. Q. So you're not able to say how regular or irregular that practice was, based on the limited documentation you had for review?
>
> A. Well, based on our discussions with management the practice was that there would be a pre-authorized payment agreement set out with the customer and that would deposit the funds in to a bank account which was controlled by the broker. But those – we didn't go through all of those transactions to know whether all of the transactions were going through one account or whether there were multiple accounts that these collections were going through.[40]

41. Most troublingly, it came to light during cross-examination that Steven Carlstrom had written to PwC on May 21, 2014 and May 26, 2014, in response to receipt of the PwC Report. In that communication, Mr. Carlstrom questions PwC's characterization of the flow-through bank account mentioned in the PwC Report, stating that he did not believe that the bank account identified by PwC was a separate bank account used primarily for TPL purposes.[41]

42. Inexplicably, this e-mail was not produced to parties to the litigation until nearly the end of Ms. Pede's examination, and only when counsel to the CRO made it available. Trimor also refused to produce PwC's working file in this matter.[42]

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[39] Pede Cross-Examination, Transcript Brief, Tab 5 at q. 11.
[40] Pede Cross-Examination, Transcript Brief, Tab 5 at qq. 40-41.
[41] Pede Cross-Examination, Transcript Brief, Tab 5 at q. 73.
[42] Pede Cross-Examination, Transcript Brief, Tab 5 at q. 5; E-mail dated May 29, 2014 from Brett Harrison to Alan Merskey, Cross-Motion Record of the DIP Lenders at Tab 7.

Restricted Cash and Assigned Loans

43. A review of the monthly reconciliation process undertaken by Cash Store for the benefit of the TPLs also suggests that the funds advanced by the TPLs were not segregated from Cash Store's general funds.

44. If the overall cash balance in Cash Store accounts fell below the recorded balance of theoretical Restricted Cash, Cash Store would assign its non-brokered loans to the TPLs to offset this deficiency. When made, these offsets were set out clearly in each of the monthly reconciliations provided by Cash Store, and were distinguished from purchases of loan portfolios or other loans designated to the TPLs.[43]

45. Accordingly, the TPLs understood or ought to have understood that Cash Store would sometimes assign receivables for the benefit of the TPLs rather than use TPL advances to actually make or purchase customer loans. These assignments had the effect of significantly decreasing the amount of cash listed in the TPLs' reconciliation statements as being available for making or purchasing customer loans:

> 138. Q. And without those loans being assigned to you or transferred or otherwise given, granted to you, there would have been a larger funding excess?
>
> A. It appears so.
>
> 139. Q. And what do you understand the line at the bottom of the first half of the page, "Funding (Excess)" to represent?
>
> A. Funds that Cash Store would have been holding for Trimor not advanced to customers.[44]

[43] Carlstrom Affidavit at paras 80-81, McCann Motion Record, Tab 4 at 84-85. See also, for example, the Lender Reconciliation for Trimor #5 for April, 2013 (CH0000175), Cross-Motion Record of the DIP Lenders, Tab 5.
[44] Armstrong Cross-Examination, Transcript Brief, Tab 4 at qq. 138-139.

Cash Store's Insolvency

46. Based upon book values, the value of Cash Store's liabilities exceeded the value of Cash Store's assets as at September 30, 2013.[45] Cash Store's insolvency from a balance sheet perspective became increasingly severe and by December 31, 2013, Cash Store's liabilities exceeded assets on a book value basis by over $8 million.[46]

47. In March of 2014, facing significant liquidity issues, Cash Store elected not to make any voluntary retention payments to the TPLs.[47]

48. Through the period following September 30, 2013, however, Cash Store continued its third-party lending business and continued:

    (a) making loans to customers that it designated as having been made on behalf of McCann and Trimor; and

    (b) assigning other loans to McCann and Trimor to offset any theoretical deficiencies in restricted cash.

PART III - ISSUES AND THE LAW

49. Issues:

    (a) Is the relationship between Cash Store and the TPLs a relationship of debtor and creditor?

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[45] Exhibit "A" to the Carlstrom Affidavit, Application Record at 122.
[46] Exhibit "B" to the Carlstrom Affidavit, Application Record at 173.
[47] Carlstrom Affidavit, at para 86, McCann Motion Record, Tab 4 at 87.

(b) Was the designation or assignment of loans in the names of the TPLs a preference that should not be furthered by this Court?

(c) If the designation of loans is found to not have been a preference, should this Court lift the stay of proceedings to allow the TPLs to extract cash?

(d) Should Cash Store be required to pay the legal costs of the TPLs?

A. The TPLs are Creditors of Cash Store

50. The BIA defines a creditor as a person having a claim provable as a claim under the BIA. The BIA goes on to deem the following as "claims provable":

> "all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".[48]

51. Cash Store has an obligation to return capital advanced by the TPLs at some point. The issue is whether that obligation was a debt or a liability versus an obligation to give back funds beneficially owned by the TPLs.

52. In determining whether a particular relationship is indeed one between debtor and creditor, the Court should look to the substance of the arrangement. Various factors will suggest that a relationship is either one between trustee and beneficiary or between debtor and creditor:

> A trustee must keep the assets of the trust distinct, but in the normal commercial transaction nothing 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, and whether or not interest payments are to be

[48] *BIA*, s. 121(1).

made by the holder of the assets. **If interest is to be paid, the relationship is nearly always that of creditor and debtor.**[49] (emphasis added)

53. The nature of the obligation to repay funds also informs the type of relationship in existence:

> [T]he debtor always remains liable to the creditor until the debt is paid. The trustee, however, is not personally obligated to compensate the beneficiaries if the trust property is lost other than through the trustee's own fault.[50]

54. Courts have considered the balance of risk between the parties in determining whether a creditor relationship exists. In *Outset Media Corp. v. Stewart House Publishing Inc.*,[51] the Court of Appeal for Ontario determined that the fact that the debtor party assumed all of the risk of a consignment transaction, by agreeing to fixed rates of return notwithstanding the sales price obtained, indicated that the seller was in fact a debtor:

> We do not think that the agreement, properly interpreted, means that the net proceeds of sale "remained the property of the respondent". Rather, the agreement provided that Stewart House was contractually obligated to pay the respondent 75% of the amount invoiced to purchasers. Payments to the respondent did not depend on receipt of payment by Stewart House. The risk of non-payment was assumed by Stewart House not by the respondent. [...]
>
> This arrangement for payment to the respondent is inconsistent with the notion that the proceeds received from sales of the games were impressed with a trust in favour of the respondent.[52]

55. Courts have also held that an indicator of a debtor-creditor relationship is the extent to which the creditor party can or does exercise control of the property at issue while it is held by the debtor party. For example, in *Salo v. Royal Bank of Canada,* the British Columbia Court of Appeal upheld a decision finding a debtor-creditor relationship largely on the basis of facts suggesting a lack of influence on the part of the creditor:[53]

> [A]part from a direction by the plaintiffs that their logs be kept separate from other logs acquired by Patrick & Miles, no direction or control was exercised by the plaintiffs over the manner in which Patrick & Miles performed its function of broker; that apart from expecting and receiving

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[49] Donovan Waters, Mark Gillen & Lionel Smith, Waters' Law of Trusts in Canada, 4th ed (Toronto: Thomson Reuters Canada Limited, 2012) at 92.
[50] A.H. Oosterhoff et al, Oosterhoff on Trusts: Texts, Commentary and Materials, 6th ed (Toronto: Thomson Canada Limited, 2004) at 104.
[51] [2003] OJ No 2558 (CA).
[52] *Outset Media, supra* at paras 4-5.
[53] 1988 BCJ No 999 (BCCA).

> an accounting from Patrick & Miles as to the disposition of the proceeds received and the expenses incurred by it in the sale of the logs, the plaintiffs exercised no direction or control over the manner in which Patrick & Miles dealt with the proceeds received from the sale of the logs; that during the years the plaintiffs dealt with Patrick & Miles they never instructed it to keep the proceeds from the sale of their logs separate from Patrick & Miles' general funds.[54]

56. The basic foundation of the transaction between Cash Store and the TPLs is that the TPLs provided capital to Cash Store, with two expectations: (i) repayment of that capital at the expiry of their Broker Agreements, and (ii) monthly payments at a 17.5% rate of return.[55] Regardless of the actual returns on brokered loans obtained by Cash Store, the TPLs always got their 17.5%, and were entirely insulated from any credit risk as a result of the capital protections used by Cash Store.

57. Here, the arrangement that should be considered was that between the parties in practice, and not merely what they put on paper in the Broker Agreements. This Court has held that, notwithstanding the presence of a "non-waiver" clause in a contract, parties can still waive their contractual rights by election. In *Barclays Bank PLC v. Devonshire Trust (Trustee of)*,[56] Justice Newbould explained that the presence of a non-waiver clause is "not the end of the matter", going on to quote Justice Swinton's reasons in *Fitkid (York) Inc. v. 1277633 Ontario Ltd.*[57] as follows:

> Even where there is a term in the lease governing waiver, the cases on waiver indicate that courts look at the conduct of the landlord to determine whether it has elected not to terminate the lease in the circumstances after the right of forfeiture arises.[58]

58. In practice, the parties understood and agreed that the TPL business of Cash Store involved: (i) making of loans by Cash Store to retail customers that were either designated as being made on behalf of a TPL or assigned to a TPL;[59] (ii) receipt of repaid retail loans and interest

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[54] *Salo, supra* at 2.
[55] Armstrong Cross-Examination, Transcript Brief, Tab 4 at q. 53; Fawcett Cross-Examination, Transcript Brief, Tab 2 at q. 150.
[56] 2011 ONSC 5008.
[57] [2002] O.J. No. 3959 (SCJ).
[58] *Barclays, supra* at para 232, citing *Fitkid, supra* at para 35.
[59] See Trimor Broker Agreement dated February 1, 2012, Art. 2.9, Trimor Motion Record, Vol 1, Tab 2A at 23-24; Fawcett Cross-Examination, Transcript Brief, Tab 2 at q. 54; Armstrong Cross-Examination, Transcript Brief, Tab 4 at qq. 130-131.

back into Cash Store's general accounts;[60] and (iii) Cash Store paying the TPLs a guaranteed interest rate of 17.5%.[61] These facts indicate that both Cash Store and the TPLs treated these advances as funds generally available to Cash Store in the running of its business – they were unsecured debts.

59. Accordingly, the funds advanced by the TPLs should be treated no differently than any other unsecured debts of Cash Store. Those funds, and the proceeds of loans made with those funds, should therefore be considered to be beneficially owned by Cash Store and subject to disposition amongst Cash Store's creditors.

B. The transfer of loan receivables to TPLs was a preference

60. Shortly prior to the commencement of these proceedings, and while Cash Store was insolvent, Cash Store made loans from its general accounts and then transferred those loans to Trimor and McCann. As a result of those transfers, Trimor and McCann, as creditors of Cash Store, have received value while other creditors remain unpaid. In other words, these transactions had the effect of preferring the TPLs over other creditors.

61. The TPLs now ask the court to enforce these transfers in furtherance of this preference.

62. The Moving Parties seek the Court's assistance in reversing these preferential transfers of loans to ensure that the proceeds of loans made with the Cash Store's general operating funds are available to all creditors in accordance with their respective priorities.

63. The TPLs have challenged the Moving Parties' standing. The Moving Parties have standing qua creditor to make this submission:

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[60] Carlstrom Affidavit at para 79, McCann Motion Record, Tab 4 at 83-84; Fawcett Cross-Examination, Transcript Brief, Tab 2 at q. 54; Armstrong Cross-Examination, Transcript Brief, Tab 4 at qq. 48-50.
[61] Armstrong Cross-Examination, Transcript Brief, Tab 4 at q. 53; Fawcett Cross-Examination, Transcript Brief, Tab 2 at q. 150.

(a) as DIP Lenders, recoveries will fall under their security;

(b) as pre-filing first lien holders, recoveries will fall under their security; and

(c) as pre-filing bondholders, recoveries will fall under their security.

64. The Moving Parties have standing under the applicable provincial legislation to make a preference claim. Under the CCAA the preference claim is the Monitor's to make in the first instance.[62] The Moving Parties have explicitly alluded to that right in their notice of motion. The Moving Parties may also take over such claim under Section 38 of the BIA, as incorporated into the CCAA.[63] Ultimately, the TPLs seek to use this Court to perpetuate the result of a preference – to get at customer loan repayments. The TPLs cannot rely upon the office of the Court to direct funds to them without determining this issue.

65. Three remedial statutory mechanisms are available to reverse a preferential transaction here:

(a) Section 95 of the *Bankruptcy and Insolvency Act* (Canada) ("BIA"), as incorporated into the CCAA under Section 36.1,

(b) Section 3 of the Alberta *Fraudulent Preferences Act* (the "AFPA") and

(c) Section 2 of the Ontario *Fraudulent Conveyances Act* (the "FCA").

The detailed statutory provisions of the BIA, CCAA, AFPA and FCA are described in Schedule "C" to this Factum.

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[62] *CCAA*, s. 36.
[63] *BIA*, s. 38.

66. Of these three remedial mechanisms, the BIA (and indirectly the CCAA) provides the narrowest basis upon which to challenge a particular transaction. If the test to reverse a preferential transaction under the BIA is met, then, subject to the defences available under the AFPA and the FCA, the tests to reverse a preferential transaction will also be met under those statutes.

67. The constituent elements of a preference under Section 95 of the BIA are:

(a) the transaction must be of a nature captured by the legislation, which includes a transfer of property made and a payment made;

(b) the transaction must have been entered into between the debtor and one of its creditors;

(c) the transaction must have occurred within the statutory review period, which is three months prior to the date of the initial bankruptcy event in the case of a transaction with an arm's length party[64];

(d) the debtor must have been insolvent at the time the transaction occurred; and

(e) the transaction must have been entered into with a view to giving a creditor a preference over other creditors, subject to statutory presumptions.

68. As remedial legislation, the BIA, the FCA and the AFPA are interpreted broadly to achieve the purposes of each statute.[65] The purpose of each of the FCA and the AFPA is to provide a

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[64] The Moving Parties note that the BIA provides a 12 month review period where a transaction involves a creditor who is not dealing at arm's length with the insolvent person. For the purposes of this Motion, the Moving Parties refer only to the shorter three month review period for expediency. However, the Moving Parties do not concede that the TPLs have dealt at arm's length with Cash Store.

[65] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] S.C.J. No. 97 at para. 13.

means to rectify transactions that improperly subvert creditors' rights by preferring one creditor over others. Similarly, one of the purposes of the BIA is to provide for the orderly and fair distribution of the property of a bankrupt among his or her creditors on a pari passu basis.[66]

Application of Remedial Preference Provisions

69. In the circumstances of this case, the transfer or designation of customer receivables to the TPLs were preferences under both the narrow BIA test and the broader provincial tests. The timing of the transfers, and insolvency at the time of those transfers, cannot be the subject of serious debate. The transfers continued on an ongoing basis both prior to and after the commencement of these proceedings. Cash Store was clearly insolvent from a balance sheet perspective, even based upon inflated book values, at the latest on September 30, 2013.[67] This is clear from the publicly disclosed financial statements of Cash Store. All TPL funding and rights were already committed to Cash Store at that time. There was and could be no legally defensible purpose to the transfer.

<u>The transaction must be of a nature captured by the legislation.</u>

70. In the present case, Cash Store made loans to its customers using its own cash that had been commingled in its general accounts. Those loan receivables were Cash Store's property. It then designated those loans as having been made on behalf of one of the TPLs, or, in certain cases, assigned those loans to the TPLs to supplement theoretical Restricted Cash balances. This designation or assignment of its loan receivables for the benefit of a TPL was a "transfer of property" as described in the BIA.

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[66] *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited*, 2013 ONCA 769 at 30, citing Houlden & Morawetz, 2013 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 2013) at 2.
[67] Exhibit "A" to the Carlstrom Affidavit, Application Record at 122; Exhibit "B" to the Carlstrom Affidavit, Application Record at 173.

The transaction was entered into between the TPLs, as creditors, and the Applicants, as debtors.

71. As set out above, the TPLs are creditors of the Applicants for the purposes of the BIA or any other legislation where this characteristic is required.

72. Further, an assertion that the TPLs were not creditors for the purposes of the BIA as a result of a broker-agent or other arrangement provides no assistance to the TPLs with respect to the tests applicable under the FCA or the AFPA. The FCA can be used to reverse transactions even where no debtor-creditor relationship existed. The AFPA does require a debtor-creditor relationship, but the definition of creditor is broadly defined to include "a cestui que trust or other person to whom liability is equitable only".

The transactions occurred within the applicable statutory review period

73. In determining whether there was a preference to the TPLs under the BIA, the Court is to consider transactions that took place within three months of the "date of the initial bankruptcy event".[68]

74. The date of the initial bankruptcy event in this case is April 14, 2014, being the date of the commencement of these proceedings. Therefore, transactions occurring on or after January 14, 2014 are reviewable.[69]

75. Given the short-term nature of the loans made by the Applicants, any such loans that are likely to have any value, after considering collection risk, were likely to have been made after January 14, 2014. Indeed, Cash Store policy dictates that any brokered loans not paid within

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[68] *BIA*, s. 95(1).
[69] The Moving Parties note that the BIA provides a 12 month review period where a transaction involves a creditor who is not dealing at arm's length with the insolvent person. For the purposes of this Motion, the Moving Parties refer only to the shorter three month review period for expediency. However, the Moving Parties do not concede that the TPLs have dealt at arm's length with Cash Store.

90 days are written-off. Loans outstanding as of April 14, 2014 and not written off had to have been advanced on or after January 14, 2014.[70]

76. Additionally, the AFPA and the FCA capture a far broader time period than the BIA. The FCA has no time limitations and would capture any transfers of loans from the Applicants to the TPLs at any time, subject to generally applicable limitation periods. The AFPA would capture any transfers of loans from the Applicants to the TPLs within the year prior to the commencement of the moving parties' motion.

The TPLs were preferred.

77. Under the BIA, the impugned transactions can be challenged if undertaken with a view to giving a creditor a preference.

78. Subsection 95(2) of the BIA provides that this view to preferring will be presumed to exist if a transaction has a preferential effect.[71]

79. According to the jurisprudence, whether something has the "effect of giving a creditor a preference" is a straightforward factual determination:

> The matter of preference or no preference is ordinarily proved by evidence of other creditors that their accounts which were outstanding at the relevant date, were still unpaid at the time of the bankruptcy so that the creditor who received the security, etc. will, as a result of receiving it, be given different treatment than other creditors.[72]

80. In this case, the facts are uncontroverted that:

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[70] See Account Reconciliation Statement for Trimor, September 2013 (CH00000499), Cross-Motion Record of the DIP Lenders at Tab 6.
[71] *BIA*, s. 95(2).
[72] *Re Van der Liek*, [1970] O.J. No. 1053 (H. Ct. J.) at para. 6.

(a) the holders of Cash Store's secured notes and Cash Store's senior secured lenders remain unpaid; and

(b) Cash Store continued its brokered loan business up to, and indeed through, the commencement of these proceedings. In that process, it made loans to customers which it then designated as being made on behalf of Trimor, or which it transferred into the name of McCann. In each case, the result was the same – Trimor or McCann received the benefit of receivables from loans made with Cash Store's general operating cash.

81. This process transferred significant – and gratuitous – value to the TPLs: the right to collect interest and principal on retail loans.

82. The TPLs received value where other creditors remained unpaid. They received transfers of receivables, long after Cash Store was in serious financial difficulty. In the plain words of *Van der Liek*: the TPLs were "given different treatment than other creditors".

Intention To Prefer

83. Once preferential effect has been established the BIA and the FCA require a consideration of intention with respect to the transaction. The AFPA does not have the same intention requirement.

84. Under the BIA the preferred creditor has the burden of proving that there was no intention on the part of the debtor to prefer that creditor once a transaction with preferential effect has been identified. It is the intention of the debtor, and not the creditor, that governs. The "intention" required in a preference case does not need to be a "fraudulent" intention. Further, the

preferential nature of the payment need not be apparent at the time that the payment was made. Finally, the creditor receiving the payment does not need to know that the preference is being given.[73]

85. Aside from an assertion that the transactions occurred in the ordinary course, no evidence is provided by the TPLs regarding a lack of preferential intent. If a preferential payment was made in the "ordinary course", the presumption that the payment was made with a view to giving a preference will be rebutted for the purposes of the BIA. However, the term "ordinary course" must be given content.[74]

86. The typical example of a payment made in the ordinary course of business is one that is consistent with what is expected of someone acting to obtain required services or goods or to realize recoveries for the benefit of all stakeholders. Such a transaction makes good commercial sense, is commercially reasonable and is in the best interests of all concerned.[75]

87. The TPLs assert that the impugned transactions were undertaken in the ordinary course. They provide the label of the defence without its substance. The act of transferring property of Cash Store to the TPLs would not have been commercially reasonable or expected in a debtor-creditor relationship in any circumstance and certainly was not in the best interests of other stakeholders. In fact, it is not clear that Cash Store and the TPLs ever operated in a manner that could be considered ordinary course if viewed objectively.

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[73] *Orion Industries Ltd. (Trustee Of) v. Neil's General Contracting Ltd.* (2013), 7 C.B.R. (6th) 329 at para. 5.
[74] See, eg. *Eland Distributors Ltd. (Re),* [1998] B.C.J. No. 1761 at para. 68.
[75] *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, (2005) 255 D.L.R. (4th) 137 at paras. 14, 17 and 18. This analysis is consistent with the exceptions established under the *AFPA* and the *FCA* that protect transactions entered into for compelling business reasons and/or that involve a contemporaneous exchange of value between parties.

88. Moreover, there was no commercial imperative to transfer these loans to the TPLs. The TPLs had no immediate recourse if the loans were not transferred and the TPLs were not induced to provide additional funding as a result of the transfers.[76]

89. Intention to prefer is also a requirement under the FCA. The presence of one or more "badges of fraud" raises the presumption of requisite intention and shifts the evidentiary burden to the recipient of the transfer to provide evidence that no such intention existed.[77] Among the "badges of fraud" are: (i) the transfer occurred for grossly inadequate consideration; and (ii) the transferor remains in possession or occupation of the property for its own use after the transfer.[78] Both of the above badges are present in the current case as: (i) the impugned transactions took place with no contemporaneous consideration from the TPLs; and (ii) irrespective of the impugned transactions, Cash Store still collected upon and had use of the proceeds of the transferred loans. Therefore, the presumption of the requisite level of intention under the FCA is raised, just as it was under the BIA.

90. Even if the presumption of intention is rebutted, the AFPA applies purely an effects based test. It is sufficient that by the transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security greater proportionately than could be realized by or for the unsecured creditors generally.

91. Accordingly, the impugned transactions are *prima facie* void.

C. The *CCAA* stay should not be lifted

92. The TPLs seek a right to collect "their" loans. Assuming, *arguendo*, that these loans were TPL property, the TPLs must still satisfy the relevant test set out in *Canwest Global*

[76] Trimor Broker Agreement, Art. 6.3, Trimor Motion Record, Vol 1, Tab 2A at 64.
[77] *Conte Estate v. Alessandro* (2002), 119 A.C.W.S. (3d) 951 (Ont. S.C.J.) at paras 21 and 22.
[78] *Conte Estate, supra* at para. 43.

Communications Corp. (Re)[79] concerning the **lifting** of a stay. In that case, Justice Pepall noted that the Court's stay power "should be broadly construed to accomplish the legislative purpose of the CCAA and in particular to enable continuance of the company seeking CCAA protection."[80]

93. The TPLs may experience reduced loan recoveries as a result of the insolvency. However, the TPLs have provided no evidence as to how permitting direct collection will improve their prospects of recovery.

94. McCann and Trimor have not given any explanation for precisely how they intend to go about effecting this transfer and collection of loans. Neither party has named a service provider that is willing to engage these loan collections, nor has either party provided any explanation for how an alternate service provider would be in any better position to collect loans than Cash Store, or would not face the same regulatory collection problems in Ontario and Manitoba.

95. A party seeking to have a stay lifted faces a "very heavy onus".[81] Factors to be considered by the Court in determining whether to lift a stay tend to be grouped into three categories:

(a) the relative prejudice to the parties;

(b) the balance of convenience; and

(c) where relevant, the merits of lifting the stay.[82]

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[79] 2011 ONSC 2215.
[80] *Canwest, supra* at para 24.
[81] *Canwest, supra* at para 27, citing *Canwest Global Communications Corp (Re)*, [2009] OJ No 5379 (SCJ) at para 32.
[82] *Timminco, supra* at para 17.

96. Justice Pepall also set out a list of situations in which courts may be willing to lift a CCAA stay.[83]

97. The Court should be mindful of the unrebutted concerns of the CRO:

> [...] I am advised by Rothschild and believe that the Cash Store customer list is a valuable asset of Cash Store and that allowing a TPL to transfer the administration of its loan portfolio would erode the value of Cash Store's saleable assets. As CRO, it is my belief that allowing a TPL to transfer the administration of its loan portfolio to another service provider could materially impair the potential value of a going concern transaction to Cash Store and could cause material prejudice to Cash Store and its stakeholders.[84]

D. Cash Store should not pay McCann's costs

98. Finally, McCann claims that this Court should vary its Initial Order to require Cash Store to pay for McCann's legal and other professional fees. It does so in reliance on section 11.52(1) of the *CCAA* and the assertion that to allow other creditors to have their professional fees paid by the estate while McCann does not is unfair. McCann claims that it "has been forced" to spend time and money trying to protect its position.[85]

99. Subsection 11.52(1)(c) of the *CCAA* 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 [...]
>
> (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.

100. It should be clear at this stage of the proceedings that a security or charge on the property of Cash Store in favour of McCann is not now and has never been necessary to allow McCann to

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[83] *Canwest, supra* at para 33.
[84] Affidavit of William Aziz sworn May 9, 2014 at para 35, Cross-Motion Record of the DIP Lenders at Tab 7.
[85] McCann Factum at paras 126-128.

participate effectively in these proceedings. That participation has been constant since these proceedings began.

101. Further, s. 11.52(1) is the statutory authority by which CCAA applicants are regularly granted the administrative charge required to secure payment of the advisors who guide a debtor company through the CCAA process.[86] It is much less common for s. 11.52(1) to be used by a creditor seeking to have a stay lifted so as to be able to remove its property. Where a creditor seeks to have its advisory expenses paid by the estate, courts have relied on the fact that the creditor's interests may align with those of other unsecured creditors as a reasonable basis for granting a charge:

> I consider that it would be unfair to the Disputing Creditors for them to bear the costs of retaining Wolrige Mahon Ltd., **which will not only provide the independent review that was contemplated by the Claims Process Order, but will also potentially benefit the unsecured creditors as a whole**. In my view, this charge in favour of Wolrige Mahon Ltd. is necessary for the effective participation by the Disputing Creditors in these proceedings (and perhaps others who might join in or benefit from such a review).[87] (emphasis added)

102. In this case, McCann has sought at every turn to remove cash from Cash Store that McCann claims is its property. This position is squarely at odds with that of nearly every other creditor of Cash Store. McCann acts alone (or in lock-step with Trimor), and not for the creditors generally.

PART IV - ORDER REQUESTED

103. The DIP Lenders seek an order:

(a) declaring that:

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[86] *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (SCJ) at para 37.
[87] *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 at para 54.

(i) the Applicants are the beneficial owners of funds described as "Trimor Funds", "McCann Funds", "Trimor Receipts" and "McCann Receipts" (collectively, the **Disputed Post-Filing Receipts**) in the Fresh as Amended Notice of Motion of Trimor Annuity Focus Limited Partnership #5, dated May 14, 2014, and the Fresh as Amended Notice of Motion of 0678786 B.C. Ltd. dated May 15, 2014, respectively (collectively, the **TPL Notices of Motion**);

(ii) the following transactions constitute preferences under applicable legislation:

(1) the designation by the Applicants of any advances or loans, including brokered loans, as advances or loans in the names of Trimor or McCann; and

(2) any assignment, whether as capital protection or otherwise, by the Applicants to Trimor or McCann, or in their names, of non-brokered loans made in the name of the Applicants

(collectively, the **Reviewable Transactions**);

(iii) the Reviewable Transactions shall be reversed such that the Applicants are the beneficial owners of assets described as "Trimor Loans", "Trimor Accounts Receivable", "McCann Loans", and "McCann Accounts Receivable" in the TPL Notices of Motion;

(iv) neither Trimor nor McCann shall take any steps to collect any advances or loans made to the Applicants' customers, irrespective of whether such loans or advances have been designated in the name of Trimor or McCann or otherwise

assigned to Trimor or McCann by the Applicants, and any recoveries or collections on such advances or loans by Trimor or McCann shall be deemed to be held in trust for the Applicants;

(v) in the alternative to (ii) through (iv) above, declaring that no steps be taken by Trimor or McCann to assert an interest in, collect or otherwise recover any of the advances or loans made to the Applicants' customers, whether in the names of Trimor or McCann or otherwise, unless the Monitor determines that the Reviewable Transactions will not be challenged by the Monitor; and

(b) that grants such other relief as counsel for the DIP Lenders may request and this Court deems fit.

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

Norton Rose Fulbright Canada LLP

Lawyers for Coliseum Capital Partners, LP, Coliseum Capital Partners II, LP, Blackwell Partners, LLC, Alta Fundamental Advisors Master LP and the Ad Hoc Committee of Cash Store Noteholders in their respective capacities as DIP Lenders, First Lien Noteholders and Holders of Senior Secured Notes

SCHEDULE "A"
LIST OF AUTHORITIES

1. Donovan Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2012).

2. A.H. Oosterhoff et al, *Oosterhoff on Trusts: Texts, Commentary and Materials*, 6th ed (Toronto: Thomson Canada Limited, 2004).

3. Outset Media Corp. v. Stewart House Publishing Inc., [2003] OJ No 2558 (CA).

4. *Salo v. Royal Bank of Canada*, 1988 BCJ No 999 (BCCA).

5. *Barclays Bank PLC v. Devonshire Trust (Trustee of)*, 2011 ONSC 5008.

6. *Fitkid (York) Inc. v. 1277633 Ontario Ltd.*, [2002] O.J. No. 3959 (SCJ).

7. *Shelanu Inc v Print Three Franchising Corporation* (2003), 64 O.R. (3d) 533 (CA).

8. *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] S.C.J. No. 97 (SCC).

9. *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited*, 2013 ONCA 769.

10. Houlden & Morawetz, 2013 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 2013).

11. *Re Van der Liek*, [1970] O.J. No. 1053 (H. Ct. J.).

12. *Orion Industries Ltd. (Trustee Of) v. Neil's General Contracting Ltd.* (2013), 7 C.B.R. (6th) 329 (ABCA).

13. *Eland Distributors Ltd. (Re),* [1998] B.C.J. No. 1761 (BCSC).

14. *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.,* (2005) 255 D.L.R. (4th) 137 (NBCA).

15. *Conte Estate v. Alessandro* (2002), 119 A.C.W.S. (3d) 951 (SCJ).

16. *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215.

17. *Canwest Global Communications Corp (Re)*, [2009] O.J. No 5379 (SCJ).

18. *Timminco Ltd. (Re)*, 2012 ONSC 2515.

19. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 (SCJ).

20. *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501.

SCHEDULE "B"
RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3**

Proceeding by creditor when trustee refuses to act

38. (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Transfer to creditor

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

Benefits belong to creditor

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Trustee may institute proceeding

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

R.S., 1985, c. B-3, s. 38; 2004, c. 25, s. 24(F).

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.

R.S., 1985, c. B-3, s. 95; 1997, c. 12, s. 78; 2004, c. 25, s. 56; 2007, c. 29, s. 100, c. 36, ss. 42, 112.

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Fraudulent Preferences Act, R.S.A. 2000, c F-24

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.

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.

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.

R.S.O. 1990, c. F.29, s. 2.

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.

Interpretation Act, R.S.C., 1985, c. I-21

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

R.S., c. I-23, s. 11.

SCHEDULE "C"

***Section 95 of the Bankruptcy and Insolvency Act* (Canada)**

1. The BIA provides a basis to remedy preferential transactions under Section 95(1) and (2):

> (1) Preferences - 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...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...
>
> (2) Preference Presumed- 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 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.[88]

2. Section 36.1 of the CCAA incorporates Section 95 of the BIA into the CCAA with necessary modifications:

> (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.
>
> (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".

[88] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 95

3. Section 36.1 ensures that the provisions of the BIA relating to preferences and transfer at undervalue would apply equally in CCAA matters, subject to any modifications that the circumstances require.[89]

***Section 3 of the Fraudulent Preferences Act* (Alberta)**

4. The provisions of the Alberta *Fraudulent Preferences Act* ("**AFPA**") provide remedies for interested parties who seek to reverse preferential transactions. Section 3 of the AFPA states:

> 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.

5. Section 4 of the AFPA provides specific guidance on the types of transactions that will be considered preferential and explains that the test applied in Section 3 of the AFPA is an effects based test, without consideration of the intentions of the parties to the preferential transaction:

> (1) A transaction is deemed to be one that has the effect of giving a creditor a preference over other creditors, within the meaning of section 3, if by the transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security for the debtor's indebtedness to that creditor or a portion of it greater proportionately than could be realized by or for the unsecured creditors generally of the debtor or for the unsecured portion of that creditor's liabilities out of the assets of the debtor left available and subject to judgment, writ proceedings, attachment or other process.
>
> (2) Independently of the intent with which the transaction was entered into or of whether it was entered into voluntarily or under pressure, the preferential effect or result of the impeached

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[89] Office of the Superintendent of Bankruptcy. Bill C-12 Clause By Clause Analysis. http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html#a86; Sarra, J. P., Houlden, L.W. and Morawetz, G.B. Bankruptcy And Insolvency Law Of Canada. Toronto: Carswell, at 11-287.

transaction governs, and no pressure by a creditor or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, avails to protect the transaction except as provided by sections 6 and 9.

6. Section 5 of the AFPA establishes that the types of "creditors" whose transactions may be challenged under the AFPA is quite broad and includes even parties that may have equitable claims against a debtor:

In sections 2 to 4, "creditor" includes

(a) a surety, and the endorser of a promissory note or bill of exchange, who would, on payment by the surety or endorser of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of sections 2 to 4, and

(b) a cestui que trust or other person to whom liability is equitable only

7. These remedial provisions are qualified by the terms of Sections 6 and 9 of the AFPA.

8. Section 6 of the AFPA creates a limited safe harbour for bona fide ordinary course transactions or other bona fide transactions in which value is contemporaneously exchanged between the parties, but only if the goods or property exchanged between the parties bear a fair and reasonable relative value to each other. Section 6 states:

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.

9. Section 9 of the AFPA creates a limited exception for good faith transactions where: (i) a secured creditor is paid money as compensation for its agreement to relinquish its security; (ii)

one item of collateral is substituted for another item of collateral of equal value; or (iii) security is granted for antecedent debts as a means of inducing the advance of further credit by the recipient of that security in limited circumstances. Section 9 states:

> 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.

10. As will be seen below, neither Section 6 nor Section 9 are applicable in the current case.

***Section 2 of the Fraudulent Conveyances Act* (Ontario)**

11. Section 2 of the Ontario *Fraudulent Conveyances Act* ("**FCA**") provides further remedies that may be accessed by creditors who believe their positions have been prejudiced by preferential transactions. Section 2 captures all transactions that are "conveyances" of real or personal property made with the intent to defeat, hinder, delay or defraud creditors.

12. 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.

13. The FCA applies to all "conveyances" of personal property, which is defined broadly to include gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out

of real property or personal property by writing or otherwise. The term "personal property" is similarly broadly defined to include goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein.

14. As with the AFPA, there are exceptions to the general protections described above. Pursuant to section 3 of the FCA, the remedies therein do 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.

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., et al.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF COLISEUM CAPITAL PARTNERS, LP, COLISEUM CAPITAL PARTNERS II, LP, BLACKWELL PARTNERS, LLC, ALTA FUNDAMENTAL ADVISORS MASTER LP AND THE AD HOC COMMITTEE OF CASH STORE NOTEHOLDERS IN THEIR RESPECTIVE CAPACITIES AS DIP LENDERS, FIRST LIEN NOTEHOLDERS AND HOLDERS OF SENIOR SECURED NOTES

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TAB 4

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

B E T W E E N :

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

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

REPLY AND RESPONDING FACTUM OF TRIMOR ANNUITY FOCUS LP #5
(returnable June 11, 2014)

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TO: THE SERVICE LIST

PART I - INTRODUCTION

1. There are two issues on this motion and cross-motion.

2. The issue on the motion is ownership of the outstanding loans ("**TPL Loans**") in the name of Trimor Annuity Focus Limited Partnership #5 ("**Trimor**") and the other third party lenders ("**TPLs**") at the time of the Applicants' CCAA filing, and the proceeds of those TPL Loans.

3. The DIP Lenders to the Applicants (the "**DIP Lenders**") argue that they should benefit from the comingling of funds by the Applicants in breach of their Broker Agreements with the TPLs. The DIP Lenders suggest that as a result of the comingling of funds, the Cash Store converted the TPLs' property, the TPL Loans, into its own property. Despite, having had the benefit of full disclosure of the nature of the Cash Store's business model and its legal relationship with the TPLs at all relevant times, the DIP Lenders now argue opportunistically for the enlargement of the Applicants' estate for their benefit.

4. The issue on the cross-motion is whether the Transactions (as defined below) are preferences under the applicable legislation.

PART II - THE FACTS

5. In determining the issue of ownership, it is important to carefully consider the facts.

6. In reviewing the arguments made by the DIP Lenders, it must be remembered that when they decided to become creditors of Cash Store they were aware of the following facts, all of which were highlighted in a Preliminary TSCI Circular dated January 12, 2012 ("**Preliminary TSCI Circular**"):[1]

(a) Cash Store acts "primarily as a broker of short-term advances between our customers and third-party lender, ***the effect of which is that the loan portfolio we service is not financed on our balance sheet...***"[2]

(b) "... our business will remain dependant on third-party lenders who are willing to make funds available for lending to our customers. ***There are no assurances that the existing or new third-party lenders will continue to make funds available to our customers.*** Any reduction or withdrawal of funds could have a significant material adverse impact on this portion of our business..."[3]

(c) "***The advances provided by the third-party lenders are repayable by the customer to the third-party lenders and represent assets of the lenders; accordingly, they are not included on our balance sheet...***"[4]

(d) "We have made the decision to ***voluntarily make retention payments to the third-party lenders as consideration for continuing to advance funds to our customers.*** The retention payments are made pursuant to a resolution approved

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[1] Second Armstrong Affidavit sworn May 8, 2014 ("**Second Armstrong Affidavit**") at para. 5 and Exhibit "A" - Preliminary TCSI Circular at p. 4 (internal); Motion Record of Trimor, Tab 3.
[2] *Ibid.* at p. 4 (internal).
[3] *Ibid.* at p. 16 (internal).
[4] *Ibid.* at p. 38 (internal).

by our board of directors (the "Board") which authorizes management to pay a maximum amount of retention payments per quarter, and the retention payments are recorded in the period in which a commitment is made to a lender pursuant to the resolution..."[5]

(e) "***While the third-party lenders have not been guaranteed a return, the decision has been made to voluntarily make retention payments to the lenders to lessen the impact of loan losses experienced by the third-party lenders...***"[6]

7. From the above it is clear that the DIP Lenders were aware that the TPL Funds and Receipts were not assets of Cash Store and that the TPLs were receiving retention payments referred to above to the extent authorized from time to time by the Board of Cash Store.

8. Despite this disclosure, the DIP Lenders are now claiming that because Cash Store commingled the proceeds of the TPL Loans, without the knowledge of the TPLs and in clear breach of the Broker Agreement, they have now been converted into an asset of Cash Store.

9. They go on to argue that the receipt of the Retention Payments, which were fully disclosed, supports this argument because these voluntary, discretionary payments transformed a brokerage arrangement into a loan.

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[5] *Ibid.*
[6] *Ibid.*

10. Lastly, they claim that the TPLs did not bear any collection risk, which they say leads to the conclusion that the TPLs are creditors. This is patently false. As described in more detail below, according to Cash Store, almost a third of the Trimor loan portfolio has gone bad and there is little chance of collecting those loans. The risk of loss could not be more clear.

A. Comingling of TPL Loans Proceeds

11. It is uncontested that the Broker Agreements (i) provide for the proceeds of the TPL Loans to be segregated, and (ii) make it very clear that they are only to be used for the purpose of brokering loans to third parties. One of the reasons for this was that it was important from a regulatory perspective that the funds being lent, and the TPL Loans themselves, did not belong to the Applicants.

12. To the extent that the Cash Store comingled funds, it breached the terms of the Broker Agreements. Contrary to the assertions made by the DIP Lenders, there was no reason for the TPLs to believe that the Cash Store would breach the Broker Agreements and applicable regulatory requirements.

13. The DIP Lenders, who are also pre-filing secured creditors of the Applicants, are now opportunistically attempting to use these breaches of the Broker Agreements as justification for confiscating the TPLs' property.

14. The DIP Lenders argue that by comingling the proceeds of the TPL Loans with its own funds, Cash Store converted the TPL Loans into an asset of Cash Store. Their argument suggests that the Cash Store ought to be entitled to rely on its breach of the

Broker Agreements, and if the DIP Lenders are to be believed, potentially applicable law, to convert the TPL Funds to a Cash Store asset.[7]

B. Retention Payments and Collection Risk

15. 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. For example, the payment of voluntary retention payments and capital protection was not provided for in the Broker Agreements. As highlighted above, these payments and transfers were disclosed to all of Cash Stores creditors, including the DIP Lenders/bondholders/secured creditors and were approved by Cash Store's Board of Directors pursuant to resolutions passed from time to time, presumably in accordance with the Board's business judgment. [8] Despite an oblique reference to the contrary in the DIP Lenders' factum, there is not a shred of evidence that suggests that the Cash Store did not at all relevant times operate at arm's length from the TPLs.

16. The reason for these payments is clear. This brokering model was very lucrative for Cash Store, which received a risk free 23% brokering fee upfront each and every time a loan was made. That meant that it made a risk free profit on every transaction, and the TPLs assumed the borrower's credit risk.[9] Without the retention payments, the TPLs

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[7] The *ex turpi causa* doctrine prohibits a party from benefitting from its illegal or immoral conduct: *Randhawa v. 420413 B.C. Ltd.*, 2009 BCCA 602 at para. 66 citing *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 45; Book of Authorities of Trimor, Tab 1. This doctrine has been applied in the context of bankruptcy proceedings. In *Re Bluebird Corp.* [1926] 2 D.L.R. 484, the Court confirmed that "no one can have the assistance of the Court in an attempt to place himself in better legal position by breaking the law." Book of Authorities of Trimor, Tab 2.

[8] Affidavit of Steven Carlstrom sworn April 14, 2014 ("**Carlstrom Affidavit**") at para. 85; Motion Record of the Applicants at Tab 1.

[9] Report of PricewaterhouseCoopers dated May 14, 2014 (the "**PwC Report**") at p. 6 (internal); Motion Record of Trimor, Tab 4.

would have demanded the return of the TPL Loans and proceeds and deprived the Cash Store of an important source of revenue that could be used, among other things, to service its secured loans and bonds. [10]

17. To encourage the TPLs to continue to make the TPL Funds available for brokering, the Cash Store decided from time to time to make Retention Payments. As stated by Mr. Carlstrom in his affidavit, "Under the broker model, Cash Store makes voluntary retention payments to the TPLs to encourage them to continue making funds available to Cash Store".[11]

18. The Retention Payments made by the Cash Store were neither "fixed" nor "guaranteed". The Retention Payments were "voluntary" and could be made in any amount the Cash Store Board of Directors determined appropriate, which is evidenced by the fact that they fluctuated over time.[12] They were entirely at the discretion of the Cash Store and could be terminated unilaterally by the Cash Store at any time, as can be seen by the fact that, as the DIP Lenders state in their factum, "Cash Store elected not to make any ***voluntary*** retention payments to the TPLs" after February 2014.[13]

19. While it is true that, as stated in Mr. Carlstrom's affidavit, the Retention Payments were made to "lessen the impact of loan losses",[14] there is no doubt that the TPLs continue to have collection risk and suffered loan losses. In fact, the Applicants

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[10] Carlstrom Affidavit at para. 85; Motion Record of the Applicants at Tab 1.
[11] Carlstrom Affidavit at para. 85; Motion Record of the Applicants at Tab 1.
[12] Trimor Distribution Summary, March 2014, DIP Lender Cross-Motion Record, Tab 2
[13] DIP Lender Factum, para. 47
[14] Carlstrom Affidavit at para 84; Motion Record of the Applicants at Tab 1.

allege that Trimor experienced more than $8 million in loan losses according to Cash Store's records.[15]

20. The DIP Lenders inaccurately state at paragraph 27 of their factum that the reason that 0% of Trimor's loans were greater than 90 days past due is that Cash Store had "acquired all of Trimor's bad debt, insulating it completely from the credit risk of the payday lending products." This is simply wrong. The reason that 0% of Trimor's loans were more than 90 days overdue is that Cash Store wrote off all loans that were more than 90 days past due. The amount of loans that were more than 90 days past due is included in the "balance forward" shown in the Trimor portfolio summary as at March 31, 2014 contained in the PwC Report.[16]

21. This is clearly stated in the PwC Report, "The current loan portfolio balance represents loans less than 90 days overdue" and "The balance forward [of $8,514,000] presented on the lender statement is comprised primarily of loans more than 90 days overdue".[17] PwC goes on to state that "The Company has acknowledged that loans more than 90 days [overdue] are more difficult to collect and have a low likelihood of being collected".[18] As a result, there is a low likelihood that Trimor will recover approximately 30% of the amounts it has lent to Cash Store customers. This is a significant credit risk.

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[15] PwC Report at pp. 13 and 17, Trimor Motion Record, Vol. 3, Tab 4.
[16] PwC Report at p. 13, Trimor Motion Record, Vol. 3, Tab 4.
[17] PwC Report at p. 17; Trimor Motion Record, Vol. 3, Tab 4.
[18] PwC Report at p. 18; Trimor Motion Record, Vol. 3, Tab 4.

PART III - ISSUES AND THE LAW

22. The sole issue on the cross-motion is whether making payments to the TPLs is a preference under the legislation referred to by the DIP Lenders.

A. The Brokering Business was not a Preference

i. The TPLs are not creditors of the Cash Store

23. The TPLs are not creditors of Cash Store with respect to the TPL Loans or proceeds of the TPL Loans. It is clear from both the Broker Agreements and the conduct of the parties that the TPL funds were made available by the TPLs solely for the purpose of brokering TPL Loans to third parties, and were not lent to Cash Store.

24. The cases relied on by DIP Lenders to assert a debtor-creditor relationship are either distinguishable or support the TPLs argument that there is no such relationship.

25. The DIP Lenders argue that the Retention Payments are "interest" and that this establishes a debtor-creditor relationship. The only "interest" that was required to be paid to the TPLs was to be paid by the Applicants' customers. In Trimor's case, the obligation to pay interest was set out in the loan agreements entered into between Trimor (not Cash Store) and the Applicants' customers.[19] The DIP Lenders have not introduced any evidence that any TPL Loans in the name of Trimor were made pursuant to agreements between Cash Store and its customers. There is no legal obligation for any customer of Cash Store that is a borrower under a TPL Loan in the name of Trimor to pay principal or interest to Cash Store. A customer's legal obligation to Cash Store is to pay a broker commission at the time a loan is made.

26. As between Cash Store and Trimor, the risk of a customer failing to repay its loan remained solely with Trimor. The fact that Cash Store might unilaterally and

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[19] PwC Report p. 10, Motion Record of Trimor, Vol. 3, Tab 4.

voluntarily elect to offset all or a portion of the losses arising from that risk from time to time in order to induce Trimor to leave the TPL Loans with Cash Store does not turn a broker relationship into a debtor creditor relationship.

27. At paragraph 53 of their Factum, the DIP Lenders include a quote from *Oosterhoff on Trusts* which actually supports the TPLs position. It states that:

> [T]he debtor always remains liable to the creditor until the debt is paid. The trustee, however, is not personally obligated to compensate the beneficiaries if the trust property is lost other than through the trustee's own fault.

28. That is exactly the case here. According to the Applicants, Trimor currently holds over $8 million in bad, or written off, loans in its loan portfolio. As provided in the Broker Agreement, Cash Store has no obligation to make Trimor whole unless it was negligent in its duties.[20] When the Broker Agreement terminates, all that the TPLs receive is the cash and loans in existence at the time of the termination, which includes all of the bad loans.[21] Nothing in the Broker Agreements or in the Cash Store's conduct requires the Cash Store to make the TPLs whole for bad loans. The TPLs are at risk, not the broker, Cash Store.

29. At paragraph 55 of their Factum, the DIP Lenders rely on *Salo v. Royal Bank of Canada*, where the Court held that "no direction or control was exercised"[22] over the property at issue. The facts of this case obviously differ from *Salo*. Trimor exercised

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[20] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit**") – Exhibits "A" and "B", s. 7.1; Motion Record of Trimor, Tab 1.
[21] Armstrong Affidavit – Exhibits "A" and "B, s. 6.4; Motion Record of Trimor, Tab 1.
[22] 1998 BCJ No. 999 (BCCA) at p. 2; Book of Authorities of Trimor, Tab 3.

significant control over the TPL Funds, which included, but was not limited to, the fact that:

(a) The Broker Agreements required the TPL Funds to be segregated from Cash Store's funds; [23]

(b) The TPL Funds could only be used for the purpose of brokering loans to third parties;[24]

(c) The TPLs retained the right to reduce the TPLs Funds available for brokering on 120 days' notice;[25]

(d) Trimor had the legal authority to approve loans and specify the amounts of loans that were made to Customers;[26] and

(e) The TPLs had audit rights, which they exercised.[27]

30. In paragraph 54 of its factum, the DIP Lender relies on *Outset Media Corp. v. Stewart House Publishing Inc.* ("*Outset*").[28] That case is also clearly distinguishable from the facts here. In *Outset*, "the parties entered into a contract that obligated the applicant to pay the respondent 75 percent (a fixed rate) of an amount invoiced to purchasers regardless of the ultimate sale price of the product. In contrast, Cash Store had no obligation under the Broker Agreement, or otherwise, to make the voluntary retention payments at a particular rate, or at all.

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[23] Affidavit of Erin Armstrong sworn April 13, 2014 (the "**Armstrong Affidavit**") – Exhibits "A" and "B", s. 1.1(g) and (h).
[24] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), questions 97, 98, 168 and Exhibits "1", "2", "3" and"9"; Motion Record of Trimor at Tab 6.
[25] Armstrong Affidavit, Exhibits "A" and "B" at ss. 2.2 and 6.4.
[26] Armstrong April 13 Affidavit, at para. 13, Motion Record of Trimor at Tab 1 and Armstrong Affidavit at para. 13, Exhibits "A" and "B" at s. 2.3, Motion Record of Trimor at Tab 6.
[27] Armstrong Affidavit at para. 13, Exhibits "A" and "B" at s. 5.1, Carlstrom Affidavit at para. 134 and Exhibit "U".
[28] [2003] O.J. No. 2558 (C.A.); Book of Authorities of Trimor, Tab 4.

31. The DIP Lenders have fundamentally mischaracterized what they refer to as the "basic foundation" of the relationship between Cash Store and the TPLs. The TPLs had no legal right to a specified rate of return on their capital and the TPLs assumed the credit risk of Cash Store's customers.

32. The DIP Lenders' claim that Trimor made its funds "generally available to Cash Store in the running of its business" is also simply wrong. In fact, Trimor obtained an express statement from Cash Store that it had "never used [proceeds of Trimor Loans] for any other purpose than loans to customers or maintaining a loan float."[29] Trimor also believed that the Trimor Funds were also separated from Cash Store's funds in a segregated account containing only TPL Funds.[30]

ii. If TPLs were Otherwise Creditors of Cash Store, the Proceeds of TPL Loans are impressed with a Trust

33. To the extent that this Court finds that there is a creditor-debtor relationship between the Cash Store and Trimor, the Trimor Loans and Receipts are the subject of a "Quistclose trust". A "Quistclose trust" arises in the following circumstances:

(a) Where the mutual intent of the parties is that the funds advanced be used exclusively for a particular use, the lender obtains an equitable right to see that the funds are applied for the primary designated purpose;[31] and

(b) If the primary purpose cannot be carried out, the question arises if a secondary purpose (*i.e.*, repayment to the lender) has been agreed expressly or by implication. If so, a secondary resulting "Quistclose trust" arises for the benefit of the lender.[32]

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[29] Transcript of Cross-Examination of Erin Armstrong on her affidavits sworn April 13 and May 8, 2014 held on May 21, 2014 ("**Armstrong Cross-Examination Transcript**"), Exhibit "3" and "9"; Motion Record of Trimor at Tab 6.
[30] Second Armstrong Affidavit at para. 10; Motion Record of Trimor, Tab 3.
[31] *Maple Homes Canada* , 2000 BCSC 1443 at para. 47 citing *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.).
[32] *Maple Homes Canada* , 2000 BCSC 1443 at para. 47 citing *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.).

34. Cash Store advised Trimor that it would not use Trimor Loans and Receipts for any purpose other than advancing loans in accordance with the Broker Agreements, unless Cash Store first obtained Trimor's written permission.[33] No such permission was ever granted. Cash Store also advised Trimor that it had "never used [Trimor Funds] for any other purpose than loans to customers or maintaining a loan float."[34]

35. The CRO has determined, in consultation with the Monitor, that it is necessary and appropriate to implement a cessation of the brokered loan business and cease brokering new loans in all jurisdictions in which the Cash Store operates.[35] Cash Store's intention to cease all brokered loan operations effectively terminates the Broker Agreements.

36. Trimor and Cash Store expressly agreed that on termination of the Broker Agreements, the Trimor Loans and Receipts would, at the sole option of Trimor, be repaid to Trimor.[36] Accordingly, the Trimor Loans and proceeds of Trimor Loans are the subject of a "Quistclose Trust" for the benefit of Trimor.

B. The Transfer of Loan Receivables to TPLs Was Not a Preference

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

(a) Cash Store's designation of advances or loans in the TPLs' names; and

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[33] Armstrong Cross-Examination Transcript, questions 97, 98, 168 and Exhibits "1", "2", "3" and"9".
[34] Armstrong Cross-Examination Transcript, Exhibit "3" and "9".
[35] Affidavit of William Aziz sworn May 9, 2014 (the "**Aziz Affidavit**") at para. 29.
[36] Upon termination of the Broker Agreements, Trimor has the option to allow the Applicants to continue to administer the Trimor Loans, transfer the administration of them to a new service provider, or sell the Trimor Loans to a third party. Armstrong Affidavit, Exhibits "A" and "B" at paras. 6.4.

(b) Any assignment by the Cash Store to the TPLs of non-brokered loans made in Cash Store's name (the "**Transactions**").

38. By way of cross-motion, the DIP Lenders ask for the Court's assistance in reversing the Transactions in order, they say, to ensure that the proceeds of loans made or brokered by the Cash Store are available to all creditors in accordance with their respective priorities. This application has nothing whatsoever to do with "all creditors" of the Cash Store nor is it brought in furtherance of the policies and objectives of the CCAA. This is a blatant attempt by the DIP Lenders to summarily opportunistically scoop the TPL Loans and the proceeds of the TPL Loans to secure repayment of their DIP Loans and nothing more. The DIP Lenders lack both the standing and the legal basis to impugn any Transactions. This backend attack on the substance of the Broker Agreements and the regular course business practices between the TPLs and the Cash Store of which the DIP Lenders ("qua" DIP Lenders, pre-filing lien holders and pre-filing bondholders) were always well aware ought not to be countenanced by this Court.

i. The DIP Lenders Lack Standing to Bring Preference Claim

39. Creditors, such as the DIP Lenders, are not entitled as of right to impugn a payment as a preference in a CCAA proceeding.

40. 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 unless the creditor complies with Section 38 and takes an

assignment of the claim. The Monitor has not challenged any transaction involving the TPLs as a preference. The DIP Lenders have not purported to take an assignment of the claim, nor would it be appropriate for them to do so in light of their express or implied consent to the ordinary course Transactions that they now complain of.

ii. The Transactions are not void as Preferences

41. Even if the DIP Lenders' motion was properly before the Court, the Transactions are not preferences or otherwise void under any legal theory advanced by the DIP Lenders in their cross-motion and factum or any other legal theory. The DIP Lenders seek to void or set aside the Transactions as:

(a) preferences under section 95 of the BIA; or

(b) void transactions under section 2 of Ontario's Fraudulent Conveyances Act and section 3 of Alberta's Fraudulent Preferences Act (Alberta).[37]

42. The DIP Lenders must, in order to successfully impeach the Transactions under any of these provisions, prove the following essential elements:

(a) that the Cash Store was insolvent at the time of the Transactions; and

(b) that the Transactions were made with the intention to prefer or that the Transactions were made outside the ordinary course of business of the Cash Store and for inadequate consideration.

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[37] BIA, ss 95, 96; *Fraudulent Conveyances Act*, RSO 1990, c F.29 [***FCA***] s. 2; *Fraudulent Preferences Act*, RSA 2000, c F-24 [***FPA***] ss. 2, 3.

43. The DIP Lenders have not proven any of these elements.

C. DIP Lenders have Failed to Establish the Statutory Requirements for a Preference

44. Under section 95 of the BIA, a trustee in bankruptcy (or a monitor in a CCAA) is empowered to attack certain payments, transfers of property or provision of services before the initial bankruptcy event with the intent of preferring one arms' length creditor (or multiple creditors) over others.

45. A pre-CCAA-filing transaction with an arm's length creditor is void under section 95 if three conditions are met:

(a) The transaction was made within the prescribed period;

(b) The debtor was insolvent on the date of the impugned transaction; and

(c) The debtor intended to prefer one creditor over another.[38]

46. 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.

47. The BIA provides that test for determining whether non-related parties are dealing at arm's length is whether the "transaction at arm's length could be considered to

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[38] *Keith G Collins Ltd v Canadian Imperial Bank of Commerce*, 2011 MBCA 41 at para 19, 268 Man R (2d) 30; Book of Authorities of Trimor, Tab 9. *Touche Ross Ltd v Weldwood of Canada Sales Ltd*, 48 CBR (NS) 83 at paras 3- 7, 1983 CarswellOnt 214 (SC) [*Touche Ross*]; Book of Authorities of Trimor, Tab 10.

be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other".[39] Notwithstanding a vague reservation of rights in their Factum, the DIP Lenders have not seriously suggested, nor have they provided any evidence to establish, that any of the TPLs did not operate at arm's length from the Cash Store.

48. There is no evidence that either the Cash Store or Trimor have any moral or psychological leverage over one another that would diminish or possibly influence the free decision-making of the other. The DIP Lenders have not shown that the Cash Store and Trimor do not deal at arm's length. Therefore that three month period applies.

49. 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.[40]

50. In Alberta, the FPA sets out rules which are substantially similar to those in Ontario. 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

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[39] BIA, s. 4(4); *Abou-Rached*, Re 2002 BCSC 1022 at para 46; Book of Authorities of Trimor, Tab 11.
[40] *FCA*, s. 2.

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. Section 3 provides as follows:

> [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.

51. While an intention to prefer need not be shown under section 3 of the FPA if the impugned transaction has preferential effect, bona fides transactions are protected from the ambit of the FPA at s. 6, which provides:

> **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.

52. As described in greater detail below, all of the Transactions were in the ordinary course of business.

ii. No Evidence of Insolvency

53. All of the statutory provisions pursuant to which the DIP Lenders ask the court to set aside the Transactions require the DIP Lender's to prove that the Cash Store was insolvent at the time the Transactions took place.

54. A party seeking to have a transaction set aside on the basis that it constitutes a preference has the burden of proving that the debtor was in fact insolvent at the time of the impugned transaction. The court is not to presume insolvency.[41]

55. Pursuant to s. 2 of the BIA, "insolvent person" means

> a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

56. In a recent decision of the Ontario Superior Court, it was held that despite the fact that the plaintiff was in default of their mortgage (failed to make payments for 13 months), they were not insolvent under the BIA.

57. An application under section 248 must be made by an insolvent person. The onus of proving insolvency is on the applicant, on a balance of probabilities. The definition of

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[41] *Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce*, 2011 MBCA 41 at para. 20; Book of Authorities of Trimor, Tab 9.

an "insolvent person" is found in section 2 of the BIA. Having regard to that definition, although I am satisfied the Plaintiff is not bankrupt, carries on business in Canada, and has liabilities in excess of $1,000, there has been no evidence led upon which I could find it is unable to meet its obligations in the ordinary course of business, has ceased paying its current obligations in the ordinary course of business as they generally become due, or that the aggregate of its property is not, at a fair valuation, sufficient, if disposed of at a fairly conducted sale under legal process, to enable payment of all its obligations.[42]

58. The DIP Lenders have not produced any evidence to show that the Cash Store was insolvent as of September 2013 or any time prior to April 14, 2014. They have not shown that the Cash Store was unable to meet its obligations generally as they became due or that the Cash Store had ceased meeting its obligations in the ordinary course of business.

59. The DIP Lenders have also not proven that, as at September 2013, the aggregate of the Cash Store's property if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. Simply referring to the book value of the assets and liabilities as stated on Cash Store's balance sheet is not enough to meet the burden. In *King Petroleum Ltd.*, Re, 29 C.B.R. (N.S.) 76, the Ontario Superior Court noted as follows:

> 11 To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not

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[42] *917488 Ontario Inc. v. Sam Mortgages Ltd*, 2013 ONSC 2212 at para. 38.

it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: first, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is the starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it.[43]

iii. The Transactions occurred in the ordinary course of business of the Cash Store

60. All of the statutory provisions relied on by the DIP Lenders, with the exception of section 3 of the FPA require the DIP Lenders to show that the Cash Store intended to prefer the TPLs. However, section 3 of the FPA presumes a preference has occurred if the impugned transaction has the effect of preferring a creditor but transactions made in the ordinary course of the business of the debtors or payments given by the debtor in exchange for a benefit are exempted from the application of section 3 and the other avoidance provisions in the FPA.

61. The debtor's intention and ordinary course of business are related concepts. If a transaction occurred in the ordinary course of the debtor's business or payment or transfer given in exchange for present consideration the presumption of intention that such transaction, payment or transfer constituted a preference is rebutted.[44]

62. The fact is that the Transactions occurred in the ordinary course of business of the Cash Store in accordance with the Broker Agreements entered into by the Cash Store outside the review periods prescribed by the various statutes with the full knowledge of

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[43] *King Petroleum Ltd.*, Re, 29 C.B.R. (N.S.) 76 at para. 11; Trimor Book of Authorities of Trimor, Tab 12.
[44] *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 at para 13; Trimor Book of Authorities of Trimor, Tab 17; L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, Bankruptcy and Insolvency Act Part IV (ss. 67-101.2), F§210 — Rebutting The Presumption; Trimor Book of Authorities, Tab 18.

the secured creditors and bondholders. Further the transfers of loan receivables were made for valuable consideration to encourage the TPLs to continue to make their funds available to the Cash Store, again with the knowledge of the secured creditors and bondholders.

63. Intention 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.*:[45]

> 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.

64. In the present case, as in the Holt Motors case, the intention which should be attributed to the Cash Store is that which their conduct reasonably bears. The evidentiary record makes clear that the Cash Store did not intend to prefer Trimor through the Transactions. The Transactions were made in accordance with the Broker Agreements and the established practices between the Trimor and the Cash Store, both of which the DIP Lenders (qua DIP Lenders, pre-filing lienholders, and pre-filing bondholders) were well aware of.

65. 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

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[45] *Re Holt Motors Ltd* (1966), 57 DLR (2d) 180 at para 8, 56 WWR 182 (Man QB) [Holt Motors]; Book of Authorities of Trimor, Tab 13. *Thorne Riddell v Fleishman*, 47 CBR (NS) 233 at para 26, 1983 CarswellOnt 201 (Sup Ct); Book of Authorities of Trimor, Tab 14.

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.[46]

66. In the present case, the Transactions bear none of the badges of fraud which the courts will often look at in reviewable transaction cases where there is often no direct evidence of intent. The Cash Store's secured creditors had notice of the business arrangements between Cash Store and Trimor, including the fact that Trimor retained ownership of the Trimor Loans and proceeds of the Trimor Loans. The secured creditors did not therefore suffer any prejudice. Rather, they benefitted from the risks of lending into a structure in which these TPL arrangements were in place. The Cash Store received 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 confiscate the Trimor Loans and the proceeds of the Trimor Loans simply because the inherent risks in their investments materialized into real losses.

67. As set out 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 Cash Store did not transfer their property to the TPLs.

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[46] *Re AR Colquhoun & Son Ltd*, [1937] WWR 222, 18 CBR 124 (SaskKB); Book of Authorities of Trimor, Tab 15. *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); Book of Authorities of Trimor, Tab 16.

68. In their factum, the DIP Lenders allege that even Transactions entered into after the Initial Order was made constitute preferences under the BIA and/or voidable transactions under the FPA and FCA. In addition to the points made above, those transactions were entered into by the Applicants under the management of the CRO and the supervision of the Monitor and as expressly contemplated in the Initial Order and the Additional TPL Protection Order made in these proceedings. The DIP Lenders had notice of and consented to both of those orders. For the DIP Lenders to now argue that such transactions are improper is telling.

PART IV - ORDER REQUESTED

69. Trimor respectfully requests that the relief sought by the DIP Lender in the cross-motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2014.

Brett Harrison and Adam Maerov
McMillan LLP

Lawyer for Trimor Annuity Focus Limited Partnership #5

SCHEDULE "A"
LIST OF AUTHORITIES

1 *Randhawa v 420413 BC Ltd*, 2009 BCCA 602, 2009 CarswellBC 3512

2 *Bluebird Corp, Re*, 1926 CarswellOnt 29, [1926] 2 DLR 484

3 *Salo v Royal Bank of Canada*, 1988 CarswellBC 3186, 11 ACWS (3d) 148

4 *Outset Media Corp v Stewart House Publishing Inc*, 2003 CarswellOnt 2460, 34 BLR (3d) 241

5 *Maple Homes Canada Ltd, Re*, 2000 BCSC 1443, 2000 CarswellBC 2017

6 *Tucker v Aero Inventory (UK) Ltd*, 2011 ONSC 4223, 2011 CarswellOnt 8476

7 *Verdellen v Monaghan Mushrooms Ltd*, 2011 ONSC 5820, 2011 CarswellOnt 11612

8 *Dilollo, Re*, 2013 ONSC 578, 2013 CarswellOnt 781

9 *Keith G Collins Ltd v Canadian Imperial Bank of Commerce*, 2011 MBCA 41, 2011 CarswellMan 196

10 *Abou-Rached, Re*, 2002 BCSC 1022, 2002 CarswellBC 1642

11 *917488 Ontario Inc v Sam Mortgages Ltd*, 2013 ONSC 2212, 2013 CarswellOnt 4413

12 *King Petroleum Ltd, Re*, 1978 CarswellOnt 197, 29 CBR (NS) 76

13 *Holt Motors Ltd, Re*, 1966 CarswellMan 3, 56 WWR 182

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

15 *AR Colquhoun & Son Ltd, Re*, 1936 CarswellSask 15, [1937] 1 WWR 222

16 *Norris, Re*, 1994 CarswellAlta 353, [1994] AWLD 831

17 *St. Anne Nackawic Pulp Company Ltd.*, 2005 NBCA 55

18 L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, Bankruptcy and Insolvency Act Part IV (ss. 67-101.2), F§210 — Rebutting The Presumption; Trimor Book of Authorities, Tab 18

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

S.2: "insolvent person"

a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

S. 4(4):

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

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.

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.

Fraudulent Conveyances Act, R.S.O. 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. R.S.O. 1990, c. F.29, s. 2.

Fraudulent Preferences Act, RSA 2000, c F-24

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.

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.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

REPLY AND RESPONDING FACTUM OF TRIMOR ANNUITY FOCUS LP #5 (RETURNABLE JUNE 11, 2014)

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TAB 5

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

THE CASH STORE FINANCIAL SERVICES INC. AND RELATED APPLICANTS

NINTH REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC., IN ITS CAPACITY AS MONITOR

August 6, 2014

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

APPLICANTS

NINTH REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA INC. IN ITS CAPACITY AS MONITOR

INTRODUCTION

1. On April 14, 2014, Regional Senior Justice Morawetz granted an Initial Order pursuant to the *Companies' Creditors Arrangement Act* (Canada), as amended (the "**CCAA**") to The Cash Store Financial Services Inc. ("**CSF**"), The Cash Store Inc., TCS Cash Store Inc., Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc. and 1693926 Alberta Ltd. doing business as "The Title Store" (collectively, the "**Applicants**" or "**Cash Store**") providing protections to the Applicants under the CCAA, including a stay of proceedings until May 14, 2014 (as extended from time to time, the "**Stay**"), and appointing FTI Consulting Canada Inc. (the "**Monitor**") as CCAA monitor.

2. On April 15, 2014, the Court granted an Amended and Restated Initial Order, which, among other things, approved an interim CCAA credit facility (the "**Initial**

DIP") by Coliseum Capital LP, Coliseum Capital Partners II LP and Blackwell Partners LLC (collectively "**Coliseum**" or the "**Initial DIP Lenders**") and appointed Blue Tree Advisors Inc. as Chief Restructuring Officer of the Applicants (the "**CRO**"). The proceedings commenced by the Applicants under the CCAA are referred to herein as the "**CCAA Proceedings**".

3. The following are among the orders obtained and motions that have proceeded to date in these CCAA Proceedings:

   (a) On April 30, 2014, Regional Senior Justice Morawetz granted an order (the "**Additional TPL Protection Order**") providing additional protections for third party lenders, specifically relating to repayments of loans bearing the name of, attributable to, or assigned to 0678786 B.C. Ltd. ("**McCann**") and Trimor Annuity Focus Limited Partnership #5 ("**Trimor**").

   (b) On May 13, 2014, Regional Senior Justice Morawetz granted an order, among other things, extending the Stay to May 16, 2014, approving the cessation of the Applicants' brokered loan business (the "**Broker Business**") in all jurisdictions in which it was then carried out and authorizing the CRO, in consultation with the Monitor, to conduct an orderly cessation of such business.

   (c) On May 16, 2014, Regional Senior Justice Morawetz granted an order (the "**B.C. Trust Fund Order**"), among other things, declaring that $1,078,328 of amounts held in trust by Cassels Brock & Blackwell LLP ("**Cassels Brock**") in the name of CSF pursuant to a Consent Order (as defined in the affidavit of Jason Beitchman sworn May 15, 2014 (the "**Beitchman Affidavit**")) be paid to a BC Compliance Order Trust Account (as defined in the Beitchman Affidavit) to be opened by Cash Store in its capacity as Trustee of the Compliance Order Trust (as defined in the Beitchman Affidavit).

(d) On May 17, 2014, Regional Senior Justice Morawetz granted an order, among other things, extending the Stay to June 17, 2014 and approving an Amended and Restated Term Sheet providing for a DIP facility (the "**Amended Joint DIP Facility**") by the following lenders (together, the "**DIP Lenders**"): Coliseum, Alta Fundamental Advisers, LLC and certain members of the *ad hoc* committee (the "**Ad Hoc Committee**") of the Applicants' 11 1/2% senior secured notes (the "**Notes**").

(e) On June 11, 2014, motions brought by McCann and Trimor and a cross-motion of the DIP Lenders (the "**TPL Motions**") were heard but not completed.

(f) On June 16, 2014, the continued TPL Motions were heard, together with a motion for appointment of representative counsel.

(g) Also on June 16, 2014, Regional Senior Justice Morawetz granted an order extending the Stay to August 15, 2014 and approving a Sale Process (attached as Schedule "A" thereto, the "**Sale Process**"). The Sale Process provided a bid deadline of July 11, 2014 at 5:00 p.m., which was later extended to July 21, 2014 (the "**Bid Deadline**").

(h) On July 22, 2014, Regional Senior Justice Morawetz granted a) an order providing authorization (in some cases, *nunc pro tunc*) to the Applicants to take steps to make demand on certain Cash Stores UK subsidiaries and in relation to the administration or liquidation of the UK business of Cash Store ; and b) an order amending the B.C. Trust Fund Order to provide that trust funds in the amount of $1,078,328 be transferred to Fasken Martineau DuMoulin LLP in trust, to be held for the benefit of Consumer Protection British Columbia ("**CPBC**"), rather than paid to a trust account to be opened by CSF in its capacity as Trustee of the Compliance Order Trust, until CPBC establishes a bank account to carry out the refund process.

(i) On August 5, 2014, Regional Senior Justice Morawetz released his decision on the TPL Motions (the "**TPL Decision**"), dismissing the cross-motion of the DIP Lenders without prejudice for the DIP Lenders to renew their motion at a future date; dismissing the TPL's motions and declaring the TPLs to be creditors of Cash Store; and declaring the Applicants beneficial owners of funds described as the Disputed Post-Filing Receipts in the TPL Motions.

4. The purpose of this Ninth Report is to provide the Court with information regarding the following:

(a) an update on the Sale Process, including the receipt of bids on the Bid Deadline;

(b) the requested approval of an additional DIP Facility (as defined below, the "**Further Amended Joint DIP**"), including a summary of the key terms and the Monitor's recommendations regarding the Further Amended Joint DIP; and

(c) the requested extension of the Stay to September 30, 2014.

TERMS OF REFERENCE

5. In preparing this report, the Monitor has relied upon unaudited financial information of the Applicants, the Applicants' books and records, certain financial information prepared by the Applicants and discussions with the Applicants' management and advisers. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information. Accordingly, the Monitor expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.

6. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.

SALE PROCESS

7. As previously reported, prior to the start of the CCAA Proceedings, Rothschild Inc. ("**Rothschild**") commenced a mergers and acquisitions process to seek a sale or significant investment in Cash Store. In the Amended & Restated Initial Order, the Court authorized Rothschild to "continue the mergers and acquisitions process as described in the Carlstrom Affidavit, in consultation with the Monitor" and on June 3, 2014, Rothschild received a number of letters of interest and several interested parties were selected to advance to the next phase of the process.

8. On June 16, 2014, the CRO obtained an order (the "**Sale Process Order**") approving a sale process (attached thereto, the "**Sale Process**"), which contained, among other key terms, a bid deadline of July 11, 2014 at 5:00 p.m. As noted above, the Bid Deadline was later extended to July 21, 2014.

9. Phase 2 of the Sale Process included numerous steps including: populating the dataroom with further due diligence information and responding to requests for additional materials; conducting management meetings with potential bidders (attended by senior Cash Store management, the CRO and the Monitor); numerous discussions between potential bidders and Rothschild and/or the CRO; discussions between potential bidders and Cash Store's Chief Compliance and Regulatory Affairs Officer ("**CCRO**"), auditor and the Ontario payday lending regulator; visits by potential bidders to the Cash Store head office; and circulating a draft form of purchase agreement.

10. On the Bid Deadline, Rothschild received a number of bids. The bids are being reviewed by Rothschild and the CRO, in consultation with the Monitor and Houlihan Lokey Capital, Inc. ("**Houlihan**"), in accordance with the Sale Process.

11. As part of the review process, Rothschild and the CRO, in consultation with the Monitor, have participated in discussions with certain of the bidders to clarify aspects of the bids and to attempt to identify a Successful Bid (as defined in the Sale Process), and have discussed the bids with the DIP Lenders, the Ad Hoc Committee and their advisors.

12. Discussions and negotiations with certain bidders are ongoing and it is presently anticipated that the Applicants will choose to accept one of the bids received and seek Court approval of the selected transaction within the proposed Stay extension period.

ADDITIONAL DIP FINANCING

13. As noted above, the Amended Joint DIP Facility was approved on May 17, 2014. As previously reported, the availability under the Amended Joint DIP Facility totalled $14.5 million with a $2 million extension option, consisting of the initial tranche of $8.5 million (which was provided under the Initial DIP, approved on April 15, 2014 and repaid on May 9, 2014) and an additional commitment of $6 million with a $2 million extension option.

14. The Applicants have fully drawn all amounts under the Amended Joint DIP Facility. The Applicants made a draw of $3 million during the week ending May 23, 2014, a draw of $3 million during the week ending June 6, 2014, and exercised the $2 million extension option, which was funded by the DIP Lenders during the week ending June 20, 2014.

15. Having fully drawn all amounts under the Amended Joint DIP, the Applicants are expected to require further funding to continue operations in the week ending August 15, 2014. In particular, the Applicants are expected to require additional funding by August 12, 2014 to meet rent and payroll obligations. Attached hereto as **Schedule "1"** is an updated cash flow projection for the period of the week ending August 1, 2014 to the week ending October 24, 2014 (the "**Cashflow**").

The Cashflow does not reflect any impact of the TPL Decision, which was only recently received.

16. The Cashflow reflects that the Applicants are expected to require additional financing in the very near future in order to continue operations and attempt to complete a transaction identified in the Sale Process. Given the Applicants' cash requirements and the status of the Sale Process, including the receipt of a number of bids on the Bid Deadline and the ongoing discussions and negotiations with certain bidders as described above, the CRO, on behalf of the Applicants, approached the DIP Lenders to seek further financing to enable such steps to continue.

17. Following discussions and negotiations with the DIP Lenders, they have agreed to provide additional funding (the "**Further Amended Joint DIP**") of $5 million pursuant to an amendment to the Amended Joint DIP Facility to be effected by an Amending Agreement to Amended and Restated Debtor-In-Possession Term Sheet (the "**Amending Agreement**").

18. The Amending Agreement is attached to the affidavit of William E. Aziz, sworn August 6, 2014 and the key changes made to the Amended Joint DIP Facility set out therein are summarized in the table below. Terms capitalized in the table have the meaning ascribed to them in the Amending Agreement.

The Cash Store Financial Services Inc. **Summary of Changes to Amended Joint DIP Facility in Amending Agreement**	
Borrower	The Cash Store Financial Services Inc. (no change)
Guarantors	The Amending Agreement does not amend the Guarantors; however, Cash Store Financial Limited ("**UK Holdco**") and The Cash Store Limited ("**UK Opco**") (the two companies that have been or will be placed into liquidation or administration in the UK) are not signatories to the Amending Agreement.
Second Extension	On or after August 7, 2014, the Borrower may request and, if requested, the DIP Lenders agree to provide their share of an

Option	additional aggregate commitment of $5.0M, which will mature with the other commitments provided for under the Amended Joint DIP Facility *provided* this amount will only be made available and the Borrower is only permitted to draw from such funds as a DIP Advance in accordance with the procedures set out in the Amending Agreement, which include: • The DIP Lenders will fund the $5.0M to a trust account following written notice by the Borrower that it is exercising the Second Extension Option. Amounts not distributed from the Trust Account as a DIP Advance are held in trust for the benefit of the DIP Lenders. • The CRO, on behalf of the Borrower, must deliver a written request for funding (with requisite support including a cash flow forecast), which must be limited to the amount of money reasonably believed by the Borrower to be required for a two week period immediately following the draw date in order to operate in the ordinary course and maintain a requisite minimum cash balance. • A committee of DIP Lenders has sole and unfettered discretion to determine if a requested DIP Advance is appropriate.
Funding Conditions	The same funding conditions continue to apply except the requirement to deliver a Drawdown Certificate.
Interest Rate	2% per annum payable monthly in arrears for portions of the Second Extension Amount delivered to the Trust Account but not yet advanced as a DIP Advance 17.5% per annum on portions of the Second Extension Amount that have become subject of a DIP Advance, payable monthly in arrears from the date of the DIP Advance All accrued and unpaid interest will be capitalised (not paid in cash), added to the outstanding principal balance of the loan and shall be due and payable on the Maturity Date
DIP Financing Fee	Amended to add that, if the Second Extension Option is exercised, 5% to DIP Lenders *pro rata* based upon their respective share of the Second Extension Amount which shall be fully earned and payable on the date the Second Extension Option is exercised and added to the outstanding principal balance of the loan (not paid in cash) and due and payable on the Maturity Date.

Affirmative Covenants	Modifications to this section relate to timing of the Sale Process, including providing until September 15, 2014 to obtain a Sale Approval Order.
Negative Covenants	Negative covenant dealing with the English Entities revised to prohibit all payments to the English Entities from a Loan Party on or after July 22, 2014.
Events of Default	Events of Default modified to amend the variance for the Updated Peak Funding Requirement to include the amount of the commitment with respect to the Second Extension Option and to provide a new Event of Default if funds in the Trust Account are disbursed other than in accordance with the Amending Agreement or if "any third party takes any steps to challenge the validity of the trust under which the Second Extension Amount is held in the Trust Account."

19. Other significant terms of the Amended Joint DIP, including maturity date, other fees, and priority of the DIP Priority Charge remain the same.

20. The Monitor notes that the DIP Lenders have significant discretion with respect to funding of the DIP Advances in the Second Extension Option and that such advances are limited to funding required for a two-week period. The Monitor understands that this mechanism is required by the DIP Lenders to fund additional amounts to the Applicants at this stage of the proceedings. This mechanism is not dissimilar to the discretion held by the DIP Lenders to fund the $2 million Extension Option pursuant to the Amended Joint DIP. The Monitor noted at that stage and notes again that, given the position of the DIP Lenders in the Applicants' capital structure, it is expected that the Further Amended Joint DIP will be administered in a manner that furthers the goals of this proceeding. The Monitor also acknowledges that amounts are being funded into a Trust Account held by Norton Rose Fulbright Canada LLP (rather than being funded by way of a DIP request made to the DIP Lenders each time) in order to provide greater certainty and reduce administrative difficulties in funding each DIP Advance and agrees this is sensible in light of the multiple DIP Lenders and potential for administrative difficulties and delays.

21. With respect to the fees and interest, the 17.5% fee on DIP Advances pursuant to the Second Extension Option and financing fee of 5% of the Second Extension Amount, are equivalent to the interest and financing fee charged on the additional $8.0M advanced under the Amended Joint DIP facility. With respect to portions of the Second Extension Amount that have been delivered to the Trust Account but have not yet been advanced as DIP Advances, a reduced amount of 2% is payable, which the Monitor understands reflects that the DIP Lender does not have use of these funds while they are in the trust account in order to facilitate funding of DIP Advances as noted above.

22. Provided the Second Extension Option is exercised and all amounts are funded by the DIP Lenders pursuant thereto, the Further Amended Joint DIP is projected to provide sufficient funding to the Applicants through to the week ended October 3, 2014. Therefore, it is anticipated that the Amended Joint DIP will provide sufficient liquidity throughout the requested Stay extension, enabling the Applicants to continue operations during that time while they seek to complete negotiations with potential bidders in the Sale Process, select a Successful Bid, paper the transaction and bring such a transaction forward to the Court for approval.

23. As noted above and reflected in the attached Cashflow, additional financing is required urgently by the Applicants. Without additional financing now the Applicants will likely be forced to cease operations without completing the Sale Process, with the resulting impact on its employees, creditors, customers and other stakeholders. Accordingly, while the Further Amended Joint DIP provides significant discretion to the DIP Lenders and the costs are not insignificant, the Monitor supports the proposed request for approval of the Further Amended Joint DIP facility.

24. The Monitor also notes that the continued involvement of the Joint DIP Lenders and the support they are showing for the Business through additional funding in the Further Amended Joint DIP appears to reflect a level of confidence of those

parties in the CRO and the restructuring process, which the Monitor expects to be valuable in moving towards the completion of a sale transaction.

25. Finally, given that the timing for service of the Applicants' notice of motion was expected to be delayed due to ongoing negotiations, the Monitor delivered a notice to parties on the service list and parties with security registrations against the Applicants (the "**PPSA Registrants**") (by email to the Service List and by overnight courier to the PPSA Registrants for whom the Monitor did not have email addresses) on August 1, 2014 stating as follows:

> The Monitor understands that the Applicants have scheduled a motion before Regional Senior Justice Morawetz on August 7, 2014 at 8:30 a.m. at which time they intend to seek an extension of the stay of proceedings and further DIP financing. The Monitor is presently monitoring the Applicants' cashflow situation carefully while the Applicants negotiate further DIP financing and intends to provide a report in relation to that hearing following service of the Applicants' materials next week (unless further developments warrant an earlier report), including providing a revised cashflow.

26. For the foregoing reasons, the Monitor recommends that the Amending Agreement and Further Amended Joint DIP be approved as requested.

STAY EXTENSION

27. The Applicants have requested an extension of the Stay to September 30, 2014.

28. Provided that the Further Amended Joint DIP is approved and the Second Extension Option is exercised and funded in full, the Cashflow attached hereto demonstrates that the Applicants are projected to have sufficient liquidity to continue operations without further financing until at least during the week ended October 3, 2014.

29. The Applicants, under the supervision and direction of the CRO, appear to be working with due diligence and in good faith to address numerous issues in these CCAA Proceedings, including the following:

(a) taking steps to conduct the Sale Process, including ongoing discussions with bidders, as described above,

(b) continued communications with provincial payday loan regulators;

(c) negotiating the Further Amended DIP Facility;

(d) reviewing the operations and prospects of the Applicants' UK business (as summarized in the Monitor's Eighth Report) and taking steps to effect the administration and liquidation of UK Opco and UK Holdco, respectively, as authorized by this Court; and

(e) working with Cash Store management with respect to ongoing operations of the Business and with the Monitor with respect to various aspects of the restructuring.

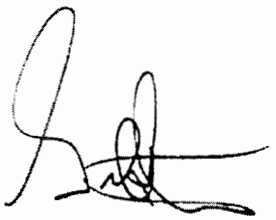
30. The proposed extension of the Stay to September 30, 2014 would enable to the Applicants to continue negotiations with potential bidders in the Sale Process and to take steps to select a Successful Bid, paper the transaction and bring such a transaction forward to the Court for approval. Provided the Amending Agreement is approved and the Second Extension Option is exercised and funded in full, the Monitor believes that this timing is appropriate and sensible. The Monitor will be monitoring the Applicants cashflow and each DIP Advance request and will report to the Court if a necessary DIP Advance is not funded as requested.

31. Accordingly, subject to approval of the Amending Agreement and Further Amended Joint DIP financing, the Monitor recommends that this Court grant the Stay extension to September 30, 2014 as requested by the Applicants.

The Monitor respectfully submits to the Court this Ninth Report.

Dated this 6th day of August, 2014.

FTI Consulting Canada Inc.
The Monitor of
The Cash Store Financial Services Inc.
and Related Applicants



Greg Watson
Senior Managing Director

Schedule "1" – Cashflow Forecast

The Cash Store Financial Services, Inc.
Weekly Cash Forecast
(CAD 000's)

Week Ended	8/1/2014	8/8/2014	8/15/2014	8/22/2014	8/29/2014	9/5/2014	9/12/2014	9/19/2014	9/26/2014	10/3/2014	10/10/2014	10/17/2014	10/24/2014	Total
Cash Receipts	$ 9,286	$ 6,220	$ 7,464	$ 9,078	$ 11,299	$ 5,997	$ 7,580	$ 8,176	$ 10,096	$ 6,634	$ 6,022	$ 6,328	$ 5,473	$ 99,653
Operating Disbursements:														
Loan Disbursements	6,165	5,661	6,200	7,009	8,087	5,101	6,121	6,631	7,651	5,937	4,785	4,587	5,127	79,063
Operating Expenses	2,729	1,110	2,696	577	3,429	599	2,900	354	3,003	538	2,665	236	2,430	23,265
Total Operating Disbursements	8,894	6,771	8,896	7,586	11,516	5,699	9,021	6,985	10,655	6,475	7,451	4,823	7,557	102,328
Operating Cash Flow	$ 392	$ (551)	$ (1,432)	$ 1,492	$ (218)	$ 298	$ (1,440)	$ 1,191	$ (559)	$ 159	$ (1,429)	$ 1,505	$ (2,084)	$ (2,676)
Non-Operating Disbursements:														
Post Petition Non Operating Expenses	-	576	461	692	576	341	341	341	682	341	341	341	341	5,374
Credit Facility Interest	-	125	-	-	125	-	-	-	125	-	-	-	-	375
DIP Interest and Related Fees	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Capex	-	-	-	6	19	-	6	-	19	-	-	25	-	75
Total Non-Operating Disbursements	-	701	461	698	720	341	347	341	826	341	341	366	341	5,824
BoP Cash	$ 11,777	$ 12,169	$ 10,916	$ 11,023	$ 11,818	$ 11,380	$ 11,337	$ 11,549	$ 12,399	$ 11,515	$ 11,333	$ 9,563	$ 10,702	$ 11,777
Total Cash Flow	392	(1,253)	(1,893)	795	(938)	(43)	(1,788)	850	(1,385)	(182)	(1,770)	1,139	(2,425)	(8,500)
EoP Cash Before New Borrowing	$ 12,169	$ 10,916	$ 9,023	$ 11,818	$ 10,880	$ 11,337	$ 9,549	$ 12,399	$ 11,015	$ 11,333	$ 9,563	$ 10,702	$ 8,277	$ 3,277
BoP DIP Loan	$ 8,000	$ 8,000	$ 8,000	$ 10,000	$ 10,000	$ 10,500	$ 10,500	$ 12,500	$ 12,500	$ 13,000	$ 13,000	$ 13,000	$ 13,000	$ 8,000
DIP Draw	-	-	2,000	-	500	-	2,000	-	500	-	-	-	-	5,000
DIP Paydown	-	-	-	-	-	-	-	-	-	-	-	-	-	-
EoP DIP Loan	$ 8,000	$ 8,000	$ 10,000	$ 10,000	$ 10,500	$ 10,500	$ 12,500	$ 12,500	$ 13,000	$ 13,000	$ 13,000	$ 13,000	$ 13,000	$ 13,000
BoP Senior Credit Facility	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000
Draw	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Paydown	-	-	-	-	-	-	-	-	-	-	-	-	-	-
EoP Senior Credit Facility	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000	$ 12,000
EoP Cash After New Borrowing	$ 12,169	$ 10,916	$ 11,023	$ 11,818	$ 11,380	$ 11,337	$ 11,549	$ 12,399	$ 11,515	$ 11,333	$ 9,563	$ 10,702	$ 8,277	$ 8,277
Less: Non-Ontario Restricted Cash	(4,164)	(4,188)	(4,224)	(4,274)	(4,328)	(4,339)	(4,354)	(4,375)	(4,398)	(4,431)	(4,468)	(4,477)	(4,492)	(4,492)
Less: Ontario Restricted Cash	(3,365)	(3,410)	(3,476)	(3,566)	(3,665)	(3,695)	(3,739)	(3,799)	(3,865)	(3,865)	(3,865)	(3,865)	(3,865)	(3,865)
Less: Cash Minimum	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)
Less: Tax Refund	-	-	-	-	-	-	-	-	-	-	-	-	-	-
EoP Cash After Restricted Cash	$ 1,641	$ 318	$ 323	$ 978	$ 387	$ 304	$ 457	$ 1,226	$ 252	$ 38	$ (1,770)	$ (640)	$ (3,080)	$ (3,080)

Notes:
[1] The purpose of this cash flow forecast is to determine the liquidity requirements of the Applicants during the forecast period.
[2] Receipts from operations are forecast based on existing Consumer Loan Receivables and Accounts Receivable, forecast lending volumes and other revenues, and customer payment terms.
[3] Forecast disbursements from operations are forecast based on existing Accounts Payable, forecast loan volumes and operating expenses, and payment terms.
[4] Post-petition non operating expenses include professional fees associated with the Applicants restructuring and payments made to Third Party Lenders.
Forecast professoinal fee disbursements are based on advisor level estimates of fees that may be incurred during the forecast period.
Third Party Lender payments include interest associated with the funds advanced by the Third Party Lenders.
[5] Credit Facility Interest includes interest associated with the $12 million in secured loans provided by the Senior Lenders.
[6] DIP Interest and Related Fees includes interest and transaction fees associated with the DIP financing.
[7] DIP Proceeds include anticipated draws from the DIP facility.

IN THE MATTER OF The Cash Store Financial Services Inc., *et al.*

Applicants

Court of Appeal File No: M44123
M44124

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

JOINT RESPONDING MOTION RECORD OF THE DIP LENDERS AND THE AD HOC COMMITTEE

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