

**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

**FACTUM**

**(Responding to motion by third party lenders ("TPLs") for leave to appeal)**

August 29, 2014

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Court-appointed representative counsel  
to class action plaintiffs

**TO: SERVICE LIST**

## PART I - OVERVIEW

1. This is the responding factum of the court-appointed representative counsel to the class members in the class proceeding *Timothy Yeoman v. The Cash Store Financial Services Inc. et al.*, Ontario Superior Court File No. 7908/12 CP (the “**Class Action**”). The Class Action was filed on August 1, 2012 against Cash Store Financial Services Inc. and various related parties (collectively, “**Cash Store**”), approximately 20 months before Cash Store obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (“**CCAA**”).
2. Cash Store is being managed by a court-appointed Chief Restructuring Officer (William Aziz) while under CCAA protection. Cash Store is focusing on a sale of its business while under CCAA protection. The sale proceeds are expected to be distributed to creditors of Cash Store in a future claims process.
3. The class members are a significant creditor group of Cash Store. The Class Action alleges, *inter alia*, that Cash Store’s practice of charging fees on various financial products which were tied to their loan products, as well as interest on those fees, is unlawful and in contravention of the Ontario *Payday Loans Act*, 2008, S.O. 2008 (“**PLA**”). It is estimated that there are thousands of individual borrowers in the class who were charged unlawful amounts by Cash Store. Damages owing to the class members are estimated at over \$50 million, based on publicly available information.
4. On August 26, 2014, Regional Senior Justice Morawetz (the “**CCAA Judge**”) issued an endorsement appointing Representative Counsel to the class members in the CCAA proceedings:

[27] In the result, I am satisfied that this is an appropriate matter in which to appoint a class representative and representative counsel. The motion is granted and an order shall issue appointing Mr. Yeoman as the Class Representative of the Class Members in the CCAA proceeding and an order appointing Harrison Pensa LLP as representative counsel to the Class Members and Koskie Minsky LLP as agent to Harrison Pensa LLP (“**Representative Counsel**”).

Endorsement of Regional Senior Justice Morawetz dated August 26, 2014, *Cash Store Financial Services (Re)*, 2014 ONSC 4567: Brief of Authorities of Representative Counsel to class members, Tab 1, p. 5, para. 27

5. Cash Store obtains funding from sources which include “third party lenders” (“TPLs”). In the decision that the TPLs seek to appeal to this Court, the CCAA Judge found that the TPLs loaned the funds to Cash Store, which in turn then loaned those funds to customers. As such, the CCAA Judge held that the relationship between the TPLs and Cash Store is that of debtor and creditor, and as a result, “the TPLs must stand in line as creditors of Cash Store”.

Endorsement of Regional Senior Justice Morawetz dated August 5, 2014, *Cash Store Financial Services(Re)*, 2014 ONSC 4326: Motion Record of the Moving Party, 0678786 B.C. Ltd., Tab 3, p. 2, para. 7

6. The TPLs’ motion for leave to appeal should be dismissed. The TPLs’ motion does not meet any of the criteria in the established test for leave to appeal:

- a) The point on the proposed appeal is a factual dispute between the TPLs and Cash Store. It is of no significance to insolvency practice as a whole;
- b) The point on the proposed appeal is in substance an effort by the TPLs to jump the priority queue and be paid ahead of other creditors, which is of no significance to the CCAA proceeding as a whole;
- c) The proposed appeal is devoid of merit. The CCAA judge did not make any legal errors that warrant review by this court; and
- d) If leave is granted, the appeal will hinder the progress of the CCAA proceeding by distracting and consuming resources of Cash Store and stakeholders from the ongoing sale effort.

## **PART II – THE FACTS**

7. Representative Counsel refers to the facts as set out in the Joint Factum of the DIP Lenders and Ad Hoc Committee, filed in response to the TPLs' motion for leave to appeal.

## **PART III – THE ISSUE**

8. The issue on this motion is: should the TPLs' motion for leave to appeal be granted?  
Answer: No.

## **PART IV – THE LAW AND ARGUMENT**

9. The test for whether to grant leave to appeal a decision of a judge supervising a CCAA proceeding is well-established. In *Stelco*, this Court stated:

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc. (Re)*, 2002 CanLII 41751 (ON CA), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point is of significance to the action;
- (c) whether the appeal is prima facie meritorious or frivolous;
- (d) whether the appeal will unduly hinder the progress of the action.

*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (Ont. C.A.); Brief of Authorities of the Moving Party, 0678786 B.C. Ltd., Tab 1, p. 8

**a) *The point on appeal is not significant to the practice***

10. The point on the proposed appeal is a dispute between the TPLs and Cash Store involving the terms of the Broker Agreements and the conduct and relationship of these two parties subsequent to the execution of the Broker Agreements. The CCAA Judge identified the issue in his Endorsement:

[7] At the core of this motion is a dispute over whether these TPLs loaned their funds *to Cash Store*, which in turn made its own loans to its customers; or whether the funds were loaned by the TPLs *to Cash Store's clients*, with Cash Store merely operating as a broker. If the conclusion is the former, the TPLs must stand in line as creditors of Cash Store...[Emphasis added by Court]

Endorsement of Regional Senior Justice Morawetz dated  
August 5, 2014, *Cash Store Financial Services(Re)*, 2014  
ONSC 4326: Motion Record of the Moving Party, 0678786  
B.C. Ltd., Tab 3, p. 2

This issue is essentially a factual dispute between the TPLs and Cash Store. This issue is of no significance to insolvency practice as a whole. This criteria of the leave test is not met.

**b) *The point is not significant to the action***

11. In this factor of the leave test, the term “action” refers to the CCAA proceeding as a whole.

*Royal Bank of Canada v. Cow Harbour Construction Ltd.*  
(2010), 72 C.B.R. (5<sup>th</sup>) 261 (AB. Q.B.), para. 38: Joint Book  
of Authorities of the DIP Lenders and the AD Hoc Committee.

12. Cash Store is currently involved in a sales process while under CCAA protection to sell its business. The proceeds obtained from a sale are expected to be distributed to creditors of Cash Store. The TPLs’ motion is in substance an effort to jump the creditor priority queue to obtain a first priority recovery ahead of other creditors of Cash Store. As Justice Van Rensburg noted in her Endorsement dated August 15, 2014: “The effect of the [CCAA’s Judge’s] decision

is that the TPLs are unsecured creditors who face the prospect of no or very little recovery in the CCAA proceedings.”

13. The substance of the TPLs’ legal point on their proposed appeal relates only to the TPLs’ priority position among other creditors. This is of no significance to the CCAA proceeding as a whole. This factor of the leave test is not met.

**c) *The TPLs’ proposed appeal is not meritorious***

14. The CCAA Judge did not make any legal errors in his Endorsement that warrant review by this Court. The CCAA Judge analyzed in detail the relationship and conduct of the TPLs and Cash Store as well as the provisions of the Broker Agreements, and correctly applied legal principles to conclude that the relationship between these two parties is that of debtor and creditor:

[123] It is also necessary to look at the basis upon which the relationship between the TPLs and Cash Store developed. Pursuant to the Broker Agreements, the TPLs would provide funding to Cash Store and Cash Store would broker loans to its customers. The customers would pay a rate of interest of 59%. The interest payments were to flow through to the TPLs. However, in reality, this did not happen. By their nature, the type and quality of the loans made to Cash Store customers would be characterized as high-risk loans. There was a significant default rate. ***The practice developed that Cash Store would effectively provide a rate of return equivalent to 17.5% per annum to the TPLs and Cash Store made "voluntary payments" to the TPLs in this amount.***

[124] ***It is also clear that the TPLs were aware that they were receiving this 17.5% payment. Indeed, such a payment was expected.*** The TPLs received monthly payments at a 17.5% rate of return and regardless of the status of the brokered loans obtained by Cash Store, the TPLs received their 17.5% and were insulated from any credit risk as a result of the capital protections used by Cash Store.

[125] ***During the period of time that Cash Store was making these payments of 17.5% to the TPLs, there is no evidence of any complaint being made by the TPLs to Cash Store.*** Rather, these payments were accepted by the TPLs and for all intents and purposes, gave the appearance of an "ordinary course" payment. ***There is no evidence that the TPLs ever took steps to challenge why interest at 59% was not being received.*** To state the obvious, this interest rate differential of 41.5% (less an amount to be written off as bad loans) is significant. It raises a question for which there is no recorded explanation, namely

why were the TPLs apparently content to receive a return of 17.5%, when customers of Cash Store, borrowing funds supposedly belonging to the TPLs, were paying 59% interest, in addition to Cash Store's brokerage fee. *The inescapable conclusion is that the relationship as between the TPLs and Cash Store was such that the 59% interest payments were never expected to flow through to the TPLs.*

...

[127] In this case, *I have reached the conclusions that the parties did alter the relationship from what was set out in the Broker Agreements.* ... [emphasis added]

Endorsement of Regional Senior Justice Morawetz dated August 5, 2014, *Cash Store Financial Services (Re)*, 2014 ONSC 4326; Motion Record of the Moving Party, 0678786 B.C. Ltd., Tab 3, p. 22-23

15. The CCAA Judge correctly applied the law. In paragraph 128 of his Endorsement, he states:

[128] The presence of an "entire agreement" clause in the Broker Agreement does not assist the TPLs. The "entire agreement" clause has application with respect to various arrangements and agreements entered into by parties up to the time of entering into an agreement with such a clause. *However, it does not follow that the parties cannot modify their arrangements subsequent to the execution of the Broker Agreement.* [Emphasis added]

[130] I conclude that the relationship as between the TPLs and Cash Store is one of debtor and creditor.

Endorsement of Regional Senior Justice Morawetz dated August 5, 2014, *Cash Store Financial Services (Re)*, 2014 ONSC 4326; Motion Record of the Moving Party, 0678786 B.C. Ltd., Tab 3, p. 23

16. The CCAA Judge's statement and application of the law is correct. In *Canadian Contractual Interpretation Law*, the author states:

Related to the principle that an entire agreement clause applies only to events which have already occurred at the time of contracting is the well-accepted notion that an entire agreement clause will not prevail over an oral agreement (especially a subsequent oral agreement) where the written agreement was not intended to encompass the entire relationship between the parties:

To be sure, courts have not always given effect to entire agreement clauses. See, for example, P.M. Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) 20 *Advocates' Q.* 287; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, 226 D.L.R. (4<sup>th</sup>) 577 (C.A.). But they have not done so where, for example, *after signing a written contract, parties have entered into an oral agreement and by their conduct have shown that they did not intend to be bound by their previous written contract.* [Emphasis added by author]

*Canadian Contractual Interpretation Law*, Geoff R. Hall, LexisNexis, 2012: Brief of Authorities of Representative Counsel to class members, Tab 2, p. 2

17. Similarly, at paragraph 129 of his Endorsement, the CCAA Judge's statement of the law is correct:

[129] [N]otwithstanding the presence of a "non-waiver" clause in the contract, parties can still waive their contractual rights by election. Specific reference was made to *Barkley's Bank PLC v. Devonshire Trust (Trustee op, 2011 ONSC 5008*, where Newbould J. explained the presence of a non-waiver clause is "not the end of the matter", going on to quote Swinton J.'s reasons in *Fitkid (York) Inc. v. 1277633 Ontario Limited (2002)*, O.J. No. 3959 (SCJ) 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.

Endorsement of Regional Senior Justice Morawetz dated August 5, 2014, *Cash Store Financial Services (Re)*, 2014 ONSC 4326: Motion Record of the Moving Party, 0678786 B.C. Ltd., Tab 3, p. 23

**d) *The appeal would unduly hinder the progress of the action***

18. As noted above, Cash Store is currently involved in a sales process to sell its business while under CCAA protection. The main objective of the sales process is to negotiate with purchaser(s) to obtain the highest possible purchase price, the proceeds of which will be used to pay claims of creditors. If leave is granted for the TPLs' proposed appeal, it will require Cash Store and other stakeholders to respond to the appeal, which will significantly distract from the



sales process and consume additional resources. Cash Store should be focused on obtaining the highest possible sale proceeds at this time, not expending more time and resources on an appeal that is an effort by the TPLs to jump the priority queue among creditors before a claims process is put in place.

**PART IV – ORDER REQUESTED**

19. Representative Counsel to the Class Members respectfully requests an order:
- a) dismissing the motion for leave to appeal; and
  - b) costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29<sup>th</sup> day of August, 2014.



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**ANDREW J. HATNAY**



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**JAMES HARNUM**

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

| <b>TAB</b> | <b>AUTHORITY</b>  |
|------------|---|
| 1.         | Endorsement of Regional Senior Justice Morawetz dated August 26, 2014, <i>Cash Store Financial Services (Re)</i> , 2014 ONSC 4567 |
| 2.         | <i>Canadian Contractual Interpretation Law</i> , Geoff R. Hall, LexisNexis, 2012  |

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**Applicants**

Court of Appeal File Nos.: M44123/M44126

**COURT OF APPEAL FOR ONTARIO**

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**(Responding to motion by third party  
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