

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

**1511419 ONTARIO INC., FORMERLY KNOWN AS THE
CASH STORE FINANCIAL SERVICES INC.
AND RELATED APPLICANTS**

**TWENTY-EIGHTH REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS MONITOR**

October 26, 2021

**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 1511419 ONTARIO INC., FORMERLY
KNOWN AS THE CASH STORE FINANCIAL SERVICES INC.,
1545688 ALBERTA INC., FORMERLY KNOWN AS THE
CASH STORE INC., 986301 ALBERTA INC., FORMERLY
KNOWN AS TCS CASH STORE INC., 1152919 ALBERTA
INC., FORMERLY KNOWN AS INSTALOANS INC., 7252331
CANADA INC., 5515433 MANITOBA INC., AND 1693926
ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

**TWENTY-EIGHTH REPORT TO THE COURT
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IN ITS CAPACITY AS MONITOR**

INTRODUCTION AND BACKGROUND

1. On April 14, 2014, Regional Senior Justice Morawetz (as he then was) granted an Initial Order (as amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (Canada), as amended (the "**CCAA**") with respect to 1511419 Ontario Inc., formerly known as The Cash Store Financial Services Inc., 1545688 Alberta Inc., formerly known as The Cash Store Inc., 986301 Alberta Inc., formerly known as TCS Cash Store Inc., 1152919 Alberta Inc., formerly known as 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 Cash Store under the CCAA, including a stay of proceedings (as extended from time to time, the "**Stay**"), appointing Blue Tree Advisors Inc. as Chief Restructuring

- Officer of the Applicants (the “**CRO**”) and appointing FTI Consulting Canada Inc. (the “**Monitor**”) as CCAA monitor.
2. The Stay has been subsequently extended, and currently expires on November 18, 2021.
 3. Prior to the expiry of the Stay, the Monitor intends to bring a motion and file an additional report in support of extending the Stay up to and including November 18, 2022.
 4. During the course of the CCAA Proceedings, Cash Store conducted various investigations with the assistance of its employees, counsel and the Monitor, which revealed potential litigation claims (the “**Litigation Claims**”) against:
 - (a) its former auditor, KPMG LLP (“**KPMG**”);
 - (b) its former counsel, Cassels Brock & Blackwell LLP (“**Cassels**”);
 - (c) its former financial advisor, Canaccord Genuity Inc. (“**Canaccord**”);
 - (d) certain of its former directors and officers (the “**D&Os**”); and
 - (e) the lenders who advanced funds to Cash Store to finance the payday loans that Cash Store provided to its customers (the “**Lenders**”).
 5. On December 1, 2014, the Court approved the Litigation Counsel Retainer and the Applicants retained Thornton Grout Finnigan LLP and Voorheis & Co. LLP (collectively, “**Litigation Counsel**”) to pursue the Litigation Claims.
 6. Cash Store completed three Court-approved asset purchase transactions during the CCAA Proceedings. Substantially all of Cash Store’s assets were sold pursuant to the aforementioned transactions, including a significant portion of its books and records.

7. Pursuant to an Order of this Court granted on September 30, 2015 (the “**Meetings Order**”), meetings of affected creditors were held on November 10, 2015 to vote on the Plan of Compromise or Arrangement concerning, affecting and involving the Applicants (the “**Plan**”). As reported by the Monitor in its Twenty-First Report dated November 16, 2015, the Plan was voted on and approved by the required majority of Affected Creditors pursuant to the terms of the Meetings Order, the Plan and the CCAA.
8. On November 19, 2015, the Court granted an Order (the “**Sanction Order**”), among other things, sanctioning the Plan and authorizing the Applicants and the Monitor to implement the Plan. On December 31, 2015, the Monitor issued a certificate in the prescribed form certifying that the Plan Implementation Date (as defined in the Plan) had occurred and that the Plan and the Sanction Order were effective in accordance with their respective terms.
9. As part of the Plan, the Litigation Claims against the D&Os and certain Lenders were settled under a global settlement (the “**Global Settlement**”). The Sanction Order, among other things:
 - (a) Approved the Global Settlement;
 - (b) Discharged the CRO as of the Plan Implementation Date; and
 - (c) Appointed BlueTree III as the Litigation Trustee (the “**Litigation Trustee**”) to advance the remaining Litigation Claims against KPMG, Cassels and Canaccord (the “**Defendants**”) as assets of the estate (the “**Remaining Estate Actions**”).
10. Further, the Sanction Order granted the Monitor certain enhanced powers and authorization to, among other things, facilitate the completion and administration of the estates of the Applicants in the CCAA Proceeding and apply to the Court for any orders necessary or advisable to carry out its powers and obligations.

11. Pursuant to the Plan, Cash Store's assets were liquidated and the net proceeds, along with the proceeds of the Global Settlement with Cash Store's former D&Os and certain Lenders, were distributed to Cash Store's creditors, subject to:
 - (a) the Litigation Funding and Indemnity Reserve (as defined in the Plan) established to provide initial financing for the Remaining Estate Actions against the Defendants; and
 - (b) the Monitor's Post-Implementation Reserve (as defined in the Plan) established pursuant to the terms of the Plan to ensure that sufficient funds remain available to the Monitor to pay the costs and expenses of the Applicants and administer the Applicants and the Plan from and after the Plan Implementation Date.
12. Cash Store's Remaining Estate Actions against the Defendants are a potential material remaining asset to be realized on.

Purpose of Report

13. The purpose of this twenty-eighth report (the "**Twenty-Eighth Report**") is to provide the Court with information regarding the Applicants' motion returnable October 28, 2021 for approval of the Litigation Funding Agreement ("**October 28 Motion**") and the Monitor's support thereof.

TERMS OF REFERENCE

14. In preparing the Twenty-Eighth Report, the Monitor has relied upon audited and unaudited financial information of the Applicants, the Applicants' books and records, certain financial information and forecasts prepared by the Applicants, information contained in the Affidavit of William E. Aziz sworn October 8, 2021 (the "**Aziz Affidavit**"), and discussions with various parties, including senior management ("**Management**") of, and advisors to, the Applicants (the "**Information**").

15. Except as described in this Twenty-Eighth Report:
 - (i) the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants of Canada Handbook; and
 - (ii) the Monitor has not examined or reviewed financial forecasts or projections referred to in Twenty-Eighth Report in a manner that would comply with the procedures described in the Chartered Professional Accountants of Canada Handbook.
16. Future-oriented financial information reported in, or relied on, in preparing this Twenty-Eighth Report is based on Management's assumptions regarding future events. Actual results will vary from these forecasts and such variations may be material.
17. The Monitor has prepared this Twenty-Eighth Report in support of the October 28 Motion for approval of the Litigation Funding Agreement. The Twenty-Eighth Report should not be relied on for any other purpose.
18. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars.
19. Capitalized terms not otherwise defined herein have the meanings defined in previous reports of the Monitor, the Plan and Orders of the Court issued in the CCAA Proceedings.

REMAINING ESTATE ACTIONS

20. The Remaining Estate Actions continued to progress in 2021. A timetable was established for the completion of the remaining steps in the action to bring it to trial in February 2023, subject to court availability. However, due to the delays in entering into the Litigation Funding Agreement outlined in the Aziz Affidavit, Cash Store was unable to meet the timetable and a new timetable will have to be re-established. The Remaining Estate Actions are being case managed by the Honourable Mr. Justice McEwen.

Summary Judgment Motions Dismissed

21. The Defendants brought motions for summary judgment dismissing the actions arguing that the Remaining Estate Actions were not commenced within the applicable limitations period. The motions for summary judgment were heard on October 4-5, 2018.
22. Justice McEwen released his decision dismissing the summary judgment motions on April 5, 2019. Justice McEwen held that, given the very limited record put forward by the Defendants, he could not determine the matter in a fair and just manner by way of summary judgment. His Honour explained that the actions involve a complicated factual matrix involving professional negligence and a significant damages claim and thus a full evidentiary record including *viva voce* evidence of the parties would be required to achieve a fair and just result. Justice McEwen held that there exists a genuine issue respecting discoverability that will require a trial on each of the three Remaining Estate Actions.

23. The Defendants each sought leave to appeal the decision of Justice McEwen to the Divisional Court. These motions were each dismissed on September 19, 2019.

Recovery of Costs

24. The Defendants were ordered to pay costs of \$300,000 for the unsuccessful summary judgment motion, and costs of \$24,000 for the unsuccessful leave to appeal motion. These amounts were paid to counsel for the Litigation Trustee by the Defendants.

Request for Mini-Trial

25. During a case conference on October 1, 2019, the Defendants requested a mini-trial on the discrete issue of limitations, which was opposed by Cash Store. Justice McEwen requested brief written submissions, which were submitted by the parties on or before October 11, 2019.
26. On December 17, 2019, Justice McEwen issued his endorsement dismissing the request for a mini-trial. Justice McEwen noted, among other things, that the case involves complicated liability analyses and overlap between the issues of negligence and discoverability and, as such, a trial on all issues is preferable.

LITIGATION FUNDING AGREEMENT

27. Cash Store requires funding to progress the Remaining Estate Actions to trial.
28. Accordingly, the Litigation Trustee entered into the Litigation Funding Agreement with Augusta Pool 4 Canada Limited (the “**Augusta Funder**”) on September 8, 2021 to finance the anticipated disbursements necessary to continue the Remaining Estate Actions.
29. Article 3 of the Litigation Funding Agreement establishes a payment waterfall and provides the following priority of payments for litigation proceeds recovered in the Remaining Estate Actions:

- (a) the Augusta Funder with a first priority for repayment of amounts drawn under the facility and any amounts paid for court ordered costs;
 - (b) payment of certain pre-funded litigation costs to Cash Store;
 - (c) a *pro rata* and *pari passu* payment of the Augusta Funder's contingent return, the deferred and contingent ATE insurance payments and the contingency payments to Counsel; and
 - (d) payments to the Cash Store estate of the remainder of the litigation proceeds.
30. The Litigation Funding Agreement also provides that that approximately \$3.8 million currently held by the Monitor in the estate's restricted bank account will be excluded from the payment waterfall. This amount will be distributed by the Monitor to the estate's creditors, including Cash Store's largest secured creditor, the Ad Hoc Committee of Noteholders (the "**Ad Hoc Committee**"). The amount distributed to the estate's creditors will be less a payment of CDN\$250,000 to Goodmans LLP ("**Goodmans**"), counsel to the Ad Hoc Committee, in order to pay outstanding invoices for services rendered in connection with litigation trust matters including the development and negotiation of the proposed Litigation Funding Agreement, and to fund a go-forward retainer for Goodmans. Goodmans has advised the Monitor that this payment has been unanimously approved by the members of the Ad Hoc Committee.
31. Pursuant to the Litigation Funding Agreement, the Augusta Funder has also agreed to fund any Court ordered costs awarded in favour of the Remaining Defendants to a maximum of \$8.5 million.
32. According to the Aziz Affidavit, the Remaining Estate Actions against the Defendants cannot proceed without additional funding for disbursements and adverse cost or security for costs orders. The Monitor agrees with this assessment.

33. The Remaining Estate Actions continue to be the only source of potential recovery remaining for certain Cash Store creditors. Pursuant to the terms of the Plan, if applicable, the estate recoveries on the Remaining Estate Actions will benefit:
- (i) the Consumer Class Action Members (as defined in the Plan) in the amount of 10% of any proceeds realized in respect of the Remaining Estate Actions against KPMG and Canaccord up to an aggregate of \$3,000,000, and, thereafter, 5% of any such proceeds in excess of \$3,000,000, after the payment of the fees and expenses of Litigation Counsel and the Litigation Trustee and the cost of any alternative litigation funding arrangements (which would include the agreements with the Augusta funder) (the “**Net Subsequent Litigation Proceeds**”); and
 - (ii) the Secured Noteholders, who will receive the remaining portion of the Net Subsequent Litigation Proceeds paid into Subsequent Cash on Hand to be distributed in accordance with the Plan up to the Secured Noteholder Maximum Claim Amount (as defined in the Plan).
34. Approval of the Litigation Funding Agreement will permit the Remaining Estate Actions to proceed through to trial while protecting the reasonable partial indemnity litigation costs of the Defendants.
35. While the Monitor has not been involved in the day-to-day efforts to obtain litigation funding, the Monitor has been kept apprised of the efforts over time.
36. The Monitor notes that a litigation funding agreement like the one required in this case is a highly specialized financial transaction that requires extensive negotiation.

37. The Monitor has reviewed the proposed Litigation Funding Agreement and supports the October 28 Motion for approval of the Litigation Funding Agreement. The Litigation Funding Agreement has been negotiated between sophisticated and well-resourced parties acting at arm's length. Cash Store has undertaken a thorough canvass of the market. It appears from the evidence filed by the proposed funder that it has the financial wherewithal to perform its obligations under the Litigation Funding Agreement. Continuation of the Remaining Estate Actions is in the best interest of Cash Store and its stakeholders, and such continuation does not appear to be possible without the Litigation Funding Agreement.

Recommendation

38. The Monitor recommends that this Court approve the Litigation Funding Agreement as requested.
39. The Monitor respectfully submits to the Court this Twenty-Eighth Report.

Dated this 26th day of October, 2021.

FTI Consulting Canada Inc.
The Monitor of 1511419 Ontario Inc.,
formerly known as The Cash Store Financial Services Inc. and Related Applicants



Greg Watson
Senior Managing Director