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

June 3, 2014

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Orestes Pasparakis
Tel: 1.416.216.4815
orestes.pasparakis@nortonrosefulbright.com

Alan B. Merskey
Tel: 1.416.216.4805
alan.merskey@nortonrosefulbright.com
Fax:1.416.216.3930

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

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Osler Hoskin & Harcourt LLP P. O. Box 50, 1 First Canadian Place Toronto ON M5X 1B8 Marc Wasserman Email: mwasserman@osler.com Jeremy Dacks Email: jdacks@osler.com Patrick Riesterer Email: priesterer@osler.com Karin Sachar Email: ksachar@osler.com	416.362.2111 416.862.4908 416.862.4923 416.862.5947 416.862.5949	416.862.6666	Counsel to the Chief Restructuring Officer ("CRO")
Rothschild Neil Augustine Email: nycprojectoilers@rothschild.com Bernard Douton Email: nycprojectoilers@rothschild.com	212.403.3500 212.403.5411 212.403.5254	212.403.3501	Financial Advisors to the CRO
Cassels Brock & Blackwell LLP 2100 Scotia Plaza, 40 King Street West Toronto, Ontario M5H 3C2 Wendy Berman Email: wberman@casselsbrock.com Ryan C. Jacobs Email: rjacobs@casselsbrock.com Lara Jackson Email: ljackson@casselsbrock.com	416.869.5300 416.860.2926 416.860.6465 416.860.2907	 416.640.3107 416.640.3189 416.640.3108	Counsel to the Applicants
FTI Consulting Canada Inc. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto ON M4K 1G8 Greg Watson Email: greg.watson@fticonsulting.com Jeff Rosenberg Email: jeffrey.rosenberg@fticonsulting.com	416.649.8077	416.649.8101	Monitor

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
McCarthy Tétrault Suite 5300, TD Bank Tower Box 48, 66 Wellington Street West Toronto ON M5K 1E6 James Gage Email: jgage@mccarthy.ca Heather Meredith Email: hmeredith@mccarthy.ca	416.362.1812 416.601.7539 416.601.8342	416. 868.0673	Counsel to the Monitor
Goodmans LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto ON M5H 2S7 Robert J. Chadwick Email: rchadwick@goodmans.ca Brendan O'Neill Email: boneill@goodmans.ca	416. 979.2211 416.597.4285 416.849.6017	416. 979.1234	Counsel to *Ad Hoc* Noteholders
Norton Rose Fulbright Canada LLP Suite 3800, Royal Bank Plaza, South Tower 200 Bay Street, P.O. Box 84 Toronto, ON M5J 2Z4 Orestes Pasparakis Email: orestes.pasparakis@nortonrosefulbright.com Alan Merskey Email: Alan.Merskey@nortonrosefulbright.com Virginie Gauthier Email: virginie.gauthier@nortonrosefulbright.com Alex Schmitt Email: alexander.schmitt@nortonrosefulbright.com	416.216.4000 416.216.4815 416.216.4805 416.216.4853 416.216.2419	416.216.3930	Counsel to Coliseum Capital Management

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Bennett Jones LLP (Calgary Office) 4500 Bankers Hall East, 855 2nd Street SW Calgary, AB T2P 4K7 Grant Stapon Email: stapong@bennettjones.com Kenneth Lenz Email: lenzk@bennettjones.com **Bennett Jones LLP (Toronto Office)** Suite 3400, One First Canadian Place P.O. Box 130, Toronto, ON M5X 1A4 Robert W. Staley Email: StaleyR@bennettjones.com Raj S. Sahni Email: sahnir@bennettjones.com Jonathan Bell Email: bellj@bennettjones.com	403.298.3100 403.298.3204 403.298.3317 416.777.4857 416.777.4804 416 777 6511	403.265.7219 416.863.1716 416 863 1716	Lawyers for 0678786 B.C. Ltd. (formerly the McCann Family Holding Corporation)
McMillan LLP Brookfield Place, 181 Bay Street, Suite 4400 Toronto, ON M5J 2T3 Adam C. Maerov Email: adam.maerov@mcmillan.ca Brett Harrison Email: brett.harrison@mcmillan.ca	403.531.4700 403.215.2752 416.865.7932	416.865.7048	Counsel to Trimor Annuity Focus LP #5
Computershare Trust Company of Canada and Computershare Trust Company, NA 100 University Avenue, 11th Floor, North Tower Toronto, ON M5J 2Y1 Patricia Wakelin, Corporate Trust Officer Email: patricia.wakelin@computershare.com Shelley Bloomberg, Manager, Corporate Trust Email: Shelley.Bloomberg@computershare.com Mohanie Shivprasad, Associate Trust Officer Email: mohanie.shivprasad@computershare.com Tina Vitale, Senior VP, Corporate Trust	 416.263.9317 416.263.9322 212.805.7345	416.981.9777 514.981.7677	Computershare Trust Company, N.A., as Indenture Trustee, and Computershare Trust Company of Canada, as Collateral Trustee and Indenture Trustee ("Computershare")

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Email: tina.vitale@computershare.com John Wahl, Corporate Trust Officer Email: john.wahl@computershare.com	646.334.3350 (C) 303.262.0707		
Dickinson Wright LLP 199 Bay Street, Suite 2200, P.O. Box 447 Commerce Court Postal Station Toronto, ON M5L 1G4 Michael A. Weinczok Email: mweinczok@dickinsonwright.com David P. Preger Email: Dpreger@dickinsonwright.com	 416.777.4026 416.646.4606	416-865-1398	Lawyers for Computershare and agents for Perkins Coie LLP, US counsel to Computershare
Perkins Coie LLP 30 Rockefeller Plaza 22nd Floor New York, New York 10112-0085 United States of America Tina N. Moss Email: TMoss@perkinscoie.com Ronald T. Sarubbi Email: RSarubbi@perkinscoie.com	 212.262.6910 212.262.6914	 212.977.1648 212.977.1644	US Counsel to Computershare
Borden Ladner Gervais Centennial Place, East Tower 1900, 520 – 3rd Ave SW Calgary, AB, T2P 0R3 Josef G.A. Kruger Email: jkruger@blg.com Patrick T. McCarthy Email: PMcCarthy@blg.com	403.232.9500 403.232.9563 403.232.9441	403.266.1395	Counsel to the Trustee in Bankruptcy for Assistive Financial Corp.
Duncan Craig LLP 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta T5J 3V9 Darren R. Bieganek, Q.C. Email: dbieganek@dcllp.com	780.428.6036 780.441.4386	780.428.9683 780.969.6381	Counsel to Mr. Cameron Schiffner

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Harrison Pensa LLP 450 Talbot Street London, ON N6A 5J6 Jonathan Foreman Email: jforeman@harrisonpensa.com	519. 679.9660 519.661.6775	519.667.3362	Counsel to the Plaintiff in the class action of *Timothy Yeoman v. The Cash Store Financial Services Inc. et al.* (Court File No. 7908/12CP)
Koskie Minsky LLP 20 Queen Street West, Suite 900 P.O. Box 52 Toronto, ON M5H 3R3 Andrew J. Hatnay Email: ahatnay@kmlaw.ca James Harnum Email: jharnum@kmlaw.ca Adrian Scotchmer Email: ascotchmer@kmlaw.ca	 416.595.2083 416.542.6285 416.542.6292	 416.204.2872 416.204.2819 416.204.4926	Agents for Harrison Pensa, counsel to Timothy Yeoman (class plaintiff) (Court File No. 7908/12CP)
Siskinds LLP 100 Lombard Street, Suite 302 Toronto, ON M5C 1M3 Canada Charles M. Wright Email: charles.wright@siskinds.com Serge Kalloghlian Email: serge.kalloghlian@siskinds.com Alex Dimson Email: alex.dimson@siskinds.com	416.362.8334	416.362.2610	Lawyers for an Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiff in the Ontario Class Action against the Applicant

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Lax O'Sullivan Scott Lisus LLP Suite 2750, 145 King Street West Toronto, ON M5H 1J8 Canada Eric R. Hoaken Email: ehoaken@counsel-toronto.com **JJS Barristers** Suite 800, The Lancaster Building 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Canada Robert Hawkes, Q.C. Email: hawkesr@jssbarristers.ca	416.598.1744 416.645.5075 403.571.1544	416.598.3730 403.571.1528	Counsel for DirectCash Bank, DirectCash ATM Processing Partnership, DirectCash ATM Management Partnership, DirectCash Payments Inc., DirectCash Management Inc. and DirectCash Canada Limited Partnership ("DirectCash") who are co-defendants with The Cash Store Financial Services Inc. and The Cash Store Inc. (the "Cash Store") in class action (Court File No. 7908/12CP)
Omini Ventures Ltd. Bruce Cormie Email: muskytoe@hotmail.com			
L-Gen Management Inc. Vernon Nelson Email: vmnelson7@hotmail.com			
1396309 Alberta Ltd. Bruce Hull Email: bruce.hull@hotmail.com			

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Hordo Bennett Mounteer LLP 1400 – 128 West Pender Vancouver, B.C. V6B 1R8 Paul R. Bennett Email: pb@hbmlaw.com Mark W. Mounteer Email: mm@hbmlaw.com	 604.639.3668 604.639.3667	604.639.3681	Counsel for the Plaintiffs in 8 class proceedings commenced against Cash Store:[1]
William E. Aziz Email: baziz@bluetreeadvisors.com			
Dentons Canada LLP 850 - 2nd Street SW 15th Floor, Bankers Court Calgary Alberta T2P 0R8 David W. Mann Email: david.mann@dentons.com	 (403) 268-7097		Counsel to DirectCash (as defined above) in all matters pertaining to this restructuring other than the class action matter.
Burnet, Duckworth & Palmer LLP 2400, 525 – 8th Avenue SW Calgary, Alberta T2P 1G1 Craig O. Alcock Email: craigalcock@bdplaw.com	 (403) 260-0120	 (403) 260-0332	Counsel for Virtutone Networks Inc., creditor of Cash Store Financial Services Inc.

[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

Party/Counsel	*Telephone*	*Facsimile*	*Party Represented*
Gowling Lafleur Henderson LLP 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, Ontario M5X 1G5 Canada Neil Abbott Email: neil.abbott@gowlings.com	416-862-4376		Counsel to GMR Marketing, A Division of Omnicom Canada Inc.
Lenczner Slaght 130 Adelaide St W., Suite 2600 Toronto, ON Canada M5H 3P5 Peter Griffin Email: pgriffin@litigate.com	416-865-9500 416-865-2921	416-865-9010	Counsel to the Board of Directors of Cash Store Financial

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 [...].

---

[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]

---

[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]

---

[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

---

[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]

---

[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:

---

[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

---

[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

---

[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

---

[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]

---

[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?

---

[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

---

[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

---

[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:

---

[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.

---

[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

---

[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.

---

[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

---

[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:

---

[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.

---

[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]

---

[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

---

[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:

---

[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;

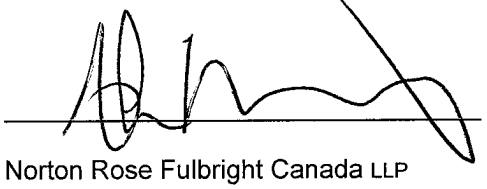
(iv) neither Trimor nor McCann shall take any steps to collect any advances or loans made to the Applicants' customers, irrespective of whether such loans or advances have been designated in the name of Trimor or McCann or otherwise

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. (6^{th}) 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

---

[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

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower
Suite 3800, 200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4

Orestes Pasparakis
Tel: 1.416.216.4815
Alan B. Merskey
Tel: 1.416.216.4805
alan.merskey@nortonrosefulbright.com

Fax: 1.416.216.3930
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