

**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

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**MEMORANDUM OF FACT AND LAW**

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April 29, 2014

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TO: SERVICE LIST

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**MEMORANDUM OF FACT AND LAW OF THE CHIEF RESTRUCTURING OFFICER  
OF THE APPLICANTS ADDRESSING THIRD PARTY LENDER CONCERNS**

**PART I – OVERVIEW**

1. The Cash Store Financial Services Inc. ("Cash Store Financial") and the other applicants listed above (the "Applicants") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA" or the "Act") by an Amended and Restated Initial Order dated April 15, 2014 (the "Initial Order"). The relief requested by the Applicants was supported by the Affidavit of Steven Carlstrom, sworn April 14, 2014 (the "Carlstrom Affidavit") and a detailed factum outlining the factual and legal arguments supporting the relief requested (the "Initial Order Factum").

2. The filing by the Applicants for protection from their creditors under the CCAA was overseen by the Special Committee of the Board of Directors of Cash Store Financial (the "Special Committee"). Pursuant to the Initial Order, the role of the Special Committee was

transitioned to the Chief Restructuring Officer (“CRO”).<sup>1</sup> The Initial Order granted the authority to the CRO to direct the operations and management of the Applicants and the restructuring.

3. The Memorandum of Fact and Law set out below is filed by the CRO in support of the proposition that the protections currently provided for the Applicants’ third party lenders (“TPLs”) in the Initial Order, or other similar protections negotiated among the Applicants’ economic stakeholders, are sufficient to preserve the pre-filing *status quo* and to balance the competing interests of stakeholders in this proceeding. Moreover, the Applicants reject certain serious allegations regarding the failure of the Applicants to provide full and plain disclosure in filing for protection under the CCAA that have been made by one of the TPLs (McCann) and that are manifestly unsupported by the record in this proceeding, including the evidence filed by McCann itself.

4. In particular, in light of the considerable instability and the competing demands on the Applicants’ businesses from multiple stakeholders, the Applicants submit that the CCAA filing was made with the benefit of the fullest possible transparency in relation to all of the issues facing the Applicants, with a view to ensuring that an appropriate balance was struck between the competing claims of the many stakeholders in this proceeding. The relief sought by McCann, including a super-priority charge in the amount of \$42 million, (as described further below) would significantly alter this *status quo* and deny the Applicants the breathing space they need. In particular, it would tip the scales in favour of McCann, to the detriment of numerous other stakeholders (including the Senior Secured Lenders and the Senior Secured Noteholders whose security over all of the Applicants’ Property clearly predates any advances made by the TPLs).

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<sup>1</sup> Affidavit of William Aziz, sworn April 27, 2014 [Aziz Affidavit], para. 4.

5. McCann's requested relief goes far beyond any purported objective of preserving the *status quo* pending resolution of the proper characterization of the TPL Funds. Instead, the requested relief would effectively predetermine this issue without the benefit of a full and fair hearing on the issues. Such relief would be premature and is unjustified by the materials available to the Court to date. Moreover, the requested relief could undermine the ability of the Applicants to continue in business at all. This would preclude any going-concern restructuring solution to their current financial difficulties, to the significant prejudice of numerous other stakeholders in this proceeding. In particular, the DIP Facility was negotiated on the basis of the magnitude and priority of the Charges granted in the Initial Order. McCann had proper notice of the Initial Order and of the priority to be granted to the DIP Lender's Charge.<sup>2</sup>

6. None of the substantive allegations made by McCann have been determined on the merits and must be determined on the basis of a full canvass of the issues. McCann itself recognizes this fact.<sup>3</sup> Moreover, it is the Applicants' view, which is shared by other parties in this proceeding, that the McCann allegations that the TPL Funds were required to be held on any form of trust at any relevant time face significant legal obstacles.<sup>4</sup> The Applicants do not consider that there was any "misappropriation" of the TPL Funds by the Applicants, although there may have been a breach (as fully disclosed in the Carlstrom Affidavit and the Initial Order

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<sup>2</sup> Endorsement of April 23, 2014 (the "Initial Order Endorsement"), para. 9

<sup>3</sup> Factum of the Respondent, 0678786 B.C. Ltd. (Formerly the McCann Family Holding Corporation), dated April 25, 2014 [McCann Factum], para. 50.

<sup>4</sup> See, for example, Memorandum of Fact and Law of Coliseum Capital Partners L.P., Coliseum Capital Partners II, LP and Blackwell Partners LLC, dated April 27, 2014. See also Second Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated April 27, 2014 [Second Monitor's Report] at para. 32(iii).

Factum) of the contractual obligation to use the funds for the purposes contemplated under the broker agreements (the “Broker Agreements”) between the Applicants and the TPLs.<sup>5</sup>

7. The Applicants are therefore of the view, for all the reasons set out below, that the interests of fairness do not dictate that the TPLs should obtain any greater protections under the Initial Order than have already been granted on the basis of the *status quo* at the time of filing, or such similar protections that can be negotiated among the Applicants’ economic stakeholders. To the contrary, the TPLs are suffering no greater prejudice than any of the other stakeholders of this business that stand to recover less than the full amounts owing to them under their arrangements with the debtor companies.

## **PART II - ANALYSIS**

### **Relief Sought by McCann**

8. McCann filed a factum in these proceedings on April 25, 2014, seeking wide-ranging relief, including an increase to the TPL Charge to a total amount of \$42 million to rank ahead of all other security interests in the Applicants’ Property (including the Charges granted under paragraph 53 of the Initial Order), an order requiring the Applicants to cease using TPL Funds to make new brokered loans (the “Lending Prohibition”), and a requirement to pay all loan proceeds and all available cash on hand into a segregated trust account (the “Trust Account Requirement”).<sup>6</sup>

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<sup>5</sup> Initial Order Factum, para. 62; Carlstrom Affidavit, paras. 80 and 83.

<sup>6</sup> McCann Factum, para. 63.

9. The basic premise for this relief is the allegation that Cash Store “misappropriated” TPL Funds and that the Initial Order works substantial injustice against the TPLs.<sup>7</sup>

### **CCAA Designed to Preserve the Status Quo**

10. It is trite law that the purpose of the CCAA and the objective of the stay of proceedings under the CCAA are designed to preserve the *status quo* at the time of filing. However, in the context of the claims for relief asserted by McCann in this proceeding, it is worth reiterating these principles, as articulated in leading CCAA case law:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable [a] plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. *In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.* [emphasis added]<sup>8</sup>

11. A key purpose for preserving the *status quo* by means of a CCAA stay of proceedings is to ensure that no creditors or stakeholders obtain an unfair advantage against any other creditors or stakeholders while the company is attempting to reorganize its affairs.<sup>9</sup> In determining how best to address McCann’s request for relief, it is essential not to lose sight of these basic CCAA principles.

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<sup>7</sup> McCann Factum, paras. 38 to 41.

<sup>8</sup> *Re Lehndorff* (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Gen. Div.).

<sup>9</sup> *Re Comstock Canada Ltd.*, 2013 ONSC 6043 at para. 17, citing *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C.S.C.).

12. The *status quo* at the time of filing was fully described in the Carlstrom Affidavit. In particular, the TPLs had advanced a total of \$42 million under the Broker Agreements. These advances were made under Broker Agreements that did not require such funds to be kept segregated.<sup>10</sup> Moreover, although the Broker Agreements do not require Cash Store to do so, Cash Store has been making voluntary monthly payments in the amount of 17.5% to the TPLs as “Monthly Lender Distributions” to provide them with a return on their TPL Funds advanced to Cash Store.<sup>11</sup> Similarly, Cash Store had been employing various mechanisms to protect the TPLs against credit losses in relation to the brokered loans made with TPL Funds.<sup>12</sup>

13. Finally, on the several occasions the “Restricted Cash”, as revealed in Cash Store’s accounting records after month end reconciliations, had exceeded total cash, Cash Store had transferred its own receivables from its direct lending portfolio to the TPLs to offset the accounting imbalance and notionally reimburse the TPLs to the extent that Cash Store had applied TPL Funds to its own operations.<sup>13</sup> In March 2014, when it was apparent that Restricted Cash at month end would likely exceed total cash, Cash Store would normally have conducted its monthly reconciliations several weeks after month end and then made such a receivables transfer. However, in light of Cash Store’s liquidity issues, Cash Store’s Audit Committee and the Special Committee were required to consider whether it was still appropriate for Cash Store to make the receivables transfer to the TPLs.<sup>14</sup>

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<sup>10</sup> Carlstrom Affidavit, para. 79.

<sup>11</sup> Carlstrom Affidavit, para. 84.

<sup>12</sup> Carlstrom Affidavit, para. 84.

<sup>13</sup> Carlstrom Affidavit, para. 80.

<sup>14</sup> Carlstrom Cross, Q. 257, p. 61.

14. At this point, Cash Store was faced with a dilemma. On the one hand, it was faced with potential allegations that the TPL Funds were subject to a trust and that the TPLs intended to require the TPL Funds to be segregated and eventually to be repaid to them at the end of the notice period under the Broker Agreements. Although Cash Store did not believe that the TPL Funds were subject to a trust, this issue likely could not be resolved without litigation. On the other hand, if Cash Store had made the receivables transfer to the TPLs to reduce its potential exposure to the TPLs, such transfer would erode the security interests of the Senior Secured Lenders and the Senior Secured Noteholders, and in the circumstances, there was a significant risk that this transaction would be viewed as a preference or transfer at undervalue. There was no means by which this dilemma could be resolved outside a CCAA filing.

15. Post-filing, business with the TPLs is intended to be conducted on the same basis as it was in the pre-filing period. The TPLs are receiving the 17.5% Monthly Lender Distribution in accordance with the terms of the Initial Order. In addition, the Initial Order sets out certain additional Capital Protection measures that were intended to preserve the *status quo*.<sup>15</sup> The only pre-filing measures that were previously taken and that are not currently being taken are the transfers of direct lending receivables.<sup>16</sup>

### **Trust Allegations Face Significant Legal Obstacles**

16. The relief sought in the McCann Factum is not in fact predicated on the existence of any express trust, which is consistent with the Applicants' position in its Initial Order Factum that the Broker Agreements do not contain any trust language, do not exhibit the legal indicia of

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<sup>15</sup> Carlstrom Affidavit, para. 84(2)(a).

<sup>16</sup> Carlstrom Affidavit, para. 80.



a trust and do not impose any fiduciary or other trust-like duties on Cash Store.<sup>17</sup> Instead, the McCann Factum states that, while it is unnecessary to resolve issues of entitlement at this time, the TPLs will contend that the TPL Funds are subject to an “equitable trust”.<sup>18</sup>

17. The “equitable trust” asserted by McCann is based on the Supreme Court of Canada’s decision in *Soulos v. Korkontzilas*, a decision that sets out a four-part test for the award of a constructive trust as a remedy for wrongful conduct.<sup>19</sup>

18. The various allegations of trust advanced by McCann appear to be based on the characterization of Cash Store as broker for the TPLs.<sup>20</sup> However, this is not the arrangement that is evidenced on the face of the Broker Agreements. In fact, the arrangement with the TPLs is, on paper, structured on the basis that Cash Store acts as the broker for the customers (i.e. the borrowers), not the TPLs.<sup>21</sup>

19. It is clear that the TPL’s claim for an equitable trust will be faced with some significant legal challenges. In particular, the alleged breach of equitable duty that is stated to be the basis for the trust is framed as a breach of the contractual obligation under the Broker Agreements to handle the TPL Funds as agreed in those contracts.<sup>22</sup> The source of any alleged equitable duty will have to be established. The proposed analogy to a securities broker for the

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<sup>17</sup> Initial Order Factum, paras. 53 to 65. This absence of trust language is noted by the Monitor in the Second Monitor’s Report, para. 32(iii).

<sup>18</sup> McCann Factum, para. 50.

<sup>19</sup> [1997] S.C.J. No. 52 at para. 45.

<sup>20</sup> See, for example, Affidavit of Murray McCann, sworn April 22, 2014 [McCann Affidavit], para. 4. McCann Factum, para. 19, para. 52.

<sup>21</sup> The Broker Agreement between McCann Family Holding Corporation and The Cash Store Inc., dated June 19, 2012, states in its first recital: “Whereas the Broker is in the business of acting as a broker for its customers in obtaining short-term loans for its customers...” (emphasis added): see Carlstrom Affidavit, Exhibit H.

<sup>22</sup> McCann Factum, para. 52.

purposes of invoking similar duties and protections that are imposed on licensed securities brokers in favour of their customers under the *Bankruptcy and Insolvency Act* appears, at best, to be novel.<sup>23</sup>

20. In addition, the TPLs face significant hurdles in demonstrating any proprietary link between the initial \$42 million advanced (even if this amount was advanced in trust, which is denied) and the cash held by Cash Store as of the date of filing.<sup>24</sup> Cash Store's evidence demonstrates that the TPL Funds have always been commingled with the Cash Store's general operating cash. Moreover, the basis on which the TPL Funds were originally provided is premised on their continual deployment, repayment, and redeployment for short term loans.<sup>25</sup>

21. Finally, the TPLs face additional legal challenges in establishing an equitable or constructive trust over Property of Cash Store, given that all of Cash Store's Property is subject to the security interests in favour of the Senior Secured Lenders and the Senior Secured Noteholders.<sup>26</sup> The security interest in favour of the Senior Secured Noteholders was granted on January 31, 2012, which predates most, if not all, of the initial advances of the \$42 million by the TPLs.<sup>27</sup>

22. In light of these significant challenges, the balancing of prejudices required in any CCAA proceeding, and the fact that the Initial Order (or other similar negotiated protections)

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<sup>23</sup> McCann Factum, paras. 58 to 60.

<sup>24</sup> See, for example, *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at paras. 228-232, per Cromwell J.

<sup>25</sup> Carlstrom Affidavit, paras. 78 and 79.

<sup>26</sup> Carlstrom Affidavit, para. 71. See *Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd.*, 2009 ABCA 99 at paras. 20-21.

<sup>27</sup> Carlstrom Affidavit, para. 69. The Broker Agreements under which the TPL advances were granted are variously dated from January 31, 2012 to June 19, 2012, in McCann's case: Carlstrom Affidavit, Exhibits G, H, I, J, K.

will effectively preserve the *status quo* in relation to the TPLs and the other Cash Store stakeholders, the Applicants are of the view that the relief sought by McCann is not justified in order to protect its interests and preserve fairness. In fact, granting the proposed super-priority TPL Charge in the amount of \$42 million, as well as imposing the Lending Prohibition and the Trust Account Requirement, would effectively alter the *status quo* in favour of McCann, to the detriment of other stakeholders, particularly the Senior Secured Lenders and the Senior Secured Noteholders. Moreover, it would, in effect, pre-determine the entitlement issues that are acknowledged by all parties to require resolution in a full hearing at a later date.

### **No Failure to Disclose**

23. In its Factum, McCann makes a number of serious allegations regarding the alleged failure of the Applicants to disclose certain matters upon filing for the Initial Order. However, McCann does not seek any particular relief associated with these allegations. Given that each and every such allegation of non-disclosure can be met by reference to specific paragraphs in the Carlstrom Affidavit or the Initial Order Factum, or both, these allegations seem to be designed, at a minimum, to add colour to McCann's request for relief, and at worst, to attempt to influence this Court in McCann's favour.

24. For the reasons explained below, the disclosure provided by the Applicants met and likely exceeded the realistic standard of disclosure that applies in proceedings of this nature.<sup>28</sup> In fact, the volume of the materials filed in support of the Initial Order, the detailed disclosure regarding all of the issues facing the Applicants and the extensive submissions in the Initial Order Factum to support the Court's jurisdiction to grant the Initial Order, demonstrate a

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<sup>28</sup> See, for example, *Re Philip's Manufacturing Ltd.* (1991), 60 B.C.L.R. (2d) 311 (S.C.) at p. 314, cited in *Re Hayes Forest Services Ltd.*, 2008 BCSC 1256 at para. 7.

*bona fide* attempt by the Applicants to file for CCAA protection on the basis of the highest degree of transparency that was reasonably achievable in the circumstances. The law does not require any higher standard.

25. The following specific responses to the McCann non-disclosure allegations demonstrate that these allegations simply have no foundation in the record before the Court and that they therefore cannot have any impact on the Court's consideration of the relief requested by McCann.

a. Disclosure of So-Called "Misappropriation" of TPL Funds

26. McCann alleges that Mr. Carlstrom failed to disclose in his affidavit that, in breach of the Broker Agreement, and without McCann's knowledge, Cash Store had misappropriated the TPL's monies and spent them on the Applicants' operating and professional costs leading up to the filing. McCann further asserts that this was not disclosed to this Court in the evidence filed in support of the Initial Order and in support of the Amended and Restated Initial Order.<sup>29</sup>

27. This allegation is without foundation. The term "misappropriation", which is used repeatedly throughout the McCann Factum, is inflammatory and conclusory. The use of this term presupposes that, as a legal matter, the TPL Funds were subject to a trust obligation. This is the very issue that the Applicants fully and plainly acknowledged in their materials was in dispute between the parties and could not be resolved without further legal proceedings. Notably, the McCann Factum, as set out above, does not, in fact, assert that the TPL Funds are subject to an express trust at all. In any event, the full nature of this dispute was clearly and

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<sup>29</sup> McCann Factum, para. 27.

plainly disclosed both in the Carlstrom Affidavit and in the Initial Order Factum, together with the legal basis for the Applicants' position that no such trust obligation was imposed.<sup>30</sup>

b. Disclosure of Breach of Broker Agreements

28. McCann further alleges that the Applicants failed to disclose to the Court that Cash Store was in breach of the Broker Agreements when the Applicants sought permission to continue to make advances using funds provided by the TPLs.<sup>31</sup> Again, this allegation is directly and expressly refuted by the Carlstrom Affidavit and by the Initial Order Factum.

29. In particular, the Carlstrom Affidavit clearly and plainly stated that all of Cash Store's cash was commingled, and, in circumstances where Restricted Cash exceeded total cash (i.e. where the TPL Funds had been used during the course of a month by Cash Store to fund its ongoing operations), the practice of the company was to transfer receivables to the TPLs in order to free up Restricted Cash.<sup>32</sup> Mr. Carlstrom further stated that, as of March 31, 2014, it was estimated that Restricted Cash would exceed the amount of total cash in Cash Store's accounts.<sup>33</sup> In other words, Cash Store had already applied some portion of Restricted Cash to its operating requirements.

30. In seeking the Initial Order, the Applicants stated that they were requesting the ability to use the existing cash on hand as of the date of filing even though it was likely that Restricted Cash exceeded Cash Store's total cash at the time of filing.<sup>34</sup> The Applicants further

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<sup>30</sup> See Carlstrom Affidavit, paras. 132 to 139. Initial Order Factum, paras. 42(h), paras. 53 to 65.

<sup>31</sup> McCann Factum, para. 28.

<sup>32</sup> Carlstrom Affidavit, paras. 80 to 83. See also Carlstrom Affidavit, para. 131.

<sup>33</sup> Carlstrom Affidavit, para. 83.

<sup>34</sup> Initial Order Factum, para. 53.

stated their legal position in the Initial Order Factum that the TPLs were unsecured claimants and in no worse position than any other unsecured claimant whose contractual rights to be paid are going unpaid as a result of the debtor's insolvency.<sup>35</sup>

31. Mr. Carlstrom's cross-examination, in which he stated that TPL Funds had been used for operating capital requirements, added certain details to the clear general disclosure he had provided in the Carlstrom Affidavit, but those details are entirely consistent that disclosure. Contrary to McCann's submission, the evidence given by Mr. Carlstrom in his cross-examination should have come as no surprise to McCann's counsel.<sup>36</sup> Moreover, Mr. Carlstrom's statements were made in the context of affirming Mr. Carlstrom's clear evidence, that was fully set out in his affidavit, that the TPL Funds were commingled – and had always been commingled – in the general accounts of Cash Store.<sup>37</sup>

c. Special Committee's Alleged Decision to Use Restricted Cash

32. McCann further alleges that the "Special Committee must have made the decision" to use the Restricted Cash knowing that Cash Store was in breach of the Broker Agreement and that "the company had misrepresented that it had segregated [McCann's] monies."<sup>38</sup> This allegation is answered by reference to the clear and plain disclosure that was provided with respect to the potential breach of the Broker Agreements addressed above.

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<sup>35</sup> Initial Order Factum, paras. 62 to 64.

<sup>36</sup> See McCann Factum, para. 29, citing Carlstrom Cross, Qs 258-273, pp. 61-63.

<sup>37</sup> Carlstrom Cross, Q. 264, p. 62.

<sup>38</sup> McCann Factum, para. 30.

33. This allegation of misrepresentation is based on two affidavits sworn by Sharon Fawcett, in her capacity as Secretary of McCann<sup>39</sup> and one affidavit sworn by Murray McCann, in his capacity as former President of McCann.<sup>40</sup> No party has had any opportunity to cross-examine these affiants.

34. The McCann Factum refers to discussions leading up to the execution of the Broker Agreement, and throughout Cash Store's administration of the TPL Funds, in which it was important to McCann that its funds be segregated from Cash Store's operating funds.<sup>41</sup> Ms. Fawcett then testifies that it was represented to McCann that, at the time the Broker Agreement was entered into, and pursuant to the terms of the Broker Agreement, all Restricted Cash would be placed in a "Designated Broker Bank Account", which would be kept separate and apart from Cash Store's general operating account.<sup>42</sup>

35. Despite the fact that the McCann Factum appears to point to a number of different statements to support this misrepresentation claim, when the various cross-references in the McCann Factum are disentangled, it is apparent that the source of this misrepresentation claim is found in one e-mail chain that does not, in fact, state what Ms. Fawcett alleges that it

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<sup>39</sup> Affidavit of Sharon Fawcett, sworn April 22, 2014 [Second Fawcett Affidavit]. Exhibit 1 to the Second Fawcett Affidavit is an affidavit of Sharon Fawcett sworn on April 11, 2014 [First Fawcett Affidavit], for the purpose of the injunction proceeding brought by McCann in the Alberta Court of Queen's Bench on the eve of the filing. On the issues of misrepresentation, the substance of the First Fawcett Affidavit and the Second Fawcett Affidavit is essentially the same.

<sup>40</sup> McCann Affidavit.

<sup>41</sup> McCann Factum, para. 17, referring to para. 7 of the First Fawcett Affidavit, which is "Exhibit 1" to the Second Fawcett Affidavit.

<sup>42</sup> McCann Factum, para. 18, referring to Second Fawcett Affidavit, para. 3 and Exhibit 2.

states.<sup>43</sup> In fact, it affirms the fact that the TPL Funds were not kept in a segregated account and that they were simply tracked separately for accounting purposes.

36. In particular, Ms. Fawcett refers to an e-mail chain between her and Michael Zvonkovic, who, at the time, was Cash Store's VP Financial Reporting. In that e-mail chain, Ms. Fawcett expressly asks whether the McCann TPL Funds are kept in a designated broker bank account, given that she has previously been told that the TPL Funds were the subject of monthly reconciliations. Mr. Zvonkovic clearly responds that "we've tried to combine all these accounts and not to have a designated broker bank account" (emphasis added). He then indicates that the funds are tracked separately in Cash Store's accounting system.<sup>44</sup>

37. Any alleged misrepresentation is not evident on the face of these documents, and certainly could not have indicated to the Special Committee or anyone else that McCann had not been told that the TPL Funds were commingled. In fact, these documents support the contrary position.

d. Alleged "False Representations" Regarding Chief Place of Business

38. The allegation that the Applicants "falsely represented" that their principal place of business is Ontario in order to have the Ontario Court assume jurisdiction<sup>45</sup> is unsupported by anything in the record. In fact, to the contrary, the Carlstrom Affidavit clearly disclosed that Cash Store's corporate headquarters and senior management are in Alberta, and that Cash Store's

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<sup>43</sup> Paragraph 18 of the McCann Factum refers to para. 3 of the Second Fawcett Affidavit, which refers to Exhibit "2" (an e-mail chain between Sharon Fawcett and Michael Zvonkovic) as the source of the alleged misrepresentation. Paragraph 17 of the McCann Factum refers to para. 7 of the First Fawcett Affidavit. Paragraph 7 of the First Fawcett Affidavit refers to the same e-mail chain that is Exhibit 2 to the Second Fawcett Affidavit.

<sup>44</sup> Second Fawcett Affidavit, Exhibit 2.

<sup>45</sup> McCann Factum, para. 43(a).



registered office is in Ontario. A chart demonstrated that by far the greatest number of Cash Store branches are located in Ontario (176).<sup>46</sup> Moreover, 470 employees are located in Ontario.<sup>47</sup> The Carlstrom Affidavit also discussed extensively the regulatory issues affecting the Ontario aspect of Cash Store's lending business and stated that addressing these issues would be a priority in the restructuring.<sup>48</sup>

39. Section 9(1) of the CCAA provides that an application for an Initial Order can be brought in the court of the province where the debtor has either its head office or its chief place of business. If the two places are different, either province has jurisdiction over the proceeding.<sup>49</sup>

e. Additional Claims of Alleged Non-Disclosure

40. Any allegations by McCann to the effect that the Special Committee "took steps" to ensure that the owners of the Restricted Cash were not apprised of the "misrepresentations" in order to enable Cash Store to spend most of the Restricted Cash, or that the Special Committee prevented Ms. Fawcett or Mr. McCann from speaking to Cash Store management is simply belied by the extensive evidence of the numerous fruitless attempts by the financial advisors to the Special Committee to engage with McCann.<sup>50</sup>

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<sup>46</sup> Carlstrom Affidavit, para. 38.

<sup>47</sup> Carlstrom Affidavit, para. 23.

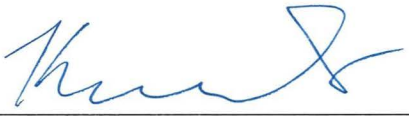
<sup>48</sup> Carlstrom Affidavit, paras. 93 to 102.

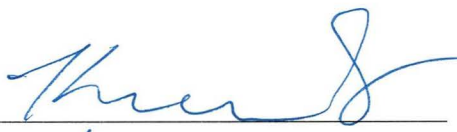
<sup>49</sup> See Houlden & Morawetz Commentary, The 2013-2014 Annotated Bankruptcy and Insolvency Act (Carswell), N§59.

<sup>50</sup> As stated in the Carlstrom Affidavit, McCann refused to sign an NDA, and despite numerous attempts by the Special Committee to engage with McCann, including sending McCann a further draft of an NDA, in early April, McCann was essentially unreachable at all relevant times. See Initial Order Endorsement, para. 9; Carlstrom Affidavit, para. 133.

Ultimately, despite McCann's failure to enter into an NDA, the Applicants allowed PWC full access to the records of Cash Store, without such protection. PWC's Draft Report was filed with the Court on April 25, 2014.<sup>51</sup> The CRO and the Company have not had a chance to fully engage with this Report or to correct any inaccuracies. As a result, the PWC Report, in its current form, should be given little or no weight.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
*per /* Jeremy Dacks

  
\_\_\_\_\_  
*per /* Marc Wasserman

Lawyers for the CRO of the Applicants

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<sup>51</sup> Aziz Affidavit, para. 19.

**Schedule “A”**

**LIST OF AUTHORITIES**

***Case Law***

1. *Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd.*, 2009 ABCA 99
2. *Re Comstock Canada Ltd.*, 2013 ONSC 6043
3. *Re Hayes Forest Services Ltd.*, 2008 BCSC 1256
4. *Re Lehndorff* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.)
5. *Soulos v. Korkontzilas*, [1997] S.C.J. No. 52
6. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

***Secondary Sources***

7. Houlden & Morawetz Commentary, The 2013-2014 Annotated Bankruptcy and Insolvency Act (Carswell)

**Schedule “B”**

***COMPANIES’ CREDITORS ARRANGEMENT ACT***

R.S.C. 1985, c. C-36, as amended

Jurisdiction of court to receive applications

**9.** (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

**IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

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

**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., Instalozans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd. Doing Business as "The Title Store"**

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**MEMORANDUM OF FACT AND LAW**

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