

**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.

Applicants

**MEMORANDUM OF FACT AND LAW OF THE DIP LENDER**

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**MEMORANDUM OF FACT AND LAW OF THE DIP LENDER**

**PART I - Overview**

1. The applicants (**Cash Store** or the **Company**) have decided to implement an orderly cessation of their brokered loan business. They will not broker new loans. The Company intends to continue collecting receipts from previously brokered loans (**Brokered Loan Receipts**). The Brokered Loan Receipts will be segregated pending a determination of stakeholder claims.
2. The primary third party lenders, Trimor Annuity Focus LP #5 (**Trimor**) and 0678786 B.C. Ltd. (**McCann**) (collectively, the **TPLs**), seek to predetermine those claims. The TPLs have brought motions seeking declarations that the Brokered Loan Receipts are their property. The TPLs seek immediate delivery of existing Brokered Loan Receipts. Significantly, the TPLs also seek the right to collect Brokered Loan Receipts themselves, independently of the Company.
3. The TPL demands are unfairly prejudicial to the rights of other stakeholders:
  - (a) Transferring segregated funds now will predetermine legal claims to the funds, on an incomplete record; and

(b) Permitting the TPLs to conduct direct collections interferes with and risks important Company assets – their customer relationships and lists.

4. The TPLs, on the other hand, can demonstrate little prejudice. The funds to which they lay claim will not be re-lent. Those funds will be segregated. Cash Store will continue collection activities.

5. By requesting the return of “their” alleged property, the TPLs are in effect requesting a lifting of the CCAA stay. The TPLs must demonstrate that the balance of prejudice favours their individual stakeholder interest over the interests of all other stakeholders. To satisfy this test, the TPLs face a very heavy onus. Given the prejudice to stakeholders at large, and the lack of prejudice to the TPLs, they are unable to meet this heavy onus.

## **PART II - FACTS**

6. This Court’s April 30, 2014 Order varying its Initial Order set out several new protections for Cash Store’s management of the Brokered Loan Receipts. Among other things:

(a) Cash Store is required to establish separate bank accounts to collect Brokered Loan Receipts linked to funds provided by each of McCann and Trimor;

(b) Cash Store is required to deposit all post-filing Brokered Loan Receipts linked to funds provided by McCann or Trimor into each TPL’s respective account; and

(c) Cash Store is barred from re-lending any of the Brokered Loan Receipts from Ontario going forward.

7. In practice, the effect of the April 30 Order is that Brokered Loan Receipts from Ontario are no longer being used in Cash Store’s business, but are being segregated

and held for the time being pending a determination of the claims of all interested parties.

8. Since the granting of the April 30 Order, the Company has also decided to cease all of its brokered loan business, as detailed in the Affidavit of William E. Aziz dated May 9, 2014.<sup>1</sup> The Company does not seek to use funds alleged to belong to TPLs at all in its ongoing business. Instead, the Company intends to continue collecting and segregating the Brokered Loan Receipts.<sup>2</sup>

9. The TPLs, however, seek to enforce alleged rights to the Brokered Loan Receipts now. In Trimor's Notice of Motion, returnable May 13, 2014, it seeks various relief including an order requiring Cash Store to forthwith "provide such assistance to Trimor as is necessary or desirable to facilitate the transfer of the administration of the Trimor-owned Loans and Advances to another service provider".<sup>3</sup> McCann, in its own Notice, seeks similar relief.<sup>4</sup>

10. The TPLs' claim, in their respective Notices of Motion, to being the "sole legal and beneficial owner" of the broad categories of assets set out in those Notices is complicated by a host of factors, including (a) the commingling of cash with the TPLs' knowledge of same; (b) Cash Store's practice of assigning "Restricted Cash" and loans to the TPLs to maintain rates of return; and (c) the interests of various other creditors and stakeholders, including the noteholders and the DIP Lender.

11. In this regard, Coliseum is the DIP Lender and a holder of portions of both the first lien charge and the secured notes. It is one of the largest economic stakeholders of the Company. Coliseum takes the position that the charges under its securities over the assets of Cash Store may include the Brokered Loan Receipts. Accordingly, it intends to contest the priority to the Brokered Loan Receipts at the appropriate time in these proceedings.

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<sup>1</sup> Affidavit of William E. Aziz sworn May 9, 2014 at paras 32-33, Motion Record of the Applicants at 18.

<sup>2</sup> Aziz Affidavit at para 37, Motion Record of the Applicants at 19.

<sup>3</sup> Trimor Notice of Motion at 2.

<sup>4</sup> McCann Notice of Motion at 2.

12. Moreover, Mr. Aziz explains in his Affidavit that a transfer of loan portfolios to other service providers is expected to have a destructive effect on Cash Store's business and the value of a potential sale transaction:

Furthermore, 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.<sup>5</sup>

### **PART III - LAW AND ARGUMENT**

13. The sole issue addressed below is whether the relief sought in the TPLs' Notices of Motion should be granted.

14. In essence, the TPLs each seek an order lifting the stay with respect to funds each TPL claims can be understood to be its property. The TPLs ask this Court to allow those funds out of the Company, without regard to possible claims from stakeholders other than the TPLs, even though these funds have been set aside. The TPLs further ask to assert individual collection and enforcements rights, rather than proceeding through the centralizing mechanism of the CCAA court.

15. The principles to be considered in determining whether to lift a CCAA-imposed stay are well-established. In *Canwest Global Communications Corp. (Re)*,<sup>6</sup> Justice Pepall explained that the Court's power to grant a stay "should be broadly construed to accomplish the legislative purpose of the CCAA and in particular to enable continuance of the company seeking CCAA protection".<sup>7</sup> Justice Pepall continued on to explain the importance of maintaining the status quo in a restructuring:

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<sup>5</sup> Aziz Affidavit at para 35, Motion Record of Applicants at 19.

<sup>6</sup> 2011 ONSC 2215.

<sup>7</sup> *Canwest, supra* at para 24.



Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole.<sup>8</sup>

16. A party seeking to have a stay lifted faces a “very heavy onus”.<sup>9</sup> This is so because “the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities”.<sup>10</sup>

17. 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.<sup>11</sup>

18. Justice Pepall also set out a list of situations in which courts may be willing to lift a CCAA stay, which include cases where:

- (a) a plan is likely to fail;
- (b) the applicant can show hardship or a need for payment;
- (c) lifting the stay is necessary to protect rights that could be affected by the passing of time;
- (d) after significant time has elapsed the insolvent company is no closer to a proposal than on commencement of proceedings;

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<sup>8</sup> *Canwest, supra* at para 25.

<sup>9</sup> *Canwest, supra* at para 27, citing *Canwest Global Communications Corp (Re)*, [2009] OJ No 5379 (SCJ) at para 32.

<sup>10</sup> *Timminco Ltd (Re)*, 2012 ONSC 2515 at para 16.

<sup>11</sup> *Timminco, supra* at para 17.

- (e) there is a risk of losing security, or of losing an opportunity to perfect a security interest; or
- (f) it is in the interests of justice to lift the stay.<sup>12</sup>

**Balance of prejudice favours maintaining status quo**

19. Given the cessation of the brokered loan business, and the existing TPL protections, the TPLs cannot be said to be subject to any significant prejudice in the circumstances. Indeed, the TPLs have advanced no evidence of prejudice. The funds the TPLs claim an interest in are being collected, segregated and set aside. While those funds may be subject to future claims from other stakeholders, they are in no current peril. Furthermore, since the funds are not being re-lent, the TPLs are not faced with any enhanced loan default risk, as a result of the Company's insolvency.

20. However, the TPLs' requests on this motion, if granted, will cause material prejudice to other stakeholders. In particular:

- (a) any stakeholder with competing claims to recover these funds, which have not yet been established in this Court to be the "property" of the TPLs, may be unable to advance such a claim; and
- (b) the Company will be required to tell its customers that another entity, possibly another service provider in the payday loan business, will be collecting on their loans. This scenario presents clear concerns regarding Cash Store's goodwill and its relationship to repeat customers, insofar as it is being asked to direct them to engage with a competitor or other party to facilitate the severance of the relationship with its TPLs.

21. As explained by Mr. Aziz, this re-direction of Cash Store's business presents significant issues for the Company in maximizing its potential value in a going-concern transaction.<sup>13</sup>

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<sup>12</sup> *Canwest, supra* at para 33.

22. Accordingly, the balance of prejudice clearly favours maintaining the status quo and allowing Cash Store to continue to collect, segregate and preserve the Brokered Loan Receipts. No realistic prejudice will be suffered by the TPLs in the interim.

**Balance of convenience favours continuing with April 30 Order protections**

23. The TPLs' request requires fairly drastic action by all parties in that it requires Cash Store to transfer multi-million dollar loan portfolios to different service providers. Although the TPLs state that this requested relief shall be carried out at the respective TPL's expense, it can hardly be said to be a convenient solution, especially in light of the minimal prejudice faced by the TPLs in the status quo.

24. In addition to the risk to the customer base, the transfer of Brokered Loan Receipts for collection may require operational steps by the Company, diverting its attention from restructuring activities.

25. In this respect, the TPLs' request is comparable to that made in *Timminco Ltd (Re)*, *supra*, by a CCAA claimant seeking to lift a stay so as to proceed with a class action to recover insurance proceeds that were not available to other claimants. In dismissing the motion, this Court stated as follows:

I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.<sup>14</sup>

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<sup>13</sup> Aziz Affidavit at para 35, Motion Record of the Applicants at 19.

<sup>14</sup> *Timminco*, *supra* at para 19.

26. Given the limited benefit (if any) of the TPLs' requested relief, the balance of convenience favours avoiding taking such drastic action, maintaining the status quo and allowing Cash Store to continue to collect the Brokered Loan Receipts for the foreseeable future. As was the case in *Timminco*, Cash Store's focus should be on a sale transaction.

### **No merit to lifting the stay**

27. Finally, for the reasons set out above, it is difficult to discern any true merit to the TPLs' requested relief.

28. The Brokered Loan Receipts are being preserved and collected.

29. While requiring Cash Store to return the Brokered Loan Receipts as they come in would certainly confer a benefit on the TPLs by removing the Brokered Loan Receipts from the eligible pool of funds to be distributed to other stakeholders, this is not a benefit that should be conferred on the TPLs until the question of the entitlement to these proceeds has been determined on a full evidentiary record at an appropriate time in this proceeding. The transfer they now seek is premature.

30. The TPLs' plan is cumbersome and could materially impair Cash Store's value in a possible transaction. There is little merit to conferring this benefit on the TPLs to the detriment of all other stakeholders and the restructuring process – whatever merit there is in this plan, it does not justify lifting the stay in the circumstances.

31. The TPLs have not met their very heavy onus in supporting their request to lift the stay in this case.

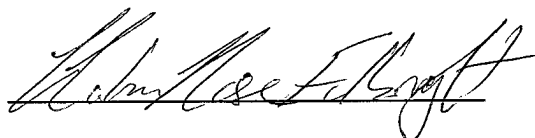
### **Not a proper case to lift the stay**

32. The scenarios in which a stay may be lifted set out by Justice Pepall in *Canwest*, *supra* and summarized above bear little resemblance to the present case. This is not a situation in which urgency, necessity or justice call for the Court to lift the stay, given the specialized protections in place to preserve the TPLs' interests during the restructuring.

As was the case in *505396 BC Ltd (Re)*,<sup>15</sup> there is simply no principled basis to lift the stay with respect to the TPLs in this case:

Furthermore, there is no sound reason to lift the stay order as against VFS. VFS retains its security over the assets and has a claim against those assets. As well, to lift the stay for VFS would adversely affect the interests of all of the stakeholders. Such an order is not justified in this case. There is no principled basis to exempt VFS from the stay order.<sup>16</sup>

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

A handwritten signature in black ink, appearing to read 'Robert Lee Fulbright', written over a horizontal line.

Norton Rose Fulbright Canada LLP

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<sup>15</sup> 2013 BCSC 1580.

<sup>16</sup> *505396*, *supra* at para 22.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215.
2. *Canwest Global Communications Corp (Re)*, [2009] OJ No 5379 (SCJ).
3. *Timminco Ltd (Re)*, 2012 ONSC 2515.
4. *505396 BC Ltd (Re)*, 2013 BCSC 1580.

**SCHEDULE "B"  
RELEVANT STATUTES**

N/A

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