

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1511419  
ONTARIO INC., FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES  
INC., 1545688 ALBERTA INC., FORMERLY KNOWN AS THE CASH STORE INC., 986301  
ALBERTA INC., FORMERLY KNOWN AS TCS CASH STORE INC., 1152919 ALBERTA  
INC., FORMERLY KNOWN AS INSTALOANS INC., 7252331 CANADA INC., 5515433  
MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

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**FACTUM OF THE APPLICANTS  
(Amended ASC Privilege Protocol)**

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December 11, 2015

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**TO: SERVICE LIST**

## PART I – OVERVIEW

1. The Cash Store<sup>1</sup> seeks an order (the “ASC Protocol Amendment Order”) amending the ASC Privilege Protocol – Email Records (the “Protocol”) that was approved by the Court on March 2, 2015. The Protocol explains the process through which the Cash Store, CRO and Mr. Reykdal would comply with production orders issued by the Alberta Securities Commission (“ASC”). The proposed amendments to the Protocol almost eliminate the otherwise massive cost of finger-tip searching the privileged documents while preserving and protecting Cash Store’s and Mr. Reykdal’s privilege claims. The proposed amendments are appropriate in light of the ASC’s confirmation that it will not institute proceedings against Cash Store, which means that an expensive finger-tip search would generate no benefit for the Cash Store. The Monitor has been consulted and does not oppose this motion.

## PART II – THE FACTS

- A. **ALBERTA SECURITIES COMMISSION PRODUCTION ORDERS AND THE ASC PRIVILEGE PROTOCOL**
2. On January 7, 2014, the ASC issued an order to the Cash Store under s. 40(2) of the *Securities Act*, R.S.A. 2000, c. S-4 requiring the production of a significant number of documents.<sup>2</sup>
3. Cash Store’s former counsel, Cassels Brock, was initially tasked by former management with helping Cash Store gather and produce documents. Part way through the production, and after the commencement of these CCAA proceedings, Cassels Brock resigned as

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<sup>1</sup> The “Cash Store” is a defined term that means 1511419 Ontario Inc., formerly known as The Cash Store Financial Services, Inc., and its affiliated companies 1545688 Alberta Inc., formerly known as The Cash Store Inc., 986301 Alberta Inc., formerly known as TCS Cash Store Inc., 1152919 Alberta Inc., formerly known as Instaloes Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd., doing business as “The Title Store”

<sup>2</sup> Affidavit of William E. Aziz, sworn October 10, 2014 at para 6 [“Aziz Affidavit, October 2014”].

counsel for Cash Store. Since that time Osler has been assisting with the document production.<sup>3</sup>

4. On June 20, 2014, the ASC issued a notice to the CRO of Cash Store, compelling the production of certain information, documents and records (the “Production Order”).<sup>4</sup>
5. Although some documents were produced, a huge number of emails (approximately 657 gigabytes of emails) that were responsive to the Production Order were not produced because they had not been reviewed for privilege and the cost of doing so would be exorbitant.<sup>5</sup> As a result, the ASC, the CRO and counsel to Mr. Reykdal negotiated the Protocol.<sup>6</sup>
6. On the consent of Mr. Reykdal, the ASC and myself, this Honourable Court approved the Protocol on March 2, 2015.

**B. IMPLEMENTATION OF THE ASC PRIVILEGE PROTOCOL**

7. The CRO, ASC and Mr. Reykdal completed several steps contemplated by the Protocol. In particular:
  - (a) Osler provided to the ASC Evidence Management Team (the “EMS”) the full set of email records responsive to the January 7, 2014 Production Order.
  - (b) For ease of processing, the EMS created two databases, one containing emails sent or received by Mr. Reykdal (the “Reykdal Database”) and one containing all

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<sup>3</sup> Aziz Affidavit, October 2014 at para 7.

<sup>4</sup> Aziz Affidavit, October 2014 at para 8.

<sup>5</sup> Aziz Affidavit, October 2014 at para 12.

<sup>6</sup> Supplementary Affidavit of William E. Aziz, sworn February 18, 2015 at para 6 [“Aziz Affidavit, February 2015”].

other emails (the “Cash Store Database”). The EMS has advised that the Cash Store Database contains nearly 1.8 million email records.

- (c) The EMS, Osler, and legal counsel for Mr. Reykdal attended a conference call to discuss the technology used by the EMS to conduct the searches.
  - (d) Osler and counsel for Mr. Reykdal, prepared the confidential Search List for the purpose of identifying records that may be subject to privilege belonging to either or both of the Cash Store and Mr. Reykdal. The Search List was provided to the ASC to be applied to the email records in May 2015.<sup>7</sup>
8. In June 2015, the EMS advised that more than 60% of the documents in the Cash Store Database contained one or more of the terms on the Search List. As a result, the ASC and counsel engaged in a dialogue about revisions to the Search List necessary to ensure that it was practical. Such a dialogue was contemplated by the Protocol.<sup>8</sup>
9. As a result of the dialogue, the parties agreed that:
- (a) The ASC would run a subset of the terms on the Search List to generate a more manageable review set. The parties selected the domain name and law firm name search terms on the Search List (the “Phase One Search List”). The Phase One Search List would be applied to both the metadata and body of the documents not released to the ASC Investigation Case Database.
  - (b) Documents containing the Phase One terms would be provided to my counsel and counsel to Mr. Reykdal, who would review the documents and provide two items to the ASC: (a) any non-privileged documents; and (b) using the approach set out in the approved protocol (attached), a second list of privilege search terms (the

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<sup>7</sup> Affidavit of William E. Aziz, sworn December 10, 2015 at para 15 [“Aziz Affidavit, December 2015”].

<sup>8</sup> Aziz Affidavit, December 2015 at para 8.

“Phase Two Search List”) designed to locate privileged documents not captured by the terms on the Phase One Search List.<sup>9</sup>

10. The further two-step review identified almost 300,000 documents in the Cash Store Database and almost 200,000 in the Reykdal Database that are subject to the Cash Store privilege claims.<sup>10</sup>
11. Following the two-step review, the approved protocol provides for a finger-tip search of the documents identified as subject to privilege claims. The approved protocol did not contemplate that the two-step review would result in 500,000 documents to be finger-tip searched. I am advised by my counsel that that the cost of completing the finger-tip search would be at least \$300,000, and likely would be substantially more costly. A cost of \$300,000 is disproportionate.<sup>11</sup>
12. Notably, in the time period since the further two-step review was negotiated the ASC has advised that it will not be seeking any relief that would financially impact the Cash Store.<sup>12</sup>

**C. THE PROPOSED SOLUTION – THE AMENDED ASC PROTOCOL**

13. In seeking a creative solution that would preserve the Cash Store’s privilege claims without expending scarce estate resources on an unnecessary finger-tip search, the Fresh as Amended ASC Privilege Protocol (the “Amended Protocol”) was developed. The proposed amendments accomplish the following:

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<sup>9</sup> Aziz Affidavit, December 2015 at para 18.

<sup>10</sup> Aziz Affidavit, December 2015 at para 19.

<sup>11</sup> Aziz Affidavit, December 2015 at para 20.

<sup>12</sup> Aziz Affidavit, December 2015 at para 21.

- (a) *The Cash Store's privilege is preserved:* Documents identified as privileged based on Phase One Search List will be characterized as Privileged Records and will not be released to the ASC Investigation Case Database.
- (b) *No further review costs:* Any documents not characterized as Privileged Records in this manner or as potentially subject to a privilege claim by Mr. Reykdal will be released to the ASC Investigation Case Database.
- (c) *Inadvertent waiver of privilege is appropriately managed:* If the ASC investigators locate any documents that may be subject to a privilege claim by the Cash Store in the ASC Investigation Case Database, then, before such documents can be disclosed to any third party, including an adjudicator, the ASC will bring such documents to the attention of Thornton Grout Finnigan LLP, counsel to the Litigation Trustee. As a result, any dispute over privilege will be focused only on potentially relevant documents.
- (d) *No impact on Mr. Reykdal's privilege claims:* The proposed amendments do not affect Mr. Reykdal's ability to review documents, apply search terms, or assert privilege over documents that may be subject to his legitimate privilege claims.<sup>13</sup>

**D. CONSULTATIONS WITH THE MONITOR, LENDERS, MR. REYKDAL, KPMG AND DELOITTE**

- 14. In addition to obtaining the ASC's consent to the revised Protocol, the CRO provided the Amended Protocol and associated form of order to Mr. Reykdal's counsel as well as counsel for other entities holding documents requested by the ASC (namely, Deloitte and KPMG). Of the entities that have responded to date, none have raised any issues with or concerns about the Amended Protocol.<sup>14</sup>

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<sup>13</sup> Aziz Affidavit, December 2015 at para 24.

<sup>14</sup> Aziz Affidavit, December 2015 at para 26.

**PART III – LEGAL ARGUMENTS**

**A. THE CASH STORE IS PROTECTING PRIVILEGE**

15. Cash Store and the CRO have made reasonable, good faith efforts to protect Cash Store’s privileged documents from inadvertent disclosure. First, the Cash Store is withholding documents that are privileged on their face: it is using a search based on lawyer’s email addresses to determine when there are communications between external counsel and Cash Store.
16. Second, both the Protocol and the Amended Protocol protect from public disclosure any privileged documents that may inadvertently be disclosed to the ASC. In the context of modern litigation, where large quantities of documents are exchanged between parties, courts acknowledge that inadvertent disclosure is bound to occur from time to time.<sup>15</sup> Courts have the discretion to determine that inadvertent disclosure does not constitute waiver in appropriate cases.<sup>16</sup>
17. The Amended Protocol creates a process that protects the Cash Store’s privileged documents if any are inadvertently disclosed: if the ASC discovers a privileged document that has been disclosed to it, the document must, in accordance with the Amended Protocol, be brought to the attention of Thornton Grout Finnigan LLP (“TGF”), Litigation Counsel on the Remaining Estate Claims, who will make a determination as to privilege and assert the privilege claim.<sup>17</sup>
18. The Amended Protocol protects privilege without requiring the Cash Store to incur the expense of reviewing half a million documents. The Amended Protocol is practical, efficient, and tailor-made to the unique circumstances of the case. Under the Amended

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<sup>15</sup> See e.g. *Universal Sales Ltd. v. Edinburgh Assurance Co.*, 2009 FC 151 at para 28; Book of Authorities, Tab 5.

<sup>16</sup> See e.g. *White v. 123627 Canada Inc.*, 2014 ONSC 2682 at para 12; Book of Authorities, Tab 6.

<sup>17</sup> Aziz Affidavit, December 2015 at para 24(c).

Protocol, Cash Store's privilege is preserved, Cash Store and the CRO comply with the ASC's production orders, and the cost to the Cash Store's stakeholders is minimized.

**B. ANY FURTHER REVIEW IS DISPROPORTIONATE**

19. As the Cash Store has protected privilege, further review of documents by the Cash Store or the CRO is both unnecessary and disproportionate. The estimated cost of such a review is at least \$300,000, and likely substantially more.<sup>18</sup> Courts encourage efficient and cost-effective means of preventing the disclosure of privileged documents.<sup>19</sup> Cost-effective methods of protecting privilege are in keeping with the "Guidelines for the Discovery of Electronic Documents in Ontario" (the "Ontario Guidelines"),<sup>20</sup> which have been applied by the Ontario Superior Court.<sup>21</sup>
20. Principle 10 of the Ontario Guidelines states that a party may satisfy its obligation to produce relevant and non-privileged electronic documents in good faith by using "electronic tools and processes".<sup>22</sup> The accompanying commentary emphasizes the need to consider practicality and proportionality in approaching privilege review:

Particularly where searches for relevant electronic documents must be undertaken on large computer systems, containing vast amounts of information, including materials that are likely to be irrelevant, it may be impractical or prohibitively expensive to review all that information for relevance and privilege. In such circumstances, it is reasonable for parties to use electronic techniques to search within electronic document sources, in collecting the materials that will be subject to detailed review for relevance and privilege. The objective should be to identify a subset or subsets of the available electronic documents for detailed review, that are most likely to be relevant. [emphasis added]

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<sup>18</sup> Aziz Affidavit, December 2015 at para 20.

<sup>19</sup> *L'Abbé v. Allen-Vanguard*, 2011 ONSC 7575 at para 98; Book of Authorities, Tab 1.

<sup>20</sup> "Guidelines for the Discovery of Electronic Documents in Ontario" (Discovery Task Force, 2005) ["Ontario Guidelines"]; Book of Authorities, Tab 3.

<sup>21</sup> *Harris v. Leikin Group*, 2011 ONSC 5474 at paras 42-44; Book of Authorities, Tab 4.

<sup>22</sup> "Ontario Guidelines" at p 14; Book of Authorities, Tab 3..

21. As per the Ontario Guidelines, the Amended Protocol appropriately protects privilege. The Cash Store should not spend another penny reviewing documents, at the expense of the estate, because privileged is already adequately protected.

**C. JURISDICTION TO MAKE THE ORDER SOUGHT**

22. The Court had jurisdiction to make the order on March 2, 2015. It also has jurisdiction to amend its order by replacing the Protocol with the Amended Protocol. The Court’s jurisdiction flows from section 11 of the CCAA, which gives this Court broad powers to “make any order that it considers appropriate in the circumstances.” In *Century Services* the Supreme Court held “The plain language of the statute was very broad”.<sup>23</sup>
23. The Supreme Court went on to hold that the powers of the court pursuant to the CCAA are not limited to specific orders, but instead guided by the ‘baseline considerations’ of appropriateness, good faith, and due diligence, including “inquiring whether the order sought advances the policy objectives underlying the CCAA”. The Court added, “I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs”.<sup>24</sup>
24. In this case, the Amended Protocol is the best way to comply with the ASC production orders while furthering the policy objectives underlying the CCAA. The proposed amendments allow for the protection of privilege while preserving maximum value for the estate and its stakeholders.

**PART IV – ORDER REQUESTED**

25. The Amended Protocol is an effective and proportionate solution which meets the needs of the estate while enabling it and the CRO to comply with their legal obligation to

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<sup>23</sup> *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para 67 [“*Century Services*”]; Book of Authorities, Tab 2.

<sup>24</sup> *Century Services*, at para 70; Book of Authorities, Tab 2.

respond to the ASC's production order. For the reasons set out above, the Applicants request that this Court grant the proposed form of the ASC Protocol Amendment Order.

26. ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 11, 2015

M. Robinson  
per A. Beale

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

1. *L'Abbé v. Allen-Vanguard*, 2011 ONSC 7575.
2. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.
3. "Guidelines for the Discovery of Electronic Documents in Ontario" (Discovery Task Force, 2005).
4. *Harris v. Leikin Group*, 2011 ONSC 5474.
5. *Universal Sales Ltd. v. Edinburgh Assurance Co.*, 2009 FC 151.
6. *White v. 123627 Canada Inc.*, 2014 ONSC 2682.

**SCHEDULE "B"**  
**STATUTORY REFERENCES**

*Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

**General power of court**

**11.** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

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MANITOBA INC., 1693926 ALBERTA LTD. DOING BUSINESS AS "THE TITLE STORE"

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS  
(Amended ASC Privilege Protocol Order)**

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