

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

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

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

November 6, 2019

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

APPLICANTS

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

INTRODUCTION AND BACKGROUND

1. On April 14, 2014, Regional Senior Justice Morawetz (as he then was) granted an Initial Order (as amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (Canada), as amended (the "**CCAA**") with respect to 1511419 Ontario Inc., formerly known as The Cash Store Financial Services Inc., 1545688 Alberta Inc., formerly known as The Cash Store Inc., 986301 Alberta Inc., formerly known as TCS Cash Store Inc., 1152919 Alberta Inc., formerly known as Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc. and 1693926 Alberta Ltd. doing business as "The Title Store" (collectively, the "**Applicants**" or "**Cash Store**") providing protections to Cash Store under the CCAA, including a stay of proceedings (as extended from time to

- time, the “**Stay**”), appointing Blue Tree Advisors Inc. as Chief Restructuring Officer of the Applicants (the “**CRO**”) and appointing FTI Consulting Canada Inc. (the “**Monitor**”) as CCAA monitor.
2. The Stay currently extends up to and including November 18, 2019.
 3. The Applicants completed three Court-approved asset purchase transactions during these CCAA Proceedings. On October 15, 2014 the Court granted an Order approving the transaction contemplated by the asset purchase agreement among the Applicants and National Money Mart Company (“**Money Mart**”), (the “**Money Mart Transaction**”). On January 26, 2015, the Court granted an Order approving the transaction contemplated by the asset purchase agreement among the Applicants and easyfinancial Services Inc. On April 10, 2015 the Court granted an Order approving the transaction contemplated by the asset purchase agreement among the Applicants and CSF Asset Management Ltd. (“**CSF**”), (the “**CSF Asset Management Transaction**”). Substantially all of Cash Store’s assets were sold pursuant to the aforementioned transactions, including a significant portion of the books and records.
 4. Pursuant to the Order of this Court granted on September 30, 2015 (the “**Meetings Order**”), meetings of affected creditors were held on November 10, 2015 to vote on the Plan of Compromise or Arrangement concerning, affecting and involving the Applicants (the “**Plan**”). As reported by the Monitor in its Twenty-First Report dated November 16, 2015, the Plan was voted on and approved by the required majority of Affected Creditors pursuant to the terms of the Meetings Order, the Plan and the CCAA.
 5. On November 19, 2015 the Court granted an Order (the “**Sanction Order**”), among other things, sanctioning the Plan and authorizing the Applicants and the Monitor to implement the Plan. On December 31, 2015, upon being provided with confirmation satisfactory to it that the conditions precedent set out in the Plan had been satisfied or waived, as applicable, in accordance with the terms of the Plan,

- and after completing the steps, payments and transactions set out in the Plan that were to be completed by the Monitor, the Monitor issued a certificate in the prescribed form certifying that the Plan Implementation Date (as defined in the Plan) had occurred and that the Plan and the Sanction Order were effective in accordance with their respective terms.
6. Pursuant to the terms of the Plan and the Sanction Order, the CRO was discharged as of the Plan Implementation Date (as defined therein) and the Monitor was granted certain enhanced powers and authorization to, among other things, facilitate the completion and administration of the estates of the Applicants in the CCAA Proceeding and apply to the Court for any orders necessary or advisable to carry out its powers and obligations under any other Order granted by this Court.
 7. The Monitor's Post-Implementation Reserve (as defined in the Plan) was established pursuant to the terms of the Plan to ensure that sufficient funds remain available to the Monitor to pay the costs and expenses of the Applicants and administer the Applicants and the Plan from and after the Plan Implementation Date.
 8. Pursuant to an order of the Court dated December 1, 2014, the Applicants retained Thornton Grout Finnigan LLP and Vooheis & Co. LLP (collectively, "**Litigation Counsel**") to pursue certain claims against KPMG LLP, Cassels Brock & Blackwell LLP and Canaccord Genuity Corp. on behalf of the estate (the "**Remaining Estate Actions**").
 9. On November 18, 2018, this Court granted an Order which, among other things, extended the Stay up to and including November 18, 2019.
 10. The Monitor now brings a motion to extend the Stay up to and including November 18, 2020.

Purpose of Report

11. The purpose of this Report is to provide the Court with information regarding:

- (i) The activities of the Monitor since its Twenty-Fifth Report was filed with the Court on November 9, 2018;
- (ii) the Monitor's motion to extend the Stay up to and including November 18, 2020; and
- (iii) the Applicants' updated cash flow forecast.

TERMS OF REFERENCE

- 12. In preparing this report, the Monitor has relied upon unaudited financial information of the Applicants, the Applicants' books and records, certain financial information prepared by the Applicants and discussions with various parties (the "**Information**").
- 13. Except as described in this Report:
 - (i) the Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook;
 - (ii) the Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook; and
 - (iii) future oriented financial information reported or relied on in preparing this report is based on third party assumptions regarding future events; actual results may vary from forecast and such variations may be material.

14. The Monitor has prepared this Report in connection with its motion to extend the Stay up to and including November 18, 2020. This Report should not be relied on for other purposes (except to the extent a future Monitor's report provides otherwise).
15. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in previous reports of the Monitor, the Plan and Orders of the Court issued in the CCAA Proceedings.

STAY EXTENSION

16. The Applicants, under the supervision of the Monitor, have been working with due diligence and in good faith throughout these CCAA proceedings. Since the Stay was last extended, the Monitor has taken the following steps which are described in more detail below:
 - (i) continued to pursue outstanding tax refunds from the Canada Revenue Agency for the benefit of the Applicants' creditors;
 - (ii) continued the process of selling, disposing of or otherwise realizing upon the limited remaining assets of the estate;
 - (iii) monitored the Remaining Estate Actions litigation process;
 - (iv) oversaw the revival and regularization of certain Applicant corporations;
 - (v) responded to inquiries from creditors, bondholders and other parties interested in Cash Store's CCAA proceedings;and

- (vi) conducted Cash Store's affairs in accordance with the Initial Order and other Orders of the Court.

Tax Refunds

17. During the CCAA proceedings, Cash Store attempted to obtain certain tax refunds from the Canada Revenue Agency ("CRA"). As of April 2016, recovery of such tax refunds was uncertain; however, given the potential benefit for the estate, Cash Store retained Osler, Hoskin & Harcourt LLP as legal counsel ("**Tax Counsel**") to continue efforts to pursue the tax refunds. A contingency arrangement was put in place whereby Tax Counsel would receive 15% of any recoveries.

18. On May 26, 2017, the Monitor received from Tax Counsel a copy of Statements of Arrears that were provided by the CRA Appeals Officer by letter dated May 25, 2017. The Statements of Arrears indicate the following credits for one of the Cash Store entities (1545688 Alberta Inc.):
 - (i) \$1,980,505 (for the period ending June 30, 2010)
 - (ii) \$544,595 (for the period ending June 30, 2011)
 - (iii) \$1,116,264 (for the period ending June 30, 2012)

Total: \$3,641,364

Less 15% contingency to Tax Counsel = **\$3,024,152**

19. The Monitor followed up with the CRA regularly on the status of these refunds. The CRA requested that Cash Store prepare and file tax returns for various related dormant corporations before any refunds would be issued. The Monitor complied with these requests, which continued into 2018. The issuance of the refunds was also delayed due to various technical issues with their information systems that the CRA indicated that it was experiencing.

20. As described in its 25th Report to the Court, the Monitor received the first part of the tax refund from the CRA in the approximate amount of \$2.11 million during October 2018. The second and final part of the refund in the approximate amount of \$1.77 million (including interest) was received during April 2019. After receiving the second refund the Monitor paid Tax Counsel its 15% contingency fee plus HST in the amount of approximately \$0.66 million.

Revival of Corporations

21. In the course of its discussions with the CRA, the Monitor was made aware that six of the seven Applicant corporations had either been dissolved or been struck from the applicable corporate registry due to a lapse in their periodic filings (the “**Dissolved Corporations**”).
22. On November 18, 2019, this Court requested the aid and assistance of the Courts of Alberta and Manitoba to assist the Applicants in reviving or regularizing the corporate status of the six dissolved corporations.
23. On November 16, 2018, 5515433 Manitoba Inc. was revived by the Manitoba Companies Office without the Monitor being required to bring a motion.
24. On November 16, 2018, 7252331 Canada Inc. was revived by Corporations Canada without the Monitor being required to bring a motion.
25. On December 12, 2018, an Order was issued by the Alberta Court of Queen’s Bench ordering, among other things, the Registrar of Corporations to revive 1545688 Alberta Inc. (formerly The Cash Store Inc.), 986301 Alberta Inc. (formerly TCS Cash Store Inc.), 1152919 Alberta Inc. (formerly Instalogs Inc.) and 1693926 Alberta Ltd. (the “**Alberta Applicants**”) for the purposes of completing and administering the estates of the Alberta Applicants. A copy of this order is attached as **Schedule “B”**.
26. None of the Dissolved Corporations were a party to the Remaining Estate Actions and, accordingly, the Remaining Estate Actions were not impacted by this issue.

27. Now that the Monitor has received the outstanding tax refunds from the CRA, and in light of the fact that the Dissolved Corporations do not have any remaining business or assets, the Monitor is of the view that there is no reason to continue to incur the expense associated with making periodic filings for the Dissolved Corporations going forward.
28. The Monitor will ensure that all periodic filings continue to be made for 1511419 Ontario Inc., which is the plaintiff in the Remaining Estate Actions.

Estate Litigation

29. The Remaining Estate Actions continued to progress in 2019, including the issuance of a decision dismissing the summary judgment motions brought by the Defendants. The Remaining Estate Actions will proceed to documentary discovery in the first quarter of 2020.

Summary Judgment Motions Dismissed

30. The Defendants brought motions for summary judgment dismissing the actions arguing that the Remaining Estate Actions were not commenced within the applicable limitations period.
31. The motions for summary judgment were heard on October 4-5, 2018 and the Honourable Mr. Justice McEwen invited counsel to make written submissions, which were delivered by December 5, 2018.
32. Justice McEwen released his decision dismissing the summary judgment motions on April 5, 2019. A copy of this decision is attached hereto as **Schedule “C”**.
33. Justice McEwen held that, given the very limited record put forward by the Defendants, he could not determine the matter in a fair and just manner by way of summary judgment. His Honour explained that the actions involve a complicated factual matrix involving professional negligence and a significant damages claim and thus a full evidentiary record including *viva voce* evidence of the parties

would be required to achieve a fair and just result. Justice McEwen held that there exists a genuine issue respecting discoverability that will require a trial on all three of the actions.

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

Recovery of Costs

35. The Defendants were ordered to pay costs of \$300,000 for the unsuccessful summary judgment motion, and costs of \$24,000 for the unsuccessful leave to appeal motion. These amounts were paid to counsel for the Litigation Trustee by the Defendants.
36. In addition, \$295,000 of the \$1.6 million that had been posted by the Applicants for security for costs was released and the Monitor will deposit such funds on receipt.

Request for Mini-Trial

37. During a case conference on October 1, 2019, the Defendants requested a mini trial on the discrete issue of limitations, which was opposed by the Plaintiff. Justice McEwen requested brief written submissions, which were submitted by the parties on or before October 11, 2019. Justice McEwen's decision remains under reserve.

Documentary Discovery and Next Steps

38. The parties are in the final stages of the process of negotiating a discovery plan for the Remaining Estate Actions. It is expected that the parties will exchange documents by March 31, 2020 and proceed to oral examinations for discovery thereafter.

39. The Litigation Trustee advises that the Remaining Estate Actions are not expected to be resolved within the next 12 months. The Monitor will report to the Court in the event that a resolution to the Remaining Estate Actions is reached during the interim period.

Stay Extension

40. The proposed extension of the Stay would, among other things, extend CCAA protection while the Litigation Counsel and the Litigation Trustee pursue the Remaining Estate Actions.
41. The Remaining Estate Actions continue to be the most significant source of potential recovery for certain Cash Store creditors. Pursuant to the terms of the Plan, if applicable, the estate recoveries on the Remaining Estate Actions will benefit:
- (i) the Consumer Class Action Members (as defined in the Plan) in the amount of 10% of any proceeds realized in respect of the Remaining Estate Actions up to an aggregate of \$3,000,00 and, thereafter, 5% of any such proceeds in excess of \$3,000,000, after the payment of the fees and expenses of Litigation Counsel and the Litigation Trustee and the cost of any alternative litigation funding arrangements (the “**Net Subsequent Litigation Proceeds**”); and
 - (ii) the Secured Noteholders, who will receive the remaining portion of the Net Subsequent Litigation Proceeds paid into Subsequent Cash on Hand to be distributed in accordance with the Plan up to the Secured Noteholder Maximum Claim Amount (as defined in the Plan).

42. Pursuant to the terms of the Plan and the Sanction Order, the Monitor will remain responsible for administering the Plan and distributing any Subsequent Cash on Hand (as defined in the Plan) obtained in the interim period.
43. Extending the Stay will also enable the Monitor to continue to monetize the few remaining assets of the estate.

Cashflow Forecast

44. The Monitor's Post-Implementation Reserve was established pursuant to the terms of the Plan to ensure that sufficient funds are available to the Monitor to pay the costs and expenses of the Applicants and administer the Applicants and the Plan from and after the Plan Implementation Date. The Monitor's Post-Implementation Reserve has been exhausted, however it is expected that the counsel to the Ad Hoc Committee will authorize funding from the Subsequent Cash on Hand to fund the expenses of the estate as described below in paragraph 48.
45. The Remaining Estate Actions are funded through a separate Litigation Funding and Indemnity Reserve (as defined in the Plan) which was established by the Applicants on the Plan Implementation Date and is maintained and administered by the Monitor.
46. Any Subsequent Cash on Hand received by the Applicants will be distributed by the Monitor in accordance with the terms of the Plan and the Sanction Order. With the consent of the Ad Hoc Committee, the Monitor is permitted to use some or all of any Subsequent Cash on Hand payable to the Secured Noteholders to supplement the Monitor's Post-Implementation Reserve or the Litigation Funding and Indemnity Reserve. The balance in the Subsequent Cash on Hand account is in excess of \$3.0 million.
47. The estimated expenses to be funded during the period of November 5, 2019 to November 23, 2020 (the "**Forecast Period**"), attached hereto as **Schedule "A"**

(the “**Cash Flow Forecast**”), demonstrates that the Applicants are projected to have sufficient liquidity to fund their activities to November 18, 2020.

48. As detailed in the Cash Flow Forecast, the \$246,000 in expenses to be funded during the Forecast Period include contractors (which are costs for former employees to provide services for the administration of the estate), operating expenses (including record storage and destruction) and professional fees in the respective amounts of \$12,000, \$99,000 and \$135,000. During the Forecast Period the Monitor expects to collect approximately \$550,000 in receipts that will be deposited into the Subsequent Cash on Hand account.

Recommendation

49. The Monitor believes that the length of the requested extension is reasonable and appropriate in the circumstances.
50. Accordingly, the Monitor recommends that this Court grant the Stay extension to November 18, 2020 as requested.
51. The Monitor respectfully submits to the Court this Twenty-Sixth Report.

Dated this 6th day of November, 2019.

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



Greg Watson
Senior Managing Director

SCHEDULE "A"
CASHFLOW FORECAST

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants

Weekly Cash Forecast

(CAD 000's)

Week Ended	11/11/2019	11/18/2019	11/25/2019	12/2/2019	12/9/2019	12/16/2019	12/23/2019	12/30/2019
RECEIPTS:								
Subsequent Cash on Hand	246	-	-	-	-	-	-	-
TOTAL RECEIPTS	246	-	-	-	-	-	-	-
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	-	-	1	-	-	-	-	1
Operating Expenses	-	-	2	-	-	-	-	2
TOTAL OPERATING DISBURSEMENTS	-	-	3	-	-	-	-	3
OPERATING CASH FLOW	\$ 246	\$ -	\$ (3)	\$ -	\$ -	\$ -	\$ -	\$ (3)
NON-OPERATING DISBURSEMENTS:								
Professional Fees	-	-	10	-	-	-	-	10
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	-	-	10	-	-	-	-	10
BoP Cash	\$ -	\$ 246	\$ 246	\$ 233	\$ 233	\$ 233	\$ 233	\$ 233
Total Cash Flow	246	-	(13)	-	-	-	-	(13)
EoP Cash	\$ 246	\$ 246	\$ 233	\$ 233	\$ 233	\$ 233	\$ 233	\$ 220

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants

Weekly Cash Forecast

(CAD 000's)

Week Ended	1/6/2020	1/13/2020	1/20/2020	1/27/2020	2/3/2020	2/10/2020	2/17/2020	2/24/2020
RECEIPTS:								
Subsequent Cash on Hand	-	-	-	-	-	-	-	-
TOTAL RECEIPTS	-	-	-	-	-	-	-	-
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	-	-	-	1	-	-	-	1
Operating Expenses	-	75	-	2	-	-	-	2
TOTAL OPERATING DISBURSEMENTS	-	75	-	3	-	-	-	3
OPERATING CASH FLOW	\$ -	\$ (75)	\$ -	\$ (3)	\$ -	\$ -	\$ -	\$ (3)
NON-OPERATING DISBURSEMENTS:								
Professional Fees	-	-	-	10	-	-	-	10
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	-	-	-	10	-	-	-	10
BoP Cash	\$ 220	\$ 220	\$ 145	\$ 145	\$ 132	\$ 132	\$ 132	\$ 132
Total Cash Flow	-	(75)	-	(13)	-	-	-	(13)
EoP Cash	\$ 220	\$ 145	\$ 145	\$ 132	\$ 132	\$ 132	\$ 132	\$ 119

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants

Weekly Cash Forecast

(CAD 000's)

Week Ended	3/2/2020	3/9/2020	3/16/2020	3/23/2020	3/30/2020	4/6/2020	4/13/2020	4/20/2020
RECEIPTS:								
Subsequent Cash on Hand	-	-	-	-	-	-	-	-
TOTAL RECEIPTS	-	-	-	-	-	-	-	-
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	-	-	-	-	1	-	-	-
Operating Expenses	-	-	-	-	2	-	-	-
TOTAL OPERATING DISBURSEMENTS	-	-	-	-	3	-	-	-
OPERATING CASH FLOW	\$ -	\$ -	\$ -	\$ -	\$ (3)	\$ -	\$ -	\$ -
NON-OPERATING DISBURSEMENTS:								
Professional Fees	-	-	-	-	10	-	-	-
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	-	-	-	-	10	-	-	-
BoP Cash	\$ 119	\$ 119	\$ 119	\$ 119	\$ 119	\$ 106	\$ 106	\$ 106
Total Cash Flow	-	-	-	-	(13)	-	-	-
EoP Cash	\$ 119	\$ 119	\$ 119	\$ 119	\$ 106	\$ 106	\$ 106	\$ 106

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants
Weekly Cash Forecast
(CAD 000's)

Week Ended	4/27/2020	5/4/2020	5/11/2020	5/18/2020	5/25/2020	6/1/2020	6/8/2020	6/15/2020
RECEIPTS:								
Subsequent Cash on Hand	-	-	-	-	-	-	-	-
TOTAL RECEIPTS	-	-	-	-	-	-	-	-
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	1	-	-	-	-	1	-	-
Operating Expenses	2	-	-	-	-	2	-	-
TOTAL OPERATING DISBURSEMENTS	3	-	-	-	-	3	-	-
OPERATING CASH FLOW	\$ (3)	\$ -	\$ -	\$ -	\$ -	\$ (3)	\$ -	\$ -
NON-OPERATING DISBURSEMENTS:								
Professional Fees	10	-	-	-	-	10	-	-
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	10	-	-	-	-	10	-	-
BoP Cash	\$ 106	\$ 93	\$ 93	\$ 93	\$ 93	\$ 93	\$ 80	\$ 80
Total Cash Flow	(13)	-	-	-	-	(13)	-	-
EoP Cash	\$ 93	\$ 93	\$ 93	\$ 93	\$ 93	\$ 80	\$ 80	\$ 80

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants

Weekly Cash Forecast

(CAD 000's)

Week Ended	6/22/2020	6/29/2020	7/6/2020	7/13/2020	7/20/2020	7/27/2020	8/3/2020	8/10/2020
RECEIPTS:								
Subsequent Cash on Hand	-	-	-	-	-	-	-	-
TOTAL RECEIPTS	-	-	-	-	-	-	-	-
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	-	1	-	-	-	-	1	-
Operating Expenses	-	2	-	-	-	-	2	-
TOTAL OPERATING DISBURSEMENTS	-	3	-	-	-	-	3	-
OPERATING CASH FLOW	\$ -	\$ (3)	\$ -	\$ -	\$ -	\$ -	\$ (3)	\$ -
NON-OPERATING DISBURSEMENTS:								
Professional Fees	-	10	-	-	-	-	10	-
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	-	10	-	-	-	-	10	-
BoP Cash	\$ 80	\$ 80	\$ 67	\$ 67	\$ 67	\$ 67	\$ 67	\$ 54
Total Cash Flow	-	(13)	-	-	-	-	(13)	-
EoP Cash	\$ 80	\$ 67	\$ 67	\$ 67	\$ 67	\$ 67	\$ 54	\$ 54

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants

Weekly Cash Forecast

(CAD 000's)

Week Ended	8/17/2020	8/24/2020	8/31/2020	9/7/2020	9/14/2020	9/21/2020	9/28/2020	10/5/2020
RECEIPTS:								
Subsequent Cash on Hand	-	-	-	-	-	-	-	-
TOTAL RECEIPTS	-	-	-	-	-	-	-	-
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	-	-	1	-	-	-	1	-
Operating Expenses	-	-	2	-	-	-	2	-
TOTAL OPERATING DISBURSEMENTS	-	-	3	-	-	-	3	-
OPERATING CASH FLOW	\$ -	\$ -	\$ (3)	\$ -	\$ -	\$ -	\$ (3)	\$ -
NON-OPERATING DISBURSEMENTS:								
Professional Fees	-	-	10	-	-	-	10	-
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	-	-	10	-	-	-	10	-
BoP Cash	\$ 54	\$ 54	\$ 54	\$ 41	\$ 41	\$ 41	\$ 41	\$ 28
Total Cash Flow	-	-	(13)	-	-	-	(13)	-
EoP Cash	\$ 54	\$ 54	\$ 41	\$ 41	\$ 41	\$ 41	\$ 28	\$ 28

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

1511419 Ontario Inc. formerly known as the Cash Store Financial Services Inc. and related Applicants
Weekly Cash Forecast
(CAD 000's)

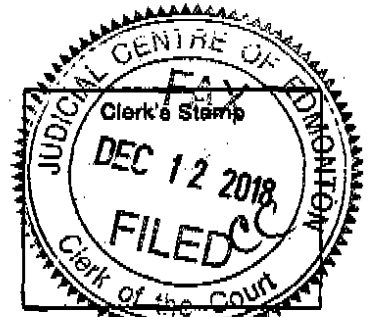
Week Ended	10/12/2020	10/19/2020	10/26/2020	11/2/2020	11/9/2020	11/16/2020	11/23/2020	Total
RECEIPTS:								
Subsequent Cash on Hand	-	-	-	-	-	-	-	246
TOTAL RECEIPTS	-	-	-	-	-	-	-	246
OPERATING DISBURSEMENTS:								
Contractors (Former Employees)	-	-	-	1	-	-	-	12
Operating Expenses	-	-	-	2	-	-	-	99
TOTAL OPERATING DISBURSEMENTS	-	-	-	3	-	-	-	111
OPERATING CASH FLOW	\$ -	\$ -	\$ -	\$ (3)	\$ -	\$ -	\$ -	\$ 135
NON-OPERATING DISBURSEMENTS:								
Professional Fees	-	-	-	25	-	-	-	135
Other	-	-	-	-	-	-	-	-
TOTAL NON-OPERATING DISBURSEMENTS	-	-	-	25	-	-	-	135
BoP Cash	\$ 28	\$ 28	\$ 28	\$ 28	\$ -	\$ -	\$ -	\$ -
Total Cash Flow	-	-	-	(28)	-	-	-	-
EoP Cash	\$ 28	\$ 28	\$ 28	\$ -	\$ -	\$ -	\$ -	\$ -

Notes

- (1) The purpose of this cash flow is to determine the liquidity requirements of the Applicants during the forecast period.
- (2) Non operating receipts represents collection of miscellaneous sundry receivables.
- (3) Contractors disbursements are costs for former employees to provide service for the administration of the estate.
- (4) Operating expenses are technology and other related costs required for the administration of the estate.
- (5) Professional fees are based on expected work load during the administration of the estate and may vary depending on actual time required.
- (6) EOP cash will be used to fund the CCAA administration. The balance will be used to pay distributions to the Secured Noteholders or fund the Litigation Funding and Indemnity Reserve upon approval of the Secured Noteholders.
- (7) The Monitor upon agreement with the Secured Noteholders will retain a reserve to satisfy the costs of the CCAA process.
- (8) The balance in the Subsequent Cash on Hand account is in excess of \$3 million.

SCHEDULE "B"
ALBERTA REVIVAL ORDER

COURT FILE NO. 1803-23397
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON



**IN THE MATTER OF THE BUSINESS CORPORATIONS ACT,
 RSC 2000, c B-9**

**AND IN THE MATTER OF 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., and 1693926 ALBERTA LTD. DOING
 BUSINESS AS "THE TITLE STORE"**

DOCUMENT **ORDER (Revival of Alberta Corporations)**

**ADDRESS FOR SERVICE
 AND CONTACT
 INFORMATION FOR
 PARTY FILING THIS
 DOCUMENT** McCarthy Tétrault LLP
 4000, 421 - 7th Avenue SW
 Calgary, AB T2P 4K9
 Attention: Walker W. MacLeod
 Tel: 403-260-3710
 Fax: 403-260-3501
 Email: wmacleod@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED: December 12, 2018
NAME OF THE JUSTICE WHO MADE THIS ORDER: Justice Graesser
LOCATION OF HEARING: Edmonton, Alberta

UPON the Application of FTI Consulting Canada Inc. (the "Monitor"), as the court-appointed monitor of 1545688 Alberta Inc., formerly known as The Cash Store Inc. ("154 Alberta"), 986301 Alberta Inc., formerly known as TCS Cash Store Inc. ("986 Alberta"), 1152919 Alberta Inc., formerly known as Instalozans Inc. ("115 Alberta"), and 1693926 Alberta Ltd. doing business as "The Title Store" ("169 Alberta", 169 Alberta, 154 Alberta, 986 Alberta, and 115 Alberta are collectively referred to as, the "Applicants") pursuant to the order issued in the Ontario Superior Court of Justice, Court File No. CV-14-10518-00CL (the "CCAA Proceedings") on April 14, 2014 (the "Initial Order") under the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA"); AND UPON noting Part 17 of the *Business*

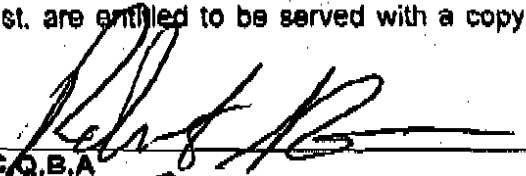
Corporations Act (Alberta) (the "Act"); AND UPON reading the Twenty-Fifth Report of the Monitor, dated November 9, 2018 and the Supplement to the Twenty-Fifth Report of the Monitor, dated December 3, 2018 (collectively, the "Monitor's Report"); AND UPON reading the Affidavit of Service of Katie Doran, sworn on 6, 2018 (the "Service Affidavit"); AND UPON hearing from counsel for the Monitor:

IT IS HEREBY ORDERED THAT:

1. Service of the Application and the Monitor's Report in the manner described in the Service Affidavit is good and sufficient and no persons other than those listed on the service list attached as Exhibit A to the Service Affidavit are entitled to receive notice of the Application or service of the Monitor's Report.
2. The Monitor is designated, pursuant to section 206.1(d) of the Act, as an "interested person" for the purposes of Part 17 of the Act.
3. Upon being provided with a certified copy of this Order the Registrar of Corporations (the "Registrar") shall revive the Applicants for the purposes of completing and administering the estates of the Applicants.
4. The Applicants are hereby relieved of any obligation to file delinquent and future annual returns with the Registrar.
5. The Applicants shall send to the Registrar a yearly report regarding the status of the action(s) that led to the revival.
6. The revival of the Applicants shall remain operative and in effect until such time as the Monitor is discharged as court-appointed monitor of the Applicants in the CCAA Proceedings.
7. The Monitor is authorized and empowered to execute, issue and endorse documents of whatever nature in respect of any of the Applicants, whether in the Monitor's name or in the name and on behalf of the Applicants, for any purpose relating or incidental to the revival of the Applicants under Part 17 of the Act.

7A This order is without prejudice to CRA's ability to object and apply to set this order aside, within 30 days of the date of service of this order on it. *[Signature]*

persons, other than those on the Service List, are entitled to be served with a copy of this Order.



J.C.Q.B.A.
Gross J

SCHEDULE "C"
SUMMARY JUDGMENT DECISION

CITATION: 1511419 Ontario Inc. v. KPMG, 2019 ONSC 228
COURT FILE NOS.: CV-14-10771-00CL, CV-14-10773-00CL, and CV-14-10774-00CL
DATE: 20190405

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
CV-14-10771-00CL)	
)	
1511419 Ontario Inc. (formerly known as The Cash Store Financial Services Inc.))	<i>John Finnigan and Megan Keenberg, for the Plaintiff</i>
)	
Plaintiff)	
)	
– and –)	
)	
KPMG)	<i>Gerry Ranking and Dylan Chochla, for the Defendant KPMG</i>
)	
Defendant)	
)	
– AND –)	
)	
CV-14-10773-00CL)	
)	
1511419 Ontario Inc. (formerly known as The Cash Store Financial Services Inc.))	<i>John Finnigan and Megan Keenberg, for the Plaintiff</i>
)	
Plaintiff)	
)	
– and –)	
)	
Canaccord Genuity Corp.)	<i>Patrick Flaherty and Bryan McLeese, for the Defendant Canaccord Genuity Corp.</i>
)	
Defendant)	
)	
– AND –)	
)	
CV-14-10774-00CL)	
)	
1511419 Ontario Inc. (formerly known as The Cash Store Financial Services Inc.))	<i>John Finnigan and Megan Keenberg, for the Plaintiff</i>
)	
Plaintiff)	
)	
– and –)	
)	
Cassels Brock & Blackwell LLP)	<i>David Byers, Daniel S. Murdoch and Michael A. Currie, for the Defendant Cassels Brock & Blackwell LLP</i>
)	
Defendant)	
)	

) **HEARD:** October 4, 5, 2018. Further written submissions received by December 14, 2018

REASONS FOR DECISION

MCEWEN J.

[1] The defendants in all three actions, KPMG LLP (“KPMG”), Canaccord Genuity Corp. (“Canaccord”), and Cassels Brock & Blackwell LLP (“Cassels”), (collectively “the Defendants”) bring motions for summary judgment to dismiss the actions based on the expiry of the two year limitation period contained in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, ss. 4 and 5.

[2] The plaintiff 1511419 Ontario Inc. (formerly known as the Cash Store Financial Services Inc.) (“Cash Store”) has sued KPMG, who was Cash Store’s long-standing auditor; Canaccord, who acted as Cash Store’s financial advisor; and Cassels, who provided legal services to Cash Store. The lawsuits all relate to professional services provided to Cash Store by the Defendants with respect to a loan purchase and note offering (the “January 2012 Transaction”).

[3] The Defendants submit that, since the January 2012 Transaction closed on January 31, 2012, and that the actions were not commenced until November 27, 2014, they are statute barred pursuant to the provisions of the *Limitations Act*. The actions were commenced almost ten months outside the mandated two year period.

SHORT ANSWER

[4] For the reasons below, I dismiss the motions for summary judgment. In my view, there are genuine issues requiring a trial concerning the issue as to whether the three actions are statute barred.

[5] The three actions involve a complex fact pattern, which includes:

- A scheme orchestrated and acknowledged by Cash Store wherein its management sought to maximize profits with its third party lenders (the “TPLs”) by circumventing payday lending laws. The scheme was concealed from payday borrowers and regulators.
- The complicated January 2012 Transaction, where Cash Store completed a note offering issuing \$132.5 million in senior secured notes and used approximately \$116 million of the proceeds to acquire the loan portfolio held by the TPLs.
- The professional assistance provided by the Defendants with respect to the January 2012 Transaction.
- Ongoing professional services provided by KPMG and Cassels subsequent to the closing of the January 2012 Transaction.
- Subsequent allegations of professional negligence against the Defendants.

- The subsequent CCAA proceeding in which Cash Store was granted CCAA protection pursuant to the Amended and Restated Initial Order of Morawetz R.S.J. dated April 15, 2014.
- A subsequent decision by Morawetz R.S.J. released on August 5, 2014 wherein he held that the practice that had been developed between Cash Store and its TPLs differed substantially from that which was documented and represented to the public: *Cash Store Financial Services (Re)*, 2014 ONSC 4326, 31 B.L.R. (5th) 313.
- The subsequent appointment of the Chief Restructuring Officer and Litigation Trustee by Morawetz R.S.J. as well as Litigation Counsel to pursue claims on Cash Store's behalf.

[6] Based on the limited, yet voluminous, record (as described below) presented at the motion and the complexity of the subject matter, I have come to the conclusion that the summary judgment process does not allow for the necessary fulsome analysis required to determine the limitation period issue. It would, therefore, be inappropriate to do so in circumstances that would not lead to a fair process and just adjudication.

OVERVIEW

[7] Between 2002 and 2014, Cash Store was a publicly incorporated company in Ontario. It was listed on the Toronto Stock Exchange and the New York Stock Exchange. Cash Store operated a payday lending business across Canada. Cash Store purported to arrange payday loans for its customers funded, ostensibly, by the TPLs.

[8] KPMG was Cash Store's auditor from 2002 to December 2014. Cassels acted as Cash Store's counsel from 2002 until May 2014. Canaccord was Cash Store's financial advisor from 2009 to 2012.

[9] With the assistance of the Defendants, acting in their professional capacities, Cash Store entered into the January 2012 Transaction with its TPLs wherein it acquired their loan portfolio in exchange for \$116 million. The fair market value of the loan portfolio, it was ultimately discovered, was far less than the amount paid.

[10] Internal Cash Store documentation demonstrates that Cash Store knew within a few months of the January 2012 Transaction that its valuation of the purchased loan portfolio had dropped significantly. Cash Store's interim financial statements for Q1, Q2, and Q3 also reflect that the initial valuation of the loan portfolio was inflated and the value of the loan portfolio had to be adjusted downward.

[11] After the January 2012 Transaction closed, Cash Store also received three letters that, generally speaking, alleged that Cash Store was conducting its business in violation of the

applicable lending laws and that Cash Store was inappropriately conducting its financial reporting and public disclosures. The first two letters were sent by VWK Management Inc. (“VWK”) on January 17, 2012 (the “January 2012 VWK Letter”) and August 27, 2012 (the “August 2012 VWK Letter”).¹ The August 2012 VWK Letter challenged the sufficiency of Cash Store’s disclosure concerning the acquisition of the loan portfolio from its TPLs, the valuation of the loan portfolio, and the relationship between Cash Store and its TPLs. It further alleged that Cash Store had been masking the true extent of its loan losses. The third letter was sent by Clearwater Management Inc. (“Clearwater”) on November 6, 2012 (the “Clearwater Letter”).²

[12] With respect to the January 2012 VWK Letter, Cash Store provided it to Cassels and Canaccord for review. Those Defendants advised Cash Store to dismiss VWK’s complaints. Cash Store did so by way of letter.

[13] Thereafter, it appears Canaccord had little or no involvement with Cash Store. However, KPMG and Cassels continued to act as Cash Store’s professional advisors until it filed for CCAA protection in April 2014. KPMG also received copies of the August 2012 VWK Letter and the Clearwater Letter.³ Cassels reviewed the August 2012 VWK Letter with the Board.

[14] During this time period Cash Store also released its interim financial statements for Q1, Q2, and Q3 of 2012 which, in each iteration, reduced the fair value of the loan portfolio.

[15] In July 2012, Craig Warnock joined Cash Store as its CFO and began to review the problems with the value of the loan portfolio. Cash Store met with KPMG to discuss the aforementioned three letters. In the November 15, 2012 meeting, Al Mondor, a director of Cash Store’s Audit Committee, advised KPMG that Cash Store would be conducting an internal investigation of the circumstances surrounding the January 2012 Transaction.

[16] In November 2012, Cash Store realized that it would likely have to restate its 2012 Q2 and Q3 financial statements.

[17] KPMG assisted with the Audit Committee’s investigation up until November 2012.

[18] In December 2012, a Special Committee was formed, which was made up of independent directors on the Audit Committee, to conduct a special investigation into the allegations that had been made surrounding the January 2012 Transaction. Torys LLP and Deloitte & Touche (“Deloitte”) were retained to assist in the investigation. As noted, Cassels and KPMG continued to act on behalf of Cash Store.

[19] In May 2013, Deloitte delivered a report to Cash Store’s Special Committee identifying problems with the January 2012 Transaction, particularly with respect to one of the TPLs.

¹ Michael Woollcombe, President of VWK, wrote both of these letters.

² Roland Keiper, President of Clearwater, wrote the Clearwater Letter.

³ For further analysis, see the section titled “The Correspondence and Assistance Rendered by the Defendants”.

[20] On April 15, 2014, Cash Store was granted CCAA protection by way of order granted by Morawetz R.S.J.

[21] On the same day BlueTree Advisors Inc. was appointed as Chief Restructuring Officer of Cash Store (the “CRO”). Later, by way of order dated November 19, 2015, BlueTree Advisors III Inc. was appointed as Cash Store’s Litigation Trustee. William Aziz is the President of both BlueTree entities (collectively “BlueTree”).

[22] Subsequent to the CCAA proceedings, certain TPLs brought a motion on the Commercial List for a declaration that any loans made by them were brokered by Cash Store and, in fact, owned by the TPLs, therefore making them free of any claims against Cash Store by its creditors.

[23] Morawetz R.S.J. released his decision on August 5, 2014. He held that the TPLs were not lending the money directly to the customers but were rather advancing funds to Cash Store, which was lending the money to the ultimate consumer. Morawetz R.S.J. then noted that the practice differed substantially from what was documented between the TPLs and Cash Store.

[24] On November 27, 2014, Cash Store commenced its four separate actions, each claiming damages of \$300 million against its former directors and officers (the “Ds&Os”), KPMG, Canaccord, and Cassels.

[25] The Ds&Os’ action was settled in September 2015.

THE BASIS FOR CASH STORE’S CLAIMS AGAINST THE DEFENDANTS

Claim against KPMG

[26] Cash Store’s Fresh as Amended Statement of Claim is a lengthy document. Cash Store concedes (at para. 55) that its management’s goal was to maximize profits by circumventing the payday lending laws with the view to generating revenue in excess of the regulatory caps and to conceal the circumvention from its borrowers and the regulators.

[27] Cash Store, thereafter, does not blame KPMG for this admittedly improper business model. In brief, Cash Store claims that KPMG was negligent and breached its contract with Cash Store for failing to take reasonable steps to understand Cash Store’s business practices and its arrangements with the TPLs to ensure that Cash Store’s financial statements were accurate. It takes particular issue with the 2011 and 2012 audits.

Claim against Canaccord

[28] In a nutshell, Cash Store’s claim against Canaccord arises out of claims of breach of contract, gross negligence, and breach of duty. Generally speaking, Cash Store alleges that Canaccord, as Cash Store’s financial advisor concerning the January 2012 Transaction, failed to take all reasonable steps to properly understand Cash Store’s business arrangements with the lenders and erroneously concluded that the January 2012 Transaction was fair from a financial

point of view for Cash Store's shareholders. In this regard, Cash Store claims that it reasonably relied upon Canaccord's fairness opinion.

Claim against Cassels

[29] In this action, in brief, Cash Store alleges that Cassels negligently permitted Cash Store to misdescribe its business affairs in its public disclosure and that it breached its fiduciary duty to Cash Store. Cash Store claims that Cassels provided negligent or improper advice about:

- Its compliance with applicable payday loan legislation and public disclosures.
- Its arrangements with TPLs and public disclosures relating to those arrangements.
- Its issuance of \$132.5 million in senior secured notes with respect to the January 2012 Transaction.

Layered into allegations against Cassels is the fact that one of its partners, Paul Stein, was the principal of one of the TPLs and had actual knowledge of the way Cash Store dealt with the lenders.

POSITION OF THE DEFENDANTS ON THIS MOTION

[30] The Defendants, as a group, take certain common positions. Each of the Defendants also has their own unique facts that they rely upon in support of the motion to dismiss.

The Common Defences

[31] The actions were commenced approximately two years and ten months after the completion of the January 2012 Transaction.

[32] The Defendants collectively submit that the claims are out of time for the following reasons:

- Cash Store admits that all of the Defendants' impugned conduct occurred prior to November 27, 2012 (more than two years before the Notice of Actions were issued).
- Internal Cash Store documentation confirms that Cash Store knew, or ought to have known, within a few months of the January 2012 Transaction that its valuation of the loan portfolio was grossly inflated and had dropped significantly.
- Cash Store's own interim financial statements for Q1, Q2, and Q3 reflect the fact that the initial valuation of the loan portfolio was grossly inflated and the fair value of the loan portfolio had to be adjusted downward. The Q2 and Q3 financial statements were revised within two years of the January 2012 Transaction.

- Cash Store's Board received the aforementioned letters from VWK and Clearwater, which raised allegations similar to those being raised in the litigation against the Defendants, on January 17, 2012, August 27, 2012, and November 6, 2012, respectively. All of these were received within two years of the January 2012 Transaction.
- The Defendants also take significant issue with the fact that Cash Store has not adduced any evidence on behalf of the Ds&Os who were involved in the January 2012 Transaction and thereafter during the time the limitation period ran prior to the commencement of the actions. Instead, Cash Store relies upon the affidavit of Mr. Aziz which is largely comprised of a paper review and the affidavit of Susan Mendoza, an executive assistant to the CFO of Cash Store from September 2010 to May 2013. Ms. Mendoza also acted as the secretary for the meetings of the Board of Directors and the Audit Committee of Cash Store. Her evidence concerns her attendance at Board and Audit Committee meetings and her preparation of the Minutes, which were relied upon by Mr. Aziz in his document review.

[33] The Defendants, therefore, submit that Cash Store knew from the outset, in part due to its own business model, that the loan portfolio was overvalued. Further, they submit that by the time Cash Store released its Q1, Q2, and Q3 statements, respectively, on February 8, May 10, and August 13, 2012, it publicly recognized that it had paid far too much for the loan portfolio. Alternatively, at the very latest, it knew or should have known at the latest by the time the August 2012 VWK Letter was sent to the Board from VWK. They further submit that Cash Store, in failing to adduce evidence from former Ds&Os, has failed to put its best foot forward on this motion and rebut the presumption in s. 5(2) of the *Limitations Act*.

[34] As a result, the Defendants submit that Cash Store (or alternatively a reasonable person with the abilities of Cash Store and in the circumstances of Cash Store) ought to have known of its claim against them within the two limitation period.

Additional Individual Defences of Canaccord and Cassels

[35] Canaccord submits that subsequent to the January 2012 Transaction closing it had no further involvement of any kind with Cash Store. Cassels submits that its partner, Mr. Stein, who was also a principal of one of Cash Store's TPLs, FSC Abel Financial Inc., had no dealings with Cash Store subsequent to the January 2012 Transaction closing and/or Cash Store's directing minds knew at the time of the loan and thereafter that Mr. Stein was a principal of FSC Abel, which provided a loan to Cash Store, and that Mr. Stein also provided advice in respect of the January 2012 Transaction. Cassels, like Canaccord, therefore, submits there is no evidence to point to an act or omission after the January 2012 Transaction closed, which is outside the two year limitation period.

POSITION OF CASH STORE ON THIS MOTION

[36] Cash Store raises a number of defences to the motion, primarily as set out below.

[37] First, Cash Store submits that the Defendants have advanced their motions on a very narrow record essentially relying upon the aforementioned correspondence from VWK and Clearwater as well as Cash Store's interim financial statements for Q1, Q2, and Q3, 2012. Cash Store points to the fact that neither Cassels nor Canaccord have produced any affidavit evidence with respect to the circumstances surrounding their involvement with Cash Store that led to the actions being commenced against them. In essence, Cash Store submits that none of the Defendants have met their onus to demonstrate that there is no genuine issue requiring a trial, since they rely upon the single affidavit filed by KPMG, which does not tender any firsthand evidence. Cash Store further submits that KPMG's affiant, Natalie Feldman, actually supports the evidence of Mr. Aziz and Ms. Mendoza.

[38] Second, Cash Store also points to the fact that Canaccord and Cassels assisted Cash Store in responding to the January 2012 VWK Letter. Further, KPMG and Cassels, as noted, continued to provide assistance to Cash Store and acted as their professional advisors throughout the relevant limitation period timeframe.

[39] Third, Cash Store further relies upon Mr. Aziz's review of the Minutes of the Board and Audit Committee meetings, prepared by Ms. Mendoza. Cash Store submits that Mr. Aziz's review of the Minutes demonstrates that Cash Store was not aware of potential claims against the Defendants prior to the Board being replaced by the CRO. Cash Store also relies upon the fact that the Board, prior to it being replaced, acted in a fashion that was consistent with it not having knowledge of the claims against the Defendants, particularly in circumstances where it continued on with the retainers of KPMG and Cassels.

THE LAW

[40] Section 5 of the *Limitations Act* deals with the discovery of claims and provides, in part, as follows:

Discovery

5(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[41] The parties agree that the two year limitation period set out in the *Limitations Act* applies.

The Process on a Summary Judgment Motion Concerning a Limitation Period

[42] On a summary judgment motion under Rule 20, the court is only to grant summary judgment if it satisfied that there is no genuine issue requiring a trial: Rule 20.04(2)(a).

[43] In deciding this matter I am mindful of the fact that Rule 20 was amended to broaden the court's jurisdiction to grant summary judgment.

[44] This change, which was endorsed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, provides this court with enhanced fact-finding powers and the discretion and flexibility in deciding the appropriate course of action.

[45] The court, however, went on to state at para. 68:

While summary judgment must be granted if there is no genuine issue requiring a trial, the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary. The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

[46] Following the decision in *Hryniak*, not surprisingly, there has been a great deal of comment and opinion as to how far the courts should go in utilizing the discretionary nature of the powers set out in Rule 20.04.

[47] The proper course for a motions judge where a limitations issue is raised was discussed by the Court of Appeal in *Collins v. Cortez*, 2014 ONCA 685, 39 C.C.L.I. (5th) 1:

11 The proper course for a summary judgment court in determining a motion based on a limitations defence is set out in *Huang*, following the approach mandated by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. The court must consider the evidence in the motion record to determine whether there is a genuine issue requiring a trial, and, if so, determine whether it is in the

interest of justice to use the enhanced powers under rules 20.04(2.1) and (2.2) to determine the issue without a trial.

...

13 The respondent asserts that, even if the evidence on the motion were considered, it is insufficient to meet the requirements of s. 5(1) of the *Limitations Act, 2002*. However, at this stage the question is whether there is a genuine issue respecting discoverability requiring a trial, and not whether the limitations defence is sure to fail. In my view, the evidence of the appellant, which was not contradicted, reveals such an issue. Indeed, the motion judge observed that the date when the appellant's claim was discovered was "less than clear".

[48] "A full trial will still be required where a summary record cannot fairly be used to decide legal issues that are unsettled, complex, or intertwined with the facts": Mew J., Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3d ed. (Markham: LexisNexis Canada, 2016), at s. 5.36.

[49] As the Court of Appeal has recently noted, discoverability cases tend to be contentious and complex. This can affect their suitability for summary judgment, particularly so in claims brought by clients against their professional advisors: *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, 141 O.R. (3d) 81, at paras. 80, 88-89; *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321, at para. 26.

[50] Recently, in the Court of Appeal's decision in *Mason v. Perras Mongenais*, 2018 ONCA 978, Nordheimer J.A. noted that "nothing in *Hryniak* detracts from the overriding principle that summary judgment is only appropriate where it leads to a 'fair process and just adjudication'": *Mason*, at para. 44; *Hryniak*, at para. 33.

[51] Nordheimer J.A. concluded by stating that there is nothing in *Hryniak* that suggested trials be viewed as the resolution option of last resort.

[52] The process that a motion judge is required to follow on a summary judgment motion concerning a limitation period is described in *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, 142 O.R. (3d) 561:

34 In order for a motion judge to grant summary judgment dismissing a plaintiff's action or, as occurred in the present case, to grant a declaration about when the limitation period began to run, the judge is required make certain necessary findings of fact. Those necessary findings of fact concern one presumption and two dates, as set out in ss. 5(1)(a), 5(1)(b) and 5(2) of the *Act*....

35 Accordingly, a typical summary judgment motion involving the basic limitation period requires the judge to determine whether the record enables making a series of findings of fact, with the certainty required by *Hryniak*, on the following matters: (i) the date the plaintiff is presumed to know the matters listed in ss. 5(1)(a)(i)-(iv) — namely, the day on which the act or omission on which the claim is based occurred; (ii) the date of actual knowledge under s.

5(1)(a), in the event the evidence proves the contrary of the presumptive date; (iii) the s. 5(1)(b) objective knowledge date, based on the reasonable person with similar abilities and circumstances analysis; and (iv) finally, which of the actual knowledge and objective knowledge dates is earlier, for that will be [the] day on which the plaintiff discovered the claim for purposes of applying the basic limitation period of two years.

...

39 I would simply reiterate that granting summary judgment dismissing an action as statute-barred, or declaring when a claim was discovered, requires making specific findings of fact. Assumptions about the matters in ss. 5(1) and (2) of the *Act* are not analytical substitutes for findings of fact. If the record does not enable the summary judgment motion judge to make those findings with the certainty required by *Hryniak*, then a genuine issue requiring a trial may exist.

[53] According to *Nasr*, the motion judge must initially consider whether the evidence proves the contrary of the presumptive date of the plaintiff's knowledge. To rebut this presumption contained in s. 5(2) on a summary judgment motion, the plaintiff must lead evidence to displace the statutory presumption of the date on which he discovered his claim: *Bergen v. Fast Estate*, 2018 ONCA 484, 30 M.V.R. (7th) 49, at para. 10; *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, 133 O.R. (3d) 35, at para. 15; *Hawthorne v. Markham Stouffville Hospital*, 2016 ONCA 10, at para. 8.

[54] To rebut this presumption, the plaintiff is not required to show due diligence. Rather, the plaintiff only needs to prove that he did that he did not know about one of the matters in s. 5(1)(a)(i) through (iv) *on the date* that the injury, loss, or damage occurred: *Fennell v. Deol*, 2016 ONCA 249, 97 M.V.R. (6th) 1, at para. 26.

[55] The next step in a summary judgment motion involves an inquiry into whether the record enables making a finding of fact on the date of the plaintiff's actual knowledge under s. 5(1)(a): *Nasr*, at para. 35.

[56] A motion judge may not make an assumption as to when a plaintiff first knew of the matters in ss. 5(1)(a)(i) through (iv). If the record does not enable the motion judge to make findings of fact "with the certainty required by *Hryniak*, then a genuine issue requiring a trial may exist": *Nasr*, at para. 39.

[57] If both parties agree on the subjective date that the plaintiff first knew about the matters in ss. 5(1)(a)(i) through (iv), that agreement can constitute an admission of fact that enables a motion judge to make a finding of fact: *Nasr*, at para. 40.

[58] The next step in *Nasr* requires the motion judge to consider whether the record enables a finding on the s. 5(1)(b) objective knowledge date. Due diligence forms part of the evaluation in s. 5(1)(b). In deciding when a person in the plaintiff's circumstances and with his abilities ought

reasonably to have discovered the elements of the claim, it is relevant to consider what reasonable steps the plaintiff ought to have taken: *Fennell*, at para. 24.

[59] Based on the above case law, due diligence forms a part of the analysis under s. 5(1)(b). It does not impact the s. 5(1)(a) analysis, which only considers actual knowledge. Cash Store is not required to demonstrate due diligence to rebut the s. 5(2) presumption.

[60] I have accordingly focused my analysis for s. 5(1)(a) on the evidence regarding Cash Store's actual knowledge about the matters contained in ss. 5(1)(a)(i) through (iv). For the s. 5(1)(b) analysis, I have focused on the evidence regarding the day on which a reasonable person with the abilities and in the circumstances of Cash Store, exercising due diligence, first ought to have known of the matters in ss. 5(1)(a)(i) through (iv).

[61] I accept the Defendants' argument that given the obvious presumption contained in s. 5(2) of the *Limitations Act*, Cash Store has an obligation to put its "best foot forward" in response to a motion for summary judgment based on the provisions of s. 5 of the *Limitations Act*.

Positions of the Parties on the Interpretation of the *Limitations Act*

[62] The parties have very different views as to how the provisions of s. 5 of the *Limitations Act* should be interpreted.

[63] The Defendants generally submit that Cash Store had a requirement to act with due diligence to investigate and acquire facts to determine if it had a claim against the Defendants.

[64] The Defendants further submit that the presumption contained in s. 5(2) of the *Limitations Act* is of fundamental importance in this case.

[65] The Defendants cited numerous cases where there was an ample evidentiary record that permitted the motion judge to grant summary judgment, and the Court of Appeal upheld those decisions: *Chernet v. RBC General Insurance Co.*, 2017 ONCA 337, 11 M.V.R. (7th) 1; *Tim Ludwig Professional Corp. v. BDO Canada LLP*, 2017 ONCA 292, 137 O.R. (3d) 570; *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, 62 B.L.R. (5th) 211; *Northern Industrial Services Group Inc. v. Duguay*, 2016 ONCA 539.

[66] Cash Store, on the other hand, submits that it must only establish that its Board did not have actual knowledge of the claims against the Defendants and that the Defendants' focus on Cash Store's lack of due diligence is misplaced. Cash Store further argues that its Board would not have approved and publicly released its 2012 audited financial statements on December 28, 2012 if it had known that the statements were materially misstated, that the defendants had been negligent, and that commencing a claim against the defendants was appropriate. Cash Store stresses that it could not have reasonably known about these matters, in part at least, due to the assistance rendered by the Defendants after the January 2012 Transaction.

ANALYSIS

[67] The motion for summary judgment was very capably argued by counsel. I appreciate the Defendants' collective desire to deal with the limitation period issues summarily and end the prospect of protracted and expensive litigation. In my view, however, for the reasons that follow, the evidence in the record satisfies me that there is a genuine issue respecting discoverability that requires a trial in all three of the actions. The case is too complicated to be dealt with summarily based on the limited record that was put before me and likely on any written record.

[68] Before I deal with certain discrete issues it bears noting that the parties filed approximately 13 separate briefs with the court (not including facta, case briefs, and subsequent written argument). The record exceeded 1,500 pages containing dozens of exhibits. KPMG filed a 13 page chronology that included 67 significant events that it wished to bring to my attention. There are also obvious underlining contentious issues that have to be considered. These include the nature of Cash Store's business model, the appropriateness of the January 2012 Transaction, the knowledge of the various Board members and officers of Cash Store during the relevant timeframe, and the professional roles played by the Defendants before, during, and after the January 2012 Transaction.

[69] Despite the above, as noted, limited affidavit evidence was filed:

- Cash Store filed an affidavit on behalf of Mr. Aziz, who is directing the litigation, as well as an affidavit of Ms. Mendoza. As noted, Ms. Mendoza served as the executive assistant to the Chief Financial Officer of Cash Store during the relevant time period. Ms. Mendoza has deposed that she attended all of the relevant corporate meetings for the purposes of taking notes and preparing the Minutes. As set out in Mr. Aziz's affidavit, the Minutes do not contain any information to suggest that the Cash Store Board knew about the matters referred to in s. 5(1)(a) of the *Limitations Act* prior to November 27, 2012. None of the Defendants examined any of the Board members.
- KPMG filed an affidavit prepared by Ms. Feldman, a Senior Manager, Audit at KPMG. Ms. Feldman also attended the Cash Store meetings. Her affidavit largely consists of a review of documentation with little firsthand information. Neither Canaccord nor Cassels filed any affidavit evidence touching upon the issues in dispute other than filing certain limited documentation without comment.

[70] No party filed affidavit evidence from anyone directly involved in the January 2012 Transaction. As I will describe below this has led to my having difficulty understanding the context of the relationships between Cash Store and the Defendants.

[71] According to *Nasr*, at para. 35, I must determine whether the record enables making a series of findings of fact, with the certainty required by *Hryniak*, on the following matters:

- (i) the date the plaintiff is presumed to know the matters listed in ss. 5(1)(a)(i)-(iv) — namely, the day on which the act or omission on which the claim is based occurred;
- (ii) the date of actual knowledge under s. 5(1)(a), in the event the evidence proves the contrary of the presumptive date;

- (iii) the s. 5(1)(b) objective knowledge date, based on the reasonable person with similar abilities and circumstances analysis; and
- (iv) which of the actual knowledge and objective knowledge dates is earlier, for that will be day on which the plaintiff discovered the claim for purposes of applying the basic limitation period of two years.

[72] The record enables me to find that the day on which the act or omission on which the claim is based is January 31, 2012, the day of the closing of the January 2012 Transaction. If I am mistaken, and the record does not permit this finding, I can nevertheless make such a finding through the agreement of all parties that the claim is based on the January 2012 Transaction. This agreement constitutes an admission of fact that enables me to make a finding of fact: *Nasr*, at para. 40.

[73] Thus, the presumption holds that Cash Store knew about the matters in ss. 5(1)(a)(i) through (iv) regarding its claim against the Defendants on January 31, 2012, which is the date of closing of the January 2012 Transaction. It is presumed that Cash Store knew that the damage had occurred, that the Defendants caused or contributed to the damage, and that a proceeding would be the appropriate means to remedy the damage on January 31, 2012.

[74] *Nasr* requires me to next consider whether the evidence in the record *proves* the contrary of the presumptive date of January 31, 2012. As previously noted, this requires Cash Store to prove that it did not know about one of the matters in ss. 5(1)(a)(i) through (iv) on January 31, 2012: *Fennell*, at para. 26. It does not need to demonstrate due diligence. Cash Store must lead evidence to displace this statutory presumption: *Bergen*, at para. 10; *Hawthorne*, at para. 8.

[75] After conducting the analysis under s. 5(1)(a), *Nasr* requires me to do a similar analysis under s. 5(1)(b).

[76] As noted, the Defendants proceeded with this motion on a limited record. Cash Store responded with a similarly limited record. Cash Store's record discloses, however, based on the Board Minutes, that there is no indication that Cash Store had knowledge of a claim against the Defendants. The limited record further discloses, as mentioned above, that the Defendants continued to provide professional services to Cash Store. In these circumstances, I am not prepared to find that Cash Store has failed to put its best foot forward or that it has failed to discharge the presumption under s. 5(2) or any presumption with respect to s. 5(1)(b).

[77] As was the case in *Mega*, this is a complex case involving allegations of professional negligence.

[78] In attempting to complete the required analysis set out in *Nasr*, it is the limited nature of the record that precludes me from doing so. To paraphrase from the Court of Appeal decisions in *Mason* and *Mega*, discoverability cases tend to be contentious and complex and not necessarily suitable for summary judgment – particularly in cases involving professional negligence. Summary judgment should only be granted if the process was fair and just.

[79] The complicated fact pattern involving allegations of professional negligence in this case precludes me from concluding that it would be fair and just, on a limited record, to determine the issue of the limitation period in a case brought against professional advisors.

[80] In coming to this conclusion, there are specific issues raised at the motion that bear further discussion. I will now deal with each of those in turn.

Evidence Adduced by Cash Store

[81] The Defendants take significant issue with what they describe as the dearth of evidence put forth by Cash Store on the motion. They argue that Cash Store has failed to put its best foot forward.

[82] In particular, the Defendants take issue with the evidence adduced by Mr. Aziz, who has authorized this litigation.

[83] Primarily, the Defendants are critical of the fact that Mr. Aziz and BlueTree have no firsthand knowledge of the underlying facts, including Cash Store's long-standing relationships with the Defendants, and that Mr. Aziz now seeks to maximize recoveries in the CCAA process.

[84] Mr. Aziz completed a review of the corporate records and concluded that no responsible fiduciary of Cash Store had discovered Cash Store's claim against the Defendants.

[85] The Defendants are critical of this hindsight review by Mr. Aziz, particularly in the context in which he is the directing mind in these actions. They are also critical of the fact that he has chosen not to tender any firsthand evidence of the 13 former Cash Store managers, directors, and officers, all of whom he has interviewed.

[86] The Defendants submit that this was done since Mr. Aziz knew that they would not support his *ex post facto* re-characterization of events that were completely contrary to Cash Store's long-standing business practices, which are admitted by Cash Store. On this basis alone the Defendants submit that Cash Store has failed to rebut the presumption.

[87] Such evidence in and of itself could ultimately prove to be insufficient at trial. In the context of this summary judgment motion, however, where the only opposing evidence I have is from Ms. Feldman, I simply do not have a suitable contextualized basis to analyze this issue.

[88] Further, I do not accept the Defendants' submission that the "inescapable conclusion" is that Cash Store deliberately chose not to secure firsthand information knowing that the former Ds&Os would not support Cash Store's position in the litigation. I accept Cash Store's submission that the former Ds&Os who were involved in litigation may well be less than willing to participate in this litigation given active or potential securities commission investigations and that, in any event, the information provided may be tainted by self-interest. In this regard, it cannot be ignored that the Ds&Os have settled their litigation with Cash Store. Further, what if Cash Store tendered evidence from only two or three Board members? It would likely be

criticized for not calling more. Last, the Defendants' argument is also somewhat undermined by the limited record they filed.

[89] Myers J. granted KPMG the ability to interview Cash Store's former directors without the court's permission: *1511419 Ontario Inc. v. KPMG LLP*, 2017 ONSC 2472, 47 C.B.R. (6th) 325. Even though Cash Store does bear the onus, none of the Defendants sought to examine or introduce evidence from any of the Ds&Os. As noted, the only affidavit evidence that the Defendants have put forth is that of Ms. Feldman, which is very limited in scope insofar as firsthand information is concerned.

[90] Without an understanding of the events surrounding and following the January 2012 Transaction from any of the involved persons, I am not prepared to determine the limitations issue.

The Board Minutes and Knowledge of the Board

[91] The Defendants dispute that the Minutes of the Board are in fact the "best evidence" of what the Board knew in or around the time of the January 2012 Transaction.

[92] They submit that a full meeting of the Board is not required for a corporation to acquire knowledge that it would otherwise obtain through its directing minds such as officers or directors: *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409, at paras. 59-60, leave to appeal to S.C.C. allowed, 2018 CarswellOnt 19181; *Canadian Dredge and Dock Company Limited v. R.*, [1985] 1 S.C.R. 662, at pp. 679-685, 707-709, 713-714, and 717-718.

[93] They further go on to submit that it is also not clear what was recorded in the Board or Audit Committee Minutes, and overall the Minutes are not reliable.

[94] Cash Store responds by submitting that, as a matter of law, the directing mind of a public corporation is its board of directors, acting as a collective: *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. S.C.), at paras. 98-113.

[95] I do not propose to determine this dispute on this motion. I am prepared to accept that the Board Minutes are, at the very least, some evidence of what Cash Store knew at the relevant time periods.

[96] The problem faced by this court is exemplified by the Defendants' submissions that the fact that the Litigation Trustee found no records analyzing claims against them does not mean that Cash Store did not have the material facts at its disposal to assess potential claims. The Defendants submit that the absence of documents could also be evidence of the fact that Cash Store did not assert claims because it knew that it had been responsible for its own difficulties and never thought that the Defendants were negligent. While this may be true, it demonstrates the conundrum that I have been placed in in trying to determine these alternative arguments on the record placed in front of me. This is an issue that is best determined at trial on a full record.

Cash Store's Financial Statements

[97] One of Cash Store's defences to this motion is that it could not have discovered its losses until its Board formally approved the restatement of its interim financial statements in December 2012.

[98] The Defendants take great exception to this submission, arguing that the public disclosure of Cash Store's financial statements in Q1, Q2, and Q3 all showed significant losses.

[99] This dispute further evidences the difficulty faced by this court. Without context, by way of further information with respect to Cash Store's knowledge *and* the role the Defendants played, particularly KPMG and Cassels, in advising Cash Store after the January 2012 Transaction, it is not possible to meaningfully analyze and resolve this dispute on this motion.

[100] The same goes with respect to the dispute between Cash Store and the Defendants concerning Cash Store's allegations that it could not have discovered its claim until Deloitte and the Special Committee released their reports or until Morawetz R.S.J. released his decision in August 2014. The decision, amongst other things, re-characterized the legal relationship between Cash Store and the TPLs from one of broker-agent to debtor-creditor.

The Correspondence and the Assistance Rendered by the Defendants

[101] I am also not satisfied that the aforementioned letters that Cash Store received from VWK and Clearwater provide the necessary clarity that would permit me to make a finding of summary judgment.

[102] With respect to the aforementioned correspondence, upon which the Defendants put great emphasis, it cannot be ignored that these letters were received over a period of time, beginning in January 2012 up until November 6, 2012. All of these letters were obtained by Cash Store within the two year limitation period but it is very much a moving target on this motion as to which letter, if any, may have or should have engaged the limitation period. For example, if I focused on the Clearwater Letter of November 6, 2012, this letter was received mere weeks before the expiration of the two year limitation period. I would then have to engage a hypothetical exercise as to when the Board had the opportunity to meet and consider the letter. I am not prepared to engage in such a speculative exercise with respect to any of the correspondence based on the filed record. The documentations relied upon by the Defendants raise nuanced arguments as to what Cash Store should have taken from the aforementioned financial statements, public disclosures, and the correspondence. It is not possible to do this in a fair and just fashion based on the record placed before me.

[103] With respect to the ongoing roles of the Defendants, the January 2012 VWK Letter was provided to Cassels and Canaccord for their input. Mr. Stein circulated a draft response letter to Cash Store's management and Canaccord on January 19, 2012. On the same day Daniel Daviau of Canaccord replied, stating that "do you say we understand you [Mr. Woollcombe] have been distributing the letter (CIBC has a copy somehow) and threaten to sue him for damage caused."

[104] There are further emails from Canaccord to Gordon Reykdal, the chairman and CEO of Cash Store, offering advice on how to proceed against Mr. Woollcombe. These emails contain

disparaging comments about Mr. Woollcombe. Canaccord suggests that threatening to sue Mr. Woollcombe or issuing him stocks might induce him to give up his short position.

[105] Mr. Stein attended the meeting of Cash Store's Board on January 22, 2012, which was called to discuss the January 2012 VWK Letter. The Minutes of this meeting indicate that Mr. Stein was invited (along with US Legal Counsel) to provide legal advice on a response to the allegations contained in the January 2012 VWK Letter. The Minutes also indicate that after discussion with legal counsel, the Board made changes to the draft news release and approved it.

[106] According to the Special Committee's Report of May 13, 2013, after the Board received the August 2012 VWK Letter, it reviewed the letter with Cassels. The report also notes that on receipt of the August 2012 VWK Letter, the Audit Committee discussed the matters referenced in the letter with management and with KPMG.

[107] On November 6, 2012, Mr. Keiper sent the Clearwater Letter to Don Matthew of KPMG. Mr. Matthew replied to Mr. Keiper acknowledging receipt of the Clearwater Letter on November 12, 2012, and stated that KPMG would be making Cash Store management aware of the contents of the letter without disclosing Mr. Keiper's name.

[108] Mr. Matthew, Ms. Feldman, and James McAuley (also of KPMG) attended a meeting on November 15, 2012 with Mr. Mondor and Werner Pietrzyk, the Vice President of Cash Store's Internal Audit group, to review the allegations raised in the Clearwater Letter. Mr. McAuley requested that KPMG be allowed to shadow the internal investigation, and Mr. Mondor agreed.

[109] Ms. Feldman and Mr. Matthew, along with Cassels lawyers Mr. Stein and Michael Brown attended the special meeting of the Audit Committee on November 27, 2012. Mr. Matthew provided a verbal report indicating that KPMG had not yet completed its audit work, but believed that there was support for the recommendation of management. Mr. Brown summarized securities law considerations regarding potential restatement or current period change of estimates.

[110] Also on November 27, 2012, Mr. Matthew sent an email to Ms. Feldman and Brad Owen (also of KPMG), stating that he had spoken with Mr. Mondor and that "the directors are going to engage another [chartered accounting] firm to assist [management] in putting together the position paper analyzing the accounting for the loan purchase".

[111] According to the Special Committee's Report of May 13, 2013, the recommendation to form the Special Committee was based on discussions with Cash Store's legal advisor and KPMG. KPMG had strongly recommended that the Board consider forming the Special Committee to carry out the investigation to determine whether there were other undisclosed parties who may have been participants in the January 2012 Transaction. This report also indicates that the Special Committee consulted with KPMG on the terms of Deloitte's engagement to conduct factual inquiries and prepare a report of its findings.

[112] All this brings me back to the issue of context. The Defendants have, as noted, brought their motion on the basis of a very limited record. No evidence has been filed from employees of

the Defendants who were directly involved in the January 2012 Transaction. The only evidence is from Ms. Feldman. Cash Store has responded with the limited affidavit evidence of Mr. Aziz and Ms. Mendoza. It is not possible to meaningfully analyze the interplay between the correspondence and the ongoing assistance provided by the Defendants to determine the issues of discoverability.

CONCLUSION

[113] I cannot determine this matter in a fair and just manner by way of summary judgment. A review of the aforementioned affidavits and voluminous yet limited record do not provide the adequate context to determine the limitation period dispute. Particularly, I have no meaningful understanding as to the interaction between the parties in and around the time of the January 2012 Transaction that would assist me in determining the limitation issue. I also have no meaningful understanding of the assistance, or lack thereof, the Defendants rendered to Cash Store before, during, or after the January 2012 Transaction closed. The actions involve a complicated factual matrix involving professional negligence and a significant damages claim. In my view, the usual rule enunciated by Nordheimer J.A. in *Mason* should be followed. A full evidentiary record including *viva voce* evidence of the parties is required to achieve a fair and just result.

[114] I find that there is a genuine issue requiring a trial with respect to the issue of discoverability in each action.

DISPOSITION

[115] The motions for summary judgment are therefore dismissed. If the parties cannot resolve the issue of costs they can arrange a 9:30 am appointment before me to discuss further steps. I am also prepared to discuss case management with the parties at a further 9:30 am appointment.

McEwen J.

Released: April 5, 2019

CITATION: 1511419 Ontario Inc. v. KPMG, 2019 ONSC 228
COURT FILE NOS.: CV-14-10771-00CL, CV-14-10773-00CL, and CV-14-10774-00CL
DATE: 20190405

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CV-14-10771-00CL

1511419 Ontario Inc. (formerly known as The Cash
Store Financial Services Inc.)

Plaintiff

– and –

KPMG

Defendant

– AND –

CV-14-10773-00CL

1511419 Ontario Inc. (formerly known as The Cash
Store Financial Services Inc.)

Plaintiff

– and –

Canaccord Genuity Corp.

Defendant

– AND –

CV-14-10774-00CL

1511419 Ontario Inc. (formerly known as The Cash
Store Financial Services Inc.)

Plaintiff

– and –

Cassels Brock & Blackwell LLP

Defendant

REASONS FOR DECISION

McEwen J.

Released: April 5, 2019