

Court File No.

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

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

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

APPLICANTS

---

**FACTUM OF THE APPLICANTS**

---

April 13, 2014

**OSLER, HOSKIN & HARCOURT LLP**  
P.O. Box 50, 1 First Canadian Place  
Toronto, ON M5X 1B8

**Marc Wasserman** (LSUC#44066M)  
Tel: 416.862.4908  
Email: [mwasserman@osler.com](mailto:mwasserman@osler.com)

**Jeremy Dacks** (LSUC#41851R)  
Tel: 416.862.4923  
Email: [jdacks@osler.com](mailto:jdacks@osler.com)

Counsel to the Special Committee of the  
Board of Directors of Cash Store Financial  
Services Inc.

TO: SERVICE LIST

<i>Party/Counsel</i>	<i>Telephone</i>	<i>Facsimile</i>	<i>Party Represented</i>
<p><b>FTI Consulting Canada Inc.</b>            TD Waterhouse Tower            79 Wellington Street West            Suite 2010, P.O. Box 104            Toronto ON M4K 1G8</p> <p>Greg Watson            Email: greg.watson@fticonsulting.com</p> <p>Jeff Rosenberg            Email: jeffrey.rosenberg@fticonsulting.com</p>	416.649.8077	416.649.8101	Proposed Monitor
<p><b>McCarthy Tétrault</b>            Suite 5300, TD Bank Tower            Box 48, 66 Wellington Street West            Toronto ON M5K 1E6</p> <p>James Gage            Email: jgage@mccarthy.ca</p> <p>Heather Meredith            Email: hmeredith@mccarthy.ca</p>	416.362.1812  416.601.7539  416.601.8342	416. 868.0673	Counsel for the Proposed Monitor
<p><b>Goodmans LLP</b>            Bay Adelaide Centre            333 Bay Street, Suite 3400            Toronto ON M5H 2S7</p> <p>Robert J. Chadwick            Email: rchadwick@goodmans.ca</p> <p>Brendan O’Neill            Email: boneill@goodmans.ca</p>	416. 979.2211  416.597.4285  416.849.6017	416. 979.1234	Counsel for <i>Ad Hoc</i> Noteholders
<p><b>Norton Rose Fulbright Canada LLP</b>            Suite 3800, Royal Bank Plaza, South Tower            200 Bay Street, P.O. Box 84            Toronto, ON M5J 2Z4</p> <p>Virginie Gauthier            Email: virginie.gauthier@nortonrosefulbright.com</p> <p>Alex Schmitt            Email: alexander.schmitt@nortonrosefulbright.com</p>	416.216.4000  416.216.4853  416.216.2419	416.216.3930	Counsel for Coliseum Capital Management

<i>Party/Counsel</i>	<i>Telephone</i>	<i>Facsimile</i>	<i>Party Represented</i>
<p><b>Bennett Jones LLP</b>                      4500 Bankers Hall East                      855 2nd Street SW                      Calgary, AB T2P 4K7</p> <p>Grant Stapon                      Email: stapong@bennettjones.com</p> <p>Kenneth Lenz                      Email: lenzk@bennettjones.com</p>	<p>403.298.3100</p> <p>403.298.3204</p> <p>403.298.3317</p>	<p>403.265.7219</p>	<p>Counsel for                      McCann Family                      Holding                      Corporation</p>
<p><b>McMillan LLP</b>                      Brookfield Place                      181 Bay Street, Suite 4400                      Toronto, ON M5J 2T3</p> <p>Adam C. Maerov                      Email: adam.maerov@mcmillan.ca</p> <p>Brett Harrison                      Email: brett.harrison@mcmillan.ca</p>	<p>403.531.4700</p> <p>403.215.2752</p> <p>416.865.7932</p>	<p>416.865.7048</p>	<p>Counsel for Trimor                      Annuity Focus LP                      #5</p>
<p><b>Computershare Trust Company of Canada and                      Computershare Trust Company, NA</b>                      100 University Avenue                      9th Floor, North Tower                      Toronto, ON M5J 2Y1</p> <p>Manager, Corporate Trust</p> <p>Charles Eric Gauthier                      General Manager, Central Canada                      Email: charles.gauthier@computershare.com</p>	<p>416.263.9445</p>	<p>416.981.9777</p>	<p>Collateral Trustee                      under the Collateral                      Trust and                      Intercreditor                      Agreement</p>
<p><b>Borden Ladner Gervais</b>                      Centennial Place, East Tower                      1900, 520 – 3rd Ave SW                      Calgary, AB, T2P 0R3</p> <p>Josef G.A. Kruger                      jkruger@blg.com</p>	<p>403.232.9500</p> <p>403.232.9563</p>	<p>403.266.1395</p>	<p>Counsel to the                      Trustee in                      Bankruptcy for                      Assisive Financial                      Corp.</p>

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

APPLICANTS

---

**FACTUM OF THE APPLICANTS**

**PART I – NATURE OF THIS APPLICATION**

1. The Cash Store Financial Services Inc. ("Cash Store Financial") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA" or the "Act").

2. The Applicants are seeking a stay of proceedings under the CCAA in order to restructure their businesses (as described in the affidavit of Steven Carlstrom sworn on April 13, 2014 (the "Carlstrom Affidavit")) with a view to emerging as a going concern in order to continue providing valued services to their customers. In addition and in particular, the Applicants seek to maintain employment for as many as possible of their approximately 1,840 employees in Canada and the UK (470 of which are in Ontario).<sup>1</sup>

---

<sup>1</sup> Carlstrom Affidavit, paras. 5, 23 and 39.

3. The stay of proceedings will provide the Applicants with the necessary “breathing space” to allow them to carry out this restructuring, including to engage with their major stakeholders to resolve their current financial difficulties. A restructuring of the Applicants’ business – for example, through a transition to a new business model and/or a sale of all or part of the business – will be in the interests of all stakeholders, including employees, customers, landlords, class action plaintiffs, bondholders, third party lenders and other creditors. Without this “breathing space”, it is very likely that Cash Store will face bankruptcy and liquidation resulting in materially worse recoveries for all stakeholders.

4. The Applicants are seeking an initial stay of proceedings. Without such relief, demands from secured and other significant creditors, the impact of ongoing litigation and regulatory action, as well as other significant pressures on the operations of Cash Store, will likely result in cessation of going concern operations, to the detriment of all stakeholders. Senior Management has expressed the view that Cash Store can be a viable business once it undergoes the restructuring process. It is therefore appropriate for this Court to grant the breathing space to allow Cash Store to continue its exploration of strategic alternatives to maximize value for all stakeholders, including continued discussion with stakeholders, with the assistance of the proposed Monitor.<sup>2</sup>

5. References to “Cash Store” in this factum refer to all of the Applicants in this proceeding.

---

<sup>2</sup> See Carlstrom Affidavit, paras. 10 and 153.

## PART II – FACTS

6. The facts with respect to this Application are more fully set out in the Carlstrom Affidavit. Capitalized terms in this Factum not otherwise defined have the same meanings as in the Carlstrom Affidavit.

### Overview of Cash Store's Business

7. Cash Store is a leading provider of alternative financial products and services, serving individuals (approximately 7 to 10 percent of Canadians) for whom traditional banking may be either inconvenient or unavailable.<sup>3</sup> Cash Store's share of Canada's \$2.5 billion payday lending market was, until recently, approximately 35 percent.<sup>4</sup>

8. Cash Store owns and operates Canada's largest network of retail branches in the alternative financial products and services industry, with 509 branches across Canada (located in every province and Territory other than Quebec and Nunavut), as well as 27 branches in the United Kingdom.<sup>5</sup> The largest number of branches (176) is located in Ontario.<sup>6</sup> Cash Store's branches are almost all located in facilities leased from third party landlords, as is Cash Store's corporate headquarters.<sup>7</sup>

9. Cash Store acts as both broker and lender of short-term advances, using a combination of payday loans and lines of credit as its primary consumer lending offerings. It

---

<sup>3</sup> Carlstrom Affidavit, paras. 3 and 28.

<sup>4</sup> This number reflects the market share prior to Cash Store's suspension of brokering activities in Ontario. See Carlstrom Affidavit, paras. 25 and 26. Further discussion of events in Ontario is found at paras. 93 to 102 of the Carlstrom Affidavit.

<sup>5</sup> Carlstrom Affidavit, paras. 3, 35, 36, and 38. Cash Store operates its branches under several banners, including "Cash Store Financial", "Instaloans", and "The Title Store".

<sup>6</sup> Carlstrom Affidavit, para. 38.

<sup>7</sup> Carlstrom Affidavit, para. 37.

earns fees and interest income on these products.<sup>8</sup> In FY 2013, Cash Store's branches made over 1.3 million individual loans, and had a customer satisfaction rating of 88% in Canada and 93% in the UK.<sup>9</sup>

10. Cash Store offers a wide range of financial products and services such as bank accounts, prepaid MasterCard, private label credit and debit cards, cheque cashing, money transfers, payment insurance and prepaid phone cards. A number of these products are offered by means of arrangements with third party providers.<sup>10</sup>

### **Corporate Structure**

11. Cash Store Financial is a publicly held Ontario Corporation that is listed on the Toronto Stock Exchange. It was also listed on the New York Stock Exchange ("NYSE") until its voluntary de-listing on February 28, 2014. The other Applicants are all privately held corporations that are direct or indirect subsidiaries of Cash Store Financial.<sup>11</sup>

12. The main active subsidiaries of Cash Store Financial are The Cash Store Inc. and Instalozans Inc., which act as both lenders and/or brokers, operating in all of the Canadian provinces and territories in which Cash Store has a presence. The other Canadian subsidiaries include: (a) 1693926 Alberta Ltd., which operates "The Title Store" and offers loans secured by a motor vehicle as collateral (not an Applicant in these proceedings); (b) TCS-Cash Store, the lessee for all of the leased corporate stores; and (c) 5515433 Manitoba Inc., which holds property in Manitoba and acts as landlord for two Manitoba corporate stores. Certain other subsidiaries

---

<sup>8</sup> Carlstrom Affidavit, para. 4.

<sup>9</sup> Carlstrom Affidavit, para. 29.

<sup>10</sup> Carlstrom Affidavit, paras. 4 and 30.

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

are essentially inactive, including The Cash Store Financing Corporation and 1677547 Alberta Ltd. (neither of which is an Applicant in these proceedings), and 7252331 Canada Inc., which formerly acted as a direct payday lender and as lender for the Elite Line of Credit in British Columbia, and currently holds certain receivables.<sup>12</sup>

13. The Applicants include three companies that are incorporated and operate in the United Kingdom. These companies include: The Cash Store Financial Limited (a holding company) and its subsidiaries, The Cash Store Limited (a lender) and CSF Insurance Services Limited (a service provider). At this stage, these three UK companies are not Applicants in this proceeding. However, Cash Store may seek to add them to this proceeding in the future, if circumstances warrant it.<sup>13</sup> In addition, Cash Store Financial holds certain equity interests in foreign operations in Australia and the UK.<sup>14</sup>

14. Cash Store operates a central cash management system, including all bank reconciliations, all accounts payable and payroll (with the exception of the UK corporations, which process their own accounts payable and payroll). Cash is transferred between legal entities and bank accounts, as necessary, on a daily basis. In particular, as discussed further below, the bank accounts do not segregate the cash belonging to each subsidiary into Unrestricted and Restricted Cash (as these concepts are defined below).<sup>15</sup>

---

<sup>12</sup> Carlstrom Affidavit, paras. 15 and 16.

<sup>13</sup> Carlstrom Affidavit, para. 17.

<sup>14</sup> Carlstrom Affidavit, para. 18.

<sup>15</sup> Carlstrom Affidavit, paras. 19 and 20.



## **Direct Lending Business**

15. Cash Store operates under two major business models: the direct lending business and the brokered lending business. Cash Store acts as a direct payday lender (as opposed to a broker) in Alberta, British Columbia, Nova Scotia, and Saskatchewan. It also formerly acted as a direct lender in Manitoba and Ontario, until it switched to offering line of credit products in those jurisdictions.<sup>16</sup>

16. In its direct lending business, Cash Store is the lender and typically arranges for advances to consumers that range from \$100 to \$1,500. To qualify, the customer provides proof of income, copies of recent bank statements, current proof of residence and current telephone and utility bills. The customer must then either write a cheque or execute a pre-authorized debit agreement for the amount of the loan plus loan fees.

17. Cash Store generally obtains payment either by processing the pre-authorized debit or cashing the cheque on the due date of the loan. The due date is generally the customer's next payday, but is never more than 62 days from the date of the advance, in accordance with regulatory requirements.<sup>17</sup>

## **Brokered Lending Business**

18. In the other provinces where Cash Store carries on its lending business (New Brunswick, Newfoundland, Northwest Territories, Prince Edward Island and the Yukon Territory), Cash Store acts as a broker or intermediary on behalf of the customers, with third party lenders ("TPLs") acting as lenders. If the customer's eligibility for a loan is established (which involves similar requirements to those that apply in the direct lending business), the

---

<sup>16</sup> Carlstrom Affidavit, para. 31. The line of credit product is no longer offered in Ontario due to regulatory issues discussed further below.

<sup>17</sup> Carlstrom Affidavit, para. 32.

customer completes the TPL's loan documentation and Cash Store makes the advance on behalf of the TPL.<sup>18</sup>

19. Brokered loans are repaid to Cash Store in accordance with their terms. Upon repayment, funds are either remitted to the TPL, or more frequently, maintained in Cash Store's operating bank account until redeployed to new borrowers.<sup>19</sup>

20. Cash Store earns fees on brokered loan transactions.<sup>20</sup>

21. The brokerage model has also been applied in Ontario and Manitoba on slightly different basis. In those jurisdictions, the traditional payday loans product was replaced in October 2012 and February 2013, respectively, by a traditional, unsecured, medium term revolving line of credit, with regular minimum payments tailored to customer needs and profiles. All of the line of credit products are brokered, except a small number of Cash Store's "Elite" lines of credit which are no longer offered as of March 2014. TPLs also provide the funding for the brokered line of credit products, which are then arranged by Cash Store in exchange for fees. Proceeds from brokered line of credit products are handled in the same way as the proceeds from other brokered loans.<sup>21</sup>

22. As of February 12, 2014, however, the brokered line of credit product was discontinued in Ontario and no lending activity is currently occurring in Ontario due to

---

<sup>18</sup> Carlstrom Affidavit, para. 33.

<sup>19</sup> Carlstrom Affidavit, para. 33.

<sup>20</sup> Carlstrom Affidavit, para. 33.

<sup>21</sup> Carlstrom Affidavit, para. 34.

outstanding issues (discussed further below) regarding compliance with regulatory requirements.<sup>22</sup>

### **Financial Position of Cash Store**

23. Based on its interim financial statements, as of December 31, 2013, Cash Store had total assets of \$176,255,000 and total liabilities of approximately \$184,984,000.<sup>23</sup>

### **Indebtedness under Credit Facilities**

24. Of the liabilities described above, approximately \$139.5 million represents long-term debt. This debt is principally composed of two amounts: \$12 million owing to the Senior Secured Lenders under the Credit Agreement (described below) and \$127.5 million owing to the Senior Secured Noteholders (also discussed below).<sup>24</sup>

25. On November 29, 2013, Cash Store entered into a credit agreement (the “Credit Agreement”) with Coliseum Capital Management, LLC, 8028702 Canada Inc. and 424187 Alberta Ltd. (collectively, the “Senior Secured Lenders”). Pursuant to the Credit Agreement, the Senior Secured Lenders have provided \$12 million of secured loans. These loans are guaranteed by certain Cash Store affiliates (the “Guarantors”).<sup>25</sup> The loans made under the Credit Agreement mature on November 29, 2016, subject to certain requirements to repay *pro rata* amounts prior to maturity to the extent that the amount outstanding exceeds the borrowing base.<sup>26</sup>

---

<sup>22</sup> Carlstrom Affidavit, para. 34. See also Carlstrom Affidavit, paras. 93 to 102.

<sup>23</sup> Carlstrom Affidavit, paras. 45 and 52. More detailed financial information is contained in the Carlstrom Affidavit at paras. 44 to 54. See also Exhibits A and B to the Carlstrom Affidavit.

<sup>24</sup> Carlstrom Affidavit, para. 55.

<sup>25</sup> Carlstrom Affidavit, para. 59. See also Exhibit C to the Carlstrom Affidavit.

<sup>26</sup> Carlstrom Affidavit, paras. 62 and 63.

26. The loans made under the Credit Agreement are designated as priority lien debt. The security interest of the Senior Secured Lenders ranks ahead of the security interest in Cash Store's property granted in favour of the Senior Secured Noteholders (described below).<sup>27</sup> Upon default, the Senior Secured Lenders have the right, *inter alia*, to accelerate the obligations under the Credit Agreement and to realize upon the security.<sup>28</sup> As of March 2014, Cash Store had breached a number of covenants under the Credit Agreement, including the obligation to pay interest when due on March 29, 2014. Such breaches either already constitute defaults or will constitute defaults with the passage of time. Cash Store has sought a waiver of these defaults from the Secured Secured Lenders, who have not responded to date.<sup>29</sup>

27. In January 2012, Cash Store Financial completed a private placement of \$132.5 million of 11.5% senior secured notes (the "Notes") under a note indenture (the "Note Indenture") and applied the proceeds to acquiring a portfolio of consumer loans from third party lenders and to settle certain pre-existing relationships with TPLs.<sup>30</sup> The Notes are recorded at a discount (\$127.5 million) to their face value and accreted to the par value over the five year term using the effective interest rate method.<sup>31</sup>

28. The Notes mature on January 31, 2017. The Notes are guaranteed by the same Guarantors that guaranteed the loans under the Credit Agreement. The Notes are secured on a second-priority basis by liens on all of Cash Store Financial's and its restricted subsidiaries' existing and future property, subject to certain exceptions. The amounts owing to the noteholders

---

<sup>27</sup> Carlstrom Affidavit, para. 64 and Exhibit E.

<sup>28</sup> Carlstrom Affidavit, para. 66.

<sup>29</sup> Carlstrom Affidavit, paras. 67 and 68.

<sup>30</sup> Carlstrom Affidavit, paras. 31, 69 and 70. See also Exhibit F to the Carlstrom Affidavit.

<sup>31</sup> Carlstrom Affidavit, para. 55.

(the “Senior Secured Noteholders”) are subordinated to the amounts owing to the Senior Secured Lenders, which are secured by a first priority lien on the same property.<sup>32</sup>

29. Upon commencement of the CCAA proceeding, Cash Store will no longer be in compliance with the covenants in the Note Indenture and the full \$139.5 million in long term debt will become immediately due and payable. Cash Store does not have the ability to repay the Notes at this time.<sup>33</sup>

### **Relationship with the TPLs**

30. In connection with its brokered lending business, Cash Store is a party to a number of agreements with the TPLs (the “Broker Agreements”). Under the Broker Agreements, Cash Store earns fees for brokering loan transactions between the TPLs as lender and the customer.<sup>34</sup>

#### **a. “Restricted Cash”**

31. Cash Store has received approximately \$42 million from the TPLs (the “TPL Funds”). Pursuant to the terms of the Broker Agreements, these funds are contractually required to be used only for the purpose of lending to customers.<sup>35</sup> TPL Funds that are not loaned to customers are held in Cash Store’s bank accounts and are designated, for accounting purposes, as “Restricted Cash”. Despite its nomenclature, “Restricted Cash” does not represent a segregated fund and is simply an accounting concept. Essentially, “Restricted Cash” is a notional amount that represents the difference between the amount of TPL Funds provided to Cash Store for

---

<sup>32</sup> Carlstrom Affidavit, paras. 70 and 71.

<sup>33</sup> Carlstrom Affidavit, para. 75.

<sup>34</sup> Carlstrom Affidavit, para. 76 and Exhibits G to K.

<sup>35</sup> Carlstrom Affidavit, para. 78. See also Exhibits G to K of the Carlstrom Affidavit.

brokered loans to consumers, and the amount of the outstanding brokered loans made with the TPL Funds that have not yet been repaid, together with cumulative losses.<sup>36</sup> All other cash held by Cash Store is accounted for as “Unrestricted Cash”.<sup>37</sup>

32. Although the Broker Agreements permit the TPLs to require Cash Store to hold the TPL Funds in a specifically designated account, no TPL has ever exercised its contractual right to require Cash Store to do so (until two TPLs recently and belatedly purported to do so, as described further below). As a result, when TPL Funds are provided by the TPLs, no separate bank account for TPL Funds is, or is required to be, maintained.<sup>38</sup>

33. Moreover, amounts received by Cash Store from borrowers in payment for indebtedness under both direct payday loans and brokered loans funded with TPL Funds are co-mingled in Cash Store’s general bank accounts. Until month end, it is not possible to know which dollars represent Restricted Cash and which represent Unrestricted Cash.<sup>39</sup> Repayments received on brokered loans are intended to replenish the source of funds for further brokered lending, and to be redeployed as further brokered loans to customers. These are the amounts that are described for accounting purposes as “Restricted Cash”.<sup>40</sup>

34. In order to ensure that Cash Store always knows how much cash that Cash Store is contractually entitled to allocate for additional brokered loans – and how much cash could be subject to a demand for repayment by the TPLs under the terms of the Broker Agreement -- Cash

---

<sup>36</sup> Carlstrom Affidavit, para. 79.

<sup>37</sup> Carlstrom Affidavit, para. 79.

<sup>38</sup> Carlstrom Affidavit, para. 79.

<sup>39</sup> Carlstrom Affidavit, para. 79.

<sup>40</sup> Carlstrom Affidavit, para. 79.

Store keeps detailed records of the amount of Restricted Cash held. Month end reconciliations are generally completed within approximately ten days after month end.<sup>41</sup>

**b. “Voluntary Retention Measures”**

35. Cash Store has historically taken two types of voluntary measures (not required under the Broker Agreements) to protect the TPLs, to support their “investment” in Cash Store’s business and to encourage the TPLs to continue funding the brokered loans. The first of these measures consists of monthly cash retention payments, which combined with portfolio returns, give the TPLs an effective return of 17.5% interest on their “investment” per year (the “Monthly Lender Distribution”).<sup>42</sup>

36. The second type of measure can be loosely described as “capital protection” (the “Capital Protection Measures”). These measures are generally designed to protect the TPLs against losses associated with unpaid broker loans. The Capital Protection Measures include both an “expensing mechanism” and a “purchasing mechanism.”

- (a) Using the “expensing mechanism”, if a loan remains unpaid after 90 days, Cash Store will, by means of a book entry, credit the TPL with a retention payment in the amount of the loss. This payment is recorded as an expense on Cash Store’s balance sheet, and does not involve any transfer of cash to the TPLs. As a result of this credit and corresponding book entry, the Restricted Cash balance increases, and the Unrestricted Cash balance goes down.

---

<sup>41</sup> Carlstrom Affidavit, para. 79.

<sup>42</sup> Carlstrom Affidavit, para. 84.

- (b) The “purchasing mechanism” is used in Ontario and Manitoba as an alternative to the expensing mechanism. Cash Store purchases past due brokered loans from the TPLs at face value and recognizes the difference between the purchase price and the fair value of the loans as a retention payment. Cash Store is then able to take collection measures for these past due loans without having to be licensed as a collection agency or to engage a third party collection agency.<sup>43</sup>

37. Neither the Monthly Lender Distribution nor the Capital Protection Measures are contractually required under the terms of the Broker Agreements. In fact, the Broker Agreements do not guarantee any specific rate of return to the TPLs on the TPL Funds provided to Cash Store. Moreover, subject to certain specific exceptions, the Broker Agreements contemplate that TPL and not Cash Store will bear the risk of loss on the brokered loans.<sup>44</sup>

38. Given that neither the Monthly Lender Distributions, nor the Capital Protection Measures are contractually required, Cash Store did not make the Monthly Lender Distribution and did not implement either of the Capital Protection Measures in March 2014. The extent to which Cash Store will make the Monthly Lender Distributions during the post-filing period is currently being resolved. At the time of drafting, it is proposed that the Monthly Lender Distributions will be made only on the pool of Restricted Cash representing post-filing payments from borrowers actually received by Cash Store which is available for redeployment to future borrowers. The Monthly Lender Distribution will not be made on the full amount of the TPL Funds received, as has been the historic practice, or on the amount of funds represented by loans currently outstanding to borrowers.

---

<sup>43</sup> Carlstrom Affidavit, para. 84.

<sup>44</sup> Carlstrom Affidavit, paras. 77 and 85.



**c. Transfer of Receivables to “Free Up” Restricted Cash**

39. On several occasions, the month end reconciliation has revealed that the amount of Restricted Cash held by Cash Store exceeds its total cash, meaning that Cash Store has used the Restricted Cash to fund its intra-month working capital needs. Cash Store has then transferred its own loan receivables from its direct lending portfolio to the TPLs to “free up” the Restricted Cash by reducing the Restricted Cash balance, together with an additional amount to permit Cash Store to meet its working capital needs during the next month with Unrestricted Cash. This practice is referred to in this factum as the “Receivable Transfers.” Like the Capital Protection Measures, the Receivable Transfers are not required under the Broker Agreements, but they are permitted. They are permitted under the Credit Agreement and the Note Indenture, as long as they are made in the ordinary course of business.<sup>45</sup>

40. Cash Store will not continue to make the Receivables Transfers during the post-filing period. The Receivables Transfers will be rendered unnecessary by the proposed accounting measures to be implemented by Cash Store after the filing.

**Urgent Need for Relief**

41. This application for relief under the CCAA is being brought on an urgent basis due to the confluence of a number of factors that have put extreme pressure on the continued ability of Cash Store to operate as a going concern. The situation is currently described as “dire”.<sup>46</sup>

42. These factors include:

---

<sup>45</sup> Carlstrom Affidavit, para. 80.

<sup>46</sup> Carlstrom Affidavit, paras. 8, 87 and 152.

- (a) Cash Store currently faces numerous regulatory challenges, arising in part out of the relatively recent introduction of payday loan legislation in certain jurisdictions and the transition generally from an unregulated market to a regulated market. These regulatory issues have impacted Cash Store's ability to design one business model for its payday lending business across Canada and exposed Cash Store to increased costs associated with adjusting Cash Store's business model to respond to regulatory change.<sup>47</sup>
- (b) Cash Store has encountered specific regulatory issues in relation to its lending business in Ontario and its inability to secure a license as a payday lender under applicable Ontario legislation. An appeal is underway of an Ontario Superior Court of Justice decision that held that Cash Store could not offer its line of credit products in Ontario without a payday lender license. At the current time, Cash Store is receiving payment for outstanding loans, but cannot sell any new payday loan products in Ontario, to the significant detriment of Cash Store's overall business. Although Cash Store's Ontario branches are still open, Cash Store has begun implementing a temporary lay-off of approximately 250 Ontario employees. If Ontario branches are ultimately closed as part of the restructuring, severance costs for some or all of the approximately 470 Ontario employees will be significant.<sup>48</sup>
- (c) The regulatory environment is in flux. New regulatory initiatives are being contemplated at both the federal and provincial levels that could further impact

---

<sup>47</sup> Carlstrom Affidavit, paras. 88 to 92.

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

aspects of Cash Store's business, such as title loans and the lines of credit offered in Manitoba.<sup>49</sup> Cash Store has also recently been subject to regulatory action in British Columbia and Manitoba and to a criminal investigation in Newfoundland.<sup>50</sup> Regulatory issues have also arisen in Nova Scotia and New Brunswick.<sup>51</sup>

- (d) In addition, Cash Store is defending a number of significant legal proceedings across Canada and the United States. These proceedings include class actions regarding its business model (primarily involving fees and interest rates charged) and regarding its compliance with securities laws. These proceedings have exposed Cash Store to significantly increased legal costs. The magnitude of any ultimate liability of Cash Store in much of this litigation is difficult to estimate.<sup>52</sup> Cash Store is also subject to additional liabilities in connection with a class action settlement in British Columbia.<sup>53</sup>
- (e) Cash Store has recently incurred significant expenses for audit and special investigation fees associated with questions about the acquisition of the consumer loan portfolio from the TPLs in 2012.<sup>54</sup>

---

<sup>49</sup> Carlstrom Affidavit, paras. 98, 103, 106 to 107.

<sup>50</sup> Carlstrom Affidavit, paras. 104 to 106, 108 to 109, 110.

<sup>51</sup> Carlstrom Affidavit, paras. 111 to 113.

<sup>52</sup> Carlstrom Affidavit, paras. 114, 115 to 123. Note that Cash Store has entered into an agreement in principle to settle four outstanding securities class actions: Carlstrom Affidavit, paras. 122 and 123.

<sup>53</sup> Carlstrom Affidavit, paras. 115 to 116.

<sup>54</sup> Carlstrom Affidavit, paras. 125 to 128.

- (f) Due to Cash Store's inability to comply with the NYSE's market capitalization and share price requirements, Cash Store voluntarily de-listed its stock from the NYSE.<sup>55</sup>
  
- (g) Cash Store does not have the cash to continue to operate. As of February 28, 2014, there was \$12.2 million in Restricted Cash available for consumer lending. Since Cash Store has been receiving repayments of brokered loans in Ontario and not re-lending, the amount of Restricted Cash has increased dramatically. Final accounting for March 2014 has not yet been completed. However, it is estimated that Restricted Cash now totals approximately \$14.4 million and exceeds the amount of total cash in Cash Store's bank accounts.<sup>56</sup>
  
- (h) Two of the TPLs ("McCann" and "Trimor") have requested the return of the Restricted Cash. Under the Broker Agreements, these "redemption" requests must be addressed by May 23, 2014 and June 26, 2014, respectively. Cash Store currently does not have the liquidity to honour these requests. Trimor has signed a non-disclosure agreement ("NDA") and been participating in discussions with Cash Store and the Special Committee. McCann has not agreed to sign an NDA, and has asserted that the Restricted Cash is held on trust, despite the lack of any trust language or other indicia of an intention to create a trust in the Broker Agreements (as discussed further below). Cash Store has disputed this contention. Efforts to resolve this issue have, to date, not borne fruit. On April 11, 2014, McCann commenced litigation against Cash Store seeking injunctive relief

---

<sup>55</sup> Carlstrom Affidavit, paras. 129 to 130.

<sup>56</sup> Carlstrom Affidavit, para. 83.

against Cash Store in relation to the TPL Funds and asserting a trust over such funds.<sup>57</sup>

### **Restructuring Efforts to Date**

43. Cash Store requests relief in this proceeding in order to achieve the necessary “breathing space” to restructure its business. Although the exact nature of the restructuring is not yet resolved, Cash Store has already undertaken a number of steps towards such a restructuring:

- (a) Cash Store established a Special Committee of its Board of Directors (the “Special Committee”) on February 19, 2014, advised by its own legal counsel and financial advisors (“Rothschild”), in order to explore options for a sale, restructuring, refinancing or liquidation.<sup>58</sup>
- (b) Cash Store hired a Compliance and Regulatory Affairs Officer, reporting directly to the Special Committee, in order to address issues of regulatory compliance and establish more productive relationships with applicable regulators. Priority is being given to the resolution of regulatory issues in Ontario.<sup>59</sup>
- (c) Rothschild has commenced efforts to canvas interest in a sale or investment transaction. As of the date of filing, a number of parties have entered into non-disclosure agreements and begun due diligence of Cash Store.<sup>60</sup>

---

<sup>57</sup> Carlstrom Affidavit, paras. 131 to 142.

<sup>58</sup> Carlstrom Affidavit, paras. 143 to 145.

<sup>59</sup> Carlstrom Affidavit, paras. 148 to 151.

<sup>60</sup> Carlstrom Affidavit, paras. 145 to 147.

**PART III – ISSUES AND THE LAW**

44. The issues on this Application are as follows:
- (a) are the Applicants insolvent?;
  - (b) are the Applicants permitted to use existing cash on hand to meet their operating capital requirements during the post-filing period?;
  - (c) does this Honourable Court have jurisdiction to grant a DIP financing charge on a priority basis over the property of the Applicants and, if so, should the Court exercise its discretion to do so?;
  - (d) does this Honourable Court have jurisdiction to grant an order entitling the Applicants to make pre-filing payments to critical suppliers and, if so, should the Court exercise its jurisdiction to do so?;
  - (e) should this Honourable Court exercise its discretion to grant the Applicants' Administration and Directors' Charges (both as defined below); and
  - (f) should this Honourable Court grant protection to the Chief Restructuring Officer ("CRO") and to the Special Committee on the basis that the Special Committee has been fulfilling the role of CRO and will continue to fulfill this role in these proceedings in the very brief period until the CRO's appointment formally takes effect?

**A. THE APPLICANTS ARE COMPANIES TO WHICH THE CCAA APPLIES**

45. The CCAA applies to a “debtor company” or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars. Pursuant to section 2 of the CCAA, a “debtor company” means, *inter alia*, a company that is insolvent.<sup>61</sup>

46. Until recently, it was common practice to refer to the definition of “insolvent person” in the *Bankruptcy and Insolvency Act* (“BIA”) in order to establish that an applicant is a “debtor company” in the context of the CCAA. The definition of “insolvent person” in the BIA is as follows:

s.2(1)

... “insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

47. In *Re Stelco Inc.*<sup>62</sup>, however, Farley J. held that the test for “insolvency” should be given an expanded meaning under the CCAA in order to give effect to the rehabilitative goal of the Act. The Court in that case concluded that it would defeat the purpose of the CCAA to limit or prevent a CCAA application until the financial difficulties of the applicant are so advanced that the applicant would not have sufficient financial resources to successfully complete its restructuring. Under the *Stelco* approach, a Court will determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that

---

<sup>61</sup> CCAA, sections 2 and 3(1).

<sup>62</sup> (2004), 48 C.B.R. (4<sup>th</sup>) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.).

will result in the applicant running out of money to pay its debts as they generally become due in the future without the benefit of a stay of proceedings. Put another way, an applicant does not necessarily need to be balance sheet insolvent to qualify as a “debtor company” under the CCAA. As Farley J. wrote:

It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.<sup>63</sup> [Emphasis added.]

48. The Applicants are all affiliated debtor companies with total claims against them exceeding \$5 million. Moreover, the Applicants are insolvent.<sup>64</sup>

49. Moreover, the Applicants are facing a significant liquidity crisis, exacerbated by (among other things) the regulatory issues in Ontario. Cash Store’s liquidity has deteriorated significantly over recent months and is continuing to do so. Senior Management and the Special Committee have expressed concerns regarding the degree of uncertainty, and the number of business and legal impediments to continuing the exploration of strategic alternatives for Cash Store’s business outside an insolvency proceeding.<sup>65</sup>

50. Cash Store’s liquidity has declined from \$13.1 million of total cash at the end of February to \$12.6 million at the end of March, and is projected to decline significantly to approximately \$5 million at the end of April. These cash balances include so-called Restricted

---

<sup>63</sup> *Re Stelco, supra*, at para. 26.

<sup>64</sup> Carlstrom Affidavit, paras. 1 and 8. See *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commerical List]) at paras. 23 to 31 for the proposition that not all companies within a corporate group need to be insolvent in order to benefit from an initial order.

<sup>65</sup> Carlstrom Affidavit, para. 8.



Cash. Cash Store's business depends on its ability to lend. As such, it requires a minimum of \$5 to \$10 million to manage ordinary day-to-day fluctuations in its lending activities.<sup>66</sup>

51. As of March 31, 2014, Cash Store had defaulted under several covenants in the Credit Agreement, entitling the Senior Secured Lenders to accelerate the obligations under the Credit Agreement and enforce their security. Cash Store does not have the funds to repay the Senior Secured Lenders.<sup>67</sup> Upon commencement of the CCAA proceeding, Cash Store will no longer be in compliance with the Note Indenture, and this portion of its long-term debt will also become immediately due and payable. It goes without saying that Cash Store does not have the funds to repay the Notes at this time.<sup>68</sup>

52. Cash Store is likely insolvent under the BIA test, as it is currently unable to meet its liabilities as they come due.<sup>69</sup> In any event, all of the above factors indicate that Cash Store faces exactly the type of "looming liquidity crisis" that was held in *Stelco* to satisfy the test for insolvency under the CCAA.

**C. USE OF EXISTING CASH ON HAND**

53. Cash Store's cash flows depend on its ability, during the post-filing period when the stay of proceedings is in effect, to use its cash on hand as of the date of filing (the "Existing Cash") for its operating capital requirements, even though so-called Restricted Cash exceeds Cash Store's total cash. Moreover, the proposed DIP Facility (described below) currently

---

<sup>66</sup> Carlstrom Affidavit, para. 155.

<sup>67</sup> Carlstrom Affidavit, para. 67.

<sup>68</sup> Carlstrom Affidavit, para. 75.

<sup>69</sup> Carlstrom Affidavit, para. 8.

contemplates that Cash Store should have access to the Existing Cash for general operating purposes.

54. The TPLs have challenged Cash Store's ability to use Restricted Cash for anything other than the permitted purposes under the Broker Agreements. McCann has initiated a legal proceeding seeking, among other things, injunctive relief and declaratory orders on the basis that the Restricted Cash is held on trust for the TPLs.<sup>70</sup> If the Initial Order is granted, this proceeding will be stayed.

55. The requirements to establish an express trust are well-established and well-known. It is necessary to demonstrate the existence of the "three certainties". These are: certainty of intention; certainty of subject-matter (or trust property); and certainty of objects (beneficiaries). In order to demonstrate certainty of intention to create a trust, it is not necessary to use any particular technical words. However, the intention must be clear.<sup>71</sup> Generally, the requirement is for the settlor of the so-called "trust" to use the words "in trust" or "as trustee for", although these words are not always indispensable.<sup>72</sup> Given the consequences for the recoveries of the Senior Secured Lenders and the Senior Secured Noteholders of a finding that the TPL Funds or the Restricted Cash are subject to a trust, it is particularly important in the context of these proceedings to find a clear intention to create a trust.

56. Cash Store strongly opposes any allegation that the TPL Funds or the Restricted Cash – and therefore some or all of the Existing Cash -- are subject to any trust obligations. Cash Store submits that the actions by the TPLs to belatedly assert trust obligations in this

---

<sup>70</sup> Carlstrom Affidavit, paras. 140 to 142.

<sup>71</sup> D.W.M. Waters, *Law of Trusts in Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 2012) at pp. 140 to 141 [*Waters*].

<sup>72</sup> *Waters, supra*, at p. 144.

context are a blatant attempt to obtain an unjustified priority over the Senior Secured Lenders and the Senior Secured Noteholders. If the TPLs had intended to impose trust obligations in relation to the TPL Funds or the Restricted Cash, they are sophisticated parties who could easily have done so. Moreover, if they had wanted any security over Cash Store's obligations to repay TPL Funds or Restricted Cash pursuant to the terms of the Broker Agreements, they could easily have negotiated such protections.

57. There are five Broker Agreements in place with TPLs.<sup>73</sup> These Broker Agreements are in similar form and contain similar terms. It is submitted that there is a complete absence of any indication in the Broker Agreements that the TPL Funds, or the Restricted Cash, were intended to be held on any type of trust for the benefit of the TPLs.

58. There is no language whatsoever in any of the Broker Agreements that purports to create an express trust over the TPL Funds when they are received by Cash Store, or over the Restricted Cash (i.e. the payments received by Cash Store for indebtedness under brokered loans). Nowhere, with the exception of one agreement, is the word "trust" even used.

59. The Omni Agreement states that a limited trust obligation does apply, but only when a customer defaults. In those circumstances (and only those circumstances), Cash Store is expressly required to hold 70% of collected amounts in trust.<sup>74</sup> The presence of this limited trust language, in contrast to the complete silence in the Broker Agreements regarding any other intention to create a trust, is convincing evidence that if the parties had intended to create a trust

---

<sup>73</sup> These Agreements include: Broker Agreement with Omni Ventures Ltd. dated January 31, 2012 ("Omni Agreement"); Broker Agreement with L-Gen Management Inc. dated January 31, 2012 ("L-Gen Agreement"); Broker Agreement with 1396309 Alberta Ltd. dated January 31, 2012 ("Numberco Agreement"); Broker Agreement with TriMor Annuity Focus Limited Partnership dated February 1, 2012, as amended April 17, 2013 ("TriMor Agreement") and Broker Agreement with McCann Family Holding Corporation dated June 19, 2012 ("McCann Agreement"). See Exhibits G to K to Carlstrom Affidavit.

<sup>74</sup> Omni Agreement, section 7.2.

obligation in relation to the TPL Funds or the Restricted Cash, they were more than capable of doing so – and they did do so when they wanted to. There is no legal basis for reading in any additional trust obligations.

60. Cash Store submits that the terms of and the historic practices under the Broker Agreements – for example, the payment of the Monthly Lender Distributions, the absence of any requirement to “flow through” funds received from borrowers in payment of brokered loans to the TPLs, and the fact that the TPL Funds and Restricted Cash are not required to be segregated from Cash Store’s general operating cash – are entirely inconsistent with the existence of trust obligations.<sup>75</sup> Cash Store’s public disclosures also do not indicate that the TPL Funds are subject to any trust obligation.<sup>76</sup> Use of Cash Store’s Existing Cash, even if some or all of it is Restricted Cash, is not a “dissipation” of trust funds, contrary to the allegations of one TPL.<sup>77</sup> It is clear that no trust exists over either the TPL Funds or the Restricted Cash.

61. As soon as Restricted Cash is received in repayment of a brokered loan, it is immediately commingled with all of Cash Store’s Unrestricted Cash. The TPLs have the contractual right under the Broker Agreements to require Cash Store to hold TPL Funds in a designated account. To date, the TPLs have not exercised this contractual right, with the exception of their belated requests that accompany recent demands for the return of the TPL Funds by the TPLs.<sup>78</sup> In any event, any requirement to keep track of TPL Funds or Restricted Cash through separate accounts cannot change the correct characterization under the Broker

---

<sup>75</sup> Carlstrom Affidavit, paras. 79 and 84.

<sup>76</sup> Carlstrom Affidavit, para. 135.

<sup>77</sup> Carlstrom Affidavit, para. 134.

<sup>78</sup> Carlstrom Affidavit, paras. 131 to 142.

Agreements of the TPL Funds and the Restricted Cash and miraculously transform them into trust funds, if they do not already have the characteristics of trust funds.

62. Cash Store's position is that either the Broker Agreements create an unsecured debt in the amount of the TPL Funds, or the TPL Funds are provided to Cash Store as an equity investment in the business. At best, the TPL Funds were advanced as an interest-free loan, subject to a contractual requirement to use those funds for a particular purpose. Any failure by Cash Store to comply with the use requirement, with a request to create a designated account, or with a demand for repayment of the TPL Funds may therefore be a breach of contract, which if proven, would give rise to an unsecured damages claim.

63. Since the TPLs do not hold any security for repayment of the TPL Funds, the TPLs are in no better or worse position than any other unsecured creditor whose claims will go unpaid during the stay period, contrary to the terms of the debtor's agreement with that creditor. In fact, if Cash Store were to repay TPL Funds at this point, or accede to the request to create a designated account with a view to bolstering a trust claim, such conduct could, in light of Cash Store's current financial difficulties, constitute a transfer at undervalue or preference.

64. Given that these matters are the subject of a dispute between the parties that cannot be resolved either through negotiation or court order prior to the granting of the Initial Order, the Initial Order will contain protections for the TPLs, including a charge in favour of the TPLs (the "TPL Charge") in the amount of the Existing Cash that will rank *pari passu* with the proposed DIP Lender's Charge (defined below). The exact terms of these TPL protections is unresolved at the time of drafting and is subject to further negotiation. However, the TPL Charge will not be enforceable unless and until it is determined that some or all of the Existing Cash is trust money.

65. The objective is to ensure that Cash Store has the immediate right to use the Existing Cash, while protecting any future ability of the TPLs to assert that these funds are trust money (a position that Cash Stores believes is without merit). Cash Store submits that these TPL protections will avoid granting the TPLs more leverage in these proceedings than they are entitled to have, given the terms of the Broker Agreements and the history of the relationship with the TPLs.

**D. JURISDICTION AND DISCRETION TO GRANT A DIP FINANCING CHARGE ON A PRIORITY BASIS**

66. It is abundantly clear that Cash Store cannot restructure its business without interim financing to allow it to continue to operate during the post-filing period while it considers the best options to maximize recovery for all stakeholders.<sup>79</sup>

67. Subject to certain conditions, including the granting of the Initial Order, Coliseum Capital Partners LP, Coliseum Capital Partners II, LP and Blackwell Partners LLC have agreed to provide the Applicants with an interim financing facility (the “DIP Facility”) in the amount of up to \$20.5 million. The DIP Facility is intended to provide the Applicants with adequate liquidity to satisfy their working capital requirements and to seek a complete restructuring as part of a CCAA proceeding.<sup>80</sup>

68. At the time of drafting, the terms of the DIP Facility were subject to ongoing negotiation. However, it is clear that the DIP Facility will be secured by a priority charge over the assets of Cash Store (the “DIP Lender’s Charge”) that will rank ahead of existing security interests, including the Senior Secured Lenders and the Senior Secured Noteholders, and *pari*

---

<sup>79</sup> Carlstrom Affidavit, paras. 9, 10 and 154.

<sup>80</sup> Carlstrom Affidavit, para. 9.

*passu* with the TPL Charge. The DIP Lender's Charge will rank behind the Administration Charge and the Directors Charge (described below).

69. Section 11.2 of the CCAA gives the Court the statutory authority to grant a debtor-in-possession ("DIP") financing charge:

**11.2(1) *Interim Financing*** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**11.2(2) *Priority – Secured Creditors*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

...

70. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

**11.2(4) *Factors to be considered*** – In deciding whether to make an order, the court is to consider, among other things:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

71. Before the above sections of the CCAA were enacted in 2009, it was well established that courts could exercise their broad and flexible powers under the CCAA to

approve DIP financing and provide that it be secured by a charge on the debtor company's assets, with priority, where appropriate, over prior security interests.<sup>81</sup> The 2009 amendments to the CCAA codify and clarify earlier practice but do not limit the court's broad discretion to grant orders that further a debtor's overall restructuring objectives, including in respect of DIP financing. As stated by Pepall J:

In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.<sup>82</sup>

72. In *Re Ted Leroy Trucking*, the Supreme Court of Canada recently affirmed the broad discretion of a CCAA court and the inherent flexibility of the statute in furtherance of the CCAA's overarching objective of facilitating the abilities of debtors to restructure their businesses as going concerns.<sup>83</sup>

73. Any prejudice to existing creditors from a DIP Charge must be "material" in order to weigh in the balance. Moreover, even if it can be established that some creditor is materially prejudiced, this factor is only one factor to be considered in equal measure with the others listed in s. 11.2(4) of the CCAA.<sup>84</sup>

---

<sup>81</sup> *Re Temple City Housing Inc.* (2007), 42 C.B.R. (5<sup>th</sup>) 274, 2007 CarswellAlta 1806 (Alta. Q.B.) at para. 14, leave to appeal to C.A. refused 2008 CarswellAlta 2 (Alta. C.A.); *Skydome Corp. v. Ontario* (1998), 16 C.B.R. (4<sup>th</sup>) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) at para. 9.

<sup>82</sup> *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5<sup>th</sup>) 72, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 24 [*Re Canwest Global*].

<sup>83</sup> *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, 2010 CarswellBC 3419 (S.C.C.) [*Re Ted Leroy Trucking*].

<sup>84</sup> *Re League Assets Corp.*, 2013 BCSC 2043, 2013 CarswellBC 3408 (B.C. S.C.) at para. 57.



74. As noted above, pursuant to s. 11.2(1) of the CCAA (Interim financing), the DIP Lender's Charge may not secure an obligation that existed before the order was made. The requested DIP Lender's Charge will not secure any pre-filing obligations.

75. The following factors also support the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in s. 11.2(4) above:

- (a) the Cash Flow Forecast projects that the Applicants will require the additional liquidity afforded by the DIP Facility in order to continue to operate through the pendency of the proposed CCAA proceeding;<sup>85</sup>
- (b) the Applicants' business is intended to continue to operate on a going concern basis during this proceeding under the direction of Senior Management with the assistance of the Applicants' advisors and the proposed Monitor;
- (c) it is anticipated that the DIP Facility will provide the Applicants with sufficient liquidity to implement restructuring initiatives – such as a sales process and/or a transition to a new business model -- which will materially enhance the likelihood of a going concern outcome for the business of the Applicants;
- (d) to the extent that the court, under the amended CCAA, must still weigh relative prejudices in determining whether to grant the DIP Lender's Charge, any prejudice to secured creditors is minimal because the proposed DIP Lender is one of the Senior Secured Lenders and one of the Senior Secured Noteholders; moreover, the amount of the proposed DIP Facility is within the permitted "basket" under the Note Indenture;

- (e) any prejudice to the secured creditors must be weighed against the stark reality that the only alternative to a CCAA restructuring is a liquidation, which will likely result in significantly worse recoveries, even for the secured creditors;
- (f) the proposed DIP Lender has indicated that it will not provide a DIP Facility if the DIP Lender's Charge is not approved and the Initial Order is not approved in form and substance satisfactory to the DIP Lender;
- (g) the DIP Lender's Charge will not secure any pre-filing obligations;
- (h) secured creditors have either been given notice of the DIP Lender's Charge, or are not affected by it; and
- (i) the Applicants anticipate that the proposed Monitor will file a report addressing the DIP Facility, including the DIP Lender's Charge.

76. Accordingly, the Applicants submit that this Honourable Court ought to grant the DIP Lender's Charge in the amount of up to \$20.5 million and approve the DIP Credit Agreement.

**E. ENTITLEMENT TO MAKE PRE-FILING PAYMENTS TO CRITICAL SUPPLIERS**

77. In the draft Initial Order the Applicants also seek authorization for Cash Store to make, if necessary and with the consent of the Monitor, a limited amount of payments -- up to \$700K -- to critical suppliers, whether such obligations were incurred prior to or after the filing date. Such payments are permitted under the proposed DIP Facility and contemplated in the Cash

---

<sup>85</sup> Carlstrom Affidavit, para. 157.

Flow Forecast. Cash Store is not requesting that a charge be granted to secure these payments, nor is Cash Store seeking to have specific suppliers declared as “critical suppliers” at this stage.

78. There is ample authority supporting the Court’s general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed “critical” to the ongoing operations of the debtor.<sup>86</sup> Although the aim of the CCAA is to maintain the *status quo* while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor:

The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist’s view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.<sup>87</sup>

79. Section 11.4 of the CCAA, which was enacted as part of the 2009 amendments to the CCAA, gives the Court the specific authority to declare a person to be a critical supplier and to grant a charge on the debtor’s property in favour of such critical supplier.

**11.4(1) Critical Supplier** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company’s continued operation.

---

<sup>86</sup> See for example *Re Smurfit-Stone Container Canada Inc.* (2009), 50 C.B.R. (5<sup>th</sup>) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) at para. 21.

<sup>87</sup> *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99, 1991 CarswellBC 494 (B.C. S.C.) at para. 23.

**11.4(2) *Obligation to supply*** – If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

**11.4(3) *Security or charge in favour of critical supplier*** – If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

**11.4(4) *Priority*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

80. Significantly, section 11.4 does not oust the court’s inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested.<sup>88</sup> As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including under s. 11.4, do not detract from the inherently flexible nature of the CCAA or the Court’s broad and inherent jurisdiction to make such orders that will facilitate the debtor’s restructuring of its business as a going concern.<sup>89</sup> This inherent flexibility and the discretion of the Court to sanction measures not explicitly contemplated by the CCAA was expressly affirmed by the Supreme Court of Canada in *Re Ted Leroy Trucking*:

The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where

---

<sup>88</sup> *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222, 2010 CarswellOnt 212 (Ont. S.C.J. [Commercial List]) at para. 50 [*Re Canwest Publishing*].

<sup>89</sup> *Re Canwest Global, supra*, at para. 24.

participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.<sup>90</sup> [Emphasis added.]

81. The requested authorization for Cash Store to make payments to certain critical suppliers, if it is considered necessary to do so in order to facilitate the Applicant's ongoing restructuring efforts and where the Monitor consents, will give the Applicants the flexibility to ensure that they maintain certain essential goods or services that are critical to the survival of their business during the restructuring period. The Applicants submit that this provision is appropriate in the circumstances and should be granted.

## **F. REQUESTED PRIORITY CHARGES**

### **a. Administration Charge**

82. Under the draft Initial Order, the Applicants are requesting that the Monitor, along with its counsel, counsel and the financial advisor to the Special Committee, counsel to the Applicants and counsel and the financial advisor to the DIP Lender be protected by a Court-ordered charge on all of the present and future assets, property and undertaking of the Applicants (the "Property") as security for their respective fees and disbursements (the "Administration Charge"). The Administration Charge – the amount of which at time of drafting is currently being worked out by the Applicants and the Monitor -- will have first priority over all other charges.<sup>91</sup>

83. Prior to the 2009 amendment to the CCAA, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides that the Court has jurisdiction to grant an administration charge:

---

<sup>90</sup> *Re Ted Leroy Trucking, supra*, at para. 70.

**11.52(1) Court may order security or charge to cover certain costs** – On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**11.52(2) Priority** – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

84. This section is permissive, and does not contain any specific criteria for a court to consider in granting such a charge.

85. In *Re Canwest Global* and *Re Canwest Publishing*, administration charges were granted pursuant to s. 11.52(1). In *Re Canwest Publishing*, Pepall J. provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.<sup>92</sup>

86. In this case, the restructuring is taking place in a shifting regulatory environment, in circumstances where the Applicants are already subject to numerous regulatory, civil and

---

<sup>91</sup> Carlstrom Affidavit, para. 165.

<sup>92</sup> *Re Canwest Publishing*, *supra*, at para. 54.

criminal actions, as well as demands from secured and other significant creditors, such as the TPLs. For these reasons alone, the restructuring will be complex and will require the robust involvement of a number of professional advisors. There is no unwarranted duplication of roles, and any secured creditors likely to be affected by the Administration Charge have been provided with advance notice.

87. The amount of the proposed Administration Charge will be established to be commensurate with the complexity of the Applicants' businesses and the tasks required to effect a successful restructuring.

88. The Applicants submit that this is an appropriate circumstance for this Honourable Court to grant the Administration Charge. Each of the professionals whose fees are to be secured by the Administration Charge has played a critical role in the restructuring activities to date and will continue to be instrumental to the Applicants' restructuring activities going forward. It is unlikely that the above-noted advisors will continue to participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. The Applicants are working with the proposed Monitor to estimate the appropriate size of the Administration Charge in view of the scope of the advisors' mandates and the anticipated complexity of the proceeding.

**b. Directors' Charge**

89. The Applicants seek a directors' and officers' charge (the "Directors' Charge") in an amount that is currently being negotiated. The Directors' Charge would be secured by the property of Cash Store and will rank behind the Administration Charge and ahead of the DIP Lender's Charge.

90. The Directors' Charge is essential to the successful restructuring of the Applicants, which would not be possible without the continued participation of the Applicants' experienced Board of Directors.<sup>93</sup>

91. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.

**11.51(1) Security or charge relating to director's indemnification** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

**11.51(2) Priority** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**11.51(3) Restriction – indemnification insurance** – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

**11.51(4) Negligence, misconduct or fault** – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

92. This provision codifies the earlier practice of CCAA courts to grant directors' and officers' charges providing the directors and officers of debtors with additional protection against liabilities that they could incur during the restructuring and reorganization of their companies.<sup>94</sup> As the Quebec Superior Court stated in *Re JetsGo Corporation* (citing Pamela L.J.

---

<sup>93</sup> Carlstrom Affidavit, para. 166.

<sup>94</sup> *Re General Publishing Co.* (2003), 39 C.B.R. (4<sup>th</sup>) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) at para. 6, aff'd 2004 CarswellOnt 49 (Ont. C.A.)



Huff and Line A. Rogers in the *Commercial Insolvency Reporter*), a directors and officers charge reflects the specific risks to which these individuals are exposed in the event of an insolvency.<sup>95</sup>

Thus, against the backdrop of a potential business failure, a CCAA restructuring creates new risks and potential liabilities for another group of critical participants in an insolvency: the directors and officers of a debtor corporation.

93. In *Re Canwest Global*, Pepall J. provided guidance on some of the considerations to be made by the court when applying s. 11.51. In approving the requested directors' charge, Pepall J. stated:

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4<sup>th</sup>) 216]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.<sup>96</sup>

94. Cash Store maintains directors' and officers' liability insurance (the "D&O Insurance") for the directors and officers of the Applicants. The amount of coverage remaining under the D&O Insurance is approximately \$28 million. Given Cash Store's involvement in multiple significant litigation proceedings, there is considerable uncertainty about whether this coverage will be sufficient to cover defence costs for the directors and officers and any potential findings of liability. In addition, the directors and officers face the usual potential exposure to employment-related statutory liabilities.<sup>97</sup>

---

<sup>95</sup> *Re Jetsgo Corp.*, 2005 CarswellQue 2700 (Que. S.C.) at para. 42.

<sup>96</sup> *Re Canwest Global*, *supra*, at para. 48.

<sup>97</sup> Carlstrom Affidavit, paras. 167 to 168.

95. The D&O Insurance will expire in July 2014. Cash Store has already purchased one year “run-off” coverage to commence upon expiry of the D&O Insurance. Cash Store has so far been unable to finalize a renewal of the D&O Insurance.<sup>98</sup>

96. Cash Store’s directors have indicated that, due to the potential for significant personal liability and the uncertainty surrounding the renewal of the D&O Insurance, they cannot continue their service and involvement in this restructuring unless the Initial Order includes the Directors’ Charge. The Directors’ Charge will secure the indemnification obligations owed by Cash Store to the directors.<sup>99</sup>

97. The requested Directors’ Charge will be established in an amount that is reasonable given the nature of the Applicants’ business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability.

98. For these reasons, it is submitted that this Honourable Court should grant the Directors Charge.

#### **G. PROTECTION FROM PERSONAL LIABILITY FOR THE CRO AND SPECIAL COMMITTEE**

99. The draft Initial Order contemplates the appointment of a CRO to act as overseer of the restructuring. As such, the draft Initial Order provides for certain protections from personal liability for the CRO in connection with his or her duties and involvement in the restructuring (the “CRO Protection”).

---

<sup>98</sup> Carlstrom Affidavit, para. 168.

<sup>99</sup> Carlstrom Affidavit, para. 169.

100. In addition, the draft Initial Order includes measures that are designed to provide the same type of protection to the Special Committee against personal liabilities associated with their role in Cash Store's restructuring (the "Special Committee Protection"). The Special Committee has indicated that, given the uncertainty surrounding the availability of the D&O Insurance after its expiry, the Special Committee intends to resign after the CRO has been formally appointed by the Court and the Special Committee's role in the restructuring has been transitioned to the CRO.<sup>100</sup>

101. The CRO Protection is typical of similar protections provided to CROs in other proceedings. In addition, given the uncertain environment in which they are operating, the Special Committee has indicated that their assistance with the transition to the CRO is conditional upon obtaining the Special Committee Protection, which recognizes the role that the Special Committee has played in overseeing the restructuring to this point. As a result, the Initial Order provides that no member of the Special Committee will have any liability with respect to any losses, damages or liabilities of any nature or kind from and after the date of the Initial Order, except to the extent that such damages, losses or liabilities result from the gross negligence or wilful misconduct of that member.<sup>101</sup>

102. Effectively, the Special Committee Protection will cover the very brief "bridging" period between the granting of the Initial Order (if it is approved) and the time when the CRO formally assumes full responsibilities for overseeing the restructuring and responsibilities are transitioned from the Special Committee to the CRO.

---

<sup>100</sup> Carlstrom Affidavit, para. 171.

<sup>101</sup> Carlstrom Affidavit, para. 171.

103. These measures are justified on the basis that it is commonplace for companies that are restructuring to appoint a CRO and to protect the CRO from liability as the CRO carries out his or her duties in connection with the restructuring. In the weeks leading up to the commencement of this proceeding, the Special Committee has been effectively fulfilling the role of CRO. Like a CRO, the Special Committee is playing the role of neutral, objective overseer of the restructuring process.

104. There is ample precedent in CCAA jurisprudence for extending protections from liability to a CRO of the nature proposed in the draft Initial Order.<sup>102</sup> The basis for extending this protection is similar to the basis for extending similar protections to the Monitor and to directors and officers of a debtor company. As this Court has stated:

It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.<sup>103</sup>

105. It is appropriate to extend the same type of specific protections to both the CRO and the Special Committee in order to mitigate any liabilities to they may be exposed in overseeing the restructuring for the benefit of all Cash Store's stakeholders. The Special Committee Protection is of very limited duration, as it applies only during the "bridging" period from the time of the Initial Order until the CRO formally assumes his or her responsibilities and the transition of responsibilities from the Special Committee to the CRO has occurred.

---

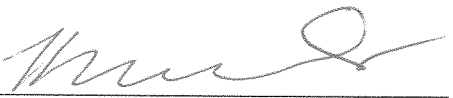
<sup>102</sup> See *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5<sup>th</sup>) 282, 2007 CarswellOnt 7014 (Ont. S.C.J.) [*Collins & Aikman*]. See also *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72, 2007 CarswellSask 324 (Sask. C.A.) [*ICR Commercial Real Estate*].


<sup>103</sup> *Collins & Aikman, supra*, at para. 138. A similar rationale was referenced by the trial judge in *ICR Commercial Real Estate, supra*, which was quoted with approval in the Court of Appeal's reasons at para. 75. In that case, the Court refused to lift the stay of proceedings to allow a claim for "bad faith" to be asserted against a CRO who was protected by language similar to that proposed in the draft Initial Order.

**PART IV – NATURE OF THE ORDER SOUGHT**

106. The Applicants therefore request an Order substantially in the form of the draft Order attached as Schedule “A” to the Notice of Application.

107. ALL OF WHICH IS RESPECTFULLY SUBMITTED:

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

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

**Schedule “A”**

**LIST OF AUTHORITIES**

***Case Law***

1. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72, 2007 CarswellSask 324 (Sask. C.A.)
2. *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99, 1991 CarswellBC 494 (B.C. S.C.)
3. *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5<sup>th</sup>) 72, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List])
4. *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222, 2010 CarswellOnt 212 (Ont. S.C.J. [Commercial List])
5. *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5<sup>th</sup>) 282, 2007 CarswellOnt 7014 (Ont. S.C.J.)
6. *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List])
7. *Re General Publishing Co.* (2003), 39 C.B.R. (4<sup>th</sup>) 216, 2003 CarswellOnt 275 (Ont. S.C.J.), aff'd 2004 CarswellOnt 49 (Ont. C.A.)
8. *Re Jetsgo Corp.*, 2005 CarswellQue 2700 (Que. S.C.)
9. *Re League Assets Corp.*, 2013 BCSC 2043, 2013 CarswellBC 3408 (B.C. S.C.)
10. *Re Skydome Corp.* (1998), 16 C.B.R. (4<sup>th</sup>) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List])
11. *Re Smurfit-Stone Container Canada Inc.* (2009), 50 C.B.R. (5<sup>th</sup>) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List])
12. *Re Stelco* (2004), 48 C.B.R. (4<sup>th</sup>) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused 2004 CarswellOnt 2936, (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.)
13. *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, 2010 CarswellBC 3419 (S.C.C.)
14. *Re Temple City Housing Inc.* (2007), 42 C.B.R. (5<sup>th</sup>) 274, 2007 CarswellAlta 1806 (Alta. Q.B.), leave to appeal to C.A. refused 2008 CarswellAlta 2 (Alta. C.A.)

***Secondary Sources***

15. Waters, D.W.M. *Law of Trusts in Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 2012).

**Schedule “B”**

***BANKRUPTCY AND INSOLVENCY ACT***

R.S.C. 1985, c. B-3, as amended

**2. [...]**

“insolvent person”  
« *personne insolvable* »

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

***COMPANIES’ CREDITORS ARRANGEMENT ACT***

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

**2.(1) [...]**

“debtor company”  
« *compagnie débitrice* »

“debtor company” means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;



[...]

Application

**3.** (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

Interim financing

**11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge;  
and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[...]

#### Critical supplier

**11.4** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

#### Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

#### Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

#### Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[...]

#### Security or charge relating to director's indemnification

**11.51** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the

court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

**11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

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

Court File No:

AND IN THE MATTER OF a plan of compromise or arrangement of The Cash Store Financial Services Inc., The Cash Store Inc., TCS Cash Store Inc., Instalozans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd Doing Business as "The Title Store"

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS**

OSLER, HOSKIN & HARCOURT LLP  
P.O. Box 50, 1 First Canadian Place  
Toronto, ON M5X 1B8

Marc Wasserman LSUC#44066M  
Tel: (416) 862-4908

Jeremy Dacks LSUC# 41851R  
Tel: (416) 862-4923  
Fax: (416) 862-6666

Counsel to the Special Committee of the  
Board of Directors of Cash Store Financial  
Services Inc.