

COURT OF APPEAL FOR ONTARIO

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"

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JOINT FACTUM OF THE DIP LENDERS AND THE AD HOC COMMITTEE
(returnable August 15, 2014)

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¹ Bodnar et al. v. The Cash Store Financial Services Inc. et al., Supreme Court of British Columbia, Vancouver Reg. No. S041348;
Stewart v. The Cash Store Financial Services Inc. et al, Supreme Court of British Columbia, Vancouver Reg. No. S126361;
Tschrter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen’s Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen’s Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen’s Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen’s Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen’s Bench, Saskatoon Reg. No. 1452 of 2012;
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COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE
CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH
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1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

JOINT FACTUM OF THE DIP LENDERS AND THE AD HOC COMMITTEE
(returnable August 15, 2014)

PART I - OVERVIEW

1. The Respondents oppose the motions of the TPLs (as defined below) for a stay pending a motion for leave to appeal the August 5, 2014 order of Regional Senior Justice Morawetz of the Superior Court of Justice (Commercial List) (the **TPL Decision**). The Respondents also oppose the appeal schedule proposed by the TPLs.

2. There is no merit to the motion for leave, and a stay will interfere with the Applicants' liquidity at a critical time in this complex restructuring. As such, the motion should be dismissed.

PART II - FACTS

The Parties and Third Party Lending

3. The Applicants (**Cash Store**) are in the business of payday lending.¹ On April 14, 2014, Cash Store obtained an initial order (the **Initial Order**, subsequently amended

¹ Endorsement of Morawetz, RSJ. dated August 5, 2014, 2014 ONSC 4326 at para. 1, Motion Record of Trimor Annuity Focus Limited Partnership #5 (**Trimor Motion Record**) at Tab 3 (**Morawetz Endorsement**).

and restated) pursuant to the CCAA allowing for, *inter alia*, a stay of proceedings while they pursued restructuring efforts.²

4. As part of Cash Store's business, it entered into a number of "Broker Agreements", whereby third parties (the **Third Party Lenders**, or **TPLs**) lent funds to Cash Store that it subsequently lent to retail customers. Trimor Annuity Focus LP #5 (**Trimor**) and 0678786 BC Ltd. (**McCann**), the moving parties, were among those Third Party Lenders.³

5. On paper, Cash Store obtained funds from the Third Party Lenders, which Cash Store, as broker, would lend to its brokered loan customers. On paper, those loans were assigned to the Third Party Lenders. On paper, the Third Party Lenders owned all payments received from the brokered loan customers.⁴

6. In practice, Cash Store borrowed money from the TPLs. In practice, the TPLs were ordinary creditors of Cash Store.⁵

7. As part of Cash Store's restructuring, the CRO shut down the brokered loan business of Cash Store. Until April of this year, receipts from the brokered loan business were regularly deposited into Cash Store's general account, consistent with past practice.⁶

8. A dispute arose over the entitlements of the Third Party Lenders and Cash Store to certain funds in the hands of Cash Store. At the core of this dispute is the question of whether (as Justice Morawetz found) the Third Party Lenders loaned their funds to

² Affidavit of Kurt Soost sworn August 11, 2014 (**Soost Affidavit**) at Exhibit "F" para. 1, Trimor Motion Record at Tab 2(f).

³ Morawetz Endorsement at para. 42, Trimor Motion Record at Tab 3.

⁴ Morawetz Endorsement at para. 3, Trimor Motion Record at Tab 3.

⁵ Morawetz Endorsement at paras. 126 - 127, Trimor Motion Record at Tab 3.

⁶ Morawetz Endorsement at paras. 24 and 27 - 30, Trimor Motion Record at Tab 3.

Cash Store, which in turn made loans to its customers; or whether (as the TPLs asserted) the funds were loaned by the Third Party Lenders to Cash Store's customers, with Cash Store merely operating as a broker.

9. The TPLs brought motions for recovery of their alleged funds, claiming that the funds held by Cash Store were the property of the TPLs, or alternatively were trust property held by Cash Store for the TPLs.⁷

Justice Morawetz's Decision

10. On August 5, 2014, Regional Senior Justice Morawetz of the Commercial List issued an order dismissing the TPLs' motion, with reasons (the **TPL Decision**).

11. Justice Morawetz found that "the manner in which Cash Store business operations were conducted differed substantially from that set out "on paper"⁸.

12. In reaching that conclusion, Justice Morawetz made a number of factual findings about how the operating relationship between Cash Store and the TPLs significantly differed from the original written description set out in the Broker Agreements:

(a) while the Broker Agreements anticipated that funds advanced by the TPLs were to be individually segregated, in practice those funds were not segregated from each other, or from operating cash. Rather, "there was one account and it is not possible to identify the source of the funds"⁹;

⁷ Morawetz Endorsement at paras. 9, 10, and 36, Trimor Motion Record at Tab 3.

⁸ Morawetz Endorsement at para. 4, Trimor Motion Record at Tab 3.

⁹ Morawetz Endorsement at para. 122, Trimor Motion Record at Tab 3.

(b) a practice developed between the parties in which Cash Store would effectively provide a rate of return (or interest) equivalent to 17.5% per annum to the TPLs¹⁰; and

(c) not only were the TPLs expecting 17.5% payments each month, but they were also insulated from any credit risk as a result of the capital protections used by Cash Store”.¹¹

13. In other words, monies were advanced by the Third Party Lenders, commingled in the Cash Store general account, the Third Party Lenders received interest payments at a rate of 17.5% and the Third Party Lenders were not directly exposed to the credit risk of any of Cash Store’s customers, only to Cash Store’s credit risk.

14. Justice Morawetz determined from these facts that the cash advanced by the TPLs to Cash Store for purposes of making loans was not the property of the TPLs. Instead, it passed to Cash Store and gave rise to a relationship of debtor and creditor between Cash Store and the TPLs.¹²

Cash Store’s Current Operations

15. Since before CCAA proceedings were commenced, Cash Store has been engaged in a process to seek a sale of or significant investment in Cash Store.¹³ On June 16, 2014, the Chief Restructuring Officer for Cash Store obtained an order

¹⁰ Morawetz Endorsement at para. 123, Trimor Motion Record at Tab 3.

¹¹ Morawetz Endorsement at para. 124, Trimor Motion Record at Tab 3.

¹² Morawetz Endorsement at para. 126 and 130, Trimor Motion Record at Tab 3.

¹³ Soost Affidavit at Exhibit “F” para. 7, Trimor Motion Record at Tab 2(f).

approving a sale process, which had a bid deadline of July 11, 2014 that was later extended to July 21, 2014.¹⁴

16. On the deadline, Cash Store's financial advisor, Rothschild, received a number of bids, which are presently under review by Rothschild. According to the most recent report of the Monitor, it is presently anticipated that Cash Store will choose to accept one of the bids received and seek Court approval of the selected transaction within the period of the most recent CCAA stay extension.¹⁵

17. Cash Store currently faces significant liquidity concerns. While an extension of the existing DIP facility was agreed to, which may provide liquidity up to an additional \$5 million (the **Second Extension Option**), this facility is highly discretionary and funding on any particular advance is limited to the Applicants' cash requirements for a two-week period. In addition, there are significant interest costs to the Second Extension Option of 17.5% per annum.¹⁶

18. While the Monitor projects that Cash Store will be sufficiently funded through October 3, 2014, that projection is based on the assumption that all amounts are funded by the DIP Lenders under the Second Extension Option.¹⁷ As noted by the Monitor:

The Monitor notes that the DIP Lenders have significant discretion with respect to the funding of the DIP Advances in the Second Extension Option and that such advances are limited to funding required for a two-week period.¹⁸

¹⁴ Soost Affidavit at Exhibit "F" paras. 8, Trimor Motion Record at Tab 2(f).

¹⁵ Soost Affidavit at Exhibit "F" paras. 10 and 12, Trimor Motion Record at Tab 2(f).

¹⁶ Soost Affidavit at Exhibit "F" paras. 17, 18 and 20, Trimor Motion Record at Tab 2(f).

¹⁷ Soost Affidavit at Exhibit "F" para. 22, Trimor Motion Record at Tab 2(f).

¹⁸ Soost Affidavit at Exhibit "F" para. 20, Trimor Motion Record at Tab 2(f).

PART III - ISSUES AND LAW

19. The issues to be determined on this motion are as follows:

- (a) Should this Court stay the TPL Decision pending a decision on Trimor's motion for leave to appeal?
- (b) Is the TPLs' proposed process and schedule for its motion for leave to appeal appropriate in the circumstances?

A. Stay pending appeal

20. It is settled law that the test for whether a stay of a judgment pending appeal should be granted is the three-part test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General)*:¹⁹

- (a) is there a serious question to be tried (ie. to be determined on the appeal);
- (b) will the moving party suffer irreparable harm if the stay is not granted; and
- (c) does the balance of convenience favour granting the stay?

Serious Issue to be Tried

21. The moving party bears the onus in establishing a case for a stay,²⁰ and the assessment begins with a presumption of the correctness of the decision under

¹⁹ [1994] 1 SCR 311 at para. 43, Joint Book of Authorities at Tab 1.

²⁰ *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2014 ONCA 546 at para. 23, citing *International Corona Resources Ltd v Lac Minerals Ltd* (1986), 21 CPC (2d) 252 (ONCA) at 255, Joint Book of Authorities at Tab 2.

appeal.²¹ In this case, given the nature of the appellate process under the CCAA, the first part of the *RJR-MacDonald* test requires a preliminary assessment of the merits of the motion seeking leave to appeal.²²

22. Leave to appeal pursuant to the CCAA is granted only sparingly, and only where there are serious and arguable grounds that are of real and significant interest to the parties and to the practice. In determining whether to grant leave, the court considers:

- (a) Whether the point on the proposed appeal is of significance to the practice;
- (b) Whether the point is of significance to the action;
- (c) Whether the appeal is prima facie meritorious or frivolous; and
- (d) Whether the appeal will unduly hinder the progress of the action.²³

Significance to the Practice

23. The TPL Decision raised no new or ongoing issues of insolvency law. On its face and in its substance it was concerned with:

- (a) what the commercial practices between Cash Stores and the TPLs actually were; and
- (b) whether those commercial practices, in departing from the contractual agreements, gave rise to a debtor-creditor relationship.

²¹ *Stuart Budd, supra* at para. 22, citing *RJR-MacDonald, supra* at 334, Joint Book of Authorities at Tab 2.

²² *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, [2011] O.J. No. 4279 (C.A.) at para. 19, Joint Book of Authorities at Tab 3.

²³ *Return on Innovation Capital Ltd v Gandhi Innovations Ltd*, 2012 ONCA 10 at para. 6, Joint Book of Authorities at Tab 4; *Stelco Inc. (Re)* (2005), 75 OR (3d) 5 (ONCA) at para. 24, Joint Book of Authorities at Tab 5.

24. Findings of fact are not of significance to the practice. The indicia of a debtor-creditor relationship, versus those of a proprietary nature, were set out in various decisions referred to before Justice Morawetz, none of which were controversial or debated. He made a number of factual determinations and applied existing law.

25. Similarly, a finding that the parties altered their contractual relationship by their post-agreement behaviour is neither new nor different.

26. Ultimately, the TPL Decision was based on narrow findings of fact, and general principles of contract law. Further review is highly unlikely to contribute to the understanding of insolvency law in particular or commercial law in general.

Significance to the Action

27. The singular question on the McCann and Trimor motions was whether the TPLs can assert a proprietary interest in certain funds to avoid the operation of the general priority scheme applicable to creditors. Having been decided, this issue does not have an ongoing impact on the CCAA proceeding, the focus of which is the completion of a going-concern transaction contemplated by a court-approved sale process. Indeed, the CCAA proceeding as a whole would be best served by avoiding any further expenditure of resources and time on a consideration of the relative priorities of McCann and Trimor, or any other creditors, to any of the Applicants' funds.

Leave Motion not *Prima Facie* Meritorious

28. The focus of the leave motion by the TPLs is that Justice Morawetz misapprehended the evidence before him in arriving at the conclusion that the parties

had deviated from their written agreements and developed a relationship as debtor and creditor.²⁴

29. Justice Morawetz's reasoning is based on a factual finding that Cash Store and the TPLs knowingly deviated from the written terms of their agreements. These were factual findings, made by the Regional Senior Justice sitting in the province's most sophisticated commercial court.

30. As findings of fact, the applicable standard of review will be whether His Honour committed any palpable or overriding error.²⁵ In addition, this Court has specifically held that a judge exercising a supervisory function during a CCAA proceeding is owed considerable deference.²⁶ This is particularly true in the current case where there have been numerous appearances before Justice Morawetz since the Initial Order was obtained, many of which concerned TPL issues and the relationship between the parties.²⁷ The TPL Decision is the culmination of several months of fact-finding and argument, all of which occurred before or at the direction of Justice Morawetz.

31. The TPLs had a full opportunity (including multiple motion records, cross-examinations and compendia) over two hearing dates to make their cases out on the facts. The principles articulated by this Court indicate that success on the leave motion in these circumstances is highly unlikely.

32. In any event, the Third Party Lenders have not identified: (a) any palpable or overriding error; or (b) any clear error in law that would make leave to appeal likely. The TPLs can cite no divergent jurisprudence on the matters decided by Justice Morawetz.

²⁴ Notice of Motion of Trimor Annuity Focus Limited Partnership #5 at pages 4-5, Trimor Motion Record at Tab 1; Notice of Motion of 0678786 BC Ltd. at paras 12-14, McCann Motion Record at Tab 1.

²⁵ *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 at para. 15, Joint Book of Authorities at Tab 6.

²⁶ *Stelco Inc. (Re)* (2005), 75 OR (3d) 5 (ONCA) at para. 28, Joint Book of Authorities at Tab 5.

²⁷ Soost Affidavit at Exhibit "F" paras. 2 and 3, Trimor Motion Record at Tab 2(f).

33. The references to bailment by the TPLs raise additional reason to question the seriousness of the leave to appeal prospects. Not only do they also cite no error of bailment law but these principles were never raised or argued before Justice Morawetz.

Appeal will unduly hinder the progress of the Action

34. The matter raised by Trimor and McCann has already been the subject of extensive motion materials, cross-examinations and multiple days of hearings.

35. These proceedings have now reached a critical stage as the Applicants' sale process is coming to a close. The Applicants cannot afford to expend further time and resources on this matter, which has been an ongoing distraction from the primary goals of this proceeding.

Irreparable Harm

36. In this case, no clear evidence of irreparable harm to the Third Party Lenders has been shown. As a result of the TPL Decision, the Third Party Lenders are entitled to pursue claims as ordinary creditors against Cash Store. It is speculative that any harm would result from that designation and speculative harm is not irreparable harm.²⁸

37. The TPLs focus on the fact that Cash Store may need to use the disputed funds before any appeal is heard in this matter. While this may be the case, this fact supports Cash Store's claim of irreparable harm. Cash Store requires funds to continue its sale process and if that process were to fail, all creditors would suffer.

38. It is instructive that Cash Store has received no undertaking as to damages from the Third Party Lenders to protect against such a result.

²⁸ *Noble v Noble*, [2002] O.J. No. 4997 (S.C.J.) at para.16, Joint Book of Authorities at Tab 7.

39. Even if the Third Party Lenders were to sufficiently prove irreparable harm, irreparable harm, is not enough on its own to satisfy the *RJR-MacDonald* test.²⁹ Irreparable harm cannot be used to surmount the prima facie weakness of the leave to appeal motion and the balance of inconvenience discussed below.

Balance of Inconvenience

40. The balance of inconvenience requires the Court to determine which of the parties will suffer greater harm from the granting or refusal of the proposed stay pending appeal. The factors to be considered will vary significantly with the facts of each case and are to be applied with the rest of the *RJR-MacDonald* factors.³⁰

41. The TPL Decision has confirmed that the TPL loans and the TPL receipts always were and continue to be the property of the Applicants. In reviewing this motion, the Court must proceed on the assumption that the TPL Decision was correct and that the relief ordered was properly granted.³¹

42. The McCann and Trimor motions would force the Applicants to seek interim financing to operate, instead of relying upon access to the Applicants' own funds. There can be no guarantee that the lenders under the Applicants interim financing facility will continue to make highly discretionary advances under that facility. Moreover, any advances under that facility also come at a significant cost to the Applicants.

43. The proposed stay prejudices the Applicants by imposing unwarranted risk and cost on the Applicants, all without any undertaking for damages from McCann or Trimor.

²⁹ *Sherman v. Drabinsky*, [1997] O.J. No. 2735 (Gen. Div.) at para. 13, Joint Book of Authorities at Tab 8; *Noble v. Noble*, [2002] O.J. No. 4997 (S.C.J.) at para. 21, Joint Book of Authorities at Tab 7.

³⁰ [1994] 1 SCR 311 at para. 62, Joint Book of Authorities at Tab 1.

³¹ *Ogden Entertainment Services v. Retail Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440* (1998), 38 O.R. (3d) 448 (C.A.) at para. 5, Joint Book of Authorities at Tab 9.

44. The unusual protections provided in favour of the TPLs in April of this year limited the Applicants' use of their own funds and forced them to borrow at a high cost, disrupting the status quo in which Cash Store would otherwise have access to its own funds. The Applicants were successful in resolving this prejudice through the TPL Decision. The balance of convenience cannot favour the continued imposition of these unusual protective provisions upon the Applicants notwithstanding the unsuccessful result of below.

B. Proposed appeal process is inappropriate

45. Trimor and McCann have proposed an appeal process that would see the motion for leave and the appeal itself argued and decided together.

46. This proposal is unjustified and ignores the purpose of the leave process, which is to prevent litigants and the courts from having to expend significant time and resources on appeals that are unlikely to succeed. Trimor and McCann are attempting to circumvent the limited scope of review on a motion for leave to appeal by proposing a system that would require full argument and evidence to be before the judge deciding the leave motion. Such a proposal is unfairly prejudicial to the Respondents.

47. The Respondents therefore propose the following schedule for hearing the leave motion:

(a) the moving parties shall deliver their factums on the motion for leave to appeal by August 22, 2014;

(b) the respondents shall deliver their factum (or factums) on the motion for leave to appeal by August 29, 2014;

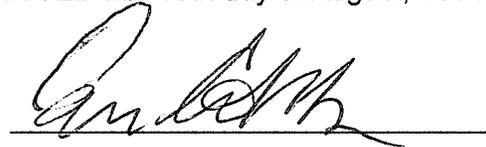
(c) the moving parties have until September 4, 2014 to serve a reply argument, if any;

(d) the leave motion may then be heard and determined in writing in the week of September 8, 2014, if possible; and

(e) if the moving parties are successful in obtaining leave to appeal, the appeal may be scheduled for late September.

48. The Respondents should not be required to prepare full records and arguments if there is a chance that leave will not be granted. In this case, the Respondents submit that denial of leave is the likely outcome.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of August, 2014.

A handwritten signature in black ink, appearing to be "C. M. H.", written over a horizontal line.

Norton Rose Fulbright Canada LLP

Lawyers for the DIP Lenders, on behalf of
the DIP Lenders and the *Ad Hoc*
Committee

SCHEDULE "A"
LIST OF AUTHORITIES

1	<i>RJR-MacDonald Inc v Canada (Attorney General)</i> , [1994] 1 SCR 311.
2	<i>Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC</i> , 2014 ONCA 546.
3	<i>BTR Global Opportunity Trading Ltd v RBC Dexia Investor Services Trust</i> , [2011] O.J. No. 4279 (C.A.).
4	<i>Return on Innovation Capital Ltd v Gandi Innovations Ltd</i> , 2012 ONCA 10.
5	<i>Stelco Inc (Re)</i> (2005), 75 OR (3d) 5 (ONCA).
6	<i>Calpine Canada Energy Ltd, Re</i> , 2007 ABCA 266.
7	<i>Noble v Noble</i> , [2002] O.J. No. 4997 (S.C.J.).
8	<i>Sherman v Drabinsky</i> , [1997] O.J. No. 2735 (Gen. Div.).
9	<i>Ogden Entertainment Services v Retail Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440</i> (1998), 38 O.R. (3d) 448 (C.A.).

SCHEDULE "B"
RELEVANT STATUTES

N/A

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

Court File No: M44123 / M44124

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**JOINT FACTUM OF THE DIP LENDERS AND THE
AD HOC COMMITTEE
(RETURNABLE AUGUST 15, 2014)**

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