

COURT FILE NUMBER 2301-03179
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



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 DYNAMIC TECHNOLOGIES GROUP INC., DYNAMIC ATTRACTIONS LTD., DYNAMIC ENTERTAINMENT GROUP LTD., DYNAMIC STRUCTURES LTD., and DYNAMIC ATTRACTIONS INC.

DOCUMENT **BRIEF OF EXPORT DEVELOPMENT CANADA**

To preserve the right of Export Development Canada to claim against Promising Expert Limited for breaching their Intercreditor Agreement

PARTY FILING THIS DOCUMENT EXPORT DEVELOPMENT CANADA

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I. INTRODUCTION AND OVERVIEW

1 This Brief is submitted by Export Development Canada (**EDC**) in response to the application by the CCAA Applicants (the **Dynamic Group**) for an Amended and Restated Initial Order (**ARIO**) under the *Companies Creditors' Arrangement Act* (**CCAA**), in particular, as it relates to the granting of a super-priority charge in favour of Promising Expert Limited (**PEL**), as interim lender.

2 EDC and PEL are parties to an Intercreditor Agreement, dated August 5, 2022 (the **Intercreditor Agreement**). The Intercreditor Agreement provides that any further advances by PEL to Dynamic Technologies Group Inc. (**DTGI**) or Dynamic Attractions Ltd. (**DAL**) shall be PEL Subordinate Obligations, which rank behind the obligations owed by the Dynamic Group to EDC. The consequence is that any advances of super-prioritized interim financing by PEL in this CCAA proceeding would be contrary to the Intercreditor Agreement, such that EDC may claim against PEL in breach of contract for any resulting loss.

3 The ARIO should expressly preserve and be without prejudice to EDC's right to claim against PEL for breaching the Intercreditor Agreement or otherwise.

II. FACTS

4 EDC is a Crown corporation that supports and develops Canada's export trade, including by providing financial services to Canadian businesses that sell or provide services internationally.

5 The following material facts are revealed by the Affidavit of Allan Francis, sworn March 8, 2023 (**Francis Affidavit #1**):

- (a) USD\$16,000,0000 plus accrued interest of secured pre-filing indebtedness is owed by the Dynamic Group to PEL;¹

¹ [Francis Affidavit #1](#) at paras 66(a), 67 and Exhibit 26 (PEL Credit Agreement). DTGI is the principal borrower under the Credit Agreement with PEL. DTGI's indebtedness to PEL is the subject of guarantees by DAL, Dynamic Attractions Inc., Dynamic Structures Ltd. and Dynamic Entertainment Group Ltd.

- (b) USD\$2,005,000 plus accrued interest of secured pre-filing indebtedness is owed by the Dynamic Group to EDC;² and
- (c) EDC provided guarantees to CIBC on certain DAL letters of credit, which total approximately USD\$2,700,000, and DTG and DAL have provided secured indemnities to EDC in respect of these guarantees.³

6 Clause 3 of the Intercreditor Agreement provides that EDC has priority over PEL in respect of the EDC Priority Collateral, which is comprised of collateral relating to a specific Equipment Supply and Installation Agreement.⁴ PEL then ranks ahead of EDC in relation to PEL Priority Obligations, which are defined as “the principal amount of PEL Obligations in an aggregate amount not to exceed USD\$14,200,000.”⁵ Finally, all obligations owing to EDC rank ahead of PEL Subordinate Obligations.⁶

7 Interim financing aside, Clause 3 of the Intercreditor Agreement is such that EDC has priority over PEL in respect of:

- (a) the EDC Priority Collateral; and
- (b) USD\$1,800,000 plus accrued interest, being the amount of the Dynamic Group’s pre-filing indebtedness to PEL that is in excess of the PEL Priority Obligations: $\text{USD\$16,000,000} - \text{USD\$14,200,000} = \text{USD\$1,800,000}$.

8 Clause 7 of the Intercreditor Agreement provides that any additional funds that PEL may advance to DTGI or DAL are PEL Subordinate Obligations:⁷

7. **Amendments to PEL Loan Agreement.** PEL may at any time from time to time, without the consent of EDC and without releasing or impairing the subordination and other benefits provided this this Agreement, advance additional funds under the revolving facility made available to DTGI by PEL under the PEL Loan Agreement and may amend, revise, restate, supplement or replace the PEL Loan Agreement and any document or instrument relating thereto, without

² [Francis Affidavit #1](#) at paras 54, 66(b) and Exhibit 31 (EDC Loan Agreement). DTGI is the principal borrower under the Loan Agreement with EDC. DTGI’s indebtedness to EDC is the subject of a secured guarantee from DAL.

³ [Francis Affidavit #1](#) at para 54.

⁴ [Francis Affidavit #1](#) at Clauses 1 and 3(v) of Exhibit 32 (Intercreditor Agreement).

⁵ [Francis Affidavit #1](#) at Clauses 1 and 3(i) (Intercreditor Agreement).

⁶ [Francis Affidavit #1](#) at Clauses 1, 3(ii)-(iv) (Intercreditor Agreement).

⁷ [Francis Affidavit #1](#) at Clause 7 (Intercreditor Agreement).

restriction. PEL confirms that, to the extent PEL advances additional funds to DTGI or DAL in excess of the PEL Priority Obligations, such advances shall be deemed to be PEL Subordinate Obligations.

[Underlining added]

9 Any advance of interim financing by PEL to DTGI or DAL would constitute “additional funds... in excess of the PEL Priority Obligations” under Clause 7 of the Intercreditor Agreement, and are therefore PEL Subordinate Obligations that must rank behind all EDC Obligations. A breach of the Intercreditor Agreement would result if interim funding were advanced by PEL on a super-prioritized basis.

10 Fagnan J. approved a super-prioritized advance of interim financing by PEL to the Dynamic Group in the amount of \$250,000 in the Initial Order on March 9, 2023; however, at EDC’s insistence, she expressly preserved the right of EDC (and other interested parties) to raise concerns with the Dynamic Group’s interim financing proposal at this Comeback Application, as follows:⁸

52. The approval of the Interim Financing Term Sheet (as defined in the Affidavit of Allan Francis sworn on March 8, 2023) is on a without prejudice basis to the right of any party to make submissions at the March 16, 2023 comeback application (the “Comeback Application”) before Justice D.R. Mah in respect of whether the Interim Financing Term Sheet (and its current terms) as presented to the Court in the initial application will continue to govern the terms of any additional Interim Financing, including the advance of any additional funds after the expiry of the initial Stay Period. For greater certainty, any amounts advanced (the “Initial Advances”) by the Interim Lender under the Interim Financing Term Sheet prior to the Comeback Application (up to the amount of \$250,000) will be properly and validly advanced in accordance with the terms of the Interim Financing Term Sheet and are not subject to being challenged or revised in respect of any such Initial Advances.

III. ISSUES

11 The sole issue addressed herein is whether the ARIO should state that it is “without prejudice” to any claim that EDC may bring against PEL for advancing interim financing in breach of the Intercreditor Agreement.

⁸ [Initial Order, granted March 9, 2023](#) (filed March 10, 2023) at para 52.

12 EDC proposes the following (or a substantially similar) addition to the ARIO:

This Amended and Restated Initial Order is “without prejudice” to any right of Export Development Canada to claim against the Interim Lender based on a breach of their Intercreditor Agreement or otherwise, including as a result of any advances made by the Interim Lender within the contemplation of the Commitment Letter or any Definitive Documents.

IV. ANALYSIS

A. Supplementation of the ARIO is not strictly required but would provide clarity to all interested parties

13 The Dynamic Group’s proposed form of ARIO — consistently with the Commercial List’s template — provides the following relief in respect of interim financing:

- (a) authorizing the Dynamic Group to obtain and borrow under a credit facility with PEL (paragraph 31), on the terms and subject to the conditions of the Commitment Letter (paragraph 32);
- (b) authorizing the Dynamic Group to execute and deliver definitive documents to formalize the credit facility (**Definitive Documents**) (paragraph 33);
- (c) authorizing the Dynamic Group to satisfy all of its indebtedness and obligations to PEL under the interim financing facility (paragraph 33);
- (d) granting a super-priority charge (**Interim Lender’s Charge**) in favour of PEL over all of the Dynamic Group’s property, as security for post-filing advances (paragraph 34);
- (e) authorizing PEL to register its security under the Interim Lender’s Charge (paragraph 35);
- (f) authorizing PEL to exercise rights and remedies upon any event of default under the Definitive Documents or the Interim Lender’s Charge (paragraph 35); and
- (g) providing that PEL is to be treated as unaffected under any plan of arrangement or compromise with respect to any advance under the Definitive Documents (paragraph 36).

14 The Dynamic Group’s proposed form of ARIO — consistently with the Commercial List’s template — does not provide for the confiscation of any claim (by EDC or otherwise) against PEL that may result from PEL’s making of super-prioritized advances of interim financing to the Dynamic Group.

15 Supplementation of the ARIO (as proposed by EDC) is therefore not strictly required to protect any claim that EDC may bring against PEL for breaching the Intercreditor Agreement by advancing interim financing to the Dynamic Group on a super-prioritized basis. However, supplementation of the ARIO (as proposed by EDC) would ensure that all interested parties are aligned as to the potential consequences of the Dynamic Group’s interim financing.

B. The ARIO cannot and should not extinguish a potential claim by EDC against PEL for breaching the Intercreditor Agreement

16 The CCAA is a restructuring statute pursuant to which claims *against the debtor(s)* may be *compromised* through a *democratic voting process*. The CCAA does not contemplate the unilateral extinguishment or confiscation of a creditor’s rights, in particular if they are a creditor’s rights as against another creditor (not the debtors).

17 The Court has broad discretion under the CCAA, including under s. 11;⁹ however, that discretion cannot be exercised to effect a unilateral confiscation of rights, no matter the effect on the debtors’ restructuring efforts: “That broad and liberal interpretation [of the CCAA], however, must not permit the enhancement of one stakeholders position at the expense of others – there should be no confiscation of legal rights.”¹⁰

18 The focus of the CCAA is rightly on the debtors and their creditors. Disputes between creditors are beyond the scope of the CCAA, as was held by Farley J. in *Stelco*:¹¹

The CCAA is styled as “An act to facilitate compromises and arrangements between companies and their creditors” and its short title is: Companies’ Creditors Arrangement Act. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines*

⁹ [CCAA, s. 11 \[Appendix B\]](#).

¹⁰ [Re 843504 Alberta Ltd, 2003 ABQB 1015 at para 13 \[Tab 1\]](#).

¹¹ [Stelco Inc, Re \(2005\), 15 CBR \(5th\) 297, 2005 CanLII 41379 \(Sup Ct J\) at para 7 \[Tab 2\]](#).

Ltd. v. Air Canada, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25;¹² *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41,¹³ appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13;¹⁴ *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

19 This decision by Farley J. — expressly including his analysis of creditor-creditor relationships — was affirmed by the Ontario Court of Appeal:¹⁵

First, as the supervising judge noted [at para. 7], the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.), at para. 24 [page 252] (after referring to the full style of the legislation):

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

20 Sections 11.2(1) and (2) of the CCAA define the form of protection that the Court may afford to an interim lender, which consists of “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”¹⁶ that may “rank in priority over the claim of any secured creditor of the company.”¹⁷ The CCAA

¹² [Pacific Coastal Airlines Ltd v Air Canada, 2001 BCSC 1721 at para 24](#): “[The CCAA’s] purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute” [Tab 3].

¹³ [Royal Bank of Canada v Gentra Canada Investments Inc, \[2000\] OJ No 315, 2000 CanLII 22796 \(Sup Ct J\) at para. 41](#) “The CCAA proceeding and the Landawn Plan apply to disputes between the debtor and its creditors. It did not deal with disputes between creditors *inter se*” [Tab 4].

¹⁴ [Re 843504 Alberta Ltd, supra at para 13](#): “That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders position at the expense of others - there should be no confiscation of legal rights” [Tab 1].

¹⁵ [Stelco Inc, Re \(2005\), 204 OAC 205, 2005 CanLII 42247 \(CA\) at paras 32-33](#) [Tab 5].

¹⁶ [CCAA, s. 11.2\(1\)](#) [Appendix B].

¹⁷ [CCAA, s. 11.2\(2\)](#) [Appendix B].

does not contemplate any other form of protection as being available to protect an interim lender. In particular, the CCAA does not contemplate the protection of an interim lender through the confiscation of a non-debtor party's right to claim against it in breach of contract.

21 There is no basis to hold that EDC cannot bring a potential claim against PEL based on any advances of interim financing that breach the Intercreditor Agreement. Unless PEL is prepared to voluntarily subordinate its interim financing to the EDC Obligations, the ARIO should state that it is "without prejudice" to any potential claim by EDC against PEL.

V. CONCLUSION

22 EDC respectfully submits that the ARIO should be supplemented by adding the language from paragraph 12 (above).

**ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF MARCH
BY:**

Aaron Stephenson

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Counsel for Export Development Canada

APPENDIX A

TABLE OF AUTHORITIES

1. [Re 843504 Alberta Ltd, 2003 ABQB 1015](#)
2. [Stelco Inc, Re \(2005\), 15 CBR \(5th\) 297, 2005 CanLII 41379 \(Sup Ct J\)](#)
3. [Pacific Coastal Airlines Ltd v Air Canada, 2001 BCSC 172](#)
4. [Royal Bank of Canada v Gentra Canada Investments Inc, \[2000\] OJ No 315, 2000 CanLII 22796 \(Sup Ct J\)](#)
5. [Stelco Inc, Re \(2005\), 204 OAC 205, 2005 CanLII 42247 \(CA\)](#)

APPENDIX B-1

CCAA PROVISIONS

General power of court

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

...

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.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.