Court File No. CV-20-00636875-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
2607380 ONTARIO INC. (the "**Applicant**")

BRIEF OF AUTHORITIES OF BRIDGING FINANCE INC., AS AGENT

(re Comeback Motion returnable March 6, 2020)

March 5, 2020

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1. *Target Canada Co., Re*, 2015 ONSC 303
2. *Warehouse Drug Store Ltd., Re*, 2005 CarswellOnt 1724 (S.C.J.)
3. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781
4. *Hush Homes Inc. (Re)*, 2015 ONSC 370
5. *Octagon Properties Group Ltd., Re*, 2009 ABQB 500
6. *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et* al, 2018 ONSC 7382
7. *Re Toys "R" Us (Canada) Ltd.*, 2017 ONSC 5571
8. *Cinram International Inc., Re*, 2012 ONSC 3767

TAB 1

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property

APPLICATION for relief under *Companies' Creditors Arrangement Act.*

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") 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"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

> a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
>
> b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
>
> c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
>
> d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy,

Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined

that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations

are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) (*"Century Services"*) that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./*

Publications Canwest Inc., Re, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)]*, and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective 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.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business 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.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 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 obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

TAB 2

2005 CarswellOnt 1724
Ontario Superior Court of Justice [Commercial List]

Warehouse Drug Store Ltd., Re

2005 CarswellOnt 1724, 11 C.B.R. (5th) 323, 138 A.C.W.S. (3d) 1009

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 WAREHOUSE DRUG STORE LTD. AND THE COMPANIES LISTED IN SCHEDULE "A" HERETO

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: April 29, 2005
Judgment: April 29, 2005
Docket: 05-CL-5880

Counsel: Frank Spizzirri for Applicants
Robert Chadwick for Proposed Monitor
Aubrey Kauffman for CIT BUsiness Credit Canada Inc.
Raymond Slattery for McKesson Canada Corporation

Subject: Insolvency; Civil Practice and Procedure

APPLICATION for order under Companies' Creditors Arrangement Act.

Farley J.:

1 The applicants qualify as to debt load of more than $5m and as to being debtor companies relating to the cash flow problems concerning liquidity to meet ongoing expenses. In these circumstances and on the basis of the plan generally to immediately functionally restrictive by downsizing, it is appropriate to grant CCAA order including stay.

2 The stay does not affect any union grievances (I am informed that it is believed there are none outstanding) — but any future ones, if any, will be dealt with in the ordinary course. As well, the stay does not affect any government entity or regulator relating to the drug industry regarding any emergency action which they feel required to take.

3 CIT and McKesson, respectively the financier and chief supplier support the application.

4 Any interested person should (as I have previously indicated) not feel constrained about using the comeback clause — the onus rests with the applicants notwithstanding the issuance of this order.

5 Order to issue as per my fiat.

Application granted.

TAB 3

2014 ONSC 2781
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. 6711162 Canada Inc.

2014 CarswellOnt 5836, 2014 ONSC 2781, 13 C.B.R. (6th) 136,
240 A.C.W.S. (3d) 646, 2 P.P.S.A.C. (4th) 332, 35 C.L.R. (4th) 167

Romspen Investment Corporation, Applicant and 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of 6711162 Canada Inc., and Those Other Companies Listed in Schedule "A" Hereto

D.M. Brown J.

Heard: May 2, 2014
Judgment: May 5, 2014 *
Docket: CV-14-10470-00CL, CV-14-10529-00CL

Proceedings: additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 CarswellOnt 7939, 2014 ONSC 3480, D.M. Brown J. (Ont. S.C.J. [Commercial List])

Counsel: S. Jackson for Romspen Investment Corporation
D. Magisano, S. Puddister for Respondents / CCAA Applicants, 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc.
A. Bouchelev for Altaf Soorty and Zoran Cocov
E. Tingley for Pezzack Financial Services Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency

APPLICATION by lender for appointment of receiver and construction lien trustee; APPLICATION by borrowers for initial order under *Companies' Creditors Arrangement Act.*

***D.M. Brown J.*:**

I. Competing applications for the appointment of a receiver and the making of an initial order under the Companies' Creditors Arrangement Act

1 Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

2 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

3 The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario — a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

4 For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

II. Evidence about the debt and secured assets

5 Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

6 By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

> The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

7 The funds were to be used "for general corporate purposes...to retire existing mortgage indebtedness [on two properties]...to pay fees and transaction costs, to set up an interest reserve, and up to $10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

8 The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was $28.1 million. The Loan was also secured by general security agreements.

9 A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of $470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

10 However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

> I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnessess' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

11 Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional $470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

12 After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedalled from his forgery allegation, now contending that:

> I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the *CCAA* application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the *CCAA* application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

13 Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear — there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

14 To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender) (approximately $7,000,000) and to pay further fee and transaction costs."

15 Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

16 The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

17 The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

18 According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the budgeted $7 million and that a funding gap of about $3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith.* (emphasis added)

19 Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

20 The Borrowers did not invest the $3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further $270,000 on June 20, 2013 and paid a supplier's $89,383 invoice on June 14, 2013.

21 Rompsen stopped making any further advances under the Loan in October, 2013.

22 In December, 2013, suppliers to the Midland Condo Project registered liens totaling about $2.248 million.

23 On January 3, 2014, Romspen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of $11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

24 On March 28, 2014, Romspen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was $12.284 million.

25 On March 4, 2014 Romspen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Romspen's receivership application was set by the Court on April 11, 2014.

26 Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the "CCAA Applicants"), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the CCAA Applicants

27 Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

28 The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

29 The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts acquiring the already-started project in power of sale proceedings in June, 2012 for $4 million, with a mortgage back for $3.1 million.

30 Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

31 There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 "short narrative appraisal" prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at $18 million (the "RE Appraisal"). That appraisal consisted of an "as is" appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs

to complete from an appraised "as if complete" sellout value for the 53 condo units. The RE Appraisal also contained "as if" appraisals of the other two Midland parcels assuming "all approvals for the proposed development are in place and the subdivisions registered" (Vindon and Victoria Streets).

32 The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner — i.e. Hugel Lofts:

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> . . .
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.*
>
> (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

33 The RE Appraisal used a "cost to complete" for the Midland Condo Project of $6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra's schedule recorded a total value for its construction contract of $7.452 million, with the value of work done to that date of $1.145 million.

34 Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

35 Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

36 The CCAA Applicants contended that the four Ramara Properties — 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road — were worth about $27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a "hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development" as of October 6, 2012 of $27.1 million.

37 The Schaufler Appraisal noted that the four properties had been acquired for $4.4 million.

38 A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

39 Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

40 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are "brown-field" lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding $300,000 in first mortgages on those properties.

III. Evidence about the owners' approach should the Court grant a CCAA initial order

41 Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be "sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal":

> The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

> ... I believe that Zoran and I should have the opportunity to restructure the Applicants' affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants' assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

42 As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of $8 million. He deposed that Harbour Mortgage had "agreed to increase the loan amount to $11,250,000, thereby providing 1026517 Ontario Limited with an additional $3,250,000. I intend to use these funds to finish the construction at the Midland Property".

43 The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The "loan amount" of $11.25 million was "not to exceed 65% of the appraised value and/or value as determined by the Lender" of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the "use of funds" as follows:

> The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

44 Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for $4.8 million: "I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario."

45 Cocov attached to his affidavit an April 11, 2014 "Discussion Paper" from National Bank which stated: "This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter; nor (ii) an agreement to provide financing". The Discussion Paper only referenced the Oshawa property, and it described the "purpose of proposed loan" as "refinancing", with the "type of facility" as "first rank conventional mortgage financing". The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

46 Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

47 The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

48 Soorty deposed that the CCAA Applicants would require $250,000 to complete four model suites, together with $50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to $300,000 in "drip" financing, provided their financing was given a DIP Priority Charge.

49 The filed CCAA Cash Flow statement contemplated using $150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

50 Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about $254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

51 As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project's general contractor, Sierra Construction (Woodstock) Limited:

> [I]s prepared to complete the Condo Project for $5.5 million plus H.S.T. (the "Project Completion Costs"). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty's assertion. Sierra Construction did write that "the all in number to complete should be $5,500,000.00 (HST is not included)". However, it continued:

> Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

52 In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.
>
> Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

53 The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at $6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of $5.5 million.

54 Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

55 Romspen filed its own internal calculations which placed all of the costs to complete — both "hard" and "soft" — several million dollars higher than the $5.5 million referred to by Sierra.

C. Summary

56 In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of $17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

57 Soorty also deposed that the CCAA Applicants proposed "...leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at $15.98 million, consisting of $12 million due to Romspen, $958,000 due to lien claimants, and $3 million due to unsecured creditors, including related parties. Soorty deposed:

> The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

58 Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

59 Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [1]

60 The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. [2]

61 Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, the British Columbia Court of Appeal stated:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing. [3]

62 More recently, C. Campbell J., in *Dondeb Inc., Re*, after quoting the above passage from *Cliffs Over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the

> first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.

In *Edgeworth*, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.
>
> . . .
>
> [In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.
>
> In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.
>
> . . .
>
> Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity. [4]

B. Applying the legal principles to the evidence

63 The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan — the Midland Condo Project — the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

64 In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order on two main grounds. First, they argued that by its conduct Rompsen had caused the Borrowers to default under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment

of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

65 First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

66 While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations, [5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

67 The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith.*

68 In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

69 The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014 email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly...the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

> Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever.* (emphasis added)

70 The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan — internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. $3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his *CCAA* initial affidavit when he deposed: "As a sign of our good faith, I was prepared to put $2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

71 Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

72 At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses — they want to carry on just as they have in the past.

73 I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

74 Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

75 Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

76 Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

77 Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

78 For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

79 Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties — 6711162 Canada Inc. and 1794247 Ontario Inc. — the companies which own the Cambridge Properties — 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. — and the company which owns the Midland Properties - Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

80 One of the Ramara Properties — 4271-4275 Hopkins Bay Road, Rama — is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen's counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

81 Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its *PPSA* registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

82 Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

83 Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

84 A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

V. Costs

85 I would encourage the parties to try to settle the costs of these applications. If they cannot, Rompsen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are

sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

86 Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air". [6]

Application for appointments granted; application for initial order dismissed.

Footnotes

* Additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 ONSC 3480, 35 C.L.R. (4th) 193, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]).

1 (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), paras. 10 and 12.

2 [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services Inc. v. Canada (Attorney General)], para. 14.

3 2008 BCCA 327 (B.C. C.A.), para. 36.

4 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), paras. 19-21, 25, 26 and 31.

5 *Royal Bank v. Chongsim Investments Ltd.* (1997), 46 C.B.R. (3d) 267 (Ont. Gen. Div.)

6 (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States v. Yemec*, [2007] O.J. No. 2066 (Ont. Div. Ct.), para. 54.

TAB 4

2015 ONSC 370
Ontario Superior Court of Justice

Hush Homes Inc., Re

2015 CarswellOnt 558, 2015 ONSC 370, 22 C.B.R. (6th) 67, 248 A.C.W.S. (3d) 754

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Hush Homes Inc., Hush Inc., 2122763 Ontario Inc. and 2142301 Ontario Inc.

Penny J.

Heard: January 15, 2015
Judgment: January 19, 2015
Docket: CV-14-10800-00CL

Counsel: Kyla Mahar, Asim Iqbal for Applicants
Kyle Peterson for MarshallZehr
Robin Dodokin, David Fenig for Diversified Capital Inc.
Sanja Sopic for VS Capital
Brian Empey for CVC Ardellini Investments
G. Benchentrit for proposed Monitor
Leonard Loewith for City of Mississauga

Subject: Contracts; Corporate and Commercial; Insolvency; Property

APPLICATION for initial order under *Companies' Creditors Arrangement Act.*

***Penny J.*:**

1 This is an application for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The application seeks an order:

> (a) appointing the Fuller Landau group as Monitor of the applicants in these proceedings;
>
> (b) staying all proceedings and remedies in respect of the applicants or any of their property, except as otherwise prescribed;
>
> (c) authorizing the applicants to enter into a debtor in possession credit facility of up to $3 million and granting a DIP lender's charge over the applicants' assets;
>
> (d) granting an administrative charge and directors' charge over the applicants' assets; and
>
> (e) authorizing the applicants to prepare a plan of compromise and arrangement for the consideration of the creditors of the applicants.

2 Each of the applicants is an Ontario incorporated company. Each is wholly owned and controlled by Naheel Suleman.

3 Each of the applicants, except Hush Inc., which is a bare trustee, owns a residential development project in Mississauga or Oakville. I shall, where necessary, collectively refer to all three of these developments as the Projects.

4 Each of Hush Homes Inc., 2122763 Ontario Inc. (Thornyco) and 2142301 Ontario Inc. (Silverthornco) has liabilities in excess of $5 million, with total liabilities of $64.9 million, including $46.9 million of current mortgage debt against the projects. The liabilities of each of these applicants exceed the realizable value of their assets, worth approximately $25.2 million in the aggregate on an "as is" liquidation basis and they are each unable to meet their liabilities as they become due.

5 Hush Homes is the owner of the Coronation project in Oakville. It is a 14 lot housing development, partially developed. Some homes have been sold, others are in development and awaiting sale. The applicants' evidence is that this project can be completed within 12 months. Hush Homes has liabilities of approximately $38.7 million.

6 Silverthornco owns a 13 lot housing development in Mississauga. It is partially developed. The applicants' evidence is that this project can also be completed within approximately 12 months. Silverthornco has liabilities of approximately $13.6 million.

7 Thornyco owns a third property in Mississauga. The original proposal was for the development of a high rise condominium and townhouses. It is raw land, not yet even zoned for the proposed housing uses. The applicants say they have downsized this project to a 45 lot housing development. At best, however, it will still take 2 to 3 years to develop this project. Thornyco has liabilities of approximately $12.3 million.

8 Hush Inc. is a bare trustee with no assets but has liabilities owing to the landlord of the head offices of the Hush organization and is unable to meet its obligations as they become due.

9 All of the mortgages secured against the Projects are currently in default and numerous creditors have initiated enforcement steps in respect of the applicants. In addition to several pending claims and enforcement actions, the landlord of the Hush group's offices has taken legal action and issued a distress warrant. The applicants say that, absent the protection of the court afforded under the CCAA, it will be impossible for the applicants to proceed with any form of restructuring for the benefit of their creditors.

10 I am satisfied that the preconditions for the exercise of the court's jurisdiction under s. 3 of the CCAA are met. The applicants are each a "debtor company" as defined in s. 2. They are affiliated companies and all but the bare trustee have claims against them in excess of $5 million.

Thornyco — Rceivership or CCAA?

11 The only contentious issue on the return of the application for the initial order is whether the Thornyco project should be carved out of the CCAA proceedings and subject to disposition by a receiver whose appointment by the court is sought by the first mortgagee of the Thornyco property, Diversified Capital Inc.

12 Since the applicants have said that they will not proceed with the application under the CCAA without the Thornyco project, I will deal with that issue first, and return to other aspects of the application once the threshold Thornyco issue is resolved.

13 Diversified has four mortgages on the Thornyco property:

(i) a first mortgage and the principal amount of $6,950,000

(ii) a second mortgage in the face amount of $1,500,000

(iii) third mortgage in the face amount of $2 million; and

(iv) a sixth mortgage in the face amount of $2,532,000.

14 The evidence does not permit the determination of the total amount actually secured under Diversified's mortgages because some of the mortgages are said to be restricted to collateral security for possible deficiencies on the realization of mortgage amounts owing on other properties. A full accounting of realization on these other properties was not before the Court.

15 According to Diversified, however, $9,078,675.35, as of December 1, 2014, is secured under its first mortgage. This quantification of the amount of the first mortgage is in dispute, which will be discussed below.

16 Diversified's first mortgage has been in default for over a year and a half. A notice of sale was issued by Diversified in May 2013. Diversified recently entered into an agreement of purchase and sale with an arm's length third party to sell the Thornyco property under power of sale for $9.3 million. Diversified's evidence is that after paying arrears of taxes, this price would result in a modest shortfall in the recovery of Diversified's first mortgage debt (and, obviously, no recovery under any subsequent mortgages).

17 At the initial return of this application (which was adjourned to permit the parties to discuss the matter) Diversified sought to have the Thornyco property carved out of the CCAA proceedings and to be permitted to carry on with its power sale.

18 By the time of the return of the application, however, a good deal of additional evidence had been filed dealing with the nature and amount of Diversified's mortgages, the validity of the notice of sale and the validity of Diversified's purported exercise of its power of sale.

19 Both the notice of sale and the process followed by Diversified in the power of sale are under attack in these proceedings. Recognizing the potential for risky litigation over various issues relating to the notice of sale, the validity of the sale process and possible claims for improvident realization, Diversified, during oral argument of the application, abandoned its initial proposal to proceed with the power of sale and now wishes to proceed by way of court appointed receiver to sell the Thornyco property. At the time of oral argument, there was no notice of application for that appointment before the court but Diversified has now served an application record for the purpose of seeking the appointment of a receiver to market and sell the Thornyco property.

20 Both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented, *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 CarswellOnt 5836 (Ont. S.C.J. [Commercial List]) at para. 61.

21 In the case of land development companies, some courts have identified several factors which might influence a decision about whether to grant an initial order under the CCAA. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C. C.A.) for example, the B.C.C.A. said that the priorities of the security against the land development are often straightforward and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing etc.

22 In *Encore Developments Ltd., Re*, 2009 CarswellBC 84 (B.C. S.C.), D. Brenner C.J.S.C. found, in a case where the "project" was raw land, there was no project development work in progress, no business activity being carried out, no equity in the project and likely a substantial shortfall to secured lenders, that there was no principled basis for putting in place or maintaining a stay that would prevent the real estate lenders from enforcing their security in the conventional manner should they choose to do so.

23 It is nevertheless clear, as D. Brown J. found in *Romspen*, *supra*, that there is no "generic" prohibition against a land development business being subject to a CCAA process. Both the receivership and CCAA processes are highly discretionary and require the court to consider and balance competing interests of various economic stakeholders in coming to a conclusion about which remedial process is more appropriate.

24 Diversified argues that real estate development projects are not well suited to CCAA proceedings. This is especially so when raw land is involved as is the case with the Thornyco project. There are few employees, no active business and there is no immediate prospect of an improved return without the expenditure of very significant additional money and after taking on

the risk of a long-term development. The "build-out" of the Thornyco property, Diversified submits, is in reality a risky long-term real estate play that will take at least two to three years to come to fruition.

25 If the applicants' proposal was that Diversified would have to sit on its hands for two to three years with its capital tied up while the applicant and its new financial backer undertake the Thornyco development in the hope that there would be a sufficient return after payment of contractors, trades, taxes, super-priorities and the like to pay back the full amount of what is owed, I would entirely agree with Diversified's position. Such a proposal would be doomed to fail as unfair and prejudicial to Diversified. That, however, is not the proposal being made by the applicants in this case.

26 MarshallZehr Group Inc. is the first secured creditor on the Coronation and Silverthornco projects. In preparation for these proceedings, the applicants negotiated a restructuring agreement with MarshallZehr which provides the framework for what the applicants and MarshallZehr hope will be a viable CCAA plan for the applicants to put forward to their creditors.

27 If implemented, the applicants (and MarshallZehr) maintain that the restructuring agreement will provide the financial and other means to enable the applicants to avoid an "as is" liquidation and proceed with an orderly "build-out" of the Projects with a view to maximizing value for the benefit of all the applicants' creditors. They estimate that an incremental $10 million can be generated for creditors under this scenario.

28 MarshallZehr has agreed to provide the applicants with a DIP loan facility in the amount of $3 million subject to obtaining a DIP lenders charge in priority to other security interests.

29 Importantly, however, the DIP lender's charge along with the other charges sought to be given a super-priority secured against the applicants' assets, will be secured on a Project-specific basis, based, in the case of the DIP financing at least, on where the funds, or the benefits of the expenditure of the funds, go. The restructuring agreement governing the DIP financing provides that:

> each of the Thorny, Silverthorn and Coronation property shall be security for amounts advanced, including interest accrued and accruing thereon, on account of professional fees, developer's working capital, financing fees and closing costs *in such manner and to such extent as is recommended by the Monitor and approved and allocated by the Court.* [emphasis added]

30 The vast majority of the DIP financing is forecast to be spent on the Coronation and Silverthornco projects, not the Thornyco project. Further, the applicants agreed during oral argument that the amount of DIP financing secured against the Thornyco property would be capped at $500,000 in any event.

31 Even more importantly, MarshallZehr also proposes to pay out Diversified's first mortgage in full (in an amount determined by the Court) and assume the first mortgagee position on Thornyco. The proposal is that a claims process will be established promptly which will be used to determine the amount properly secured under Diversified's first mortgage. MarshallZehr has undertaken to the Court that it will pay whatever amount is found to be owed under Diversified's first mortgage.

32 Thus, if Diversified is right that it is owed $9,078,675.35 on its first mortgage (plus additional accrued interest since December 1, 2014), it would be in a better position under the applicants' CCAA proposal than it would have been if it had gone through with its power of sale (the power of sale process involved an offer that Diversified was prepared to, and did, accept which would have resulted in a *shortfall* on the amount it says it is owed under the first mortgage). In the former scenario, Diversified would not be "dragged into" a CCAA proceeding and would not, presumably, have any obvious reason to vote against a plan of compromise since any amount it might receive on its subsequent mortgages would be a "windfall" compared to what Diversified was willing to accept on its proposed power of sale of the Thornyco property.

33 Ultimately, Diversified's complaint about being drawn into the CCAA process, as opposed to asserting its own rights through a receivership process, is that the Court may find in the CCAA claims process that Diversified's first mortgage is not $9,078,675.35 but some lesser amount. Diversified's concern is that if the "difference" is allocated to its second, third or even sixth mortgages, it will be paid out the amount of its first mortgage but amounts found to be secured by subsequent mortgages will be tied up indefinitely in the CCAA proceedings.

34 The problem with this argument is that the issues which have been raised about the calculation of Diversified's first mortgage debt will be raised in whatever process is adopted to realize on the value of its first mortgage.

35 The disputes over the calculation of the amount of Diversified's mortgage entitlements appear to involve four issues:

(i) whether a $1.4 million increase to the first mortgage was, in fact, advanced;

(ii) whether a deficiency resulting from a 2013 refinancing of a first mortgage Diversified formally held on the Silverthornco property was secured under its first mortgage on Thornyco;

(iii) whether there is a shortfall resulting from realization on another property, Langston Hall, for which Diversified's first, second or third Thornyco mortgages are collateral security; and

(iv) whether certain payments made in 2013 totaling about $700,000 were "advances" under the first mortgage made with knowledge of the subsequent fourth and fifth mortgages (and therefore subordinate to those mortgages) or whether they qualify as amounts secured by the Thornyco mortgages at all.

36 The Diversified first mortgage is a conventional charge for monies actually advanced to the borrower, rather than a collateral charge. The applicants take the position that under an August 2012 mortgage amending agreement which increased the first mortgage by $1.4 million, Diversified did not "advance" $1.4 million to Thornyco. Rather, they argue, this increase in the amount of the Diversified first mortgage was intended as collateral security given in consideration for the discharge of Diversified's mortgages over certain Silverthornco properties. Diversified takes the position that valuable consideration was provided for this mortgage.

37 In June 2013, MarshallZehr refinanced Diversified's Silverthornco mortgage, repaying the loan that Diversified argues was collaterally secured by Diversified's first mortgage on Thornyco. This refinancing left a shortfall of approximately $600,000 which was only then crystallized and allegedly transferred to the Thornyco first mortgage to be secured on the Thornyco property. The applicants again argue that no portion of this $600,000 was "advanced" to Thornyco.

38 Finally, there were payments made to Thornyco on June 4 and June 25, 2013 in the amounts of $450,000 and $250,000 respectively. Diversified's mortgage summaries and Acknowledgment at the time characterized these payments a "advances." At the time of these advances, Diversified had actual knowledge of the subsequent fourth and fifth mortgages on the Thornyco property.

39 Initially, Diversified took the position that all of its advances were secured under its first Thornyco mortgage and that it could not advance funds under the second or third mortgages because those mortgages were collateral security for a mortgage Diversified held on another property, Langston Hall. In a subsequent affidavit, Diversified took the position that these amounts were not "advances" under the first mortgage after all but repayments of an overpayment credit owed to Thornyco. Diversified says that its second and third mortgages nevertheless "secured" the $450,000 repayment on June 4, 2013 and the $250,000 repayment on June 25, 2013. Diversified also still maintains that the second and third mortgages represent collateral security for a mortgage loan made on the other property, Langston Hall.

40 There is a potential swing of roughly $2 million in the calculation of Diversified's first mortgage security as a result of these issues.

41 I am not being asked, nor would it be possible on the record before me, to resolve the question of which of these amounts in dispute represent proper and valid amounts due and owing under Diversified's first mortgage on Thornyco and which do not. But it is clear that they are issues that will have to be resolved by the court in the event of either a receivership or a CCAA claims process.

42 If Diversified is right about the amount secured under its first mortgage, it will be paid ought its first mortgage obligation accordingly. If it is wrong, some amounts may not be secured by the first mortgage or at all. Either way, the "disallowed" portion

of Diversified's first mortgage claim will not be available to it. And, under either process, Diversified will receive what it is entitled to receive under its first mortgage. This is because, in a CCAA process, MarshallZehr has undertaken to the court that it will take out Diversified's first mortgage for the amount the court says is properly secured. And in a receivership process, likewise, the court will award Diversified the amount of any sale proceeds to which it is entitled under its first mortgage in priority to other creditors.

43 Although it is theoretically possible that amounts "disallowed" as not being secured under Diversified's first mortgage could slide seamlessly into a secured position under Diversified's second or third mortgages, it is by no means clear on the present record how that could necessarily be so.

44 In short, it is difficult to see how Diversified would be worse off in a claims process under the CCAA (in which MarshallZehr has undertaken to pay out Diversified on its first mortgage at full value, as found by the court) than it would in a receivership process, especially when compared to the amount Diversified was prepared to accept under its power of sale.

45 Diversified also complains that under a CCAA order, it claims will be subordinated to the DIP lender's and other charges sought in these proceedings. The concern is lessened, however, by the manner in which the proposal has been structured. First, I was advised during oral argument that MarshallZehr will pay out to Diversified its first mortgage, in the full amount found by the court to be properly secured by that mortgage, without adjustment for DIP financing priority.

46 Second, and in any event, the super-priority charges that will be secured against the applicants' assets will be allocated between Projects subject to court approval. Thus, to the extent Diversified has concerns about the allocation of these charges between Projects, it will have the opportunity to address this issue at a future court proceeding.

47 It must also be noted that the appointment of a receiver by the court now being sought by Diversified, will come with its own set of significant costs.

48 Finally, I am prepared to order (to the extent that this right would not already exist) that Diversified is at liberty to return to court at a future juncture, for example, when the proposed claims process has run its course, prior to a vote on the applicants' proposed plan of compromise or arrangement to renew its request if any new or additional prejudice has been identified.

49 In conclusion, I find that the concerns which led other courts to dismiss some CCAA applications concerned with land development businesses are not present here. I find, on the unique facts of this case, that the "prejudice" to Diversified, that is the risks it faces in seeking recovery on its mortgage security, is roughly the same whether realization takes place in the receivership scenario or the CCAA scenario.

50 For this reason, I find that Diversified's concerns are not sufficient, at this initial stage, to warrant carving the Thornyco project out of the CCAA application and denying the stay in respect of that Project.

The Stay

51 The CCAA is remedial legislation. It is intended to provide a structured environment for the negotiation of compromises between the debtor company and creditors for the benefit of both. Where a debtor company realistically plans to continue to deal with its assets so as to benefit creditors but requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA, *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) at para. 6.

52 Section 11.02 of the CCAA provides that a court may, on the initial application, make an order staying all proceedings in respect of the debtor company for a period of 30 days, provided the court is satisfied that circumstances exist that make the order appropriate.

53 The applicants require a stay of proceedings in order to stay the enforcement actions that have been initiated against the applicants and their property. Absent the protection of the court afforded under the CCAA, it would be impossible for the applicants to proceed with any form of restructuring. The stay of proceedings will allow the applicants to refine and implement

a restructuring plan, including a claims process as discussed above, based on the restructuring agreement with MarshallZehr that could, realistically, result in more value for all creditors.

Prefiling Obligations

54 The proposed initial order does not seek to designate critical suppliers but proposes to grant to the applicants' the power, with the approval of the Monitor or by order of the court, to determine if payments of certain prefiling expenses are necessary to the continued operations of the applicants. In granting the authority to permit payments of this kind, the courts have considered factors such as:

(a) whether the supply of goods or services is integral to the business;

(b) the dependency of the business on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the Monitor or the court; and

(d) the effect on the ongoing operations of the business and the applicants' ability to restructure if were unable to make prefiling payments to critical suppliers.

55 In this case, the continued supply of materials and services to the Coronation and Silverthornco projects to undertake restructuring efforts is absolutely critical. The Monitor is supportive of the grant of this authority and has undertaken to work with the applicants to minimize payments of prefiling liabilities.

56 In the circumstances, I am prepared to grant the order sought.

The Monitor

57 Section 11.7 of the CCAA requires that the Monitor be a trustee within the meaning of ss. 2(1) of the BIA. There are also certain restrictions on who may be a Monitor set out in ss. 11.7(2) of the CCAA. Gary Abrahamson of the Fuller Landau group is a trustee and is not subject to any of the restrictions. Fuller Landau has consented to its appointment as Monitor. Their appointment is approved.

The DIP Financing and Charge

58 The authority to grant this order is set out in s. 11.2 of the CCAA. The listed factors include:

(a) the period during which the applicants are expected to be subject to CCAA proceedings;

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

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

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

(e) the nature and value of the property involved; and

(f) the views of the proposed monitor contained in its prefiling report.

59 In this case, the DIP lender's charge does not purport to rank in priority over any secured creditor that has not received notice of this application. The amount to be advanced under the DIP facility is appropriate and required, having regard to the debtors' cash flow statement as reviewed by the proposed Monitor and, the charge does not secure any obligation which existed before the order was made, *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at paras. 31 - 35.

60 It is true that Diversified has advanced a strongly held view that it has no confidence in the applicants' management. However, as discussed above, very little of the DIP facility is going to be spent on the Thornyco project, so that any charge on the Thornyco property will be limited and, in any event, shall not exceed $500,000.

61 It is clear that the DIP facility is needed to enhance the prospects of any viable compromise or arrangement. It will, among other things, enable all restructuring costs including fees and disbursements to be paid. It is also necessary to unlock the value which resides in the Coronation and Silverthornco projects which are relatively close to completion.

62 Finally, there is no evidence of any other immediate sources of interim financing available on better terms.

63 Accordingly, the request for an order approving the DIP facility in the maximum principal amount of $3 million, in accordance with the terms and conditions of the relevant agreements and as specified in this endorsement, is approved.

Administrative and Directors' Charge

64 It is clear that the applicants' legal advisers and the proposed Monitor must have a secure source of payment in order to perform their functions. The court has jurisdiction to make this order under section 11.52 of the CCAA. Having regard to the factors outlined in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at paras. 42 - 45, I find the amount is proportional to the size and complexity of the business being restructured and there is no apparent duplication of roles. The only objecting secured creditor, Diversified, will be minimally affected by these charges because, again, they will have to be allocated on a Project-specific basis.

Conclusion

65 In conclusion the application for an initial order under the CCAA is granted. I am prepared to sign the Initial Order submitted subject to counsels' confirmation (or upon a further submissions if necessary) that the Order reflects the guidance of this endorsements in all material respects.

Application granted.

TAB 5

2009 ABQB 500
Alberta Court of Queen's Bench

Octagon Properties Group Ltd., Re

2009 CarswellAlta 1325, 2009 ABQB 500, [2009] A.W.L.D. 4033, 180 A.C.W.S. (3d) 18, 486 A.R. 296, 58 C.B.R. (5th) 276

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 AND ARRANGEMENT OF OCTAGON PROPERTIES GROUP LTD., 1096907 ALBERTA LTD., 880512 ALBERTA LTD., 5448710 MANITOBA LTD., and 5433801 MANITOBA LTD.

C.A. Kent J.

Heard: August 26, 2009
Judgment: August 28, 2009
Docket: Calgary 0901-12182

Counsel: Larry Robinson, Q.C., Lance Williams for Applicants
Sean Collins, Dean A. Hutchison for GE Canada Real Estate
Brian O'Leary, Q.C., Simina Ionescu-Mocanu for Alberta Treasury Branches
Russell Avery for Canada ICI
John Ircandia for HSBC Bank Canada
Charles Russell, Q.C. for Canadian Western Bank
Andrew Maciag for Citizens' Bank
Josef Kruger for Servus
Clifford J. Shaw, Q.C. for First Calgary
Bruce Milne for 1st Choice Savings
Stephen Raby, Q.C. for Trumpet Capital
Chris Simard for Echo Merchant Fund Ltd.
Kelly Bourassa for Proposed Monitor, Alger & Associates Inc.

Subject: Insolvency; Property; Corporate and Commercial

APPLICATION by real estate company for relief pursuant to *Companies' Creditors Arrangement Act*.

***C.A. Kent J.*:**

1 Octagon Properties Group Ltd. and related entities apply for relief pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 as amended (*CCAA*). Octagon is the parent company and sole shareholder of the remaining applicants. Throughout these reasons reference to Octagon will include the subsidiaries. Octagon is a real estate company which purchases, holds and sells property. It is not a development company. Currently, it owns 20 properties, all of which would fall under the *CCAA* proceedings if granted. In addition, there is a property entitled Blackfalds which Octagon proposes not fall under the *CCAA* proceedings.

2 Each of the 20 properties has at least one mortgage on it and in some cases a second and third mortgage. At the application, counsel for the mortgagees appeared and made representations. The majority of the first mortgagees opposed the application for relief under the *CCAA*. One mortgagee, Canada ICI, which has mortgages on 2 properties supported the application and

one mortgagee, ATB, was essentially neutral but applied for an adjournment to deal with issues arising out of the proposed DIP financing.

3 The reason that Octagon has applied for *CCAA* protection is that it has been unable to make all of its mortgage payments. This is a result of the economic downturn which in turn has meant that several tenants of properties owned by Octagon have defaulted on their lease. The cash flow has diminished which in turn means that the bills, specifically taxes and the mortgage interest payments, have not been paid. Some of the properties are currently in foreclosure.

4 The company says that should *CCAA* protection be granted, its proposed plan is to market some of the properties which will not only reduce some of its mortgage obligations but also provide the equity to deal with the remaining properties. As part of its application, it proposes that DIP financing be ordered. It has a commitment from Echo Merchant Fund Ltd. for a total amount of $3,500,000.00, with the first draw being up to $1.5 million with 3 subsequent $500,000.00 draws. The interest rate in the letter of commitment is 15% per annum. A standby fee of 6% per annum on the undrawn portion of the DIP, a facility fee of 2.75% of the DIP facility and $10,000.00 deposit for lender expenses.

5 The cash flow summary provided by Octagon shows that the majority of debt is a combination of mortgage arrears and unpaid property taxes. If the *CCAA* order permitted drawing $1.5 million of the DIP financing, the majority of that financing would go to pay the taxes and the arrears which Octagon says is for the benefit of the first mortgagees. From August to November, the cash flow summary shows a shortfall from $210,000 to $290,000 per month depending on the month.

6 In support of its application Octagon provided a property summary which lists the 20 properties, their book value, the latest appraisal value, a company valuation and the outstanding amount of the mortgage which then results in a summary of the equity available on book value, latest appraisal value and the company's estimate. Because of the sensitive nature of some of that information the affidavit attaching that information was sealed. Generally, however the summary reveals that the latest appraisals for any of the properties occurred in November and December 2008 with most of the appraisals in either early 2008 or 2007. The summary also reveals that on the current company valuation there is some equity in most of the properties although in some cases it is a very small amount of equity. There is no equity in a few properties.

7 The majority of the first mortgagees oppose the application. They argue that each of the mortgagees negotiated their arrangement individually with Octagon. Part of each of those agreements include remedies for default under the mortgage. The foreclosure remedy which is available under each of the mortgages should be permitted to run its course. The *CCAA* order would take away the mortgagees' right to exercise those remedies and in a situation where there is no other reason to grant the *CCAA*. They argue that the plan proposed by Octagon is really not a plan. In this case there are no employees. The only stakeholders beyond the secured lenders are shareholders and a small number of unsecured creditors (about $300,000.00). On the other hand, granting *CCAA* protection would mean that Octagon would incur professional fees estimated at about $300,000.00 to take the company to the end of December. They say that the proposed DIP financing is particularly onerous and of concern to the first mortgagees. It would prime them and there is no proposed explanation for how the DIP financing would be allocated amongst the various properties.

8 The mortgagees also argue that *CCAA* relief is a drastic remedy and unprecedented in the context of a business where reasonable commercial remedies are available. There is no public policy reason such as a business that is crucial to the economy or where there is a large group of employees affected that would require that *CCAA* proceedings trump those ordinary commercial remedies.

9 In support of their opposition, the first mortgagees cite 3 cases. In *Marine Drive Properties Ltd., Re* (2009) (B.C. S.C.), Justice Butler allowed an application to set aside an *ex parte* order under the *CCAA* on the basis that the debtor's proposal was an inappropriate use of the *CCAA*. Justice Butler noted that the purpose of the *CCAA* was to facilitate the making of a compromise or arrangement between an insolvent debtor and its creditors to allow the company to stay in business (para. 31). In that case as in this case the major creditors were unlikely to approve any compromise proposed by the debtor. He found that the arrangement was doomed to fail.

10 He also found that the debtor had sought *CCAA* protection to buy time in an attempt to raise new funding. He says at para. 38:

> To be it bluntly, the petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the petitioners stated in argument, they need time to "try to pull something of the hat." They have sought DIP financing so they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

11 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323 (B.C. C.A. [In Chambers]), the debtor was a business involved in a single land development. The Chambers judge had extended a *CCAA* stay and authorized financing. The Court of Appeal allowed an appeal from that order. Three points relevant to this case emerge from the Court's reasons. First, the fundamental purpose of the *CCAA* is to facilitate a compromise or arrangement and granting or continuing a stay is ancillary to that purpose. (paras. 26 and 27)

12 Second, the court questions whether it should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted on by the creditors if the plan of arrangement intended to be made by the debtor will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. (para. 32)

13 Third, if the sole business of a company is a single land development, the company may have difficulty proposing an arrangement that would be more advantageous to the secured lenders than their exercise of remedies available pursuant to their security. In such circumstances the fundamental purpose of the *CCAA* to reach a compromise or arrangement is likely to be thwarted by the secured creditors who have no incentive to do anything other than demand their right to exercise their remedies under their security. (para. 36)

14 The final case is *Encore Developments Ltd., Re* (2009), 2009 BCSC 13 (B.C. S.C.). Encore was a developer where the projects were either bare land or completed subdivisions awaiting sale. There was no active business being carried out. Chief Justice Brenner found that there was no reason for putting in place or maintaining a stay which would ... "prevent the real estate lenders from enforcing their security in the conventional manner should they so choose." (para. 24) He also held that in those circumstances it had not been appropriate to apply *ex parte* particularly since the terms of the DIP financing were particularly onerous on the secured lenders who would bear the costs of the restructuring.

15 In response to those submissions counsel for Octagon urged that a 30 day stay under the *CCAA* would give the company breathing time and hopefully affect a sale. He also said that it would not be necessary during that 30 day period to grant an order allowing for the full amount of DIP financing to be available.

16 I should note that I have not summarized the submissions made by or against ICI or ATB since these may reveal otherwise confidential information. I do, however, agree with the submissions of the other first mortgagees.

17 This is not a case where it is appropriate to grant relief under the *CCAA*. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted *CCAA* relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for *CCAA* relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

18 In the result, the application of Octagon is denied.

Application dismissed.

End of Document

TAB 6

CITATION: Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al, 2018 ONSC 7382
COURT FILE NO.: CV-18-607303-00CL
COURT FILE NO: CV-18-00609634-00CL
DATE: December 10, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30, AS AMENDED

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS (RICHMOND HILL) LIMITED PARTNERSHIP, ATLAS SHOULDICE HEALTHCARE LTD., ATLAS SHOULDICE HEATHCARE LIMITED PARTNERSHIP, ATLAS HEALTHCARE (BRAMPTON) LTD. and ATLAS BRAMPTON LIMITED PARTNERSHIP, Respondents

AND RE:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ATLAS SHOULDICE HEALTHCARE LTD., ATLAS HEALTHCARE (BRAMPTON) LTD., ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS HEALTHCARE ASSET MANAGEMENT LTD., ATLAS GLOBAL HEALTHCARE LTD., GRIGORAS DEVELOPMENTS LTD. AND ATLAS INVESTMENTS AND SECURITIES COPORATION

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Preger* and *Linda Corne*, for Romspen Investment Corporation

Clifton Prophet, for Meridian Credit Union Limited

Marc Wasserman and *Mary Paterson*, for the Atlas Respondents and the Applicants under the *Companies' Creditors Arrangement Act* application

Robert Chadwick and *Andrea Harmes*, for PointNorth Capital Inc., the Proposed DIP Lender

Eric Golden, for Ernst & Young Inc., Proposed Receiver

Mario Forte, for KSV Kofman Inc., the Proposed Monitor

HEARD: November 27, 2018

ENDORSEMENT

[1] There are two applications before the Court.

[2] In the first application (the "Receivership Application"), Romspen Investment Corporation ("Romspen") applies for the appointment of Ernst & Young Inc. as receiver, manager and construction lien trustee of the undertaking, assets and properties of the Respondent, Atlas Healthcare (Richmond Hill) Ltd., and as receiver and manager of the undertakings, assets and properties of the remaining Respondents including Atlas Healthcare (Richmond Hill) Limited Partnership ("Richmond Hill"), Altas Shouldice Healthcare Limited Partnership ("Shouldice") and Altas Brampton Limited Partnership ("Brampton") (collectively, Richmond Hill, Shouldice and Brampton are referred to as the "Debtors").

[3] In the second application (the "CCAA Application"), certain corporations related to the Debtors including the general partners of the Debtors (collectively, the "CCAA Applicants") request certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") including an initial stay of proceedings in respect of the Debtors and approval of a proposed debtor-in possession facility in respect of Richmond Hill (the "DIP Facility").

[4] On December 3, 2018, the Court advised the parties that the CCAA Application was denied and that the Receivership Application was granted for written reasons to follow. This Endorsement sets out the Court's reasons for these determinations.

Factual Background

The Debtors

[5] Richmond Hill is the owner of a 5.59 acre parcel of land that fronts on the west side of Brodie Drive and the east side of Leslie Street in Richmond Hill, Ontario and has a municipal address of 25 Brodie Street (the "Richmond Hill Property").

[6] Richmond Hill is currently building a six-story medical office building on the Richmond Hill Property (the "Project"), which is addressed in greater detail below.

[7] Shouldice owns a 22.467 acre parcel of land at 7750 Bayview Avenue (the "Shouldice Property") in Markham, Ontario. The Shouldice Property is currently improved with a three-storey hospital and is occupied by Shouldice Hospital Limited under a lease (the "Hospital Lease").

[8] Atlas owns a 4.59 acre parcel of land at 241 Queen Street East in Brampton, Ontario (the "Brampton Property"). The Brampton Property is currently improved with a single-storey commercial building. The building is currently vacant.

[9] In this Endorsement, the Richmond Hill Property, the Shouldice Property and the Brampton Property are referred to collectively as the "Properties".

Financing of the Project

[10] The Project has been financed by a combination of loans from third-party lenders and equity contributions of Richmond Hill, representing equity contributed principally by the limited partners of Richmond Hill.

[11] At the present time, the principal financing arrangements in place are the following:

(1) Loans made by Meridian Credit Union Limited ("Meridian") in favour of Richmond Hill (collectively, the "Meridian Loan") secured by a first charge on the Project (the "Meridian Charge") and a first general assignment of rents; and

(2) A loan made by Romspen in favour of the Debtors together with an outstanding loan acquired by Romspen (collectively, the "Loan"), secured by the Bridging Charge (defined below) and the Romspen Third Charge (defined below), both of which rank behind the Meridian Charge.

These financing arrangements are further described below.

The Meridian Loan

[12] Pursuant to a credit agreement dated March 2, 2017 (the "Meridian Credit Arrangement"), Meridian extended a loan in the maximum principal amount of $59 million to Richmond Hill. In addition, pursuant to an agreement dated July 27, 2018, Meridian extended an interim loan of $4.4 million to Richmond Hill. As of November 7, 2018, Richmond Hill owed $43,371,985 under these loan arrangements and certain other facilities extended by Meridian (collectively, the "Meridian Loan"). Interest has not been paid on the Meridian Loan since August 2018 and continues to accrue. As mentioned, the Meridian Loan is secured by a first ranking charge, the Meridian Charge, in the principal amount of $75 million.

The Romspen Loan Arrangements

[13] The Romspen loan arrangements comprise a loan made to the Debtors and an outstanding loan acquired by Romspen, which will be addressed in turn.

The Romspen Loan

[14] Pursuant to a financing commitment dated December 11, 2017, as amended by a supplement dated June 10, 2018 (collectively, the "Commitment"), Romspen loaned the amount of $81.2 million to the Debtors on a joint and several basis (the "Romspen Loan"). The Romspen Loan was evidenced, among other things, by a joint and several promissory note of the

Debtors in the principal amount of $81.2 million. Of this amount, approximately $49 million was loaned to Shouldice and $10 million was loaned to Brampton, in each case to repay all outstanding debt in respect of these properties. In addition, $19.5 million was loaned to Richmond Hill to partially repay the Bridging Finance Loan (defined below) and $3,280,500 was loaned to Richmond Hill for use in respect of the Project.

[15] The Romspen Loan is fully advanced. Interest accrues on the Romspen Loan at the rate of 11.45 percent per annum. As of November 1, 2018, according to a schedule derived from the records of Richmond Hill, $22,382,788 was owed in respect of the monies loaned to Richmond Hill (I note that Romspen calculates a slightly larger amount that is used below but the difference is not material for these proceedings), $49,324,156 was owed in respect of the monies loaned to Shouldice, and $10,071,200 was owed in respect of the monies loaned to Brampton, for a total of $81,778,143 owing on a joint and several basis by the Debtors. Interest has not been paid on the Romspen Loan since August 2018 and is accruing at the rate of slightly less than $1 million per month.

The Bridging Finance Loan and the Bridging Charge

[16] The Bridging Charge secures a loan made by Sprott Bridging Income Fund LP to Richmond Hill pursuant to a commitment letter dated February 9, 2016, as amended. This loan was originally in the principal amount of $15,840,201 but was subsequently increased in stages to $40,850,000 (the "Bridging Finance Loan"). In this Endorsement, the Romspen Loan and the Bridging Finance Loan are collectively referred to as the "Loan".

[17] Pursuant to the Commitment, Romspen loaned Richmond Hill $19.5 million, which was used to reduce the outstanding amount of the Bridging Finance Loan. The outstanding balance of the Bridging Finance Loan and the security therefor, including the Bridging Charge, were then acquired by Romspen by way of a transfer upon payment by Romspen to Bridging Finance Inc. of $19,590,206.47.

[18] At the present time, Romspen says approximately $25 million is owing in respect of monies advanced to Richmond Hill. There is an issue regarding whether the amount secured by the Bridging Charge is limited to the amount outstanding at the time of the transfer of the Bridging Finance Loan to Romspen plus accrued interest or is the principal amount of the Bridging Charge, being $40.85 million. However, this is not an issue to be determined in these proceedings. I have proceeded on the basis that the total amount owing by the Debtors jointly and severally secured against the Properties is the amount of the Romspen Loan and therefore the resolution of this issue does not affect the analysis or the determinations made below.

The Romspen Security in the Properties

[19] As security for the Bridging Finance Loan and the Romspen Loan, Romspen holds the following:

(3) a second charge on the Project in the principal amount of $40,850,000, originally given in favour of Bridging Finance Inc. and transferred to Romspen on May 24, 2018 (the "Bridging Charge");

(4) a third charge against the Project in the principal amount of $5 million (the "Romspen Charge");

(5) a subordinate general assignment of rents of the Project;

(6) a first charge over the Shouldice Property in the principal amount of $81.2 million (the "Shouldice Charge"), together with a general assignment of rents and a specific assignment of the Hospital Lease; and

(7) a first charge over the Brampton Property in the principal amount of $81.2 million (the "Brampton Charge") together with a general assignment of rents in respect of the Brampton Property.

Status of the Project

[20] The Project is over budget. Based on the most recent report dated November 23, 2018 of Pelican Woodcliff Inc. ("Pelican") (the "Pelican Report"), the Project's cost consultant, the net project budget has increased by approximately $39,000,000 from $83,000,000 to $122,000,000 (including holdback and reserves).

[21] Meridian stopped funding the Project under the Meridian Loan in early 2018 due to increases in the construction budget. Since then, the Debtors have funded construction costs, including the costs of certain remediation work required as a result of cracks in the slab-on-grade, which are the subject of a dispute between Richmond Hill and Dineen Construction Corporation ("Dineen"), the former general contractor for the Project.

[22] The Project is also behind schedule. Based upon the latest construction schedule, construction was to have been completed on October 1, 2018. However, at the present time, it is only 80 percent complete. Moreover, construction has effectively ceased, apart from a small amount of work that is proceeding as a result of settlement agreements with three lien claimants, which have enabled these trades to continue to work on the Project.

[23] Richmond Hill originally contracted with Dineen as the general contractor for the Project. In August 2018, Dineen terminated its contract, prompted by Dineen's concern for payment after learning that Meridian was no longer advancing funds to finance the construction and that Meridian had refused to confirm that it would advance the funds necessary to complete the Project.

[24] Between August 3, 2018 and September 28, 2018, Dineen and eleven trades filed construction liens totalling $16,542,335.75 against the Richmond Hill Property (collectively, the "Liens"). The largest Lien was registered by Dineen. Richmond Hill says Dineen's Lien claim duplicates the other claims of the trades with respect to the Project. Richmond Hill says that currently approximately $8 million is required to discharge all the Liens in respect of the Project. Romspen and Meridian acknowledge there is duplication in the Lien claims.

[25] Because the Loan was fully advanced and Meridian had stopped advancing monies under the Meridian Loan, the Debtors, and in particular Richmond Hill, have experienced a liquidity crisis commencing August 2018. Since that time, the Debtors have made serious, but unsuccessful, efforts to enter into a sale or refinancing transaction that would pay out Romspen and Meridian.

[26] Richmond Hill has selected a different general contractor, Greenferd Construction Inc. ("Greenferd"), to manage the interior works to make the Project suitable for the future tenants, referred to as the "Fit-Out Works". Richmond Hill has recently also engaged Greenferd to take over the role of general contractor for the remaining construction of the Project.

[27] Richmond Hill says that it now expects substantial completion of the Project to occur during May 2019. In view of the construction delay, Richmond Hill has sought and obtained signed acknowledgements regarding the new target occupancy date from future tenants who have contracted for 72 percent of the gross leasable space in the Project and who represent 76 percent of the total projected rent roll. These acknowledgements have provisions that permit Richmond Hill to extend the commitments of these tenants to May 30, 2018.

[28] Meridian's consultant on the Project, Glynn Group Incorporated ("Glynn"), has reviewed the Pelican Report and has made a number of comments, including the following.

[29] First, Glynn agrees with Pelican that construction of the Project will only be back up and running in a productive manner by the middle of January 2019. Second, given the volume of construction remaining, the Project requires "extremely intensive" supervisory, scheduling and management oversight" to achieve the timelines contemplated by Pelican and the Debtors. Third, the selection of a new general contractor/construction manager is "pivotal" to the success of the Project going forward. Fourth, the scenario of a new general contractor/construction manager working with the existing trades is the best scenario and is contemplated by the budget reviewed by Pelican. However, Pelican was also of the opinion that it may not be possible to convince these trades to return to the Project given the recent history of non-payment and the existence of the Liens.

Demands under the Loan and the Meridian Loan

[30] The registration of the Liens and the failure of the Debtors (and the other guarantors under the Loan) to remove the Liens from title to the Richmond Hill Property constitutes a default under the Commitment under and each of the Meridian Charge, the Romspen Charge, the Shouldice Charge, the Brampton Charge and the Bridging Charge (collectively, the "Charges").

[31] The existence of the Liens on the Richmond Hill Property also constitutes a serious material adverse change under the Loan. Section 16.16 of the Commitment provides that if, in the opinion of Romspen, an adverse material change occurs in respect of any of the Debtors, its business, a charged property or Romspen's security, the whole balance of the Loan becomes immediately due and payable and becomes enforceable. The Bridging Finance Loan and the Meridian Credit Agreement contain similar provisions.

[32] In addition, the failure to pay municipal taxes when due also constitutes a default under the Commitment and the Charges. It is understood that tax arrears are owing in respect of each of the Properties and that further arrears are being incurred.

[33] On September 12, 2018, Romspen made demand on the Debtors (among others) and issued notices pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). On November 12, 2018, Meridian also made demand on Richmond Hill, among others, and issued similar notices under s. 244 of the BIA. The Debtors do not deny that they are in default under the Commitment, the Bridging Finance Loan, the Meridian Loan and the Charges.

[34] The Debtors also do not dispute that each Charge held by Romspen and Meridian in respect of the Properties provides for the appointment of a receiver in the event of default under the Loan and the Meridian Loan. The Romspen Charge also expressly contemplates the appointment of a construction lien trustee under the *Construction Act*, R.S.O. 1990, C. 30 (the "CA") in the event of default.

The Receivership Application

[35] As mentioned, in the Receivership Application, Romspen seeks the appointment of a receiver over the properties and assets of Richmond Hill having the necessary powers to engage third parties to complete the construction of the Project. Romspen also seeks the appointment of a receiver over the assets of Shouldice and Brampton.

[36] The receivership order sought by Romspen included the power to sell the assets of each of the Debtors. However, the principal purpose of the Romspen application in respect of Richmond Hill is the appointment of a receiver to supervise the completion of construction of the Project. Romspen also says the principal purpose of the appointment of a receiver over the assets of Shouldice and Brampton is to ensure that the priority of funds advanced under the proposed Receivership Financing (defined below) is preserved in respect of these Properties as well as the Richmond Hill Property. Accordingly, Romspen has indicated that it is prepared to exclude the power of sale in respect of the Properties from any order that the Court may grant.

[37] Romspen has filed a report of Ernst & Young Inc., the proposed receiver (the "Proposed Receiver"), which sets out its proposed course of action. The Proposed Receiver states that it intends to engage Elm Development Corp. as the construction manager for the Project.

[38] Meridian supports the Receivership Application of Romspen and has committed to the Receivership Financing (defined below) with Romspen. In this Endorsement, the term "Receivership Applicants" refers to Romspen and Meridian in the circumstances in which they join in making the same submissions in these proceedings.

The Receivership Financing

[39] Romspen and Meridian have provided the Court with a signed term sheet for a joint financing in the amount of $35 million to fund the proposed receivership (the "Receivership Facility"). The following are the principal terms of this Facility.

[40] The principal amount of the Facility of $35 million is available in two tranches – a tranche of $15 million to be provided by Romspen (the "Romspen Tranche") and a tranche of $20 million to be provided by Meridian (the "Meridian Tranche"). The Meridian Tranche is to be available only after specified construction work described in a schedule to the Pelican Report (although the term sheet refers to a prior Pelican report dated October 21, 2018) is completed, in which event the loan/value covenant under the Meridian Credit Agreement would be brought into compliance permitting further advances under that Agreement.

[41] The Receivership Facility would have a one-year term, and would bear interest at a rate of 15 percent under the Romspen Tranche and at the rate provided for under the Meridian Credit Agreement for the Meridian Tranche. The Receivership Applicants say this would result in a blended rate of approximately nine percent.

[42] Advances under the Romspen Tranche of the Receivership Facility are to be secured by a charge ranking behind the Meridian Charge but ahead of all other charges on the Properties, including the Liens. Advances under the Meridian Tranche are to be secured on the Richmond Hill Property in priority to all other charges on that Property.

[43] The Receivership Facility contemplates fees of three percent of the maximum amount of the Romspen Tranche to Romspen and of $170,000 to Meridian.

The CCAA Application

[44] In addition to opposing the Receivership Application, the CCAA Applicants, which effectively includes the Debtors, have brought an application for certain relief under the CCAA, including an initial stay of proceedings and the appointment of KSV Kofman Inc. as the Monitor in respect of the proposed proceedings. The order sought also includes approvals of the DIP Facility and related charge (the "DIP Charge"), of a financial advisor agreement dated October 19, 2018 between Atlas Global Healthcare Ltd., one of the CCAA Applicants, and FTI Capital Advisors – Canada ULC ("FTI") and a related charge (the "FTI Charge"), of a directors' and officers' charge in the aggregate amount of $500,000, and of an administration charge in the aggregate amount of $1.5 million.

The DIP Facility

[45] In the CCAA Application, the CCAA Applicants have included a signed term sheet dated as of November 26, 2018 respecting the DIP Facility between PointNorth Capital (PNG) LP and PointNorth Capital (O) LP (collectively, "PointNorth"), as lenders on behalf of certain funds and accounts (collectively "PointNorth"), on the one hand, and each of the CCAA Applicants, on the other. The following sets out the principal terms of the DIP Facility.

[46] The DIP Facility is a non-revolving facility that accrues interest at 15 percent per annum compounded monthly and has a term of one year, subject to earlier termination under certain circumstances. The total availability under the DIP Facility is $50 million to be funded in two equal tranches – the first upon the issuance of the initial order sought under the CCAA including approval of the DIP Facility and the second on or about February 1, 2019. The DIP Facility also includes provision for an additional loan of up to $2,830,000 to cover overrun construction costs (the "Bulge Facility").

[47] The DIP Loan requires payment of a commitment fee of $750,000, a monthly administration fee of $50,000 and an early exit payment fee on repayment of any portion of the DIP Facility to top up aggregate interest payments to $6,875,000.

[48] The DIP Facility contemplates the following use of proceeds: (1) to pay advisory, consultant and legal fees of the lenders, the CCAA Applicants and the Monitor; (2) to pay interest, fees and other amounts owing under the DIP Facility; (3) to fund the working capital requirements of Richmond Hill and property taxes and insurance of the other Debtors during the CCAA proceedings; and (4) to fund the costs to complete the Project in accordance with the budget for the Project, estimated to be $28.261 million plus certain amounts to address certain Lien claims.

[49] The DIP Facility contemplates a charge over all the property and assets of the CCAA Applicants, including the Richmond Hill Property, ranking prior to all other charges other than the Meridian Charge. Accordingly, the DIP Facility requires a charge ranking behind the security in favour of Meridian on the Richmond Hill Property but ahead of the security in favour of Romspen on each of the Properties. Further, the DIP Facility contemplates subordinate charges over a fourth property (the "Mississauga Property") that is not subject to any security in favour of either Meridian or Romspen.

Applicable Law

[50] The appointment of a receiver and manager is governed by s. 43 of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, both of which provide that the Court may appoint a receiver where it is "just or convenient" to do so. Although s. 68 of the CA does not specify that the requirement for the appointment of a construction lien trustee is satisfaction of the "just or convenient" test, Ontario courts have relied on this test in making such an appointment: see, for example, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CanLII 31188 (Ont. S.C.).

[51] It is trite law that, in considering whether to appoint a receiver, a court should have regard to all the circumstances of the case but in particular to the nature of the property and the rights and interests of the affected parties in relation thereto: see, for example, *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. C.J. (Gen. Div.)), at para. 11.

[52] The granting of a stay of proceedings on an initial application under s. 11.02(1) of the CCAA requires the applicant demonstrate that it is a "debtor company" as defined in s. 2(1) of the CCAA and that circumstances exist that make the order appropriate.

[53] For this purpose, I adopt the following description of the purpose of the CCAA in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at p. 88:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A., the

> Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

[54] There is no dispute that each of the CCAA Applicants are debtor companies for the purposes of the CCAA. Further, each of the Debtors is insolvent in that, regardless of the values of the Richmond Hill Property on completion of the Project, and of the Shouldice Property after redevelopment of that Property, they are currently unable to meet their respective obligations as they fall due.

[55] In the present case, because the CCAA Application also requires approval of the DIP Facility at this time, the provisions of s. 11.2 of the CCAA governing the approval of any charge to secure debtor-in-possession financing, while not technically applicable unless the CCAA Application is granted, also inform the determinations made in this Endorsement. In this regard, s. 11.2(4) provides that, among other things, in deciding whether to approve such a charge, a court is to consider the following factors:

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

(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, if any.

Analysis and Conclusions

[56] There is no obvious priority of consideration of the Receivership Application and the CCAA Application. Moreover, each must be judged independently on its own merits. It is at least theoretically possible that each application could be denied. However, as a practical matter, the parties require that the Court grant the relief sought in one of the applications in order that construction of the Project can restart under the supervision of either a court-appointed receiver or Richmond Hill as a debtor-in-possession. Further, the considerations respecting the merits of each application are broadly similar. Accordingly, I propose to address the considerations raised by the parties first and then to set out my determinations regarding the applications.

[57] The considerations raised by the parties fall broadly into four categories – operational issues, the nature of the property involved, the respective rights and interests of the parties and the respective costs of the prospective proceedings. I will deal with each of these considerations in turn.

Operational Issues Pertaining to the Competing Applications

[58] The CCAA Applicants have raised two considerations that they urge the Court to take into account pertaining to the manner in which it is proposed to conduct the remaining construction of the Project: (1) the comparative feasibility of the respective financial plans of the parties; and (2) the comparative feasibility of the respective construction plans of the parties. I will address each of these considerations separately before addressing whether one of the operational plans is demonstrably superior to the other.

The Competing Financial Plans

[59] The CCAA Applicants argue that their financial plan is more realistic than the Romspen receivership plan, which they suggest is unrealistic in the sense of not feasible.

[60] The financial plan of the CCAA Applicants contemplates an availability of $50 million under the DIP Facility. In the current cash flows provided to the Court, which also form the budget for the purpose of the DIP Facility, Richmond Hill would have a cushion of approximately $5 million to cover cost overruns. In addition, the DIP Facility provides for the possibility of the Bulge Facility to cover further cost overruns.

[61] The financial plan of the proposed receivership is based on the Receivership Facility. It is limited to $35 million, of which the Meridian Tranche of $20 million is available only if the hard construction costs do not materially exceed those contemplated in a schedule to the Pelican Report. The Receivership Facility also does not have any significant amount of cushion for cost overruns. However, each of Romspen and Meridian are of the view that these costs are achievable and that they will deal with any unanticipated cost overruns. They are also of the view that the budget of the CCAA Applicants includes certain costs in amounts that are either unnecessary or larger than necessary.

[62] The principal differences between the two plans pertain to lower interest costs and professional fees of the Receivership Financing as well as a different view of the amounts required to pay the Lien claimants and a larger cushion for contingencies under the DIP Facility.

[63] While there is some benefit in the greater flexibility provided by the DIP Facility, I am not persuaded that, on balance, the financial plan for the receivership is unrealistic, as the CCAA Applicants suggest. It is consistent with the estimate of capital costs to completion of Pelican, Richmond Hill's own quantity surveyor, which the CCAA Applicants also use in their budget. Those capital costs have also been reviewed and approved by Meridian's quantity surveyor. Further, as Romspen acknowledges, the terms of the Receivership Financing, as well as the limited scope of the proposed receivership order in respect of Shouldice and Brampton, effectively require Romspen to fund any cost overruns provided they will translate into increased equity in the Project. In addition, as mentioned, a principal difference between the two plans is a more conservative estimate of certain payments (i.e. involving larger payments) in the financial

plan of the CCAA Applicants. It is not possible to estimate these latter costs with any degree of certainty at the present time.

[64] Based on the foregoing assessment of the considerations raised by the parties, I conclude that the evidence before the Court does not establish that the financing plan of the Receivership Applicants is unrealistic in the sense that it is not feasible or that the financing plan of the CCAA Applicants is materially better than the plan of the Receivership Applicants.

The Competing Construction Plans

[65] The CCAA Applicants also argue that their construction plan is more reliable than that of the proposed receivership. In particular, the CCAA Applicants argue that they are better placed to get the construction restarted because of their prior familiarity with the construction plan and schedule, as well as their relationship with the trades. Romspen and Meridian say that Elm is experienced in workout construction projects and is therefore more than capable of restarting the Project in a reasonable time.

[66] I do not think that the record provides a basis for preferring one construction plan over the other for the following reasons.

[67] First, while Richmond Hill has more experience of, involvement in, and knowledge of, the Project, this cuts both ways. Under its supervision, the capital costs of the Project have increased very significantly. While Richmond Hill disputes the $38 or $39 million figure of Pelican, it acknowledges at least $32 million in cost overruns. There are, therefore, valid grounds for concern regarding the ability of Richmond Hill's management to control construction costs. In addition, under Richmond Hill's supervision, the trades previously working on the Project have ceased working and registered construction liens. A decision will have to be made on an individual trade basis whether to settle with, or to replace, the trade. This may be affected in part by the state of the current relationship between Richmond Hill and each of the affected trades.

[68] Second, Richmond Hill has been forced to engage a new general contractor for the construction, Greenferd. Both Greenferd and Elm appear to have a similar degree of familiarity with the Project and a similar challenge of "getting up to speed". I cannot find that Elm is any more of a risk than Greenferd on the record before the Court.

[69] Third, the more aggressive construction schedule proposed by Richmond Hill in the affidavit of Peter Grigoras, sworn November 14, 2018 (the "Grigoras Affidavit"), is not consistent with the opinion of Pelican, its own quantity surveyor. As noted above, Pelican is of the view that construction would restart in early January and that substantial performance would not be achieved until late June 2019. I see no basis for concluding that there will be no "ramp-up" time under a CCAA proceeding, as the CCAA Applicants suggest.

[70] Fourth, the CCAA Applicants say the Court should be mindful of the specialized nature of the Project as a hospital and the fact that Richmond Hill has engaged specialized employees and consultants to address the complicated issues associated with construction of such a building. However, to the extent that Richmond Hill has engaged any such individuals as employees or consultants, a receiver would also be in a position to engage them to receive the benefit of their

expertise. The real significance of this consideration, if any, lies in the increased costs that would be incurred beyond those currently contemplated by the Receivership Facility but are apparently included in the budget used for the DIP Facility.

[71] Fifth, the CCAA Applicants also suggest that the involvement of OMERS, as an investor in PointNorth, and of Dream Alternatives Lending Services LP, as a participant in the DIP Facility, is a significant advantage. They suggest that the expertise of these organizations will translate into better cost administration and the availability of construction expertise. While such involvement would be desirable, there is nothing to demonstrate that such benefits will accrue to the Project. Moreover, each of PointNorth and Romspen has expertise in the administration of construction projects in a workout situation and an incentive to require careful oversight.

[72] Lastly, while I agree that, in certain circumstances, a debtor-in-possession restructuring may impart greater confidence in the financial stability of the debtor than a receivership, I am not persuaded that this is an important consideration in the present case. The liquidity problems of Richmond Hill have been transparent to all of the trades working on the Project for some time and to the future tenants. It is not clear that a CCAA proceeding would restore confidence in Richmond Hill if the same management continued to be involved with the Project, even with a new general contractor.

Conclusion Regarding Operational Issues Pertaining to the Competing Applications

[73] Each of the proposed plans for completing the Project of the Receivership Applicants and the CCAA Applicants carries its own risks. I have considered whether, when viewed in their entirety, the construction and financing plans of one of these parties is materially superior to the other, or more credible than the other, such that this should be a consideration to be taken into account in the Court's determination. Given the evidence before the Court, I am not persuaded, however, that the plan of either the CCAA Applicants or the Receivership Applicants is materially superior to, or more credible than, the other. In particular, I cannot conclude that either the CCAA Applicants' plan or the Receivership Applicants' plan is more likely to achieve construction completion on time and on budget. Given the number of variables involved, any such determination would be highly speculative at this time. Nor do I think that the CCAA Applicants have demonstrated that the Receivership Application, if granted, will result in the Project failing to be completed, as the CCAA Applicants suggest. Accordingly, I do not consider the operational features of the plans of the parties to be a significant consideration weighing in favour of either the CCAA Application or the Receivership Application.

The Nature of the Property

[74] An important consideration in this proceeding is the nature of the property at issue.

[75] The Receivership Applicants say that each of the Debtors is a single-project real estate development company. Romspen says that courts have generally held that there is no principled basis for granting a stay under the CCAA to prevent real estate lenders from enforcing their security. Meridian submits that courts will generally refuse to grant a stay where CCAA protection would place the value of the security of secured creditors at risk. Both rely on the

decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 83 B.C.L.R. (4th) 214 and in *Dondeb Inc. (Re)*, 2012 ONSC 6087, 97 C.B.R. (5th) 264.

[76] In *Cliffs Over Maple Bay Investments*, Tysoe J.A. stated the following at para. 36:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[77] In *Dondeb Inc.*, after referring to the above statement of Tysoe J.A., C. Campbell J. went on to refer with approval to the following comments of Kent J. in *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 A.R. 296, at para. 17:

> This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[78] The CCAA Applicants do not deny this line of cases but suggest that it is not applicable in the present circumstances. They suggest that the circumstances are much closer to the circumstances in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, 96 B.C.L.R. (4th) 77 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, in which courts ordered a stay under the CCAA in preference to the appointment of a receiver.

[79] In *Forest & Marine Financial Corp.*, at para. 26, Newbury J.A. distinguished the circumstances from those in *Cliffs Over Maple Bay Investments* as follows:

> In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[80] The same analysis was applied by Fitzpatrick J. in *Pacific Shores Resort & Spa Ltd.*, at para. 39:

> I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The CCAA proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

[81] The CCAA Applicants suggest that Richmond Hill in particular should be treated as a business because it has approximately 20 employees and consultants and because it has contracted with approximately 20 future tenants. They also suggest that the relationships among the CCAA Applicants and the Debtors are complex with the result that a CCAA proceeding is more appropriate.

[82] I do not think that any of the Debtors can properly be characterized as a business in the sense contemplated in the cases relied upon by the CCAA Applicants. There is no demonstrated ongoing business of any of the Debtors. There are only a limited number of employees and consultants of Richmond Hill and these individuals are employed solely for the purpose of building the Project. The fact that approximately 20 entities have executed leases for space in the Project when it is completed also does not establish the existence of a business at the present time. Nor have the CCAA Applicants demonstrated that the relationship between themselves is sufficiently complex to require a CCAA proceeding to properly identify the respective stakeholder interests in the debtor companies and ensure fair treatment of such interests.

[83] More generally, the circumstances in the cases relied upon by the CCAA Applicants are very different from the present circumstances in a number of significant respects. In *Forest & Marine Financial*, the debtor companies were engaged in a very different business from real estate development – that of providing financing and advisory services. The assets of the debtor companies comprised a loan portfolio of many types of assets as well as an office building and the liabilities included both secured debt and "investment receipts" issued to the public. In *Pacific Shores Resort & Spa*, the debtor companies employed approximately 250 persons and were in the business of selling vacation ownership products and deeded ownership products, and the management of such interests, including the management of several resorts. Moreover, and significantly, in both cases, the court concluded that the secured creditors were well covered by the equity in the debtor companies. In my view, therefore, the present circumstances are much closer to those in *Dondeb* and *Cliffs Over Maple Bay Investments* than they are to the circumstances in *Forest & Marine Financial* and *Pacific Shores Resort & Spa*.

[84] The foregoing analysis suggests that there are no features of the business of the Debtors, or of the Properties, that render a CCAA proceeding necessary, or more appropriate than a receivership proceeding, to address the current liquidity difficulties of the Debtors and the need to complete the Project with an additional injection of funds from third parties. The proposed receivership proceeding and the proposed CCAA proceeding should each accomplish the objective of completion of construction of the Project. However, the case law suggests that, in similar circumstances, particularly where the security coverage of secured creditors is in question, courts have given effect to the rights of secured creditors by granting a receivership order. This consideration weighs in favour of a receivership order in the present circumstances. To be clear, however, I think that the judicial preference for a receivership over a CCAA proceeding in the circumstances of a single-project real estate development corporation is not so much a free-standing rule, as Romspen suggests, as it is the outcome of a consideration of the other factors discussed below.

Legal Rights and Interests of Meridian and Romspen

[85] Meridian and Romspen submit that where the contract between a lender and a borrower provides for the appointment of a receiver in the event of a default, a court should not ordinarily interfere. In short, they argue that the Court should give effect to their contractual rights.

[86] As mentioned, the Court is required to assess whether the appointment of a receiver is "just or convenient" having regard to all of the circumstances. In this context, I do not think that the rights of secured creditors who choose to seek the benefits of a court-appointed receiver over a privately-appointed receiver are as unqualified as Romspen suggests. Nevertheless, the legal rights of Meridian and Romspen are an important consideration in making a determination regarding the appropriateness of relief under the CCAA as well as the application of the "just or convenient" test for the appointment of a receiver. In this regard, two considerations are of particular significance.

The Security Position of Meridian and Romspen

[87] First, there is a real possibility that the consequence of the priority to be afforded the DIP Charge, which is a condition of any CCAA proceeding, would be to diminish the security of Romspen and, to a lesser extent, of Meridian. For clarity, it should be noted, however, that the security of these creditors will only be "primed" as a practical matter to the extent that the monies advanced under the DIP Facility exceed the monies that would otherwise be advanced under the Receivership Financing, given that prior-ranking construction financing is required under each plan to complete the Project.

[88] The CCAA Applicants argue that, on the basis of their evidence, both Romspen and Meridian are fully secured with the result that there is no practical significance to this concern. I agree that, given the terms of the DIP Facility, and subject to the resolution of one issue acknowledged by counsel for PointNorth, it is unlikely that Meridian would be adversely affected by the imposition of that Facility in priority to the Meridian Loan. However, the situation in respect of Romspen is not as clear. This requires a consideration of the evidence in the record.

[89] The CCAA Applicants have provided appraisals of the Properties that they say demonstrate that Romspen is very well secured. Conversely, Romspen has provided internal valuations for the Properties that place Romspen's security "on the cusp", in that they suggest that the aggregate value of the equity in the Shouldice Property, the Brampton Property and the completed Project, after deduction of the amount of the Meridian Loan and the DIP Facility, would be no greater than the outstanding amount of the Loan at the present time and could be materially less than such amount. Romspen also notes that, given the interest rate under the Loan, interest continues to accrue at the rate of slightly less than $1 million per month eroding any existing equity. Accordingly, under these valuations, Romspen could suffer a deficiency under a CCAA proceeding using its estimate of the costs of such a proceeding. On the other hand, using more optimistic assumptions, the same valuation models would provide a cushion of coverage for Romspen.

[90] I do not think that the appraisals provided by the CCAA Applicants are sufficiently reliable that the Court can rely on them on a balance of probabilities standard for the following reasons.

[91] With respect to the Project, the appraisal of the CCAA Applicants was conducted on a "fully built" basis. It also assumes 100 percent occupancy at certain projected rental rates. While Richmond Hill has contracted for a large portion of the rental space, there is a real risk until the Project is fully completed that the projected rental stream will not be achieved for a number of reasons. Accordingly, it logically follows that the value of the Project at the present time must be discounted from this appraisal value to reflect such risks. With respect to the Shouldice Property, the appraisal of the CCAA Applicants is based on the assumption that the Shouldice Property can be rezoned for the development contemplated in the appraisal. There is, however, no evidence on the feasibility of such development. Accordingly, neither of these appraisals provides a reliable valuation of these Properties at the present time.

[92] On the other hand, the internal valuations of Romspen make certain assumptions regarding occupancy rates and an appropriate capitalization rate that are likely to be conservative given Romspen's status as a subordinated lender to the Debtors. The sensitivity analysis provided by Romspen demonstrates a range of values as these assumptions are varied that would result in Romspen's security position falling between a material deficiency and a moderate excess of coverage. In the absence of any basis for determining the appropriate assumptions, it is also not possible to rely on these internal valuations.

[93] It is therefore necessary to seek other objective evidence regarding a realistic range of values for the Project.

[94] In this case, the best objective evidence is PointNorth's position, as the lender under the DIP Facility. If PointNorth accepted the Debtor's estimate of value, it would not have required that the DIP Charge prime the Romspen security, much less required that the CCAA Applicants provide the additional security on the Mississauga Property. Given PointNorth's requirement of these terms of the DIP Facility, I think it is a fair inference that PointNorth does not share the Debtor's confidence in the value of the Properties.

[95] In addition, the inability of the Debtors to obtain financing at the indicative values in the term sheets set out in the Grigoras Affidavit is further evidence that the appraisal values put forward by the CCAA Applicants are not reliable indicators of the current values of the Properties. In this respect, the indicative term sheet of PointNorth attached to that Affidavit is of particular relevance.

[96] Similarly, the failure of a proposed sale of the Shouldice Property on the terms, and at the value, set out in the Grigoras Affidavit due to the purchaser's failure to satisfy the financing condition is also evidence that the value ascribed to that Property by the CCAA Applicants is not credible.

[97] The foregoing evidence does not, however, establish a credible value or range of values for the Richmond Hill Property or the Shouldice Property. In these circumstances, I think the Court can find no more than that the equity in the Properties lies somewhere between the

Romspen internal values and values that are materially less than the aggregate value ascribed to them by the Debtors.

[98] The Court must therefore proceed on the basis that there is at least a reasonable possibility that the DIP Facility would adversely affect the Romspen security position. There is, therefore, a real possibility that, under the proposed CCAA proceedings, the Debtors would be "playing with Romspen's money" by virtue of the terms of the DIP Facility, as Romspen suggests. In other words, as in *Octagon Properties Group*, under the proposed CCAA proceedings, Romspen would be paying the cost to permit the Debtors to buy some time. This is also a consideration that weighs in favour of a receivership.

[99] I note, as well, that there is an inherent check and balance on the foregoing value assessment in the CCAA Applicants' favour. The grant of the requested receivership order would not prevent the CCAA Applicants from continuing to market the Properties with a view to a sale or refinancing transaction that would repay Meridian and Romspen. If the values of the Properties do in fact approach the values suggested by the CCAA Applicants, it should be possible to conclude such a transaction and, thereby, to retain the remaining equity in the Properties for the benefit of the subordinated lenders and equity holders.

The Contractual Rights of Meridian and Romspen

[100] Second, the effect of a CCAA proceeding would be to deprive Meridian and Romspen of the right to cause a change in the management of the Project in the very circumstances in which their security contemplates such a right. The Receivership Applicants have lost faith in the Debtors' management and an acknowledged default has occurred. Meridian and Romspen have bargained for the right to have a receiver take over control of, and to complete, the construction of the Project in these circumstances. There must be a good reason to deprive them of that right.

[101] In the present circumstances, however, this right has a particular significance because oversight and control of the construction costs is likely to impact the value of Romspen's security and, in an extreme case, of Meridian's security. A court-appointed receiver must justify its actions to the court and thereby to the creditors. It is exposed to potential liability if it is grossly negligent in the performance of its duties. Accordingly, secured creditors would reasonably expect to have more input into a receiver's actions than they would into the actions of the Debtors' management in a CCAA proceeding. While this might not be significant in a status quo situation, it is an important consideration in the present circumstances in which significant construction activity must take place, and significant additional debt must be incurred, to complete the Project.

[102] Accordingly, I conclude that the assertion by the Receivership Applicants of their contractual rights in the present circumstances, as well as their loss of faith in the management of the Debtors, must be important considerations for the Court.

The Interests of the Other Stakeholders in the Project

[103] Based on the foregoing, the proposed CCAA proceedings would have the two adverse or potentially adverse effects on the Receivership Applicants described above. The CCAA Applicants argue, however, that any such prejudice to the Receivership Applicants is more than

offset by the operational benefits of a CCAA proceeding and the benefits to the other stakeholders in the Project.

[104] I have dealt with the alleged operational benefits of the proposed CCAA proceeding above. I have concluded that the CCAA Applicants have not established that there are material operational benefits that make a CCAA proceeding superior to a receivership proceeding. This is therefore not a factor to be taken into consideration.

[105] The position of the CCAA Applicants that there are other stakeholders who will benefit from a CCAA proceeding and whose interests counterbalance the interests of the Receivership Applicants raises an important issue in these applications. Such stakeholders fall into two categories – future tenants and subordinate creditors and equity owners.

[106] The future tenants are critical to the success of the Project. It is of fundamental importance that the tenancy agreements in place continue and that any unrented space be rented as soon as possible. However, I am not persuaded that the future tenants who have contracted with Richmond Hill are more likely to favour a CCAA proceeding over a receivership. There is no evidence to this effect in the record. The more likely position is that the future tenants are more concerned with satisfaction that the Project, including the Fit-Out Works in respect of their space, will be completed in accordance with the timelines contemplated. In this respect, I think the future tenants are likely to be neutral as between a receivership or CCAA proceedings.

[107] The subordinated creditors of the Project comprise the trade creditors and certain unsecured lenders to the Project. The former include the Lien claimants whose priority has been established and any future trade creditors who will need to be kept current in order to complete the Project. The interests of these parties pertain to operational issues that are not affected by the nature of the proceeding that results in a restart of construction of the Project.

[108] On the other hand, the unsecured creditors and the equity holders in the Project rank junior to Meridian and Romspen. A CCAA proceeding, which entails prejudice or potential prejudice to senior ranking creditors in favour of junior ranking creditors and equity holders can only be justified, if ever, on the basis of larger societal interests.

[109] Meridian and Romspen submit that, as single-project real estate development companies, the insolvency of the Debtors, and in particular of Richmond Hill, does not raise any such interests. They rely on the decisions in *Cliffs Over Maple Bay Investments* and *Dondeb*, and in particular on the statements in those decisions cited above. Three considerations emerge from the case law set out above which are important in the present circumstances.

[110] First, where there is no business but rather a single-project real estate development company having mortgage lenders, it is not realistic to contemplate the possibility of a plan of compromise or arrangement under the CCAA that gives Meridian and Romspen less than a full payout of their indebtedness from the proceeds of any sale or a refinancing. In particular, there can be no justification for transferring value from Meridian and Romspen to more junior creditors or the equity holders.

[111] Second, for the same reason, there is no basis on which subordination of the priority position of Meridian and Romspen to that of a DIP Lender can be justified beyond the

construction costs contemplated by the financing plans of the parties to the extent such costs translate into equity in the Project and therefore do not diminish the security of these creditors.

[112] Third, for the foregoing reasons, it is questionable whether the CCAA proceedings contemplated by the CCAA Application can be said to further the purpose of the CCAA as set out above for the following reasons.

[113] In the present case, the CCAA is not being proposed with a view to "stabilizing" the present circumstances of the Debtors and allowing the Debtors the benefit of the status quo with a view to putting a restructuring plan to the stakeholders. There are two elements to this conclusion.

[114] First, it is not meaningful to talk of the maintenance of the status quo for the reason that, as discussed above, construction of the Project, being the only activity of Richmond Hill, is currently almost completely shut down. The Court is not being asked to grant relief to maintain that status quo. It is being asked to determine which of the two legal procedures – a receivership or a CCAA proceeding – should be ordered with a view to furthering a resumption of the construction of the Project under a new construction general contractor. Moreover, while the DIP Facility provides for some working capital, the DIP Facility is a non-revolving facility whose predominant purpose is to provide construction financing in a material amount which is necessary to permit construction to restart. In effect, the CCAA Applicants ask the Court to impose a third construction lender on the Project in priority to the existing lenders. This is beyond the usual nature and purpose of a DIP loan for working capital purposes. It underscores the fact that mere "stabilization" of the alleged business of the Debtors would serve no useful purpose. In short, the CCAA Applicants do not seek relief under the CCAA for the purpose of maintaining the status quo, or for "stabilizing" the situation, in the sense in which those terms are generally understood in the context of CCAA proceedings.

[115] Second, the CCAA Applicants do not contemplate a plan of compromise or arrangement as understood for the purposes of the CCAA for the reason that, as mentioned, Meridian and Romspen cannot be compelled to accept less than a complete payout of the Meridian Loan and the Loan, respectively, out of the proceeds of a sale or a refinancing. The "plan" of the CCAA Applicants is to seek to repay Meridian and Romspen out of the proceeds of a future sale or refinancing, if possible, after completion of the Project.

[116] Fundamentally, the purpose of the CCAA Application is not to restructure the business of the Debtors with a view to continuing their business but rather to maintain control of the Project by a Court-ordered imposition of new construction financing in the hope of realizing value for the subordinated lenders and equity holders. However, such control comes at the cost of prejudice to the rights, and potentially to the security position, of Romspen and Meridian. In this regard, the circumstances are similar to those in *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300.

[117] The Debtors have experienced a liquidity crisis since August 2018. None of the Debtors has any working capital with which to carry on business. The Debtors have explored a number of sales and refinancing options and have been unsuccessful. There is no sale or refinancing

option available to the Debtors at the present time. The CCAA Application is the only means available to them to preserve control over the continued construction of the Project.

[118] The purpose of the CCAA Application is to maximize the value of the Project. In the abstract, this is a desirable objective. However, in the present circumstances, it is not. It is the hope of the CCAA Applicants that sufficient value will be realized upon completion of the Project to make a sale or refinancing transaction feasible. If they are successful in realizing additional value, the subordinate creditors and the equity holders will benefit. However, if they are unsuccessful, Romspen and, in an extreme case, Meridian may well suffer a loss. The proposed CCAA proceeding therefore places the risk of a reduction in the value on Romspen and Meridian.

[119] This is inconsistent with the purpose of the CCAA which is to preserve the status quo in order to facilitate a plan of compromise or arrangement among the creditors of a debtor company, not to transfer risk, and potentially value, from senior creditors to junior creditors and equity holders without the consent of the senior creditors.

[120] Based on the foregoing, I conclude that the CCAA Applicants have failed to establish that the prejudice to the Receivership Applicants is offset by the benefits of the proposed CCAA proceeding.

The Respective Costs of a Receivership Versus a CCAA Proceeding

[121] Romspen alleges that the costs of a receivership will be less than the costs of a CCAA proceeding. While this is acknowledged by the CCAA Applicants, the parties dispute the extent of the difference. Counsel agree that the disputed difference is roughly $5-6 million i.e. between a difference of $5 million and a difference of $11 million. The difference pertains largely to the difference in the estimated costs discussed above in respect of the financing plans of the parties. Romspen says this consideration is important in respect of its position as a secured lender to the extent that the security for the Loan may not exceed, or only minimally exceeds, the current value of the Properties, which it considers to be the case.

[122] However, for the reasons discussed above, the Court is not in a position to make any determination on the likely difference in costs between these two proceedings beyond the agreed difference of $5 million. Any other figure would be speculative based on operational assumptions regarding the Project construction operations that may or may not prove to be appropriate.

[123] The more important cost considerations, which have been addressed above, are the extent to which the CCAA proceeding would result in less control over the financing of the much larger costs of completion of the Project, in a larger advance under the DIP Facility than would otherwise have been made under the Receivership Financing, and in a larger subordination of the security position of Romspen and Meridian.

[124] Accordingly, while the CCAA proceeding appears to entail costs of at least $5 million more than as receivership proceedings, the fact that a receivership proceeding would be less expensive than a CCAA proceeding is, by itself, not a significant factor in the Court's determination in this Endorsement.

Conclusions

[125] Based on the considerations addressed above, I conclude that it would not be appropriate to grant the CCAA Application and that it is instead just and convenient to grant the Receivership Application for the appointment of a receiver without a power of sale in respect of the Properties.

Wilton-Siegel J.

Date: December 10, 2018

TAB 7

2017 ONSC 5571
Ontario Superior Court of Justice [Commercial List]

Re TOYS "R" US (CANADA) LTD.

2017 CarswellOnt 14645, 2017 ONSC 5571, 283 A.C.W.S. (3d) 471

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

F.L. Myers J.

Heard: September 19, 2017
Judgment: September 20, 2017
Docket: CV-17-00582960-00CL

Counsel: Brian F. Empey, Melaney Wagner, Christopher Armstrong, for Applicant
R. Shayne Kukulowicz, Jane Dietrich, for Proposed Monitor, Grant Thornton Limited
Tony Reyes, for pre-filing ABL lenders
Alexander Cobb, for B4 lenders
Linc Rogers, Chris Burr, for JPMorgan Chase Bank, NA, the lead lender on behalf of the proposed DIP lenders

Subject: Insolvency

APPLICATION by retailer under Companies' Creditors Arrangement Act for stay and for approval of enhanced terms for debtor in possession lending facility.

***F.L. Myers J.*:**

1 At the conclusion of the hearing I granted the relief sought by the applicant with minor revisions for reasons to be delivered shortly. These are my reasons for doing so.

2 The applicant is Canada's leading retailer of toys and baby products. It operates from 82 stores across all ten provinces and over the internet. It employs nearly 4,000 people. This number increases to more than 6,000 during the peak holiday season. It is an important participant in the Canadian retail economy and a much beloved childhood icon in many Canadians' lives.

3 The applicant is an indirect, wholly owned subsidiary of TOYS "R" US INC. a US company. On September 18, 2017 the US parent, several affiliates, and the applicant filed for bankruptcy protection in the US Bankruptcy Court for the Eastern District of Virginia. They did so in order to protect against stakeholder action that could adversely impact their businesses while they explore restructuring options. Publicity concerning the problems facing the companies has already led some suppliers to take steps to limit the credit terms that they are willing to extend to the retailer. As a result, the businesses found themselves in need of the stability of bankruptcy protection.

4 The Canadian applicant's operations are generally autonomous from the parent's US operations. But, the applicant's pre-filing US$200 million secured revolving credit facility and its US$125 million secured term loan facility were both provided under a wider asset-backed lending facility provided by the pre-filing ABL lenders to the US and Canadian companies.

5 When the applicant and its US affiliates filed for US bankruptcy protection, they committed defaults under their ABL facilities. Therefore, although the applicant is generally cash flow positive and has positive shareholder equity, it found itself without borrowing facilities and within two weeks of being unable to meet its obligations as they come due.

6 As a result of its looming liquidity crisis, the applicant meets the definition of a "debtor company" to whom the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 applies. *Stelco Inc., Re* [2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])], 2004 CanLII 24933. It has liabilities of more than $5 million and otherwise meets the technical requirements of the statute.

7 The applicant needs the protection of a general stay that is available under the *CCAA*. The stay is a court order that prevents people and companies with claims against the applicant from cancelling their contracts or taking steps to enforce their claims against the applicant during the period of the restructuring. All creditors and claimants are held at bay, together, to maintain a level playing field. At the same time, the stay protects the applicant's business in order to: create conditions under which a lender will advance fresh funds to the applicant to carry it through its restructuring efforts; help prevent suppliers from ceasing or tightening credit terms just prior to the vital holiday selling season; to prevent enforcement efforts by creditors that would deflect the company from its efforts to find a win-win restructuring for the general body of its creditors; and to enable the applicant to continue to operate on a "business as usual" basis to protect the value of its business and brand for all. I am satisfied that this is an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*.

8 The applicant expresses concern that it might be required to pay some pre-filing claims to critical suppliers and others despite the general goal of a bankruptcy proceeding to freeze all claims at the filing date. For example, employees with wages accrued before today need to be paid in the ordinary course in order to keep the workforce engaged. Customers holding gift cards and similar pre-paid rights need to be able to enforce those pre-filing claims in order to protect the company's public customers. There is good reason to allow these types of claims to protect the goodwill of the business in the interests of all creditors even though most others are being prevented from enforcing their claims while these claims are recognized.

9 In addition, a small number of critical suppliers of goods and services may have the ability to avoid the stay order under the CCAA and the US automatic stay. Sometimes those suppliers will threaten to refuse to continue to supply a *CCAA* debtor unless they are paid their pre-filing claims in priority to others. In some circumstances this could imperil the applicant's business. Under s. 11.4 of the *CCAA*, the court may declare a person to be a "critical supplier." A critical supplier can be compelled to supply the applicant with goods and, in return, it can be provided with court-ordered security to protect its right to payment. That situation is quite different than the order sought in this case. Here, the applicant is not seeking to compel anyone to supply on credit against its will. The suppliers of concern in this case may claim to be beyond the reach of the court's orders. Rather, here, the applicant is recognizing that in some specific and limited cases, it may face an inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date. Providing such a payment is a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few. They will be carefully scrutinized by the applicant and the Monitor. The initial order granted by the court in this proceeding empowers the Monitor to exercise discretion to approve a payment to a critical supplier on its pre-filing claims. The Monitor will do so only in truly critical situations. It will be guided by the factors set out in para. 55 of the applicant's factum as drawn from the discussion by Morawetz J. (as he then was) in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]).

10 The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the *CCAA* provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in *CCAA* cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge

is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.

11 The DIP terms are lengthy and complex. The court has had limited time to scan and parse the documents and has relied heavily on the Monitor's and the applicant's assessments and submissions. Based on my review and the submissions made, I am satisfied that the DIP terms are generally limited to standard lending terms. With one exception discussed below, I was not drawn to any terms that might be thought to create unusual powers in the DIP lenders to control the applicant or the process. There do not appear to be any terms that provide incentives for the DIP lenders to try to execute loan-to-own or other strategies to somehow extract more value than is made available in fees and interest on the face of the DIP loan documents. Scrutinizing complicated, lengthy DIP terms on an urgent initial hearing is a dangerous pursuit. The court relies on the integrity of the parties to disclose unusual terms and otherwise to protect the stakeholders from terms that may be buried in thick documents that could later create skewed outcomes or incentives that are contrary to the interests of the stakeholders generally. If a DIP lender wants extraordinary rights or powers beyond standard, plain vanilla lending terms, they should be disclosed expressly and subject to transparent scrutiny at minimum.

12 In this case, the DIP lenders ask for the right to enforce their security in the event that they claim that the applicant has committed a default under the terms of its new borrowing. The stay provisions that I have approved above generally prevent creditors from enforcing their claims without leave of the court. In some cases the stay may prevent a supplier from unilaterally discontinuing supply. The parties are able to come to court very quickly on the Commercial List. Therefore, a party who has good cause to be released from a stay can usually get to court to ask for an order lifting the stay before it has suffered much, if any, prejudice. But the leave requirement ensures that suppliers or others cannot claim that an applicant is in default and take unilateral, destabilizing steps without scrutiny of the alleged default by stakeholders, the Monitor, and ultimately, the court.

13 The DIP lender and the applicant agreed that the DIP lender could give five days' notice of default to the applicant and then take a number of unilateral enforcement steps. This reverses the burden and requires the applicant to come to court during the five day period to have the DIP lenders' claims reviewed. But there are terms of the DIP documents that limit the applicant's entitlement to oppose the DIP lenders. This could create a complex and ambiguous situation.

14 In my view, the stay provisions protect the stakeholders, creditors, and the public interest as much as the applicant. The court process provides assurances of transparency and accountability to which all interested parties are entitled as a *quid pro quo* for the protections offered by the statute. The DIP lenders are well protected without an extraordinary power to enforce their claims without court scrutiny. The DIP lenders in this case are replacing first secured lenders. It is not clear why they need special DIP priority when the DIP lenders are likely entitled to step into the priority position of the pre-filing ABL lenders under the doctrine of equitable subrogation. The applicant is paying the DIP lenders more than $20 million in fees plus enhanced interest for a loan that is protected not only by equitable priority but by court-ordered security. DIP loans have not proven to be that risky in Canada generally. I know of only one case where a DIP lender has not been repaid in full and that was a very specific instance where the DIP lender was the principle purchaser of the CCAA debtor's goods and needed to keep funding the debtor at a loss in order to keep its own business afloat.

15 In this case, the applicant seems to be solvent on a balance sheet basis. The B4 lenders have advised the court that they expect to realize substantial value from their security against the shares of the applicant. I see no valid reason for the DIP lenders to require any significantly enhanced enforcement rights when their position is protected already. Given the applicant's consent and the importance of the DIP loan to the restructuring process generally, I accept that the DIP lenders will be entitled to take minimal steps to give notice of default and to withhold further advances while the parties come to court. Otherwise, the DIP lenders require leave of the court on notice before they may accelerate their loans or to take any other enforcement steps.

16 The fees and disbursements of the Monitor, counsel, and the financial advisors to the debtor will be protected by a court ordered charges as well under s. 11.52 of the *CCAA*. The members of the board of directors and officers of the applicant will also be protected against the risk of incurring uninsured, post-filing liabilities. I am satisfied that the applicant and the Monitor have calculated the limits of this charge to reflect realistic, potential statutory D & O liability. I am less sanguine that these liabilities cannot be insured at a reasonable cost under s. 11.51 (3) of the *CCAA*. One can always postulate that an insurer might decline

coverage or that the insurance limits might prove to be insufficient. However, creating a charge can also provide an incentive to structure affairs so that others can access the available insurance precisely because the Ds & Os can access their charge and do not need their insurance. Moreover, the standard, *in terrorem* assertion that the Ds & Os are necessary to the restructuring and may resign unless they are granted a charge is rarely subjected to real scrutiny. However, absent concerns expressed by those being primed, I am satisfied that the applicants have met the statutory test for the purposes of this initial hearing.

17 Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee is a strong performing business facing a liquidity crisis that causes it to suffer technical insolvency. It is fair, reasonable, and wholly appropriate for it to be supported by the protections of the *CCAA* so as to provide it with an opportunity to restructure its affairs to enable it to address its current circumstances.

18 Order accordingly.

Application granted in part.

TAB 8

2012 ONSC 3767
Ontario Superior Court of Justice [Commercial List]

Cinram International Inc., Re

2012 CarswellOnt 8413, 2012 ONSC 3767, 217 A.C.W.S. (3d) 11, 91 C.B.R. (5th) 46

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 Cinram International Inc., Cinram International Income Fund, CII Trust and The Companies Listed in Schedule "A" (Applicants)

Morawetz J.

Heard: June 25, 2012
Judgment: June 26, 2012
Docket: CV-12-9767-00CL

Counsel: Robert J. Chadwick, Melaney Wagner, Caroline Descours for Applicants
Steven Golick for Warner Electra-Atlantic Corp.
Steven Weisz for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent
Tracy Sandler for Twentieth Century Fox Film Corporation
David Byers for Proposed Monitor, FTI Consulting Inc.

Subject: Insolvency

APPLICATION by group of debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

2 Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

3 The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

4 Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

5 Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

(i) to ensure the ongoing operations of the Cinram Group;

(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

6 Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

7 The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

8 Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

9 Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

10 The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

11 Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

12 Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

13 Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

14 Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

15 Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

16 The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

17 All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

18 As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

19 Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

20 Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

21 The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

22 As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access

to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

23 The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

24 Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

25 The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

26 In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

27 Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

28 Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

29 Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

30 Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

31 The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

> Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

32 Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

33 The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

34 Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

35 The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

36 In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

37 As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

38 The Applicants have also requested that the confidential supplement — which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules — be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

39 Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

40 In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

> (a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;

(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;

(j) new business development initiatives are centralized and managed from Toronto, Ontario; and

(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

41 Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

42 The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

43 In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

Schedule "A"

Additional Applicants

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

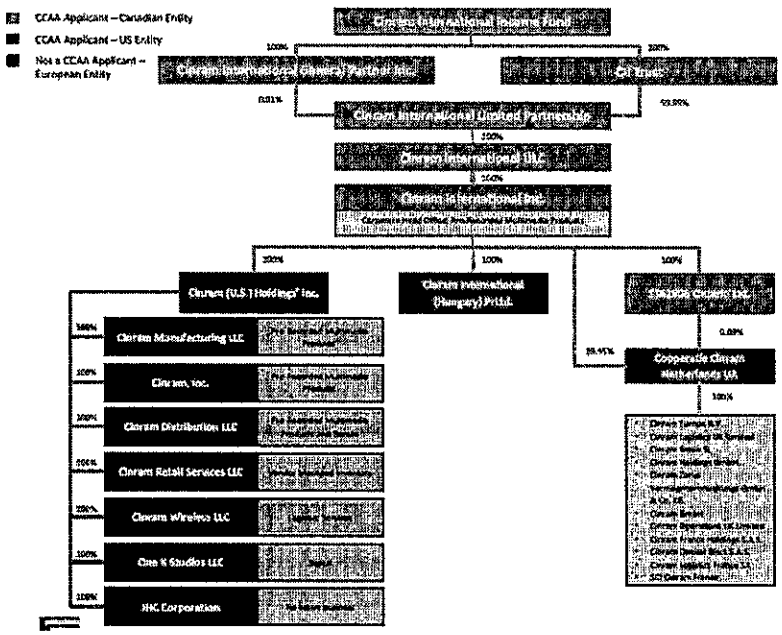
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

Schedule "B"



Graphic 1

Schedule "C"

A. The Applicants Are "Debtor Companies" to Which the CCAA Applies

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated,

and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.

"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 receiving 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.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Canwest Global Communications Corp., Re (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("*Book of Authorities*"), Tab 1.

Global Light Telecommunications Inc., Re (2004), 2 C.B.R. (5th) 210 (B.C. S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

Global Light Telecommunications Inc., Re, supra at para. 17; Book of Authorities, Tab 2.

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his 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.

BIA, Section 2 ("insolvent person").

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), at para.4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco Inc., Re, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco Inc., Re, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. The Relief is Available under The CCAA and Consistent with the Purpose and Policy of the CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Nova Metal Products Inc. v. Comiskey (Trustee of), supra at paras. 22 and 56-60; Book of Authorities, Tab 4. *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 5; Book of Authorities, Tab 6.

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Sulphur Corp. of Canada Ltd., Re (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

Lehndorff General Partner Ltd., Re, supra at para. 5; Book of Authorities, Tab 6. *Canwest Global Communications Corp., Re, supra* at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff General Partner Ltd., Re, supra at paras. 5 and 16; Book of Authorities, Tab 6.

T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10. *Lehndorff General Partner Ltd., Re, supra* at para. 21; Book of Authorities, Tab 6.

Canwest Global Communications Corp., Re, supra at paras. 28 and 29; Book of Authorities, Tab 1.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 5, 18, and 31; Book of Authorities, Tab 11.

Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments, including Section 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.

Canwest Global Communications Corp., Re supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global Communications Corp., Re supra, at para. 43; Book of Authorities, Tab 1.

Brainhunter Inc., Re, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Priszm Income Fund, Re (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction 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.
>
> *Timminco Ltd., Re*, 211 A.C.W.S. (3d) 881 (Ont. S.C.J. [Commercial List]) [2012 CarswellOnt 1466] at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 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.

CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.

Angiotech, *supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Fraser Papers Inc., Re [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

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

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedingsand implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings;and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

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*

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

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco Ltd., Re*, *Canwest Global Communications Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re.*

Canwest Global Communications Corp., Re, supra; Book of Authorities, Tab 1.

Canwest Publishing, supra; Book of Authorities, Tab 16.

Timminco Ltd., Re, 2012 ONSC 106 (Ont. S.C.J. [Commercial List]) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is 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.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, *supra*, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

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 — 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 creditors 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.
>
> CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global Communications Corp., Re*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global Communications Corp., Re, supra* at paras 46-48; Book of Authorities, Tab 1.
>
> *Canwest Publishing, supra* at paras. 56-57; Book of Authorities, Tab 16.
>
> *Timminco, supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

> a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
>
> b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;
>
> c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;
>
> d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;
>
> e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
>
> f. the Monitor is in support of the proposed Directors' Charge.
>
> Bell Affidavit, paras. 249, 250, 254-257; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest Products Inc., Re, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global Communications Corp., Re supra, at para. 49; Book of Authorities, Tab 1.

Timminco Ltd., Re (2012), 95 C.C.P.B. 48 (Ont. S.C.J. [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest Products Inc., Re, supra at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the

Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest Corp., Re*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

Sino-Forest Corp., Re, supra, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

Bell Affidavit, para. 176; Application Record, Tab 2.

Application granted.

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 2607380 ONTARIO INC. (the "**Applicant**")

Court File No. CV-20-00636875-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF BRIDGING FINANCE INC., AS AGENT

(re Comeback Motion returnable March 6, 2020)

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