Court File No.: CV-24-00713245-00CL

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 BALBOA INC., DSPLN INC., HAPPY GILMORE INC., INTERLUDE INC., MULTIVILLE INC., THE PINK FLAMINGO INC., HOMETOWN HOUSING INC., THE MULLIGAN INC., HORSES IN THE BACK INC., NEAT NESTS INC., AND JOINT CAPTAIN REAL ESTATE INC.

Applicants

FACTUM OF THE APPLICANTS
(Returnable January 23, 2024)

January 23, 2024

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: (416) 777-6254
Email: zweigs@bennettjones.com

Joshua Foster (LSO# 79447K)
Email: fosterj@bennettjones.com

Thomas Gray (LSO# 82473H)
Tel: (416) 777-7924
Email: grayt@bennettjones.com

Lawyers for the Applicants

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I: OVERVIEW 1

PART II: FACTS 3

A. The Applicants' Corporate Structure 3

B. The Applicants' Business 4

C. Assets and Liabilities 6

1. The First Mortgage Loans 8

2. The Second Mortgage Loans 8

3. Other Secured Obligations 9

4. The Unsecured Promissory Notes 10

5. Litigation Claims 10

6. Other Unsecured Obligations 11

D. Events Leading to the CCAA Filing 12

E. The Proposed Monitor 13

PART III: ISSUES 13

PART IV: LAW AND ANALYSIS 13

A. Each of the Applicants is a Debtor Company to which the CCAA Applies 13

1. Each Applicant is a Company and Certain Applicants are Affiliated Companies 14

2. Each of the Applicants is Insolvent and Individually or with its Affiliated Companies Has Liabilities in Excess of $5 Million 15

3. Ontario is the Appropriate Venue for these CCAA Proceedings 16

B. The Stay of Proceedings Should be Granted 16

C. Proceedings Should be Stayed Against the Additional Stay Parties 17

D. Lender Representative Counsel Should be Appointed 21

E. The Administration Charge Should be Granted 24

PART V: RELIEF REQUESTED 25

PART I: OVERVIEW

1. Balboa Inc., DSPLN Inc., Happy Gilmore Inc., Interlude Inc., Multiville Inc., The Pink Flamingo Inc., Hometown Housing Inc., The Mulligan Inc., Horses In The Back Inc., Neat Nests Inc., and Joint Captain Real Estate Inc. (collectively, the "**Applicants**") seek relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. The Applicants are Canadian privately held corporations that, together with certain non-Applicants, are part of a group of companies (collectively, the "**Company**") specializing in the acquisition, renovation and leasing of distressed residential real estate in undervalued markets throughout Ontario (the "**Business**"). The Applicants currently own 405 residential properties (collectively, the "**Properties**" and each, a "**Property**"), including 424 currently-tenanted rental units, and a single non-operating golf course.

3. The purchase, renovation and related costs of the Properties were financed through (i) first and second mortgage loans, and (ii) unsecured promissory notes. This debt is predominantly held by hundreds of individual real estate investors (the "**Lenders**").

4. The Applicants have struggled to generate sufficient free cash flow to support their ongoing payment obligations, which led them to explore options for a refinancing or sale of the Business (or parts thereof) beginning in 2022. Despite their best efforts, the Applicants have been unable to obtain a comprehensive solution and have suffered substantial losses over the past 18 months.

5. The Applicants now face a severe liquidity crisis and are generally unable to meet their obligations as they become due. Collectively, the Applicants have under $100,000 of cash on hand,

are in default of their obligations owing under nearly all of their funded debt, and have significant tax and other unsecured obligations.

6. The Applicants have received over 50 demand letters, notices of default, notices of intention to enforce security and notices of sale under mortgage, among other demands and notices, and are named in approximately 32 statements of claim that have been filed in the Ontario Superior Court of Justice.

7. These CCAA proceedings present the only viable means to preserve and maximize the value of the Business for the benefit of the Applicants' stakeholders. The relief sought in the Initial Order will allow the Applicants the breathing space needed to pursue a comprehensive refinancing or restructuring and implement a consensual plan of arrangement.

8. Critically, a stay of proceedings in favour of the Applicants (the "**Stay of Proceedings**") is needed to prevent an uncoordinated enforcement process and likely liquidation of Properties at distressed values to the detriment of stakeholders, including the Lenders and the Applicants' approximately 1,000 tenants. It is equally necessary that proceedings be temporarily stayed in favour of the principals of the Applicants, Aruba Butt, Dylan Suitor, and Ryan Molony (the "**Additional Stay Parties**") and their property with respect to claims involving the Applicants to ensure the Additional Stay Parties can devote their undivided attention to achieving a restructuring solution.

9. The appointment of Chaitons LLP as representative counsel for the Lenders in these proceedings and any other insolvency proceedings (in such capacity, "**Lender Representative Counsel**") is also appropriate in the circumstances, as it will provide the Applicants' over 300 Lenders with meaningful representation and facilitate the efficient administration of these CCAA proceedings.

10. The Applicants have limited the relief sought in the Initial Order to that which is reasonably necessary to maintain the *status quo* and continue the Business in the ordinary course during the initial ten-day Stay of Proceedings (the "**Initial Stay Period**"). The Applicants intend to return to Court within ten days to seek further relief pursuant to an amended and restated Initial Order, which, if approved, will extend the Initial Stay Period, increase the administration charge, approve debtor-in-possession financing and a related charge, authorize the Applicants to make certain pre-filing payments, and approve the appointment of a financial advisor. These issues are not before the Court at this time.

PART II: FACTS

11. The facts underlying this application are more fully set out in the affidavit of Robert Clark, sworn January 23, 2024 (the "**Initial Order Affidavit**").[1] All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Order Affidavit.

A. The Applicants' Corporate Structure

12. The Applicants are comprised of several corporations held by four non-Applicant parent companies. Together, the Applicants operate as an integrated company.

13. The Applicants are all subsidiaries of (i) One Happy Island Inc. ("**Happy Island**"), (ii) Keely Korp Inc. ("**Keely Korp**"), (iii) 2657677 Ontario Inc. ("**265 Inc.**"), or (iv) Sail Away Real Estate Inc. ("**Sail Away**", and collectively, the "**Non-Applicant Parent Cos.**"), or some combination thereof, as set out below:

(a) The Pink Flamingo Inc., DSPLN Inc., and Balboa Inc. are wholly-owned subsidiaries of Happy Island;

[1] Affidavit of Robert Clark sworn on January 23, 2024 [Initial Order Affidavit], Applicants' Application Record dated January 23, 2024 at Tab 2 [Application Record].

(b) Multiville Inc. and Happy Gilmore Inc. are jointly-owned subsidiaries of Happy Island and Keely Korp.;

(c) Hometown Housing Inc., Horses in the Back Inc., Interlude Inc., and Neat Nests Inc. are wholly-owned subsidiaries of 265 Inc.;

(d) The Mulligan Inc. is a subsidiary of Happy Island, Keely Korp. and 265 Inc.; and

(e) Joint Captain Real Estate Inc. is a jointly-owned subsidiary of Happy Island and Sail Away.[2]

14. With the exception of The Mulligan Inc., the primary assets of the Applicants are the Properties.[3] The Mulligan Inc. owns a non-operating golf course.[4] The Applicants and the Non-Applicant Parent Cos. are all incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, as amended (the "**OBCA**").[5]

B. The Applicants' Business

15. The Company is among the largest holders of residential real estate in Ontario. It focuses on the acquisition, renovation and leasing of distressed residential properties in undervalued markets throughout the province, including Timmins, Sault Ste. Marie, Sudbury, Kirkland Lake, Capreol, Temiskaming Shores and Val Caron.[6] The Company renovates the residential properties it acquires by performing restorations with a view to reviving such properties and providing sustainable and affordable single or multi-family housing.[7] The Company has acquired, renovated, leased and/or sold over 800 underutilized properties across Ontario, and the Applicants have raised and invested approximately $100 million to acquire and renovate the Properties.[8]

---

[2] *Ibid* at paras 23, 27, 31, 35, and 39, Application Record at Tab 2.
[3] *Ibid* at para 65, Application Record at Tab 2.
[4] *Ibid* at para 41, Application Record at Tab 2.
[5] *Ibid* at paras 21, 24, 28, 32, 36, and 40, Application Record at Tab 2.
[6] *Ibid* at para 51, Application Record at Tab 2.
[7] *Ibid* at paras 44, Application Record at Tab 2.
[8] *Ibid* at paras 45, Application Record at Tab 2.

16. Together, the Applicants own 405 residential properties and one non-operating golf course.[9] The Properties contain 631 rental units, 424 of which are currently tenanted (the "**Rental Units**").[10] As discussed in more detail below, the vast majority of the Properties are encumbered by mortgages and general assignments of rent in favour of the applicable Lenders.

17. The property management and renovation services for the Applicants are provided exclusively by SID Management Inc. ("**SID Management**") and 2707793 Ontario Inc. o/a SID Renos ("**SID Renos**"), respectively. SID Management is a property management company of which Robert Clark is the sole director and officer. Its services to the Applicants include collecting and distributing monthly rent; leasing the vacant Rental Units; addressing disputes as between the Applicants and their tenants; and performing and coordinating the performance of maintenance required by the Applicants.[11] SID Renos, of which Aruba Butts is the sole director, manages the renovation construction of the Applicants' residential Properties, and is responsible for contacting, approving and overseeing all of the third-party contractors, trades and service providers required to complete the Applicants' unrenovated Properties.[12] As of June 2022, SID Management and SID Renos have temporarily ceased charging certain fees to the Applicants in connection with these services in light of the Applicants' liquidity crisis.[13]

18. As much of the day-to-day property management and renovation services are provided by SID Management and SID Renos, the Applicants only have one employee – a single individual

[9] *Ibid* at para 6, Application Record at Tab 2.
[10] *Ibid* at para 6, Application Record at Tab 2.
[11] *Ibid* at para 46, Application Record at Tab 2.
[12] *Ibid* at para 48, Application Record at Tab 2.
[13] *Ibid* at para 50, Application Record at Tab 2.

employed full-time by The Mulligan Inc.[14] The Mulligan Inc. has approximately $55,000 in unpaid source deductions.[15]

19. Value accretive renovations are a critical part of the Applicants' business, and the Applicants have spent approximately $6.2 million in this regard to date.[16] These renovations improve monthly cash flow by raising the value of Rental Units and the resale value of the residential Properties.[17] The Applicants rely on various third-party contractors, trades and service providers in connection with renovations and maintenance. The Applicants' lack of liquidity has prevented them from undertaking approximately $4.1 million of renovation needed for certain unrenovated Rental Units, which the Applicants estimate is resulting in approximately $350,000/month in lost rental revenues.[18]

C. Assets and Liabilities

20. As of the date of the Initial Order Affidavit, the Applicants have less than $100,000 of cash on hand.[19]

21. None of the Applicants have prepared financial statements for the year ended December 31, 2023. Each of the Applicants most recently prepared unaudited financial statements for the year ended December 31, 2022, except for: (i) The Mulligan Inc., for which unaudited financial statements were prepared for the year ended December 31, 2021; and (ii) Horses In The Back Inc., which has not prepared financial statements for any period since it was incorporated on July 24, 2020.[20] As at December 31, 2021 and December 31, 2022, as applicable, the Applicants (other

[14] *Ibid* at para 55, Application Record at Tab 2.
[15] *Ibid* at para 56, Application Record at Tab 2.
[16] *Ibid* at para 58, Application Record at Tab 2.
[17] *Ibid* at para 58, Application Record at Tab 2.
[18] *Ibid* at para 58, Application Record at Tab 2.
[19] *Ibid* at para 13, Application Record at Tab 2.
[20] *Ibid* at para 61, Application Record at Tab 2.

than Horses In The Back Inc.) had total assets with a book value of approximately $127,858,943.[21] The Properties are the most significant of the Applicants' assets, with an estimated aggregate value of approximately $173 million based on appraisals conducted in respect of approximately 30% of the Properties in 2023 (with the same methodology being used to extrapolate the estimated value of the remaining Properties for which no appraisals were obtained).[22]

22. As at December 31, 2021 and December 31, 2022, as applicable, the Applicants (other than Horses In The Back Inc.) had total liabilities with a book value of approximately 124,633,211.[23] The liabilities of the Applicants are summarized below.

Applicant	Parent Company	Liabilities of Applicant
Balboa Inc.	Happy Island	$9,214,039
DSPLN Inc.	Happy Island	$27,241,593
The Pink Flamingo Inc.	Happy Island	$3,332,531
Multiville Inc.	Happy Island & Keely Korp.	$9,396,667
Happy Gilmore Inc.	Happy Island & Keely Korp.	$20,861,680
Hometown Housing Inc.	265 Inc.	$1,671,159
Interlude Inc.	265 Inc.	$39,198,752
Neat Nests Inc.	265 Inc.	$5,095,319
The Mulligan Inc.	Happy Island, Keely Korp. & 265 Inc.	$739,825
Joint Captain Real Estate Inc.	Happy Island & Sail Away	$7,881,646

23. As of December 31, 2023, the funded indebtedness of the Applicants totaled approximately $144,350,000.[24] The Applicants' liabilities and financial position are discussed in detail in the Initial Order Affidavit.[25] Certain of the Applicants' liabilities are discussed below.

[21] *Ibid* at paras 61, Application Record at Tab 2.
[22] *Ibid* at para 65, Application Record at Tab 2.
[23] *Ibid* at para 66, Application Record at Tab 2.
[24] *Ibid* at para 68, Application Record at Tab 2.
[25] *Ibid* at paras 61-101, Application Record at Tab 2.

1. The First Mortgage Loans

24. The Applicants financed the acquisition of substantially all of the Properties pursuant to mortgage term sheets and commitments secured by first-priority mortgages/charges against the Properties (as amended, renewed or refinanced from time to time, the "**First Mortgage Loans**"). As of December 31, 2023, there is approximately $81,455,930 in principal outstanding under 390 First Mortgage Loans.[26] Substantially all of the First Mortgage Loans were executed by the Additional Stay Parties that are indirect shareholder(s) and director(s) and/or officer(s) in respect of the applicable Applicant, purportedly in their capacity as guarantor.[27] Certain of the Lenders under the First Mortgage Loans were also provided with a general security agreement by the applicable Applicants.[28]

25. All of the original First Mortgage Loans were sourced by a Hamilton-based mortgage brokerage, The Windrose Group Inc. ("**Windrose**"), through its principal broker, Claire Drage ("**Ms. Drage**").[29] As such, the First Mortgage Loans have substantially similar terms.

26. The majority of the 390 First Mortgage Loans are currently in default as a result of, among other things, the Applicants' failure to repay the principal amount thereunder and/or monthly interest.[30]

2. The Second Mortgage Loans

27. 121 of the Properties are also encumbered by second-priority mortgages/charges and general assignments of rent granted in connection with loan commitments or mortgage term sheets and commitments (as amended, renewed or refinanced from time to time, the "**Second Mortgage**

[26] *Ibid* at para 71, Application Record at Tab 2.
[27] *Ibid* at para 77, Application Record at Tab 2.
[28] *Ibid* at para 77, Application Record at Tab 2.
[29] *Ibid* at para 72, Application Record at Tab 2.
[30] *Ibid* at para 74, Application Record at Tab 2.

Loans").[31] As of December 31, 2023, there is approximately $8,642,697 in principal outstanding under the Second Mortgage Loans.[32] The Second Mortgage Loans were also substantially all executed by the Additional Stay Parties that are indirect shareholder(s) and director(s) and/or officer(s) in respect of the applicable Applicant, purportedly in their capacity as guarantor, and certain lenders in respect thereof were provided with general security agreements by the Applicants.[33]

28. Most of the Applicants' current Second Mortgage Loans were provided by Lift Capital Incorporated (the "**Lift Second Mortgage Loans**"), and subsequently syndicated among individual lenders. The Lift Second Mortgage Loans have substantially similar terms. Unlike the First Mortgage Loans, all of the Lift Second Mortgage Loans are blanket mortgages involving more than one Property under which more than one Applicant is frequently a borrower.[34]

29. The majority of the Second Mortgage Loans are currently in default as a result of, among other things, the Applicants' failure to repay the principal amount thereunder and/or monthly interest.[35]

3. Other Secured Obligations

30. There are numerous registrations granting, among other things, security in certain of the applicable Applicants' personal property pursuant to general security agreements and/or general assignments of rents and leases in favour of dozens of registrants under the *Personal Property Security Act*, R.S.O. 1990, c. P.10, as amended (the "**PPSA**") against various of the Applicants.[36]

[31] *Ibid* at para 78, Application Record at Tab 2.
[32] *Ibid* at paras 78, Application Record at Tab 2.
[33] *Ibid* at paras 86, Application Record at Tab 2.
[34] *Ibid* at paras 80, Application Record at Tab 2.
[35] *Ibid* at para 83, Application Record at Tab 2.
[36] *Ibid* at para 88, Application Record at Tab 2.

The registrations under the PPSA are almost all in favour of existing Lenders (or trustees thereof) of the Applicants.[37]

4. The Unsecured Promissory Notes

31. The Applicants have collectively issued approximately 802 unsecured promissory notes (as amended from time to time, the "**Promissory Notes**").[38] Approximately 602 of the Promissory Notes were issued to The Lion's Share Group Inc., of which Ms. Drage is the chief executive officer, and the remainder were sourced by Windrose and issued directly to individual Lenders.[39] The terms of the Promissory Notes are substantially similar. Substantially all of the Promissory Notes were executed by the Additional Stay Parties that are indirect shareholder(s) and director(s) and/or officer(s) in respect of the applicable Applicant, purportedly as guarantor.[40] As of December 31, 2023, the Applicants currently owe the principal amount of $54,236,109.51 pursuant to the Promissory Notes.[41]

32. Notwithstanding the consensual renewal of many of the Promissory Notes at the end of their original terms, the majority of the Promissory Notes are currently in default as a result of, among other things, the Applicants' failure to repay the principal amount thereunder and/or monthly interest.[42]

5. Litigation Claims

33. As noted above, the Applicants have numerous defaults under the First Mortgage Loans, Second Mortgage Loans, and Promissory Notes. This has resulted in the issuance of over 50

[37] *Ibid* at para 89, Application Record at Tab 2.
[38] *Ibid* at para 90, Application Record at Tab 2.
[39] *Ibid* at para 90, Application Record at Tab 2.
[40] *Ibid* at para 95, Application Record at Tab 2.
[41] *Ibid* at para 91, Application Record at Tab 2.
[42] *Ibid* at para 94, Application Record at Tab 2.

demand letters, notices of default, notices of intention to enforce security, and related notices and demands in 2023.[43] Further, at least 32 statements of claim have been filed in the Ontario Superior Court of Justice in which Applicant borrowers are named as defendants.[44] In 27 of these instances, an Additional Stay Party is also named as a defendant.[45] These actions remain unresolved and the Applicants and the Additional Stay Parties have not responded to or taken any material steps in connection therewith.

6. Other Unsecured Obligations

34. The other unsecured obligations of the Applicants include:

(a) *Intercompany Indebtedness* – the Applicants engage in intercompany transactions, resulting in the creation of intercompany receivables and payables. The Applicants also owe $202,560.98 of fees to SID Renos.[46]

(b) *Trade Accounts Payable* – the Applicants' trade accounts payable as of January 19, 2024 were $600,000, all of which was past due.[47]

(c) *Municipal Tax* – The Applicants collectively have $1,896,739.85 in municipal property tax arrears as of December 31, 2023.[48]

(d) *Income Taxes* – Hometown Housing Inc. and Multiville Inc. had approximately $350,427.68 and $117,789.93 in corporate income tax arrears, respectively, as of July 6, 2023.[49]

(e) *Utilities* – The Applicants collectively owe approximately $532,883.20 in unpaid utilities.[50]

---

[43] *Ibid* at para 99, Application Record at Tab 2.
[44] *Ibid* at para 100, Application Record at Tab 2.
[45] *Ibid* at para 100, Application Record at Tab 2.
[46] *Ibid* at para 96, Application Record at Tab 2.
[47] *Ibid* at para 97, Application Record at Tab 2.
[48] *Ibid* at para 98, Application Record at Tab 2.
[49] *Ibid* at para 98, Application Record at Tab 2.
[50] *Ibid* at para 98, Application Record at Tab 2.

D. Events Leading to the CCAA Filing

35. Despite strong annual revenues, the Applicants have struggled to generate sufficient cash flow to support their ongoing obligations. As a result, the Company began exploring refinancing and sale opportunities in early 2022. This culminated in a sale of 223 properties to Core Development Group ("**Core**", and that sale, the "**Core Sale**").[51] The Core Sale closed in May 2022, subject to Core's payment of a holdback of $3.5 million (the "**Core Holdback**").[52]

36. The Company continued efforts to find a broader refinancing solution starting in August 2022. While grappling with interest rate increases and falling home prices, the Company collaborated with Scotiabank and Finneo with a view to establishing a financial product in respect of the Business that could be marketed to Canadian residential real estate investors.[53] With Finneo's assistance, over 60 financial institutions were approached in 2023 to solicit interest in such a product – these efforts were ultimately not successful.[54] Substantial losses continued for the Applicants, which were exacerbated by disputes arising in connection with the Core Holdback.

37. Having been unsuccessful in obtaining a comprehensive refinancing solution and facing continued and unsustainable losses driven by the Applicants' significant interest expense burden, the Company engaged Howards Capital Corp. ("**HCC**") as a financial advisor in August 2023. With the assistance of HCC, the Company initiated discussions with approximately 35 potential purchasers, financers or investors, to assist in obtaining a comprehensive refinancing solution for the Applicants' funded indebtedness.[55]

---

[51] *Ibid* at para 9, Application Record at Tab 2.
[52] *Ibid* at para 9, Application Record at Tab 2.
[53] *Ibid* at para 103, Application Record at Tab 2.
[54] *Ibid* at para 103, Application Record at Tab 2.
[55] *Ibid* at para 105, Application Record at Tab 2.

38. To date, the Applicants have not been able to find a comprehensive solution. In light of their current liquidity crisis, limited cash on hand, and numerous defaults and related enforcement proceedings, the Applicants can no longer continue to operate the Business absent the relief sought under the Initial Order.[56]

E. The Proposed Monitor

39. KSV Restructuring Inc. is the proposed monitor (the "**Proposed Monitor**") in these CCAA proceedings (if appointed in such capacity, the "**Monitor**").

PART III: ISSUES

40. The issues to be considered on this application are whether:

(a) each of the Applicants meet the criteria to obtain relief under the CCAA;

(b) the Stay of Proceedings should be granted;

(c) proceedings should be stayed against the Additional Stay Parties;

(d) the Lender Representative Counsel should be appointed; and

(e) the Administration Charge (as defined below) should be granted.

PART IV: LAW AND ANALYSIS

A. Each of the Applicants is a Debtor Company to which the CCAA Applies

41. The CCAA applies in respect of a "debtor company" or "affiliated debtor companies" whose liabilities exceed $5 million.[57] The CCAA defines a "debtor company" as "any company"

---

[56] *Ibid* at para 106, Application Record at Tab 2.

[57] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 3(1) [CCAA]; *Nordstrom Canada Retail, Inc*, 2023 ONSC 1422 at para 25 [*Nordstrom*]; *MPX International Corporation*, 2022 ONSC 4348 at para 46 [*MPX*]; *Re Just Energy Corp.*, 2021 ONSC 1793 at para 48 [*Just Energy*].

that is, among other things, "insolvent", which has been interpreted to include companies that are reasonably expected to run out of liquidity in the time it may take to implement a restructuring.[58]

1. Each Applicant is a Company and Certain Applicants are Affiliated Companies

42. The term "company" is defined under the CCAA to include "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province" or "any incorporated company having assets or doing business in Canada".[59] The Applicants were all incorporated pursuant to the OBCA, and their business and assets are exclusively in Ontario.[60] As such, each of the Applicants is a "company" within the ambit of the CCAA.

43. Pursuant to subsection 3(2) of the CCAA, "companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person".[61] As set out above, the Applicants operate as an integrated Company, and various of the Applicants are "affiliated companies" through their shared ownership by the Non-Applicant Parent Cos. Specifically:

(a) Balboa Inc., DSPLN Inc., and The Pink Flamingo Inc. are affiliated companies because each is a subsidiary of Happy Island;

(b) Hometown Housing Inc., Interlude Inc., Horses In The Back Inc., and Neat Nests Inc. are each affiliated companies because each is a subsidiary of 265 Inc.; and

(c) the Applicants submit that The Mulligan Inc. is an affiliate of both groups of companies above, because it is collectively controlled by Happy Island and 265 Inc.

---

[58] CCAA, *ibid*, s 2(1), "*debtor company*". See also, *Just Energy*, *ibid* at para 49.
[59] CCAA, *ibid*, s 2(1), "*company*".
[60] Initial Order Affidavit, *supra* note 1 at paras 7, 24, 28, 32, 36, and 40, Application Record at Tab 2.
[61] CCAA, *supra* note 57, s 3(2).

2. Each of the Applicants is Insolvent and Individually or with its Affiliated Companies Has Liabilities in Excess of $5 Million

44. In the absence of a definition for the term "insolvent" under the CCAA, courts have referred to the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. c. B-3, as amended (the "**BIA**").[62] The BIA defines "insolvent person" as a person:

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

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

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.[63]

45. The test for determining whether a company is an "insolvent person" under the BIA is disjunctive – satisfaction of any one of the above criteria is sufficient.[64]

46. Courts have also recognized the expanded definition of insolvency provided in *Re Stelco*, which provides that a company is also insolvent for purposes of the CCAA if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.[65]

47. Applied here, the Applicants are individually and as a whole insolvent. The Applicants are facing a significant liquidity crisis and cannot satisfy their liabilities as they come due.[66] They are in default of their debt obligations and have substantial sums past due in respect of other obligations, including taxes, trade accounts, and utilities. Given their nominal cash on hand, the

---

[62] *Nordstrom*, *supra* note 57 at para 26; *Just Energy*, *supra* note 57 at para 49; *Re Target Canada Co*, 2015 ONSC 303 at para 26 [*Target*].
[63] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s 2, "*insolvent person*".
[64] *Laurentian University of Sudbury*, 2021 ONSC 659 at para 31.
[65] *Stelco Inc, Re*, 2004 CanLII 24933 at paras 25-26 [*Stelco*]; *Nordstrom*, *supra* note 57 at para 26; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753 at para 35 [*OTE*].
[66] Initial Order Affidavit, *supra* note 1 at para 107, Application Record at Tab 2.

Applicants currently have no prospect of satisfying their obligations as they become due unless the Initial Order is granted.[67]

3. Ontario is the Appropriate Venue for these CCAA Proceedings

48. An application under the CCAA may be "made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated".[68] Given that each of the Applicants' registered offices is located in Ontario, and the Business is carried out exclusively in Ontario, Ontario is the appropriate venue for these proceedings and this Court has jurisdiction to hear this application.[69]

B. The Stay of Proceedings Should be Granted

49. Section 11.02 of the CCAA provides this Court with the jurisdiction to impose a stay of proceedings for a period of not more than ten days if it is satisfied that circumstances exist that make the order appropriate.[70]

50. The jurisdiction vested in Courts to stay proceedings under section 11.02 "should be construed broadly to accomplish the legislative purposes of the CCAA".[71] These purposes include, among others, enabling the continuation of the applicants' business and avoiding the social and economic costs of a liquidation.[72] Accordingly, a stay of proceedings will be appropriate where it maintains the *status quo* and provides applicants with breathing room while they seek to restore solvency and emerge from the CCAA on a going-concern basis.[73]

---

[67] Initial Order Affidavit, *supra* note 1 at para 107, Application Record at Tab 2.
[68] CCAA, *supra* note 57, s 9(1); *Target*, *supra* note 62 at para 29.
[69] *Re Lydian International Limited*, 2019 ONSC 7473 at para 41 [*Lydian*]; *Target*, *supra* note 62 at paras 29-30.
[70] CCAA, *supra* note 57, s 11.02. See also, *Boreal Capital Partners Ltd et al (Re)*, 2021 ONSC 7802 at para 15 [*Boreal*]; *OTE*, *supra* note 65 at para 45.
[71] *Canwest Global Communications Corp*, 2011 ONSC 2215 at para 24 [*Canwest*].
[72] *Canwest*, *ibid* at para 24; *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 15 [*Century Services*].
[73] *Century Services*, *ibid* at para 14; *Target*, *supra* note 62 at para 8; *Canwest*, *ibid* at paras 24-25.

51. Here, the Stay of Proceedings is intended primarily to stay and prevent enforcement action that has and will be taken by the Lenders and other creditors. The Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to advance their restructuring efforts, including seeking approval of a debtor-in-possession facility, appointing HCC as financial advisor, and developing a plan of compromise or arrangement and/or exploring other restructuring transaction alternatives. Additionally, it will permit the Applicants to continue to operate the Business as a going concern with minimal disruption. The continued and uninterrupted operation of the Business and the avoidance of uncoordinated and distressed sales or forced liquidations of the Properties will preserve value for the Applicants' stakeholders and is in the best interests of all stakeholders, including the Lenders and the Applicants' tenants.[74]

52. The Applicants submit that the Stay of Proceedings is in their best interests and the best interests of their stakeholders, consistent with the purposes of the CCAA, and appropriate in the circumstances.

C. Proceedings Should be Stayed Against the Additional Stay Parties

53. The Applicants seek to stay all proceedings against or in respect of the Additional Stay Parties or their current or future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, and including all proceeds thereof with respect to any guarantee, contribution or indemnity obligation, liability or claim in respect of or that relates to any agreement involving any of the Applicants or the obligations, liabilities and claims of and against any of the Applicants (the "**Non-Applicant Stay**").

[74] Initial Order Affidavit, *supra* note 1 at para 111, Application Record at Tab 2.

54. The Additional Stay Parties are all indirect shareholders, as well as directors and officers, of the Applicants. As discussed above, the Additional Stay Parties purportedly provided guarantees in respect of substantially all of the First Mortgage Loans, Second Mortgage Loans, and Promissory Notes. The Applicants' defaults have already resulted in at least 27 claims being filed against the Additional Stay Parties. If the Non-Applicant Stay is not granted, it is conceivable that hundreds of claims could be filed against the Additional Stay Parties in connection with the Applicants' Business.

55. This Court has the jurisdiction to grant the Non-Applicant Stay under section 11 of the CCAA. Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.[75] Under a narrow interpretation, these provisions may appear to prevent the Non-Applicant Stay sought by the Applicants, and indeed, this Court in *Cannapiece Group Inc v. Marzili* found that it did not have the authority to stay an action brought against a director of the applicant in respect of a guarantee given by the director in favour of the Applicant in light of these provisions.[76]

56. As a factual matter, it is important to note that there was only one potential claim against a director that the applicants in that case were concerned with, as opposed to the hundreds of claims that may exist in this case.[77] Because there was only one claim at issue, the Court ultimately made a procedural order extending the time to file a statement of defence with respect to that claim.[78]

---

[75] CCAA, *supra* note 57, s 11.03(2) and 11.04.
[76] 2022 ONSC 6379.
[77] *Ibid* at para 36.
[78] *Ibid* at para 37.

This would be impractical in this case where there are currently 27 claims already issued and the potential for hundreds more to follow. In addition, the applicants in that case had sought a broader stay by removing the limitation "except as permitted by 11.03(2)" from the description of the director stay in their proposed initial order, which would effectively function as a stay against any proceeding whatsoever against the applicable directors.[79] Here, the Applicants have tailored the language of the Initial Order to specify exactly the claims that they are concerned with.

57. Moreover, in decisions both before and after *Cannapiece*, CCAA Courts have found that the broad power under section 11 of the CCAA allows the Court to grant stays in favour of third-party guarantors notwithstanding sections 11.04 and 11.03(2).[80] Prior to the *Cannapiece* decision, Courts had exercised this discretion to stay guarantee claims (among others) against parties who were both directors and owners of CCAA applicants.[81] Most recently, after considering the *Cannapiece* decision and acknowledging that "the issue is not free from doubt", Chief Justice Morawetz in both the *Bed Bath* and *Nordstrom* decisions ultimately granted a stay in favour of certain non-applicant guarantors on an initial CCAA application, notwithstanding the language of section 11.04.[82] In both cases, those stays of proceedings were extended for additional time by subsequent Court Order.[83]

---

[79] *Ibid* at para 26.

[80] CCAA, *supra* note 57, s 11; *Nordstrom*, *supra* note 57 at paras 40-42; *BBB Canada Ltd.*, 2023 ONSC 1014 at paras 32-34 [*Bed Bath*];*McEwan Enterprises Inc*, 2021 ONSC 6453 at para 45; *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, 2015 QCCS 4716 at paras 50-51.

[81] *In the Matter of a Plan of Compromise or Arrangement of McEwan Enterprises Inc.*, (September 28, 2021), Toronto, CV-21-00669445-00CL (Order) (ONSC); *In the Matter of a Plan of Compromise or Arrangement of Forme Development Group Inc. and the Other Companies Listed on Schedule "A" Hereto*, (November 30, 2018), CV-18-608313-00CL (Order) (ONSC).

[82] *Nordstrom*, *supra* note 57 at paras 40-42; *Bed Bath*, *supra* note 80 at paras 32-34.

[83] *In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail Inc., Nordstrom Canada Holdings Inc, LLC and Nordstrom Canada Holdings II, LLC*, (March 10, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC); *Nordstrom Canada Retail, Inc*, 2023 ONSC 1631; *In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail Inc, Nordstrom Canada Holdings Inc, LLC and Nordstrom Canada Holdings II, LLC*, (March 20, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC); *Nordstrom Canada Retail, Inc*, 2023 ONSC 1814; *In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd*, (February 21, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC); *Bed Bath & Beyond Canada Ltd*, 2023 ONSC 1230.

58. The Additional Stay Parties wear multiple "hats" in their involvement with the Applicants. They are not just directors and officers, but are also indirect owners of the Applicants through the Non-Applicant ParentCos.[84] To the extent any valid guarantees were given, it is more likely in this capacity that the Additional Stay Parties would have agreed to provide such guarantees – the recent decisions above considering section 11.04 are therefore especially instructive in these circumstances.

59. Courts may exercise their broad judicial discretion under section 11 in furtherance of the CCAA's remedial objectives of facilitating restructurings and avoiding the devastating impact of bankruptcy.[85] It is clearly not in the best interests of the Applicants' stakeholders or the administration of justice for the Additional Stay Parties to be forced to respond to uncoordinated actions in respect of their purported guarantees at the same time the Applicants are attempting to restructure under the CCAA. The Non-Applicant Stay is consistent with the "single-proceeding model" that favours the resolution of claims within a CCAA process and avoids the "inefficiencies and chaos" that could otherwise result from uncoordinated attempts at recovery.[86]

60. Moreover, the plaintiffs and potential plaintiffs are minimally prejudiced by this temporary stay, which does not settle their actions or provide any release of claims against the Additional Stay Parties. The Additional Stay Parties liability, if any, is derivative of the Applicants' obligations under the First Mortgage Loans, the Second Mortgage Loans, and the Promissory Notes. A material amount of the Additional Stay Parties' net worth is invested in the Applicants, and the remainder would not be nearly enough to satisfy the obligations that are purportedly guaranteed.[87] Given the Applicants' intention to consummate a comprehensive refinancing or

---

[84] Initial Order Affidavit, *supra* note 1 at para 18, Application Record at Tab 2.
[85] *Century Services*, *supra* note 72 at para 59.
[86] *Ibid* at para 22.
[87] Initial Order Affidavit, *supra* note 1 at para 117, Application Record at Tab 2.

restructuring transaction that will underpin a plan of compromise or arrangement, the Additional Stay Parties' liability may be reduced (and materially so) during these CCAA proceedings.

61. In addition, the Additional Stay Parties are the principals of the Applicants and will be crucial to achieving a successful restructuring. Their involvement defending the current claims, let alone the hundreds of potential additional claims that may result, would unduly strain the Applicants' resources and be a significant distraction that could paralyze these CCAA proceedings to the detriment of the Applicants, their tenants, the Lenders, and other stakeholders.[88] Granting the Non-Applicant Stay will facilitate the restructuring of the Applicants and is clearly in line with the remedial objectives of the CCAA. It is therefore necessary, reasonable and appropriate that the Non-Applicant Stay be granted in the circumstances.

62. In addition to its jurisdiction under section 11 of the CCAA, this Court has inherent jurisdiction to grant a of stay proceedings whenever it is just and convenient to do so, which general power is further embodied under section 106 of the *Court of Justice Act,* R.S.O. 1990, c. C.43.[89] For the reasons set out above, it is just and convenient for the Non-Applicant Stay to be granted in these circumstances.

D. Lender Representative Counsel Should be Appointed

63. As described above, there are over 300 individual Lenders to the Applicants under approximately 390 First Mortgage Loans, 121 Second Mortgage Loans and 802 Promissory Notes. The Lenders are predominantly individual real estate investors.[90] The Applicants seek the appointment of Chaitons LLP as Lender Representative Counsel in these and any other insolvency

---

[88] Initial Order Affidavit, *supra* note 1 at para 116, Application Record at Tab 2.
[89] *Campeau v Olympia & York Developments Ltd*, [1992] OJ No 1946 (Ont SCJ) at para 14, attached at Schedule C hereto; *Courts of Justice Act*, RSO 1990, c C 43 at s 106.
[90] Initial Order Affidavit, *supra* note 1 at para 7, Application Record at Tab 2.

proceedings. If appointed, Lender Representative Counsel may identify up to six Lenders to be nominated as Court-appointed representatives (the "**Lender Representatives**") to advise and, where appropriate, instruct Lender Representative Counsel. Lenders who do not opt-out of Lender Representative Counsel's representation pursuant to the Initial Order would be bound by the actions of the Lender Representative Counsel and the Lender Representatives, if any.

64. Section 11 of the CCAA and the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 confer broad jurisdiction on the Court to appoint representative counsel for vulnerable stakeholder and creditor groups.[91] In doing so, the relevant factors to consider include:

(a) the vulnerability and resources of the group sought to be represented;

(b) any benefit to the companies under CCAA protection;

(c) any social benefit to be derived from representation of the group;

(d) the facilitation of the administration of the proceedings and efficiency;

(e) the avoidance of a multiplicity of legal retainers;

(f) the balance of convenience and whether it is fair and just including to the creditors of the estate;

(g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

(h) the position of other stakeholders and the Monitor.[92]

65. The ability for representative counsel to provide for effective communication and efficiency within the proceedings have been highlighted as particularly important factors.[93]

---

[91] CCAA, *supra* note 57, s 11; *Rules of Civil Procedure*, RRO 1990, Reg 194, s 10.01; *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 at paras 10-12.

[92] *Canwest Publishing Inc.*, 2010 ONSC 1328 at para 21; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para 23 [*Mountain Equipment*]; *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61 at para 26.

[93] *Quadriga Fintech Solutions Corp (Re)*, 2019 NSSC 65 at para 9.

66. The factors above each weigh in favour of the appointment of Lender Representative Counsel. In particular, Lender Representative Counsel will benefit both the Lenders and the Applicants. Their appointment will assist with streamlining the CCAA process by providing a single point of contact between hundreds of Lenders, the Applicants, the Monitor, and the Court. Without the appointment of Lender Representative Counsel, the Applicants (as well as the Monitor and other stakeholders) would be forced to liaise and attempt to develop consensus among potentially hundreds of counsel, which would increase professional costs substantially and increase the difficulty of achieving a successful restructuring.[94] Further, the Lenders are for the most part individual real estate investors who would benefit from the assistance of experienced insolvency counsel in both communicating developments and legal issues to them and voicing their views to the Court. The Applicants do not believe the relief sought will prejudice any stakeholder, and note that any Lenders that do not wish to be represented may opt-out in accordance with the Initial Order. The relief sought is supported by the Proposed Monitor.[95]

67. The appointment of Lender Representative Counsel is necessary and appropriate in the circumstances to facilitate the administration of these CCAA proceedings and to ensure the Lenders have meaningful representation therein. Chaitons LLP has acted as representative counsel in other proceedings, including for real estate investors, and is an appropriate firm for this position.[96] The Applicants believe that Chaitons LLP should be appointed at the time the Initial Order is granted to avoid unnecessary confusion and cost by initiating communications with the Lenders in advance of the Applicants' comeback hearing. As such, the Applicants submit that the appointment of Representative Counsel is necessary and appropriate in the circumstances.

---

[94] Initial Order Affidavit, *supra* note 1 at para 125, Application Record at Tab 2.
[95] *Ibid* at para 126, Application Record at Tab 2.
[96] *Ibid* at para 119, Application Record at Tab 2.

E. The Administration Charge Should be Granted

68. The Applicants are seeking a Court-ordered charge over the Applicants' Property in the amount of $750,000 to secure the professional fees and disbursements of the Proposed Monitor, along with counsel to the Proposed Monitor and the Applicants, at their standard rates and charges, incurred prior and subsequent to the granting of the Initial Order (the "**Administration Charge**").[97]

69. Section 11.52 of the CCAA vests this Court with jurisdiction to grant an administration charge on notice to the secured creditors likely to be affected thereby in favour of, among others, a Court-appointed monitor, its legal advisors and any legal experts engaged by the debtor company.[98] This Court has recognized that it is essential to the success of any CCAA restructuring "to order a super-priority in respect of charges securing professional fees and disbursements".[99]

70. The following list of non-exhaustive factors may inform a Court's decision to grant an administration charge:

(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.[100]

---

[97] *Ibid* at para 128, Application Record at Tab 2.
[98] CCAA, *supra* note 57, s 11.52(1)-(2); *US Steel Canada Inc (Re)*, 2014 ONSC 6145 at para 20; *Canwest Global Communications Corp (Re)*, 2009 CanLII 55114, at paras 37-38; *MPX*, *supra* note 57 at para 62; *Nordstrom*, *supra* note 57 at para 55; *Lydian*, *supra* note 69 at para 44.
[99] *US Steel*, *ibid* at para 22. See also, *Timminco Limited (Re)*, 2012 ONSC 506 at para 66.
[100] *Lydian*, *supra* note 69 at paras 46-48; *Nordstrom*, *supra* note 57 at para 55; *MPX*, *supra* note 57 at para 63-64.

71. In this case, the Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the proposed Administration Charge, given that:

(a) the Applicants require the knowledge, expertise and continued participation of the beneficiaries of the Administration Charge during these CCAA proceedings;

(b) the beneficiaries of the Administration Charge have, and will continue to, contribute to these CCAA proceedings and assist the Applicants with continuing and operating the Business in the ordinary course;

(c) certain beneficiaries of the Administration Charge have modest retainers and significant arrears;

(d) the Applicants have no other means of retaining the beneficiaries of the Administration Charge, and each beneficiary is performing distinct functions;

(e) the Administration Charge will not rank in priority to any Encumbrances in favour of any person that has not been served with notice of the within application; and

(f) the Proposed Monitor is supportive of the Administration Charge.[101]

PART V: RELIEF REQUESTED

72. The Applicants submit that the relief sought on the within application is appropriate in the circumstances and respectfully request that the proposed form of Initial Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF JANUARY 2024

Bennett Jones LLP

BENNETT JONES LLP

[101] Initial Order Affidavit, *supra* note 1 at paras 129-131, 137, Application Record at Tab 2.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *BBB Canada Ltd.*, 2023 ONSC 1014.
2. *Bed Bath & Beyond Canada Ltd.*, 2023 ONSC 1230.
3. *Boreal Capital Partners Ltd et al (Re)*, 2021 ONSC 7802.
4. *Campeau v. Olympia & York Developments Ltd*, [1992] O.J. No. 1946 (Ont. S.C.J.).
5. *Cannapiece Group Inc. v. Marzili*, 2022 ONSC 6379.
6. *Canwest Global Communications Corp.*, 2011 ONSC 2215.
7. *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114
8. *Canwest Publishing Inc.*, 2010 ONSC 1328.
9. *Century Services Inc. v. Attorney General (Canada)*, 2010 SCC 60.
10. *Imperial Tobacco Canada Ltd., Re*, 2020 ONSC 61.
11. *In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd*, (February 21, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC).
12. *In the Matter of a Plan of Compromise or Arrangement of Forme Development Group Inc. and the Other Companies Listed on Schedule "A" Hereto*, (November 30, 2018), CV-18-608313-00CL (Order) (ONSC).
13. *In the Matter of a Plan of Compromise or Arrangement of McEwan Enterprises Inc.*, (September 28, 2021), Toronto, CV-21-00669445-00CL (Order) (ONSC)
14. *In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail Inc., Nordstrom Canada Holdings Inc, LLC and Nordstrom Canada Holdings II, LLC*, (March 10, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC).
15. *In the Matter of a Plan of Compromise or Arrangement of Nordstrom Canada Retail Inc, Nordstrom Canada Holdings Inc, LLC and Nordstrom Canada Holdings II, LLC*, (March 20, 2023), Toronto, CV-23-00695619-00CL (Order) (ONSC).
16. *Laurentian University of Sudbury*, 2021 ONSC 659.
17. *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, 2015 QCCS 4716.
18. *McEwan Enterprises Inc.*, 2021 ONSC 6453.

19. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037.

20. *MPX International Corporation*, 2022 ONSC 4348.

21. *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422.

22. Nordstrom Canada Retail, Inc., 2023 ONSC 1631.

23. Nordstrom Canada Retail, Inc., 2023 ONSC 1814.

24. Nortel Networks Corporation (Re), 2009 CanLII 26603.

25. *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753.

26. *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65.

27. *Re Just Energy Corp.*, 2021 ONSC 1793.

28. *Re Lydian International Limited*, 2019 ONSC 7473.

29. *Re Target Canada Co.*, 2015 ONSC 303.

30. *Stelco Inc., Re*, 2004 CanLII 24933.

31. *Timminco Limited (Re)*, 2012 ONSC 506.

32. *US Steel Canada Inc (Re)*, 2014 ONSC 6145.

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Section 2, "Insolvent Person"

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

> **(a)** who is for any reason unable to meet his obligations as they generally become due,
>
> **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> **(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36**

Section 2(1), "Company"

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, 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*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

Section 2(1), "Debtor Company"

debtor company means any company that

> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
>
> (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

Section 3

Application

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

Affiliated companies

(2) For the purposes of this Act,

> **(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 of them is controlled by the same person; and
>
> **(b)** two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

> **(a)** securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
>
> **(b)** the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

> **(a)** it is controlled by
>
> > **(i)** that other company,
> >
> > **(ii)** that other company and one or more companies each of which is controlled by that other company, or
> >
> > **(iii)** two or more companies each of which is controlled by that other company; or
>
> **(b)** it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 31997, c. 12, s. 1212005, c. 47, s. 125.

Section 9

Jurisdiction of court to receive applications

(1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Section 11

General Power of Court

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

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128.

Section 11.02

Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F)2019, c. 29, s. 137.

Section 11.03

Stays — directors

(1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128

Section 11.04

Persons obligated under letter of credit or guarantee

No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128

Section 11.52

Court may order security or charge to cover certain costs

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

> **(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> **(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

2005, c. 47, s. 1282007, c. 36, s. 6

***Courts of Justice Act*, R.S.O. 1990, c C. 43**

Section 106

Stay of proceedings

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

R.S.O. 1990, c. C.43, s. 106.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

Section 10.01

Representation of an Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

(1) In a proceeding concerning,

> **(a)** the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> **(b)** the determination of a question arising in the administration of an estate or trust;
>
> **(c)** the approval of a sale, purchase, settlement or other transaction;
>
> **(d)** the approval of an arrangement under the Variation of Trusts Act;
>
> **(e)** the administration of the estate of a deceased person; or
>
> **(f)** any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

> **(a)** those persons are represented by a person appointed under subrule (1) who assents to the settlement; or
>
> **(b)** there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

R.R.O. 1990, Reg. 194, r. 10.01 (4).

SCHEDULE C – NON-HYPERLINKED CASELAW

1992 CarswellOnt 185
Ontario Court of Justice (General Division)

Campeau v. Olympia & York Developments Ltd.

1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303,
14 C.P.C. (3d) 339, 35 A.C.W.S. (3d) 679, 3 W.D.C.P. (2d) 575

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle*, for the plaintiffs.
Peter F. C. Howard, for National Bank of Canada.
Yoine Goldstein, for Olympia & York Development Limited and 857408 Ontario Inc.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.c Grounds
XVI.3.c.ii Another proceeding pending
XVI.3.c.ii.E Miscellaneous
Headnote
Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General
Stay of proceedings — Companies' Creditors Arrangement Act — Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.
The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant

bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex. The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Table of Authorities

Cases considered:

Arab Monetary Fund v. Hashim (June 25, 1992), Doc.34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 — *referred to*

Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 244 (C.A.) — *referred to*

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) — *applied*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. (H.C.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *applied*
Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*
Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 —

s. 17(1)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,

b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period*.

(emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way.

The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However,

in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim*, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to

that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

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 BALBOA INC., DSPLN INC., HAPPY GILMORE INC., INTERLUDE INC., MULTIVILLE INC., THE PINK FLAMINGO INC., HOMETOWN HOUSING INC., THE MULLIGAN INC., HORSES IN THE BACK INC., NEAT NESTS INC. AND JOINT CAPTAIN REAL ESTATE INC.

Court File No.: CV-24-00713245-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

Factum of the Applicants
(Initial Order)

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: (416) 777-6254
Email: zweigs@bennettjones.com

Joshua Foster (LSO# 79447K)
Tel: (416) 777-7906
Email:fosterj@bennettjones.com

Thomas Gray (LSO# 82473H)
Tel: (416) 777-7924
Email: grayt@bennettjones.com

Lawyers for the Applicants