



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00716192-00CL
CV-24-00716267-00CL

DATE: March 11, 2024

NO. ON LIST: 3/4

TITLE OF PROCEEDING:

THE TORONTO-DOMINION BANK v. SKYLINK EXPRESS INC et al

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 SKYLINK
EXPRESS INC.

BEFORE: JUSTICE CAVANAGH

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
FRANCIS, CATHERINE LIU, CAROL MOSES, RACHEL	THE TORONTO-DOMINION BANK	cfrancis@foglers.com cliu@foglers.com rmoses@foglers.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
STAM, JENNIFER	SKYLINK EXPRESS INC.	Jennifer.stam@nortonrosefulbright.com
LARRY, JEFF	MOMENTUM DECISIVE SOLUTIONS CANADA INC.	Jeff.larry@palaireroland.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
DIETRICH, JANE	KSV – AS PROPOSED MONITOR	jdietrich@cassels.com
KOFMAN, BOBBY		bkofman@ksvadvisory.com
MANCHANDA, MUKUL	MSI SPERGEL INC. – AS PROPOSED RECEIVER	mmanchanda@spergel.ca

ENDORSEMENT OF JUSTICE CAVANAGH:

1. The Applicant, Skylink Express Inc., brings this application seeking, among other things, an Initial Order under the *Companies’ Creditors Arrangement Act (Canada)* (the “*CCAA*”). The primary purpose of the *CCAA* application is to provide a stabilized environment while the Applicant commences restructuring and obtains debtor-in-possession funding which is urgently required.
2. The Applicant has operated for over 25 years providing regional air cargo services throughout North America and is one of Canada’s largest operators specializing in regional courier feeder operations and time-sensitive air cargo charter throughout North America. The Applicant’s focus is to provide “last mile” services for major delivery services to secondary locations, primarily in Canada. The Applicant’s sole shareholder is Momentum Decisive Solutions Canada Inc. (“Momentum”) who acquired the Applicant in 2020.
3. The primary customer of the Applicant’s business is United Parcel Service Canada Ltd. (“UPS”).
4. Over the past year, the Applicant has experienced negative operating cash flow, and it is now facing an imminent liquidity crisis.
5. The Toronto-Dominion Bank (“TD”) is the Applicant’s senior secured lender and only secured creditor. The TD Loan Facility is secured pursuant to various security granted by the Applicant on its assets including on its aircraft as well as pursuant to a secured guarantee provided by Momentum (in the maximum amount of \$15 million). The current balance of the TD Loan Facility is approximately \$13.8 million and the balance on the secured line of credit is approximately \$300,000.
6. The Applicant maintains various American Express and VISA cards for use by its employees for business related expenses. As of March 8, 2024, the estimated balance was \$250,000. The Applicant intends to continue to make payments in the ordinary course during the *CCAA* proceeding to keep the balances on the cards current.
7. The Applicant also has approximately \$1.7 million of aged trade payables and incurs trade liabilities in the ordinary course of its business.
8. Other than TD, there are no other parties with personal property security registrations against the Applicant or registrations against the Applicant’s aircraft.
9. The Applicant is almost entirely reliant on UPS to generate revenue. A restructuring of the UPS contract is required for the Applicant to remain viable and to return to profitability. Discussions with UPS to date have

been preliminary in nature. The Applicant intends to use these proceedings to immediately commence discussions with UPS with a view to restructuring the UPS contract.

The CCAA Applies

10. Relief under the *CCAA* is available to a “debtor company” or affiliated “debtor companies” where the total claims against such company or affiliated companies exceed \$5 million.
11. The *CCAA* defines a “company” to include any incorporated company having assets in Canada. A “debtor company” includes any company that is “bankrupt or insolvent”. A financially troubled company is insolvent for the purposes of the *CCAA* if it is “reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring”. See *Stelco Inc. (Re)*, 2004 CanLII 24933, at para. 26.
12. The Applicant is a debtor company to which the *CCAA* applies. It is incorporated pursuant to the *OBCA* and its registered office is in Toronto. The Applicant has liabilities significantly exceeding \$5 million.
13. The Applicant is insolvent. Although the book value of its assets is greater than its liabilities, the Applicant is facing a liquidity crisis as the UPS contract is not sufficiently profitable to fund the Applicant’s costs of operations, including its aircraft maintenance costs. Without further funding, the Applicant is not projected to be able to fund its payroll due March 15, 2024. Momentum is not prepared to provide any further funding outside of a DIP facility and a *CCAA* filing.

The Stay of Proceedings is Appropriate

14. This Court may grant a stay of proceedings of up to 10 days on an initial application, provided it is satisfied that: (i) such stay is appropriate; and (ii) the Applicant has acted in good faith and with due diligence (s. 11.02(1), (3)).
15. When exercising judicial discretion under the *CCAA*, the court must be cognizant of the various interest at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, and even other parties doing business with the insolvent company. Absent exceptional circumstances, the relief sought shall be limited to relief reasonably necessary for the ordinary course of continued operations and, whenever possible, the *status quo* should be maintained during the initial 10-day period. This allows for stabilization of operations and a negotiating window.
16. I am satisfied that the requested stay of proceedings, other than, as agreed, against TD, is reasonably necessary to maintain the status quo and to allow the Applicant to continue its operations for the next 10 days, for the benefit of stakeholders.

KSV should be appointed as Monitor

17. I am satisfied that KSV is qualified to act as Monitor and that it is appropriate to make this appointment.

The Administration Charge, the Directors’ Charge, and the DIP facility and DIP Lender’s Charge

18. The Applicant is seeking approval of an Administration Charge in favour of the proposed Monitor, the proposed Monitor’s counsel and the Applicant’s counsel to secure payments of their reasonable fees and disbursements incurred both prior to filing and after the initial Order in the maximum amount of \$350,000.

19. The *CCAA* provides that the Court has jurisdiction to grant an administration charge where it concludes that (a) the notice has been given to the secured creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the charges should extend to all of the proposed beneficiaries.
20. The proposed Administration Charge will be subordinate to the security held by TD.
21. I am satisfied that the Administration Charge is appropriate in the circumstances because (a) the beneficiaries of the charge will provide the required legal and financial advice during the course of this proceeding; (b) there is no anticipated duplication of roles; and (c) the proposed Monitor has indicated it believes the amount of the proposed Administration Charge is appropriate in the circumstances.
22. The Applicant is seeking the Directors' Charge in favour of the officers and directors of the Applicant in the amount of \$480,000. This represents an estimate of accruals of amounts that are potentially director liability obligations between payment cycles. Under the *CCAA*, the Court has authority to grant a charge to the directors and officers of the company as security for an indemnity provided by the applicant in respect of certain statutory obligations. In order to grant such charge, the Court must be satisfied that (a) notice has been given to the secured creditors likely to be affected by the charge; (b) the amount is appropriate; (c) the debtor could not obtain adequate indemnification insurance at reasonable cost; and (d) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.
23. The proposed Monitor believes the quantum of the charge is reasonable in view of the potential liabilities faced by the directors and officers in the post-filing period. I am satisfied that the proposed Directors' Charge is appropriate.
24. The Applicant is seeking approval of the DIP Facility pursuant to the DIP Term Sheet during the *CCAA* proceeding. The proposed DIP Lender's Charge will rank subsequent to the TD security and the Administration Charge, but in priority to the proposed Directors' Charge and any other security interests, trusts, liens, charges and encumbrances, statutory or otherwise. The Applicant is not aware of any such other encumbrances.
25. In determining whether to grant a charge to secure the interim financing sought, the factors described in section 11.2 of the *CCAA* should be considered. These are (a) whether notice has been given to secured creditors who are likely to be affected by the subject charge; (b) whether the amount of the interim financing to be secured by the charges appropriate and necessary having regard to the Applicant's cash flow statement; (c) whether the charge secures an obligation it would exist before the order is made; and (d) the enumerated factors in subsection 11.2(4) of the *CCAA*.
26. Fresh capital is being injected into Momentum to provide Momentum with capital to fund the DIP facility.
27. The DIP Term Sheet will provide the Applicant with essential funding to continue operations during the *CCAA* proceeding. The proposed initial maximum borrowing amount is \$1.35 million and is required for funding for the Applicant's payroll for March 15, 2024. The proposed DIP Lender's Charge does not secure any pre-filing obligations.
28. I am satisfied from the materials filed on this application that: (a) absent an event of default, the proposed funding under the DIP Term Sheet will be made available through the end of April, 2024; (b) without funding under the DIP Term Sheet, the Applicant will be unable to continue operations or make crucial payments including its upcoming payroll; (c) the proposed Monitor has reviewed the DIP Term Sheet with

other interim financing facilities approved by Canadian courts in *CCAA* proceedings commenced between 2021 and 2023 and has concluded the cost of the proposed facility is within the range of similar facilities recently approved by the Court and other Canadian courts in *CCAA* and other restructuring proceedings; (d) it is unlikely any other lender would provide DIP funding on a subordinated basis to TD; (e) there are no structuring, facility, standby or other fees being charged by the DIP lender under the DIP facility other than reasonable legal fees of the lender; (f) the proposed Monitor has indicated it believes that the DIP Lender's Charge is in the best interest of the Applicant and its stakeholders; and (g) Momentum has advised it will not provide further funding absent the granting of the DIP Lender's Charge.

29. I am satisfied that the requested DIP Lender's charge should be approved.
30. The Applicant is requesting that it be authorized, but not require, to pay pre-filing amounts owing in respect of its outstanding credit card balances that are critical to their business and ongoing operations up to a maximum of \$250,000.
31. I am satisfied that the ongoing use of these credit cards is crucial to the business because employees, (including the Applicant's pilot group) are often travelling and required to incur expenses in the course of their employment. I am satisfied that authorization to grant such relief should be granted.

Position of TD

32. TD has confirmed it is not opposing the Applicant's *CCAA* application based on the following terms:
 - a. TD will not be stayed pending the comeback but agrees that its receivership application (Court File No. CV-24-00716192-00CL) is adjourned pending the comeback;
 - b. During the 10 day period, TD will agree that the Applicant and Momentum can continue to use their bank accounts and Momentum will continue to have access to its line and FX facility;
 - c. The parties will work in good faith on the terms of a forbearance agreement among TD, Momentum and the Applicant pending the comeback;
 - d. The Administration Charge will be subordinated to the TD Loan Security; and
 - e. Momentum will agree to post \$2 million of cash collateral in escrow to be held in trust with Norton Rose (legal counsel to the Applicant) subject to agreeing on the terms of an escrow agreement. The parties will work on the terms of an escrow agreement prior to the comeback for the deposit of the cash collateral which will provide, among other things, that so long as the Applicant is continuing its restructuring, if it at any time misses a payment, TD may immediately access the full amount of the cash collateral to pay down its loan and the cash collateral be held until the loan is repaid in full. The funding of the cash collateral by Momentum will be sourced through an injection of new capital and not from existing working capital.
33. Order to issue in form of Order signed by me today.



Digitally signed
by Mr. Justice
Cavanagh