CITATION: 2675970 Ontario Inc., 2024 ONSC 6174
COURT FILE NO.: CV-24-00726584-00CL
DATE: 20241106

SUPERIOR COURT OF JUSTICE – ONTARIO
(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 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC.

RE: 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC., individually, an "Applicant" and collectively, the "Applicants"

BEFORE: W.D. Black J.

COUNSEL: *Sharon Kour, William Main, Gabrielle Schachter and Caitlin Fell,* for the Applicants

Shayne Kukulowicz, Colin Pendrith, Natalie Levine, Alec Hoy and Kate Byers, for Canopy Growth Corporation

Josh Nevsky and Skylar Rushton, Alvarez & Marsal Canada, Monitor

Maria Konyukhova, for the Monitor

Martino Calvaruso, for the DIP Lender

Kyle Plunkett and Adrienne Ho, for the Bank of Montreal

Simon Bieber and Jacqueline Houston, Counsel for DAK Capital

HEARD: October 18, 2024

ENDORSEMENT

Overview

[1] On August 28, 2024, this court granted an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "CCAA") providing for, among other items, an initial stay of proceedings against the applicants and certain of their affiliates and the appointment of Alvarez & Marsal Canada Inc. as monitor (the "Monitor"). The applicants own, operate and franchise retail dispensaries and an online platform selling cannabis products and accessories under the name "Tokyo Smoke."

[2] On September 6, 2024, Cavanagh J. issued an amended and restated initial order (the "ARIO") that extended the stay of proceedings up to and including December 6, 2024, and provided various other related relief.

[3] Justice Cavanagh approved a sale and investment solicitation process on September 18, 2024, and on that day adjourned the applicants' motion for a related proceeding stay, the motion before me today, to today's date.

[4] The applicants are currently in the throes of the court-approved sale and investment solicitation process within the CCAA proceedings ("SISP") for which the current bid deadline is November 11, 2024. The closing of the Successful Bid (as defined in the SISP) is expected to take place by December 6, 2024.

[5] Prior to the CCAA proceeding, on March 8, 2024, certain of the applicants, and DAK Capital Inc. ("DAK") were named as defendants (collectively the "TS Respondents") in a Notice of Arbitration filed by Canopy Growth Corporation ("Canopy" and the "Canopy Arbitration").

[6] The Canopy Arbitration alleges breaches of a Share Purchase Agreement dated September 23, 2022, as amended by an Amendment to Share Purchase Agreement dated December 30, 2022 (the "SPA"). DAK is alleged to have guaranteed certain payments claimed to be owing under the SPA. As a result of the stay of proceedings under the initial order and the ARIO, the Canopy Arbitration is (undisputedly) stayed as against all of the defendants therein except DAK.

[7] The issue before me is whether Canopy may proceed in the near term with the Canopy Arbitration as against DAK.

The Parties' Positions Generally

[8] Canopy maintains that there is no impediment to the Canopy Arbitration proceeding as against DAK, and that the Canopy Arbitration ought to proceed expeditiously.

[9] The applicants say that although DAK is solvent and is not subject to the CCAA stay, DAK and the TS Respondents share a centralized management team, that the ongoing Canopy Arbitration will therefore necessitate substantial participation from the TS Respondents, and that

such participation would, if required in the near term, distract from and undermine the engagement of the management team in the SISP and restructuring effort, at a critical time in those endeavors.

[10] I note that the Monitor echoes and supports the applicants' position. In a Supplement to its Second Report, at para. 4.3, the Monitor expresses the view that:

> [T]he attention of the directors, officers and/or employees of the Applicants should be focused on the Applicants' ongoing operational restructuring efforts – including supporting the SISP process. Accordingly, if the continuation of the Canopy Arbitration against DAK necessitates the involvement of the Applicants' management team which may create a distraction for the Applicants, the Monitor would recommend a third party stay in favour of DAK pending completion of the CCAA Proceedings subject to the Court's discretion.

[11] While of course the Monitor's input on the practical implications of the court's decision is helpful and warrants careful consideration, the resolution of the motion before me entails a determination of contested legal issues.

Canopy's Argument Relying on Sections 11.02 and 11.04

[12] That is, specifically, the parties disagree on the threshold question as to whether or not, in these circumstances, this court has the jurisdiction under section 11 of the CCAA to extend the stay of proceedings to encompass DAK.

[13] Canopy asserts that, while orders extending stays of proceedings to third-party guarantors have been made in Ontario, such orders have only ever been made on an unopposed basis, and even then, with cautions uttered by this court about whether or not jurisdiction exists to do so.

[14] Canopy's position is based on the interplay between subsections 11.02 and 11.04 of the CCAA.

[15] Its argument begins with the language of s. 11.04, which provides that:

> 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.

[16] Canopy characterizes this language as clear and unambiguous, and argues that it prohibits the extension of the stay of proceedings to a third-party guarantor.

[17] It points out that s. 11.04 does not, like other sections within Part II of the CCAA (concerning Jurisdiction of the Courts) feature express exceptions and/or provide the court with discretion.

[18] For example, Canopy notes, the prohibition regarding the appointment of a company's auditor as monitor in section 11.7(2) is prefaced with the words "Except with the permission of the court and on any conditions that the court may impose…"

[19] Canopy also argues that it is important to distinguish between a stay of third-party litigation and proceedings involving a guarantee. It says that courts have clearly exercised discretion under s. 11 to stay third-party litigation not involving a guarantee, and that there is no prohibition in the CCAA against the court doing so. On the other hand, Canopy emphasizes, guarantees and letters of credit are singled out in s. 11.04. In response to the applicants' primary submission, discussed below, Canopy asserts that it is "not credible" and in fact "absurd" to suggest that the purpose of s. 11.04 is to ensure that an order under s. 11.02 does not stay proceedings against guarantors while a party can circumvent that prohibition simply by invoking s. 11.

[20] Canopy also maintains, from a policy perspective that it says should influence the interpretation of provisions of the CCAA, that the legislation is explicitly intended to facilitate compromises and arrangements between companies and their creditors, and that it is not the scheme of the CCAA to undermine the rights of a creditor against a third-party guarantor.

The Applicants' Responding Arguments

[21] The applicants' spin on the overriding policy objectives is to note that the CCAA serves important remedial objectives, and that among those objectives is the notion that generally companies retain greater value as going concerns. As such, the applicants assert, reorganization serves the public interest by facilitating the survival of companies for the good of the economy and the "complex web of interdependent relationships, avoiding the harmful consequences of liquidation" (see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379).

[22] The applicants rely, for support of the court's jurisdiction to make the order they seek, on s. 11 of the CCAA. They note the broad purview of s. 11, and that, subject to specified restrictions set out in the Act, the court may make any order that it considers appropriate in the circumstances at hand.

[23] They observe that courts have repeatedly used these broad powers to extend stays of proceedings to non-parties, including guarantors.

[24] In that regard, the applicants reference *Pride Group Holdings Inc.*, 2024 ONSC 1830, a case from earlier this year in which Morawetz C.J. extended a stay of proceedings to include certain guarantors who had provided personal guarantees relative to a CCAA applicant's obligations, and against whom certain lenders had threatened proceedings.

[25] To similar effect, the applicants rely on Morawetz C.J.'s decision in *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014 ("*BBB*").

[26] The applicants also cite Kimmel J.'s decision earlier this year in *Balboa Inc. et al. (Re)*, Court File No. CV-24-00713254, in which Her Honour, in granting a stay in favour of non-applicant parties who had provided guarantees in respect of certain of the applicants' obligations, wrote:

> This is an order that is within the discretion of the court to make when it is considered just and convenient to do so, and I find it to be so in this case. That jurisdiction is derived from s. 11 of the CCAA and further embodied in section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Canopy's Reliance on "Non-Opposition » in *Nordstrom* and *BBB*

[27] In response to these authorities, Canopy points to passages in Morawetz C.J.'s decisions in *Nordstrom* and *BBB*, respectively, in which His Honour extended a "Parent Stay" in the absence of opposition by any landlord (in *Nordstrom*) and extended a Third-Party Stay relative to certain indemnities, again without opposition from affected landlords, (in *BBB*). In doing so, Morawetz C.J. in each case said that, in view of the consensual nature of the requests, the extension of the stays had "no precedential value" and added that "the issue of [non-party stay orders] is not free from doubt."

Discussion of the Recent Relevant Cases

[28] While that is fair and accurate, it does not, in my view, address the decision of Kimmel J. in *Re Balboa*, nor Morawetz C.J.'s decision in *Pride*, which decisions do not repeat Morawetz C.J.'s proviso (in Nordstrom and BBB) about the implications of non-opposition.

[29] In *Re Balboa*, Kimmel J. specifically turned her mind to the passages from Morawetz C.J.'s decisions in *Nordstrom* and *BBB* on which Canopy relies before me, and, after reviewing those and additional authorities bearing on these issues, noted that even in *Nordstrom* and *BBB* Morawetz C.J. had ultimately granted a stay in favour of certain non-applicant guarantors on an initial CCAA application, notwithstanding the language of s. 11.04.

[30] Moreover, Kimmel J. said, at para. 34:

> It is 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 of the very indebtedness that 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.

[31] Justice Kimmel then stated her conclusion that s. 11 confers the jurisdiction to make the (extended) stay order.

[32] Equally compelling is Morawetz C.J.'s decision in *Pride*.

[33] In discussing the submission of the applicants before him that the stay of proceedings should be extended to the Personal Guarantors, he wrote, at paras. 33-35:

> 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…
>
> **Notwithstanding sections 11.04 and 11.03(2) of the CCAA, this Court has found that it has broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director guarantors, to ensure that the intent and purpose of the CCAA proceedings are not frustrated. (See: *Balboa Inc, et al. (Re)* (January 23, 2024), Toronto, CV-24-00713254-00CL at para. 32; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at paras. 40-42).**
>
> **This Court has granted stays in favour of non-applicant director guarantees where their involvement in defending potential claims would unduly strain the Applicants' resources and be a significant distraction from the restructuring efforts to the detriment of all stakeholders.** [Emphasis added]

[34] Accordingly, notwithstanding Morawetz C.J.'s earlier caution about the precedential value (or otherwise) of an unopposed order, it appears clear in *Re Balboa*, cited by Morawetz C.J. with approval in the passage above, and in particular in His Honour's own decision in *Pride*, that he recognizes the jurisdiction conferred by s. 11 to order this type of relief notwithstanding the provisions of s. 11.04.

[35] The applicants argue that this interpretation is supported also by parsing the language of ss. 11.02 and 11.04 and the interplay between them.

[36] The applicants observe, first, that the subparagraphs of subsection 11.02(2) in each case contemplate a stay order in certain prescribed circumstances "against the company." Correspondingly, these provisions do not speak to the court's jurisdiction to grant stays in respect of any other entity.

[37] Section 11.04, the applicants argue, clarifies that orders under s. 11.02 do not on their own affect guarantees in relation to the debtor company. Specifically, s. 11.04 says that:

> 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.

[38] The applicants assert that s. 11.04 simply means that any stay granted by the court over the debtor company using its powers under section 11.02 (which again are expressly limited to "the company") does not affect a guarantee in respect of the debtor company.

[39] In other words, the applicants argue, s. 11.04 is a deeming provision intended to clarify the scope and effect of an order made under s. 11.02, and is not prohibitive. To that end, the applicants contrast the language of s. 11.04 with the language of, for example, s. 11.08: "No order may be made under section 11.02 that…"

[40] The applicants argue that Parliament made a choice not to use such prohibitive language in s. 11.04, and that therefore s. 11.04 does not bar any relief under s. 11.02, or delimit the court's authority generally (as found in s. 11) to make an order staying a guarantee.

[41] The applicants also note in this respect that s. 11.04 does not purport to limit or clarify the relief that may be granted under the general powers of s. 11. As such, say the applicants, s. 11.04 must be read by the court so as not to frustrate the remedial effect of the CCAA by restricting the court's broad powers under s. 11.

The Gage and Courtis Article

[42] In support of their argument concerning the proposition that s. 11.04 only applies to specified stays of proceedings against the debtor company under s. 11.02, the applicants rely on the 2022 article by James D. Gage and Trevor Courtis: "Staying Guarantees by Non-Debtors and Section 11.04 of the CCAA" (2022) 20 Annual Rev. Insolvency L., 2022 CanLIIDocs 4310 (the "Gage and Courtis Article").

[43] The Gage and Courtis Article traces the evolution of the relevant provisions, and notes that the predecessor to s. 11.04 did contain the kind of blanket prohibition that the respondents wish to read into s. 11.04. That predecessor section, s. 11.2, provided that:

> No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

[44] This blanket prohibition was removed as part of a 2009 amendment to the CCAA.

[45] Mr. Gage and Mr. Courtis conclude:

> On balance, the factors seem to weigh in favour of a narrow interpretation of section 11.04 that would maintain the CCAA court's flexibility to grant stays of proceedings that are necessary to facilitate the restructuring of the debtor company while preserving the court's discretion to refuse to extend stays to issuers of letters of credit and guarantors if it is not appropriate to do so in the circumstances of a particular case.

Conclusion re Operation of Section 11

[46] I find this logic compelling, and it leads me to join company with Kimmel J. and Morawetz C.J. in the view that the court may stay guarantee claims under s. 11 in appropriate circumstances.

[47] I also find that the circumstances before me qualify as appropriate circumstances in which to extend the stay to DAK.

[48] While there is a debate between the parties as to whether or not the evidence demonstrates that the applicants' management will be distracted and occupied by the Canopy Arbitration to the extent they claim, I accept and rely upon the Monitor's view, as a court-appointed officer, that allowing the Canopy Arbitration to proceed would be counterproductive to the SISP and the overall restructuring effort.

Discussion of Two Alberta Cases Cited by Canopy

[49] I should note before concluding that Canopy cites and relies on two cases from Alberta that it says support its interpretation of the interplay between s. 11.02 and s. 11.04, and its position that no stay should be extended here.

[50] It appears to me that the first of those cases, *Northern Transportation Company Limited (Re)*, 2016 ABQB 522, was driven by factors other than an analysis of the effect of s. 11, 11.02 and 11.04 of the CCAA.

[51] Paragraphs 43 and 44 of that decision, in my view, provide insight into what was animating the court in that case, being such factors as the location of the corporate debtor, the location of the non-consumer good collateral, and conflicts with the governing law clause chosen by the parties in their contract, and a concern that the B.C. PPSA did not give the court the ability to intervene "to relieve the debtor from the consequences of the default, or to stay enforcement of any payment acceleration provision of a security agreement that triggers upon default."

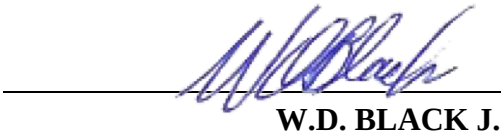
[52] Meaning no disrespect, the court's interpretation of the effect of the relevant provisions of s. 11 of the CCAA is not the subject of detailed analysis and is not in any event the basis on which the decision turns.

[53] The other Alberta decision, the decision of Nixon A.C.J. in *Mantle Materials Group Ltd. (Re)*, 2024 ABKB 19, in fact references a passage from Northern Transportation leaving open the granting of stays in "certain exceptional circumstances", cites the Gage and Courtis Article with approval, and finds that the case was one in which it was appropriate to extend the stay as requested: at paras. 57-58. I find that this decision is consistent with the Ontario cases cited above, and in no way disinclines me to grant the relief I propose to grant.

Conclusion

[54] Accordingly, I grant the applicants' motion, and extend the stay to DAK as requested.

[55] I do not propose to do so indefinitely. Once there is an approved bid pursuant to the current SISP and once the resulting transaction is completed, the stay vis-à-vis DAK should be lifted and the Canopy Arbitration should proceed.



W.D. BLACK J.

DATE: November 6, 2024