Court File No.: CV-21-00669445-00CL

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 MCEWAN ENTERPRISES INC.

FACTUM OF FIRST CAPITAL HOLDINGS (ONTARIO) CORPORATION

(Motions Returnable on December 8, 2021)

December 7, 2021

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PART I – OVERVIEW

1. Since the outset of this proceeding, McEwan Enterprises Inc. (the "**Debtor**") has used and abused the CCAA with one impermissible goal in mind: to sell its business to its shareholders for the lowest price possible without testing the market, all in contravention of section 36 of the CCAA.

2. The Debtor has brought multiple meritless motions, which it has either lost or withdrawn at the last minute, at great expense to itself and the Debtor's stakeholders. Now, after incurring well over $1 million in professional fees (if not more) pursuing a goal it knew was impermissible from the beginning, the Debtor conveniently says (without supporting evidence) that its business is in jeopardy and has no time or money to do what it is supposed to do – engage in good faith efforts over a meaningful period of time, with a meaningful breadth of eligible bidders and meaningful due diligence disclosure, to try and sell its assets to the market for the *highest* price possible.

3. The terms of the Debtor's so-called "*bespoke truncated [sale] process*" are once again designed to ensure that no one other than the Debtor's shareholders has any reasonable chance to purchase the business.

4. This cycle must end. The steps taken by the Debtor cannot be construed as fair or balanced, notwithstanding the Debtor's repeated assertions to the contrary.

5. First Capital Holdings (Ontario) Corporation ("**First Capital**") opposes the terms of the Debtor's self-serving "*bespoke truncated [sale] process*" that is the subject of the Debtor's current motion, and opposes the Debtor's continued irresponsible dictation of the steps being taken (or not taken) in this proceeding. It is time that the Debtor be relieved of its responsibilities, and that an independent receiver be substituted in its place so that a meaningful sale process can be conducted to demonstrate what the market value of the business really is.

PART II – FACTS AND PROCEDURAL HISTORY

6. Capitalized terms not otherwise defined below are defined as they appear in First Capital's previous factum dated November 24, 2021, upon which First Capital continues to rely.

7. In late September 2021, the Debtor commenced this CCAA proceeding with the stated purpose of consummating a related-party transaction that "*contemplates the transfer of substantially all of the assets and the assumption of substantially all the liabilities of the [Debtor], with the exception of certain excluded agreements and liabilities, to the current owners of the [Debtor]*" (the "**Related Party Transaction**"). In substance, these exclusions consist of the Debtor's obligations to First Capital under the Y&B Lease.

Affidavit of Dennis Mark McEwan sworn September 27, 2021 [Initial McEwan Affidavit] at paras. 1 and 8.

Supplement to the Third Report of the Monitor dated December 2, 2021 [Third Report Supplement] at para. 4.5(iii)(d).

8. At the comeback hearing on October 7, 2021, First Capital requested that the Debtor's motion to approve the Related Party Transaction (the "**First Related Party Transaction Approval Motion**") be adjourned from October 15, 2021 until a satisfactory sale process is implemented and completed in the CCAA proceeding. The Debtor opposed such an adjournment, and opposed running any form of sale process.

Affidavit of Jordan Robins sworn November 4, 2021 [Robbins Affidavit] at para. 34.

9. First Capital then proposed its own purchase transaction on October 11, 2021, in substantially the same form as the Related Party Transaction but inclusive of the Y&B Lease, a 14-day due diligence period and associated interim financing (the "**First Capital Transaction**"). The Monitor described the First Capital Transaction as "*on its face, financially superior*," but the Debtor still did not back-down from seeking approval of the Related Party Transaction and continued to reject any form of sale process, even when financing to run a sale process was offered by First Capital.

Robins Affidavit at paras. 48-49.

10. The First Related Party Transaction Approval Motion was heard on October 15, 2021. During the hearing, the Debtor's counsel advised that if it lost the motion, the Debtor would proceed through a bankruptcy process to seek approval of the Related Party Transaction, again without running a sale process or comparable good faith arm's-length sale efforts. The Debtor's counsel went so far at the hearing to: (i) offer to obtain an undertaking that the Debtor would become bankrupt in the event it lost its motion; and (ii) describe First Capital as a gambler if it thought the Debtor would not follow-through with the bankruptcy.

Robins Affidavit at para. 32.

11. The Debtor's motion to approve the Related Party Transaction in the CCAA proceeding was dismissed pursuant to reasons dated November 1, 2021. Featuring prominently in these reasons is the Related Party Transaction's non-compliance with section 36(4) of the CCAA.

First Related Party Transaction Endorsement.

12. The Debtor did not follow-through with its bankruptcy threat.

Robins Affidavit at para. 32.

13. On November 4, 2021, First Capital served a motion record[1] to appoint a receiver over the Debtor so that a meaningful sale process could be conducted. First Capital's motion, which the Debtor described as "*premature*," has still not been heard.

Robins Affidavit at para. 55.

14. On November 12, 2021, the Debtor served a motion seeking to approve a revised version of the Related Party Transaction, with such substantive revisions comprising an increase in the proposed purchase price thereunder (collectively, the "**Second Related Party Transaction Approval Motion**").[2]

Affidavit of Dennis Mark McEwan sworn November 12, 2021 [Third McEwan Affidavit] at paras. 12-15.

15. This increased consideration belied the Debtor's submissions to Court only a few weeks earlier, when, as part of the First Related Party Transaction Approval Motion, the Debtor stated:

> No other transaction can result in better recovery for stakeholders. No sale process will produce a better result. The highest consideration, from a financial and social point of view, is the proposed Transaction.

Factum of the Debtor dated October 13, 2021 at para. 14.

16. As was the case with the First Related Party Transaction Approval Motion, the Debtor continued to refuse to run a sale process or otherwise expose its assets to the market as part of the Second Related Party Transaction Approval Motion. In substance, the Second Related Party Transaction Approval Motion was nothing more than a substantive repeat of the First Related Party Transaction Approval Motion.

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[1] The notice of motion was served on November 2, 2021.

[2] Increasing the cash payment to First Capital from $520,000 to $2.2 million, and leaving certain equipment in place.

17. On November 30, 2021, three days before the Second Related Party Transaction Approval Motion was to be heard (and after all other litigation steps in respect of same had been completed), the Debtor advised that:

(a) it was purportedly "*withdrawing*" the Second Related Party Transaction Approval Motion "*without prejudice*;" and

(b) would now be asking the Court, still in three days time, to approve a highly truncated set of purported sale procedures (the "**Sale Procedures**"), with bids due in mere days. No new evidence was filed by the Debtor to explain why the Debtor had changed course or to justify the specifics of the proposed Sale Procedures.

Amended Notice of Motion of the Debtor dated November 30, 2021 [Debtor's Amended Notice of Motion].

18. On their face, the Sale Procedures contain a number of highly-irregular and concerning terms, which, if approved, would discourage meaningful participation by bidders and frustrate the overall "value maximization" purpose of conducting a sale process. These include:

(a) prohibiting anyone from bidding other than the Related Party Purchaser and First Capital;

(b) imposing an almost immediate bid deadline of December 10, 2021;

(c) pairing that almost immediate bid deadline with bid submission requirements that cannot realistically be satisfied by such date by anyone other than the Related Party Purchaser;

(d) allowing the Related Party Purchaser, as the so-called "*stalking horse bidder*," to conceal the aggregate consideration being offered under its so-called "*stalking horse bid*," such that the benchmark offer to beat is not ascertainable;

(e) entitling the Related Party Purchaser to "*a stalking horse break fee in an amount to be agreed with the Monitor and in any event no greater than $390,000,*" and requiring any competing offer to provide for payment of same; and

(f) positioning the entire process as being "*supervised*" by the Monitor, while expressly granting the Debtor a reservation of rights clause, pursuant to which the Debtor is not required to complete *or accept* any bid.

Sale Procedures, at paras. 2, 4, 5, 6, 8, 10(a), 10(f) and 14 [emphasis added].

19. On December 2, 2021, one day before the motion, the Monitor filed its Third Report Supplement, in which (amongst other things) the Monitor advised that:

(a) the Monitor "*was provided with an opportunity to review and comment on the draft Sale Procedures and certain of the Monitor's comments were incorporated in the Sale Procedures*;"

(b) the Monitor was "*not yet able to take a position*" on an adjournment request by First Capital arising from the short service of the Debtor's new motion;

(c) the Monitor believed the bid deadline should be extended from December 10, 2021 to December 17, 2021 "*regardless of the outcome of [First Capital]'s adjournment request*;" and

(d) the Debtor had "*undertaken to provide the Monitor with a minimum of two business days' notice of any material step it wishes to take in the CCAA Proceedings*."

Third Report Supplement at paras. 4.1, 4.9, 4.10 and 8.1 [emphasis added].

20. At the hearing on December 3, 2021, the Debtor opposed First Capital's request for an adjournment. The Monitor did not take a position on First Capital's adjournment request. The Court granted an adjournment to the afternoon of December 8, 2021.

PART III – ISSUES

21. The substantive issues to be determined are whether the Debtor's "*bespoke truncated*" Sale Procedures should be approved, and, if not, whether a receiver should be appointed at this time.

PART IV – LAW AND ARGUMENT

22. Contrary to the proposed Sale Procedures, a valid sale process ensures "*maximum realization by obtaining as many advantageous offers as possible*." There must be "*some demonstration by the [debtor] that reasonable attempts have been made to properly canvass the market*." This has a "*heightened importance if a sale to a person related to the debtor is envisaged, given that, in such circumstances, the debtor has an interest in selling its assets for a price below fair market value*."

> **Jason Dolman and Gabriel Faure, "Preplan Sales under Section 65.13 BIA and Section 36 CCAA" (2017) 59 Canadian Business Law Journal 333 [Preplan Sales], s. III (Solicitation of Potentially Interested Purchasers; Sale to a Related Party) (https://ln5.sync.com/dl/9bdcba170/xxpbcar2-yw52i9mc-dnkqce7m-x73rgqwc).**
>
> ***American Iron v. 1340923 Ontario*, 2018 ONSC 2810 [Comm. List] (https://canlii.ca/t/hs6k6) [*American Iron*] at para. 44.**
>
> ***Mechachrome Canada Inc. (In the matter of the plan of compromise or arrangement of) c. Ernst & Young Inc.*, 2009 QCCS 6355 (https://canlii.ca/t/28rhk) [*Mechachrome*] at paras. 35 and onwards.**

23. Rather than seek the best offers to maximize value, the proposed Sale Procedures are designed to supress offers and conceal the true value of the Debtor's assets. If approved, they would enable the Debtor to do the very thing that is prohibited (but what it has consistently tried to achieve since the outset of this proceeding) – sell its assets to the Related Party Purchaser for the lowest price possible below fair market value.

24. There is simply no support behind the Debtor's statement that "*A broader third party sale process would not result in a higher offer for the Business than an offer from the [Related Party] Purchaser or First Capital*." Much ink has been spilled in this proceeding about the asset value that the Debtor wishes to jettison (i.e., the Y&B Lease with First Capital) (the "**Proposed Jettisoned Asset**"), but the record is conspicuously thin about the asset value that the Debtor wishes to retain (i.e., everything else) (the "**Proposed Retained Assets**"). It is precisely for this reason that a meaningful canvassing of the market is required.

Debtor's Amended Notice of Motion at para. 31.

25. Other than First Capital's ownership of the hotel property from which ONE Restaurant operates, First Capital is as equally informed and uninformed about the value of the Proposed Retained Assets as any other sophisticated bidder who would normally also be granted the opportunity to perform due diligence as part of a meaningful canvassing of the market.

Robins Affidavit at para. 28.

26. What really differentiates First Capital from other sophisticated third-party bidders is First Capital's role as the counter-party to the Proposed Jettisoned Asset, and, as a result, the submission by First Capital to the Monitor of the protective First Capital Transaction that includes the Proposed Jettisoned Asset. While that is certainly a reason to include First Capital as an eligible bidder under any meaningful sale process, it is no reason to exclude everyone else. Such exclusion is not a proper canvassing of the market, which is extremely prejudicial to First Capital given that it faces lost rent under the Y&B Lease of approximately $26.5 million.

Preplan Sales, s. III.
***American Iron* at para. 44.**
***Mechachrome* at paras. 35 and onwards.**
Third Report of the Monitor dated November 24, 2021 at footnote 3.

27. Given First Capital's significant claim arising from the Proposed Jettisoned Asset, and given the Debtor's decision not to bankrupt itself at this time, First Capital's monetary recovery is not limited to realizations from the Proposed Jettisoned Asset. Accordingly, to the extent a third-party bidder submits a better offer than both First Capital and the Related Party Purchaser, the benefits of same flow first to First Capital as the only remaining creditor.

> ***Bankruptcy and Insolvency Act*** **(Canada), s. 136(1)(f).**

28. First Capital remains prepared to proceed with the First Capital Transaction on its terms and remains prepared to submit an offer akin to the First Capital Transaction in a sale process, but First Capital is a rationale economic participant and is entitled to have its significant claim satisfied by the best offer available on the market. First Capital's agenda is to protect and mitigate its claim. First Capital should not be penalized because the Debtor has incurred professional fees "*north of a million dollars*" resisting a competitive sale process for months.

> **Preplan Sales, s. III.**
>
> ***American Iron*** **at para. 44.**
>
> ***Mechachrome*** **at paras. 35 and onwards.**
>
> **Transcript of the Cross-Examination of Mark McEwan conducted on November 19, 2021 at questions 128-130.**

29. There is good reason to suspect that a truly competitive sale process would cause everyone, including the Related Party Purchaser, to "*sharpen their pencils*" and generate as much value as possible for the business opportunity. For example, while no material financial information about ONE Restaurant has been filed by the Debtor or the Monitor in this proceeding, despite this location constituting an important (and presumably valuable) part of the Debtor's business, First Capital's evidence as landlord of the hotel from which ONE Restaurant operates is that ONE Restaurant is highly profitable. First Capital's evidence is uncontested.

> **Robins Affidavit at paras. 27-28.**

30. Similarly, there has been no material financial information filed by the Debtor or the Monitor in respect of any of the Debtor's other Proposed Retained Assets. The Monitor does not provide any evidentiary support for the statement in its Third Report Supplement that "*it would be uneconomical for a third-party purchaser to take an assignment of the five Cadillac Fairview Leases (which make up the majority of [the Debtor]'s business) without significant concessions from the Cadillac Fairview Entities*."

Third Report Supplement at para. 4.5(iii)(c)(III).

31. First Capital has been denied access, even on a confidential basis, to the lease amending agreements between the Debtor and Cadillac Fairview (which the Debtor claims have now expired) and to written communications with Cadillac Fairview to the extent they touch upon the new proposed rent arrangements, notwithstanding: (i) how important they supposedly are to the successful restructuring of the business; and (ii) the reliance placed on them by the Debtor.[3] Production of both the new and supposedly expired rent arrangements with Cadillac Fairview was refused by the Debtor, even confidentially, on the basis of being "*Not relevant*."

Answers to Questions Taken Under Advisement on the Cross-Examinations of Dennis Mark McEwan, at nos. 16, 26 and 28.

Third McEwan Affidavit at para. 21.

Third Report Supplement at para. 4.5(iii)(c)(III).

32. Under these circumstances, the Court should be highly suspicious of the Debtor's motivations behind the proposed two-bidder and abbreviated bid date Sale Procedures, even before analyzing the other features of the Sale Procedures.

Preplan Sales, s. III.

***Hypnotic Clubs Inc.*, 2010 ONSC 2987 [Comm. List] (https://canlii.ca/t/29vps) at para. 35.**

[3] Mr. McEwan swore that "*the reduced rent arrangements between the parties will only be available to the [Debtor] upon completion of its proposed transaction with the [Related Party] Purchaser, and in the interim, the [Debtor] has agreed with the Cadillac Fairview Entities that it will pay full contractual rent for the period since the commencement of the CCAA proceeding*."

33. In addition to the Sale Procedures prohibiting, on their face, the participation of bidders other than the Related Party Purchaser and First Capital, the Sale Procedures also contain at least four substantive elements that discourage bidders from participating and value from being maximized, as set out in the below table:

Discouraging Elements	**Comments**
All bids must be submitted by December 10, 2021 (as proposed by the Debtor) or December 17, 2021 (as proposed by the Monitor), and must be accompanied by the following (amongst other things): • a description of the legal basis for the assumption of any obligations, accompanied by any required counterparty consents; and • a business plan, including details of any contemplated changes to the current terms and conditions of employment for employees, any contemplated changes to the current operations and/or locations of the business and details regarding the go-forward capital structure of the business.	A two-day or nine-day sale process in December is designed to frustrate the ability for anyone other than the Related Party Purchaser and First Capital from bidding, and make it all but impossible for First Capital's bid to win. The requirement to provide counterparty consents in this limited window of time will all but guarantee that the Related Party Purchaser is designated the winner by default. The Debtor knows that First Capital (or any arm's-length bidder) cannot realistically obtain counterparty consents in such short period of time. Even the Related Party Purchaser, which has been negotiating with Cadillac Fairview for months, is still "*working to finalize satisfactory arrangements on a consensual basis with the Cadillac Fairview Entities*."[4] The Monitor also "*expects [that it] would be difficult for a third-party to obtain [this] in a reasonable time frame, if at all*."[5] As stated earlier in this factum, First Capital has been denied access, even on a confidential basis, to the lease amending agreements between the Debtor and Cadillac Fairview and to written communications with Cadillac Fairview to the extent they touch upon the new proposed rent arrangements, notwithstanding how important they supposedly are to the successful restructuring of the business. The requirement for a business plan is curious, considering that the Debtor itself does not have one.[6]
The Related Party Purchaser may amend the consideration to be provided to First Capital under the Related Party Transaction, which bid will serve as a stalking horse bid for the purpose of the sale process, but any bid submitted by a participating bidder must be no less favourable than the stalking horse bid.	The terms of the stalking horse bid are unknown, such that the baseline offer that needs to be beaten by a participating bidder is also unknown. Accordingly, a participating bidder is unable to comply with the requirement of the Sale Procedures to submit a better bid (and the supposed "stalking horse bid" is not really a stalking horse bid).

[4] This language, which appears most recently in the Debtor's Amended Notice of Motion dated November 30, 2021 (at paragraph 16) also appeared in the initial affidavit of Mr. McEwan dated September 27, 2021 (at paragraph 100) in support of the very commencement of this CCAA proceeding.

[5] Third Report Supplement (at paragraph 4.5(iii)(c)(III)).

[6] Answers to Questions Taken Under Advisement on the Cross-Examinations of Dennis Mark McEwan (at nos. 2,8).

The Related Party Purchaser shall be entitled to a stalking horse break fee in an amount to be agreed with the Monitor and in any event no greater than $390,000, and any bid by First Capital (or presumably any other arm's-length bidder, if permitted to participate) must provide for payment of this stalking horse break fee in cash to the Related Party Purchaser.	No justification is provided by the Debtor or the Monitor for a stalking horse break fee, particularly to a related party (and particularly when the related party's bid is not really even a stalking horse bid). No justification is provided by the Debtor or the Monitor for the purpose of the stalking horse break fee. Presumably, the Related Party Purchaser incurred $nil conducting due diligence (unlike First Capital or other arm's-length bidders), given the identical ownership of the Debtor and the Related Party Purchaser. The effect of the stalking horse break fee[7] is to chill the market from participating, penalize First Capital, make it more difficult to maximize value for the business/assets and create a funding source for the professional fees for which the Debtor/Related Party Purchaser is responsible.
The process is "*supervised*" by the Monitor, but the Debtor shall not be required to accept or complete any bid submitted thereunder.	In other words, the Debtor has the right to "*call the whole thing off*" if the Related Party Purchaser is not declared the winner. This is reminiscent of, and consistent with, the Debtor "*withdrawing*" its Second Related Party Transaction Approval Motion "*without prejudice*." Even without the reservation of rights clause, it is concerning that the Debtor would run the process in which its Related Party Purchaser is bidding, particularly given that the ownership of both the Debtor and its Related Party Purchase are identical.

34. The proposed Sale Procedures also raise significant concerns in respect of section 36 of the CCAA, from which the Debtor has been desperately (but unsuccessfully) trying to escape since the commencement of this CCAA proceeding. These concerns include:

(a) section 36(3)(f) of the CCAA, which requires the Court to consider "*whether the consideration to be received for the assets is reasonable and fair, <u>taking into account their market value</u>*" [emphasis added], which market value would be unexplored if these Sale Procedures are implemented;

[7] *American Iron* at paras. 35 and onwards.

(b) section 36(4)(a) of the CCAA, which prohibits the so-called stalking horse bid from being approved by the Court unless good faith efforts are made to sell or otherwise dispose of the assets to persons who are not related to the Debtor. Running a truncated process for a few days that is only open to one unrelated participant is far from the good faith efforts standard; and

(c) section 36(4)(b) of the CCAA, which prohibits the so-called stalking horse bid from being approved unless the consideration to be received is "*superior*" to the consideration that would be received under "*any other offer made in accordance with the process leading to the proposed sale or disposition.*" Section 36(4)(b) of the CCAA is therefore inconsistent with the Related Party Purchaser's purported ability under the Sale Procedures to amend downwards the consideration to be provided to First Capital from the most recent iteration of the Related Party Transaction (i.e., the Related Party Purchaser's latest supposed "best" offer).

CCAA, s. 36.

35. The Court should not approve these grossly inadequate Sale Procedures on the basis of the Debtor supposedly "*remain[ing] very concerned that further ongoing time and uncertainty … and further delays in implementing a going concern restructuring transaction that protects all stakeholders will cause irreparable harm and damage to the Business and stakeholders.*" If the Debtor and its other stakeholders were truly concerned about this (not that there is any evidence of irreparable harm, beyond the Debtor's wasted professional fees), they would not have embarked upon repeated meritless motions over the past two months that they knew had a likely chance of being dismissed.

Debtor's Amended Notice of Motion at para. 29.

36. Mr. McEwan was asked on cross-examination whether the other major creditors in this proceeding who supported the Related Party Transaction also warned him "*that there was a very real risk that the Court would not approve the transaction without a sale process*," he answered:

> A. There had been discussion that that could be possible.
>
> 122 Q. Was that concern raised by just one of them or was it several of them or were they all raising that concern with you? What's your recollection?
>
> A I don't recall how may in the original conversation. It had been discussed. We analyzed all sides of it, but we came to the determination that we came to.

Transcript of the Cross-Examination of Mark McEwan conducted on November 19, 2021, at questions 121 and 122.

37. The Debtor came to the determination that it came to, and embarked upon the route that it embarked upon, and must live with the consequences of those decisions. It could have agreed upon a meaningful sale process months ago, as First Capital repeatedly requested, but it did not do so.

Appointment of A Receiver

38. If the Court dismisses the substance of the Debtor's current motion, which First Capital submits is the only reasonable outcome, then the Debtor will have been unsuccessful on four separate attempts to approve its Related Party Transaction in one form or another – once on the Debtor's original motion, twice on the withdrawn motion and once again on the current motion. The Debtor has also already conceded that there is no possibility of a CCAA plan of arrangement, and the Debtor has also repeatedly refused to run a *meaningful* CCAA sale process.

Debtor's Amended Notice of Motion at para. 30.

39. These CCAA proceedings have no realistic, good faith future. The time has come for the Court to remove the Debtor from the driver's seat, and to appoint an independent receiver. Doing so is not only just and convenient, but it is the only reasonable way forward given the Debtor's repeated refusals to run a sale process in the CCAA.

CCAA, ss. 11.02 and 18.6.

***Courts of Justice Act* (Ontario) [CJA], s. 101.**

Robins Affidavit at para. 55.

40. Section 101 of the CJA provides the Court with extremely broad discretion to appoint a receiver "*where it appears to a judge of the court to be just or convenient to do so*." There are no pre-conditions for the exercise of a Court's discretion to appoint a receiver.

CJA, s. 101.

***DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 [Comm. List] (https://canlii.ca/t/g1wgz) at paras. 51-53.**

41. Unlike the Debtor, First Capital is not requesting to place any pre-conditions on, or otherwise handcuff, a proposed independent court officer. The relief sought by First Capital is consistent with the Model Receivership Order of the Commercial List, and includes the standard provisions, including, without limitation: (i) permitting the receiver to market the Debtor's assets, which, in this case, is proposed to be done "*with the approval of the Court*" on a motion that the receiver would presumably bring in short order to advance a meaningful sale process; and (ii) compelling the Debtor to furnish its books and records to the receiver upon the receiver's request, which would be of assistance in populating a due diligence data room for interested purchasers with the material information that they actually need to make an informed decision.

CJA, s. 101.

***Graceway Canada Company (Re)*, 2011 ONSC 6292 [Comm. List] (https://canlii.ca/t/fnk4q), with additional reasons at 2011 ONSC 6403 [Comm. List] (https://canlii.ca/t/fnm5v).**

42. Empowering an independent receiver in this way, in such a manner that is consistent with the Model Receivership Order of the Commercial List, will finally permit: (i) meaningful canvassing of the market; (ii) meaningful due diligence by interested market participants; and (iii) meaningful understanding by the Court and the Debtor's stakeholders of what the best available offer really is without relying exclusively on the Debtor's untested and self-serving beliefs.

PART V – RELIEF REQUESTED

43. It is respectfully submitted that the Debtor's motion once again be dismissed in its entirety, and that First Capital's receivership motion finally be heard and granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2021

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SCHEDULE "A"

AUTHORITIES CITED

Jurisprudence

1. *American Iron v. 1340923 Ontario*, 2018 ONSC 2810 [Comm. List].
2. *Mechachrome Canada Inc. (In the matter of the plan of compromise or arrangement of) c. Ernst & Young Inc.*, 2009 QCCS 6355.
3. *Hypnotic Clubs Inc.*, 2010 ONSC 2987 [Comm. List].
4. *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 [Comm. List].
5. *Graceway Canada Company (Re)*, 2011 ONSC 6292 [Comm. List], with additional reasons at 2011 ONSC 6403 [Comm. List].

Secondary Sources

1. Jason Dolman and Gabriel Faure, "Preplan Sales under Section 65.13 BIA and Section 36 CCAA" (2017) 59 Canadian Business Law Journal 333.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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

Stays, etc. — initial application
11.02 (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.

…

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court
(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

…

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of

the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

….

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

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 MCEWAN ENTERPRISES INC.

Court File No.: CV-21-00669445-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF FIRST CAPITAL HOLDINGS (ONTARIO) CORPORATION

(Motions returnable on December 8, 2021)

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