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 November 26, 2021)

November 24, 2021

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PART I – NATURE OF THE COMPETING MOTIONS

1. McEwan Enterprises Inc. (the "**Debtor**") has already lost its motion to authorize the sale of its business to an insider group without running a sale process or otherwise complying with section 36(4) of the CCAA.

2. The Debtor has now brought a second motion, in which it once again asks that the same substantive relief be granted – for implementation of a slightly modified sale transaction within the CCAA proceeding itself (for a second time), or, alternatively, in some future hypothetical receivership (while the CCAA proceeding continues in the interim).

3. There is no merit to the Debtor's motion. In light of the Debtor's consistent refusal to run a sale process or otherwise test the market, there is also no future for this CCAA proceeding.

4. First Capital Holdings (Ontario) Corporation ("**First Capital**") has brought a motion to end this "Groundhog Day" cycle by appointing a receiver over the Debtor so that a sale process can be conducted. Such relief will finally enable the Debtor's stakeholders and the Court to evaluate what the fair market value of the business opportunity really is.

PART II - FACTS

5. The Debtor operates a portfolio of high-end restaurants, grocery stores, food halls and catering services. The Debtor's principal is Dennis Mark McEwan, who, through his holding company, owns 45% of the Debtor's equity interest. The other 55% is owned by a subsidiary of Fairfax Financial ("**Fairfax**").

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

Affidavit of Jordan Robins sworn November 4, 2021 [Robins Affidavit] at para. 7.

Endorsement of The Honourable Mr. Chief Justice Morawetz dated November 1, 2021 [First Related Party Transaction Endorsement] at para. 8.

6. First Capital is one of the Debtor's landlords. First Capital is a leading owner, operator and developer of grocery-anchored and mixed-use real estate located in Canada's most densely populated cities. First Capital is a landlord to every major grocery store chain in Canada, and its portfolio includes leases with 126 grocery stores occupying 4.1 million square feet, or 21% of First Capital's total gross leasable area.

Robins Affidavit at paras. 4 and 14.

The Y&B Premises

7. In 2019, the Debtor opened a food hall-style grocery store with an integrated restaurant and catering business branded as "McEwan" from the concourse level at 1 Bloor Street East, in Toronto (the "**Y&B Premises**"). First Capital is the Debtor's landlord at the Y&B Premises, which is located in one of Toronto's most prestigious and prominent areas for shopping, dining and living. Due to its location and proximity to public transportation, condominiums and office towers, the Y&B Premises attracts a substantial volume of daily vehicular and pedestrian traffic.

Robins Affidavit at paras. 6, 8, 9 and 10.

8. The initial term of the Debtor's lease at the Y&B Premises dated April 27, 2018 (the "**Y&B Lease**") runs for a period of 15 years. The Debtor has concluded that one year's worth of rent under the Y&B Lease totals approximately $2.2 million. Rent under the Y&B Lease includes annual minimum rent (approximately $1.1 million in the first year, with annual increases of 1.5% thereafter), and additional obligations associated with common area maintenance and realty taxes.

Robins Affidavit at paras. 10 and 11.

Affidavit of Dennis Mark McEwan sworn November 12, 2021 [Third McEwan Affidavit] at para. 13.

9. Following an initial fixturing period, the Debtor began operating at the Y&B Premises in January 2019. In the 28-month period thereafter, the Debtor sought and obtained four material financial accommodations from First Capital, which substantially reduced the Debtor's rent obligations. These accommodations assisted the Debtor at its new location (and, as a result, more generally). The details of these accommodations are summarized below:

April 2019	Upon receipt of approximately $600,000 in rental arrears, First Capital agreed to lower the Debtor's annual minimum rental obligations at the Y&B Premises for the remainder of the year. This included reducing annual minimum rent for the first year to approximately $850,000 (a reduction of approximately $245,000).
June 2019	First Capital agreed to further reduce minimum rent at the Y&B Premises for the period between May 1 and December 31, 2019 to approximately $366,000 (being a further reduction of approximately $122,000).
April 2020	First Capital agreed to additional accommodations at the Y&B Premises, including reducing rent for the period between January 1 and June 30, 2020 from approximately $580,000 to approximately $285,000 (a reduction of approximately $295,000). Pursuant to this amendment, the Debtor was obligated to invest the abated rent into marketing for the Y&B Premises as a means to enhance its exposure and grow sales, but the Debtor did not do so.
April 2021	First Capital agreed to temporarily waive the Debtor's obligation to pay minimum rent at the Y&B Premises for the period between November 2020 and April 30, 2021. Instead, the Debtor was only required to pay gross rent equivalent to 11.5% of the Debtor's gross revenue during that period. In contravention of the amendment, the Debtor continued to pay percentage rent only until it filed for CCAA protection in September 2021.

Robins Affidavit at paras. 15-21.

10. Despite First Capital's significant accommodations, including assisting the Debtor with its liquidity during the Covid-19 pandemic (the "**Pandemic**"), the Debtor continued to demand further concessions from First Capital.

Robins Affidavit at para. 22.

11. First Capital continued, as it had done on many prior occasions, to engage in good faith discussions with the Debtor regarding potential options for the Y&B Premises. Unlike the previous rounds of negotiations, many of which occurred during the heart of the Pandemic and resulted in First Capital providing significant concessions to the Debtor, the most recent negotiations were conducted during a phase of emergence from the Pandemic and did not advance to a resolution.

Robins Affidavit at para. 23.

ONE Restaurant

12. While First Capital and the Debtor were still engaged in ongoing discussions regarding the Y&B Lease, the Debtor effected a transfer of one of its businesses to a subsidiary company in August 2021. This transferred business is the Debtor's 50% interest in a luxury restaurant located at The Hazelton Hotel in Yorkville, called ONE Restaurant.

Robins Affidavit at para. 26.

13. First Capital owns a 100% interest in the hotel property from which ONE Restaurant operates. Based on annual sales revenue data provided to First Capital in its capacity as landlord of ONE Restaurant, First Capital understands that this location is highly profitable for ONE Restaurant.

Robins Affidavit at para. 28.

14. The reasons for the transfer of the Debtor's entire 50% interest in ONE Restaurant have never been explained. The Monitor advised in its Second Report that the transfer was "*undertaken for legitimate business and corporate purposes*," but these purposes have not been disclosed. First Capital did not learn about the transfer from the Debtor until it filed for CCAA protection. No material information about ONE Restaurant has been filed in these CCAA proceedings, despite it constituting an important (and presumably valuable) part of the Debtor's business.

Robins Affidavit at paras. 27-28.

The CCAA Proceedings and the Related Party Transaction

15. After benefiting from First Capital's many concessions prior to and during the worst phases of the Pandemic, and after having transferred the Debtor's interest in ONE Restaurant for unexplained purposes, the Debtor commenced CCAA proceedings in late September 2021, without prior notice to First Capital.

Robins Affidavit at para. 24.

16. From the outset, the primary purpose of the CCAA proceedings was to disclaim the Y&B Lease by seeking approval of a sale to the Debtor's insider group (the "**Related Party Transaction**") of substantially all the Debtor's business and assets (including the Debtor's now indirect interest in ONE Restaurant), without conducting a sale process or otherwise making good faith efforts to sell or dispose of the assets at arm's length. The ownership of the proposed purchaser under the Related Party Transaction mirrors the ownership of the Debtor.

Robins Affidavit at para. 24.

17. On its face, the Debtor's intentions for the CCAA proceedings were, from the outset, inconsistent with, and in violation of, the CCAA itself. The CCAA prohibits the Court from granting a related-party sale unless, amongst other things, "*good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company*" and "*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.*"

CCAA, s. 36(4).

18. Notwithstanding the questionable purpose for which the Debtor commenced these CCAA proceedings, First Capital's preference from the very outset has not been the Debtor's failure. 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 proceedings. The Debtor opposed such an adjournment.

Robins Affidavit at para. 34.

19. First Capital then proposed its own purchase transaction in the CCAA proceedings on October 11, 2021, in substantially the same form as the Related Party Transaction but inclusive of the Y&B Lease and a 14-day due diligence period (the "**First Capital Transaction**").[1] 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.

Robins Affidavit at paras. 48-49.

[1] Under the First Capital Transaction, First Capital would provide interim financing to the Debtor during the short 14-day due diligence period, as well as further financing consistent with what was proposed in the Related Party Transaction if due diligence were satisfied or waived by First Capital.

20. An unsolicited expression of interest from a third-party was then delivered to the Monitor on October 12, 2021. Once again, the Debtor did not back-down from seeking approval of the Related Party Transaction without a sale process or other good faith efforts to sell or dispose of the assets at arm's length, notwithstanding that two unsolicited arm's-length parties had by this time expressed their interest.

Robins Affidavit at paras. 37, 48-49 and 51.

The Debtor Loses the First Related Party Transaction Approval Motion

21. 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.

22. The Debtor's motion to approve the Related Party Transaction in the CCAA proceedings 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.

23. In an about face, the Debtor has not followed-through with its bankruptcy threat, and now describes the potential termination of the CCAA proceedings as "*premature*."

Robins Affidavit at para. 32.

Go-Forward Positions

24. Even though the Debtor lost its motion, First Capital has still been prepared to support the continuation of the CCAA proceedings if a satisfactory sale process is implemented and completed under the supervision of the Monitor and the Court, which has been First Capital's position since the CCAA proceedings commenced approximately two months ago.

Robins Affidavit at para. 35.

25. First Capital is flexible as to what a satisfactory sale process would look like. First Capital is prepared to submit an offer akin to the First Capital Transaction in a traditional sale process (including in receivership/bankruptcy proceedings if the Debtor refuses to entertain a CCAA sale process), and First Capital is also prepared to be a stalking horse in any such sale process. First Capital does not expect the Court to approve any transaction without a sale process, but First Capital is prepared to proceed with the First Capital Transaction on its terms.

Robins Affidavit at para. 50.

26. First Capital, like any arm's-length bidder, will reasonably require a due diligence period to evaluate the Debtor's business. First Capital has already proposed to provide the necessary interim financing during the First Capital Transaction's due diligence period, and First Capital is also prepared to provide additional interim financing for a sale process' duration.

Robins Affidavit at para. 52.

27. For its part, the Debtor not only continues to resist a sale process despite having lost its motion, but now has also chosen to resile from its own threat to terminate the CCAA proceedings in the event of such a loss. Instead, the Debtor's latest move is to *pretend* that it is prepared to relinquish control via a bankruptcy and/or receivership, but, in substance, dictate that such step be conditional on the pre-approval of the Related Party Transaction, again without the business and assets being exposed to the market.

Robins Affidavit at paras. 33, 55 and 56.
Third McEwan Affidavit at paras. 26-29.

The Second Related Party Transaction Approval Motion

28. The Debtor served a motion on November 12, 2021 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] The Second Related Party Transaction Approval Motion is nothing more than a substantive repeat of the First Related Party Transaction Approval Motion.

Third McEwan Affidavit at paras. 12-15.

29. Like its failed predecessor motion, the Debtor is once again seeking to approve the Related Party Transaction under the CCAA without the assets being exposed to the market, notwithstanding His Honour having already concluded in the First Related Party Transaction Approval Motion that "*the requirement set out in s. 36(4)(a) [is] efforts being made to sell or otherwise dispose of assets to persons who are not related to the Company. In this case, no efforts were made*."

Third McEwan Affidavit at para. 25.
First Related Party Transaction Endorsement at paras. 52 and 63.

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

30. In the alternative, the Debtor is asking the Court to approve the Related Party Transaction in advance of a hypothetical pre-packaged receivership, again without any third-party sale efforts being undertaken by either the Debtor or the proposed receiver, and without even asking the Court to grant the underlying receivership or any of its terms until and unless the Debtor's principals know they will get exactly what they want. It is difficult to imagine a more self-serving understanding of the term "*just or convenient*" in respect of the appointment of a receiver.

Third McEwan Affidavit at paras. 26-29.

31. In the further alternative, the Debtor is asking for an additional extension of the stay of proceedings to December 8, 2021 instead of consenting to First Capital's motion to appoint a receiver to implement a sale process. The Debtor has made no attempt to justify a further stay extension in its notice of motion or supporting affidavit if the Debtor loses its Second Related Party Transaction Approval Motion, and there would not appear to be any good faith rationale for such a stay extension given the Debtor's refusal to run a CCAA sale process.

Notice of Motion of the Debtor dated November 12, 2021 at para. 3.
Third McEwan Affidavit at paras. 35-39.

Appointment of a Receiver

32. At this stage, with the Debtor having been given every reasonable opportunity to propose and implement a satisfactory sale process to maximize stakeholder value, First Capital believes that the appointment of a receiver to do so in the Debtor's stead – without the Debtor dictating the receiver's decisions in advance – represents the reasonable and prudent path forward.

Robins Affidavit at para. 55.

33. Given the Monitor's associated familiarity with the file, First Capital has proposed that Alvarez & Marsal Canada Inc. ("**A&M**") be appointed as receiver. However, if A&M is not prepared to accept the mandate, Grant Thornton Limited has consented to such a mandate.

Consent of Proposed Receiver dated November 4, 2021.

PART III – ISSUES

34. There are five inter-related issues to be addressed on the motions returnable on November 26, 2021:

(a) the Debtor's request (for a second time) to approve consummation of the Related Party Transaction in the CCAA proceedings in the absence of a sale process or any other steps to test the market;

(b) the Debtor's alternative request, still in the CCAA proceedings, to approve consummation of the Related Party Transaction in hypothetical receivership proceedings (for which the Debtor has not moved), again in the absence of a sale process;

(c) the Debtor's further alternative request for an additional stay extension in the CCAA proceedings if the Debtor is unsuccessful with the first two branches of its current motion in (a) and (b);

(d) First Capital's request to appoint a receiver over the Debtor for the substantive purpose of running a sale process; and

(e) costs (including, without limitation, in respect of the First Related Party Transaction Approval Motion).

PART IV – LAW AND ARGUMENT

Issue (a): The Debtor's request (for a second time) to approve consummation of the Related Party Transaction in the CCAA proceedings in the absence of a sale process or any other steps to test the market

35. The reasons why the Related Party Transaction cannot be approved in the CCAA proceedings have already been canvassed in the Court's previous endorsement and on the face of the very clear wording of section 36(4) of the CCAA. First Capital adopts and relies upon these authorities, and upon First Capital's previous factum that dealt with this issue.

> **Factum of First Capital dated October 5, 2021.**
> **First Related Party Transaction Endorsement at paras. 51-52 and 62-63.**
> **CCAA, s. 36.**

36. Increasing the amount of consideration under section 36(4)(b) of the CCAA does not displace the mandatory language of section 36(4)(a) of the CCAA, which requires that "*good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company*." The Court already concluded as part of the First Related Party Transaction Approval Motion that no such efforts were made, and no such efforts have been made since. Indeed, the purpose of the Second Related Party Transaction Approval Motion is to *avoid* such efforts, as was the purpose of the First Related Party Transaction Approval Motion.

> **First Related Party Transaction Endorsement at paras. 51-52 and 62-63.**
> **CCAA, s. 36.**

37. The Debtor cannot seriously assert it is acting in good faith when it requests relief under section 36(4)(a) of the CCAA for a second time, without taking any steps to comply with it for a second time. If there were any doubt the Debtor should have know better the first time around, no such doubt remains the second time around.

> **CCAA, ss. 11.02, 18.6 and 36.**

38. Moreover, the Debtor also continues to fail to satisfy section 36(4)(b) of the CCAA. Increasing the amount of consideration under the Debtor's CCAA transaction, while also proposing the same increase under the Debtor's alternative receivership transaction, means that the Debtor is once again offering consideration under the CCAA that is clearly not "*superior*" to another offer.

CCAA, s. 36(4)(b).

Issue (b): The Debtor's alternative request, still in the CCAA proceedings, to approve consummation of the Related Party Transaction in hypothetical receivership proceedings (for which the Debtor has not moved), again in the absence of a sale process

39. Even putting aside: (i) the related-party nature of the Related Party Transaction; and (ii) the "quick-flip" nature of the Related Party Transaction, such transaction is not supported by the four basic *Soundair* principles that a Court considers when reviewing *any* proposed sale of assets by a receiver:

***Soundair* Principles**	**Application of *Soundair* Principles**
1. The Court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.	There have been no efforts, much less sufficient efforts or sufficient efforts by a receiver. The Monitor has already confirmed that it was not involved in the review process that led to the proposed Related Party Transaction.
2. The Court should consider the interests of all parties.	The parties supporting the transaction would be treated favourably by it. The opposing party is the proverbial "ox being gored," is one of the biggest creditors and has submitted an unsolicited offer that is financially superior on its face.
3. The Court should consider the efficacy and integrity of the process by which offers are obtained.	There has been no process to obtain offers. The Debtor continues to resist one.
4. The Court should consider whether there has been unfairness in the working out of the process.	Again, there has been no process (and therefore no fairness), and the Debtor refuses to work-out a process despite multiple opportunities to do so.

***Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) (CanLII: https://canlii.ca/t/1p78p) [*Soundair*] at 6.**

First Related Party Transaction Endorsement at para. 45(3).

40. Compounding the problematic application of the *Soundair* principles in the present case are the related party and "quick flip" aspects of the Related Party Transaction.

> ***Soundair* at 6.**

41. When the Court is asked to authorize a sale to one or more related parties, the Court "*will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sale process … [and] ensure the process was performed in good faith.*" The failure to run a process altogether is therefore particularly problematic in this matter, given the proposed related-party sale.

> ***Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 [Commercial List] (CanLII: https://canlii.ca/t/g25ss) at paras. 44-45.**

42. In addition, there is also an "*enhanced standard of review*" in receivership sales involving quick-flip transactions. This is "*warranted in view of the absence of a prior court-approved marketing process,*" which therefore triggers "*a heightened need for a comprehensive and transparent record that allows a court to retrospectively consider the efficacy and integrity of the process*" [emphasis added].

> **Matthew Nied and Natalie Levine, "Pre-Packaged Sales Transactions under the CCAA: Where Are These Packages From, What Do They Look Like and Where Are They Going?" (2017) Annual Review of Insolvency Law 2016 at II "Where Do Pre-Pack Sales Come From?" (https://ln5.sync.com/dl/1f7c79ad0/xxqzszj3-ypet4bew-xuy2mjej-emqui38v).**
>
> ***Montrose Mortgage Corporation v. Kingsway Arms Ottawa*, 2013 ONSC 6905 [Commercial List] (CanLII: https://canlii.ca/t/g1r8r) at paras. 10 and 11.**

43. It is insufficient, in the "quick flip" receivership context, "*to accept information provided by the debtor – where a related party is purchaser – without taking steps to verify the information*." Yet this is precisely what the Debtor is asking of the Court on this motion (as in the past motion) – to take the Debtor's word, at face value and without testing the market in any way, that the Related Party Transaction is the best offer available.

> ***The Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 [Commercial List] (CanLII: https://canlii.ca/t/fpj35) at paras. 4-8.**

44. There is good reason to question the Debtor's integrity when it says that the Related Party Transaction is the best offer available. Only a few weeks ago, the Debtor made the following submissions at the First Related Party Transaction Approval Motion, when the underlying transaction offered materially less consideration than what the Related Party Purchaser is now proposing:

> 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.**

45. The Debtor's amendments to its own Related Party Transaction a few weeks later suggest that these submissions were not made in good faith (even without regard to the offer made by First Capital, which offer should certainly also be considered).

> **CCAA, s. 11.02 and 18.6.**

46. This Debtor has acted on its clear and self-serving interest to sell its assets for a price below fair market value. It is precisely for this reason why "*[t]he identification and solicitation of potentially interested purchasers has a heightened importance if a sale to a person related to the debtor is envisaged*." This concern is unchanged by the Debtor seeking to consummate the Related Party Transaction in a hypothetical receivership in lieu of the CCAA.

> **Jason Dolman and Gabriel Faure, "Preplan Sales under Section 65.13 BIA and Section 36 CCAA" (2017) 59 Canadian Business Law Journal 333 at s. III.2, "Sale to a Related Party" (https://ln5.sync.com/dl/9bdcba170/xxpbcar2-yw52i9mc-dnkqce7m-x73rgqwc).**

47. The Debtor has also been very selective and self-serving in ***how*** it is asking the Court to approve the Related Party Transaction, in a hypothetical receivership context. Neither the Debtor nor anyone on its behalf has brought a receivership motion. Despite its earlier statements to the contrary at the First Related Party Transaction Approval Motion, it turns out that the Debtor is not prepared to exit CCAA protection unless it knows that approval of the Related Party Transaction is guaranteed.

> **Robins Affidavit at paras. 33, 55 and 56.**
>
> **Third McEwan Affidavit at paras. 26-29.**

48. There is an important consequence of the Debtor requiring this guarantee as a pre-condition to bringing a receivership motion. If the Debtor were to succeed on its current motion, it would still remain "*A debtor company in respect of which an order has been made under [the CCAA],*" as set out in section 36(1) of the CCAA. Accordingly, the Debtor is once again faced with the same section 36(4)(a) approval prohibition around which it has been trying to dance since the outset of these proceedings.

> **CCAA, ss. 36(1), 36(3) and 36(4).**

49. It is fitting that the Debtor has been unable to escape from the direct light of section 36(4)(a) of the CCAA, because what the Debtor is proposing is not really a receivership sale. A receiver's duty is "*to do everything reasonably possible in the circumstances to obtain the best price*," and the Debtor is asking the Court to handcuff the receiver in advance of its appointment because identifying the best price is not in the Related Party Purchaser's interest. As a result, the Court is "*left to assess the reasonableness of the proposed purchase price without the benefit of any independent valuations*," and that is precisely the mischief that both the *Soundair* principles and section 36 of the CCAA are intended to prevent, particularly in related-party "quick flips."

> ***Skyepharma PLC. v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007 (ONSC [Commercial List]) (https://canlii.ca/t/1wbx3) at para. 4.**
>
> ***9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788 [Commercial List] (CanLII: https://canlii.ca/t/fr9wq) at paras. 29, 30 and 33.**

50. It is troubling that the Debtor and its representatives continue to ask this Court to ignore: (i) decades of well-reasoned jurisprudence; and (ii) the resulting statutory regime, both of which are intended to protect stakeholders from the very mischief sought to be perpetrated here.

Issue (c): The Debtor's further alternative request for an additional stay extension in the CCAA proceedings if the Debtor is unsuccessful with issues (a) and (b)

51. The Debtor has made no attempt to justify a further stay extension in its notice of motion or supporting affidavit if the Debtor loses the balance of its Second Related Party Transaction Approval Motion, and yet it has asked for one. There does not appear to be any good faith rationale for such a stay extension if the Debtor loses its motion for a second time, given the Debtor's refusal to run a CCAA sale process and First Capital's motion to appoint a receiver to run a sale process.

> **Notice of Motion of the Debtor dated November 12, 2021 at para. 3.**
>
> **Third McEwan Affidavit at paras. 35-39.**

52. If the Debtor loses its motion for a second time, a stay extension under the CCAA would serve no purpose but to allow the Debtor to do what it did previously – make yet another amendment to the Related Party Transaction by offering even more consideration thereunder, notwithstanding the Debtor's submissions that such transaction already offers the highest consideration available. Such a purpose would be inconsistent with the Debtor's good faith obligations on a stay extension.

CCAA, ss. 11.02 and 18.6.

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

Issue (d): First Capital's request to appoint a receiver over the Debtor for the substantive purpose of running a sale process

53. 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.

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

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

54. If the Court dismisses the substance of the Debtor's current motion, which First Capital submits is the only reasonable outcome on the facts and the law, then the Debtor will have been unsuccessful on three separate attempts to approve its Related Party Transaction (once on the Debtor's past motion, and twice on the Debtor's 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 running a sale process within the CCAA proceedings.

First Related Party Transaction Endorsement at para. 18.

55. 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 a 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.
CJA, s. 101.
Robins Affidavit at para. 55.

56. Unlike the Debtor, First Capital is not requesting to place any pre-conditions on, or otherwise handcuff, an independent receiver. 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 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.

CJA, s. 101.

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

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

Issue (e): Costs

58. While costs of the motions that are presently before the Court can be dealt with in the ordinary course and/or in accordance with the Model Receivership Order of the Commercial List, as applicable, First Capital submits that it ought to be awarded costs in respect of the Debtor's First Related Party Transaction Approval Motion that was dismissed on November 1, 2021, and the matters leading-up to same.

First Related Party Transaction Endorsement.

59. First Capital seeks an Order of costs in the amount of $123,898.38 in respect of the First Related Party Transaction Approval Motion. This represents costs payable on a partial indemnity scale (inclusive of taxes and disbursements).

Bill of Costs of First Capital dated November 5, 2021.

60. The Debtor sought the advice of very sophisticated insolvency professionals months ago to plan for the First Related Party Transaction Approval Motion. The Debtor ought to have been aware that its chances for success were extremely low in light of the clear language of section 36(4) of the CCAA, both in respect to good faith arm's-length sale efforts ("*no efforts were made*") and superior consideration (the Debtor "*had a choice. [It] could have proposed superior consideration to [First Capital], but [it] elected not to do so*").

First Related Party Transaction Endorsement at paras. 50-64.

61. Emphasis should therefore be placed on the following cost factors under the *Rules*:

(a) the dismissal, in its totality, of the Debtor's First Related Party Transaction Approval Motion;

(b) the Debtor's First Related Party Transaction Approval Motion having unnecessarily lengthened the proceeding;

(c) the Debtor's First Related Party Transaction Approval Motion representing an unnecessary step in the proceeding;

(d) the Debtor's denial of or refusal to admit what should have been admitted, namely, that the underlying requirements of section 36(4) of the CCAA had clearly not been met;

(e) the unfairness that would result if First Capital is forced to bear the costs of the foregoing; and

(f) the amount of costs that the Debtor, as the unsuccessful party, could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed (with Mr. McEwan advising on cross-examination that the professional fees for which the Debtor is currently responsible in this proceeding are "*north of a million dollars*").

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended [Rules], r. 57.01(1) (https://www.ontario.ca/laws/regulation/900194).

Transcript of the Cross-Examination of Mark McEwan conducted on November 19, 2021, at questions 128 and 130.

62. First Capital asks that these costs be payable by the Debtor (i.e., from potential creditor realizations). When Mr. McEwan was asked on cross-examination whether the other major creditors in this proceeding who supported the First 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.**

63. To the extent the Debtor also loses its Second Related Party Transaction Approval Motion, First Capital has advised the Debtor's counsel that First Capital reserves the right to ask for costs against the Debtor's principals, whose interests are those really being advanced by both the Debtor's past and current motions.

PART V – RELIEF REQUESTED

64. It is respectfully submitted that the Debtor's Second Related Party Transaction Approval Motion be dismissed in its entirety, and that the relief requested by First Capital be granted in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November, 2021

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SCHEDULE "A"

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Jurisprudence

1. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).
2. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 [Commercial List].
3. *Montrose Mortgage Corporation v. Kingsway Arms Ottawa*, 2013 ONSC 6905 [Commercial List].
4. *The Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 [Commercial List].
5. *Skyepharma PLC. v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007 (ONSC [Commercial List]).
6. *9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788 [Commercial List].
7. *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 [Commercial List].
8. *Graceway Canada Company (Re)*, 2011 ONSC 6292 [Commercial List], with additional reasons at 2011 ONSC 6403 [Commercial List].

Secondary Sources

1. Matthew Nied and Natalie Levine, "Pre-Packaged Sales Transactions under the CCAA: Where Are These Packages From, What Do They Look Like and Where Are They Going?" (2017) Annual Review of Insolvency Law 2016.
2. 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.

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

General Principles

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs.

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

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