Court File No. CV-24-00726584-00CL

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 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")

REPLY FACTUM OF THE APPLICANTS
(Returnable October 18, 2024)

October 14, 2024

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TO: THE SERVICE LIST

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PART I – REPLY

1. The Applicants reply on the following five issues:

   (a) The presumption upon which the Respondents' argument is founded—that section 11.04 of the CCAA contains a blanket prohibition—is wrong;

   (b) The Applicants cited numerous recent decisions in which this Court has determined in had jurisdiction to stay a third party guarantee claim. The Respondents have cited no decisions of this Court in which the Court reached the opposite conclusion;

   (c) The uncontradicted evidence favours extending the stay;

   (d) The Respondents have still failed to identify any prejudice posed to them; and

   (e) The Respondents' factum repeatedly mischaracterizes the record.

A. Section 11.04 Does Not Contain a Prohibition

2. The Respondents' argument is founded on a presumption that they fail to substantiate, and which is wrong: That section 11.04 contains a prohibition. The Respondents state that the "text of the statute is unambiguous". The Applicants agree. Section 11.04 states:

> **Persons obligated under letter of credit or guarantee**
>
> 11.04. ***No order made under section 11.02 has effect*** 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.

3. The plain language of section 11.04 does not contain a blanket prohibition on guarantee claims being stayed. Section 11.04 clarifies orders under Section 11.02 not to have any effect on guarantee claims. Section 11.04 does not provide that a Court may not in appropriate circumstances use its powers under section 11 to stay actions involving guarantees.

4. The Respondents point to subsection 11.7(2) of the CCAA to make the point that (unlike subsection 11.7(2)) section 11.04 does not contain an express exception. That observation is correct. But rather than supporting the Respondents' position, the difference between subsections 11.7(2) and section 11.04 instead emphasizes that section 11.04 *does not contain a blanket prohibition on stays of guarantee claims*. Subsection 11.7(2) contains an express exception because, unlike section 11.04, subsection 11.7(2) *does* contain a prohibition: "Except with the

permission of the court and on any conditions that the court may impose, ***no trustee may be appointed as monitor in relation to a company***." Because Section 11.04 contains no such prohibition, no exception is necessary. There are further examples of blanket prohibitions in the CCAA.[1] Parliament declined to use such prohibitive language in section 11.04.

5. The Respondents submit that the interpretation argued for by the Applicants would render section 11.04 meaningless.[2] That is incorrect. Subsection 11.04 makes clear that an order staying litigation against a CCAA applicant under 11.02 alone does not also automatically stay guarantee claims. There is utility in section 11.04. Stays of proceedings are routinely granted by CCAA courts to protect CCAA debtors. Parliament saw it necessary to specify that such routine stays in favour of a debtor company do not also automatically stay third party guarantee claims. To stay such guarantee claims, parties have to specifically seek such stay, and to make their case before a CCAA court that such stay of a guarantee claim is warranted.

6. The Applicants commend to this Court the 2022 article *Staying Guarantees By Non-Debtors and Section 11.04 of the CCAA* by Jamey Gage and Trevor Courtis. Gage and Courtis note that "reading the language in sections 11.02 and 11.04 in its entirety supports an interpretation that section 11.04 only applies to stays of proceedings against the debtor company issued under section 11.02."[3] Mr. Gage and Mr. Courtis also note that the predecessor provision to section 11.04[4] *did* contain the kind of blanket prohibition the Respondents wish to read into section 11.04:

> 11.2 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.

7. The 2009 amendments to the CCAA removed the blanket prohibition.

8. Mr. Gage and Mr. Courtis conclude that:

> 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

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[1] E.g. sections 5.1(2), 11.02(1), 11.09(1)(a), 11.09(1)(b), 11.2(1), 11.3(4), 11.51(3), 19(2), 33(1).
[2] Responding Factum of Canopy Growth Corporation, October 11, 2024 ("**Respondents' Factum**") at paras. 3 and 32.
[3] James D Gage and Trevor Courtis, *Staying Guarantees By Non-Debtors and Section 11.04 of the CCAA*, 2022 20 *Annual Review of Insolvency Law*, 2022 CanLIIDocs 4310, retrieved on 2024-10-14 ("**Gage Article**") at p. 28.
[4] Section 11.2 in the pre-2009 CCAA.

> 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.[5]

9. The authors' view is consistent with how restructuring practice has evolved; stays are not sought exclusively under section 11.02. They are often sought and granted under section 11.[6]

B. The Respondents Cite No Decisions of this Court

10. The Applicants cited five recent decisions in which this Court concluded that it had jurisdiction to stay third party guarantee claims. The Respondents have cited no decisions in which this Court reached the opposite conclusion.

11. Unable to identify any case law in support of their position, the Respondents attempt to attack the authority of the decisions of this Court cited by the Applicants, on the basis that those decisions were on consent or unopposed. This submission has no merit. First, there is no indication that any of the decisions were on consent, and to suggest they were is misleading. Second, any of the decisions being unopposed (which is unclear) is neither here nor there. The issue under consideration is a jurisdictional one. Irrespective of whether parties are contesting the relief sought, the Court had to satisfy itself that it had jurisdiction to make the order sought, which it did.

12. The Respondents submit that it was "misleading" for the Applicants to cite two of the cases they did (*Nordstrom* and *Bed Bath and Beyond*) without also advising that the Chief Justice "emphasized" that the decisions were of no precedential value.[7] It is the Respondents' submission that is again misleading. The two endorsements cited by the Respondents for this proposition were **not** the decisions cited by the Applicants. Both endorsements cited by the Respondents related to later orders made in those cases to extend the *time* of the existing stay.[8] The Chief Justice made

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[5] Gage Article at p. 40.
[6] Factum of the Applicants, October 8, 2024 ("**Applicants' First Factum**") at paras. 43-63.
[7] Respondents' Factum at para. 38.
[8] In *Nordstrom,* the endorsement considering jurisdiction and initially granting the stay until March 12, 2023 was made on March 2, 2023 (*Nordstrom Canada Retail, Inc.,* 2023 ONSC 1422 at paras. 36-42). The stay was subsequently extended to March 20, 2023. On March 20, 2023, the parties returned on a motion for a sale approval order. As part of that order, Chief Justice Morawetz extended the stay to June 30, 2023, the targeted sale termination date for the sale process. It was in this endorsement that the Chief Justice made the comment cited by the Respondents (*Nordstrom* Endorsement of Justice McEwen re Amended and Restated Initial Order at paras. 7-8).
In *Bed Bath & Beyond*, the endorsement considering jurisdiction and initially granting the stay until February 21, 2023 was made on February 10, 2023 (*BBB Canada Ltd.*, 2023 ONSC 1014 at para. 34). The endorsement cited by the Respondents is in the context of a motion for a sale approval order and amended and restated initial order. The latter order included a request to extend the stay in respect of the third-party indemnities to May 1, 2023, which aligned with the dates for the proposed liquidation (*Bed Bath & Beyond* Endorsement of Chief Justice Morawetz re Sales Approval and ARIO at paras. 14-15).

no such comment when deliberating his jurisdiction to make the initial stay order, and in electing to make that order.

13. The Respondents submit that this Court has recently considered the meaning of section 11 in *Pride Group Holdings Inc.* The section at issue in this *Pride* decision provides yet another illustration of the fallaciousness of the Respondents' interpretation of section 11.04.[9] Unlike section 11.04, the section at issue in the decision expressly restricts the Court's powers under Section 11:

> **Rights of suppliers**
>
> **11.01** No order made ***under section 11*** or 11.02 has the effect of…

14. The Applicants seek an order under section 11. The Respondents argue that section 11.04 limits not only section 11.02, but also section 11. This argument is inconsistent with Parliament's decision not to reference section 11 in section 11.04, as it did in section 11.01.

15. The Applicants further note that third party guarantee claims were stayed under section 11 in an earlier decision in the *Pride* case cited by the Respondents.[10]

C. The Applicants' Evidence is Uncontradicted

16. Having tendered no evidence of their own to contradict the Applicants' evidence that the arbitration will harm the CCAA process (other than Mr. Paterson's statement "I don't believe there is any prejudice to the Applicants as Canopy is now solely pursuing DAK Capital in the arbitration."[11]), the Respondents attempt to attack the Applicants' evidence as "self-serving" and "bald".

17. The Respondents do not understand the allegation that the evidence is "self-serving". As to the allegation that it is "bald": The evidence was the sworn evidence of 267 Ontario's President, who has sworn all of the Applicants' affidavits to date in this proceeding. His evidence was subject, and stood up, to rigorous cross-examination. Mr. Williams' evidence regarding the deleterious effects the arbitration will have on the CCAA process remains uncontradicted.

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[9] Respondents' Factum at para. 34, citing *In the Matter of Pride Group Holdings Inc. et al.*, (September 26, 2024) Court File No. CV-24-00717340-00CL (Endorsement of Osborne, J.) at para. 24 and 25.
[10] *Pride Group Holdings Inc.*, 2024 ONSC 1830 at para. 32.
[11] Paterson Affidavit at para. 35, Responding Motion Record of Canopy, at p. 11.

D. No Prejudice to Respondents

18. The Respondents have again failed to put forward any cogent theory of the prejudice they will suffer if the stay is extended. The Respondents' new argument for prejudice is simply "the already lengthy delay Canopy has suffered" being extended further.[12] There are a number of issues with this submission.

19. First, the existing "delay" referred to by Canopy is of its own making.[13]

20. Second, the seven-week delay on its own is not prejudicial. There is no evidence that Canopy's guarantee claims will be any less viable after a further seven weeks. Canopy seeks prejudgment interest in respect of those claims, addressing any issues with respect to the time value of money.

21. The Applicants submit that the relative prejudice that will be suffered by the parties by granting or not granting the stay is a key consideration on this motion. The Applicants have led uncontradicted evidence of significant prejudice. The Respondents have led no evidence of real prejudice they would suffer as a result of the stay being extended.

E. Mischaracterizations of the Record

22. The Respondents' factum repeatedly mischaracterizes the record, including the examples set out in **Schedule "C"**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF OCTOBER, 2024

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[12] Respondents' Factum at para 53.

[13] Canopy elected not to commence the arbitration for more than a year after its claims initially arose. Then, Canopy elected to engage in without prejudice discussions with the Applicants and DAK, and not advance the arbitration for more than six months. Again, and for context, the stay being sought is for seven weeks.

Schedule "A"

List of Authorities

1. James D Gage and Trevor Courtis, Staying Guarantees By Non-Debtors and Section 11.04 of the CCAA, 2022 20 *Annual Review of Insolvency Law*, 2022 CanLIIDocs 4310
2. *Nordstrom Canada Retail, Inc.,* 2023 ONSC 1422
3. *Nordstrom Canada Retail, Inc.,* 2023 ONSC 1631
4. *BBB Canada Ltd.*, 2023 ONSC 1014
5. *BBB Canada Ltd.*, 2023 ONSC 1230
6. *In the Matter of Pride Group Holdings Inc. et al.*, (September 26, 2024) Court File No. CV-24-00717340-00CL (Endorsement of Osborne, J.)
7. *Pride Group Holdings Inc.*, 2024 ONSC 1830

Schedule "B"

Statutory Authorities

Companies' Creditors Arrangement Act, RSC 1985, c C-36

General power of court

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

…

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

…

Stays, etc. — other than initial application

11.02(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.

…

Persons obligated under letter of credit or guarantee

11.04 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.

…

Restrictions on who may be monitor

11.7(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Companies' Creditors Arrangement Act, RSC 1985, c C-36 (pre-2009_

11.2 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.

Schedule "C"

Respondents' Mischaracterizations of the Record

Para No.	Text	Issue
13	Canopy and Tweed have not received any of the $3 million Up-Front Consideration that became due on December 30, 2023.	**Misleading**. The Up-Front Consideration as set out in the SPA means "the Closing Cash Consideration and the Anniversary Cash Consideration, together".[14] The Respondents received $2,500,000 of the Up-Front Consideration (the Closing Cash Consideration). This is acknowledged in Mr. Paterson's Affidavit.[15] The $3,000,000 Anniversary Cash Consideration is disputed in the Canopy Arbitration.
14	Certain other claims between the parties were withdrawn from the Arbitration at the request of the Applicants.	**Incorrect.** No claims have been withdrawn. No claims have been released and no amended Notice of Arbitration has been served.[16]
17(a)	The Applicants do not deny the existence of the Payment Obligations but speculate (without actual knowledge) that the Applicants have certain counterclaims based on allegations that Canopy breached certain terms of the SPA.	**Misleading.** It is not a matter of speculating about the existence of counterclaims. The uncontradicted evidence is that DAK may plead in its defence that the alleged guarantees are unenforceable due to certain breaches of the SPA by Canopy.[17]
17(c)	While Canopy is specifically targeted, another third-party guarantor is expressly excluded from the Proposed Order.	**Incorrect**. No third-party guarantor except is expressly excluded from the Proposed Order.[18] There is no evidence of any other claims sought to be advanced against DAK or any other third party guarantor of the Applicants.
17(d)	Despite the Guarantee Fee Agreement being specifically referenced in the affidavit, sworn by the Applicants' President, Andrew Williams, the Applicants have refused to produce same.	**Incorrect**. The Applicants did not refuse to produce the Guarantee Fee Agreement. Mr. Williams was asked for a copy of the agreement but did not have one. A request was then made by the Respondents to the Applicants on October 10, 2024 for a copy of the agreement. Within approximately one business day, a copy of the agreement (which the Applicants say is irrelevant) was produced to the Respondents.

[14] SPA, s. 1.1
[15] Paterson Affidavit at para. 20, Responding Motion Record of Canopy, at pp. 7-8.
[16] Cross-examination of D. Paterson, qq. 94 and 95, Transcript Brief Tab 1.
[17] Second Williams Affidavit at paras. 7 and 19; Direct Claim Notice dated April 28, 2024, SMR Tab 1D.
[18] FARIO at para. 16, MR Tab 5 p. 240.

Para No.	Text	Issue
51(a)	[…] there is evidence that both the Applicants and DAK have tried to delay any determination of the claims.	**Misleading.** The paragraph referenced in Mr. Paterson's affidavit says nothing about delay.[19] Moreover, the evidence is that Canopy took more than a year to commence an arbitration in respect of its claims, and then proceeded to engage in without prejudice discussions with the Applicants and DAK for a number of months.
51(b)	the Applicants have not disputed the Payment Obligations but assert that the Applicants may have counterclaims that could be set-offs. That is irrelevant to the obligations of DAK under the Guarantee which are owed "without any set-off, recoupment or counterclaim".	**Incorrect**. Mr. Williams makes no reference to set-off in respect of the counterclaims. Mr. Williams' evidence is that DAK may plead in its defence that the alleged guarantees are unenforceable due to certain breaches of the SPA by Canopy.[20]
51(c)	[…] the relevant calculations have been made, […] any potential legwork (including calculation of the Deferred Compensation) was already completed;	**Incorrect**. Mr. Williams specifically and repeatedly gave evidence that the relevant calculations have not been completed.[21]
51(d)	[…] the Canopy claims have been targeted by the Applicants for the extended stay while another guarantee party is specifically excluded.	**Incorrect**. There is no evidence of any other claims sought to be advanced against DAK or any other third party guarantor of the Applicants.
51(e)	Moreover, there is a legitimate issue as to whether DAK is being compensated for the Canopy Guarantee while asking the Applicants to use the CCAA to stay DAK's obligations thereunder;	**Incorrect**. Mr. Williams has specifically confirmed that no payments were made to DAK in respect of the "Canopy Guarantee".[22]
52	The Applicants' refusal to produce these documents (in response to the Notice of Examination, in response to questions at the cross-examination of Mr. Williams, and in response to Canopy's Request to Inspect Documents).	**Incorrect**. The Applicants did not refuse to produce the agreements. Mr. Williams did not have copies of the agreements. A request was then made by the Respondents to the Applicants on October 10, 2024 for copies of the agreements. Within approximately one business day, copies of the agreements (which the Applicants say are irrelevant) were produced to the Respondents.

[19] Paterson Affidavit at para. 20, Responding Motion Record of Canopy, at pp. 7-8.
[20] Second Williams Affidavit at paras. 7 and 19; Direct Claim Notice dated April 28, 2024, SMR Tab 1D.
[21] UA 4, Answers to Under Advisements, Respondents' Transcript Brief Tab 5.
[22] UA 9, Answers to Under Advisements, Respondents' Transcript Brief Tab 5.

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