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.

Applicants

RESPONDING FACTUM OF CANOPY GROWTH CORPORATION (Further ARIO)

October 11, 2024

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TO: SERVICE LIST

Court File No. CV-24-00722044-00CL

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

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PART I – OVERVIEW

1. The Applicants seek to stay a guarantee claim brought by Canopy Growth Corporation ("**Canopy**") against a non-Applicant, DAK Capital Inc. ("**DAK**"), in direct contravention of section 11.04 of the CCAA. That section provides that:

> No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2. The clear and unambiguous language in section 11.04 prohibits the extension of the stay of proceedings to a third-party guarantor. Despite the fact that prior orders have been made in Ontario only where the relief was unopposed and with the Court's explicit caution that jurisdiction may not exist, the Applicants are seeking such an order in the face of opposition from Canopy.

3. The Applicants attempt to circumvent the clear prohibitive language of section 11.04 by relying on a tortured interpretation of the interplay between sections 11.04, 11.02 and 11. Their attempt to rely on section 11 to confer jurisdiction to stay guarantee claims without regard to the statute as a whole renders the prohibition in section 11.04 meaningless. It is also inconsistent with the scheme of the CCAA, which is to facilitate compromises between a debtor company and its creditors, not third-party guarantors. This cannot have been the legislature's intent.

4. While it is submitted that the prohibition under section 11.04 is absolute and without exception, even if judicial discretion exists, the particular facts in this case make the exercise of any such discretion in favour of the Applicants unjust, inequitable, and inappropriate.

PART II - THE FACTS

The Proposed Order

5. The order sought by the Applicants (the "**Proposed Order**") expressly seeks to stay Canopy from pursuing a guarantee claim against DAK. The specific wording of the Proposed Order is as follows:

> 16. **THIS COURT ORDERS** that during the Stay Period, no Proceeding relating to or involving any of the Applicants or Non-Applicant Entities (any such proceeding a "**Related Proceeding**"), shall be commenced or continued against or in respect of DAK Capital Inc. (the "**Additional Stay Party**") except with the written consent of the Additional Stay Party and the Monitor, or with leave of this Court, and any Related Proceeding currently under way is hereby stayed and suspended pending further Order of this Court. For greater certainty, the arbitration proceeding commenced on March 8, 2024, by Canopy Growth, Tweed, and Tweed Leasing Corporation against Ontario Inc., 2161907 Alberta Ltd., 2733181 Ontario Inc., 14284585 Canada Inc., and the Additional Stay Party is a Related Proceeding. For further certainty, this clause does not apply to any proceeding that BMO has or may commence against the Additional Stay Party in relation to any loan or credit products that BMO has extended to the Additional Stay Party.

6. Upon service of the motion for the Proposed Order, among other relief, Canopy advised the Applicants that it was opposing the Proposed Order.[1]

The Sale of the Tokyo Smoke Business to the Applicants

7. The subject matter of the Proposed Order arises from a dispute over a Share Purchase Agreement dated September 23, 2022, as amended (the "**SPA**") between Canopy and its affiliate Tweed Inc. ("**Tweed**"), as vendors, the Applicant, 2675970 Ontario Inc., as purchaser (the "**Purchaser**"), and DAK, as Payment Guarantor.[2]

8. The SPA was executed as part of a transaction involving the sale of Canopy's Canadian retail cannabis business to the Purchaser, which business the Applicants are now seeking to sell to a related party in the CCAA. Pursuant to the terms of the SPA, the Purchaser purchased all of the issued and outstanding shares of 14284585 Canada Inc. ("**142 Canada**"), which, directly or indirectly, owned the Tokyo Smoke concept, stores, and certain intellectual property, from Canopy and Tweed.

9. The SPA provided that the Purchase Price for the shares of 142 Canada would be paid by the Purchaser to Tweed and Canopy in multiple phases, with some consideration fixed and payable up-front, either on the date of closing or on a fixed future date (the "**Up-Front Consideration**"), and other consideration to be calculated in the future with corresponding payments deferred to later dates (the "**Deferred Consideration**").[3]

10. In addition to the Up-Front Consideration and the Deferred Consideration, Canopy and certain related companies have other multi-million dollar claims against the Applicants, which are

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[1] Affidavit of Dave Paterson sworn September 20, 2024 ("Paterson Affidavit"), Exhibit "A", Responding Motion Record of Canopy Growth Corporation ("Canopy MR") [B-1-16].

[2] Paterson Affidavit paras. 8-11, Canopy MR [B-1-6 – B-1-7].

[3] Paterson Affidavit paras. 12-14, Canopy MR [B-1-7 – B-1-8].

currently stayed by these CCAA proceedings. These claims concern lease arrears in excess of $2.5 million, over $1.8 million in unpaid amounts owing under a transitional services agreement and over $800,000 in unpaid amounts under an acknowledgment agreement. In addition, a $5 million promissory note (referenced in the Applicants materials as the "Canopy Promissory Note") remains outstanding.[4]

The DAK Guarantee

11. DAK signed the SPA as "Payment Guarantor" for the Purchaser. Pursuant to Article 9 of the SPA, DAK unconditionally and irrevocably guaranteed (the "**Guarantee**") that the Purchaser would comply with certain of its payment obligations under the SPA (the "**Guaranteed Obligations**") and agreed to be jointly and severally liable with the Purchaser for the due and punctual payment of the Guaranteed Obligations. The Guaranteed Obligations included payment of the Up-Front Consideration and part of the Deferred Consideration.[5]

12. The Guarantee also provides that:

(a) It is a "direct, independent and primary" obligation of DAK;

(b) It is "absolute and unconditional";

(c) The obligations must be performed "promptly upon demand";

(d) Payment and performance by DAK shall be made "without any set-off, recoupment or counterclaim"; and

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[4] Initial Affidavit of Andrew Williams sworn August 28, 2024 ("**Initial Williams Affidavit**"), paras. 116-118, 121, Motion Record of the Applicants dated September 12, 2024 ("**Applicants' MR**"), Tab 2-B, [A1741-1742].

[5] Paterson Affidavit paras. 15-18, Canopy MR [B-1-8 – B-1-9].

(e) It shall "remain in force"… and "shall not be released or discharged"… notwithstanding he voluntary or involuntary receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization composition, or other similar proceeding affecting the Purchaser.[6]

The Purchaser's and DAK's Default on their Payment Obligations

13. Canopy and Tweed have not received any of the $3 million Up-Front Consideration that became due on December 30, 2023 or any of the Deferred Consideration payments which first became due on March 31, 2023 (collectively the "**Payment Obligations**").[7]

14. On March 8, 2024, Canopy and Tweed commenced an arbitration against certain of the Applicants and DAK to collect the Payment Obligations (the "**Arbitration**"). Certain other claims between the parties were withdrawn from the Arbitration at the request of the Applicants.

15. Canopy is of the view that the Applicants intentionally delayed the adjudication and resolution of Canopy's claims while they prepared for their CCAA filing.[8]

16. Subject to the outcome of this motion, during the CCAA, Canopy intends to exclusively pursue DAK for the Payment Obligations pursuant to the terms of the Guarantee.

Other Relevant Facts

17. The following additional facts are relevant to this Motion:

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[6] Paterson Affidavit para. 18 and Exhibit "B"; Canopy MR [B-1-9, B-1-34 – B-1-35].

[7] Paterson Affidavit paras. 20-21, Canopy MR, [B-1-10 – B-1-11].

[8] Paterson Affidavit paras. 27-28, Canopy MR, [B-1-12 – B-1-13].

(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;[9]

(b) The right of Canopy and its affiliates to pursue DAK on its Guarantee are the only rights being targeted by the Proposed Order;[10]

(c) While Canopy is specifically targeted, another third-party guarantor is expressly excluded from the Proposed Order;[11]

(d) Pursuant to a "Guarantee Fee Agreement", the Applicants paid DAK 12% of the monies advanced under the BMO Loan as compensation for DAK providing the BMO guarantee. 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;[12]

(e) The Applicants and DAK are party to various "management services agreements" where DAK allegedly provides management services to the Applicants although DAK has no employees. Nevertheless, part of the management services provided by DAK was to become a party to the SPA as a payment guarantor.[13]

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[9] Transcript of the cross-examination of Andrew Williams taken on October 4, 2024 ("Williams Transcript"), Transcripts Brief of the Applicants ("Applicants' Transcript Brief"), Tab 2, qq. 37, 162-167, [A1950 & A1981-A1982].

[10] Williams Transcript, Applicants' Transcript Brief, Tab 2, qq. 37 [A1950].

[11] Draft Further Amended and Restated Initial Order, Applicants' MR Tab 5, p. 240, para. 16, [A1876].

[12] Initial Williams Affidavit, paras. 111, 113, Applicants' MR, Tab 2-B [A1739]; Williams Transcript, qq. 195-196, Applicant's Transcript Brief, Tab 2, [A1988]; Answers to Under Advisements delivered October 8, 2024, Transcript Brief of Canopy dated October 11, 2024 ("Canopy Transcript Brief"), Tab 5, [B-1-56].

[13] Initial Williams Affidavit, paras. 112-113, Applicants' MR, Tab 2-B [A1739]; Affidavit of Andrew Williams sworn September 12, 2024, para. 34, Applicants' MR, Tab 2 [A1670]; Williams Transcript, qq. 123, 171-175, 189, 191-193, Applicants' Transcript Brief, Tab 2, [A1971], [A1982-A1983], [A1988].

(f) Despite the management services agreements being specifically referenced in the affidavit of Mr. Williams and the Applicants are allegedly receiving services thereunder, the Applicants have claimed that they are unable to produce same because "Mr. Williams does not have any such documents in his power, possession, or control";[14]

(g) The assertion that the Applicants would face a "significant burden" to respond to the Arbitration is self-serving and entirely speculative, as revealed by the improper refusals given during cross-examination and Mr. Williams' apparent lack of knowledge concerning the need for the Applicants' management team to be involved in the Arbitration:

BY MR. PENDRITH:

288 Q. Because you don't really know. Isn't that the truth, Mr. Williams, you don't really know how DAK is going to defend itself?

R/F MR. MAIN: That question is also refused.

BY MR. PENDRITH:

289 Q. What are the steps in the arbitration that you are going to need to be involved in, do you know?

A. At this stage, no.

290 Q. And what about for Mr. Schreiber or Mr. Bedford?

A. I don't know.

[14] Williams Transcript qq 188-189, Applicants' Transcript Brief, Tab 2, [A1985].

(h) The limited evidence tendered by Mr. Williams concerning DAK's position in the Arbitration and the need to involve the Applicants' management team is based on inadmissible hearsay from Jurgen Schreiber (not on Mr. Williams' personal knowledge). Mr. Williams admitted that Mr. Schreiber does not have a relationship to DAK and that Mr. Williams did not know whether the hearsay provided by Mr. Schreiber to Mr. Williams was validated;[15]

(i) No evidence from any witness at DAK was tendered; and

(j) In addition to being entirely unsupported by any admissible evidence, the bald assertion that management would be significantly distracted from the Applicant's restructuring is further undermined by the fact that work was already done to identify alleged counterclaims[16] and to calculate Deferred Compensation[17] and the fact that the Applicants and DAK are already being assisted by experienced counsel to deal with the Arbitration.

PART III – ISSUES AND THE LAW

18. The issues for determination on this Motion are:

(a) whether the Court has jurisdiction to a grant a stay of proceedings against a non-debtor third-party guarantor pursuant to section 11.04 of the CCAA; and

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[15] Williams Transcript, qq. 146-149, Applicants' Transcript Brief, Tab 2 [A1977-A1978].

[16] Wiliams Transcript qq. 272-275, Applicants' Transcript Brief, Tab 2 [A2011-A2012].

[17] Williams Transcript qq. 81, 84, 260, Applicants' Transcript Brief, Tab 2 [pp. A1961-A1962, A2008].

(b) in the event that the Court determines that it has some discretion notwithstanding the unambiguous wording of section 11.04, whether such discretion be exercised in the factual circumstances of this case.

The Unambiguous Wording of Section 11.04

19. Pursuant to section 11.04 of the CCAA, an order granting a stay of proceedings under section 11.02 cannot extend to proceedings against a non-applicant company which involve a letter of credit or guarantee:

> **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.

20. The text of the statute is unambiguous. Unless a guarantor is an applicant in a CCAA proceeding, the stay of proceedings should not affect any proceeding against a guarantor.

21. There is no exception or override in section 11.04.

Section 11.04 in Context

22. Notably, section 11.04 is different than certain other sections in Part II of the CCAA (Jurisdiction of the Courts) which contain express exceptions and provide the Court with discretion.

23. For example, the prohibition regarding the appointment of an auditor as monitor in section 11.7 (2) is prefaced with the words "Except with the permission of the court and on any conditions that the court may impose….".[18] (emphasis added)

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[18] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], s. 11.7(2), Schedule "B".

24. As a result, section 11.7(2) has an express exception where such an order can be made with permission from the Court.[19]

25. It is important to distinguish between a stay of third-party litigation and proceedings involving a guarantee. As is discussed below, the Courts have clearly exercised discretion under section 11 to stay third-party litigation that does not involve a guarantee. There is no prohibition in the CCAA against the Court granting such an order. On the other hand, guarantees and letters of credit are singled out in section 11.04. It is not credible to suggest that the purpose of section 11.04 is to ensure that an order under section 11.02 does not stay proceedings against guarantors while a party can do an end-run on that prohibition by simply invoking section 11. This interpretation in the face of the plain meaning of the words is absurd.

26. In terms of reading and applying section 11.04 in accordance with its plain and obvious meaning, the Court of Appeal for Ontario recently reiterated:

> [23] I begin with the observation that the modern approach to statutory interpretation requires that statutes "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 26. A statute must not be interpreted in a manner that would result in absurd consequences. An interpretation will be absurd where it leads to "ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment": *Rizzo*, at para. 27.[20]

27. It should be emphasized that the scheme of the CCAA is to facilitate compromises and arrangements between companies and their creditors. While the CCAA can and inevitably does affect other parties, it is not the scheme of the Act to undermine the rights of a creditor against a third-party guarantor.

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[19] *Trees Corporation*, 2024 ONSC 30 [*Trees Corp.*], para. 45.

[20] *Varriano v. Allstate Insurance Company of Canada*, 2023 ONCA 78 at para. 23.

28. In a proper and coherent context, section 11.02 says that the court can order a stay of proceedings against a debtor company and section 11.04 makes it clear that such a stay cannot affect proceedings against a non-debtor guarantor.

Section 11 Discretion

29. The Applicants argue that section 11 (General power of the court) provides the Court with general discretion which could either fill a void (notwithstanding the clear language of section 11.04 or somehow override the specific prohibition.

30. The Applicants attempt to rely on *Century Services*[21] for the position that the Court may exercise its judicial discretion under section 11 to make an order that effectively disregards the prohibition in section 11.04. The jurisdiction under section 11 is not "open-ended and unfettered" or "boundless", but rather it must be guided by the scheme and object of the Act.[22]

31. Section 11 reads as follows:

> **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. (emphasis added)

32. It would create an absurd result (and render section 11.04 meaningless) if a party could circumvent the prohibition on staying proceedings related to guarantee claims by relying on a general power in section 11 to accomplish something that the specific power in section 11.04

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[21] 2010 SCC 60 [*Century Services*].

[22] *Stelco, Inc., Re*, 2005 CanLII 8671 (ONCA) at para 44; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*] at para 49.

restricts it from doing. Such a result does not create a "harmonious" reading of the CCAA and does not accord with the contractual interpretation principles reiterated by the Court of Appeal.

33. Section 11 does not say the Court can override specific prohibitions in the CCAA. In fact, it says the opposite: it confirms that the Court's jurisdiction is subject to the restrictions in the CCAA. If indeed section 11 was meant to be an override, there would be no need for the specific exceptions under various subsections such as the already noted exception in section 11.7(2). The exception language would be redundant, and inconsistent with proper statutory interpretation.

34. This Court has recently considered the meaning of section 11 in *Pride Group Holdings Inc.* The Court observed that "[c]learly, the discretion granted in section 11 is subject to the 'restrictions set out in this Act'", in refusing to grant certain requested relief which contravened Section 11.01(b) of the CCAA.[23] The wording of Section 11 is explicit in providing that the judicial discretion thereunder cannot be used to ignore other restrictions in the CCAA.

35. Accordingly, section 11.04 sets out an explicit and unambiguous restriction against the relief being sought by the Applicants.

Case Law Dealing with Section 11.04

36. The Applicants base their arguments on (i) cases where the extension of the stay over guarantee-related claims was permitted on consent or without opposition, and (ii) cases standing for the general proposition that the stay may be extended to third parties who are not guarantors.

37. The Applicants cite to *Pride, Nordstrom*, *Bed Bath and Beyond*, *Balboa* and *McEwan Enterprises* and others, on the basis that, in each instance, this Court granted a stay in favour of a non-applicant party in respect of its obligations under a guarantee.[24] However, the Applicants

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[23] *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.

[24] Applicants' Factum, paras. 44-46 [A2031-A2032].

omit to mention the critical distinguishing fact that, in each of those cases, the relief sought was either unopposed or on consent. In the *Pride* case, the order was made *ex parte*.[25]

38. In relying on *Nordstrom* and *Bed Bath and Beyond* as guiding precedents, the Applicants omit the context in which the orders were granted. It is misleading to the Court to put such cases forward without also advising that Morawetz, C.J. emphasized that the cases with these circumstances have **no precedential value**. The Court stated, "the proprietary and appropriateness of granting such a third-party stay is not without doubt" and the granting of the unopposed stay to a third-party guarantor in the circumstances "has no precedential value".[26] (emphasis added).

39. In another overreach, the Applicants also reference the orders issued by this Court in *Imperial Tobacco Canada Limited*, *Paladin Labs Canadian Holdings Inc.* and *JTI-Macdonald Corp.* for the proposition that this Court has "often stayed entire litigation proceedings where CCAA applicants are involved as defendants."[27] In each of these decisions, this Court dealt with the issue of whether to extend the stay to cover litigation-related claims and not specifically guarantee claims or letters of credit. The applicability of section 11.04 was not in question in these decisions and therefore, these decisions cited by the Applicants are not relevant to the case at hand.

40. Outside of Ontario, there are two non-binding Alberta cases that deal with section 11.04 and an objecting party. These cases are not raised by the Applicants.

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[25] *In the Matter of Pride Group Holdings Inc. et al.*, (March 28, 2024) Court File No. CV-24-00717340-00CL (Endorsement of Morawetz C.J.) at para 24 and 25.

[26] *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1814 at paras 14-15 (emphasis added); *BBB Canada Ltd.*, 2023 ONSC 1230 at paras 14-15 (emphasis added).

[27] Applicants' Factum, paras. 60-63 [A2035-A2036].

41. In *Northern Transportation*, the third-party guarantor had guaranteed the obligations of the debtor under a lease for marine vessels used by the debtor to provide essential products to remote Northern Canadian communities.[28] The Alberta Court refused to grant the opposed third-party stay, notwithstanding that permitting the creditor to enforce upon the third-party guarantee had the potential to "fully frustrate the purpose of the CCAA protection" and "negatively affect many people".[29]

42. The Court held that, absent other considerations, a court "cannot extend the stay to protect one party's claim against a third party where that claim is in the nature of a guarantee".[30] The Court continued:

> [w]hile the potential consequences of not extending the CCAA protection in this case is troubling and possibly even devastating to [the debtor company] and all associated parties for which the plan of arrangement pertains, the consequences of neutralizing a related company guarantee when the debtor seeks CCAA protection (and without more information) is far more troubling."[31]

43. The Alberta Court in *Northern Transportation* did however leave the possibility open that the third-party stay could potentially be ordered in "exceptional cases". Nevertheless, the possibility that the enforcement of the third-party guarantee could devastate the restructuring in that case was insufficient to justify such an order.

44. In a subsequent case, *Mantle Materials*,[32] the Alberta Court recognized the "exceptional" threshold from *Northern Transportation* in considering an opposed stay against a third-party guarantor.[33] The Court also relied upon the "judicial direction issued in *Redwater*", to hold that

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[28] *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para 1 [*Northern Transportation*].

[29] *Northern Transportation* at para 99.

[30] *Northern Transportation* at para 92.

[31] *Northern Transportation* at para 100.

[32] *Mantle Materials Group, Ltd (Re),* 2024 ABKB 19 *[Mantle Materials].*

[33] *Mantle Materials, supra* at para 57.

the performance of critical environmental reclamation obligations constituted an exception which justified granting the requested relief to stay a proceeding against a third-party guarantor.[34]

45. While it is submitted that the order in the *Mantle Materials* case was outside the Alberta Court's jurisdiction and it is not binding on the Ontario Court, there is still is a huge factual distinction between, on the one hand, the case before this Court which involves the potential inconvenience of management by having to respond to a single arbitration over a relatively straightforward issue of unpaid amounts under an agreement, and on the other hand, serious environmental reclamation issues that were required to be addressed pursuant to a statutory licensing regime.

Discretionary issues

46. Canopy submits that there is simply no jurisdiction to make the Proposed Order. However, to the extent the Court determines that there is some basis for discretion, the facts of this case do not support an order staying the Arbitration of DAK's guarantee obligations.

47. In *Trees Corp.*, the Court considered its discretion in connection with section 11.7 (auditor prohibition to act as monitor) which has an exception with the "permission of the court". The Court held that the exception could apply in "extenuating circumstances".[35] The Court did not define "extenuating circumstances" but it is instructive that the Court rejected what it called "self-serving arguments" such as incremental costs and inefficiencies.[36] In the case at hand, the Applicants advance self-serving arguments such as management being too busy and the stay only being for a short period of time. These statements appear in almost every CCAA pleading involving a stay of proceedings and there is nothing exceptional or extenuating about them.

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[34] *Mantle Materials*, *supra* at para 59.

[35] *Trees Corp.*, *supra* at para 46.

[36] *Trees Corp.*, *supra* at para 47.

48. The sole evidence concerning the purported impact of the claim against DAK on the CCAA comes from Andrew Williams, the President of the Applicants. At its highest, Mr. Williams' evidence consists of speculation, based on out of court statements from an individual who similarly lacks direct knowledge on this issue and who the witness could not confirm had validated this information, that the Applicants' management will need to assist DAK in the defence it intends to assert. [37] When pressed, Mr. Williams admitted, in no uncertain terms, that he didn't actually know what steps the Applicants' management would be required to take in the Arbitration, and refused to answer whether he even knew how DAK intended to the defend the claims.[38]

49. In its totality, the Applicants have adduced no admissible evidence that goes beyond bald speculation as to the impact of litigating the guarantee claim on the CCAA proceeding. Their spartan, self-serving evidence does not support the extraordinary request being made to stay a guarantee claim in the face of the prohibition in section 11.04 and is not sufficient to justify an exercise of the Court's discretion in these circumstances.

50. The SCC in *Callidus* sets out the guiding principles for the exercise of discretion under the CCAA:

> ….the court must keep in mind three "baseline considerations", which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence.[39]

51. In considering whether the Applicants have met this burden, the following facts are relevant:

(a) in addition to millions of dollars of other claims that are stayed in these CCAA proceedings, the Payment Obligations have been outstanding for more than a year

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[37] Williams Transcript, q. 149, Applicants' Transcript Brief, Tab 2 [A1978].

[38] Williams Transcript, q. 142, Applicants' Transcript Brief, Tab 2]A1975].

[39] *Callidus* at para 49.

and there is evidence that both the Applicants and DAK have tried to delay any determination of the claims;[40]

(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";

(c) the Applicants assert that management does not have enough time to deal with a single arbitration claim. Unlike the *Balboa* case which had the potential of hundreds of guarantee claims against management, Canopy is trying to enforce against one party, DAK in circumstances where the alleged counterclaims have been identified, the relevant calculations have been made, and DAK has already engaged counsel to defend the Arbitration. Even if there was admissible evidence concerning DAK's need to involve management from the Applicants to defend the arbitration (which there is not) the guarantee claim is, on its face, straightforward and any potential legwork (including calculation of the Deferred Compensation) was already completed;

(d) in considering overall fairness, it must be emphasized that the Canopy claims have been targeted by the Applicants for the extended stay while another guarantee party is specifically excluded;

(e) in considering whether the Applicants are acting in good faith and with due diligence, the Applicants have failed to produce agreements with DAK where it purports to provide management services with no employees and receive a 12%

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[40] Paterson Affidavit at para 20, Canopy MR [B-1-10].

payment for providing a guarantee to the Applicant's lender. The Applicants are required pursuant to the *Rules of Civil Procedure* to produce documents referenced in an affidavit.[41] 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;

(f) in respect of the management services agreements, which the Applicants specifically rely on to suggest that DAK and the Applicants are inter-related, Mr. Williams asserted in response to a question taken under advisement that the management services agreements are not within his power, possession or control. This ought to be rejected given his repeated reliance on and reference to the agreements in his affidavits and given he is the President of the Applicants. If Mr. Williams did not have access to these agreements, they ought not to have been referenced in his affidavit. In any event, there can be no question that the Applicants have the documents in their power, possession, or control, given that they are party to the agreements.

52. The Applicants' refusal to produce these documents (in response to the Notice of Examination[42], in response to questions at the cross-examination of Mr. Williams, and in response to Canopy's Request to Inspect Documents) is improper, unfair, and ought to be remedied. The lack of transparency also goes to the absence of good faith.

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[41] RRO 1990, Reg 194 at r. 30.04(2), Schedule "B". Canopy delivered a Request to Inspect Documents in respect of these agreements on October 10, 2024: Canopy Transcript Brief, Tab 6 [B-1-62]; *Friends of Lansdowne v. Ottawa*, 2011 ONSC 2089 at para 8; *Friends of Lansdowne v. Ottawa*, 2011 ONSC 1015 at paras 28-34, 50.

[42] Canopy Transcript Brief, Tab 1 [B-1-42].

53. Finally, the Applicants continually assert that the proposed stay of proceedings is only for 7 weeks and there is no prejudice from this short period of delay. There are a number of fallacies with this position. First, the extension sought is for the "Stay Period". There is no certainty that the Stay Period will not be extended further as regularly occurs in CCAA cases. Second, the Payment Obligations have been outstanding for more than a year, and the Notice of Arbitration was issued in March 2024. The already lengthy delay Canopy has suffered is ongoing.

54. Canopy submits that whether the time-period is 7 weeks or 7 days or 7 minutes, the CCAA does not permit an order extending the stay of proceedings to a third-party guarantor nor would such a stay be just or appropriate in the current circumstances, particularly given the millions of dollars of other claims of Canopy's that are stayed in these CCAA proceedings.

PART IV - RELIEF REQUESTED

55. For the reasons set out above, the requested relief extending the stay of proceedings to DAK should be refused, with costs, and the Applicants should be ordered to produce the "Guarantee Fee Agreement" and "management services agreements" referenced in Mr. Willams' affidavits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of October 2024.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Trees Corporation*, 2024 ONSC 30
2. *Century Services,* 2010 SCC 60
3. *Stelco, Inc., Re*, 2005 CanLII 8671 (ONCA)
4. *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10
5. *Varriano v. Allstate Insurance Company of Canada*, 2023 ONCA 78
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. *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1814
8. *BBB Canada Ltd.*, 2023 ONSC 1230
9. *Northern Transportation Company Limited (Re)*, 2016 ABQB 522
10. *Mantle Materials Group, Ltd (Re)*, 2024 ABKB 19
11. *Friends of Lansdowne v. Ottawa*, 2011 ONSC 2089
12. *Friends of Lansdowne v. Ottawa*, 2011 ONSC 1015

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *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. (emphasis added)

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.

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).

2. *Rules of Civil Procedure*, RRO 1990, Reg 194

Inspection of Documents

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM OF CANOPY GROWTH CORPORATION
(Further ARIO)

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