

2025 01G 0491

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Companies*  
*Creditors Arrangement Act* R.S.C., 1985  
c. C- 36 as Amended (the "CCAA")

AND IN THE MATTER OF an  
application of Karwood Contracting Ltd.,  
Karwood Engineering Ltd., Karwood  
Design Group Ltd., and Karwood Ontario  
Ltd. (the "Applicants")

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SUBMISSION OF BOREAL ATLANTIC LTD.  
Re. Proposed Distribution Order

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Stephen Fitzgerald, KC  
**BROWNE FITZGERALD MORGAN & AVIS**  
Solicitor for the Creditor Boreal Atlantic Ltd.  
Whose address for service is:  
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**Attention: Registrar**

TO: O'Keefe & Sullivan  
Solicitor for the Applicants  
80 Elizabeth Avenue, Suite 202  
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**Attention: Darren D. O'Keefe**

TO: BDO Canada Limited  
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Halifax, NS B3M 4G2  
**Attention: Neil Jones**

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**Facts**

1. Boreal Atlantic Ltd. (“Boreal”) is a body corporate duly incorporated under the laws of the Province of Newfoundland and Labrador and is a creditor in these proceedings.
2. Pursuant to a written letter of offer (the “Loan Agreement”) dated March 26, 2024, made between Boreal as lender and Karwood Contracting Ltd. (“KCL”) as borrower, Boreal lent KCL the sum of \$550,000.00 plus interest (the “Loan”) to be secured with, among other things, a promissory note from KCL, a first charge mortgage over KCL’s property, being a parcel of vacant land situate on Kenmount Road, in the Town of Paradise, in the Province of Newfoundland and Labrador (the “Property”).
3. The first charge mortgage on the Property was registered on the 2<sup>nd</sup> of April, 2024, at the Registry of Deeds with Newfoundland and Labrador registration number 1108954.
4. KCL went into default of the Loan Agreement and the mortgage and thus, Boreal commenced power of sale proceedings under the *Conveyancing Act*, RSNL 1990, c. C-34 by serving notice of its intention to proceed on the 20<sup>th</sup> of December 2024.
5. On February 3<sup>rd</sup>, 2025 this Court granted an initial Order following an application by KCL (among other related Karwood companies) for an initial Order pursuant to the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36 (“CCAA”), with the effect that Boreal’s power of sale proceedings were stayed. The aforesaid stay of proceedings was extended to February 13<sup>th</sup>, 2025, to February 20<sup>th</sup>, 2025, at which time the stay of proceedings was again extended to July 4<sup>th</sup>, 2025.

6. On the 12<sup>th</sup> of February 2025, the Monitor, BDO Canada Ltd., who is the Court appointed Monitor in these proceedings, provided its First Report. At paragraph 21 of the Monitor's First Report, the Monitor identified the primary secured creditors of Karwood as follows:

*“21. According to management, Karwood Contracting is indebted to the following secured creditors:*

- a. BMO, in the amount of approximately:*
- i. \$666,000.00 secured by a mortgage against one (1) complete and five (5) partially complete residential homes located in Paradise, NL.*
  - ii. \$150,000.00 with respect to a revolving line of credit secured by a general security agreement;*

*[emphasis added]*

- b. Boreal Atlantic Limited (Boreal), in the amount of approximately \$644,000.00, secured by a mortgage against a 7,318 square meter parcel of land located on Kenmount Road, Paradise, NL;*

*...”*

*(See: First Report of the Monitor, dated February 12, 2025, p. 7)*

7. Notably, it appears that BMO's \$150,000.00 revolving line of credit was secured only by a general security agreement (GSA) and not by any real property mortgage that Boreal is aware of.

8. By its second report dated February 20, 2025, the Monitor reported that KCL was applying to the Court to approve a debtor-in-possession (DIP) facility, being provided by the Bank of Montreal (BMO) in the amount of up to \$750,000.00 pursuant to a DIP Term Sheet.

9. The Monitor's Second Report also reported that as of the date of its report, the residential homes referred to in paragraph 6 above were in various stages of completion as follows:

- “a. 55 Silver Birch Crescent, Paradise, NL – 100% complete and subject to a PSA dated June 19, 2023 and an amendment extending closing until February 17, 2025;*
- b. 59 Silver Birch Crescent, Paradise, NL – 80% complete and subject to a PSA dated July 13, 2023 and an amendment extending closing until March 17, 2025;*
- c. 61 Silver Birch Crescent, Paradise, NL – 53% complete and subject to a PSA dated May 31, 2023 and an amendment extending closing until May 12, 2025;*
- d. 63 Silver Birch Crescent, Paradise, NL – 53% complete and subject to a PSA dated April 17, 2023 and an amendment extending closing until May 20, 2025;*

- e. 70 Silver Birch Crescent, Paradise, NL - 46% complete and subject to a PSA dated December 9, 2023 and an amendment extending closing until May 27, 2025; and
- f. 41 Yellow Wood Drive, Paradise, NL - 51% complete and subject to a PSA dated December 9, 2023. The Company issued an amendment to extend closing until June 4, 2025 which is pending execution by the purchaser.”

(See: Second Report of the Monitor, dated February 20, 2025, p. 8)

10. The Monitor’s Second Report also detailed how the proceeds from future sales of the completed residential homes would be treated, as follows:

“30. Pursuant to the terms of the DIP Term Sheet, the Monitor understands the DIP Lender will open a new account specific to the DIP facility. Further, the Monitor will collect the proceeds from the sale of each of the Residential Properties and hold in trust funds sufficient to repay the BMO secured debt including the builder mortgages held against each of the Residential Properties and a pro-rate portion of the BMO revolving line of credit (the “**Restricted Cash**”). The net proceeds from the sale of the Residential Properties, in excess of the Restricted Cash, will be released by the Monitor to the Applicants for purposes of, together with the DIP Financing, to finance the Applicants’ operations to allow for the completion of the Residential Properties. If the Applicant’s [sic] require use of the Restricted Cash to complete the construction of the Residential Properties, funds may be released to the Applicants with prior approval of the DIP Lender.”

(See: Second Report of the Monitor, dated February 20, 2025, p. 9-10)

11. By the Court’s amended and restated initial order (the ARIO) dated February 20<sup>th</sup>, 2025, the DIP financing was approved. The Court’s order stated, *inter alia*:

“35. This court orders that the DIP lender shall be entitled to the benefit of, and is hereby granted a charge on the principle, interest, and other costs noted in the Commitment Letter (the **DIP Lender’s Charge**) on the Property, which DIP lender’s charge shall not secure any obligation that exists before this order is made.”

[emphasis added]

(See: ARIO dated February 20, 2025)

12. The ARIO had the effect, *inter alia*, of creating a priority charge over the real property which Boreal had previously held a first mortgage charge on, in favour of BMO, as the DIP Lender.

13. Following the ARIO in February of 2025, the six residential homes on which BMO had a previous, pre-filing first mortgage were sold over time and partial proceeds from these sales were paid to BMO by the Monitor pursuant to the terms of the DIP. The dates and the amounts that were paid to BMO are as follows:

March 24, 2025	55 Silver Birch	\$150,573.00
April 25, 2025	59 Silver Birch	\$159,180.00
July 4, 2025	61 Silver Birch	\$151,754.00
July 7, 2025	63 Silver Birch	\$151,754.00
August 13, 2025	70 Silver Birch	\$132,589.00
September 9, 2025	41 Yellow Wood	\$128,701.00

The total amount paid to BMO from the sale of the residential lots was **\$874,551.00**.

(See: Fifth Report of the Monitor, dated June 27, 2025, p. 7-8)  
(See: Sixth Report of the Monitor, dated September 15, 2025, p. 7)

14. According to the terms of the DIP loan, a portion of each of the payments referred to above was used to pay down amounts owed to BMO arising from KCL's line of credit, which had been secured by BMO's pre-filing GSA.
15. KCL's CCAA application, including the stay of proceedings, was extended on several occasions. By September of 2025 the Monitor was reporting that, following discussions between "the Applicant, DIP lender (BMO), Monitor, and private investor", KCL had received a binding offer to sell all of the assets of KCL (including the lands mortgaged to Boreal), and the Monitor further reported that an Asset Purchase Agreement (APA) was executed between KCL and the private investor.
- (See: Seventh Report of the Monitor, dated September 29, 2025)
16. The Monitor's Seventh Report also advised that the funds to be realized from the APA would be insufficient to pay any amounts to, *inter alia*, secured creditors of KCL, including Boreal.
17. On October 24<sup>th</sup>, an AVO was granted whereby the Court approved the APA and the related Transaction, whereby the assets of KCL, including the property previously secured by Boreal's first mortgage, was conveyed to the private investor.
18. By its Eighth Report and following the closing of the Transaction, which Eighth Report was received by Boreal's counsel at 4:30 p.m. on November 10<sup>th</sup>, the Monitor is now proposing to distribute a further amount of \$706,968.00 to BMO pursuant to BMO's DIP charge. The Monitor is recommending that no amount be distributed to Boreal as a former secured creditor or other secured creditors.

## Issues

- I. Did BMO's DIP charge have the effect of enhancing BMO's pre-filing GSA?
- II. If so, what effect should this have on the Distribution Scheme proposed by the Monitor in its Eighth Report?

## Argument

### Issue I. Did BMO's DIP charge have the effect of enhancing BMO's pre-filing GSA?

19. Section 11.2(1) of the CCAA refers to interim financing as an available course of action for a debtor company. Section 11.2(1) states as follows:

*“11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.”*

[emphasis added]

(See: Tab 1: CCAA (RSC 1985, c. C-36), section 11.2)

20. In *Toys “R” Us (Canada) Ltd.*, 2017 ONSC 5571, the Ontario Superior Court of Justice (Commercial) considered section 11.2 of the CCAA in context of the granting of a DIP loan in that case. In allowing the DIP loan, the Court held as follows:

*“... Section 11.2 of the CCAA provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in CCAA cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a “takeout DIP”) all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.”*

[emphasis added]

(See: Tab 2: *Toys “R” Us (Canada) Ltd.*, 2017 ONSC 5571, para. 10)

21. Boreal submits that in this case the DIP charge did “improve” or “fill a gap” in BMO’s pre-filing security. Prior to the DIP charge, BMO had a \$666,000.00 real property mortgage on the residential homes referred to in paragraph 6 above and a GSA to secure \$150,000.00 line of credit granted to KCL.
22. Boreal therefore submits that the DIP charge in effect converted BMO’s GSA into a first charge on KCL’s real property with priority over Boreal’s first mortgage security. But for the DIP loan, there would have been no ability for BMO to pay down KCL’s line of credit that was secured only by BMO’s GSA. The DIP charge “improved” BMO’s security or “filled in a gap” in BMO’s security.
23. Thus, Boreal submits that the DIP loan secured an obligation that existed before the ARIO, contrary to section 11.2 of the CCAA and paragraph 35 of the ARIO itself.

Issue II. If so, what effect should this have on the Distribution Scheme proposed by the Monitor in its Eighth Report?

24. As indicated above, BMO has been paid a total amount of \$874,551.00 for the sale of KCL’s completed residential homes between February and September 2025. A portion of each of the payments included payments towards KCL’s outstanding line of credit, pursuant to the DIP charge. Prior to the ARIO, the Monitor had reported that BMO’s first mortgage was for the approximate amount of \$666,000.00.
25. Boreal submits that any amounts from the sale proceeds of the residential homes that were paid to BMO over and above the amounts owed to BMO pursuant to its mortgage of \$666,000.00, which amounts were used to pay down the outstanding BMO line of credit, should be deducted from any amount the Monitor is now proposing to be paid to BMO as a DIP lender from the proceeds of the Transaction.
26. Furthermore, Boreal submits that this overage amount should be distributed among the secured creditors of KCL, including Boreal, on a pro rata basis.
27. All of which is respectfully submitted.

**DATED AT** St. John’s, in the Province of Newfoundland and Labrador, this 12<sup>th</sup> day of November, 2025.



Stephen Fitzgerald, KC  
**BROWNE FITZGERALD MORGAN & AVIS**  
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**Attention: Neil Jones**

**Tab 1**



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

Current version: in force since 2024-12-12

Link to the latest version ⓘ: <https://canlii.ca/t/7vdw>

Stable link to this version ⓘ: <https://canlii.ca/t/56fc5>

Citation to this version: Companies' Creditors Arrangement Act, RSC 1985, c C-36, <<https://canlii.ca/t/56fc5>> retrieved on 2025-10-24

Currency: This statute is current to 2025-09-29 according to the Justice Laws Web Site

## Companies' Creditors Arrangement Act

**R.S.C., 1985, c. C-36**

An Act to facilitate compromises and arrangements between companies and their creditors

## Short Title

### Short title

**1** This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

## Interpretation

### Definitions

**2 (1)** In this Act,

***aircraft objects*** [Repealed, 2012, c. 31, s. 419]

*Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

### **Meaning of *regulatory body***

**11.1 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

### **Regulatory bodies — order under section 11.02**

**(2)** Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

### **Exception**

**(3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

**(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

**(b)** it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

### **Declaration — enforcement of a payment**

**(4)** If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

**11.11** [Repealed, 2005, c. 47, s. 128]

### **Interim financing**

**11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

### **Priority — secured creditors**

Tab 2

**CITATION:** Re TOYS "R" US (CANADA) LTD., 2017 ONSC 5571  
**COURT FILE NO.:** CV-17-00582960-00CL  
**DATE:** 20170920

**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  
TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

**BEFORE:** F.L. Myers J.

**COUNSEL:** *Brian F. Empey, Melaney Wagner, Christopher Armstrong, counsel for the applicant*  
*R. Shayne Kukulowicz, Jane Dietrich, counsel for Grant Thornton Limited, the Proposed Monitor*  
*Tony Reyes, counsel for the pre-filing ABL lenders*  
*Alexander Cobb, counsel for the B4 lenders*  
*Linc Rogers, Chris Burr counsel for JPMorgan Chase Bank, NA, the lead lender on behalf of the proposed DIP lenders*

**HEARD:** September 19, 2017

**ENDORSEMENT**

[1] At the conclusion of the hearing I granted the relief sought by the applicant with minor revisions for reasons to be delivered shortly. These are my reasons for doing so.

[2] The applicant is Canada's leading retailer of toys and baby products. It operates from 82 stores across all ten provinces and over the internet. It employs nearly 4,000 people. This number increases to more than 6,000 during the peak holiday season. It is an important participant in the Canadian retail economy and a much beloved childhood icon in many Canadians' lives.

[3] The applicant is an indirect, wholly owned subsidiary of TOYS "R" US INC. a US company. On September 18, 2017 the US parent, several affiliates, and the applicant filed for bankruptcy protection in the US Bankruptcy Court for the Eastern District of Virginia. They did so in order to protect against stakeholder action that could adversely impact their businesses while they explore restructuring options. Publicity concerning the problems facing the companies has already led some suppliers to take steps to limit the credit terms that they are willing to extend to the retailer. As a result, the businesses found themselves in need of the stability of bankruptcy protection.

[4] The Canadian applicant's operations are generally autonomous from the parent's US operations. But, the applicant's pre-filing US\$200 million secured revolving credit facility and its US\$125 million secured term loan facility were both provided under a wider asset-backed lending facility provided by the pre-filing ABL lenders to the US and Canadian companies.

[5] When the applicant and its US affiliates filed for US bankruptcy protection, they committed defaults under their ABL facilities. Therefore, although the applicant is generally cash flow positive and has positive shareholder equity, it found itself without borrowing facilities and within two weeks of being unable to meet its obligations as they come due.

[6] As a result of its looming liquidity crisis, the applicant meets the definition of a "debtor company" to whom the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 applies. *Re Stelco Inc.*, 2004 CanLII 24933 (ON SC). It has liabilities of more than \$5 million and otherwise meets the technical requirements of the statute.

[7] The applicant needs the protection of a general stay that is available under the *CCAA*. The stay is a court order that prevents people and companies with claims against the applicant from cancelling their contracts or taking steps to enforce their claims against the applicant during the period of the restructuring. All creditors and claimants are held at bay, together, to maintain a level playing field. At the same time, the stay protects the applicant's business in order to: create conditions under which a lender will advance fresh funds to the applicant to carry it through its restructuring efforts; help prevent suppliers from ceasing or tightening credit terms just prior to the vital holiday selling season; to prevent enforcement efforts by creditors that would deflect the company from its efforts to find a win-win restructuring for the general body of its creditors; and to enable the applicant to continue to operate on a "business as usual" basis to protect the value of its business and brand for all. I am satisfied that this is an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*.

[8] The applicant expresses concern that it might be required to pay some pre-filing claims to critical suppliers and others despite the general goal of a bankruptcy proceeding to freeze all claims at the filing date. For example, employees with wages accrued before today need to be paid in the ordinary course in order to keep the workforce engaged. Customers holding gift cards and similar pre-paid rights need to be able to enforce those pre-filing claims in order to protect the company's public customers. There is good reason to allow these types of claims to protect the goodwill of the business in the interests of all creditors even though most others are being prevented from enforcing their claims while these claims are recognized.

[9] In addition, a small number of critical suppliers of goods and services may have the ability to avoid the stay order under the *CCAA* and the US automatic stay. Sometimes those suppliers will threaten to refuse to continue to supply a *CCAA* debtor unless they are paid their pre-filing claims in priority to others. In some circumstances this could imperil the applicant's business. Under s. 11.4 of the *CCAA*, the court may declare a person to be a "critical supplier." A critical supplier can be compelled to supply the applicant with goods and, in return, it can be provided with court-ordered security to protect its right to payment. That situation is quite different than the order sought in this case. Here, the applicant is not seeking to compel anyone

to supply on credit against its will. The suppliers of concern in this case may claim to be beyond the reach of the court's orders. Rather, here, the applicant is recognizing that in some specific and limited cases, it may face an inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date. Providing such a payment is a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few. They will be carefully scrutinized by the applicant and the Monitor. The initial order granted by the court in this proceeding empowers the Monitor to exercise discretion to approve a payment to a critical supplier on its pre-filing claims. The Monitor will do so only in truly critical situations. It will be guided by the factors set out in para. 55 of the applicant's factum as drawn from the discussion by Morawetz J. (as he then was) in *Re Cinram International Inc.*, 2012 ONSC 3767.

[10] The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the *CCAA* provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in *CCAA* cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.

[11] The DIP terms are lengthy and complex. The court has had limited time to scan and parse the documents and has relied heavily on the Monitor's and the applicant's assessments and submissions. Based on my review and the submissions made, I am satisfied that the DIP terms are generally limited to standard lending terms. With one exception discussed below, I was not drawn to any terms that might be thought to create unusual powers in the DIP lenders to control the applicant or the process. There do not appear to be any terms that provide incentives for the DIP lenders to try to execute loan-to-own or other strategies to somehow extract more value than is made available in fees and interest on the face of the DIP loan documents. Scrutinizing complicated, lengthy DIP terms on an urgent initial hearing is a dangerous pursuit. The court relies on the integrity of the parties to disclose unusual terms and otherwise to protect the stakeholders from terms that may be buried in thick documents that could later create skewed outcomes or incentives that are contrary to the interests of the stakeholders generally. If a DIP lender wants extraordinary rights or powers beyond standard, plain vanilla lending terms, they should be disclosed expressly and subject to transparent scrutiny at minimum.

[12] In this case, the DIP lenders ask for the right to enforce their security in the event that they claim that the applicant has committed a default under the terms of its new borrowing. The

stay provisions that I have approved above generally prevent creditors from enforcing their claims without leave of the court. In some cases the stay may prevent a supplier from unilaterally discontinuing supply. The parties are able to come to court very quickly on the Commercial List. Therefore, a party who has good cause to be released from a stay can usually get to court to ask for an order lifting the stay before it has suffered much, if any, prejudice. But the leave requirement ensures that suppliers or others cannot claim that an applicant is in default and take unilateral, destabilizing steps without scrutiny of the alleged default by stakeholders, the Monitor, and ultimately, the court.

[13] The DIP lender and the applicant agreed that the DIP lender could give five days' notice of default to the applicant and then take a number of unilateral enforcement steps. This reverses the burden and requires the applicant to come to court during the five day period to have the DIP lenders' claims reviewed. But there are terms of the DIP documents that limit the applicant's entitlement to oppose the DIP lenders. This could create a complex and ambiguous situation.

[14] In my view, the stay provisions protect the stakeholders, creditors, and the public interest as much as the applicant. The court process provides assurances of transparency and accountability to which all interested parties are entitled as a *quid pro quo* for the protections offered by the statute. The DIP lenders are well protected without an extraordinary power to enforce their claims without court scrutiny. The DIP lenders in this case are replacing first secured lenders. It is not clear why they need special DIP priority when the DIP lenders are likely entitled to step into the priority position of the pre-filing ABL lenders under the doctrine of equitable subrogation. The applicant is paying the DIP lenders more than \$20 million in fees plus enhanced interest for a loan that is protected not only by equitable priority but by court-ordered security. DIP loans have not proven to be that risky in Canada generally. I know of only one case where a DIP lender has not been repaid in full and that was a very specific instance where the DIP lender was the principle purchaser of the CCAA debtor's goods and needed to keep funding the debtor at a loss in order to keep its own business afloat.

[15] In this case, the applicant seems to be solvent on a balance sheet basis. The B4 lenders have advised the court that they expect to realize substantial value from their security against the shares of the applicant. I see no valid reason for the DIP lenders to require any significantly enhanced enforcement rights when their position is protected already. Given the applicant's consent and the importance of the DIP loan to the restructuring process generally, I accept that the DIP lenders will be entitled to take minimal steps to give notice of default and to withhold further advances while the parties come to court. Otherwise, the DIP lenders require leave of the court on notice before they may accelerate their loans or to take any other enforcement steps.

[16] The fees and disbursements of the Monitor, counsel, and the financial advisors to the debtor will be protected by a court ordered charges as well under s. 11.52 of the CCAA. The members of the board of directors and officers of the applicant will also be protected against the risk of incurring uninsured, post-filing liabilities. I am satisfied that the applicant and the Monitor have calculated the limits of this charge to reflect realistic, potential statutory D & O liability. I am less sanguine that these liabilities cannot be insured at a reasonable cost under s. 11.51 (3) of the CCAA. One can always postulate that an insurer might decline coverage or that

the insurance limits might prove to be insufficient. However, creating a charge can also provide an incentive to structure affairs so that others can access the available insurance precisely because the Ds & Os can access their charge and do not need their insurance. Moreover, the standard, *in terrorem* assertion that the Ds & Os are necessary to the restructuring and may resign unless they are granted a charge is rarely subjected to real scrutiny. However, absent concerns expressed by those being primed, I am satisfied that the applicants have met the statutory test for the purposes of this initial hearing.

[17] Toys “R” Us (Canada) Ltd. Toys “R” Us (Canada) Ltee is a strong performing business facing a liquidity crisis that causes it to suffer technical insolvency. It is fair, reasonable, and wholly appropriate for it to be supported by the protections of the *CCAA* so as to provide it with an opportunity to restructure its affairs to enable it to address its current circumstances.

[18] Order accordingly.

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F.L. Myers J.

**Date:** September 20, 2017