Court File No. CV-20-00638930-00CL

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
CANNTRUST HOLDINGS INC., CANNTRUST INC.,
CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

Applicants

FACTUM OF CONSOLIDATED BOTTLE CORPORATION
(Re: Motion Returnable January 31, 2022 @ 11 AM)

January 28, 2022

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TO: THE SERVICE LIST

OVERVIEW

1. The initial order in this matter restrained suppliers from ceasing supply "*provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants".*

2. Consolidated Bottle Corporation ("**Consolidated Bottle**") supplied goods to one of the applicants after the making of the initial order. Consolidated Bottle has not been paid. The applicant has acknowledged the resulting debt in writing, twice, and has promised to pay, but has not done so. It has, however, paid its pre-filing creditors $52 million, while in default to Consolidated Bottle.

3. It would be grossly inequitable and contrary to the animating purpose of the *CCAA* if Consolidated Bottle, having been compelled to supply to a distressed company for the benefit of the other stakeholders in that company, was denied payment for those goods, contrary to a term of the initial order. This Court should therefore order the applicants to immediately pay the indebtedness, plus accumulated interest and costs, to Consolidated Bottle or, in the alternative, should decline to extend the stay so as to allow Consolidated Bottle to commence proceedings against the applicant and bring an immediate motion for summary judgment on the written acknowledgment of the debt.

PART II – THE FACTS

4. Commencing in approximately 2017, Consolidated Bottle Corporation ("**Consolidated Bottle**") supplied glass and plastic bottles, plastic caps, and associated goods (collectively, the "**Goods**") to the applicant CannTrust Inc. ("**OpCo**").

5. The Goods were custom-manufactured to OpCo's specifications: OpCo ordered bottles in a particular shape, colour and configuration. Consolidated Bottle was OpCo's only supplier of such goods.

6. The agreement and practice between OpCo and Consolidated Bottle was that Consolidated Bottle would arrange to manufacture Goods upon receipt of a purchase order from OpCo, would deliver those Goods to OpCo accompanied by an invoice, and would be paid the amount set out in the invoice within the 30 days specified in that invoice. OpCo was occasionally late in its payments, but generally satisfied the invoices in good order.

7. On March 31, 2020, the applicants, among them OpCo, sought and obtained relief from this Honourable Court pursuant to an initial Order (the "**Initial Order**") made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "***CCAA***"). The Initial Order stated, in part:

> ***CONTINUATION OF SERVICES***
>
> *16. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants … for the supply of goods and/or services, … **are hereby restrained** until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, … **provided in each case** that the normal prices or charges for all such goods or services received after the date of this Order **are paid by the Applicants** …*[1]

[1] Emphasis added

8. In May 2020, approximately six weeks after the making of the Initial Order, OpCo contacted Consolidated Bottle to order more Goods. In accordance with the Initial Order, Consolidated Bottle supplied those Goods to Opco, together with invoices. Consolidated Bottle believed at the time that OpCo would comply with the Initial Order and pay those invoices.

9. On July 16, 2021, this Court sanctioned the applicants' plan of arrangement (the "**Plan**").

10. OpCo paid Consolidated Bottle's invoices until the late summer of 2021. In August and September 2021, Consolidated Bottle delivered Goods to OpCo accompanied by more invoices (the "**Invoices**"). OpCo did not satisfy the Invoices, and by early October, 2021, OpCo was indebted to Consolidated Bottle in the amount of in the amount of $869,831.03. Consolidated Bottle's Vice President of Finance and CFO, Hengen Chow ("**Chow**") discussed this indebtedness with OpCo's CFO, David Blair ("**Blair**").

11. The outcome of the discussions was that on or about October 15, 2021, Chow (on behalf of Consolidated Bottle) and Blair (on behalf of OpCo) executed an agreement entitled "Payment Plan Summary" (the "**Payment Plan**") wherein OpCo acknowledged its indebtedness to Consolidated Bottle in the amount of $869,831.03, and agreed to pay that indebtedness in four scheduled installments, the last of which was to occur on December 23, 2021.

12. OpCo paid the first two instalments described in the Payment Plan. OpCo has not paid either the third instalment (due December 9, 2021), (the "**Third Installment**") or the fourth instalment (due December 23, 2021) (the "**Fourth Installment**"). Each instalment was to be in the sum of $200,000.

13. On December 3, 2021, shortly before OpCo defaulted on the Third Installment, the Monitor filed its Sixteenth Report to this Court in support of the applicants' motion for an extension of the stay of proceedings imposed by the Initial Order and extended by subsequent orders of this Court (the "**Stay**"). The Sixteenth Report appended a "CCAA Cash Flow Forecast" prepared by the applicants (the "**December 3rd Cash Flow**"), which stated that during the week of December 12, 2021, the applicants would pay $344,000 in "Other Operating Expenses". This sum (necessarily) included the $200,000 due to Consolidated Bottle on December 9, 2021. Similarly, the December 3rd Cash Flow stated that the applicants would pay $365,000 in "Other Operating Expenses" during the week of December 19, 2021, which sum (necessarily) included the $200,000 due to Consolidated Bottle on December 23rd.

14. The December 3rd Cash Flow further stated that during the week in which the Third Installment was due, the applicants would have $58 million in funds available to them, ("Ending Balance"). During the week in which the Fourth Installment was due, the applicants were projected to have $57.79 million in funds. There was plenty of money available to pay Consolidated Bottle what it was indisputably owed. Accordingly, the Sixteenth Report stated:

> *51. Based on the Cash Flow Forecast, the Monitor believes that the Applicants will have sufficient liquidity to fund their operations through to January 31, 2022, the maximum length of the proposed extension of the Stay Period.*

15. OpCo defaulted on the Third Installment on December 9th.

16. On December 15th, the Monitor filed its Supplemental Sixteenth Report, again in support of the applicants' motion for a Stay extension. The post-filing default to Consolidated Bottle (and perhaps other post-filing creditors) was not mentioned, but the Monitor did opine that "*the Applicants have continued to act in good faith and with due diligence since the date of the Initial Order*". Further, the Report stated that "*the Applicants have sufficient funds to make the payments and distributions required by the CCAA Plan*" and that even in a wind-down scenario, "*all creditors of CannTrust Holdings, including post-filing creditors, are expected to be paid*".

17. The Supplemental Sixteenth Report appended another "CCAA Cash Flow Forecast", (the "**December 15th Cash Flow**"), which showed that as at the previous week, during which OpCo had defaulted on the Third Installment, the applicants had had $59 million in "Ending Balance" funds available to them. It also showed that the applicants had paid only $150,000 in "Other Operating Expenses" during that week, rather than the $344,000 anticipated by the December 3rd Cash Flow. The December 15rd Cash Flow projected that the applicants would pay $668,000 in "Other Operating Expenses" during the week of December 19, 2021, (rather than the $365,000 shown in the December 3rd Cash Flow), which sum (necessarily) included the $400,000 due to Consolidated Bottle on December 23rd.

18. On December 23rd, after this Court extended the Stay, OpCo defaulted on the Fourth Installment. Opco's current indebtedness to Consolidated Bottle therefore consists of $400,000, plus interest (the "**Indebtedness**").

19. On January 5, 2022, the applicants implemented their Plan, and in so doing paid $52,500,000 to their pre-filing creditors. OpCo received nothing. This meant that pre-filing creditors were paid in preference to at least one post-filing supplier, and were paid in part with funds generated by and owed to that post-filing supplier.

20. Respectfully, the Court which approved the Plan must have believed that the post-filing creditors would be paid in accordance with the Initial Order, both because of the terms of that Order and because it is extremely unusual (if not unheard-of) for pre-filing creditors to be paid before post-filing creditors have been satisfied in full.

21. On January 25, 2022, the applicants moved for another extension of the Stay. In paragraph 9 of their notice of motion, the applicants stated that:

> *A cash flow forecast running from January 17 to March 6, 2022 (the "Cash Flow Forecast"") will be appended to the Seventeenth Report of the Monitor, to be filed, and will demonstrate that the CannTrust Group will have sufficient liquidity to operate its business* ***and meet its obligations*** *during the Proposed Stay Extension Period.*[2]

22. OpCo's continuing default on its debt to Consolidated Bottle was not mentioned in the applicants' notice of motion, or in the accompanying affidavit of Greg Guyatt, the CEO

[2] Emphasis added

of CannTrust Holdings Inc. However, Guyatt did swear to the truth of the "*meet its obligations*" statement from the notice of motion, and he did assert that *"[t]he CannTrust Group has acted and continues to act in good faith and with due diligence*."

23. The Monitor eventually (on January 27, 2022) filed its Seventeenth Report in support of the applicants' request for another extension of the Stay. The Monitor did not report OpCo's continuing default (by this point more than three months old) on ordinary course-payment of a post-filing supplier, and the Monitor did not opine on whether such a default demonstrated a lack of good faith by applicants seeking the indulgence of this Court.

24. Another "CCAA Cash Flow Forecast" was attached to the Seventeenth Report. In a footnote to that document, the applicants stated that with respect to "Other Operating Expenses", "*Week 7 [i.e.March 6, 2022] includes the $400,000 payment to Consolidated Bottle Inc*." This is a) another written acknowledgment of the Indebtedness, and b) another (worthless) promise to pay in the distant future, if a liquidation does not occur first.

PART III – THE ISSUES AND THE LAW

25. The issues before this Honourable Court are as follows.

1. Should this Court order that the applicants forthwith pay the Indebtedness to Consolidated Bottle, and that Consolidated Bottle is relieved from any obligation to supply to OpCo in the future?

2. In the alternative, should this Court decline to extend the Stay, both as a sanction for the applicants' conduct and to permit Consolidated Bottle to bring civil proceedings to recover the Indebtedness?

3. Should this Court set aside the Sanction Order, as the applicants were in protracted breach of the Initial Order when the plan was implemented?

ISSUE ONE – CONSOLIDATED BOTTLE SHOULD BE PAID

26. There is no dispute about the essential facts. Consolidated Bottle is a post-filing supplier, which supplied goods pursuant to, and under the protection of, the Initial Order; OpCo has been in default of ordinary-course payment to Consolidated Bottle for many months, and has been in default of the Payment Plan since December 9th; the total Indebtedness is $400,000 plus interest; OpCo's default was not reported to the Court by the applicants or by the Monitor; the applicants distributed more than $52 million to pre-filing creditors while in default to Consolidated Bottle; and pre-filing creditors have therefore enjoyed priority over (at least one) post-filing creditor.

27. There can also be no dispute about the applicable legal principles, which amount to this: it would be inequitable and contrary to the purpose of the *CCAA* if Consolidated Bottle was not paid immediately. In *Re Quest University*,[3] a recent decision of the British Columbia Supreme Court, Justice Fitzpatrick, a noted insolvency judge, considered a request by Quest University, a CCAA applicant, for an order allowing it to defer (not avoid entirely) payments of post-filing rent owed to its landlord, Southern Star Developments

[3] 2020 BCSC 921 ("***Re Quest***")

Ltd.[4] Quest relied upon the unusual circumstances created by the Covid-19 pandemic. Fitzpatrick J., who had made the initial order, observed:

> *44 However, fundamentally, the Initial Order and the ARIO reflect the common understanding in* CCAA *proceedings that, as Quest continued in the process, it would continue its operations substantially in the ordinary course and would pay for those operations.* ***It is unsurprising that counterparties to those arrangements would expect payment as a matter of fairness. It would clearly be unattractive for a post-filing supplier to allow Quest, an insolvent company, to run up substantial obligations that might or might not be paid at the end of the day, depending on the outcome of the restructuring process*** *[citations omitted]*[5]

28. Justice Fitzpatrick then reviewed the law respecting post-filing debts, much of it from this Court.

> *46 In Air Canada, Re, [2004] O.J. No. 576 (Ont. S.C.J. [Commercial List]), Justice Farley addressed an application by aircraft lessors to obtain post-filing rent for a plane that was not returned until months after the lease was repudiated. At para. 6, Farley J. noted that the above* CCAA *provision (then s. 11.3) meant that the lessor could require payment for use of the plane on the contract terms.* ***The court ordered Air Canada to make payment.***
>
> *47 Similarly, in Boutiques San Francisco Inc., Re, [2004] Q.J. No. 2886 (C.S. Que.), Justice Gascon (as he then was) dealt with the right of unpaid suppliers to repossess their goods, in this case display units, from a* CCAA *debtor. At paras. 103-105, Gascon J. consider the* CCAA *provision (then s. 11.3). He held that,* ***if the debtor wished to continue using the display units, it had to abide by the terms of the agreement and pay for them.***
>
> *48 In Cosgrove-Moore Bindery Services Ltd.*, Re *(2000), 48 O.R. (3d) 540 (Ont. S.C.J. [Commercial List]), the same reasoning was applied in the context of a proposal under the* Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). The* BIA*, s. 65.1 contains similar provisions to those in the* CCAA *imposing restrictions on counterparties but also not allowing the stay to prevent a post-filing supplier or lessor from demanding payment.* **Justice Ground stated***:*
>
> > *[10] I have come to the conclusion that the purpose of s. 65.1 is to provide a commercial enterprise with the opportunity to continue operations while*

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[4] *Re Quest* at paragraphs 2- 5
[5] *Re Quest* at paragraph 44, emphasis added

> *working toward a reorganization* ***but at the same time to give creditors obligated to continue to supply goods, services or the use of leased property some protection that payments ordinarily due during the proposal period will not be wiped out or reduced to pro rata unsecured claims in the event of an ultimate bankruptcy****.*[6]

29. In dismissing Quest's application, Fitzpatrick J. returned to the fundamental principle of fairness.

> *97 Fairness is a common touchstone in* CCAA *proceedings. In Ted Leroy Trucking Ltd., Re, 2010 SCC 60 (S.C.C.), the Court stated:*
>
> > *[70] . . . Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.*
> >
> > *. . .*
> >
> > *[77] The* CCAA *creates conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.*
>
> *[…]*
>
> *98 As stated above,* ***it is commonly considered "fair" that a person continuing to supply an insolvent debtor or allow the debtor to continue using its property during the restructuring should also be compensated for that supply or use****, consistent with Model Orders in place across Canada: Cow Harbour Construction at para. 16.*
>
> *99 In my view, significant indicia of unfairness arise by allowing the rent deferral.*
>
> *[…]*
>
> *101 There is a definite benefit to the stakeholders by allowing the rent deferral. No doubt, Vanchorverve Foundation, a major secured creditor, recognized this in indicating its support for Quest on this application.* ***I fail to see why Southern Star (and indirectly, BMO) should bear substantial risk and loss to allow all of the other stakeholders to enjoy this benefit. It is, in my view, manifestly unfair****.*[7]

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[6] *Re Quest* at paragraphs 46-48, emphasis added

[7] *Re Quest* at paragraphs 97-101, emphasis added

30. Stated differently: paragraph 16 of the Initial Order essentially treated post-filing suppliers such as Consolidated Bottle as "critical suppliers", but without using that term or giving them the protection of the super-priority secured interest contemplated by sub-sections 11.4(3)-(4) of the *CCAA*.

> ***Critical supplier***
>
> ***11.4*** *(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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.*
>
> ***Obligation to supply***
>
> *(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.*
>
> ***Security or charge in favour of critical supplier***
>
> *(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.*
>
> ***Priority***
>
> *(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.*

31. By these provisions, Parliament clearly established that payments due to persons required to supply to an insolvent entity are to receive the protection of the Court, up to and including a security ranking "*in priority over the claim of any secured creditor of the company*." Indeed, Parliament could not do otherwise: as Justice Fitzpatrick observed, no one would supply, and thereby preserve an insolvent company during its

reorganization for the benefit of all stakeholders, if doing so meant a real possibility that one would not be paid. Yet here Consolidated Bottle has received nothing more than a series of promises to pay a few ever-receding months hence, and has watched pre-filing creditors receive $52 million from the applicants in the meantime. The "*fairness*" at issue here is not simply fairness to Consolidated Bottle, but the fairness of the *CCAA* to post-filing suppliers, and thus its practical utility.

32. Consolidated Bottle should be paid immediately. It should not have to assume the risk of non-payment in a wind-down and liquidation.

ISSUE TWO – THE STAY SHOULD NOT BE EXTENDED

33. Opco was in continuing breach of paragraph 16 of the Initial Order when it obtained the last extension of the Stay, and when it implemented the Plan. That breach was not (and has never been) reported to the Court. By any reasonable measure, OpCo has breached the duty of good faith imposed upon it by section 18.6 of the CCAA, and as a result the applicants should not obtain discretionary relief from this Court.

34. In *Quintette Coal Ltd. v. Nippon Steel Corp.*[8], the British Columbia Court of Appeal considered the scope and purpose of the stay of proceedings imposed by the *CCAA*. After reviewing the jurisprudence, Gibbs J.A. held:

> *[…] [T]he courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.* ***The power is discretionary and therefore to be exercised judicially****. It would*

[8] 1990 CanLII 430 (BC CA)

> *be a reasonable expectation that* ***it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries****, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from or services thereafter received from the debtor company, as is the case here. In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances.*[9]

35. For these reasons, this Court should exercise its discretion so as to allow the current Stay to expire, or (at a minimum) to lift any further Stay imposed solely with respect to Consolidated Bottle, so that that company might bring immediate proceedings for recovery of the Indebtedness.

ISSUE THREE – THE SANCTION ORDER SHOULD BE SET ASIDE

36. In the words of Justice Ground, formerly of this Court:

> *13 It is well settled law that, for the court to exercise its discretion pursuant to s. 6 of the CCAA and sanction a plan, the Applicants must establish that: (a) there has been strict compliance with all statutory requirements* ***and adherence to previous orders of the court****; (b) nothing has been done or purported to be done that is not authorized by the CCAA; and (c) the Plan is fair and reasonable.*[10]

37. OpCo was in "adherence with previous orders of the court" when the Plan was sanctioned. It was *not* in adherence with the Initial Order, which required payment of post-filing suppliers, when that Plan was implemented on January 5th and $52 million was paid to pre-filing creditors. It cannot be the law that a *CCAA* applicant has to obey Court orders only until its plan is sanctioned.

[9] 1990 CanLII 430 (BC CA), emphasis added
[10] *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (ON SC), at paragraph 13, emphasis added

38. OpCo's failure to pay a post-filing creditor also rendered the Plan unfair and unreasonable for the purposes of the above analysis. *In this very matter*, Justice Pattillo declined to approve the initial proposed plan of arrangement (after citing the above test) in part because the plan was unfair to one class of creditors.

> *54 In my view, Article 7.3 of the Plan as it is currently drafted is not fair to the non-settling defendants, including KPMG. While it bars any claims, including contribution and liability, against the Applicants, it fails to restrict the Securities Claimants' claims in the Action against the non-settling defendants to several liability. Having elected to settle with the Applicants, the Securities Claimants bear the risk of an inadequate settlement. By enabling the Securities Claimants to continue their action against the non-settling defendants and recover 100% of their damages, that risk shifts to the non-settling defendants.* ***Rather than balancing the interests of the stakeholders therefore, it favours the Securities Claimants (one group of creditors) over the non-settling defendants (another group of creditors).***[11]

39. At present, the applicants have used the implementation of the Plan to concretely favour their pre-filing creditors, at the expense of a post-filing creditor. The order sanctioning that Plan should be set aside.

PART IV – ORDER REQUESTED

40. Consolidated Bottle requests:

1. an order abridging the time for service of this notice of motion;

2. an order and direction that the applicants forthwith pay to Consolidated Bottle the sum of $400,000 (the "**Indebtedness**");

3. pre-and-post judgment interest at the rate stipulated by the *Courts of Justice Act*, R.S.O 1990, c. C-43, calculated commencing December 9, 2021 with respect to $200,000 of the above-mentioned sum, and calculated

[11] *CannTrust Holdings Inc., et al. (Re)*, 2021 ONSC 4408 (CanLII), at paragraph 54, emphasis added

commencing December 23, 2021 with respect to the whole Indebtedness;

4. an order and declaration that Consolidated Bottle is no longer required to supply goods or services to the applicants, or any of them, and that such order and declaration takes precedence over any previous order of this Honourable Court;

5. in the alternative to 1) and 2), above, an order that the stay of proceedings imposed by this Honourable Court's initial order dated March 31, 2020 and extended by subsequent orders of this Court (the "**Stay**") not be extended further;

6. in the further alternative to 1) and 2), above, an order lifting the Stay as against Consolidated Bottle, to allow Consolidated Bottle to commence proceedings against the applicant CannTrust Inc. in order to recover the Indebtedness;

7. an order setting aside the July 16, 2021 order of this Honourable Court sanctioning the applicants' plan of arrangement, (the "**Sanction Order**") on the basis that the applicants were in material breach of this Court's initial order dated March 31, 2020 at the time the plan was implemented; and

8. costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

FRED TAYAR
OF COUNSEL FOR CONSOLIDATED BOTTLE CORPORATION

Date: JANUARY 28, 2022

SCHEDULE "A"

Authorities Cited

1 *Re Quest University*, 2020 BCSC 921

2 *Quintette Coal Ltd. v. Nippon Steel Corp.*, 1990 CanLII 430 (BC CA)

3 *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (ON SC)

4 *CannTrust Holdings Inc., et al. (Re)*, 2021 ONSC 4408 (CanLII)

SCHEDULE "B"
Statutes and Regulations Cited

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

Stays, etc. — initial application

11.02 *(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,*

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

[…]

Critical supplier

11.4 *(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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.*

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
[…]

Good faith

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

Good faith — powers of court

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

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

FACTUM
OF CONSOLIDATED BOTTLE CORPORATION
(Re: Motion Returnable January 31, 2022)

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