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

BRIEF OF AUTHORITIES OF THE APPLICANTS (AGM Extension) (Returnable July 7, 2022)

July 4, 2022

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6

James Gage LSO#: 34676I
Tel: 416-601-7539
E-mail: jgage@mccarthy.ca

Trevor Courtis LSO#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Natasha Rambaran LSO#: 80200N
Tel: 416-601-8110
Email: nrambaran@mccarthy.ca

Lawyers for CannTrust Holdings Inc.

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

BRIEF OF AUTHORITIES OF THE APPLICANTS
(AGM Extension)
(Returnable July 7, 2022)

INDEX

Tab 1

2007 CarswellOnt 8860
Ontario Superior Court of Justice [Commercial List]

IMAX Corp., Re

2007 CarswellOnt 8860, 41 B.L.R. (4th) 289

In the Matter of IMAX Corporation and Section 133 of the Canada Business Corporations Act

Pepall J.

Judgment: June 19, 2007
Docket: 07-CL-7058

Counsel: Dana Peebles, Lucas Lung, for Applicant, IMAX Corporation
Mark A. Gelowitz, Jennifer Fairfax, for Catalyst Fund Limited Partnership II
Michael G. Robb, Dimitri Lascaris, for Messrs Silver, Varesh, Marczak

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.c Meetings
III.3.c.i General principles

Headnote

Business associations --- Specific corporate organization matters — Shareholders — Meetings — General principles

Corporation was publicly traded entertainment technology company — Corporation suffered drop in value as result of tepid sales — Investment fund was major shareholder in and creditor of corporation — Corporation announced delay of filing of financial statements for 2006 fiscal year — Corporation faced decision regarding possible delisting from major exchange — Corporation obtained requisite consents from majority of its senior noteholders to delay filing of annual report — Shareholder meeting was scheduled at which corporation board of directors would stand for re-election — Fund supported holding of meeting at regular date — Corporation brought motion for order to allow delay of shareholder meeting until later in year — Motion granted — Corporation had met onus of showing that departure from ordinary course of business was necessary — Key element of business conducted at annual general meeting of shareholders was consideration of financial statements and auditors' reports — Corporation's financial statements would not be ready until later in year — Corporation would be forced to hold two meetings within short period of time in order to provide full accounting to shareholders — Preparing for and holding annual meeting of shareholders at early date would be drain on resources of corporation's senior management and could ultimately result in further delaying filing of financial statements — Material information regarding corporation would continue to be made public in regular press releases and bi-weekly status updates.

Table of Authorities

Cases considered by *Pepall J.*:

Paulson & Co. v. Algoma Steel Inc. (2006), 2006 CarswellOnt 41, 14 B.L.R. (4th) 104, 79 O.R. (3d) 191 (Ont. S.C.J.) — considered

1184760 Alberta Ltd. v. Falconbridge Ltd. (2006), 2006 CarswellOnt 4316, 20 B.L.R. (4th) 6 (Ont. S.C.J.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 133 — considered

s. 133(1) — considered

s. 133(1)(b) — considered

s. 133(3) — considered

s. 143 — considered

s. 143(4) — considered

s. 144 — considered

s. 155(1) — considered

s. 247 — considered

s. 252(1) — considered

Rules considered:

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

R. 13.01(1)(a) — referred to

MOTION by corporation for order to allow delay of shareholder meeting until later in year.

***Pepall J.*:**

1 The provisions governing the time within which a federally incorporated company must call an annual meeting of its shareholders are contained in section 133(1) of the *Canada Business Corporations Act* [1] (the "*Act*"). The applicant, IMAX Corporation, requests an extension of that time pursuant to section 133(3) of the *Act*.

Background Facts

2 IMAX is incorporated pursuant to the *Act*. It is an entertainment technology company, specializing in digital and film based motion picture technologies. Its shares are traded on the TSX and NASDAQ. The trading price of IMAX's shares have dropped from $11.50 on April 11, 2006 to $4.44 on June 12, 2007.

3 The respondent, Catalyst Fund Limited Partnership II ("Catalyst") is an investment fund. It purchased 17,900 IMAX common shares with a current market value of about $80,000 approximately six months ago. In January 2007, the closing price for IMAX shares ranged from a low of $4.25 to a high of $4.75. Catalyst is also a creditor of IMAX, holding over $60 million in senior notes issued under a trust indenture dated December 4, 2003, and a plaintiff in an action against IMAX commenced in the Supreme Court of the State of New York.

4 Counsel also appeared for three shareholders: Matthew Marczuk, Tom Varesh and Neil Silver. They hold 300, 700 and 1,000 shares respectively with approximate values ranging from $1,200 to $4,500. Mr. Silver is the plaintiff in a putative class action alleging improper revenue recognition by IMAX in its 2005 financial statements. That proceeding was commenced on September 20, 2006. No affidavit was filed by these shareholders. Their material filed in support of a motion to intervene on this application consisted of an affidavit sworn by an articling student. The statement of claim in the class proceeding states that Mr. Silver purchased his shares in the summer of 2006. These three shareholders bring a motion for leave to intervene and request an adjournment to permit a cross-examination of IMAX's representative, Mr. Vance. In their notice of motion, as an alternative, they requested leave to cross-examine Mr. Vance at the hearing but this was not advanced in argument.

5 The Director General under the *Act* was served with the application but did not appear.

6 IMAX's preceding fiscal year ended December 31, 2006. Its last annual meeting of shareholders occurred on April 11, 2006. As such, pursuant to section 133(1)(b) of the *Act*, IMAX is required to call an annual meeting of shareholders no later than June 30, 2007. It asks the court to grant an extension of the time requirement pursuant to section 133(3) of the *Act*.

7 The chronology of recent events is as follows. On March 16, 2007, IMAX announced that it would delay the completion and filing of its financial statements for fiscal year 2006 due to the discovery of certain accounting errors. On March 26, 2007, it announced that it would broaden its accounting review to address comments from the Ontario Securities Commission ("OSC") and the Securities Exchange Commission ("SEC"). Since that time, IMAX management and its auditor, PricewaterhouseCoopers, LLP, have been involved in an extensive accounting review. That review is not yet complete and no financial statements for 2006 are available to put before IMAX shareholders. The activities of the company since the announcement of the accounting review are set out in press releases which have been issued since March 29, 2007.

8 On April 9, 2007, IMAX announced that it had received a NASDAQ Staff Determination letter on April 3, 2007 advising that IMAX was not in compliance for continued listing of its shares and that they were subject to delisting from the NASDAQ Global Market. IMAX's request for a hearing to appeal the Staff Determination letter stayed the delisting. As of the date of the hearing of the application before me, that decision had not yet been rendered.

9 On April 16, 2007, IMAX announced that it had obtained the requisite consents from the majority of its senior note holders to delay the filing of its annual report on Form 10-K for the 2006 fiscal year. IMAX's consent solicitation had been opposed by Catalyst. It maintained that IMAX was in default of certain indenture obligations. The senior note holder consent extends to June 30, 2007 and also provides for an additional 30-day cure period.

10 On April 16, 2007, the OSC issued a management cease trade order that is to remain in place until two days following the receipt by the OSC of all filings IMAX is required to make pursuant to Ontario securities laws.

11 On April 27, 2007, IMAX had filed a formal notice of a meeting of shareholders to be held on June 28, 2007. It announced its intent to cancel the meeting on May 15, 2007 and to seek a court order in Canada to permit it to hold its annual shareholders' meeting after June 30, 2007.

12 On May 24, 2007, IMAX announced that it had formed a number of preliminary accounting judgments and that it intended to consult with the SEC and OSC before completing and filing the statements. The application requesting an order extending the time for IMAX to call an annual meeting was issued on June 8, 2007.

13 IMAX states that postponing the meeting would allow IMAX management to provide shareholders with necessary disclosure of all material issues at one single meeting and that costs would be saved for IMAX and its shareholders. IMAX states that it has committed extensive resources to this accounting review and is working diligently with its independent auditor, PricewaterhouseCoopers, LLP, to complete its financial statements and to file them as soon as possible. It also states that organizing, preparing and holding a meeting at this juncture would be a significant drain on the resources of IMAX's senior management and may result in further delays to the company's completion and filing of its 2006 financial statements. It states that if that delay renders IMAX unable to remedy any default by the end of the cure period, it is likely that Catalyst and others will seek to accelerate payment on the notes and attempt to seize control of the company.

14 In the interim, material information related to IMAX will be made public pursuant to the alternative information guidelines of the OSC which provide that the company give bi-weekly updates on its affairs until it is current with its filing obligations. This information is made available to the public on IMAX's website or the SEDAR website. Press releases have been issued on a regular basis.

15 IMAX anticipates that its financial statements will be completed before September 30, 2007.

16 Two members of IMAX's board of directors are to stand for re-election. They are the co-chairs of the board and co-CEOs of IMAX. No proxy circular or proxy statement in respect of any 2007 shareholder meeting has been delivered. There is

no evidence of any shareholder proposal having been delivered to IMAX, nor is there any evidence of any steps having been taken to request a shareholders' meeting.

Positions of the Parties

17 In brief, the applicant submits that the order requested should be granted because a later annual general meeting date is in the interests of all of its shareholders as a group. It states that Catalyst seeks to enhance its bondholder position. Catalyst states that it is incumbent upon IMAX's directors and management to be accountable to IMAX's shareholders and to explain the current state of affairs at a shareholders' meeting within the time frame contemplated by the *Act*. It also states that it may be adversely affected by a court order extending the time. The three individual shareholders wish to cross-examine Mr. Vance and failing same, they oppose the application.

Discussion

a) Motion to Intervene

18 IMAX took the position with Catalyst that an intervention motion would not be required for a shareholder to make submissions. As a result, Catalyst did not pursue its motion to intervene. I heard argument from counsel for Catalyst and for the three shareholders, Messrs. Silver, Varesh and Marczak. The three shareholders did pursue their motion for intervention. While they arguably may have an interest in the subject matter of the proceeding within the meaning of Rule 13.01(a), I need not conclusively decide that issue as I am not persuaded that I should exercise my discretion to add them as parties in any event. Their request to participate would delay the determination of the application. Given the already tight timeframe and the nature of the issue, this would be wholly undesirable. Furthermore, their interest as shareholders is adequately represented by the submissions advanced by Catalyst.

b) Motion for Time Extension

19 Section 133 of the *Act* states:

> (1) The directors of a corporation shall call an annual meeting of shareholders
>
> > (a) not later than eighteen months after the corporation comes into existence; and
> >
> > (b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation's preceding financial year.
>
> (2) The directors of a corporation may at any time call a special meeting of the shareholders.
>
> (3) Despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

20 Section 133 of the *Act* was amended in 2001 so as to add section 133(3). In an early discussion paper for the proposed amendments. Industry Canada recommended the addition of an explicit provision in order to make "the legislation flexible", stating:

> Presently, there is no provision allowing a corporation unable to hold the annual shareholders' meeting within that 15 month period for reasons beyond its control (i.e. not having received from the auditor the corporation's financial statements) to postpone the holding of its annual meeting. [2]

In the Industry Canada policy paper published after the amending legislation, the "Purpose of Change" for the addition of section 133(3) was described as follows:

> (a) This amendment is designed to ensure that corporations report to their shareholders in a timely and regular fashion.

(b) This amendment would allow increased flexibility without creating any new risk for the shareholders. The amendment is permissive and will not be seen as a requirement. It is designed to provide a method whereby corporations can receive an extension if they do not meet the time provisions found in section 133.

Shareholders remain protected by a number of provisions which enable them to require the corporation to hold a meeting. Under section 143, the holders of not less than 5% of the issued shares of a corporation that carry the right to vote may requisition the directors to call a meeting. Section 144 allows members to apply to the court to have a meeting called. As well, section 247 allows "complainants" to apply to the court for an order requiring compliance with the *Act* (for example, to call a meeting in accordance with the *Act*). [3]

21 Court orders have been granted extending the time to call an annual general meeting in other cases. For instance, Nortel Networks Corporation sought and obtained at least five extension orders arising from problems associated with finalizing its financial statements. Although there are endorsements granting orders, including one from Justice Farley in *Re: Nortel Networks Corporation*, there is no reported decision or endorsement defining the test to be applied by the court on an application by a widely held corporation under section 133(3).

22 The applicant submits that there are other CBCA provisions, namely sections 143(4), 144, 247 and 252(1), which provide opportunities for the court to consider the timing of shareholder meetings. Decisions made under those sections reinforce the overarching principle that the discretion of the company should be respected except where to do so would harm the shareholders as a whole. In contrast, Catalyst, supported by the three shareholders, argues that no assistance can be found in the *Act* in that the sections relied upon by the applicant are not analogous.

23 I agree with Catalyst's submission in this regard. The sections relied upon by IMAX involve shareholders forcing directors of a company to do something that they are not obliged to do. Section 133 is about obtaining the court's leave not to do something that the directors are obliged to do. The request for the extension is an exception to the general rule that is set forth in section 133(1). As such, it seems to me that the burden of proof should be on IMAX to establish that it has a legitimate and compelling reason to request that the court grant an extension pursuant to section 133(3). In exercising its discretion, the court will consider the interests of the company balanced against any meaningful risk of harm to the shareholders arising from the granting of an extension.

24 I am satisfied that IMAX has met the burden justifying a departure from the requirement set forth in section 133(1). Furthermore, I am not persuaded by any of the materials filed by Catalyst or the three shareholders that either an adjournment is warranted or that an extension should not be given.

25 A key element of the business conducted at an annual general meeting of shareholders is the consideration of the financial statements and auditors' reports. Under section 155(1) of the CBCA, a company is required to place the financial statements of the previous financial year before the shareholders at the annual meeting. IMAX is continuing to conduct its accounting review and no financial statements for 2006 are available to put before IMAX's shareholders. Without the financial statements, little purpose would be served by holding a meeting of shareholders at this time. Furthermore, from a practical perspective, IMAX would be required to hold two rather than one meeting within a short period of time thereby incurring additional costs for IMAX and its shareholders. I accept IMAX's submission that it is prudent for the company to consult with the SEC and OSC prior to finalizing its financial statements, particularly in light of the issues involved and the ongoing formal inquiries being conducted by these regulating bodies. Preparing for and holding an annual meeting of shareholders at this time would be a drain on the resources of IMAX's senior management and may ultimately result in further delaying the company's filing of its financial statements.

26 I also note that shareholders will continue to receive disclosure in the interim. Material information regarding IMAX has been and will continue to be made public in regular press releases and bi-weekly status updates pursuant to the alternative information guidelines of the OSC. These press releases are readily accessible by the public on either IMAX's corporate website or the SEDAR website.

27 Lastly, IMAX anticipates that its financial statements will be completed by September 30, 2007 and that it will be in a position to call a meeting and provide shareholders with proper financial disclosure prior to that date. The cases of *Paulson & Co. v. Algoma Steel Inc.*[4] and *1184760 Alberta Ltd. v. Falconbridge Ltd.*[5] both stand for the proposition that to call and to hold a meeting are two different concepts,[6] and in oral submissions, counsel for IMAX indicated that the meeting could be called and held by September 30, 2007. This is consistent with the comments made in IMAX's press release of May 10, 2007 and its counsel's correspondence of June 12, 2007.

28 In conclusion, the applicant's request for an order extending the time for IMAX to call an annual meeting of its shareholders from a date no later than June 30, 2007 to a date no later than September 30, 2007 is granted. In granting this order, subject to any unexpected developments, it is anticipated that the meeting will be called and held no later than September 30, 2007. To the extent required, an order abridging the time for the hearing of this application is also granted.

29 At the conclusion of argument, I granted my order and indicated that reasons would be released shortly thereafter. Counsel for IMAX agreed that no costs would be sought against the three individual shareholders. In the event that IMAX Corporation and Catalyst are unable to agree on the issue of costs, they are to make brief written submissions.

Motion granted.

Footnotes

1 R.S.C. 1985, c. C-44

2 CBCA Discussion Paper: Proposals for Technical Amendments. Released: September, 1995 by the Corporate Law Policy Directorate, Industry Canada.

3 Corporate and Insolvency Law Policy: Analysis of the Changes to the CBCA. Industry Canada, created 2002-05-25, amended 2004-01-29.

4 (2006), 79 O.R. (3d) 191 (Ont. S.C.J.).

5 (Ont. S.C.J.).

6 These involved an interpretation of comparable *Ontario Business Corporations Act* terminology.

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. ET AL.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES
OF THE APPLICANTS
(AGM DEADLINE EXTENSION)
(Returnable July 7, 2022)

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6

James Gage LSO#: 34676I
Tel: 416-601-7539
Email: jgage@mccarthy.ca

Trevor Courtis LSO#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Natasha Rambaran LSO#: 80200N
Tel: 416-601-8110
Email: nrambaran@mccarthy.ca

Lawyers for the Applicants
MTDOCS 41727653