

**CITATION:** Cannapiece Group Inc v. Carmela Marzili, 2022 ONSC 6379  
**COURT FILE NO.:** CV-22-00689631-00CL  
**DATE:** 20221114

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**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  
CANNAPIECE GROUP INC., CANNAPIECE CORP., CANADIAN CRAFT GROWERS  
CORP., 2666222 ONTARIO LTD., 2580385 ONTARIO INC. AND 2669673 ONTARIO INC.

**RE:** **CANNAPIECE GROUP INC**, Plaintiff

**AND:**

**CARMELA MARZILI**, Defendant

**BEFORE:** Penny, J.

**COUNSEL:** *David S. Ward and Jennifer Quick* Counsel, for the Plaintiff

*Robert Kennedy* Counsel, for BDO Canada LLP

*Clifton Prophet* Counsel, for 2125028 Ontario Inc

*John Peddle* Counsel, for Carmela Marzilli

*Vincent Pion* Counsel, for Solid Packaging Robotik Group Inc

*Robert McDonald* Counsel, for 2726398 Ontario Inc.

*Philippe Tremblay* Counsel, for Solid Packaging Robotik

*Russell Bennett* Counsel, for certain unnamed investors

*Clark Lonergan* Counsel, for BDO Canada Limited

*Rory McGovern* Counsel, to Cardinal Advisory Limited

**HEARD:** November 10, 2022

[1] On November 3, 2022, I made an Initial Order in this matter under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The relief granted in the Initial Order was limited to that which was reasonably necessary for continued operations during the initial ten-day stay of proceedings.

[2] At the comeback hearing on November 10, 2022, the applicants sought:

- (a) an amended and restated initial order:
  - (i) extending the stay of proceedings granted pursuant to Initial Order to February 3, 2023;
  - (ii) extending the scope of the stay of proceedings to include claims against directors and officers in respect of their potential liability under personal guarantees of corporate obligations;
  - (iii) approving a key employee retention plan and authorizing the applicants to make payments in accordance with its terms;
  - (iv) authorizing the Company to make payments to certain third party suppliers for pre-filing expenses which are necessary to facilitate the applicants' ongoing operations; and
  - (v) approving an increase to the Administration Charge to the maximum amount of \$500,000; and
- (b) a sale process approval order:
  - (i) approving a sale and investment solicitation process;
  - (ii) authorizing a stalking horse purchase agreement; and
  - (iii) approving the payment of a break fee, professional fee, and the deposit repayment.

[3] On November 10, 2022 I issued an amended and restated initial order and took under reserve certain aspects of the proposed sales process order, with reasons to follow. These are my reasons on all issues.

### Sales Process

#### *The Stalking Horse Agreement*

[4] Stalking horse agreements are recognized by the court as a reasonable and useful component of a sales process. Here, the stalking horse agreement provides some certainty that the applicants' business will continue as a going concern. If the stalking horse agreement is not approved, the applicants will not have sufficient funds to continue operating, to the detriment of their stakeholders. The baseline price in the stalking horse agreement will assist in maximizing the

value of the applicants' business by canvassing the market to obtain the best bids available. Importantly, no better or other alternative has been identified. Despite the applicants' efforts, they were unable to source other rescue financing or purchase proposals, either inside or outside of the filing.

[5] The reasonableness of the break fee (\$175,000) is subject to the exercise of the applicants' business judgment so long as it lies within a range of reasonable alternatives. In my view it does. The Monitor is satisfied that the break fee is reasonable in the circumstances. It has noted, among other things, that: (a) the applicants were insolvent and did not have sufficient cash to continue beyond the week of the Initial Order without the DIP Loan that was provided by the stalking horse bidder; (b) the applicants made significant efforts to improve their financial situation prior to commencing the CCAA proceedings; (c) the stalking horse bidder required the break fee as compensation for its efforts; and (d) the stalking horse bidder was the only party showing any interest in acquiring the applicants' business, funding the stalking horse sales process and these CCAA proceedings. I accept the Monitor's recommendations on this issue.

#### *The Sales Process*

[6] Both by way judicial precedent and under the CCAA, a number of factors have been developed to assist in deciding whether to approve a proposed sales process. Having regard to those factors, I am satisfied that the sales process contemplated here is appropriate.

[7] A sale transaction is warranted at this time. The applicants are insolvent and unable to continue operations without restructuring the Company's debt. A sale of the business is the only option available at this time.

[8] The sale transaction will benefit a wide range of stakeholders. The stalking horse agreement sets a minimum price and the bidding procedures in the stalking horse sales process is designed to test the market by soliciting the best bids available, thereby maximizing value for stakeholders. Importantly, it is anticipated under the stalking horse agreement that, if the stalking horse bidder is the ultimate purchaser in the process, the purchaser will maintain the employment of the vast majority of employees.

[9] The senior secured creditor of the applicants, Carmela Marzilli, and the equipment financier, 2125028 Ontario Inc., are supportive of the stalking horse sales process and no other creditor has indicated that they object.

[10] There is no other, better, or viable alternative. The applicants, in consultation with their advisors, pursued a number of strategic initiatives to improve their operations and financial position. Despite their attempts, no other alternative to the stalking horse sales process has materialized. The stalking horse bidder is the only party who showed any interest in acquiring the applicants' business to date.

[11] The Monitor was consulted about and will administer the stalking horse sales process in consultation with its sales agent and the applicants. The Monitor is supportive of the process, including the stalking horse agreement acting as the minimum bid. The Monitor will also have certain consent rights in connection with material decisions, including extending timelines,

dispensing with bid requirements, and terminating the stalking horse sales process. The Monitor is not aware of any stakeholders who will be prejudiced by the stalking horse sales process.

[12] During the initial stay period, the applicants have communicated with various stakeholders, including secured and unsecured creditors, to provide information and answer questions. There is support from key customers and critical suppliers for a stalking horse sales process as well.

[13] On the evidence, the stalking horse sales process is the best and only value-maximizing option available to the debtor. The sales process is intended to avoid the value destruction that would follow from a cessation of manufacturing operations and customer order fulfilment. The process provides interested parties with sufficient time to evaluate the opportunity presented by the process and to submit a bid before the deadline.

#### *Critical Suppliers*

[14] The court may grant a request for approval of payment of pre-filing liabilities to critical suppliers. This is because one of the purposes of the CCAA is to permit an insolvent corporation to remain in business. The court has broad jurisdiction to make orders that will facilitate a restructuring of a business as a going concern. The Monitor supports the need for this order in the circumstances of this case.

[15] The applicants' request for an order granting approval to make payments to critical suppliers advances the goal of allowing the applicants to continue operating in the ordinary course of business throughout the stalking horse sales process. This will benefit the applicants' stakeholders.

#### *The KERP*

[16] The Court has jurisdiction to approve a key employee retention plan under s. 11 of the CCAA to make any order it considers appropriate.

[17] The purpose of a KERP is to retain employees who are important to the management or operations of the debtor company in order to keep their skills within the company at a time when, because of the company's financial distress, they might otherwise look for alternate employment. KERPs have been approved in numerous insolvency proceedings where the retention of certain employees was deemed critical to a successful restructuring.

[18] I accept that a KERP is warranted in the circumstances of this case. The eleven identified employees have senior level roles and responsibilities that are essential to ensure the stability of the business, enhance effectiveness of the sale process, and facilitate an effective restructuring. These key employees have specialized experience and unique knowledge about the operations of the Company. Their involvement in the sale process appears to be important to the success of the restructuring. The potential KERP beneficiaries may well seek other employment if the KERP is not authorized. The applicants developed the KERP with input from the Monitor and the Monitor supports the proposed KERP in this case.

#### *Administration Charge*

[19] The amount of the Administration Charge in the Initial Order was limited to the estimated professional fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants during the initial stay period. The applicants seek to increase the Administration Charge from \$250,000 to \$500,000 in order to remain current with the projected fees and disbursements of the professionals during the proposed extended stay period.

[20] Section 11.52 of the CCAA provides for the grant of an administration charge. On the evidence, I find the increase in the Administration Charge is appropriate. The cannabis industry is complex, highly regulated and subject to many statutory and regulatory restrictions and requirements. Successful restructuring will require the extensive input of the professionals who have been retained. The beneficiaries of the Administration Charge have and will continue to contribute to these CCAA proceedings and assist the applicants with achieving the restructuring objectives. Each of the proposed beneficiaries of the Administration Charge is performing unique functions without duplication of roles. The quantum of the proposed increase to the Administration Charge appears to be fair and reasonable and is in line with the nature and size of the applicants' business and the involvement required by the professionals. The Monitor, the DIP Lender, and the applicants' senior secured lender, Ms. Marzilli, are supportive of the increase in the Administration Charge.

#### *Stay of Claims Against Directors*

[21] The applicants seek to extend the Initial Order stay to include a stay of an action on guarantees of unpaid Company debt given by three directors. The stay is opposed by the plaintiff/creditor in that action. This was the only issue of controversy before the Court on this motion. The controversy arises in the following context.

[22] 2726398 Ontario Inc. is an unsecured creditor of the Company, having originally loaned the principal sum of \$7,000,000. As security for its loan, 272 received mortgage security over property as well as personal guarantees from certain officers and directors of the Company. This included guarantees from Ali Etemadi, Afshin Souzankar and Reza Khadem Shahreza. These three individuals are all founders, directors and senior officers of the Company.

[23] In August 2022 the Company sold the mortgaged property in Clarington, Ontario. However, the sale did not generate sufficient funds to pay the entire debt owing to 272. 272 agreed to accept the total sum of \$7,000,000 in exchange for a discharge of its mortgage security, without prejudice to its right to claim the balance of the debt owing from the Company and the guarantors. Following the sale of the property, \$7,000,000 was delivered to 272. 272 granted discharges of its mortgage security, leaving a balance owing to it of about \$815,000.

[24] On October 18, 2022, 272 issued a statement of claim in the Superior Court of Justice for payment of the remaining balance on its loan plus additional accrued interest. The Company and each of the guarantors are named as defendants in that proceeding. I was advised that service on all defendants has not yet been completed, and that no defences have yet been filed.

[25] The applicants started this proceeding on November 2, 2022. The supporting affidavit on the motion for the Initial Order acknowledged the existence of the guarantees given to 272, the

shortfall 272 suffered when its mortgage security was discharged, and that 272's discharge of its mortgage security was without prejudice to its right to claim the balance outstanding to it.

[26] My Initial Order in this proceeding included a limited stay of proceedings against the Company's directors. The order stipulated that "*except as permitted by subsection 11.03(2) of the CCAA*, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants [emphasis added]" whereby the directors or officers were alleged to be liable for the payment or performance of the Company's obligations.

[27] The present motion seeks to extend the stay of proceedings by excluding the limitation contained in the "except as permitted by subsection 11.03(2) of the CCAA" proviso in the Initial Order. The issue turns on the interpretation of ss. 11, 11.02 and 11.03 of the CCAA.

### The CCAA Provisions

[28] Section 11 of the CCAA provides that, "subject to the restrictions set out in this Act" the court may "make any order that it considers appropriate in the circumstances".

[29] Section 11.02 provides that the court may make an order staying all proceedings taken "in respect of the company".

[30] Section 11.03(1) states that an order under s. 11.02 may prohibit "any action against a director of the company" that arose before the commencement of the CCAA proceedings and that relates to an obligation of the company "if directors are under any law liable *in their capacity as directors* for the payment of those obligations [emphasis added]". Section 11.03(2) contains an exception to 11.03(1), however. It provides that s. 11.03(1) "does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations".

[31] Thus, s. 11.03 distinguishes between proceedings based on the director's personal liability under "any law" in his or her "capacity as a director" (s. 11.03(1)) and proceedings based on the director's personal liability arising out of a personal contract that he or she gave to guarantee the obligations of the company (11.03(2)): *Re Magasin Laura (PV) inc.*, 2015 Carswell Que 9722, 31 C.B.R. (6<sup>th</sup>) 168 (Que. Bkcty).

### Analysis

[32] The applicants submit that my jurisdiction to stay the action on the guarantees arises out of the broad general powers under s. 11. They further submit that this jurisdiction was exercised in *McEwan Enterprises Inc.*, 2021 ONSC 6453, at para. 44(a), in parallel circumstances to those existing here.

[33] I am unable to accept these arguments.

[34] In my view, the CCAA, by its own terms, limits the general powers in s. 11 by expressly making the scope of those powers "subject to the restrictions set out in this Act". Section 11.03(1) permits the court to extend the stay power in s. 11.02 (regarding claims against the debtor

company) to the directors of the company, if the director's personal liability arises under any law in his or her capacity as a director. However, s. 11.03(2) limits the power to order a stay by stipulating that s. 11.03(1) "does not apply" to an action against a director on a guarantee relating to the company's obligations. The use of the phrase "does not apply to" in s. 11.03(2) means that, although the court *may* make an order in the circumstances covered by s. 11.03(1), the court *may not* make such an order in the circumstances covered by s. 11.03(2). Since the 272 action is a claim against the directors under a personal contract given to guarantee the obligations of the company, the provisions of s. 11.03(2) apply. Accordingly, I conclude that I do not have jurisdiction to order a stay in these circumstances. Such an order is prohibited by the express language of s. 11.03(2).

[35] *McEwan Enterprises Inc.* does not support the applicants' argument. The passage they rely on in that decision makes it clear that the parties and the court were concerned with a guarantee given by Mr. McEwan in connection with obligations owed by another company, not the applicant debtor (a "non-filing party" which did not fall within the language of s. 11.03(2)). Although it may be the case as a matter of fact that Mr. McEwan also guaranteed obligations of the applicant debtor and that actions on those guarantees were also stayed, there is no indication that s. 11.03(2) was even raised with the court, much less considered by the court in its decision. It is, for example, (given Mr. McEwan's overarching importance to the business -- he *was* the business and all stakeholders understood that), entirely possible that potential plaintiffs in any actions on Mr. McEwan's guarantees were content to have those potential actions stayed, wagering that this was their only hope of recovery in the long run in any event. And, as para. 44(c) makes plain, the obligations which Mr. McEwan guaranteed were not anticipated to be impacted by the CCAA proceedings as they were assumed as part of the proposed restructuring transaction. I simply cannot find my jurisdiction to make the order sought in the face of s. 11.03(2) on a decision in which the point in issue was neither raised nor ruled upon.

[36] Accordingly, for these reasons, I decline to order a stay of the 272 action against Messrs. Etemadi, Souzankar and Shahreza.

[37] This does not end the matter, however. The stay was only being sought until the end of the sales process; that is, February 3, 2023. I agree with the applicants that Messrs. Etemadi, Souzankar and Shahreza will be heavily engaged in the restructuring effort until the contemplated closing of the sales process. 272 has not even completed the necessary service on all defendants. The proceeding is in its infancy. It is an action on a debt/guarantee. There is no suggestion of urgency. 272's action has been brought for the benefit of one creditor. The sales process in these proceedings is calculated to benefit many stakeholders, including other creditors, employees and customers. While I have declined, for jurisdictional reasons, to order a stay of 272's action, it is appropriate in these circumstances to make a procedural order in the 272 action that these three defendants shall have until February 10, 2023 (one week after the forecast close of the sales process) to deliver their statements of defence.

#### *The Temporal Extension of the Stay*

[38] The Initial Order granted an initial 10-day stay of proceedings ending on November 10, 2022. The applicants seek an order extending the stay of proceedings to and including February 3, 2023. I am satisfied that the requested extension is justified. The evidence supports the conclusion that since the Initial Order, the applicants have acted and continue to act in good faith and with

due diligence to communicate with stakeholders and to develop the sales process, while continuing to operate in the ordinary course of business to preserve the value of their business. The cash flow forecast appended to the Monitor's First Report shows sufficient liquidity during the extended stay period to fund obligations and the costs of the CCAA proceedings. The extension of the stay is required to complete the sales process without having return to Court to seek a further extension. There is no evidence that any creditor will suffer material prejudice as a result of the extension of the stay. And, the Monitor supports the requested extension of the stay of proceedings.

*Conclusion*

[39] For the forgoing reasons, the orders sought are approved and granted, other than the request for an order to extend the stay of proceedings to include the action on Messrs. Etemadi, Souzankar and Shahreza's personal guarantees, which is denied (subject to the procedural direction outlined in my reasons).

*Other Matters*

[40] Mr. Russell Bennett appeared on behalf of certain unnamed investors who claim to have invested in some aspect of this business. No material was filed on their behalf. Mr. Bennett described concerns these investors have about the propriety of Miller Thompson and BDO representing the applicants in these proceedings. He sought a two-week adjournment of the applicants' motion to enable the investors to decide whether to file material and pursue the matter. In the absence of any material and, given the highly time-sensitive nature of the proposed sales process/restructuring, I declined this request.

A handwritten signature in blue ink, appearing to read "Penny J.", is written above a horizontal line.

Penny J.

**Date:** November 14, 2022