Court File No. CV-24-00715773-00CL

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 BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP. and FINAL BELL CORP.

Applicants

FACTUM OF CORTLAND CREDIT LENDING CORPORATION

(Threshold Legal Issue re Cortland Priority)

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PART I - INTRODUCTION

1. While this CCAA proceeding should have already been long completed, it has been delayed – and made significantly more expensive – as a result of claims asserted by one of BZAM Ltd.'s ("**BZAM**") shareholders, Final Bell Holdings International Ltd. ("**Final Bell**").

2. Final Bell was afforded the opportunity to pursue a claim for rescission of Final Bell's pre-filing acquisition of shares in BZAM under a share exchange agreement between BZAM and Final Bell (the "**Share Exchange Agreement**"). However, on the eve of a summary trial, Final Bell sought and was granted a contested adjournment. It then amended its claim to seek a constructive trust, which Final Bell asserts should take priority over the court-ordered charges, including the DIP financing provided by Cortland Credit Lending Corporation ("**Cortland**").

3. Even if Final Bell could be generally entitled to equitable damages and a constructive trust on the facts of its case (which is not admitted), as a matter of law, Final Bell is not entitled to and cannot be granted a constructive trust in priority to Cortland's security interests, including its court-ordered super-priority DIP charge.

4. Pursuant to the ARIO (as defined below), this Court approved Cortland's DIP financing and granted Cortland a super-priority charge over all of the Applicants' assets in priority to all claims, including any "trusts".[1] The ARIO was granted by this Court on notice to and without objection from Final Bell. Final Bell's assertion of a constructive trust in priority to Cortland is an improper collateral attack on the ARIO and contrary to the clear legal principles established by the Supreme Court of Canada for DIP priorities.

5. Cortland therefore seeks a declaration from this Court that whatever claims Final Bell does or does not have against BZAM, they are subordinate to Cortland's security. The Court can and should grant this declaration on the basis of the well-understood principles of collateral attack (or abuse of process) and DIP super-priority.

6. In doing so, the Court should also have reference to the context of the claims. Constructive trusts claims are disruptive to the insolvency process and rarely allowed for that reason. Even the steps their proponents demand as "procedural fairness" are ripe for misuse as litigation tactics. This is amply illustrated by Final Bell labelling its responding motion record as "Cortland Motion for Partial Summary Judgment".

[1] The super-priority of the DIP charge was only subject to two express exclusions: the Administration Charge and a pre-existing third party mortgage on one piece of real property.

7. Worsening matters is the fact that Final Bell is itself simply a shareholder of BZAM. Its underlying claim is squarely an "equity claim" under the CCAA as it is a claim of misrepresentation in connection with the acquisition of equity of BZAM. It is a fundamental tenet of the CCAA that debt is paid before equity.

8. Cortland asks that the Court apply the considerations of judicial economy, consistency, finality and the integrity of the administration of justice, and re-affirm the priority granted to Cortland under the ARIO. In doing so, it will restore order to a CCAA proceeding that Final Bell has upended and put the horse back before the cart.

PART II - SUMMARY OF FACTS

A. The FBC Share Exchange Agreement

9. On December 5, 2023, Final Bell, Final Bell Canada Inc. ("**FBC**"), and BZAM entered into the Share Exchange Agreement pursuant to which Final Bell became a shareholder of BZAM. Under the Share Exchange Agreement, Final Bell divested to BZAM its Canadian subsidiary FBC, together with FBC's subsidiary, Final Bell Corp. On January 5, 2024, the Share Exchange Agreement closed.[2]

B. The Cortland Credit Agreement

10. On January 8, 2024, Cortland, the existing lender to BZAM, through a credit agreement with one of BZAM's subsidiaries, The Green Organic Dutchman Ltd., executed a further amended and restated credit agreement (the "**Second ARCA**"). Cortland

[2] Affidavit of Deepak Alappatt sworn August 6, 2024 ("**Alappatt Affidavit**"), at paras 3-4 and Exhibits "A"-"B", Motion Record of Cortland ("**MR-Cortland**"), Tab 2, Case Centre Bundle 015 ("**CC**"), pp B-2-11 and B-2-22 - B-2-108.

entered into the Second ARCA to add FBC and Final Bell Corp and their assets into the collateral package pledged to Cortland.[3] At the time of the Second ARCA, the Cortland operating credit facility was already almost fully extended. Out of a maximum $34 million availability,[4] the balance stood at $27.5 million on January 8, 2024.[5]

11. FBC and Final Bell Corp each executed a General Security Agreement in favour of Cortland granting continuing security for the payment and performance of all obligations and liabilities in the Second ARCA.[6] In addition, FBC executed a Short Form Intellectual Property Security Agreement in favour of Cortland.[7] Cortland filed PPSA registrations against both FBC and Final Bell Corp. as debtors thereby putting the public on notice of its priority security interest.[8]

12. Approximately $18 million in revolving advances were made by Cortland under the Second ARCA following closing of the Share Exchange Agreement. Those advances were made at a time when Cortland understood that FBC formed part of BZAM's asset base and was part of the collateral against which the advances were made. Cortland's advances were made in reliance on its position as senior secured lender.[9] Cortland's pre-filing advances were made as a bona fide third-party purchaser for value without knowledge of Final Bell's claims. The vast majority of the pre-filing advances also predated Final Bell's Share Exchange Agreement itself.

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[3] Alappatt Affidavit at paras 8-10 and Exhibit "E", MR-Cortland, Tab 2, CC, pp B-2-12 and B-2-351 - B-2-417.
[4] Subject to borrowing base conditions.
[5] Cross-Examination of Deepak Alappatt, dated August 6, 2024 ("**Alappatt Cross-Examination**"), Exhibit 2, p 1.
[6] Alappatt Affidavit at para 11 and Exhibit "F", MR-Cortland, Tab 2, CC, pp B-2-12 - B-2-13 and B-2-418 - B-2-451.
[7] Alappatt Affidavit at para 12 and Exhibit "G", MR-Cortland, Tab 2, CC, pp B-2-12 and B-2-452 - B-2-457.
[8] Alappatt Affidavit at para 13 and Exhibit "H", MR-Cortland, Tab 2, CC, pp B-2-12 and B-2-458 - B-2-464.
[9] Alappatt Affidavit at paras 14-15, MR-Cortland, Tab 2, CC, p B-2-13.

B. BZAM Seeks Protection Under CCAA and the Initial Order

13. On February 28, 2024, BZAM and the other Applicants (including FBC and Final Bell Corp) were granted protection under CCAA, as provided for in the Initial Order of Justice Osborne dated February 28, 2024 (the "**Initial Order**").[10]

14. In connection with the commencement of the CCAA proceedings on February 28, 2024, Cortland, in its capacity as agent for the Lenders, agreed to provide a court-approved debtor-in-possession credit facility (the "**DIP Loan**") to the Applicants in accordance with a DIP facility agreement dated February 28, 2024 (the "**DIP Agreement**").[11]

15. The DIP Agreement provides that "all amounts advanced under the DIP Facility shall be used by the Borrower to fund its working capital needs (including restructuring expenses and any pre-filing obligations permitted by Court order and approved by the Agent) during the CCAA Proceedings and shall in no circumstances be used to fund any Cortland pre-filing obligations."[12] In addition, the DIP Agreement requires that following the CCAA filing, all post-filing collections will be applied against the Applicants' pre-filing obligations owing to Cortland.[13] Importantly, as a condition to any advances under the DIP Loan, the DIP Agreement required that the Court grant Cortland a super-priority DIP charge over all of the Applicants' property.[14]

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[10] Alappatt Affidavit at paras 16 and 21-22 and Exhibit "L", MR-Cortland, Tab 2, CC, pp B-2-13 - B-2-16 and B-2-602 - B-2-635.
[11] Alappatt Affidavit at para 16 and Exhibit "I", MR-Cortland, Tab 2, CC, pp B-2-13 - B-2-14 and B-2-465 - B-2-492.
[12] Alappatt Affidavit at para 17 and Exhibit "I", MR-Cortland, Tab 2, CC, pp B-2-14 and B-2-472 at s. 3.1(c).
[13] Alappatt Affidavit at para 18 and Exhibit "I", MR-Cortland, Tab 2, CC, pp B-2-14 and B-2-485 - B-2-492.
[14] Alappatt Affidavit at para 19 and Exhibit "I", MR-Cortland, Tab 2, CC, pp B-2-14 and B-2-485 - B-2-492.

16. The Initial Order approved the DIP Agreement and granted Cortland, as DIP lender, a super-priority charge (the "**DIP Lender's Charge**") on the present and after acquired property of the Applicants (including FBC and Final Bell Corp).[15]

17. As the Court's Endorsement from the February 28, 2024 hearing noted:

> 54. The DIP Loan is conditional on the granting of the DIP Charge.
>
> ...
>
> 56. While the DIP Agreement contemplates what the Applicants describe as a "creeping-roll up" structure pursuant to which all post-filing receipts by the Applicants will be applied to repay pre-filing obligations owing to Cortland, it is important to note that the DIP Charge does not secure any obligation that existed prior to the granting of the Initial Order. This Court has previously approved DIP facilities that use receipts from operations post-filing to repay pre-filing amounts, pursuant to the jurisdiction found in section 11.2(1). The emphasis is on preserving the pre-filing status quo, so as to uphold the relative pre-stay priority position of each secured creditor: *Comark Inc., (Re),* 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd.,* 2016 ONSC 6800 at para. 22.
>
> 57. Moreover, and in accordance with section 11.2(1), notice has been provided to the secured creditors proposed to be primed by the DIP, and as noted above, the proposed DIP Charge does not secure any pre-filing obligations of the Applicants. Cortland, the proposed DIP Lender, is already in first position as the senior secured creditor in respect of all of the property of the Applicants save and except for the Edmonton Facility which is not proposed to be primed by the DIP in any event. Stone Pine Capital is supportive of the proposed DIP Loan.[16]

C. THE ARIO AND FINAL BELL'S ATTENDANCE

18. At the comeback hearing of March 8, 2024 the Court granted the Amended and Restated Order (the "**ARIO**") affirming the approval of the DIP Agreement and Cortland's super-priority charge over all existing and after-acquired real and personal property of the

[15] Alappatt Affidavit at para 21 and Exhibit "L", MR-Cortland, Tab 2, CC, pp B-2-15 and B-2-602 - B-2-635.
[16] Alappatt Affidavit at para 21 and Exhibit "L", MR-Cortland, Tab 2, CC, pp B-2-15 and B-2-633.

Applicants and specifically provides that the security granted under the court-ordered charges has priority over "**all […] trusts**".[17]

19. Final Bell received notice of and was represented by counsel at the hearing. Final Bell did not object to the approval of the DIP Agreement or the granting of the DIP Lender's Charge in the ARIO.[18]

20. The Court's Endorsement from the comeback hearing sets out the position that was taken by Final Bell:

> 24. I observe one additional point in conclusion. Counsel for Final Bell Holdings International Ltd. appeared today in Court and made brief submissions to the effect that while Final Bell was specifically not opposing any of the relief sought (particularly including approval of the SISP and the timelines therein), it wished to advise the Court that it was in the process of investigating whether it would be bringing a motion to seek certain relief which could have an impact on the sales process approved today.
>
> 25. Final Bell was a company acquired by the Applicants very shortly prior to filing for creditor protection in this proceeding. The acquisition purchase price was satisfied by the issuance of equity and unsecured debt.
>
> 26. Final Bell apparently takes the position that financial disclosure provided to it in the course of due diligence was inconsistent with the financial state of the company as disclosed in this Application. Final Bell may seek rescission of its transaction. That issue is for another day. However, it is obviously imperative for potential bidders in the SISP to have clarity and certainty as to the assets and business on which they are bidding, with the result that, if Final Bell pursues a claim, and specifically pursues a claim seeking rescission, that may well have to be determined before bids are finalized.[19]

21. Notably, Final Bell did not oppose or raise any issue with (i) the authorization of the DIP Agreement, (ii) the granting of the DIP Lender's Charge and the super-priority

[17] Alappatt Affidavit at para 23 and Exhibit "O", MR-Cortland, Tab 2, CC, pp B-2-16 and B-2-689 - B-2-713 at para 41.
[18] Alappatt Affidavit at para 25 and Exhibit "N", MR-Cortland, Tab 2, CC, pp B-2-17 and B-2-683 - B-2-688.
[19] Alappatt Affidavit at para 25 and Exhibit "N", MR-Cortland, Tab 2, CC, pp B-2-17 and B-2-687 - B-2-688.

afforded to it, (iii) the fact that the DIP Agreement required that post-filing collections be used to repay Cortland's pre-filing indebtedness, or (iv) the nature and structure of the Stalking Horse SPA, including the fact that the only cash proceeds that would be available would be the amount required and contemplated to pay Cortland's priority debt in full.

22. Although Final Bell reserved its right to seek rescission of the Share Exchange Agreement (which in and of itself raised serious issues, including for the SISP, as noted by the Court), Final Bell did not attempt to reserve any rights or take any position that it could or would seek priority over Cortland's DIP Lender's Charge or allege that it was entitled to a constructive trust over the cash proceeds of the Stalking Horse SPA in priority to Cortland.

23. As of the end of July 2024, approximately $33,291,442.60 of principal was owing under the DIP Loan and an additional $424,295.96 of interest has accrued month-to-date thereon for a total amount owing of $33,715,738.56.[20] Save and except for nominal pre-filing expenses of $709.12 that are not included in the above-referenced amounts, all of the amounts currently owing to Cortland were advanced under the DIP Agreement and are subject to, and were advanced in reliance upon, the DIP Lender's Charge.[21]

D. Final Bell's Motion for Rescission

24. By Notice of Motion dated March 18, 2024, Final Bell commenced a claim against BZAM seeking rescission of the Share Exchange Agreement. If granted, this remedy would have had the effect of removing FBC and Final Bell Corp as assets of BZAM, and

[20] Alappatt Affidavit at para 35, MR-Cortland, Tab 2, CC, p B-2-21.
[21] Alappatt Affidavit at para 36, MR-Cortland, Tab 2, CC, p B-2-21.

in turn would have prejudiced Cortland's pre-filing security under the Second ARCA and Cortland's DIP Loan.[22]

25. Cortland responded to Final Bell's motion, arguing that the relief sought would prejudice Cortland, an innocent party, and ought not to be granted on the basis that doing so would be unjust. The matter was scheduled to proceed to trial on an expedited timeline, with a hearing on April 22 and 23, 2024. However, on April 19, 2024, Final Bell sought and obtained an adjournment of the trial over BZAM and Cortland's objection.[23]

E. Final Bell Abandons Its Rescission Claim and Seeks Constructive Trust

26. On May 6, 2024, Final Bell delivered a Further Amended Notice of Motion in which it abandoned its plea for a rescission remedy and instead sought equitable damages and the imposition of a constructive trust. As noted by the Court on the resulting security for costs motion, this creates even further prejudice to Cortland:

> 37. This Court previously approved the DIP Facility pursuant to which the DIP financing was advanced. It allows BZAM to continue operating during this restructuring. Pursuant to the DIP facility, Cortland was granted a super priority charge over all existing and after-acquired real and personal property of the Applicants. That includes all existing and after-acquired real and personal property of FBC and Final Bell. I pause to observe that Final Bell did not oppose that super priority charge, and nor has it sought subsequently to amend, vary or vacate that charge, although the constructive trust remedy it now seeks would have precisely that effect.
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> …
>
> 41. Had the Final Bell claim been outstanding earlier, Cortland may well have elected not to provide DIP financing at all. Other stakeholders (such as other creditors) could also be directly affected by the Final Bell claim here

[22] Alappatt Affidavit at para 27, MR-Cortland, Tab 2, CC, pp B-2-17 - B-2-18.
[23] Alappatt Affidavit at para 29, MR-Cortland, Tab 2, CC, p B-2-18.

> notwithstanding that they are not directly involved in its determination. The pendency of that claim is delaying the progress in the restructuring, including but not limited to the SISP. DIP financing costs and other professional fees that may otherwise have been avoided or reduced continue to accrue, all of which reduces the overall recovery available to creditors and other stakeholders.[24]

27. The hearing of Final Bell's constructive trust claim has been postponed pending resolution of this motion. If Final Bell's constructive trust cannot prime Cortland's interest, then the trial will be moot as there will be no cash proceeds to which the constructive trust could attach.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

28. The only issue to be determined on this motion is whether Final Bell could obtain a constructive trust that would prime Cortland's interests. The law is clear that no such remedy is available due to the pre-existing ARIO.

A. The ARIO is a Complete Answer to Final Bell's Claims

29. The ARIO, granted on notice to Final Bell, provides Cortland with a first priority charge over all of the Applicant's property, explicitly including any property that would otherwise be imposed with a trust. Imposition of a constructive trust would directly contradict – or reverse – the priority provisions of the ARIO.

30. The doctrine of collateral attack protects the fairness and integrity of the justice system by preventing a party from undermining a previous order issued by the court or

[24] Alappatt Affidavit at para 31 and Exhibit "R", MR-Cortland, Tab 2, CC, pp B-2-18 - B-2-20 and B-2-754 - B-2-766.

circumventing the effect of a decision rendered against it when the party has not used the direct attack procedures open to it.[25]

31. Similarly, the doctrine of abuse of process allows a court to exercise its inherent discretion to preclude litigation which "would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice." As with the doctrine of collateral attack, underlying the doctrine of abuse of process are the general principles of "[preserving] the courts' and the litigants' resources, [upholding] the integrity of the legal system in order to avoid inconsistent results, and [protecting] the principle of finality".[26]

32. Finding that it would be "contrary to the expectations which the [debtor] and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order," the Court in *Collins & Aikman* dismissed a request to vary an initial order to require that certain payments be made out of the DIP budget. The Court went on to note that had the objection been raised at the hearing in respect of the Initial Order, the issue may have been resolved through commercial negotiations. Once the DIP lender had advanced funds and changed its position, allowing a modification of the initial order would impermissibly change the dynamics between the DIP lender and the objecting stakeholder.[27]

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[25] *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*Telezone*]; *Kechichian v Paradis*, 2021 ONSC 1009 at paras 10-11.
[26] *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 at paras 37-38. See also *Gale v Ontario Racing Commission*, 2009 ONCA 92.
[27] *Collins & Aikman Automotive Canada Inc, Re*, 2007 CanLII 45908 (Ont SC) at paras 105-107.

33. In this proceeding Final Bell had not one but two "direct attack" procedures available to it to challenge Cortland's priority, even leaving aside any appeal rights. The very nature of a comeback hearing itself is intended to allow parties who were not present for the initial order an opportunity to address any concerns – including the DIP priorities. Moreover, the ARIO itself provides at paragraph 57 that any interested party may apply to the Court to vary or amend the order on seven days' notice.[28]

34. Had Final Bell directly challenged Cortland's DIP priority, the Court would have been confronted with the stark choice inherent in Final Bell's position to either:

(a) Confirm Cortland's priority and thereby assure continued DIP funding and the operations of BZAM; or

(b) Vary the DIP Charge priority, with the real possibility that continued DIP funding would cease and BZAM and its restructuring would collapse.

Instead, Final Bell effectively seeks to do by the back door what it did not attempt through the front, after the DIP funds have been advanced.

35. In the absence of any direct attack on its priority, and with the knowledge of the ARIO, Cortland continued to lend under the DIP. As noted by Chief Justice Morawetz, stakeholders of CCAA proceedings necessarily rely on past orders – especially ARIOs – as setting out the rules of the game or "building blocks":

> [81] The CCAA process is one of building blocks. In this proceedings [sic], a stay has been granted and a plan

[28] Alappatt Affidavit at para 23 and Exhibit "O", MR-Cortland, Tab 2, CC, pp B-2-16 and B-2-689 - B-2-713 at para 57.

> developed. During these proceedings, this court has made a number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.
>
> …
>
> [85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.[29]

36. In this case, like in *Target*, the Initial Order and the ARIO are crucial building blocks in the CCAA proceedings because they established the basis on which the case would be funded.

37. Although unnecessary to sustain the rule against collateral attack, the ARIO priorities were also premised on uncontroverted jurisprudence related to DIP lending. The Supreme Court of Canada has repeatedly held that under the CCAA courts can, and indeed should, grant super-priority charges to facilitate the insolvency system.

38. In *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, the Supreme Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority

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[29] *Target Canada Co. (Re)*, 2016 ONSC 316.

over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10, to protect employee pensions.[30]

39. More recently, in *Canada v Canada North Group Inc*, 2021 SCC 30 (*Canada North*), the Supreme Court confirmed that ss. 11 and 11.2(1)-(2) of the CCAA authorize the Court to order that charges of interim financiers rank in priority over any creditor of the company, including creditors with deemed trusts in the debtor company's property.

40. While the deemed trust in *Canada North* arose under the *Income Tax Act*, the issue of whether the funds could be subject to the DIP lender's charge had the same effect — the court confirmed that a DIP lender's charge extends to property notwithstanding that it might otherwise be beneficially owned by the Crown by virtue of the deemed trust.

41. Explaining the rationale for this position, Justice Côté for the majority noted:

> [30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (Indalex, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. **For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness** […] (emphasis added)[31]

[30] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6.

[31] *Canada v Canada North Group Inc*, 2021 SCC 30 *[Canada North]* at para 30. See also, *Canada North* at paras 23-24: noting the expansiveness of the Court's powers under s. 11 of the CCAA, and *Hollinger Inc. (Re)*, 2013 ONSC 5431 at paras 39-40: noting the risk to other creditors generally if constructive trust claims were able to prime charges.

42. Notably, the conditions for establishing statutory deemed trusts are broader and more predictable than constructive trusts, but such claims still nevertheless give way to DIP priority.

43. As a result of this line of case law and to ensure predictability, DIP approval orders expressly provide that trusts are primed, without any limitation. Consistent with that authority, the ARIO provides Cortland, as DIP lender, the benefit of the DIP Lender's Charge which has priority, subject to only the express exclusions set out in the ARIO.[32] Section 41 of the ARIO reads:

> 41. THIS COURT ORDERS that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person notwithstanding the order of perfection or attachment, except for the Directors' Charge and the Bid Protections Charge, which shall rank subordinate to Cortland's Pre-Filing Debt and the Edmonton Property Charge.[33]
>
> (Emphasis added)

44. In fact, the primacy of DIP financing over trust claims, even those existing at law and that were even known to the parties at the time the financing was approved (which is not the case here), is so fundamental that this Court recently granted an order to vary a CCAA initial order where the word "trust" was inadvertently struck.[34] Finding that the intention of the parties was that the charges would rank ahead of any trusts, Justice Penny

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[32] Alappatt Affidavit at para 23 and Exhibit "O", MR-Cortland, Tab 2, CC, pp B-2-16 and B-2-689 - B-2-713 at paras 36, 39 and 41.
[33] Alappatt Affidavit at para 23 and Exhibit "O", MR-Cortland, Tab 2, CC, pp B-2-16 and B-2-689 - B-2-713 at para 41.
[34] *Waygar Capital Inc v Quality Rugs of Canada Limited*, 2024 ONSC 2486 *[Waygar]* at paras 55-56 and 65.

found that the order should be amended to reinsert the word “trusts” where it had been inadvertently removed.[35]

45. Justice Penny went on to note that if the purported trust claimants intended to argue that the DIP financing did not prime their interests, they should have advanced such arguments at the hearing to approve the DIP to allow the DIP lender an opportunity to oppose or decide if it was unwilling to lend with such a condition.[36]

46. In the present case, the ARIO is absolutely clear. The DIP Lender’s Charge has super-priority over all claims, including all trusts. Final Bell was provided notice of BZAM’s motion seeking the ARIO and was represented by its counsel at the hearing. Final Bell did not oppose, object to or raise any concerns or reservations in respect of the ARIO, including the granting of the super-priority DIP Lender’s Charge.

47. Similarly, the nature of the DIP Agreement and the fact that post-filing collections would be used to repay the pre-filing secured indebtedness owing to the Court was fully and frankly disclosed and was not opposed or objected to by Final Bell, nor did Final Bell raise any concerns or reservations with the structure of the DIP Agreement. Moreover, the vast majority of the pre-filing indebtedness was extended before BZAM’s claims could even have come into existence.[37]

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[35] *Waygar*, 2024 ONSC 2486 at para 65.
[36] *Waygar*, 2024 ONSC 2486 at para 65.
[37] Cross-Examination of Deepak Alappatt, dated August 6, 2024 (“**Alappatt Cross-Examination**”), Exhibit 2, p 1.

48. Final Bell has filed no evidence that has any bearing on this motion. There is no suggestion that it did not understand the ARIO, nor could there be.

49. While Final Bell cross-examined Mr. Alappatt for half a day, it pursued collateral lines of inquiry, pressing Mr. Alappatt on, among other things:

(a) Cortland's continued DIP lending after it became aware of the Final Bell claims; and

(b) Cortland's potential knowledge of excise tax obligations owed by BZAM at the time of the Share Exchange Agreement, an area of inquiry that was refused as being irrelevant.

50. Following the cross-examination of Mr. Alappatt, in a transparent attempt to create factual confusion, Final Bell has again pivoted to propose a tactical amendment to its notice of motion (which is essentially an amendment to its pleading in the case). The proposed amendment baldly asserts that Cortland, a party that Final Bell had previously represented to the court was blameless, knowingly received the proceeds of fraud.

51. In particular, the proposed amendment flies in the face of the written representation in Final Bell's factum on the security for costs motion, and oral submissions to the Court at the hearing:

> 41. Final Bell describes Cortland as an intervener because that title fits its role in this case. No party alleges that it committed any wrongdoing; it is only participating to seek to

> avoid an outcome that might affect its recovery in this CCAA proceeding.[38]

52. The Court specifically noted this admission in its reasons granting security for costs:

> 43. […] To conclude that Cortland ought not to be entitled to security would amount to elevating the position of Final Bell above Cortland and leave Cortland, as the admittedly innocent party against which no allegations are advanced, bearing most of the risk.[39]

53. Final Bell has not brought a motion to withdraw its admission as required by Rule 51.05 and has neither sought leave to amend its pleading nor sought (let alone obtained) consent of the parties, as required by Rule 26.02. More fundamentally, even leaving aside the formal requirements of Rules 51.05 and 26.02, Final Bell's most recent about-face is in and of itself an individual abuse of process. Final Bell sought to portray Cortland as an innocent bystander where it was convenient to Final Bell to do so on the security for costs motion. It is not open to Final Bell to now reverse that statement and label Cortland as having participated in a fraud.

54. There is no evidence from Final Bell to support the proposed amendment. There is also no evidence from Final Bell to explain why this new was not raised in April or even at the case conference to schedule this motion. In the circumstances, the only available

[38] Responding Factum of Final Bell Holdings International Inc (Cortland Motion for Security for Costs), dated May 22, 2024 at para 41.

[39] Alappatt Affidavit at para 31 and Exhibit "R", MR-Cortland, Tab 2, CC, pp B-2-18 - B-2-20 and B-2-754 - B-2-768 at para 43.

explanation is either that Final Bell is changing its theory again to derail this hearing, or avoid a proper refusal – or both.

55. Ultimately, the nature of Cortland's knowledge of the exact status of excise tax payments is a red herring. It is commercially absurd to expect Cortland to review BZAM's contractual representations and warranties made to Final Bell in the Share Exchange Agreement (an agreement to which Cortland is not a party) and assess their accuracy. It is even more absurd to expect Cortland to assess BZAM's intent when making such representations and warranties to determine fraudulent intent.

56. Final Bell's shifting arguments and tactical amendment are indicative of the absence of any substantive defence to this motion. The suggestion that a stakeholder cannot rely on a validly granted order until it is varied simply because it has notice of a potential claim is alarming for the conduct of all CCAA proceedings. Further, as Mr. Alappatt noted on his cross-examination, once the DIP is extended, the lender is incentivized to protect its collateral from deterioration – including by ongoing lending.

57. Final Bell's attempts to induce factual confusion must be placed on the context of Final Bell's repeated attempts to mischaracterize this motion as one for partial summary judgment and thereby avoid a direct and discrete finding on the issue now before the Court.

B. CCAA Courts Have Not Granted Constructive Trusts Where Such Remedy Would Affect Creditor Priorities

58. On this motion Cortland only seeks to have the Court grant the declaration of priority on the basis of collateral attack and related principles of DIP priority. To provide

additional context, Cortland notes that the caselaw is clear that in any circumstance, constructive trusts will be granted in insolvencies "only in the most extraordinary case"[40] and not where other secured interests would be impaired.

59. Recently in *Kingsett Mortgage Corp et al v Stateview Homes et al*, 2023 ONSC 2636, Justice Steele held that a remedial constructive trust was not appropriate in the circumstances where the imposition of the trust would mean the secured creditor would not be paid in full. Although that case was in the receivership context, the circumstances of the case are very similar to this case in which a creditor was seeking the imposition of an equitable constructive trust in order to take priority over sale proceeds that would otherwise be paid entirely to the senior secured lenders.

60. Other courts in the CCAA context have taken the same approach. In *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809, the Alberta Court of Queen's Bench held that constructive trusts are discretionary and "will not be imposed without taking into account the interests of others who may be affected by granting the remedy".[41] First, Romaine J. held that the statutory priority of the first lien lenders under the CCAA constituted a juristic reason to deny recovery through the doctrine of unjust enrichment.[42] Second, in denying a constructive trust to right wrongful conduct, Romaine J. relied on *Hollinger Inc, Re,* 2013 ONSC 5431 at para 39, leave to appeal denied in 2014 ONCA 282, for the authority that there is no legitimate reason for the use of the proprietary remedy of a constructive trust

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[40] *Kingsett Mortgage Corp et al v Stateview Homes et al*, 2023 ONSC 2636 at paras 71-72.
[41] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para 77.
[42] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para 85.

where the claimant relies on the remedy to try and gain a super-priority over other creditors in the CCAA.[43]

61. Similarly, the Court of Queen's Bench of Alberta in *Lightstream Resources Ltd (Re)*, 2016 ABQB 665 refused to grant a constructive trust as a remedy in the CCAA context because where "the appropriate remedy is damages and, […], it would be contrary to the purpose of the *CCAA* to grant an equitable remedy which would adversely affect other creditors."[44]

C. As An Equity Claimant, Final Bell is Last in Line

62. For additional context, Final Bell's claim to a constructive trust in priority to the DIP lender is even more untenable given that its underlying claim as a shareholder is an "equity claim" as defined in the CCAA. Final Bell's requested relief runs counter to the clear principles set out in the CCAA and common law regarding the availability of relief for equity claimants as well as the limits placed on the discretion under the CCAA to reorder priorities among equity claimants and creditors.

63. The common law principle that equity claimants are not entitled to share in assets of an insolvent corporation until after all the ordinary creditors have been paid in full is codified in the CCAA at s. 6(8) in the amendments to the CCAA that came into force on September 18, 2009. That section provides:

> Payment — equity claims
> (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court

[43] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para 98.
[44] *Lightstream Resources Ltd (Re)*, 2016 ABQB 665 at para 89-90.

> unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

64. The 2009 amendments also dealt with the historical treatment of equity claims, at s. 22.1:

> Class — creditors having equity claims
> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

65. The definition of "equity claim" is found at s. 2(1) of the CCAA:

> equity claim means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d).
>
> (Emphasis added)

66. An "equity interest" is defined in s. 2(1) of the CCAA as including "in the case of a company other than an income trust, a share in the company – or a warrant or option or other right to acquire a share in the company" – other than one that is derived from a convertible debt …".

67. The legislature's use of the phrases "in respect of" and "including a claim for, among others" (followed by a non-exhaustive list) in the definition of "equity claim" is important. The Court of Appeal for Ontario in *Sino-Forest Corporation (Re)*, 2012 ONCA 816, held that Parliament's use of these phrases meant that equity claims should be given an expansive interpretation.[45]

68. In *Nelson Financial Group Ltd, Re,* 2010 ONSC 6229 (*Nelson Financial*), Justice Pepall (as she then was) held that "equity claim" as defined at s. 2(1) of the CCAA included, among other things, a claim for rescission of a purchase of an equity interest.[46]

69. Justice Pepall cited with approval *Blue Range Resource Corp. (Re),* 2000 ABQB 4 (*Blue Range*) for the proposition that fraudulent misrepresentation claims advanced by a shareholder seeking to recover their investment were considered equity claims and subject to ss. 6(8) and 22.1 of the CCAA.[47]

70. While Cortland does not seek a ruling on the point on this motion, Final Bell's underlying claim that it asserts should give rise to a constructive trust – allegations of fraud or fraudulent misrepresentation made in connection with Final Bell's acquisition of shares of BZAM – falls squarely within the meaning of an "equity claim" under the CCAA, *Nelson Financial* and *Blue Range.*

[45] *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at paras 40-45.
[46] *Nelson Financial Group Ltd, Re*, 2010 ONSC 6229 at para 27.
[47] *Nelson Financial Group Ltd, Re*, 2010 ONSC 6229 at para 26; See also *Return on Innovation v Gandi Innovations*, 2011 ONSC 5018 at paras 59-60.

71. The fact that concurrently with the Share Exchange Agreement, an affiliate of Final Bell was issued a promissory note to evidence a pre-existing trade payable, does not change the fact that the actual claim that Final Bell seeks to assert as a constructive trust is itself an equity claim.

D. Fairness to Cortland and Policy Considerations for the Enforcement of the Collateral Attack Rules

72. Cortland is by Final Bell's own prior admission an innocent party. The constructive trust remedy sought by Final Bell is, at its core, inequitable, because it seeks to shift Final Bell's loss to Cortland.

73. Cortland extended DIP financing to the Applicants, in reliance on its pre-filing secured position and the primacy of the DIP Lender's Charge in the ARIO. Final Bell did not oppose the ARIO or raise any concerns with the terms of the DIP Agreement.

74. The CCAA cannot function without DIP lenders. If subordinate creditors – and even equity claimants – are permitted to advance constructive trust claims that can leapfrog the priority of DIP lenders, it creates an untenable level of uncertainty. No DIP lender would be willing to extend credit in such a volatile environment where its Court-ordered priority could be subsequently upended.

75. Similarly, if not dismissed now at this threshold stage, Final Bell's claim creates a roadmap for any aggrieved shareholder to elevate their equity claims above secured creditors. By alleging fraud, any shareholder will gain the ability to disrupt a CCAA and undermine its efficacy.

PART IV - ORDER REQUESTED

76. Cortland respectfully requests:

(a) A declaration that Final Bell's constructive trust claim is subordinate to Cortland's interests as DIP lender and pre-filing secured lender;

(b) The costs of this motion on a substantial indemnity basis; and

(c) Such further and other relief as to this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2024.

Colin Pendrith

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809
2. *Blue Range Resource Corp. (Re),* 2000 ABQB 4
3. *Canada v Canada North Group Inc*, 2021 SCC 30
4. *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62
5. *Collins & Aikman Automotive Canada Inc, Re*, 2007 CanLII 45908 (Ont SC)
6. *Gale v Ontario Racing Commission*, 2009 ONCA 92
7. *Hollinger Inc. (Re),* 2013 ONSC 5431
8. *Kechichian v Paradis*, 2021 ONSC 1009
9. *Kingsett Mortgage Corp et al v Stateview Homes et al*., 2023 ONSC 2636
10. *Lightstream Resources Ltd (Re)*, 2016 ABQB 665
11. *Nelson Financial Group Ltd, Re,* 2010 ONSC 6229
12. *Return on Innovation v Gandi Innovations*, 2011 ONSC 5018
13. *Sino-Forest Corporation (Re)*, 2012 ONCA 816
14. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6
15. *Target Canada Co. (Re)*, 2016 ONSC 316
16. *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63
17. *Waygar Capital Inc. v Quality Rugs of Canada Limited*, 2024 ONSC 2486

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, RSC 1985, c C-36 section 2(1)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

- **(a)** a dividend or similar payment,
- **(b)** a return of capital,
- **(c)** a redemption or retraction obligation,
- **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

- **(a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- **(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

Companies' Creditors Arrangement Act, RSC 1985, c C-36 section 6(8)

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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Companies' Creditors Arrangement Act, RSC 1985, c C-36 section 11.001

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period

Companies' Creditors Arrangement Act, RSC 1985, c C-36 section 11.02

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.

Companies' Creditors Arrangement Act, RSC 1985, c C-36 section 22.1

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 26.02

When Amendments may be Made

26.02 A party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or

(c) with leave of the court. R.R.O. 1990, Reg. 194, r. 26.02.

Rules of Civil Procedure, RRO 1990, Reg 194 Rule 51.05

Withdrawal of Admission

51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court. R.R.O. 1990, Reg. 194, r. 51.05.

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 BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP. and FINAL BELL CORP

Court File No. CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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