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

REPLY FACTUM OF CORTLAND CREDIT LENDING CORPORATION

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TO: SERVICE LIST

A. OVERVIEW

1. Final Bell has radically altered the remedy it is seeking in this matter since Cortland and BZAM commenced their motions seeking security for costs. Final Bell now seeks the imposition of a constructive trust over certain of BZAM's assets that are subject to Cortland's first-priority claims as CCAA DIP lender and senior secured lender.

2. This change in remedy by Final Bell makes Cortland's request for security for costs even more appropriate and pressing.

3. Even if Final Bell can establish the factual and legal basis for its fraudulent misrepresentation and equitable damages claim (which is contested by BZAM and Cortland), any claim by Final Bell for the imposition of a constructive trust in priority to Cortland is doomed to fail and is completely contrary to the principles of the CCAA and the extensive case law.

4. First, granting a constructive trust would be directly contrary to the terms of the ARIO and the charge granted by this Court securing Cortland's interim financing ranking in priority to all claims, including all trusts. Final Bell's claim for a constructive trust constitutes a collateral attack on the ARIO which was granted on notice to Final Bell and without objection or appeal by Final Bell, which Cortland is entitled to rely upon.

5. Second, a constructive trust would have the impermissible effect of re-ordering priorities in CCAA. The relief sought by Final Bell is contrary to well-established case law, including cases specifically involving attempts to impose constructive trusts over the interests of secured creditors. While Final Bell selectively cites certain cases in its factum

to suggest that a constructive trust can be available in the bankruptcy context, Final Bell fails to note that none of those cases involve a constructive trust trumping the interests of a DIP lender or an existing senior secured lender. Final Bell has failed to cite cases that are on point, whereas the applicable jurisprudence, as referenced herein, completely undermines Final Bell's claim to a constructive trust in the circumstances of this case.

6. In amending its claims to seek a constructive trust, Final Bell is effectively seeking to re-order CCAA priorities and leap-frog over Cortland's court-ordered super priority charge and its senior security. The inappropriateness of such a remedy is even more pronounced in this case given that Final Bell's claims are in substance an "equity claim" as defined in the CCAA and is therefore in principle relegated to the lowest priority under the CCAA.

7. Final Bell's remaining arguments are procedural arguments that also do not withstand scrutiny. Cortland is a party and has standing to bring this motion. As conceded by Final Bell in its factum, Cortland is affected by the order being sought in that "if Final Bell is successful, the relief it seeks will likely lead to Cortland recovering less than the full amount".[1] Cortland is an interested person pursuant to r. 37.07(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 because it will obviously be affected by the relief sought in Final Bell's motion. Cortland has all the rights and opportunities as a responding party in these proceedings which include seeking security for costs.

[1] Responding Factum of Final Bell, at para 2.

8. There was neither delay in the timing of this motion and nor any associated prejudice to Final Bell. Cortland brought the security for costs motion on April 24, 2024, (just over a month after the March 19, 2024 case conference at which the Court confirmed that Final Bell's motion would be heard via summary trial and less than one week after the summary trial was adjourned *sine die* at Final Bell's request).[2] There is no delay for Cortland to explain. In any event, delay is principally concerned with any associated prejudice.[3] Final Bell has failed to adduce any evidence of prejudice arising from the alleged delay.

9. Applying a holistic approach, the overriding interests of justice support the making of an order that Final Bell post security for costs for the benefit of Cortland. The purpose of security for costs would be met if Final Bell is ordered to post security: doing so would even the playing field and ensure that Final Bell is not given a risk-free opportunity to advance a remedy that would have the affect of leap-frogging a subordinate creditor over the claims of the DIP lender and senior secured lender contrary to the well-established principles of the CCAA. Moreover, without a constructive trust with such priority, Final Bell's claims are practically speaking moot.

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[2] Endorsement of Justice Osborne dated April 19, 2024.
[3] *Midland Resources Holdings Limited v. Shtaif*, 2023 ONSC 865, at para 22.

B. FINAL BELL HAS NOT PROVEN THAT IT HAS A GOOD CHANCE OF SUCCESS ON THE MERITS

10. Final Bell has failed to show that it has a good chance of success on its claims.[4] The merits standard of a "good chance of success" requires something more than a demonstration that there is a genuine issue requiring a trial (the summary judgment motion test) but not as high as proof on a balance of probabilities.[5] A good chance of success falls somewhere in between the two injunction standards – prima facie case and strong prima facie case – but it is closer to the higher standard of strong *prima facie* case.[6]

11. The jurisprudence is clear that it is not appropriate to grant the remedy sought by Final Bell even if it was able to establish fraudulent misrepresentation and a claim for equitable damages. The constructive trust relief sought by Final Bell is simply not available given the intervening interests of Cortland as a pre-filing secured lender and DIP Lender.

(i) The ARIO is a Complete Bar to Final Bell's Constructive Trust Remedy if it Affects the DIP Lender's Priority

12. The Supreme Court of Canada has repeatedly held that courts sitting in CCAA jurisdiction can, and indeed should, grant super-priority charges to facilitate the

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[4] *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*, 2019 ONSC 566, at para 13; *Know Your City Inc. v. The Corporation of the City of Brantford*, 2020 ONSC 7364, at para 14.
[5] See *T.S. Publishing Group Inc. v. Shokar*, 2013 ONSC 1755, at para. 35(vii).
[6] *Vaultose Digital Asset Services Inc. v. Kunz*, 2023 ONSC 5790, at para 118.

insolvency system.[7] Most recently, the Supreme Court of Canada in *Canada v. Canada North Group Inc*, 2021 SCC 30, [*Canada North*] confirmed that Sections 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. 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.

13. 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)[8]

14. The rationale applies equally to property that a party could claim is, or should be, subject to a constructive trust.

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[7] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, confirming that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10, to protect employee pensions

[8] See also, *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.

15. As a result of these Supreme Court of Canada decisions and in an effort to ensure predictability, DIP approval orders expressly provide that trusts are primed, without any limitation. The ARIO provides Cortland, as DIP Lender, with the benefit of a charge on the Property (as defined in the ARIO) which has priority subject to only the charges set out in the ARIO.[9] 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.
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> (Emphasis added)

16. The relief sought by Final Bell, if granted, would allow Final Bell to subvert the DIP Lender's Charge and this Court's order that the DIP Lender's Charge ranks in priority to "all … trusts".[10] Presumably, Final Bell would also assert its constructive trust in priority over the Administration Charge and other charges similarly granted in the ARIO.

17. Final Bell was provided notice of BZAM's motion seeking the ARIO and was represented by its counsel at the hearing in which the Court granted the ARIO. Final Bell did not oppose any of the relief sought, including the granting of the super-priority DIP Lender's Charge.[11] Nor did Final Bell seek leave to appeal the ARIO.

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[9] Amended and Restated Initial Order dated March 8, 2024 ("**ARIO**"), s. 36.
[10] ARIO, s 41.
[11] Endorsement of the Honourable Mr. Justice Osborne, dated March 8, 2024, at para 6.

18. Final Bell cannot now seek to circumvent the effects of the ARIO by recasting its claim for a breach of a share exchange agreement as a constructive trust claim.

(ii) CCAA Courts Have Not Granted Constructive Trusts Where Such Remedy Would Affect Creditor Priorities

19. Final Bell's claim for a constructive trust fails as it is a blatant attempt to reorder the statutory priority scheme in the CCAA and obtain priority over Cortland as a DIP lender and senior secured lender.

20. Final Bell's factum omits the established caselaw dealing with the interplay between constructive trust claims and the statutory priority scheme of the CCAA. This jurisprudence makes clear that constructive trusts are granted only in the rarest of circumstances and cannot be used to gain priority over secured lenders or DIP lenders. The prevailing caselaw all support the finding that the constructive trust remedy whether based in unjust enrichment or wrongful conduct is untenable in this case.

21. A constructive trust, as a remedy in insolvency proceedings, is used "only in the most extraordinary case".[12] Recently in *Kingsett Mortgage Corp et al v. Stateview Homes et al*., 2023 ONSC 2636 [*Kingsett*], 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, which was decided less than six months ago, are very similar to this case in which a creditor was seeking the imposition of an equitable

[12] *Kingsett Mortgage Corp et al v. Stateview Homes et al*., 2023 ONSC 2636, at para 71.

constructive trust in order to take priority over sale proceeds that would otherwise be paid entirely to the senior secured lenders.

22. 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".[13] 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.[14] 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 where the claimant relies on the remedy to try and gain a super-priority over other creditors in the CCAA.

23. 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 to do so would be contrary to the purpose of the CCAA and adversely affect other creditors.

24. The Courts are aware of the attempt to use of constructive trusts as a legal mechanism to obtain new security at the expense of other creditors. In *Bank of Montreal v. 1870769 Ontario Inc*., 2022 ONSC 5100, the Court rejected a bank's assertion that

[13] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809, at para 77.
[14] *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809, at para 85.

there was constructive trust over certain paintings because the bank was a sophisticated party who chose not to take security in the paintings and the bank's aim in asking for a constructive trust was to "jump the queue" over other unsecured creditors in the bankruptcy.[15]

25. Final Bell's attempt to rely on the Court of Appeal for Ontario's decision in *Credifinance Securities Limited v DSLC Capital Corp.,* 2011 ONCA 160, [*Credifinance*] as authority that a constructive trust is available in this case is misguided. In *Credifinance,* which was a bankruptcy, the Court noted the facts of the case were exceptional in that the only creditors impacted by the order were the principal of the debtor who was implicated in the fraud and his lawyers.[16] Unlike the present case, no DIP lender or third party secured creditor was affected by the relief.[17] Therefore, consistent with the cases noted above, the court considered the impact on other creditors and determined that no priorities would be impacted by the application of constructive trust in the bankruptcy.

26. *Sirius Concrete Inc. (Re)*, 2022 ONCA 524, relied on by Final Bell is similarly distinguishable from this case as a bankruptcy case which does not involve DIP lenders or secured creditors being impacted.[18]

27. Final Bell's reliance on *Bonnie Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781 (CanLII) [*Peopledge*] is also problematic. As with *Credifinance* and *Sirius Concrete, Peopledge* was decided in the bankruptcy context wherein the Court was

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[15] *Bank of Montreal v. 1870769 Ontario Inc*., 2022 ONSC 5100, at para 132.
[16] *Credifinance Securities Limited v DSLC Capital Corp.,* 2011 ONCA 160, at para 39.
[17] *Credifinance Securities Limited v DSLC Capital Corp.,* 2011 ONCA 160, at para 44.
[18] *Sirius Concrete Inc. (Re),* 2022 ONCA 524.

tasked with determining method of distributing funds to various unsecured parties – no secured creditor or DIP lender was involved.[19] In addition, the facts of *Peopledge* centred around a debtor corporation that operated as a payroll processor with an obligation to maintain a trust account for payroll funds received from its customers but failed to do so, thereby making those customers creditors.[20] The Court held that certain funds were impressed by a *Quistclose* trust because certain funds were advanced for a specific purpose. The facts of this case are overwhelmingly distinguishable from *Peopledge* and the principles emanating from *Peopledge* are of no assistance in this context.

28. Final Bell cites no authority whatsoever to support the imposition of a constructive trust in the CCAA context to take priority over a court-ordered DIP lender charge or an existing secured lender.

(iii) Claims advanced by Final Bell are "Equity Claims" under CCAA.

29. Final Bell's claim to a constructive trust is even more untenable given that its underlying claim is an "equity claim" for the purposes of 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.

30. 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

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[19] *Bonnie Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781, at paras 5, 11: While one secured claim for the costs of the receivership was filed, that claim was to be paid prior to the resolution of other claims in the proceeding and in priority to the unsecured claims.
[20] *Bonnie Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781, at para 6.

codified in the CCAA at section 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 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.[21]

31. 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.[22]

32. The definition of "equity claim" is found at section 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,
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> (c) a redemption or retraction obligation,
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> (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).[23]
> (Emphasis added)

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[21] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 6(8).
[22] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 22.1.
[23] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 2(1).

33. 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 Parliaments use of these phrases meant that equity claims should be given an expansive interpretation.[24]

34. 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.[25] Justice Pepall cited with approval *Blue Range Resource Corp. (Re),* 2000 ABQB 4, for the proposition that fraudulent misrepresentation claims advanced by a shareholder seeking to recover their investment were considered equity claims and subject to sections 6(8) and 22.1 of the CCAA.[26]

35. Despite Final Bell's focus on the remedy sought (seeking declarations of equitable compensation and constructive trust), the underlying claim must be identified for what it is. Final Bell is advancing a claim based in fraud or fraudulent misrepresentation in respect to the acquisition of an equity interest in BZAM that it obtained through the FBC Share Exchange Transaction. Final Bell's claim is squarely an "equity claim" as defined in the CCAA and interpreted by the courts.

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[24] *Sino-Forest Corporation (Re)*, 2012 ONCA 816, at paras 40-45.
[25] *Nelson Financial Group Ltd, Re*, 2010 ONSC 6229, at para 27.
[26] *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.

36. As set out in *Nelson Financial*, separate agreements and ensuing claims have been treated as part of one integrated transaction in respect of an equity interest.[27] In this case, the challenge to the FBC Share Exchange Transaction is in respect of an equity interest in a debtor company – namely, Final Bell's acquisition of BZAM shares.

37. Whether Final Bell is seeking rescission, equitable compensation in lieu of rescission, or a constructive trust, these are all remedies for Final Bell's inherent equity claim and must be dealt with in accordance with ss. 6(8) and 22.1 of the CCAA. The effect of Final Bell's claim is to create the very problem the legislature intended to avoid by its creation of the rules concerning equity claims: equity claimants seeking relief against creditors which unduly complicate and delay the CCAA proceedings.[28] A potentially aggrieved shareholder is simply not entitled to upend the priorities of the CCAA by claiming an alternative remedy.

38. Parliament's intention is clear that the type of claims advanced by Final Bell are captured by the language of the CCAA. Moreover, as held in *Nelson Financial*, the CCAA does not provide for any greater judicial flexibility in cases involving damages arising from egregious conduct on the part of the debtor corporation.[29]

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[27] *Nelson Financial Group Ltd, Re,* 2010 ONSC 6229, at para 26.
[28] *Nelson Financial Group Ltd, Re,* 2010 ONSC 6229, at para 26.
[29] *Nelson Financial Group Ltd, Re,* 2010 ONSC 6229, at para 34.

C. CORTLAND IS A RESPONDING PARTY TO THE FINAL BELL MOTION AND ENTITLED TO SECURITY FOR COSTS

39. On May 3, 2024, following the delivery of Cortland's motion record and factum for the security for costs motion, Final Bell notified BZAM and Cortland that it was withdrawing its recission claim and, *in lieu*, was seeking equitable damages and the imposition of a constructive trust over the proceeds of sale of BZAM's shares or assets.[30]

40. On May 6, 2024, Final Bell amended its notice of motion. The amended notice of motion provided that Final Bell was seeking:

> 2. A Declaration that BZAM Ltd. and its affiliates are liable to Final Bell Holdings International Ltd. for equitable damages, in an amount to be determined by the Court at a reference;
>
> 2.1 A Declaration that the equitable damages for which BZAM Ltd. and its affiliates are liable to Final Bell Holdings International Ltd. are subject to a constructive trust;

41. Final Bell properly concedes in its Factum that Cortland is affected by the remedy being sought in that "if Final Bell is successful, the relief it seeks will likely lead to Cortland recovering less than the full amount".[31]

42. Despite this concession, Final Bell urges the Court to engage in an unduly restrictive and incorrect reading of Rule 56.01(1) to the effect that Cortland is "not a defendant to an action" and therefore not entitled to bring the motion for security for costs. Final Bell's proffered interpretation must be rejected. The lead in language of Rule

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[30] Exhibit "H" to Affidavit of Ashley McKnight, Responding Motion Record of Final Bell ("**RMR**"), Tab 6, p 842.
[31] Responding Factum of Final Bell, at para 2.

56.01(1) makes clear that the *rule* is available to a "respondent in a proceeding". Cortland has standing as a respondent and therefore party status to the claim brought by Final Bell because Cortland will be affected by the relief sought.

43. Final Bell advances its "claim" by way of a notice of motion such that Rule 37 of *Rules of Civil Procedure,* R.R.O. 1990, Reg 194 applies. Rule 37.07(1) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg 194 provides that a notice of motion shall be served on any party who will be affected by the order sought unless the *Rules* provide otherwise.

44. The Court of Appeal for Ontario in *Fontaine v. Canada (Attorney General)*, 2018 ONCA 1023, reaffirmed the common law principle of standing at para 21:

> […] Of the many principles underlying the Canadian judicial system, generally those who will be subject to an order of the court are to be given notice of the legal proceeding and afforded the opportunity to adduce evidence and make submissions: *A.(L.L.) v. B.(A.)*, 1995 CanLII 52 (SCC), at para. 27.

45. In *US Steel Canada Inc et al v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2022 ONSC 6993 [*US Steel*], Justice McEwen dealt with the standing issue in the context of a motion brought within the CCAA context. His Honour held that r. 37.07(1) of the *Rules* applied to the motion and that a party affected by the order sought should have standing.[32]

[32] *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2022 ONSC 6993, at paras 51-52.

46. Given that imposition of the constructive trust being sought by Final Bell directly and materially impacts Cortland and effectively seeks to re-order its priority as a DIP lender and senior secured creditor, it is absurd for Final Bell to suggest that Cortland should not be treated as a proper "respondent" to Final Bell's claim.

47. The principle of standing as set out in the *Rules* and at common law ought not be limited or restricted in this case. Cortland submits it should have the same rights as other responding parties, including bringing security for costs motion and obtaining such relief.

D. NO DELAY ON PART OF CORTLAND IN BRINGING MOTION

48. There is no delay for Cortland to explain. Cortland advanced its security for costs motion just over a month after receiving Final Bell's motion record. That timing cannot be considered delay in any sense of the word.

49. In any event, delay is just one factor the Court may rely on in assessing whether an order for security for costs would be just in all the circumstances of the case.[33] Prejudice arising from the delay also must be considered. As held by Master Short in *Livent Inc (Receiver of) v Deloitte & Touche*, 2011 ONSC 648 at para 80:

> 80 As I have noted earlier, the plaintiff only relies on delay and has not attempted to prove any actual, specific, irreparable prejudice flowing from that delay. I believe that the law has been moving towards the position where a corporate plaintiff seeking to avoid posting any security by virtue of delay must demonstrate at least some prejudice.

[33] *Midland Resources Holdings Limited v. Shtaif*, 2023 ONSC 865, at para 22; see also *Heidari v. Naghshbandi*, 2020 ONCA 757, at para 6.

50. Final Bell has not adduced any evidence of prejudice arising from the alleged delay.

E. QUANTUM OF COSTS REASONABLE IN CIRCUMSTANCES

51. Contrary to the position advanced by Final Bell, the amount ordered must fall within "the reasonable contemplation of the parties".[34] Final Bell is no doubt aware that its claim was commenced within the CCAA context. This necessarily required counsel already engaged on the CCAA proceedings to advise and work with litigation counsel to efficiently advance Cortland's position.

52. Final Bell's own bill of costs provides more than sufficient evidence that Cortland's costs fall within the reasonable contemplation of the parties. Final Bell's bill of costs shows costs of $450,000 (exclusive of disbursements). Final Bell's bill of costs illustrates that it would reasonably have contemplated that parties responding to its claim would incur similar costs.

53. The quantum should also reflect what the successful party would likely recover and the factors set out in Rule 57.01.[35] Turning to the factors in 57.01(1), the amount claimed in the proceedings is significant.[36] The proceeding is exceptionally complex given the equitable remedies being sought within the context of the insolvency landscape. The importance of the issues cannot be understated. The remedy sought by Final Bell would

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[34] *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*, 2019 ONSC 566, at para 27.
[35] *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*, 2019 ONSC 566, at para 27.
[36] In this regard, Final Bell asserts that it is entitle to $21.5 million in equitable damages and seeks a constructive trust in that amount.

jeopardize Cortland's priority status as DIP lender and senior secured lender. Final Bell has conducted itself in a way that has lengthened unnecessarily the duration of the proceeding by adjourning the summary trial and subsequently amending its claim withdrawing its rescission relief and adding a constructive trust relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May, 2024.

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SCHEDULE "A"

LIST OF ORDERS, ENDORSEMENTS, AND AUTHORITIES

Orders and Endorsements

1. Amended and Restated Initial Order dated March 8, 2024 [link]
2. Endorsement of Justice Osborne dated March 8, 2024 [link]
3. Endorsement of Justice Osborne dated April 19, 2024 [link]

Caselaw

4. *Bank of Montreal v. 1870769 Ontario Inc.*, 2022 ONSC 5100
5. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809
6. *Blue Range Resource Corp (Re),* 2000 ABQB 4
7. *Bonnie Cummings v. Peopledge HR Services Inc.*, 2013 ONSC 2781
8. *Canada v. Canada North Group Inc*, 2021 SCC 30
9. *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*, 2019 ONSC 566
10. *Credifinance Securities Limited v. DSLC Capital Corp.,* 2011 ONCA 160
11. *Fontaine v. Canada (Attorney General)*, 2018 ONCA 1023
12. *Heidari v. Naghshbandi*, 2020 ONCA 757
13. *Hollinger Inc. (Re),* 2013 ONSC 5431
14. *Kingsett Mortgage Corp et al v. Stateview Homes et al.*, 2023 ONSC 2636

15. *Know Your City Inc. v. The Corporation of the City of Brantford*, 2020 ONSC 7364

16. *Lightstream Resources Ltd (Re)*, 2016 ABQB 665

17. *Livent Inc (Receiver of) v. Deloitte & Touche*, 2011 ONSC 648

18. *Midland Resources Holdings Limited v. Shtaif*, 2023 ONSC 865

19. *Nelson Financial Group Ltd, Re,* 2010 ONSC 6229

20. *Return on Innovation v. Gandi Innovations*, 2011 ONSC 5018

21. *Sino-Forest Corporation (Re)*, 2012 ONCA 816

22. *Sirius Concrete Inc. (Re)*, 2022 ONCA 524

23. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6

24. *T.S. Publishing Group Inc. v. Shokar*, 2013 ONSC 1755

25. *US Steel Canada Inc et al v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2022 ONSC 6993

26. *Vaultose Digital Asset Services Inc. v. Kunz*, 2023 ONSC 5790

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Definitions

2 (1) In this Act

[…] *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*)

Payment — equity claims

6 (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.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring

that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

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,**

Service of Notice
Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

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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