



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

**COURT FILE NO.:** CV-25-00736572-00CL

**DATE:** February, 2025

**NO. ON LIST:** 4

**TITLE OF PROCEEDING:**

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JBT TRANSPORT INC., WAYDOM MANAGEMENT INC., MELAIR MANAGEMENT INC., HERITAGE TRUCK LINES INC., DRUMBO TRANSPORT LIMITED, HERITAGE NORTHERN LOGISTICS INC., AND HERITAGE WAREHOUSING & DISTRIBUTION INC.**

**BEFORE:** MADAM JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

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**For Defendant, Respondent, Responding Party:**

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## **ENDORSEMENT OF JUSTICE KIMMEL:**

### **The Competing CCAA and Receivership Applications**

- [1] On January 24, 2025 (the "Filing Date"), JBT Transport Inc., Waydom Management Inc., Melair Management Inc., Heritage Truck Lines Inc. ("HTL"), Drumbo Transport Limited ("Drumbo"), Heritage Northern Logistics Inc. ("HNL"), and Heritage Warehousing & Distribution Inc. ("HWD") (each individually, an "Applicant" and collectively, the "JBT Group" or "Applicants") each filed a Notice of Intention to Make a Proposal ("NOI") under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "BIA"). Dodick Landau Inc. ("DLI") was appointed as proposal trustee under each NOI proceeding (collectively, the "NOI Proceedings").
- [2] The NOI's were filed after the Applicants' senior secured lender, Toronto-Dominion Bank ("TD Bank"), served a demand for the entirety of the approximately \$16.2 million debt owed by the Applicants to TD Bank (the "Demands").
- [3] In the year prior to the Demands, the Applicants and TD Bank had worked cooperatively during various periods of forbearance by TD Bank. In particular, the Applicants engaged a financial advisor mandated by TD Bank, effected the sale of a real property and other assets, and implemented an operational restructuring to decrease operating costs and enhance the Applicants' market position. The Applicants efforts resulted in a reduction of the indebtedness owed to TD Bank from approximately \$25 million in January of 2024 to \$16.2 million in December of 2024, while they stayed current on all monthly payments.
- [4] However, there were other defaults under the TD Bank's loan and security documents and the Applicants were unable, over the course of over a year of informal and formal forbearance agreements with TD Bank, to come up with a refinancing proposal or restructuring plan that was acceptable to TD Bank. TD Bank made the Demands after the last refinancing proposal came back with increased shortfalls on its secured debt.
- [5] The Applicants claim to now be facing an urgent liquidity and operational crisis and would like to avail themselves of the benefit of the flexibility of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "CCAA") in their application commenced on February 6, 2025 (the "CCAA Application").
- [6] The Applicants have over 58 trucks, 162 dry vans and refrigerated units, and over 100,000 square feet of state-of-the-art, GDP Gold-certified food storage and warehouse spaces. The Applicants also employ 83 full-time employees and 23 independent owner-operators.

- [7] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the affidavit of Denis Medeiros sworn February 6, 2025 in support of the CCAA Application.
- [8] The JBT Group, with the assistance of the Proposed Monitor, has prepared a weekly cash flow forecast ("Cash Flow Forecast") for the period from January 26, 2025 to April 19, 2025 ("Cash Flow Period") that is attached to and described in the pre-filing report of DLI dated February 8, 2025 (the "Pre-filing Report"). The JBT Group is seeking approval of Debtor in Possession financing ("DIP Financing") from a related party (individual) and a corresponding priority DIP Charge that would give it sufficient cash flow and liquidity to continue operations until April 19, 2025. Counsel for the Applicants confirmed in court that the JBT Group will require external financing to fund its operations starting in March 2025 and expects to be in a positive cash flow position by the Applicants' proposed extended Stay Period to April 19, 2025.
- [9] The JBT Group is asking for an extended initial stay under the CCAA (building on the stay already in place from the NOI Proceedings) until April 19, 2025 to give it the necessary breathing room to implement a restructuring strategy and conduct a court-approved sale and investment solicitation process for the purposes of selling the Applicants as a going concern to a new owner ("SISP").
- [10] The Applicants also seek a Critical Suppliers Charge and direction that suppliers continue to provide service under s 11.4 of the CCAA to address the exercise of prejudicial self-help remedies by carriers. The Applicants also seek an order staying such carriers from contacting customers of the Applicants directly or otherwise interfering with the Applicants' arrangements with their customers during the restructuring.
- [11] In response to the CCAA Application, TD Bank served its own draft Notice of Application dated February 7, 2025 (the "Receivership Application") seeking to lift the NOI stay of proceedings and an order appointing BDO Canada Limited ("BDO") as receiver and (in such capacity, the "Receiver"), without security, of all of the current and future assets, undertakings, and properties (the "Property") pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* ("BIA"), R.S.C. 1985 c. B-3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the "CJA"). TD has the right under its security documents to appoint a receiver. The Applicants also consented to the appointment of a receiver under the terms of the Forbearance Agreement.
- [12] The Applicants maintain that a debtor-in-possession restructuring that permits the JBT Group, that is familiar with their own operations, suppliers, customers, employees and other stakeholders, to continue the Applicants' operations in the normal course will better preserve value for stakeholders through a going concern option, as opposed to a receivership that the Applicants believe will put their going concern business at risk.

- [13] TD Bank is not prepared to continue financing, through its outstanding Loan Facilities, the going concern business of the JBT Group while its indebtedness increases (the Applicants are not proposing to service its loans) and is primed and eroded in favour of other proposed Debtor in Possession (DIP) financing, administration charges for the professional fees of the Applicants and DLI (the Proposal Trustee and proposed Monitor) and possibly certain non-trust priority payments for pre-filing debt to Critical Suppliers. TD Bank has not had the opportunity to do a fulsome analysis of the greater prejudice that it faces from a CCAA as opposed to Receivership scenario, as it was only served with the CCAA Application late last week.
- [14] The Critical Suppliers were served with the CCAA Application late on Thursday February 7, 2025 (for the application returnable today). None of the Critical Suppliers raised any concerns at or before the hearing, but the court expressed some concern that they may not realize the nature of the relief that is being sought against them and they were short served with the CCAA Application over the weekend.
- [15] Neither the Applicants nor TD Bank are contesting the ability of the other to satisfy the basic requirements of the orders they seek (in the case of the Applicants, an initial first day CCAA order (the "Initial Order") and the appointment of DLI as Monitor, and in the case of TD Bank, an order appointing BDO as Receiver under the BIA). They both agree that it is appropriate for one of the orders to be made (perhaps with some tweaking of the specific terms). However, they disagree about which of the orders is the more appropriate order to be made at this time and in the specific circumstances of the JBT Group.

### **The Competing Considerations and Notice Concerns**

- [16] At the core of the Applicants' position is its desire to preserve a going concern option at least until they have had the chance to put forward, and if approved, to run a SISP. They say that the value of their business is derived from assets that require a going concern business. They are looking for a means to avoid what they believe will be devastating social and economic effects of bankruptcy or creditor initiated termination of their ongoing business operations through a court-supervised attempt to reorganize their financial affairs.
- [17] TD Bank's position is that the Applicants have already tried to sell off some of their property and that there is no SISP proposal before the court to consider and evaluate against what the JBT Group has been trying to do since its loan defaults started in October of 2023. At the heart of TD Bank's position is its concerns about the erosion of its security and its increased debt.
- [18] TD Bank was transparent that it does not know whether the Receiver will recommend any options that preserve the going concern operations of the Applicants' business. To grant the Receivership Application today could deprive the Applicants of a debtor-led going concern restructuring alternative; whereas, the converse is not true: To grant the CCAA Application does not foreclose a liquidation or even the appointment of a Receiver at or

after the comeback hearing when the Receivership Application will also come back on for a hearing with the CCAA Application hearing de novo.

- [19] While the court would like to encourage the parties to try to reach an agreement on the type of the restructuring proceedings for these Applicants, it recognizes that this may not be possible. These parties have been trying to come to a consensual resolution for over a year already. However, given the short service of the CCAA Application (and corresponding shorter service of the Receivership Application), the lack of any response at all from the Critical Carriers or any other creditor of the Applicants, the insufficient time for a complete record to be developed on the question whether TD Bank will suffer material prejudice if it is not permitted to pursue its Receivership Application and the need to more fully develop the SISP, I have concluded that a first instance "very skinny" order should be made now in the CCAA Application.
- [20] The parties should also consider whether there is a possibility of appointing DLI as Receiver if the Receivership Application were to be later granted (as indeed the model form of Initial Order allows for), to try to take advantage of DLI's familiarity with the Applicants' business and assets and liabilities, if all parties and DLI were to agree to this appointment.

### **Initial CCAA Order and Comeback Provisions**

- [21] I agree with the Applicants that a slightly longer than 10 day initial Stay Period is warranted in this case, given that there is already a Stay in the NOI Proceedings that would not expire in any event until February 24, 2025 and efforts were made to give notice to the creditors, which has led to further engagement with the most significant and senior secured creditor, TD Bank: see Endorsement of Cavanagh J dated October 7, 2021 in *Medifocus Inc (Re)*, Court File No CV20- 00669781-00CL and the initial order granted in *Cannmart Labs (Re)*.
- [22] The order that I am signing will grant an extended initial Stay Period until February 28, 2025, the day after the comeback hearing on February 27, 2025.
- [23] The Applicants' maintain that they need the Critical Suppliers Charge and corresponding direction for the continued supply of goods and services by the Critical Suppliers, with discretion to pay pre-filing obligations to these creditors to ensure their continued supply, even during the initial Stay Period. This is what the Applicants say distinguishes the CCAA Application from the Receivership Application. There is precedent for granting this type of order and I am satisfied that it is appropriate to do so in the circumstances of this case, at least for the Initial Stay Period and until February 28, 2025, the day after the comeback hearing, at which time the Critical Suppliers will have the opportunity to be heard if they decide to avail themselves of that.

- [24] The factors that favour granting the Critical Suppliers Charge derived from *Prizm Income Fund (Re)*, 2011 ONSC 2061, at para 31 and *Pride Group Holdings Inc et al (Re)*, 2024 ONSC 2026, at para 46 are succinctly set out in paragraphs 59 and 60 of the Applicants' factum. Precedent and authority for giving the Applicants, in consultation with the Monitor, the ability to pay pre-filing amounts to suppliers for critical goods and services actually supplied to the Applicants (and that are not otherwise covered by the Carrier Trust Funds) for their pre-filing claims can be found in *Springer Aerospace Holdings Limited*, 2022 ONSC 6581, at paras. 25-27; *McEwan Enterprises Inc. (Re)*, 2021 ONSC 6453, at paras. 32-33. That said, this discretion should be utilized sparingly and only when determined by the Applicants in consultation and with approval of the Monitor to be essential to the continued supply during the initial Stay Period until the comeback hearing. The court will expect to receive a complete report from the Monitor about who the Critical Suppliers are and what if any pre-filing and post-filing payments to them have been authorized and made to any of them.
- [25] The ability of transport carriers to enforce their right to payment of the Carrier Trust Funds directly from the customer who receives and pays for the goods, instead of that payment going to the broker is preserved under the Initial Order.
- [26] The Administrative Charge requested in the revised form of Initial Order is \$150,000, which is modest but shall, for purposes of this Initial Order, only apply to fees for services rendered by professionals in connection with the CCAA Proceeding from and after today and during the initial Stay Period, up to the specified maximum of \$150,000. The request for the Administrative Charge to cover pre-filing professional obligations can be revisited at the comeback hearing. There is going to be a cost associated with both a Monitor and a Receiver and, in the immediate short term during the initial Stay Period there will be far less of a learning curve for the proposed Monitor and counsel for the Applicants and the Monitor than for TD Bank and its proposed Receiver who do not have the same background regarding the business and operations of the Applicants.
- [27] This Initial Order shall be without prejudice to all issues raised or to be raised at the *de novo* comeback hearing. The balance of the CCAA Application and the entirety of the Receivership Application are adjourned to February 27, 2025 for a three-hour hearing commencing at 11:00 a.m., which will proceed by zoom.
- [28] I asked counsel for the Applicants to prepare a "very skinny" Initial Order that seeks only what is needed during this short period to February 28, 2025 during which it was confirmed during oral submissions that no DIP Financing would need to be drawn. Some edits were made to scale back the proposed form of Initial CCAA Order but it still contains provisions for the approval of the DIP Financing and DIP Charge and some other provisions that do not appear to me to be necessary during this Initial Stay Period. Those are not being approved at this time but may be revisited at the comeback hearing.

[29] The paragraphs of the revised draft of the Initial Order submitted by the Applicants that still need to be deleted or amended to reflect what the court has ordered under this endorsement for the limited purpose of the Initial Order are as follows:

- a. 12
- b. 24 (c) and (d)
- c. 31 (to remove reference to pre-filing fees)
- d. 32 to 37 inclusive
- e. 41 (remove DIP Charge and reduce Administration Charge to \$150,000)
- f. 43 and 45 remove references to the DIP Charge
- g. 52 – insert February 27, 2025 at 11:00 a.m.

[30] The court will sign a further revised form of Initial CCAA Order to be submitted by counsel for the Applicants to reflect these changes. The signed Initial Order shall be delivered to the service list together with a copy of this endorsement and all of the motion material for the motions now adjourned to February 27, 2025.

[31] All participating parties shall deliver a fresh factum for the comeback hearing (even if most of the points are repetitive of the factums from today's hearing) and all material for that hearing shall have been served, filed and uploaded into the appropriate bundle in Case Center by no later than 4:30 p.m. on February 25, 2025. If there are new positions taken by any interested party that challenge the relief sought on either the CCAA Application or the Receivership Application, the Applicants and TD Bank (as the case may be) may file a brief reply factum (of no more than 5 pages double spaced) by 4:30 p.m. on February 26, 2025.

[32] In addition to any other submissions the parties wish to make, the court asks that they address in their written submissions any comments they may have about the case of *Ashcroft Urban Developments Inc. (Re)*, 2024 ONSC 7192 (not cited by the parties but which addresses similar issues as were considered in the case of *Antibe Therapeutics Inc. (Re)*, Unreported Endorsement of Osborne J, 22 April 2024, at para. 59 cited by TD Bank).



KIMMEL J.