Court File No. 13-10362-00CL

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147650 ONTARIO INC.

Applicants

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(Application Returnable December 17, 2013)

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TO: SERVICE LIST

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I – INTRODUCTION

1. This factum is filed by the Applicants, Silver Streams Homes Inc. ("**Silver Streams**"), Silver Streams Homes (Puccini) Inc. ("**Puccini**"), 2148993 Ontario Inc. ("**2148993**"), 2148990 Ontario Inc. ("**2148990**"), 2147681 Ontario Inc. ("**2147681**") and 2147650 Ontario Inc. ("**2147650**") in support of an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order, *inter alia*:

i. declaring that the Applicants are affiliated debtor companies to which the CCAA applies;

ii. appointing Grant Thornton Limited ("**Grant Thornton**") as monitor of the Applicants in these proceedings (in such capacity, the "**Monitor**");

iii. staying all proceedings taken or that might be taken in respect of the Monitor, the Applicants, their directors and officers or any of their property;

iv. authorizing the Applicants to complete the construction and sale of Phase II and III homes in the Puccini Project (as defined below);

v. authorizing the Applicants to enter into, and borrow under, the DIP term sheet (the "**DIP Term Sheet**") issued by Sandall Investments Limited (the "**DIP Lender**") in favour of the Applicants;

vi. granting the following charges over the property of the Applicants:

   i. a priority charge in favour of the Applicants' counsel, the Monitor and the Monitor's counsel in the maximum amount of $500,000 (the "**Administration Charge**"); and

   ii. a charge, ranking immediately subordinate to the Administration Charge, in favour of the DIP Lender to secure all amounts owing under the DIP Term Sheet (the "**DIP Charge**");

vii. vesting in the respective purchasers all of the Applicants' rights, title and interest in and to lots 22 and 25 (and the houses thereon) of Phase III of the Puccini Project free and clear of all liens, mortgages, charges and other encumbrances other than those contemplated by the applicable agreements of purchase and sale

II – OVERVIEW

2. Silver Streams is a residential homebuilder in the Greater Toronto Area and is in the process of constructing a project located at Bathurst Street and King Road in Richmond Hill,

Ontario (the "**Puccini Project**"). Puccini was incorporated for the purpose of selling the homes in the Puccini Project. Title to the lands in Phases I, II and III of the Puccini Project are in the names of 2148990, 2148993, 2147650, and 2147681 (collectively, the "**Title Holders**"). Title to the Phase IV lands is in the name of 2148991 Ontario Inc., a non-debtor in these proceedings.

3. There are currently 10 remaining homes in Phases II and III of the Puccini Project that are in various stages of completion. Two of the homes have been presold and with minimal work such sales can close within several weeks.

4. The Applicants are insolvent on both a balance sheet and cash flow basis. They cannot repay their institutional and private mortgage lenders who are owed in total approximately $12 million nor can they pay their trades who are owed approximately $3.5 million and have registered liens against various lots in the Puccini Project.

5. In these circumstances the Applicants seek protection under the CCAA, a stay of proceedings and approval of DIP financing to allow them to complete the construction of the remaining 10 homes and to apply the net sale proceeds, after payment of operating costs and the costs of these proceedings, to payment of their creditors' claims in the priority determined by the Court. The 10 homes are expected to generate gross revenue of approximately $8 million to $9 million whereas construction costs to completion are estimated to be approximately $800,000 to $1 million.

6. In the absence of CCAA protection and DIP financing the completion and sale of the 10 homes will not occur and the ongoing Tarion warranty service work and work required under the Subdivision Agreement (as defined below) will not be completed expeditiously nor in a cost effective manner. The completion of the homes will maximize value for the Applicants' stakeholders and protects the interests of purchasers under executory agreements of purchase and sale.

III - FACTS

(a) The Applicants and the Puccini Project

7. The Applicants are affiliated Ontario corporations owned by Imran Jinnah.

Affidavit of Imran Jinnah sworn December 11, 2013 (the "**Jinnah Affidavit**") at para. 1

8. Silver Streams, incorporated in 2003, is a registrant with Tarion Warranty Corporation ("**Tarion**") as a home builder. To date, Silver Streams has successfully completed 3 projects in the Greater Toronto Area.

Jinnah Affidavit at paras. 9 and 10

9. Silver Streams is in the process of completing its fourth project comprising 118 units located at Bathurst Street and King Road in Richmond Hill, Ontario (the "**Puccini Project**").

Jinnah Affidavit at para. 11

10. The Puccini Project is being built in 4 phases. Title to the lands in Phases I, II and III are in the names of the Title Holders. Phase I comprises 20 detached homes and was completed in 2010 and all homes comprising Phase I were sold. Phase II comprises 25 detached homes and was completed in late 2012. All but 3 homes in Phase II have been sold. Phase III consists of 25 detached homes. Eighteen (18) of the homes were completed and sold between June and September 2013. Phase IV is registered in the name of 2148991 Ontario Inc. ("**2148991**") (a non-debtor in these proceedings) and consists of 40 townhouse units and 8 semi-detached homes. Construction of the homes in Phase IV has not yet commenced, although 33 of the homes have been presold.

Jinnah Affidavit at para. 11

11. Puccini was incorporated in October 2008 for the purpose of selling the homes in the Puccini Project. Puccini is registered with Tarion and is the vendor under the agreements of purchase and sale for homes in the Puccini Project.

Jinnah Affidavit at para. 12

(b) Puccini Project Financing

12. The Puccini Project is financed by a combination of institutional financing, granted by Bank of Montreal, Home Trust Company and Foremost Financial Corporation and private lender' loans. The funds advanced by the institutional mortgagees were used to fund acquisition of lands for the Puccini Project and construction. The funds advanced by the private lenders were used to refinance existing debt, establish interest reserves, pay financing costs, development charges and relevant municipal fees such as building permit fees and for working capital. As security for their loans, the Applicants granted to these lenders, among other things, mortgages against title to various lots in the Puccini Project. The Applicants' liabilities to these institutional and private lenders amount to approximately $12 million.

> Jinnah Affidavit at paras. 13-21 and 31 and Exhibits "B", "C", "D", "E", "F", and "G"

(c) Financial Difficulties

13. For the reasons described in detail in paragraphs 25 to 35 of the Jinnah Affidavit, the Puccini Project, experienced significant delays causing the Applicants to run out of money.

> Jinnah Affidavit at paras. 25-35

14. The Applicants do not have sufficient resources to complete construction of the remaining Phase II and III homes, service the loans to the institutional and private lenders, fund Tarion warranty work and pay trade suppliers to the Puccini Project and general overhead expenses.

> Jinnah Affidavit at para. 32

15. Certain of the private lenders have issued Notices of Sale under Mortgage.

> Jinnah Affidavit at para. 33 and Exhibit "I"

16. A number of trades have registered claims for lien under the *Construction Lien Act* R.S.O. 1990, c. C30 (the "**CLA**") against title to the lots in the Puccini Project due to non-payment. The total amount of the liens is approximately $3.5 million.

> Jinnah Affidavit at para. 34

(d) Anticipated Restructuring

17. The Applicants' objective is to complete the 10 remaining homes in Phases II and III and to apply the net sale proceeds, after payment of operating costs and the costs of these proceedings, to payment of their creditors in the priority determined by the Court.

Jinnah Affidavit at para. 51

18. There are three homes in Phase II and seven homes in Phase III that have not yet closed. BMO has a first mortgage registered against title to seven of the lots. Home Trust has a first mortgage registered against title to two of the lots and Foremost has a first mortgage registered against title to one of the lots. Certain of the private lenders have registered subsequent mortgages against title to the ten lots. The claims for lien referred to above are also registered against title to some or all of these lots. The estimated net proceeds of the home sales are insufficient to discharge the encumbrances registered against these lots. Accordingly, the sale of these homes cannot be completed by Puccini without the benefit of the Court granting a vesting order.

Jinnah Affidavit at para. 52

19. The estimated gross sale proceeds from the sale of these 10 homes are approximately $8 to $9 million, whereas the expected costs of completion are approximately $800,000 to $1 million.

Jinnah Affidavit at para. 54

20. Silver Streams has continuing Tarion warranty obligations with respect to the sales of homes in Phases I, II and III of the Puccini Project.

Jinnah Affidavit at para. 55

21. The ongoing servicing and deficiency work for Phase II and III homes must be done. There are a number of home buyers who will be negatively impacted by the Applicants' inability to provide this service.

Jinnah Affidavit at para. 57

22. Silver Streams is the best party to do the warranty work. It has a team in place, is aware of the work that must be done and can complete the work in an efficient and cost effective manner.

Jinnah Affidavit at para. 58

23. Silver Streams has provided letters of credit in favour of the Town of Richmond Hill to secure the performance of certain work under the terms of the Subdivision Agreement. The letters of credit are secured by $2.6 million in cash held on deposit at BMO.

Jinnah Affidavit at para. 59

24. The work that is necessary to be completed by Silver Streams for the Town includes the construction of a park, planting of trees, construction of sidewalks, final asphalts, curbs and final maintenance and needs to be done as soon as possible. The work needs to be completed for the benefit of the residents currently living in the Puccini Project.

Jinnah Affidavit at para. 60

25. Silver Streams estimates the cost to complete the outstanding work to be approximately $600,000, which will result in a portion of the money currently held as cash collateral by BMO to secure the Letters of Credit to be released to Silver Streams when the work is completed.

Jinnah Affidavit at para. 61

(e) Stay of Proceedings

26. The Applicants require relief under the CCAA including a stay of proceedings in order to preserve the status quo and to obtain the necessary financing to complete the construction of the remaining 10 homes.

Jinnah Affidavit at para. 62

27. Without the benefit of CCAA protection, the Applicants will be unable to complete the homes, convey title to home buyers, complete the required work under the Subdivision Agreement, and comply with their Tarion obligations.

Jinnah Affidavit at para. 63

(f) DIP Financing

28. The Applicants have prepared a cash flow projection for the 13 week period commencing on December 20, 2013 and ending March 14, 2014 which reflects an immediate need for working capital to pay construction costs and other operating expenses.

Jinnah Affidavit at para. 64 and Exhibit "U"

29. The DIP Lender, who is an affiliate of one of the private lenders, has offered to make available to the Applicants a debtor-in-possession loan in the maximum amount of $1 million (the "**DIP Loan**") on the terms and conditions set out in the DIP Term Sheet.

Jinnah Affidavit at para. 65 and Exhibit "V"

30. It is a fundamental term of the DIP Loan that the Court grant an Initial Order on terms acceptable to the DIP Lender which shall require that the Monitor control the Applicants' receipts and disbursements and that the DIP Lender shall be entitled to the benefit of the DIP Charge which shall rank behind the Administration Charge (as defined below) but in priority to all other security interests, trusts, liens, construction liens (whether or not preserved or perfected) charges and encumbrances, statutory or otherwise in favour of any person.

Jinnah Affidavit at para. 66

31. As indicated above, the registered lien claims against the 10 homes amount to approximately $3.5 million. If the lien claims have priority over the private mortgages there will be sufficient funds available from the sale proceeds of the homes to pay their claims. However, if the lien claims do not have priority over any of the mortgages, there will not be sufficient funds to pay their claims irrespective of the DIP financing. In either event, the lien claimants will not be materially prejudiced by the proposed DIP financing.

Jinnah Affidavit at para. 67

32. Without DIP financing, the Applicants will be unable to continue their business and complete the construction and sale of the remaining 10 homes, all to the material detriment of their stakeholders, including the secured lenders and purchasers under executory agreements of purchase and sale.

Jinnah Affidavit at para. 68

(g) Vesting Order

33. Puccini has entered into binding agreements to sell the houses on lots 22 and 25 of Phase III of the Puccini Project. The purchasers of these homes are ready, willing and able to close and one of the purchasers has been living in a hotel in anticipation of closing.

Jinnah Affidavit at para. 69 and Exhibits "W" and "X"

34. It is a condition of closing that Puccini transfer title to the homes free and clear of any encumbrances except those contemplated by the applicable agreements of purchase and sale. In the circumstances, Puccini is unable to do so without the benefit of a vesting order issued by this Court.

Jinnah Affidavit at para. 70

35. In order to avoid the additional expense of another motion, Puccini is also seeking at this time an order vesting in the respective purchasers all of the Applicants' rights, title and interest in and to lots 22 and 25 of Phase III of the Puccini Project and the houses thereon free and clear of any encumbrances upon the delivery to the respective purchaser by the Monitor of a certificate confirming that the purchase price for the applicable house has been paid and the transaction has been completed to the satisfaction of the Monitor.

Jinnah Affidavit at para. 71

(h) Appointment of Monitor and Administration Charge

36. Grant Thornton has consented to act as the monitor of the Applicants under the CCAA.

Jinnah Affidavit at para. 73 and Exhibit "Y"

37. It is contemplated that the proposed Monitor, counsel to the proposed Monitor and counsel to the Applicants would be granted a first priority Court-ordered charge on the assets, property and undertaking of the Applicants in priority to all claims (the "**Administration Charge**"), up to the maximum amount of $500,000 in respect of their fees and disbursements, incurred at standard rates and charges.

Jinnah Affidavit at para. 74

IV - LAW AND ARGUMENT

(a) The Test Under the CCAA

38. The CCAA applies in respect of "affiliated debtor companies" if the total claims against "affiliated debtor companies" is more than $5,000,000. For the purposes of the CCAA, companies are affiliated companies if each of them is controlled by the same person.

> CCAA section 3(1)

(b) The Applicants are Affiliated Debtor Companies under the CCAA

39. The term "debtor company" is defined in section 2 of the CCAA as follows:

> "debtor company" means any company that
>
> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
>
> (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;
>
> CCAA, section 2(1) "debtor company"

40. The insolvency of a debtor under the CCAA is assessed as of the time of filing of the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", Courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the "**BIA**"), which defines an insolvent person as a person (i) who is not bankrupt; and (iii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

i. is for any reason unable to meet his obligations generally as they become due;

ii. has ceased paying its current obligations in the ordinary course of business as they become due; or

iii. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process,, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA section 2 ("insolvent person")

Re Stelco Inc. (2004), 48 CBR (4th) 299 (Ont. Sup. Ct. [Commercial List]; leave to appeal to CA refused [2004] OJ No. 1903; leave to appeal to SCC refused [2004] SCCA No 336 ("***Stelco***"), Tab 1 Applicants Brief of Authorities at para. 4

41. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, Tab 1 Applicants Brief of Authorities at paras. 26 and 28

42. The Applicants meet the traditional test for insolvency under the BIA as a result of the following:

i. The Applicants' debts are substantially greater than the appraised aggregate value of the Applicants' property;

ii. The Applicants have run out of money and are unable to meet their obligations in the ordinary course as they come due;

iii. The Applicants have stopped paying their obligations to their trades and other suppliers which has caused a number of these creditors to demand payment, register liens and commence litigation proceedings;

iv. A number of the Applicants' mortgagees have demanded payment and certain of the private lenders have issued Notices of Sale under Mortgage;

v. The Applicants are unable to generate sufficient cash flow to support their existing debt obligations; and

vi. The Applicants do not have available cash resources to complete the Puccini Project.

Jinnah Affidavit at paras. 32-35 and 76

43. The Applicants are affiliated debtor companies as they are all owned and controlled by Imran Jinnah. The Applicants cumulative liabilities to their secured and trade creditors amount to approximately $16 million, far in excess of the $5 million threshold amount under the CCAA. Therefore, the CCAA applies to the Applicants in accordance with section 3(1).

Jinnah Affidavit at paras. 1 and 13-21

(c) The Relief Sought Is Consistent With The Purpose And Policy Of the CCAA

44. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings wherever possible.

Elan Corporation v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (WL) (Ont. C.A.), Tab 2 of the Applicants' Brief of Authorities at paras. 22 and 56-60

Lendhorf General Partners Ltd. (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (WL) (Ont. Gen. Div.), Tab 3 of the Applicants' Brief of Authorities at para. 5

45. In the recent Supreme Court of Canada decision *Sun Indalex Finance, LLC v. United Steelworkers*, Chief Justice McLachlin addressed the overarching purpose of the CCAA as being the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather <u>to try to provide a constructive solution for all stakeholders when a company has become insolvent.</u> As my colleague, Deschamps J. observed in Century Services, at para. 15:
>
> ...the purpose of the CCAA... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in Elan Corp. v. Comiskey (1990), 41 O.A.C. 282, at para. 57 (dissenting):

The legislation is remedial in the sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

Sun Indalex Finance, LLC v. United Steelworkers ("***Indalex***") 2013 SCC 6, Tab 4 of the Applicants' Brief of Authorities at para. 205

46. The Applicants are insolvent and cannot repay their secured indebtedness which is in excess of $12 million or pay their trades who are owed approximately $3.5 million. A number of creditors have commenced enforcement proceedings, which in the absence of a stay of proceedings and the protection of the CCAA, will cause the Applicants' to file for bankruptcy protection and shut down the Puccini Project without completing the development. It is unlikely that a bankruptcy trustee would be in the position to complete the Puccini Project, the ongoing Tarion warranty work or the work required to be completed under the subdivision agreement.

Jinnah Affidavit at paras. 35 and 76

47. The Applicants' objective is to complete the 10 remaining homes in Phases II and III of the Puccini Project and to apply the net sale proceeds, after payment of operating costs and the costs of these proceedings, to payment of their creditors' claims in the priority determined by the Court.

Jinnah Affidavit at para. 51

48. The decision of the Supreme Court of Canada in *Century Services Inc. v. Canada* confirms the breadth and flexibility of the CCAA is to not only preserve and allow for

restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and the highest price for the benefit of all stakeholders.

> *Century Services Inc. v. Canada,* 2010 SCC 60, [2010] 3 S.C.R. 379, Tab 5 of the Applicants' Brief of Authorities at para.15

49. The completion of the 10 remaining homes in Phases II and III of the Puccini Project represents the best option available to all of the Applicants' stakeholders as:

i. The completion of the homes maximizes value for the Applicants' stakeholders and protects the interests of purchasers under executor agreements of purchase and sale. The homes are expected to generate gross revenue of approximately $8 million to $9 million where as construction costs to completion are estimated to be approximately $800,000;

ii. A liquidation of the Puccini Project homes prior to completion would likely result in a significantly reduced value and recovery for creditors;

iii. The Applicants are the best parties to complete the ongoing Tarion warranty work and the work required under the Subdivision Agreement in a cost effective manner;

iv. The provision for a vesting order in any agreement of purchase and sale is attractive to any potential purchaser, and is something that would not be easily obtained under any alternative enforcement process at less cost. In light of the liens registered by the trades against title to the Puccini lands it is unlikely that a potential purchaser would purchase the homes without a vesting order; and

v. The priority issues between lien claimants and mortgagees are best managed and resolved pursuant to a single court supervised process rather than a multiplicity of foreclosure proceedings or construction lien actions.

> Jinnah Affidavit at paras. 54 and 58

(d) The Stay of Proceedings is Appropriate

50. Pursuant to section 11.02 of the CCAA, the Court has discretion to make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose".

51. In exercising the discretionary authority to grant a stay pursuant to the CCAA, the discretionary authority must be informed by the purpose behind the CCAA, and the CCAA should be construed broadly in order to achieve the objectives of the CCAA.

> *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), Tab 6 of the Applicants' Brief of Authorities at para10

52. The Applicants seek a stay of proceedings to enable them to complete the 10 homes in Phases II and III of the Puccini Project and provide for an orderly distribution of proceeds to the Applicants' creditors in accordance with priorities to be determined by this Court. In the absence of a stay of the existing and future enforcement proceedings, the Applicants face a multiplicity of enforcement proceedings.

> Jinnah Affidavit at paras. 62 and 75

(e) The Charges Are Appropriate

53. The Applicants seek approval of certain Court-ordered charges over its assets relating to its administrative costs and DIP financing which would rank in priority to all other present and future security interests, trusts, liens, construction liens (whether or not perfected or preserved), trust claims (whether or not perfected or preserved), charges and encumbrances, claims of secured creditors, statutory or otherwise, in favour of any Person (as defined in the proposed Initial Order).

(f) Administration Charge is Appropriate

54. In connection with the appointment of the proposed Monitor, the Applicants are seeking a charge over the assets, property, and undertaking of the Applicants in the amount of $500,000 to secure the fees and disbursements at the standard rates and charges of the Monitor,

legal counsel to the Monitor and counsel to the Applicants. The Administration Charge is to rank in priority to all present and future security interests, trusts, liens, construction liens (whether or not preserved or perfected) and other encumbrances.

55. Section 11.52 of the CCAA confers on CCAA courts the statutory jurisdiction to grant an administration charge:

> **11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

56. In *Re Canwest Publishing Inc.,* this Court provided a list of non-exhaustive factors to consider in making such an assessment:

> (a) the size and complexity of the business being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the monitor.

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115 (WL), 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Tab 7 of the Applicants' Brief of Authorities at para. 54

Comstock Canada Ltd., Re *(2013) 4 C.B.R. (6th) 47, 2013 CarswellOnt 9796, ("***Comstock***"), Tab 8 of the Applicants' Brief of Authorities at para. 47

57. The Applicants submit that this is an appropriate circumstance for this Court to grant the CCAA Administration Charge with priority over pre-existing security interests. Each of the professionals whose fees are to be secured by the CCAA Administration Charge will play a critical role in these proceedings. It is unlikely that the above-noted professionals will continue to participate in the CCAA proceeding unless the CCAA Administration Charge is granted to secure their reasonable fees and disbursements.

58. Notice has been given to all of the secured creditors and lien claimants who are likely to be materially prejudiced by the granting of the Administration Charge.

59. The Applicants submit that the amount of the charge sought is appropriate in the present circumstances for the following reasons:

i. successful and effective resolution of priority disputes between the mortgagees and the lien claimants will require extensive involvement of professional advisors;

ii. there is no unwarranted duplication of roles so as to minimize the professional fees associated with the restructuring;

iii. the work to be done in connection with the sale of the 10 homes;

iv. the proposed Monitor is supportive of the proposed Administration Charge;

v. the institutional mortgagees and the lien claimants will not be materially prejudiced by the Administration Charge and the private lenders do not object to the Administration Charge or the amount of the charge.

(g) The DIP Charge is Appropriate

60. The Applicants seek approval of the DIP Term Sheet providing the DIP Loan of up to $1 million to be secured by a charge over the assets, property and undertakings of the Applicants. The DIP Charge is to be in priority to all present and future security interests, trusts, construction liens (whether or not preserved or perfected) and other encumbrances, save and except for the Administration Charge.

61. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession financing charge:

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

62. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;

> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

63. The above list of factors is not exhaustive. The Court may consider additional factors in determining whether to grant a DIP financing charge.

64. The DIP Charge, if approved, would have priority to all present and future security interests, trusts and liens, including the statutory liens and trusts created pursuant to the CLA.

65. The Supreme Court of Canada's decision in *Indalex* is instructive when the Court is faced with a request for the creation of a super priority in respect of a DIP charge in favour of a DIP lender over a deemed trust. In *Indalex*, the Supreme Court dealt with whether the priority established under s. 11.2 of the CCAA had priority over a deemed trust established provincially under s. 57(3) of the *Pension Benefits Act*, RSO 1990, c. P-8. The Court unanimously agreed with the reasons of Deschamps J., who reasoned that:

> [58] In the instant case, the CCAA judge, in authorizing the DIP charge, ... did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):
>
> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring:
>
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;

. . .

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

. . .

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, Rescue! The Companies' Creditors Arrangement Act (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve the rights on June 12, 2009, are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate". 2009 CanLII 37906 (ON SC), (2009 CanLII 37906, at paras. 7 and 8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust. [Emphasis added]

Indalex, Tab 4 of the Applicants' Brief of Authorities at paras. 58-60

Comstock, Tab 8 of the Applicants' Brief of Authorities at para. 54

66. More recently, in *Comstock*, this Court approved a DIP charge that, as in the case at hand, would prime the statutory trusts created by the *Construction Liens Act*.

Comstock, Tab 8 of the Applicants' Brief of Authorities at paras. 53-55

67. The Applicants' respectfully submit that the granting of the DIP Charge is appropriate in the circumstances of this case for the following reasons:

i. The Applicants are unable to complete the homes in Phases II and III of the Puccini Project without the additional financing;

ii. No creditor will advance funds to the Applicants without priority for their advances;

iii. Without DIP financing, the Applicants will be unable to continue their business and complete the construction and sale of the remaining 10 homes, all to the material detriment of their stakeholders including the secured lenders and purchasers under executory agreements of purchase and sale;

iv. The benefit of the DIP facility to the stakeholders outweighs any potential prejudice;

v. There is no prejudice to the institutional mortgagees or the lien claimants if the DIP Charge is granted. If the lien claimants are found to have priority over the mortgagees there will be sufficient funds from the proceeds of sale of the 10 homes to satisfy their claims. However, if the lien claimants do not have priority over the mortgagees, there will not be sufficient funds to pay their claims irrespective of the DIP financing;

vi. The private lenders do not object to the granting of the DIP Charge

vii. Notice has been given to all of the secured creditors and lien claimants who are likely to be materially prejudiced by the granting of the charge; and

viii. The proposed Monitor has filed a report that opines that the terms and conditions of the DIP Term Sheet are reasonable in the circumstances and necessary if the Applicants are to be allowed the opportunity to continue so that they can complete the 10 remaining homes.

Jinnah Affidavit at paras. 32 and 66-68

Monitor's Report dated December 13, 2013

VESTING ORDER

68. As indicated above, Puccini has entered into binding agreements to sell the houses on lots 22 and 25 of Phase III of the Puccini Project. The purchasers of these homes are ready, willing and able to close and with one of the purchasers currently residing in a hotel pending the closing of the sale of the home.

Jinnah Affidavit at paras. 53 and 69 and Exhibits "W" and "X"

69. It is a condition of closing that Puccini transfer title to the homes free and clear of any encumbrances except those contemplated by the applicable agreements of purchase and sale. In the circumstances, Puccini is unable to do so without the benefit of a vesting order issued by this Court.

Jinnah Affidavit at para. 70

70. In order to avoid the additional expense of another motion, Puccini is seeking at this time an order vesting in the respective purchasers all of the Applicants' rights, title and interest in and to lots 22 and 25 of Phase III of the Puccini Project, and the houses thereon, free and clear of any encumbrances upon the delivery to the respective purchaser by the Monitor of a certificate confirming that the purchase price for the applicable house has been paid and the transaction has been completed.

Jinnah Affidavit at para. 71

V – ORDER SOUGHT

71. The Applicants request an order of the Court approving the relief set out in paragraph 1 of this factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: December 16, 2013

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SCHEDULE "A" – List of Authorities

1.	*Re Stelco Inc.* (2004), 48 CBR (4th) 299 (Ont. Sup. Ct. [Commercial List]; leave to appeal to CA refused [2004] OJ No. 1903; leave to appeal to SCC refused [2004] SCCA No 336.
2.	*Elan Corporation v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (WL) (Ont. C.A.).
3.	*Lendhorf General Partners Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (WL) (Ont. Gen. Div.).
4.	*Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6.
5.	*Century Services Inc. v. Canada,* 2010 SCC 60, [2010] 3 S.C.R. 379.
6.	*Re Nortel Networks Corp.*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).
7.	*Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (WL), 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).
8.	*Comstock Canada Ltd., Re,* (2013) 4 C.B.R. (6th) 47, 2013 CarswellOnt 9796.

SCHEDULE "B" – Relevant Legislation

***Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36**

2. (1) In this Act,

"debtor company" means any company that

(*a*) is bankrupt or insolvent,

(*b*) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(*c*) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(*d*) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

2. In this Act,

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(*a*) who is for any reason unable to meet his obligations as they generally become due,

(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

Court File No. 13-10362-00-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

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