SUPERIOR COURT OF JUSTICE

ENDORSEMENT

COURT FILE NO.: CV-23-00701377-00CL **DATE:** **June 21, 2023**

NO. ON LIST: **4**

TITLE OF PROCEEDING: SWARMIO MEDIA HOLDINGS INC, CCAA

BEFORE: **Madam Justice Steele**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Asim Iqbal / Monica Faheim	Counsels for the Applicants	aiqbal@millerthomson.com / mfaheim@millerthomson.com
Vijai Karthigesu	Applicants	vijai@swarmio.media
Jonathan Visva	Applicants	jonathan@swarmio.media

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Sean Peasgood	2697254 Ontario Inc.	Sean@SophicCapital.com
Daniel Wootton	Grant Thornton Limited, proposed Monitor	Dan.Wooton@ca.gt.com
Clifton Prophet / Heather Fisher	Counsel for Grant Thornton Limited, proposed Monitor	Clifton.Prophet@gowlingwlg.com / Heather.Fisher@gowlings.com
Steven Singh	2184907 Ontario Inc.	finansingh@gmail.com

Laura Culleton / Maya Poliak	Counsel to Ontario Securities Commission	laurac@chaitons.com /

ENDORSEMENT

[1] This is an application by the applicants for an initial order under the CCAA. The proposed monitor is Grant Thornton Limited ("GT" or the "Proposed Monitor").

[2] The Proposed Monitor indicated that it was supportive of the relief sought by the applicants today.

[3] The evidence before the Court is set out in an affidavit of Vijai Karthigesu, sworn June 20, 2023. Mr. Karthigesu is the Chief Executive Officer of the applicant, Swarmio Media Holdings Inc. ("Swarmio Parent") and a member of Swarmio Parent's board of directors. He is also the CEO and a member of the board of Swarmio Parent's wholly-owned subsidiary applicants, Swarmio Inc. ("Swarmio Opco"), and Swarmio Media Inc. ("Swarmio Media" and together with Swarmio Opco and Swarmio Parent, the "Swarmio Group" or the "applicants")

[4] Any capitalized terms not defined herein will have the meaning prescribed to them in Mr. Karthigesu's affidavit.

[5] At this initial hearing, the applicants seek (i) the appointment of GT as monitor; (ii) the granting of administration charge to secure professional fees up to $100,000, (iii) the granting of a charge in favour of the current directors and officers of the Swarmio Group in the amount of $100,000; (iv) the approval of interim financing of $135,000 under the terms of the DIP Term Sheet to fund operations during the initial stay period; and (v) authorizing Swarmio Parent to incur no further expenses in relation to the Securities Filings.

[6] The applicant state that the requested relief is necessary to maintain the *status quo* and give the applicants time to develop a restructuring plan in consultation with their advisors and the Proposed Monitor.

[7] The applicants are an early stage, pre-revenue technology and media company focused on the gaming sector. The applicants are insolvent and are unable to raise the necessary capital. They have exhausted their liquidity and not made payroll. They owe almost $1.1 million to their Canadian employees.

[8] The Swarmio Group have 22 full-time employees located in Canada. The applicants also contract with approximately 50 independent consultants to perform a wide-range of functions and services.

[9] As at December 31, 2022, the Swarmio Group, on a consolidated basis, had assets with a book value of approximately $1.2 million. The total liabilities of the Swarmio Group as at June 10, 2023 amount to approximately $10,266,328.

Initial Order

Application of the CCAA

[10] Section 2 of the CCAA defines a "company" to mean any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, among other entities. The applicants are each a "company" as defined in the CCAA:

a. Swarmio Parent is a British Columbia company with a registered office in B.C.

b. Swarmio Opco is a wholly owned subsidiary of Swarmio Parent and is a Canadian federal corporation with a registered office in Nova Scotia.

c. Swarmio Media is a wholly owned subsidiary of Swarmio Opco and a federal Canadian corporation with its registered head office in Sydney, Nova Scotia.

d. Swarmio Group's management team is located in the greater Toronto area in Ontario, and other employees are located in Ontario and Nova Scotia.

[11] Section 2 of the CCAA defines a "debtor company" to include a "company" that is bankrupt or insolvent. The CCAA applies to a "debtor company" where the total claims against it exceed $5 million: s. 3(1) CCAA.

[12] The evidence is that the applicants are unable to meet their obligations as they become imminently due. The Swarmio Group is insolvent. They are in default of their secured debt obligations. They have missed payroll and owe source deductions. The Applicants are insolvent under both the BIA test for solvency and the expanded concept of insolvency accepted by the Stelco test (Stelco Inc. (Re), 2004 CarswellOnt 1211).

[13] The Applicants are also "affiliated companies" for the purposes of section 3(2) of the CCAA. As noted above, both of Opco and Swarmio Media are owned, directly or indirectly, by Swarmio Parent.

[14] I am satisfied that each of the Applicants is a "debtor company" under the CCAA. Each of the Applicants is incorporated in Canada or British Columbia.

[15] Section 9(1) of the CCAA provides that any application under the CCAA shall be made to the Court that has jurisdiction within which the head office or chief place of business of the company in Canada is situated, or, if the company has no business in Canada, in any province within which any of the assets of the company are located. The Swarmio Group states that their locality is Ontario, which is the chief place of business because:

a. The Company's entire executive management team that is responsible for the operation of the business is located in the GTA;

b. Employees are located in Ontario and Nova Scotia;

c. The CEO and director of the Swarmio Group is in Ajax, Ontario; and

d. Sorin Stoian, a senior executive and director of the group, also resides in Ajax.

[16] The applicants have filed the documents required under s. 2(1) of the CCAA.

[17] Further circumstances exist that make the initial order appropriate. The applicants urgently require financing to fund operations and restructuring costs. Among other things, the applicants need CCAA protection to commence a court-supervised sale process to find a value-maximizing transaction and emerge as a going concern. The applicants need the breathing room to obtain interim financing, develop the sales process and emerge as a going concern. Such circumstances are appropriate for an initial order and initial stay of proceedings: *Target Canada Co.*, 2015 ONSC 303, at para. 8.

Relief Requested in Initial Order Limited to what is Reasonably Necessary

[18] Section 11.001 of the CCAA requires that the relief granted in the initial order be limited to what is "reasonably necessary for the continued operations" of the applicants in the ordinary course of business for the initial ten-day period.

[19] The applicants have only requested interim funding needed for the initial 10-day period. The administration charge has been similarly sized.

Appointment of Grant Thornton as Monitor

[20] The Court is required to appoint a person to monitor the business and financial affairs of a debtor company when an initial order is made: CCAA, s. 11.7. There are also requirements set out in the CCAA re who may act as a monitor. A monitor is required to be a trustee within the meaning of s. 2 of the BIA.

[21] Grant Thornton is a trustee within the meaning of s. 2 of the BIA and not subject to any of the restrictions set out in s. 11.7(2) of the CCAA. Grant Thornton has provided its consent to act in this capacity.

[22] Grant Thornton is appointed monitor.

DIP Loan and DIP Lenders Charge

[23] Section 11.2 of the CCAA allows the Court to grant the DIP Loan and order a priority charge on notice to those secured creditors that would be affected and in an amount that the Court considers appropriate.

[24] The Court cannot grant an order for interim financing at the same time as granting an initial order under s. 11.2 unless the terms of the loan are limited to those reasonably necessary for the applicants' continued operation during the initial stay period. The factors the Court is to consider re whether the DIP Lender's charge is appropriate are set out in s. 11.2(4) of the CCAA.

[25] In this case the applicants seek CAD$135,000 to be made available for the initial period. The applicants submit that this is the amount that is reasonably necessary so that they can meet critical payments and continue operations during the initial period. The full DIP Loan facility will provide for up to $1.5 million (however only $135,000 is to be made available under the credit facility during the initial period).

[26] The necessity of the DIP Loan is supported by the cash flow forecast. Without the DIP Loan the applicants will not be able to continue to carry on business. The applicant notes that the proposed monitor is supportive of the DIP Loan, the DIP Term Sheet and the DIP Lender's Charge and sets out several other reasons as to why it is appropriate to grant this relief at s. 54 of their factum.

[27] I am satisfied that this relief should be granted.

Administration Charge

[28] The applicants seek an Administration Charge of $100,000 to secure the professionals' fees and disbursements in respect of the initial period. At the Comeback, the applicants intend to request an increase to the Administration Charge.

[29] The Court has the jurisdiction to grant the Administration Charge pursuant to section 11.52 of the CCAA. In *Re Canwest Publishing*, 2010 ONSC 222, at para. 54, the Court identified six non-exhaustive factors that the Court may consider when determining whether to grant an administration charge:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is unwanted 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.

[30] The applicants submit that the proposed Administration Charge is warranted, necessary and appropriate in the circumstances. The professional group is needed to assist the applicants with the proceedings, including the sales process. The proposed charge is also supported by the proposed monitor.

[31] Notice has been provided to the secured creditors likely to be affected.

[32] I grant the Administration Charge pursuant to s. 11.52 of the CCAA.

D&O Charge

[33] The applicants also seek a directors' charge in favour of the applicants' current officers and directors in priority to all other charges other than the Administration Charge and the DIP Lender's Charge, in the amount of $100,000.

[34] Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the D&O charge in an amount the Court considers appropriate, provided that notice is given to the secured creditors who are likely to be affected by it.

[35] In *Re Jaguar Mining Inc.*, 2014 ONSC 494 at para. 45, the Court set out factors to be considered re approval of a directors' charge:

a. Whether notice has been given to the secured creditors likely to be affected by the charge;

b. Whether the amount is appropriate;

c. Whether the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

d. Whether the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[36] To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers. The Applicants also state the directors and officers' insurance policy has expired and obtaining a new policy will be cost-prohibitive is unlikely to occur.

[37] Notice has been provided to the secured creditors likely to be affected.

[38] The ranking re priorities of the Directors' Charge, the Administration Charge and the DIP Lender's Charge are set out at para. 38 of the Order.

[39] The D&O charge is approved.

Comeback Hearing

[40] Order to go as signed by me and sent to counsel for the applicants and the Proposed Monitor for distribution to the Service List. The order is effective from today's date and is enforceable without the need for entry and filing.

[41] The comeback hearing is scheduled for June 30, 2023 at 9 am.

Madam Justice Steele

Date: June 21, 2023