

**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

RESPONDING WRITTEN SUBMISSIONS OF THE MONITOR AS TO COSTS

January 5, 2016

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PART I: FACTS

1. The Applicants in these CCAA proceedings sought an Order declaring that they had the requisite authority to enter into a settlement agreement dated February 17, 2015 with, *inter alios*, Imran Jinnah ("**Jinnah**") and Tarion Warranty Corporation ("**Tarion**") (collectively, the "**Settlement Agreement**") without the approval of the Court, or, in the alternative, if they did not have such requisite authority, an Order approving the Settlement Agreement.
2. Certain lien claimants (the "**Objecting Lien Claimants**") objected to the Settlement Agreement and the relief sought by the Applicants. Jinnah, the Applicants' controlling mind, swore an affidavit in support of the Applicants' motion, which relief was also supported by Tarion. No other stakeholder took a position, filed materials or made submissions. The Monitor took no position; it filed a short report and its counsel made brief submissions.

3. The Honourable Justice Wilton-Siegel denied the Applicants' motion. The Objecting Lien Claimants now seek costs: (i) from Jinnah, Tarion and the Applicants;¹ or (ii) in the alternative, from the Estate. While the Objecting Lien Claimants sought costs in their facta, they did not indicate that they were seeking costs from the Estate.

Factum of Medi Group Incorporated and certain other Objecting Lien Claimants, at para. 87.

Factum of Argo Lumber Inc. and Newmar Window Manufacturing, at para. 27.

PART II: THE ISSUE

4. In the event that costs are not ordered against Jinnah, Tarion or the Applicants, the issue for determination becomes whether, on an alternative basis, it is appropriate for the Objecting Lien Claimants to recover costs from the Estate.

PART III: THE LAW AND ARGUMENT

5. The Objecting Lien Claimants acknowledge that cost orders are often not made in CCAA proceedings. Some jurisprudence goes further, holding that CCAA cost orders are a rarity. Even in the limited circumstances when CCAA cost orders are made, they are made against unsuccessful parties. The Objecting Lien Claimants have not put forward an example of costs being awarded against a passive estate in a CCAA proceeding.

Submissions as to Costs of Medi Group Incorporated and certain other Objecting Lien Claimants, at para. 14 [Medi Cost Submissions].

Submissions as to Costs of Argo Lumber Inc. and Newmar Window Manufacturing, at para. 11 [Argo Cost Submissions].

***Return on Innovation v. Gandhi Innovations*, 2011 ONSC 7465, [2011] O.J. No. 5829 [Comm. List] at paras. 3-7 [RO/], citing and explaining, amongst other cases:**

***Re Indalex Ltd.*, 2011 ONCA 578, 81 C.B.R. (5th) 165 at para. 4 [Indalex];**

***Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487 (Gen. Div.) at para. 31; and**

***Re Calpine Canada Energy Limited*, 2008 ABQB 537, [2008] A.J. No. 965 at para. 1 [Calpine].**

¹ Argo Lumber Inc. and Newmar Window Manufacturing are the only Objecting Lien Claimants seeking costs against the Applicants.

6. The underlying policy rationale for the reluctance to award costs in CCAA proceedings is expressed as follows:

- (a) *"as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs"; and*

ROI, supra, at para. 3, citing Indalex, supra, at para. 4.

- (b) *"generally, stakeholders in CCAA proceedings are involuntary parties in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act."*

Calpine, supra, at para. 1.

Medi Cost Submissions, supra, at para. 15.

7. If it is determined that costs ought not to be awarded against Jinnah or Tarion – described by the Objecting Lien Claimants as *"the only parties to benefit from the implementation of the Settlement Agreement"* – it would therefore be entirely inappropriate to award costs on an alternative basis against the Estate, the general stakeholders of which never stood to benefit from or expressed support for the Settlement Agreement.

Medi Cost Submissions, supra, at para. 11.

Argo Cost Submissions, supra, at para. 12.

8. Moreover, the Objecting Lien Claimants acknowledge that they *"took on the risk and the cost of opposing the motion."* Accordingly, they cannot have reasonably expected to recover their costs from the Estate. As the Objecting Lien Claimants further acknowledge, *"[a]ll creditors were at liberty to oppose the motion; however, they did not."*

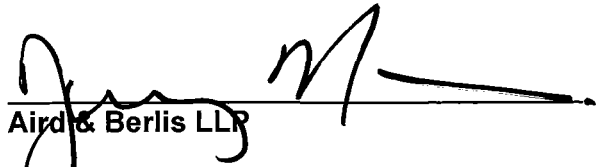
Argo Cost Submissions, supra, at para. 12.

PART IV: ORDER SOUGHT

9. The Monitor requests that this Court refuse to award costs against the Estate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 5, 2016

Per: 
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TAB A

SCHEDULE A

1. *Return on Innovation v. Gandi Innovations*, 2011 ONSC 7465, [2011] O.J. No. 5829 [Comm. List], citing and explaining, amongst other cases:
 - a. *Re Indalex Ltd.*, 2011 ONCA 578, 81 C.B.R. (5th) 165;
 - b. *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487 (Gen. Div.); and
 - c. *Re Calpine Canada Energy Limited*, 2008 ABQB 537, [2008] A.J. No. 965.

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Applicants

Court File No. CV-13-10362-00CL

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Proceedings commenced at Toronto

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