Court File No. CV-20-00645116-00CL

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 **TRIBALSCALE INC.**

Applicant

FACTUM OF THE APPLICANT
(Re Meeting Order)

November 23, 2020

WEISZ FELL KOUR LLP
100 King Street West
Suite 5600
Toronto, ON M5X 1C9

Caitlin Fell LSO No. 60091H
cfell@wfklaw.ca
Tel: 416.613.8282

Sharon Kour LSO No. 58328D
skour@wfklaw.ca
Tel: 416.613.8283

Pat Corney LSO No. 65462N
pcorney@wfklaw.ca
Tel: 416.613.8287

Fax: 416.613.8290

Lawyers for TribalScale Inc.

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I – OVERVIEW

1. This factum is filed in support of the Applicant's motion returnable November 25, 2020, for the granting of an Order (the "**Meeting Order**"), substantially in the form at Tab 3 of the Motion Record, that, among other things:

   (a) accepts for filing a plan of compromise and arrangement in respect of the Applicant dated November 22, 2020 (the "**Plan**"); and

   (b) authorizes (i) the Applicant to hold a meeting (the "**Creditors' Meeting**") of its Affected Secured Creditors (as defined herein) to consider and vote on a resolution to approve the Plan; and (ii) related procedures and obligations.

2. The proposed Meeting Order will "set the wheels in motion" for the Applicant's emergence from its *Companies' Creditors Arrangement Act*[1] (the "**CCAA**") proceedings, and for meaningful recoveries for the Applicant's stakeholders. The Applicant expects the Creditors' Meeting to be uneventful given that the Applicant has only two secured creditors (the "**Affected Secured Creditors**"), one of which has already agreed to vote all of its debt in favour of the Plan and the other will be repaid in full.

3. At this time, the Applicant is not seeking Court sanction of the Plan. Such approval will be sought following the Affected Secured Creditors' approval of the Plan.

4. Capitalized terms not otherwise defined in this Factum have their meanings defined in the Affidavit of Sheetal Jaitly sworn November 22, 2020 (the "**Third Jaitly Affidavit**").

---

[1] R.S.C. 1985, c. C-36, as amended.

PART II – FACTS

A. Procedural History

5. TribalScale is a software engineering and development firm that provides digital product strategy, design, and development services to clients located in Canada and in the United States. TribalScale specializes in creating enterprise software solutions for large, institutional clients. Examples of past work include a project with the PGA Tour to develop voice user interface-based applications to engage fans through Google Assistant and Amazon Alexa, as well as a project with iHeartRadio to develop an application for the Amazon FireTV service.[2]

6. On May 19, 2020, TribalScale filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended. MNP Ltd. ("**MNP**"), was appointed as the proposal trustee in the NOI proceedings.[3]

7. On July 31, 2020, the Honourable Justice Gilmore granted an Order (the "**Initial Order**") converting the NOI proceedings into proceedings under the CCAA. MNP was appointed as TribalScale's CCAA monitor (the "**Monitor**"), and an initial Stay Period was implemented up to and including October 31, 2020.[4]

8. On October 30, 2010, the Honourable Justice Conway granted an Order (i) extending the Stay Period up to and including January 31, 2021; and (ii) authorizing the Applicant to enter into a Restructuring Support Agreement (the "**RSA**") with its largest secured creditor, 1924191 Ontario

---

[2] Third Jaitly Affidavit, Motion Record Returnable November 25, 2020 ["**Motion Record**"], Tab 2, para 2.
[3] *Ibid*, para 3.
[4] *Ibid*, para 4.

Inc. ("**192**").[5] The RSA was executed on November 3, 2020, and sets out the terms of a Transaction to facilitate the Applicant's emergence from CCAA protection whereby, in summary,

(a) the Applicant's secured indebtedness with 192 will be restructured and the Applicant's secured indebtedness with the Business Development Bank of Canada ("**BDC**") will be repaid in full;

(b) the Applicant's unsecured debt will be vested out, by way of a reverse vesting order, to a newly incorporated company; and

(c) unsecured creditors will receive the proceeds, if any, of an outstanding receivable (the "**Outstanding Receivable**") owed to the Applicant by Sirius XM Connected Vehicle Services Inc. (less the fees and costs incurred to collect).[6]

B. Restructuring Efforts to Date

9. Since the Initial Order was granted, the Applicant's management, together with the Monitor and company counsel, has focused on:

(a) the performance of current customer contracts;

(b) the execution of new customer contracts;

(c) the collection of outstanding receivables;

(d) the strategic "right-sizing" of the business with the assistance of Monitor;

[5] Para 7
[6] Para 12

(e) negotiating the RSA; and

(f) developing the Plan.[7]

10. The RSA has been executed and the Applicant is ready to move forward with the Plan. Following approval of the Plan by the Affected Secured Creditors, the Applicant will turn to the final steps in its CCAA proceeding: Court sanction of the Plan and, if granted, implementation of same; and pursuit of the Outstanding Receivable for the exclusive benefit of the Applicant's unsecured creditors.

C. Meeting Order

11. The proposed Meeting Order is designed to permit voting on the Plan and to proceed to the Sanction Motion if the Plan Resolution received approval by majorities required by section 6(1) of the CCAA (the "**Required Majorities**"). The proposed Meeting Order, among other things:

(a) accepts the Plan for filing purposes;

(b) authorizes the Applicant to divide the two Affected Secured Creditors (being all of the Applicant's secured creditors) into separate classes for voting purposes: (i) the Converting Secured Creditor Class and (ii) the Paid-Out Secured Creditor Class;

(c) authorizes the Creditors' Meeting to be held on November 27, 2020, at 4:00pm EST via Zoom due to the COVID-19 pandemic;

[7] Affidavit of Sheetal Jaitly, sworn October 27, 2020, Motion Record Returnable October 30, 2020, Tab 2, para. 6.

(d) deems the Paid-Out Secured Creditor Class to have voted in favour of the Plan such that the Required Majority for the class shall have been obtained;

(e) provides notification and voting procedures for Affected Secured Creditors;

(f) provides a process for amendments or modifications to be made to the Plan;

(g) outlines the procedure for conduct and voting at the Creditors' Meeting including provisions establishing deadlines for receipt of Proxies from Affected Secured Creditors;

(h) requires the Monitor, no later than one business day prior to the Creditors' Meeting, to serve a report regarding the Plan on the service list and post a copy of such report on its website;

(i) requires the Monitor to provide a report, as soon as practicable after the Creditors' Meeting with regard to, among other things, the results of the votes;

(j) schedules a Sanction Motion to be heard on December 3, 2029 if the Required Majorities are obtained; and

(k) provides a process for the adjournment of the Creditors' Meeting and the Sanction Motion.[8]

[8] Meeting Order, Motion Record, Tab 3.

PART III – ISSUES

12. The key issues on this Motion are:

(a) Should the Plan be accepted for filing and the Creditors' Meeting scheduled?

(b) Is the proposed classification of creditors appropriate?

PART IV – LAW

A. The Plan Should be Accepted for Filing and the Creditors' Meeting Should be Scheduled

13. Section 5 of the CCAA gives this Court authority to order a meeting of secured creditors of a debtor company to consider and vote on a plan compromising or arranging the claims of those creditors:

> 5. Compromise with secured creditors
>
> Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.[9]

14. The threshold to be satisfied in order to file a plan and call a meeting of creditors is low.[10]

---

[9] CCAA s. 5.

[10] *Re Federal Gypsum Co.,* 2007 NSSC 384 (CanLII), at para 12; *Re Target Canada Co.*, 2016 ONSC 316 (CanLII) ["***Target***"], at paras 66-67.

15. The Court should only decline to refuse to order a meeting "if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court."[11]

16. Court approval of a plan rests on three well-established criteria:

(a) whether there has been strict compliance with all statutory requirements;

(b) whether all material filed and procedures carried out were authorized by the CCAA; and

(c) whether the plan is fair and reasonable.[12]

17. If a plan is so flawed that it cannot meet these criteria, the Court should not exercise its discretion to order a meeting.[13] However, an analysis of fairness and reasonableness is not mandatory at this stage;[14] the Applicant submits that, absent extenuating circumstances or opposition, a motion for a meeting Order is a "procedural step" in the CCAA process.

18. Finally, releases in a plan of compromise are permissible and do not render a plan ineligible for sanction.[15] It is well established that releases are appropriately considered in connection with the sanction of a plan of compromise rather than in connection with the meeting order.[16]

---

[11] *Target*, at paras 66-71.
[12] *Target* at para 70.
[13] *Target* at paras 67-69.
[14] *Re Jaguar Mining Inc.*, 2014 ONSC 494 (CanLII), at para 48.
[15] *Target* at paras 50-51.
[16] *Target* at paras 50-51.

19. The Applicant submits that there is no basis for concluding that the Plan has no hope of success. To the contrary, as is evident from the terms of the executed RSA, that the Plan is supported by the Applicant's largest secured creditor and will see the only other secured creditor repaid in full. The Applicant further submits that the Plan complies with the statutory requirements of the CCAA and is consistent with the objectives thereof and should, therefore, be accepted for filing purposes.

B. The Proposed Classification of Creditors is Appropriate

20. If the Meeting Order is granted, the two Affected Secured Creditors will be classified into two classes for the purposes of voting on the Plan: (i) Converting Secured Creditor Class (i.e. 192); and (ii) the Paid-Out Secured Creditor Class (i.e. BDC).

21. Section 22 of the CCAA provides the authority to divide creditors into classes for voting on a Plan:

> 22(1) Company may establish classes
>
> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.[17]

22. The legal principles regarding classification of creditors were recently summarized by Koehnen J., in *Re Sherritt International Corporation* (citing *Re Canadian Airlines Corp.*):[18]

[17] CCAA s. 22(1).
[18] 2020 ONSC 5822 (CanLII) at para. 35.

(a) Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test.

(b) The interests to be considered are the legal interests the creditor holds *qua* creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation.

(c) The commonality of these interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if at all possible.

(d) In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

(e) Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

(f) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

23. In the present case, the Applicant submits that each of the Applicant's two secured creditors should vote in different classes because, having regard to the *Re Canadian Airlines* principles,

(a) they do not have a commonality of interest;

(b) while both Affected Secured Creditors are secured creditors, 192 (the Converting Secured Creditor Class) has through the RSA already committed to voted in favour of the Plan Resolution, and would therefore be breaching a contract with the Applicant should it not; and, under the Plan, 192's claim is being compromised while BDC (the Paid-Out Secured Creditor Class) is being repaid in full;

(c) as BDC is being paid out and being deemed to vote in favour of the Plan, voting in separate classes will make the Creditors' Meeting as administratively efficient as possible, thereby facilitating the restructuring;

(d) the proposed classification is supported by all affected stakeholders and the Monitor;

(e) there is no evidence of bad faith;

(f) each Affected Secured Creditor has sufficiently different rights and obligations before and under the Plan such that they cannot meaningfully consult together.

24. The Meeting Order provides for adequate notice to Affected Secured Creditors for voting and solicitation purposes. The provisions of the Meeting Order, including those regarding voting and conduct at the Creditors' Meeting, are fair and appropriate in the circumstances. In particular, it is fair and appropriate to deem that the Paid-Out Secured Creditor Class has voted in favour of the Plan Resolution. This creditor class is being repaid in full. Deeming its vote to be in favour of the Plan Resolution will save the Applicant from unnecessary administrative expense.

25. As recommended by the Monitor, the Court should exercise its discretion under section 5 of the CCAA to approve such Meeting Order.

PART V – RELIEF SOUGHT

26. The Applicant request that this Court grant the proposed Meeting Order in the from appended as Tab 3 to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF NOVEMBER, 2020

patrick corney

WEISZ FELL KOUR LLP

SCHEDULE "A"

List of Authorities

1. *Re Federal Gypsum Co.*, 2007 NSSC 384
2. *Re Jaguar Mining Inc.*, 2014 ONSC 494
3. *Re Target Canada Co.,* 2016 ONSC 316
4. *Re Sherritt International Corporation*, 2020 ONSC 5822

SCHEDULE "B"

Statutory Authorities

***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*)

equity interest means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (intérêt relatif à des capitaux propres)

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Compromises to be sanctioned by court

6 **(1)** If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

a. on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

b. in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a ***provincial pension plan*** as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

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.

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.

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to 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.

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 TRIBALSCALE INC.

Court File No. CV-20-00645116-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM
(Re: Meeting Order)

WEISZ FELL KOUR LLP
100 King Street West, Suite 5600
Toronto, ON M5X 1C9

Caitlin Fell - LSO No. 60091H
cfell@wfklaw.ca
Tel: 416.613.8282

Sharon Kour - LSO No. 58328D
skour@wfklaw.ca
Tel: 416.613.8283

Pat Corney - LSO No. 65462N
pcorney@wfklaw.ca
Tel: 416.613.8287

Fax: 416.613.8290

Lawyers for TribalScale Inc.