Court File No. CV15-10920-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF *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 COMARK INC.

APPLICANT

FACTUM OF THE APPLICANT (AMENDED)

March 25, 2015

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PART I - NATURE OF THE APPLICATION

1. The Applicant, Comark Inc. ("**Comark**"), seeks relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. Comark is a leading Canadian specialty apparel retailer. It operates hundreds of retail stores across Canada and employs approximately 3,400 people.

3. Until the spring of 2014, Comark's financial performance for the previous several years had been highly profitable and relatively consistent. However, a combination of factors, including a sharply worsening retail environment and the dramatic weakening of the Canadian dollar, have resulted in a severe liquidity crisis. An approximately CAD$79.9 million secured payment obligation to Salus Capital Partners, LLC ("**Salus**") has become fully due and payable, and Comark is unable to pay this debt. Comark is therefore insolvent.

4. After considering various solutions and consulting with its professional advisors, Comark has determined that the best way to maximize the possibility of an outcome which will

preserve as much enterprise value for its stakeholders as possible is through a court-supervised restructuring process under the protection of the CCAA.

5. The Applicant is seeking a stay of proceedings under the CCAA in order to provide Comark's management with the "breathing space" it needs to develop and oversee an orderly restructuring of the business and to preserve enterprise value. The stability of the CCAA stay of proceedings will enable Comark to maintain employment for as many employees as possible, continue to engage with its suppliers, and pursue the sale of or investment in Comark's business and property. During the CCAA proceedings, Comark also intends to evaluate and pursue operational restructuring initiatives, including disclaiming certain unprofitable leases and reducing headcount to meet staffing requirements.

6. Any such sale(s), investment(s) or operational restructuring initiatives will be undertaken for the purpose of further enhancing Comark's long-term financial health, liquidity and competitiveness in order to achieve the ultimate goal of allowing Comark to continue to operate as a going concern and to prevent the erosion of enterprise value.

7. Similarly, the other relief requested herein makes appropriate use of the flexibility afforded by the CCAA, which, with the oversight of the Proposed Monitor, will allow Comark to pursue the acquisition of or investment in its business and property, and to restructure in a manner that will maximize value to the greatest extent possible for its stakeholders.

PART II – FACTS

8. The relevant facts with respect to this Application are briefly outlined herein. They are more fully set out in the Affidavit of Gerry Bachynski sworn March 25, 2015 (the "**Bachynski Affidavit**") and in the Pre-Filing Report of the Proposed Monitor (the "**Pre-Filing**

Report"). Capitalized terms in this Factum that are not otherwise defined have the same meanings as in the Bachynski Affidavit or the Pre-Filing Report.

A. Overview of Comark's Business

9. Comark has been providing specialty apparel for Canadian consumers since 1976. It operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and cleo (together, the "**Banners**"). Comark stores sell predominantly exclusive private label merchandise. Its product mix includes work attire and casual clothing for Canadian men and women aged 20 to 60 years old.

Bachynski Affidavit at paras. 4 and 21

10. Comark is a privately-held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("**KarpReilly**"). Cormark's corporate headquarters are located in Mississauga, Ontario (the "**Corporate Headquarters**") and employ 83 full-time employees. The Corporate Headquarters support each of the three Banners by providing centralized systems and various corporate support functions. Comark operates a central Distribution Centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for physical stores and online sales, respectively. As noted above, as of March 17, 2015, Comark employs a total of approximately 3,400 people in Canada.

Bachynski Affidavit at paras. 4, 5 and 32

11. Comark has over 300 product suppliers, primarily located in Asia and North America, and hundreds of other suppliers of goods and services. As at March 17, 2015, approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and

the remaining 20% were sourced in North America. These purchases are typically made in U.S. dollars.

Bachynski Affidavit at paras. 6 and 37

12. Comark transports all products to its stores through third-party transportation companies. Purolator is Comark's primary third-party transportation provider whose continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

Bachynski Affidavit at para. 40

13. Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores that are performing poorly or have negative cash flow.

Bachynski Affidavit at paras. 30 and 34

14. Comark participates in co-branded community events and cause marketing with charitable organizations. As part of these charitable initiatives, Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other funds. As at March 17, 2015, Ricki's has CAD$40,057, Bootlegger has CAD$108 and cleo has CAD$107,917 in funds received from customers in respect of donations to various charitable organizations. The Applicant seeks approval from this Court to pay these donated amounts to the charitable organizations for which they were intended.

Bachynski Affidavit at paras. 56 and 60

B. Financial Position of Comark

15. Comark has experienced declining financial results over the past two fiscal years.

16. As at February 28, 2015, Comark had total assets of CAD$112.4, and its total indebtedness was approximately CAD$126.1.

Bachynski Affidavit at paras. 75-76

17. Comark is financed primarily through a term loan and revolving credit facilities under a Credit Agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and the lender thereto (the "**Salus Credit Agreement**").

18. As at March 17, 2015, there was approximately USD$43.1 million outstanding under the term loan facility and CAD$24.8 million outstanding under the revolving credit facility. The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

19. As is described further below, Comark has been noted in default of the agreement and Salus has made a demand for repayment. Comark is not able to repay its debt obligations to Salus.

Bachynski Affidavit at paras. 8-9 and 85-88

C. Challenges in the Retail Industry

20. The womenswear and specialty retail industry in Canada is highly competitive and has undergone significant changes in the last two years, including: the entry of new retail concepts; the significant growth of online shopping; and an increase in discounts offered by retailers. As a result of these changes, many Canadian retailers have experienced serious financial challenges and have discontinued operations in the last 12 to 18 months.

Bachynski Affidavit at paras. 19 and 95

21. These industry challenges have been exacerbated by the significant decline of the Canadian dollar, which has dropped over 20% against the U.S. dollar since the start of 2014. Given that approximately 66% of Comark's product purchases are in USD while its sales are in Canadian currency, the weakening of the Canadian dollar has resulted in increased cost to Comark and a significant decrease in its profit margins. In addition, the Salus Term Loan Facility under the Salus Credit Agreement is in USD, so Comark's indebtedness has also increased with the weakened Canadian currency.

Bachynski Affidavit at para. 92

22. Moreover, the retail industry as a whole has seen a significant decline in sales in the last several years.

Bachynski Affidavit at para. 95

23. The negative trend in retail sales has been aggravated by instability and change in the Ricki's banner due to key senior employee departures in 2013. In particular, the position of General Merchandise Manager remained vacant for 18 months, which impacted revenue in late 2013 and 2014.

Bachynski Affidavit at para. 96

D. Insolvency of Comark and Need for CCAA Protection

24. Given the challenges described above, Comark's adjusted EBITDA fell to approximately CAD$16.5 million for the year end February 28, 2015. This constituted an Event of Default under the Salus Credit Agreement. Upon the occurrence of an Event of Default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are automatically due and payable without presentment, demand, protest or other notice of any kind.

25. Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, made a demand for repayment for all amounts owing under the Salus Credit Agreement.

26. Comark is not able to pay the full amount owing under the Salus Credit Agreement, which has become immediately due and payable as a result of the Event of Default and the demand made by Salus. Comark is thus insolvent.

Bachynski Affidavit at paras. 87-88

27. Accordingly, the Applicant is requesting the Court's assistance through the granting of an Initial Order. With the benefit of the protection of the stay of proceedings, Comark will be provided with the necessary "breathing space" to allow it to develop a plan to restructure and reorganize the business and preserve enterprise value.

E. Interim Financing in the CCAA

28. Comark requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA Proceedings.

29. Subject to certain terms and conditions, Salus has agreed to act as DIP lender (the "**DIP Lender**") and provide an interim financing facility (the "**DIP Facility**") under an Amended and Restated Credit Agreement with Salus (the "**DIP Agreement**"). It is a condition of the DIP Agreement that advances made to Comark thereunder be secured by a Court-ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "**DIP Lender's Charge**").

Bachynski Affidavit at paras. 101 and 203

30. Under the draft Initial Order, the Charges, including the DIP Lender's Charge, do not prime TD and creditors with a purchase money security interest, which are Comark's only secured creditors.

31. It is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. The DIP Lender's Charge therefore will not secure any obligation that exists before the date of the Initial Order.

32. Proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free up availability under the DIP Facility. In accordance with the DIP Facility and the Current Cash Management System in effect, Comark's cash from business operations will be deposited into the Blocked Account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

Bachynski Affidavit at para. 104

33. Under the Salus Revolver Facility, Comark has drawn down approximately CAD$24 million out of the maximum revolver loan commitment amount in the lesser of CAD$32 million or the availability under the borrowing base, which borrowing base is linked to the value of certain of Comark's credit card receivables plus the cost of certain eligible inventory less the amount of certain reserves. Accordingly, Comark has approximately $7.3 million undrawn under the Salus Revolver Facility. As cash from operations are swept from the Blocked Account and then used to pay the Salus Revolver Facility, this will allow Cormark to draw down under the DIP Facility as a post filing advance to fund, among other things, its working capital requirements.

Bachynski Affidavit at paras. 79 and 83

34. Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP financing.

F. The Key Employee Retention Plan

35. Comark proposes a KERP for certain employees (the "**Key Employees**") considered critical to a successful proceeding under the CCAA. The Key Employees include certain key senior management employees, both at the Corporate Headquarters and Banner level, that possess unique professional skills and experience with Comark's business and operations.

36. In addition to Comark's division-wide leadership at the Corporate Headquarters, each of Comark's Banners has its own leadership team which consists of a President or General Manager and key senior management personnel responsible for Banner-specific planning, online sales, in-store sales, sourcing and product development.

Bachynski Affidavit at paras. 46 and 107 -109

37. Given the robust and competitive job market, and the fact that a number of employees have already left, Comark has determined that the KERP is necessary for ensuring that the Key Employees remain in their current employment, and will facilitate maximizing stakeholder value. The Proposed Monitor agrees that the KERP is reasonable in the circumstances.

Bachynski Affidavit at paras. 110-111

38. The Confidential KERP Schedule to the Bachynski Affidavit contains sensitive personal information relating to certain employees of the Applicants. Disclosure of this information would be harmful to the privacy interests of those employees.

Bachynski Affidavit at para. 113

G. The Sale Process

39. The Applicant retained Houlihan Lokey as financial (the "**Financial Advisor**") to advise on a possible restructuring, refinancing or sale for Comark.

Bachynski Affidavit at para. 127

40. The Applicant has worked with the Financial Advisor, in consultation with the Proposed Monitor and Salus, to develop the sale and investor solicitation process (the "**SISP**"). The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property (meaning all property, assets and undertakings of Comark). The SISP will allow Comark to identify the best opportunities for optimizing value for its stakeholders and creditors.

Bachynski Affidavit at para. 129

41. The SISP describes, among other things:

(a) the Property, including the Divisions available for sale and the opportunity for an investment in the Business of Comark;

(b) the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property and the Business;

(c) the manner in which bidders and bids become Qualified Bidders and Qualified Bids, respectively;

(d) the manner in which a Qualified Bidder may be a Stalking Horse Bidder;

(e) the process for the evaluation of bids received;

(f) the process for the ultimate selection of a Successful Bidder; and

(g) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.

Schedule "A" to the draft Initial Order

42. The Financial Advisor is of the view that the timeframes set out in the SISP are reasonable in the circumstances.

Bachynski Affidavit at para. 141

PART III – ISSUES AND THE LAW

43. This Application addresses the following issues:

(a) The Applicant's entitlement to seek protection under the CCAA:

(b) The Applicant's entitlement to a stay of proceedings;

(c) The granting of the DIP Lender's Charge on a priority basis over the Property and approval of the DIP Facility;

(d) The approval of the KERP and KERP charge;

(e) The sealing of the KERP Schedule;

(f) The granting of the Directors' Charge on a priority basis over the Property;

(g) The approval of pre-filing payments to "critical" suppliers and to certain charitable organizations to which Comark's customers donated funds; and

(h) The approval of the SISP.

A. The Applicant is Entitled to Seek Protection Under the CCAA

44. The CCAA applies to a "debtor company" where the total of claims against the debtor exceeds five million dollars. Under section 2 of the CCAA, a "debtor company" includes a corporation incorporated by or under an Act of Parliament that is insolvent.

CCAA, sections 2 and 3(1)

45. In the present case, Comark satisfies the definition of "debtor company" under the CCAA. Comark is a company for the purposes of the CCAA because it is corporation incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44.

46. As noted above, Comark is a borrower under the Salus Credit Agreement pursuant to which, as at March 17, 2015, approximately USD$43.1 million is currently outstanding under the term loan facility and CAD$24.8 million is currently outstanding under the revolving credit facility. The total claims against Comark therefore far exceed $5 million.

47. Comark is insolvent. The insolvency of the debtor is assessed as of the time of filing. The CCAA does not define "insolvent" or "insolvency". Accordingly, in interpreting the meaning of "insolvent", courts have been guided by the definition of "insolvent person" under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") in order to establish that an applicant is a "debtor company" in the context of the CCAA. Under the BIA, an "insolvent person" is:

> s. 2(1)
>
> … "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability 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.
>
> ***Stelco Inc., Re,* [2004] O.J. No. 1257 (Ont. S.C.J.) [Commercial List] at paras. 21-22 [*"Stelco"*], Book of Authorities, Tab 1**
>
> **BIA, Section 2(1)**

48. A company is deemed to be insolvent if the requirements of any one of the tests are satisfied and such company would be a "debtor company" entitled to apply for protection under the CCAA.

> ***Stelco* at paras. 26 and 28; Book of Authorities, Tab 1**

49. In *Stelco,* this Court applied an expanded definition of "insolvent" in the CCAA context to reflect the '"rescue" emphasis of the CCAA to include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

> ***Stelco* at paras. 26 and 28; Book of Authorities, Tab 1**

50. As a result of the Event of Default and the acceleration of all amounts due under the Salus Credit Agreement, Comark does not have sufficient liquidity to satisfy its liabilities as they become due. Further, Comark does not have sufficient cash to continue to fund its operations. Thus, Comark meets both the BIA and *Stelco* tests for being insolvent.

B. The Applicant is Entitled to a Stay of Proceedings

51. 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" and "effective for the period that the Court

considers necessary" provided the stay period is no longer than 30 days. The onus is on the applicant to satisfy the Court that circumstances exist that make the Order appropriate.

CCAA, Section 11.02(1) and Section 11.02(3)

52. Comark seeks a stay of proceedings in this case for an initial period of 30 days.

53. In exercising the discretionary authority to grant a stay pursuant to the CCA, the Court 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.

54. The CCAA has been described as a statute intended to "facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy" and, as such, is "remedial legislation entitled to a liberal interpretation." The Court has also expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually.

***Lehndorff General Partner Ltd., Re,* [1993] O.J. No. 14 (Ont. Gen. Div.) [Commercial List] at paras. 5-7 ["*Lehndorff*"], Book of Authorities, Tab 2**

***Nortel Networks Corp., Re,* [2009] O.J. No. 3169 (Ont. S.C.J.) [Commercial List] at paras. 47 ["*Nortel*"], Book of Authorities, Tab 3**

55. The power to grant a stay of proceedings should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and to enable continuance of the company seeking CCAA protection.

***Lehndorff* at para. l0, Book of Authorities, Tab 2**

56. A stay of proceedings will allow Comark to maintain its operations while giving it the necessary time to facilitate any operational restructuring and implementation of a sale and investment process with respect to its property and business. The preservation of the business

will satisfy Comark's suppliers with respect to the stability of the restructuring process in place and the prospects for continuing the business as a going concern.

C. Jurisdiction and Discretion To Grant A DIP Financing Charge On A Priority Basis And Approve the DIP Facility

57. In the draft Initial Order, the Applicant seeks approval of the DIP Facility, to be secured by a charge over all of the assets and undertakings of Comark. The Applicant also seeks approval of the related DIP Agreement.

58. Section 11.2 of the CCAA gives the Court the statutory authority to grant a debtor-in-possession ("**DIP**") financing charge:

> **11.2(1)** ***Interim Financing*** – 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.
>
> **11.2(2)** ***Priority*** – ***Secured Creditors*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

59. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **11.2(4)** ***Factors to be considered*** – 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 the CCAA;
>
> (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.

60. Section 11.2 of the CCAA was intended to prevent pre-filing lenders from obtaining enhanced priority for any pre-existing loans to the debtor or to prevent a super priority DIP Charge from securing otherwise unsecured obligations. This not a concern in the present case. As noted above, Salus is Comark's principal first secured creditor, the DIP Charge does not prime Comark's existing secured creditors or statutory deemed trusts, and the payment of the pre-filing amounts outstanding under the Salus Revolver Facility does not create an inversion of any priorities or secure pre-filing obligations that are not otherwise secured in favour of Salus.

> **The Standing Senate Committee on Banking, Trade and Commerce, "Seventeenth Report: Bill C-55, without amendment but with observations" (24 November 2005) tabled in the 38th Parliament, 1st Session, Book of Authorities, Tab 25**

61. As described above, in order to draw down on the DIP Facility, proceeds from Comark's operations must be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility. As cash from operations are swept by Salus from the Blocked Account and then used to pay the Salus Revolver Facility, this will allow Comark to draw down under the DIP Facility as a post filing advance to fund, among other things, its working capital requirements.

62. The DIP Facility expressly provides that Comark may not use any advances under the DIP Facility to repay any indebtedness outstanding prior to the date of the commencement of this proceeding.

63. Section 11.2 (1) expressly prohibits the DIP Lender's Charge from securing Comark's pre-filing obligations. It is clear on the facts of this case that the DIP Lender's Charge meets this requirement. The DIP Facility expressly provides that Comark may not use any

advances under the DIP Facility to repay pre-filing obligations. To the extent that Salus is repaid pre-filing amounts owing to it, this repayment is made from operational receipts as a result of lending, security and enforcement arrangements in place prior to the CCAA filing (all as described immediately below). The repayment is not made out of proceeds of the DIP Facility. The payments to Salus simply maintain the status quo as at the CCAA filing date under the existing Salus asset-based lending credit facility.

(a) Comark entered into the Salus Credit Agreement on October 31, 2014. Comark's obligations under this agreement are secured by all Comark's assets. At the same time, Comark entered into the Blocked Account Agreement as is typical of an asset-based lending arrangement.

(b) An event of default occurred under the Salus Credit Agreement when Comark's adjusted EBITDA fell below a certain amount for the year end February 28, 2015.

(c) On March 5, 2015, Salus delivered a Reservation of Rights letter to Comark.

(d) Also on March 5, 2015, Salus delivered a letter to TD instructing TD to exercise control over the Blocked Account and to transfer funds to a Salus bank account in accordance with the Blocked Account Agreement. Since Comark is required to deposit its receipts into the Blocked Account pursuant to the Salus Credit Agreement, these transfers reduce the amount owing under the Salus Credit Agreement.

(e) On March 25, 2015, Salus made a demand for repayment of all amounts owing under the Salus Credit Agreement.

64. The proposed DIP Facility and the DIP Charge is consistent with the plain reading and underlying purpose of the CCAA. The spirit and intent behind section 11.2 is to preserve the status quo of creditors and prevent pre-filing creditors from obtaining enhanced priority for any pre-existing loans to the debtor.

65. The proposed DIP Facility preserves the current structure of the existing asset based loan with Salus where advances under the revolver are fully based on the reliance of collateral values. By using cash to pay the pre-filing Salus Revolver Facility, Salus is in no better position with respect to amounts owing to it relative to other creditors of Comark. Thus, the status of quo of creditors is not disturbed.

66. Preserving the existing asset based lending structure allows Salus as the DIP Lender and pre-filing lender to properly monitor and manage its collateral position. Incoming cash swept from the Blocked Accounts provide a form of adequate protection and replacement for sold collateral.

67. The following factors further support the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in s. 11.2(4) above:

(a) Salus has indicated that it will not provide a DIP Facility if the DIP Lender's Charge is not approved and the Initial Order is not approved in form and substance satisfactory to Salus;

(b) Comark's business is intended to continue to operate on a going concern basis during this proceeding under the direction of senior management with the assistance of Comark's advisors and the proposed Monitor;

(c) it is anticipated that the DIP Facility will provide Comark with sufficient liquidity to implement certain operational restructuring initiatives and pursue a sale process, which will materially enhance the likelihood of a going concern outcome for the business of Comark;

(d) the nature and value of Comark's assets as set out in their financial statements can support the requested DIP Lender's Charge;

(e) the Proposed Monitor is supportive of the DIP Facility, including the DIP Lender's Charge.

68. Accordingly, Comark submits that this Honourable Court should grant the DIP Lender's Charge in the amount of up to the lesser of the amount advanced under the DIP Facility and CAD$32 million and approve the DIP Agreement.

D. Approval of the KERP and KERP Charge

69. A KERP is designed to retain employees that are important to the management and operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.

> ***Grant Forest Products Inc., Re,*** **[2009] O.J. No. 3344 (Ont. S.C.J.) [Commercial List] at para. 8 [*"Re Grant Forest Products"*], Book of Authorities, Tab 10**

70. The approval of a KERP and related KERP Charge is in the discretion of the CCAA court. This Court has approved KERPs in numerous CCAA proceedings where the retention of key employees was important to a successful outcome.

> ***Nortel Networks Corp., Re,*** **[2009] O.J. No. 1044 (Ont. S.C.J.) [Commercial List] at para. 4, Book of Authorities, Tab 11**
>
> ***Re Grant Forest Products,*** **Book of Authorities, Tab 10**

***US Steel Canada Inc., Re,* 2014 ONSC 6145 at paras. 28-33 [*"US Steel"*], Book of Authorities, Tab 12**

71. In *US Steel*, this Court very recently approved the KERP for employees whose continued services were critical for the stability of the business and for the implementation of the marketing process.

72. All of the Key Employees are critical to the SISP and are necessary for maximizing the value that will be realized from a potential sale or investment. The Key Employees have been instrumental in the restructuring thus far and possess unique professional skills and experience with Comark's business and operations. The Key Employees perform services such as finance, operations, real estate, human resources, online sales, sourcing and marketing that will be critical throughout the restructuring and thereafter.

Bachynski Affidavit at paras. 108-110

73. As a result of the Applicant's financial situation and the commencement of the CCAA proceedings, the Key Employees may be incentivized to seek alternative employment. The KERP is designed to incentivize the Key Employees to remain in their current employment during the CCAA proceedings. Without the retention of the Key Employees, the Applicant's ability to maximize stakeholder value would be seriously compromised.

Bachynski Affidavit at para. 111

74. In *Re Grant Forest*, at paragraphs 8 to 25, this Court considered a number of factors in determining whether to approve a proposed KERP. The Applicant submits that the factors considered in that case militate in favour of the authorization of the KERP in this case. In particular, the KERP has the support of the Proposed Monitor and Salus. The evidence is that there is a robust and competitive job market, and that the Applicant has already experienced

significant upheaval as a result of the departure of certain employees. In the circumstances, the KERP is appropriate to ensure the successful completion of, in particular, the SISP.

Bachynski Affidavit at paras. 110-111

Pre-Filing Report at paras. 11.4-11.5

75. The Applicant submits that the size of the KERP is reasonable given that each of Comark's Banners have their own leadership team, in addition to the overall leadership at the Corporate Headquarters and certain district and regional managers that oversee store operation.

Bachynski Affidavit at paras. 46 and 108

E. Sealing the Confidential KERP Schedule

76. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> ***Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 at para. 53 ["*Sierra Club*"], Book of Authorities, Tab 13**

77. There is an important public interest in preserving the integrity of the SISP (and, more generally, sales and investment processes conducted under the auspices of a court-supervised process). There is also an important public interest in ensuring that private, personal information relating to identifiable individuals, including details of their remuneration, be kept confidential.

78. Orders sealing confidential supplements relating to KERPs containing sensitive personal and compensation information have been granted by this Court on a number of occasions.

> ***Canwest Global Communications Corp., Re,*** **[2009] O.J. No. 4286 (Ont. S.C.J.) [Commercial List] at para. 51-52 [*"Canwest Global"*], Book of Authorities, Tab 14**
>
> ***Canwest Publishing Inc., Re,*** **[2010] O.J. No. 188 (Ont. S.C.J.) [Commercial List] at para. 65 [*"Canwest Publishing"*], Book of Authorities, Tab 15**
>
> ***Nortel*** **at para. 57, Book of Authorities, Tab 3**

79. In *Canwest Global Communications Corp (Re)* and *Canwest Publishing Inc. (Re)*, Justice Pepall applied the *Sierra Club* test and approved a similar request by the applicants for the sealing of a confidential supplement containing unredacted copies of the KERPs for the employees of the applicants.

F. Approval of the Directors' Charge

80. The Applicant seeks the Directors' Charge in an amount of up to CAD $3 million, to act as security for indemnification obligations for Comark Directors' potential liabilities**.** The Directors' Charge would stand in priority to the proposed DIP Charge, but subordinate to the proposed Administration Charge to be created in favour of counsel for Comark, the Proposed Monitor, counsel for the Proposed Monitor and the Financial Advisor.

> **Draft Initial Order at para. 116**

81. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.

> **11.51(1)** ***Security or charge relating to director's indemnification*** – On application by a debtor company and 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 the company is subject to a security

> or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **11.51(2)** ***Priority*** – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **11.51(3)** ***Restriction – indemnification insurance*** – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> **11.51(4)** ***Negligence, misconduct or fault*** – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

82. In *Canwest Global*, Pepall J. set out some of the factors to be considered by the court when applying s. 11.51. In approving the requested directors' charge, Pepall J. stated:

> The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: Re General Publishing Co. [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.
>
> ***Canwest Global*** **at para. 48, Book of Authorities, Tab 14**

83. With the assistance of the financial advisor, Comark has estimated the potential exposure of its present and former directors and officers for unpaid statutory amounts, including unpaid accrued wages, unremitted source reductions, unpaid accrued vacation pay, unpaid sales and service taxes, unpaid termination pay, unpaid employee health tax and unpaid workers' compensation at approximately CAD$7.15 million. The proposed amount of the Directors Charge is based on this estimate.

> **Bachynski Affidavit at para. 115**

84. Comark's directors have indicated that, in light of the uncertainty surrounding available directors' and officers' insurance, their continued service and involvement in this restructuring is conditional upon the granting of a charge in favour of the directors and officers of Comark in the amount of CAD$3 million on the property of Comark (the "**Directors' Charge**").

85. The Directors' Charge is therefore necessary and appropriate to so that Comark may benefit from its directors' and officers' experience with the business and the apparel retail industry and their leadership in the company's restructuring efforts.

Bachynski Affidavit at paras. 113 and 115

86. The requested Directors' Charge is reasonable given the nature of Comark' retail business, the number of employees and the corresponding potential exposure of the directors and officers to personal liability. The magnitude of the Directors Charge is consistent with the directors' charges granted in other large and/or complex CCAA proceedings.

***Canwest Publishing* at para. 56, Book of Authorities, Tab 15. ($35 million)**

***Canwest Global* at para. 44, Book of Authorities, Tab 14. ($20 million)**

***US Steel* at para. 19, Book of Authorities, Tab 12. ($39 million)**

G. Authorization to Make Pre-Filing Payments

87. The CCAA grants the Court the general power to make any order it considers appropriate in the circumstances. It is well established that the provisions of the CCAA are to be given a broad and liberal interpretation in order to permit a company to remain in business, notwithstanding that it is insolvent.

CCAA, s. 11

***Royal Oak Mines Inc., Re,* [1999] O.J. No. 709 (Ont. Gen. Div.) [Commercial List] at para. 7, Book of Authorities, Tab 16**

88. In the draft Initial Order, Comark seeks authorization to: (i) continue to make payments in the ordinary course to certain critical third parties that provide services that are integral to Comark's ability to operate; and (ii) make payments to certain charitable organizations with respect to amounts donated by Comark's customers to those organizations.

(a) ***Pre-Filing Payments to Critical Suppliers***

89. There is ample authority supporting the Court's general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed "critical" to the ongoing operations of the debtor.

See for example *Smurfit-Stone Container Canada Inc., Re,* [2009] O.J. No. 349 (Ont. S.C.J.) [Commercial List] at para. 21, Book of Authorities, Tab 17

90. Although the aim of the CCAA is to maintain the *status quo* while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the *status quo* does not necessarily entail the preservation of the relative pre-stay debt status of each creditor. The interests of all the stakeholders must be considered, including all the interests that the company's demise would affect.

***Alberta-Pacific Terminals Ltd., Re,* [1991] B.C.J. No. 1065 (B.C.S.C.) at para. 23, Book of Authorities, Tab 18**

91. The Court's inherent jurisdiction to make provision for the payment of pre-filing amounts to critical suppliers is not ousted by section 11.4 of the CCAA, which was enacted as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property to secure amounts

owing to that supplier for services provided after the filing. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the 2009 amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

***Canwest* Global at para. 24, Book of Authorities, Tab 14**

92. The Supreme Court of Canada has also affirmed in *Century Services* that: "[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders."

***Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, at para. 70, Book of Authorities, Tab 19**

93. There are several cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

(a) whether the goods and services were integral to the business of the applicant;

(b) the applicant's dependency on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the Monitor;

(d) the Monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

(e) whether the applicant had sufficient inventory of the goods on hand to meet their needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global at para. 43, Book of Authorities, Tab 14

Brainhunter Inc., Re, [2009] O.J. No. 5207, (Ont. S.C.J.) [Commercial List] ["_Brainhunter_"] at para. 21, Book of Authorities, Tab 20

Priszm Income Fund, Re, [2011] O.J. No. 1491 (Ont. S.C.J.) paras. 29-34, Book of Authorities, Tab 21

Cinram International Inc., Re, 2012 ONSC 3767 [Commercial List] at paras. 66-72, Book of Authorities, Tab 22

SkyLink Aviation Inc., Re, 2013 ONSC 1500, [Commercial List] at para. 26, Book of Authorities, Tab 23

94. Comark relies on the efficient and expedited supply of products and services from its suppliers in order to ensure that its operations continue and that customer demand can be satisfied. Comark operates in a highly competitive retail environment where the timely provision of its products is essential in order to ensure the continuance of the Comark business. In order to meet the needs of Comark's customers over the next shopping season, it is essential that certain of Comark's suppliers that are critical to Comark's ability to operate during these CCAA proceedings continue to supply Comark over this period, and that Comark has access to sufficient credit to maintain required levels of inventory.

95. The Applicant therefore submits that in these circumstances, this Court has jurisdiction to authorize Comark, where necessary and appropriate and with the consent of the Proposed Monitor, to pay pre-filing amounts owing to certain suppliers who are determined to be critical to its post-filing operations.

(b) ***Payments in respect of Charitable Donations***

96. The Applicant submits that, pursuant to the Court's broad discretion to grant an order under s. 11 of the CCAA, this Court has jurisdiction to authorize Comark to pay certain amounts that were donated by Comark's customers to the charitable organizations for which the amounts were intended. These donated amounts are currently comingled with Comark's other funds.

H. Approval of the SISP

97. This Court has held that when considering whether to approve a marketing process, the following questions ought to be considered:

(a) Is a sale warranted at this time?

(b) Will the sale be of benefit to the whole "economic community"?

(c) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(d) Is there a better viable alternative?

***Nortel* at para. 49, Book of Authorities, Tab 3**

98. In addition to the above criteria, section 36 of the CCAA, which is engaged when determining whether to approve a sale, may be considered indirectly when approving a sales process. Section 36 provides:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;

> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> ***Brainhunter* at paras. 14-16, Book of Authorities, Tab 20**

99. A court should generally accept a proposed sale process under the CCAA when it has been recommended by the Proposed Monitor and is supported by disinterested creditors, absent any compelling, exceptional circumstances to the contrary.

> ***Ivaco Inc., Re,* [2004] O.J. No. 2483 (Ont. S.C.J.) [Commercial List] at para. 21, Book of Authorities, Tab 24**

100. The SISP has been reviewed and approved by the Monitor and Salus.

> **Bachynski Affidavit at para. 12**

101. The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property. The SISP provides an opportunity to canvass the market for such opportunities and for Comark' financial advisor, in consultation with the Proposed Monitor, Comark and Salus, to assess the available options. The SISP will allow Comark to identify the best opportunities for optimizing value for its stakeholders and creditors.

> **Bachynski Affidavit at paras. 129 and 141**

102. The timelines in the SISP balance the time necessary for a commercially reasonable sale and investment process with Comark's available financial resources.

PART V — NATURE OF THE ORDER SOUGHT

103. The Applicants therefore respectfully requests an Order substantially in the form of the draft Initial Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March, 2015.

Marc Wasserman

Alexander Cobb

Schedule "A"

LIST OF AUTHORITIES

Tab	Case Law
1.	*Stelco Inc., Re,* [2004] O.J. No. 1257 (Ont. S.C.J.) [Commercial List] (WL)
2.	*Lehndorff General Partner Ltd., Re,* [1993] O.J. No. 14 (Ont. Gen. Div.) [Commercial List] (WL)
3.	*Nortel Networks Corp., Re,* [2009] O.J. No. 3169 (Ont. S.C.J.) [Commercial List] (WL)
4.	[deletion]
5.	[deletion]
6.	[deletion]
7.	[deletion]
8.	[deletion]
9.	[deletion]
10.	*Grant Forest Products Inc., Re,* [2009] O.J. No. 3344 (Ont. S.C.J.) [Commercial List] (WL)
11.	*Nortel Networks Corp., Re,* [2009] O.J. No. 1044 (Ont. S.C.J.) [Commercial List] (WL)
12.	*US Steel Canada Inc., Re,* 2014 ONSC 6145 (WL)
13.	*Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 (WL)
14.	*Canwest Global Communications Corp., Re,* [2009] O.J. No. 4286 (Ont. S.C.J.) [Commercial List] (WL)
15.	*Canwest Publishing Inc., Re,* [2010] O.J. No. 188 (Ont. S.C.J.) [Commercial List] (WL)
16.	*Royal Oak Mines Inc., Re,* [1999] O.J. No. 709 (Ont. Gen. Div.) [Commercial List] (WL)
17.	*Smurfit-Stone Container Canada Inc., Re,* [2009] O.J. No. 349 (Ont. S.C.J.) [Commercial List] (WL)
18.	*Alberta-Pacific Terminals Ltd., Re,* [1991] B.C.J. No. 1065 (B.C.S.C.) (WL)
19.	*Ted Leroy Trucking [Century Services] Ltd., Re,* 2010 SCC 60 (WL)
20.	*Brainhunter Inc., Re,* [2009] O.J. No. 5207 (Ont. S.C.J.) [Commercial List] (WL)

21. *Priszm Income Fund, Re,* [2011] O.J. No. 1491 (Ont. S.C.J.) (WL)

22. *Cinram International Inc., Re,* 2012 ONSC 3767 [Commercial List] (WL)

23. *SkyLink Aviation I*nc.*, Re,* 2013 ONSC 1500 [Commercial List] (WL)

24. *Ivaco Inc., Re,* [2004] O.J. No. 2483 (Ont. S.C.J.) [Commercial List] (WL)

Tab **Secondary Sources**

25. The Standing Senate Committee on Banking, Trade and Commerce, "Seventeenth Report: Bill C-55, without amendment but with observations" (24 November 2005) tabled in the 38th Parliament, 1st Session

Schedule "B"

BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

2. […]

"insolvent person"

« personne insolvable »

"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;

R.S., 1985, c. B-3, s. 2; R.S., 1985, c. 31 (1st Supp.), s. 69; 1992, c. 1, s. 145(F), c. 27, s. 3; 1995, c. 1, s. 62; 1997, c. 12, s. 1; 1999, c. 28, s. 146, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25, c. 9, s. 572; 2004, c. 25, s. 7; 2005, c. 3, s. 11, c. 47, s. 2; 2007, c. 29, s. 91, c. 36, s. 1; 2012, c. 31, s. 414; 2015, c. 3, s. 6(F).

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

2. (1) […]

"debtor company"

« compagnie débitrice »

"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;

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37.

[…]

Application

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.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

[…]

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

[…]

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

[…]

Interim financing

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.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(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.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[…]

Critical supplier

11.4 (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[…]

Security or charge relating to director's indemnification

11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the

obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

[…]

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(*a*) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(*b*) whether the monitor approved the process leading to the proposed sale or disposition;

(*c*) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(*d*) the extent to which the creditors were consulted;

(*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(*f*) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(*a*) a director or officer of the company;

(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

IN THE MATTER OF *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 COMARK INC.

APPLICANT

Court File No. CV15-10920-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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