Court File No.

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 BEN MOSS JEWELLERS WESTERN CANADA LTD.

APPLICANT

FACTUM OF THE APPLICANT

May 16, 2016

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PART I - NATURE OF THE APPLICATION

1. The Applicant, Ben Moss Jewellers Western Canada Ltd. ("**Ben Moss**"), seeks relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

2. Ben Moss is a leading Canadian jewellery retailing business employing approximately 549 people across Canada (208 of which are located in Ontario).[1] Ben Moss is part of the JSN group of affiliated companies (collectively, the "**JSN Group**" or the "**Companies**"), which is principally comprised of two separate operating businesses: the Ben Moss jewellery retail business and the JSN jewellery wholesale business.

3. The JSN Group is financed primarily through a revolving credit facility and three term loan credit facilities (collectively the "**Credit Facilities**") under a Credit Agreement (the "**Salus Credit Agreement**") between Ben Moss and three other JSN Group companies, as co-

[1] Manzoor Affidavit, at paras 4 and 21.

borrowers (the "**Borrowers**"), certain other related parties as guarantors (the "**Guarantors**"), Salus Capital Partners, LLC ("**Salus Capital**"), as administrative agent, collateral agent and lender, and Salus CLO 2012-1 Ltd. as lender ("**Salus CLO**", and collectively with Salus Capital the "**Senior Secured Lenders**").

4. Since the JSN Group acquired Ben Moss in 2013, there has been a significant decrease in Ben Moss's net sales and profitability. A combination of factors including softness in western Canada due to declining energy prices and the dramatic weakening of the Canadian dollar have resulted in a severe liquidity crisis. An approximately $68.1 million secured payment obligation under the Salus Credit Agreement has become fully due and payable, and Ben Moss is unable to pay this debt. Ben Moss is therefore insolvent.

5. After considering various solutions and consulting with its professional advisors, Ben Moss 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. The JSN Group's wholesale business is not included as part of these proceedings at this time given the concern that any such filing would potentially jeopardize sensitive aspects of the JSN Group's global operations.

6. The Applicant is seeking a stay of proceedings under the CCAA in order to provide Ben Moss's management with the "breathing space" it needs to develop and oversee an orderly restructuring of the business and to preserve enterprise value. The Applicant is also seeking to extend the stay to its parent company with respect to claims arising from any cross-default provisions in respect of amounts owing by the Applicant to third parties, provided that the amounts owed to such claimants by the Applicant are in the cash flows and contemplated to be paid in the ordinary course.

7. The stability of the CCAA stay of proceedings will enable Ben Moss to maintain employment for as many employees as possible, continue to engage with its suppliers, and commence a refinancing, investment and/or sale solicitation process (the "**RISP**"). During the CCAA proceedings, Ben Moss also intends to evaluate and pursue operational restructuring initiatives, including most likely disclaiming certain unprofitable leases. To achieve its goals, Ben Moss is also seeking the appointment of FAAN Advisors Group Inc. as Chief Restructuring Officer ("**CRO**").

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

9. Similarly, the other relief requested herein makes appropriate use of the flexibility afforded by the CCAA, which, with the assistance of the CRO and the oversight of the Proposed Monitor, will allow Ben Moss to restructure in a manner that will maximize value to the greatest extent possible for its stakeholders.

PART II – FACTS

10. The facts with respect to this Application are more fully set out in the Affidavit of Naveed Z. Manzoor sworn May 16, 2016 (the "**Manzoor 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 Manzoor Affidavit or the Pre-Filing Report.

A. Overview of Ben Moss's Business

11. Ben Moss is a large Canadian jewellery retailer in an industry dominated by smaller operations. It operates 66 retail stores across Canada, 27 of which are located in Ontario (more than in any other province).[2] Previously, key decisions for the Ben Moss business were made out of its head office in Winnipeg, Manitoba. However, certain decision-making responsibility has recently been assumed by Ben Moss's parent company, J.S.N. Jewellery Inc. ("**JSN Inc.**"), which is located in Toronto.[3]

12. Ben Moss offers a wide selection of products ranging from entry-level priced diamond designs to fully-certified, top-quality diamond jewellery available in 10-kt. to 14-kt. gold (the "**Core Products**") as well as watches and gold and silver jewellery. Ben Moss sources its Core Products from the JSN Group's wholesale business, while non-core products are sourced from a variety of third-party suppliers.[4]

13. Ben Moss's stores are all located in facilities leased from third party landlords, as is Ben Moss's corporate headquarters. As part of its restructuring under these proceedings, Ben Moss anticipates that it will likely disclaim certain leases in respect of Ben Moss stores that are performing poorly or are unprofitable within the initial stay period.[5]

14. Ben Moss provides Gift Cards and Store Credit to increase sales and improve the customer experience. As of May 2016, there was approximately $280,000 in outstanding gift cards and store credit.[6]

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2 Manzoor Affidavit, at paras 4 and 21.
3 Manzoor Affidavit, at para 22.
4 Manzoor Affidavit, at para 26.
5 Manzoor Affidavit, at paras 29 and 31.
6 Manzoor Affidavit, at paras 35 and 36.

B. Financial Position of Ben Moss

15. Ben Moss has experienced steeply declining financial results since the 2014 fiscal year.[7] According to Ben Moss's draft unaudited financial statements, as at March 26, 2016 Ben Moss had total assets of $72,249,130 and liabilities of approximately $62,168,925. These liabilities do not take into account the amounts owing under the Credit Facilities.[8]

16. As at May 16, 2016, there was approximately $68.1 million outstanding under the Credit Facilities. The Credit Facilities mature on July 18, 2016. All of the obligations of the Borrowers under the Salus Credit Agreement are secured by all of the Borrowers' assets.[9]

17. As is described further below, Ben Moss has been noted in default of the Salus Credit Agreement and Salus Capital has made a demand for repayment. Ben Moss is not able to repay its debt obligations to the Senior Secured Lenders.[10]

C. Financial Challenges Facing Ben Moss

18. Ben Moss has been hard hit by the decline in energy prices in western Canada, which has resulted in a drop off in sales and corresponding fall in revenues. Ben Moss is also struggling with the expense of certain economically unviable leases and a misaligned fixed overhead cost structure which has consumed much needed capital.[11]

19. Additionally, the appreciation of the U.S. dollar relative to the Canadian dollar has resulted in Ben Moss paying more Canadian dollars in 2016 for less product, causing significant liquidity constraints. This has resulted in a suboptimal product mix and a lack of

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7 Manzoor Affidavit, at paras 60-62.
8 Manzoor Affidavit, at paras 50, 52, and 57. The Credit Facilities are not included as part of Ben Moss's financial statements but are instead included in the combined financial statements of the JSN Group.
9 Manzoor Affidavit, at paras 7, 65, and 67.
10 Manzoor Affidavit, at paras 9, 10 and 91.
11 Manzoor Affidavit, at paras 6 and 60.

ability to replenish the best-selling, non-core products, causing significant sales declines and serious underperformance by certain retail locations.[12]

D. Insolvency of Ben Moss and Need for CCAA Protection

20. As a result of Ben Moss's financial challenges, an overadvance of USD$855,048 (the "**Overadvance**") was requested under the Credit Facilities and was granted by Salus Capital on April 4, 2016. The total amount drawn down on the revolver exceeds the maximum amount available under the Revolving Credit Facility by approximately $7.5 million.[13]

21. Neither Ben Moss nor the other Borrowers nor the Guarantors are able to repay the excess amount, and this constitutes an Event of Default (as defined in the Salus Credit Agreement). Further, Ben Moss and the other Borrowers breached the Collateral Coverage Ratio covenant (as defined in the Salus Credit Agreement), which also constitutes an Event of Default.[14]

22. As a result, on May 16, 2016, Salus Capital issued to each of the Borrowers and Guarantors demands for repayment of all amounts owing under the Credit Facilities (the "**Demands**") and Notices of Intention to Enforce Security (collectively, the "**BIA Notices**")[15]. The Demands terminated the Borrowers' rights to access any further credit under the Salus Credit Agreement. Ben Moss cannot pay the full amount owing under the Salus Credit Agreement, which has become immediately due and payable as a result of the Events of Default and the Demands made by Salus Capital. Ben Moss is thus insolvent.[16]

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12 Manzoor Affidavit, at paras 82-83.
13 Manzoor Affidavit, at paras 8-9.
14 Manzoor Affidavit, at para 9.
15 Pursuant subsection 244(1) of the *Bankruptcy and Insolvency Act*.
16 Manzoor Affidavit, at para 10 and 91.

23. Pursuant to the Accommodation Agreement, Salus Capital has agreed to forbear from exercising its rights and remedies under the Salus Credit Agreement and to continue to provide the Credit Facilities until the earlier of (a) the date on which any stay of proceedings granted in favour of Ben Moss is terminated or lifted; and (b) July 29, 2016; on certain conditions. These conditions include, *inter alia*, the implementation of a restructuring plan that involves Ben Moss filing for CCAA protection. Per the JSN Group's request, Salus Capital did not require that the other Companies file for CCAA protection at this time, given the concern that such a filing would potentially jeopardize sensitive aspects of the JSN Group's global operations.[17]

24. 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, Ben Moss 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

25. Ben Moss requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA Proceedings.[18] Salus CLO has agreed, subject to certain terms and conditions, to act as DIP lender (the "**DIP Lender**") and to provide an interim financing facility of $8 million to Ben Moss (the "**DIP Facility**") under an under the Super Priority DIP Credit Agreement (the "**DIP Agreement**").[19]

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17 Manzoor Affidavit, at para 11.
18 Manzoor Affidavit, at para 97.
19 Manzoor Affidavit, at para 98.

26. Access to the DIP Facility is subject to compliance with the Accommodation Agreement, as well as a budget, restructuring plan and the RISP. Approval of the DIP Agreement in the Initial Order is a condition of the Accommodation Agreement.[20]

27. It is a condition precedent to the availability of the DIP Facility that the DIP Facility be secured by a Court-ordered security interest, lien and charge over all of the assets and undertakings of Ben Moss (the "**DIP Lender's Charge**").[21]

28. Because the proposed DIP Facility is being provided by Salus CLO with Salus Capital's consent and these entities are Ben Moss's senior secured creditors, Ben Moss is of the view that there will be no material prejudice to any of its existing creditors. Additionally, no amounts are outstanding under Ben Moss's agreements with its only other secured creditors, and the cash flows anticipate continuing to pay them in the ordinary course.[22]

29. The DIP Facility expressly provides that Ben Moss may not draw down any advances under the DIP Facility to be used to repay any indebtedness outstanding prior to the date of the commencement of this proceeding, except as permitted by the Initial Order.[23] The DIP Lender's Charge will not secure any obligation that exists before the date of the Initial Order, nor will it rank in priority to a properly perfected purchase money security interest.[24]

30. It is anticipated that proceeds from Ben Moss's operations will be used to reduce pre-filing obligations outstanding under the Credit Facilities. In accordance with the DIP Facility and the current Cash Management System in effect, Ben Moss's cash from business operations

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20 Manzoor Affidavit, at paras 77(d) and 99.
21 Manzoor Affidavit, at para 104.
22 Manzoor Affidavit, at para 107.
23 Manzoor Affidavit, at para 100.
24 Manzoor Affidavit, at para 105.

will continue to be deposited into the Blocked Accounts and swept by Salus Capital in order to reduce first, the Overadvance under the Credit Facilities, second, the obligations under the DIP Facility and third, the outstanding obligations under the Credit Facilities.[25]

31. The maintenance of the pre-existing Cash Management System (which is more fully described in Section C(g) of the Manzoor Affidavit), as modified by the DIP Facility, means that the Senior Secured Creditors' secured collateral from before the filing date which is sold subsequent to the filing date will continue to be used to reduce pre-petition amounts owing to the Senior Secured Lenders. The maintenance of the existing Cash Management System is a condition precedent to the availability of the DIP Facility.[26]

32. Ben Moss will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP financing.[27]

33. The DIP Facility provided by Salus CLO is the only realistic source of funding available given that Salus Capital will oppose any other DIP financing arrangement which seeks to prime the Senior Secured Lenders. Moreover, working with Salus CLO is the only way to ensure that the other Borrowers (which operate the JSN Group's wholesale business) do not have to file immediately for CCAA protection. Any such filing would disrupt the JSN Group's international wholesale supply chains to the detriment of the viability of the entire group, including Ben Moss.[28]

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25 Manzoor Affidavit, at para 101.
26 Manzoor Affidavit, at para 102.
27 Manzoor Affidavit, at para 97.
28 Manzoor Affidavit, at paras 11 and 108.

F. The RISP

34. In addition to the restructuring efforts undertaken to date (as set out in section G of the Manzoor Affidavit), the Applicant has developed the RISP in consultation with Alvarez & Marsal Canada Inc. (the "**Proposed Monitor**") and Salus Capital. The purpose of the RISP is to solicit and assess available opportunities for the possible refinancing of the Credit Facilities, investment in the JSN Group or Ben Moss, and/or the sale of Ben Moss. The RISP will allow Ben Moss to identify the best opportunities for optimizing value for its stakeholders and creditors.[29]

35. The RISP describes, among other things:

(a) the property available for sale, the opportunity for an investment in the JSN Group and Ben Moss's businesses, and the opportunity to refinance the Credit Facilities;

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

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

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

(e) the process for the ultimate selection of a Successful Bid; and

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[29] Manzoor Affidavit, at para 113, 114 and 127. Pre-Filing Report, at para 8.11.

(f) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.[30]

36. The CRO and Proposed Monitor are of the view that the timeframes set out in the RISP are reasonable in the circumstances.[31]

PART III – ISSUES AND THE LAW

37. 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 extension of the stay of proceedings to JSN Inc.;

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

(e) The granting of the Administration and Directors' Charges (both as defined below);

(f) The granting of protections to the CRO;

(g) The approval of pre-filing payments to "critical" suppliers; and

(h) The approval of the RISP.

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30 Manzoor Affidavit, at paras 115-125; RISP found at Schedule "A" to the Draft Initial Order.
31 Manzoor Affidavit, at para 126. Pre-Filing Report, at paras 8.12 and 8.15.

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

38. 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 company that is insolvent.[32]

39. Until recently, it was common practice to refer to the definition of "insolvent person" in the *Bankruptcy and Insolvency Act* ("BIA") in order to establish that an applicant is a "debtor company" in the context of the CCAA. The definition of "insolvent person" in the BIA is as follows:

> 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.[33]

40. 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.[34]

41. In *Re Stelco Inc,*[35] this Court applied an expanded definition of "insolvent" in the CCAA context to reflect the "rescue" emphasis of the CCAA. Under the *Stelco* approach, "insolvent" includes a financially troubled corporation that is "reasonably expected to run out of

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32 CCAA, sections 2 and 3(1).
33 BIA, Section 2(1).
34 *Stelco Inc., Re*, [2004] O.J. No. 1257 at paras. 26 and 28 (Sup. Ct. J.) [Commercial List] ["*Stelco*"], Book of Authorities, Tab 18.
35 *Stelco* at paras. 21-22, Book of Authorities, Tab 18.

liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[36]

42. Ben Moss is a debtor company with claims against it under the Salus Credit Agreement of approximately $68.1 million, an amount that far exceeds $5 million.[37]

43. Moreover, as a result of the Events of Default and the acceleration of all amounts due under the Salus Credit Agreement, Ben Moss does not have sufficient liquidity to satisfy its liabilities as they become due. Further, Ben Moss does not have sufficient cash to continue to fund its operations. [38] Thus, Ben Moss meets both the BIA and *Stelco* tests for being insolvent.

B. The Applicant is Entitled to a Stay of Proceedings

44. 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.[39]

45. Ben Moss seeks a stay of proceedings in this case for an initial period of 30 days.

46. In exercising the discretionary authority to grant a stay pursuant to the CCAA, 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.

47. 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

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36 *Stelco* at paras. 26 and 28; Book of Authorities, Tab 18.
37 Manzoor Affidavit, at para 7.
38 Manzoor Affidavit, at paras 6, 14, and 91.
39 CCAA, Section 11.02(1) and Section 11.02(3).

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.[40]

48. 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.[41]

49. A stay of proceedings will allow Ben Moss 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 Ben Moss'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. The Stay Should be Extended to JSN Inc.

50. The Applicant requests that the benefit of the stay of proceedings be extended to JSN Inc. in relation to any claims brought against JSN Inc. as a result of cross-default provisions in respect of amounts owing by Ben Moss to third parties. The stay would be limited to amounts owing that are currently not in arrears and that are contemplated in the cash flows as being paid in the ordinary course.[42] As such, any third parties prevented from bringing such claims would not, for all practical purposes, be negatively impacted by the extension of the stay to JSN Inc.

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40 *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 at paras. 5-7 (Gen. Div.) [Commercial List] ["*Lehndorff*"], Book of Authorities, Tab 11; *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 at para. 47 (Sup. Ct. J.) [Commercial List] ["*Nortel*"], Book of Authorities, Tab 12.

41 *Lehndorff* at para. 10, Book of Authorities, Tab 11.

42 Draft Initial Order at para. 15.

51. The extension of the stay of proceedings to JSN Inc. has the effect of postponing (but not resolving or otherwise impairing) these claims that could potentially be asserted against JSN Inc. that depend on or derive from the actions of the Applicant.

52. The Applicant requests that this limited stay of proceedings be extended to JSN Inc. in order to allow the Applicant sufficient "breathing space" to focus its resources on the restructuring process. Any proceedings commenced against JSN Inc. would necessarily require the participation of key personnel of the Applicant – for example, to provide evidentiary support for the claim through witnesses or documents. The need to provide such support could be a very significant distraction for the Applicant's key personnel during the restructuring and would materially detract from the paramount goal of achieving the timely restructuring of the business.[43]

53. Additionally, Ben Moss is currently reliant on the JSN Group for a significant portion of its inventory and accordingly, a detrimental impact on the JSN Group would have a corresponding negative impact on Ben Moss. The operations of the Applicant and JSN Inc. are intertwined and the extension of the stay is necessary to maintain stability during the CCAA process.[44]

54. A well-recognized purpose of the stay of proceedings under the CCAA is to prevent the debtor company from having to devote time and scarce resources to addressing litigation against it. Thus, for example, in upholding a stay of proceedings in favour of the directors and officers of Nortel, the Court expressly noted that the purpose of the stay of proceedings is to provide the debtor company's management and the board with the opportunity

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43 Manzoor Affidavit, at para 94.
44 Manzoor Affidavit, at para 17.

to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy defending legal actions.[45]

55. The "balancing of prejudices" favours this relief in the circumstances of this case. As a general matter, CCAA courts have held that subjecting plaintiffs to a temporary stay of their rights to bring legal actions causes no prejudice to such plaintiffs because their actions are not being precluded, but simply postponed.[46] Specific claims against JSN Inc. are being postponed, but not otherwise impaired by the proposed extension of the stay to claims against it that are derivative of the liability of the Applicant.

56. A CCAA stay of proceedings has frequently been extended to non-applicants where such an order furthers the purpose of the CCAA stay.[47] In *Tamerlane Ventures*, the applicants requested that the CCAA stay of proceedings be extended to two non-applicant parties on the basis that the operations of the applicants and the non-applicants were intertwined and that the stay was necessary to maintain stability and value in the CCAA process. The non-applicant parties included a US subsidiary of the applicants that had guaranteed the applicants' secured loans.[48] In *Target*, Regional Senior Justice Morawetz recently granted a stay of proceedings to the applicants' parent company and its subsidiaries in relation to claims against these entities that

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45 *Nortel Networks Corp., Re*, 2009 CarswellOnt 4806 at paras. 20, 27 and 36 (Sup. Ct. J.), Book of Authorities, Tab 13.

46 *Ibid.* at paras. 37-38, Book of Authorities Tab 13, citing *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 at para. 24 (Ont. Gen. Div.).

47 Courts often extend the stay to non-applicants such as partnerships: *Target Canada Co., Re*, 2015 ONSC 303 at para 42 ["*Target*"], Book of Authorities, Tab 20.

48 *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at paras. 20-21, Book of Authorities, Tab 19. See also *Cinram International Inc., Re*, 2012 ONSC 3767 at paras. 61-65 ["*Cinram*"], Book of Authorities, Tab 5 (stay extended to a number of non-applicant entities, including subsidiaries of the debtor company that were parties to an agreement with an applicant as surety, guarantor or otherwise); *Sino-Forest Corp., Re*, 2012 ONSC 2063 at paras. 5(i), 26-29, 31, 48 [Commercial List], Book of Authorities, Tab 16 (stay extended to a number of non-applicant subsidiaries that acted as guarantor for the obligations of the applicant).

were derivative of the primary liability of the applicants. The Court found that in such circumstances it was appropriate to grant the stay and preserve the status quo.[49]

57. Any prejudice associated with the extension of the stay to JSN Inc. in relation to derivative claims is far outweighed by the benefits to the Applicant's stakeholders as a whole. This is particularly true given that the stay is limited to claims for amounts owing pursuant to agreements that are currently not in arrears and that are contemplated in the cash flows as being paid in the ordinary course.[50] The extension of the stay to JSN Inc. will preserve the status quo.

58. The Monitor supports the Applicant's request for this stay of proceedings[51] and the views of the Monitor should not lightly be disregarded.[52] For all of the forgoing reasons, the Applicant submits that it is appropriate to extend the stay of proceedings in favour of JSN Inc. in this manner.

D. Jurisdiction and Discretion to Grant a DIP Financing Charge on a Priority Basis and Approve the DIP Facility

59. 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 Ben Moss. The Applicant also seeks approval of the related DIP Agreement.

60. 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

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49 *Target* at paras. 49-50, Book of Authorities, Tab 20.
50 Initial Order, para 15.
51 Pre-Filing Report, at para 12.2.
52 See for example, *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 at para. 19 (Sup. Ct. J. [Commercial List]), Book of Authorities, Tab 8, citing *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

> 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.

61. 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.

62. 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.[53] This not a concern in the present case. As noted above, Salus CLO and Salus Capital[54] are Ben Moss's senior secured creditors, the DIP Lender's Charge does not prime any secured party's purchase money security interests, and the payment of the pre-filing amounts outstanding under the Revolving Credit Facility does

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53 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 22.

54 Salus Capital acts as Agent pursuant to the DIP Agreement and has consented to the proposed DIP Facility.

not create an inversion of any priorities or secure pre-filing obligations that are not otherwise secured in favour of the Senior Secured Lenders.[55]

63. As described above, it is anticipated in the DIP Agreement that proceeds from Ben Moss's operations will be used to reduce pre-filing obligations outstanding under the Credit Facilities. In accordance with the DIP Agreement and the current Cash Management System in effect, Ben Moss's cash from business operations will continue to be deposited into the Blocked Accounts, swept to Salus Capital's collection accounts and applied in order to reduce in order to reduce first, the obligations classified as a "Permitted Overadvance" under the Credit Facilities, second, the obligations under the DIP Facility and third, the outstanding obligations under the Credit Facilities.[56]

64. Section 11.2 (1) expressly prohibits the DIP Lender's Charge from securing Ben Moss'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 Ben Moss may not draw down any advances under the DIP Facility to repay any indebtedness outstanding prior to the date of the commencement of this proceeding, except as permitted by the Initial Order.[57] To the extent that the Senior Secured Lenders are repaid pre-filing amounts owing to them, 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 Capital simply maintain the status quo as at the CCAA filing date under the existing Salus Credit Agreement:

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55 Manzoor Affidavit, at paras 105 and 107.
56 Manzoor Affidavit, at para 101.
57 For example, the draft Initial Order permits critical supplier payments. Manzoor Affidavit, at para 100.

(a) Ben Moss entered into the Salus Credit Agreement on July 18, 2013. Ben Moss's obligations under this agreement are secured by all Ben Moss's assets. At the same time, Ben Moss entered into the Blocked Account Agreements as is typical of an asset-based lending arrangement.[58]

(b) Since the inception of the Salus Credit Agreement, Salus Capital has had cash dominion over all receipts of the Borrowers (including Ben Moss) pursuant to the Blocked Account Agreements. These amounts have always been swept to Salus Capital's accounts to reduce the amount owing under the Salus Credit Agreement.[59]

65. Regional Senior Justice Morawetz approved a similar DIP Facility with a very similar cash management sweeping mechanism in *Comark Inc. (Re)*.[60] In *Comark*, the DIP agreement also provided that the proceeds from operations would be used to reduce pre-filing obligations outstanding under an existing revolving credit facility with Salus Capital. In accordance with Comark's cash management system that was already in effect, Comark's cash from business operations would be deposited into a blocked account and swept by Salus Capital in order to reduce pre-filing amounts outstanding under its revolving credit facility.[61] As in this case: (i) it was an express term of Comark's DIP agreement that advances made thereunder could not be used to satisfy pre-filing obligations under the existing revolving credit facility;[62] (ii) the DIP lender's charge did not prime any other secured party's purchase money security interests;[63]

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58 Manzoor Affidavit, at paras 7, 44, and 65. Since the sale of inventory constantly erodes the collateral which supports the indebtedness, asset-based lenders generally have dominion over a borrower's cash receipts.

59 Manzoor Affidavit, at para 44.

60 *Comark Inc., Re*, 2015 ONSC 2010 ["*Comark*"], Book of Authorities, Tab 7.

61 *Comark* at para 19, Book of Authorities, Tab 7. Salus already had cash dominion over Comark's cash receipts pursuant to a Blocked Account Agreement: *Comark* at para 22, Book of Authorities, Tab 7.

62 *Comark* at para 18, Book of Authorities, Tab 7.

63 *Comark* at para 26, Book of Authorities, Tab 7.

and (iii) the DIP lender's charge did not secure any obligation that existed before the date of the initial order.[64] In light of these facts, Regional Senior Justice Morawetz concurred that the Comark DIP facility did not contravene the provisions of section 11.2(1) of the CCAA.[65]

66. As in *Comark*, the proposed DIP Facility and the DIP Lender's Charge in this case are 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.

67. The proposed DIP Facility preserves the current structure of the existing asset based loan with the Senior Secured Lenders where advances under the Revolving Credit Facility are determined based on the value of the Borrowers' collateral – specifically, their inventory and accounts receivable balances.[66] By using cash to pay the pre-filing Revolving Credit Facility, the Senior Secured Lenders are in no better position with respect to amounts owing to them relative to other creditors of Ben Moss. Thus, the status of quo of creditors is not disturbed.

68. Preserving the existing asset based lending structure allows Salus CLO as the DIP Lender and the Senior Secured Lenders to properly monitor and manage their collateral positions. Incoming cash swept from the Blocked Accounts provide a form of adequate protection and replacement for sold collateral.

69. 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:

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64 *Comark* at para 18, Book of Authorities, Tab 7.
65 *Comark* at para 29, Book of Authorities, Tab 7.
66 Manzoor Affidavit, at para 102. See also Manzoor Affidavit, at para 44: Cash receipts represent a loss/replacement of the collateral which supports the indebtedness. Thus, the money deposited by Ben Moss into the Blocked Accounts from the sale of its inventory represents both a reduction in the collateral securing the Senior Secured Lenders' outstanding loans and a corresponding reduction in the amount borrowed under the Revolving Credit Facility.

(a) Salus CLO 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 Capital;

(b) Ben Moss's business is intended to continue to operate on a going concern basis during this proceeding under the direction of the Court-appointed CRO and with the assistance of Ben Moss's legal advisor and the Proposed Monitor;

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

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

(e) the Proposed Monitor is supportive of the DIP Facility, including the DIP Lender's Charge, as the DIP Facility is the best available option in the circumstances.[67]

70. Accordingly, Ben Moss 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 $8 million and approve the DIP Agreement.

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[67] Manzoor Affidavit, at paras 52, 104,109, 110. Pre-Filing Report, at paras 14.12-14.14.

E. Approval of the Directors' Charge

71. The Applicant seeks the Directors' Charge in an amount of up to $1.5 million, to act as security for indemnification obligations for Ben Moss Directors' potential liabilities**.** The Directors' Charge would be subordinate to the proposed DIP Lender's Charge and the proposed Administration Charge to be created in favour of counsel for Ben Moss, the Proposed Monitor, counsel for the Proposed Monitor, counsel for Joseph Shilon (with respect to amounts incurred before the date of the Initial Order), and the CRO.[68]

72. 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.

73. 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:

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[68] Draft Initial Order, para 58.

> 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.[69]

74. With the assistance of the Proposed Monitor, Ben Moss 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 $1.9 million. The proposed amount of the Directors Charge is less than the estimated liability.[70]

75. Ben Moss's directors have indicated that, in light of the uncertainty surrounding potential renewal of the 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 Ben Moss in the amount of $1.5 million on the property of Ben Moss (the "**Directors' Charge**").[71]

76. The Directors' Charge is therefore necessary and appropriate so that Ben Moss may benefit from its directors' and officers' experience with the business and the retail jewellery industry and their leadership in the company's restructuring efforts.[72]

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69 *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 at para. 48 (Sup. Ct. J.) [Commercial List] [*Canwest Global*], Book of Authorities, Tab 3.
70 Manzoor Affidavit at para 136.
71 Manzoor Affidavit at para 137.
72 Manzoor Affidavit at para 138.

77. The requested Directors' Charge is reasonable given the nature of Ben Moss's 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 similar CCAA proceedings.[73]

F. CRO Protections

78. The draft Initial Order contemplates the appointment of a CRO to act as overseer of the restructuring. As such, the draft Initial Order provides for certain protections from personal liability for the CRO in connection with his or her duties and involvement in the restructuring (the "**CRO Protection**").

79. The CRO Protection is typical of similar protections provided to CROs in other proceedings. The Initial Order provides that the CRO will not have any liability with respect to any losses, damages or liabilities of any nature or kind from and after the date of the Initial Order, except to the extent that such damages, losses or liabilities result from the gross negligence or wilful misconduct of the CRO.[74]

80. These measures are justified on the basis that it is commonplace for companies that are restructuring to appoint a CRO and to protect the CRO from liability as the CRO carries out his or her duties in connection with the restructuring. The CRO is playing the role of neutral, objective overseer of the restructuring process.

81. There is ample precedent in CCAA jurisprudence for extending protections from liability to a CRO of the nature proposed in the draft Initial Order.[75] The basis for extending this

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73 *Cash Store Financial Services, Re*, 2014 ONSC 2372 at paras 25 and 29 [Commercial List], Book of Authorities, Tab 4: $2.5 million.

74 Initial Order at paras. 22-27.

75 See *Collins & Aikman Automotive Canada Inc., Re*, 2007 CarswellOnt 7014 (Sup. Ct. J.) ["*Collins*"], Book of Authorities, Tab 6. See also *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72 [*ICR Commercial*], Book of Authorities, Tab 9.

protection is similar to the basis for extending similar protections to the Monitor and to directors and officers of a debtor company. As this Court has stated:

> It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.[76]

82. It is appropriate to extend the same type of specific protections to the CRO in order to mitigate any liabilities to which it may be exposed in overseeing the restructuring for the benefit of all of Ben Moss's stakeholders.

G. Authorization to Make Pre-Filing Payments

83. 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.[77]

84. In the draft Initial Order, Ben Moss seeks authorization to: (i) continue to make payments in the ordinary course to certain critical third parties that provide services that are integral to Ben Moss's ability to operate; and (ii) continue to honour or comply with existing return policies, customer deposits, pre-payments, gift cards and similar programs it offers.

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[76] *Collins* at para. 138, Book of Authorities, Tab 6. A similar rationale was referenced by the trial judge in *ICR Commercial* which was quoted with approval in the Court of Appeal's reasons at para. 75, Book of Authorities, Tab 9. In that case, the Court refused to lift the stay of proceedings to allow a claim for "bad faith" to be asserted against a CRO who was protected by language similar to that proposed in the draft Initial Order.

[77] CCAA, s. 11. *Royal Oak Mines Inc., Re*, [1999] O.J. No. 709 at para. 7 (Gen. Div.) [Commercial List], Book of Authorities, Tab 15.

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

85. 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.[78]

86. 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.[79]

87. 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.[80]

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

79 *Alberta-Pacific Terminals Ltd., Re*, [1991] B.C.J. No. 1065 at para. 23 (S.C.), Book of Authorities, Tab 1.

80 *Canwest Global* at para. 24, Book of Authorities, Tab 3.

88. 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."[81]

89. 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) the fact that no payments would be made without the consent of the Monitor;

(b) 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;

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

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

(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.[82]

90. Ben Moss is seeking authorization to pay third-party suppliers which provide essential services for Ben Moss's business in order to ensure that its operations continue and that

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81 *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 70, Book of Authorities, Tab 21.

82 *Cinram* at para. 68, Book of Authorities, Tab 5. See also *Cinram International Inc., Re* at paras. 66-72, Book of Authorities, Tab 5; *Canwest Global* at para. 43, Book of Authorities, Tab 3; *Brainhunter Inc., Re*, [2009] O.J. No. 5207 at para. 21 (Sup. Ct. J.) [Commercial List], Book of Authorities, Tab 2; *Priszm Income Fund, Re*, 2011 ONSC 2061 at paras. 29-34, Book of Authorities, Tab 14.

customer demand can be satisfied. All such payments would be made under the supervision of and with the consent of the Proposed Monitor. The Proposed Monitor supports this requested relief as it is essential that certain of Ben Moss's suppliers that are critical to Ben Moss's ability to operate during these CCAA proceedings continue to supply Ben Moss over this period.[83]

91. The Applicant therefore submits that in these circumstances, this Court has jurisdiction to authorize Ben Moss, 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 Gift Cards and Store Credit***

92. 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 Ben Moss to continue to honour or comply with existing return policies, gift cards and similar programs it offers. This relief is essential to maintain customer satisfaction and preserve Ben Moss's business going forward.

H. Approval of the RISP

93. 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?

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[83] Pre-Filing Report, para 11.1-11.2.

(d) Is there a better viable alternative?[84]

94. 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.[85] 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.

95. 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.[86]

96. The RISP has been reviewed and approved by the Proposed Monitor and Salus Capital.[87]

97. The purpose of the RISP is to solicit and assess available opportunities for the refinancing of the Credit Facilities, investment in the JSN Group or Ben Moss's business, and/or the sale of Ben Moss's business and property. The RISP provides an opportunity to canvass the

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84 *Nortel* at para. 49, Book of Authorities, Tab 12.
85 *Brainhunter Inc., Re* at paras. 14-16, Book of Authorities, Tab 2.
86 *Ivaco Inc., Re,* [2004] O.J. No. 2483 at para. 21 (Sup. Ct. J.) [Commercial List], Book of Authorities, Tab 10.
87 Manzoor Affidavit, at para 13. Pre-Filing Report, at para 8.17.

market for such opportunities and for Ben Moss, in consultation with the Proposed Monitor and Salus Capital, to assess the available options. The RISP will allow Ben Moss to identify the best opportunities for optimizing value for its stakeholders and creditors.[88]

98. The RISP timelines are appropriate in light of the extensive solicitation process that was undertaken by A&M Corporate Finance in 2015 to identify potential investors/purchasers and educate them about Ben Moss's business. The timelines in the RISP balance the time necessary for a commercially reasonable refinancing, investment and/or sale process with Ben Moss's available financial resources.[89] The Proposed Monitor is of the view that the timeframes set out in the RISP are reasonable in the circumstances.[90]

PART V — NATURE OF THE ORDER SOUGHT

99. The Applicant 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 16th day of May, 2016.

per / Marc Wasserman

Michael De Lellis

Karin Sachar

88 Manzoor Affidavit, at paras 113-114.
89 Manzoor Affidavit, at para 126.
90 Pre-Filing Report, at para 8.18.

Schedule "A"

LIST OF AUTHORITIES

Tab	Case Law
1.	*Alberta-Pacific Terminals Ltd., Re,* [1991] B.C.J. No. 1065 (S.C.)
2.	*Brainhunter Inc., Re,* [2009] O.J. No. 5207 (Sup. Ct. J.) [Commercial List]
3.	*Canwest Global Communications Corp., Re,* [2009] O.J. No. 4286 (Sup. Ct. J.) [Commercial List]
4.	*Cash Store Financial Services, Re,* 2014 ONSC 2372 [Commercial List]
5.	*Cinram International Inc., Re,* 2012 ONSC 3767 [Commercial List]
6.	*Collins & Aikman Automotive Canada Inc., Re,* 2007 CarswellOnt 7014 (Sup. Ct. J.)
7.	*Comark Inc., Re,* 2015 ONSC 2010
8.	*Grant Forest Products Inc., Re,* 2009 CarswellOnt 4699 (Sup. Ct. J.) [Commercial List]
9.	*ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.,* 2007 SKCA 72
10.	*Ivaco Inc., Re,* [2004] O.J. No. 2483 (Sup. Ct. J.) [Commercial List]
11.	*Lehndorff General Partner Ltd., Re,* [1993] O.J. No. 14 (Gen. Div.) [Commercial List]
12.	*Nortel Networks Corp., Re,* 2009 CarswellOnt 4467 (Sup. Ct. J.) [Commercial List]
13.	*Nortel Networks Corp., Re,* 2009 CarswellOnt 4806 (Sup. Ct. J.) [Commercial List]
14.	*Priszm Income Fund, Re,* 2011 ONSC 2061
15.	*Royal Oak Mines Inc., Re,* [1999] O.J. No. 709 (Gen. Div.) [Commercial List]
16.	*Sino-Forest Corp., Re,* 2012 ONSC 2063 [Commercial List]
17.	*Smurfit-Stone Container Canada Inc., Re,* [2009] O.J. No. 349 (Sup. Ct. J.) [Commercial List]
18.	*Stelco Inc., Re,* [2004] O.J. No. 1257 (Sup. Ct. J.) [Commercial List]
19.	*Tamerlane Ventures Inc., Re,* 2013 ONSC 5461 [Commercial List]
20.	*Target Canada Co. (Re),* 2015 ONSC 303 [Commercial List]
21.	*Ted Leroy Trucking [Century Services] Ltd., Re,* 2010 SCC 60

Tab **Secondary Sources**

22. 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 BEN MOSS JEWELLERS WESTERN CANADA LTD.

Court File No:

Applicant

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