Court File No. CV-16-11419-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 2473304 ONTARIO INC.**

**(the "Applicant")**

# FACTUM OF THE APPLICANT

**(Initial Application returnable June 7, 2016)**
**(Motion for Approval of Agency Agreement returnable June 13, 2016)**

Dated: June 6, 2016

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**TO: THE SERVICE LIST**

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**(Initial Application returnable June 7, 2016)**
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## PART I - OVERVIEW[1]

1. This factum is delivered in connection with an application by 2473304 Ontario Inc., which carries on business under the licensed trade name "Jones New York" in Canada (the "**Company**") for relief in the form of an initial order ("**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "**CCAA**"). The Initial Application is returnable June 6, 2016.

2. This factum is also delivered in connection with a motion brought by the Company, served contemporaneously with the Application and returnable June 13, 2016, for an order approving the transactions contemplated under the Agency Agreement entered into between the Company and GA Retail Canada, ULC (the "**Agent**") on June 6, 2016 (the "**Agency Agreement**") and granting the Agent's Charge (as defined below) (the "**Agency Agreement**

[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Mark Sun, sworn June 6, 2016 in support of the Initial CCAA Order (the "**Sun Affidavit**").

**Approval Order**"). The Motion is scheduled to be heard on June 13, 2016 (subject to the Court granting the Initial Order).

3. The Company is a privately held women's clothing retailer that operates 37 stores in Canada. In July, 2015 the Company acquired the tangible assets of the Canadian retail business formerly operated under the name "Jones New York" from Sycamore Partners ("**Sycamore**"), a private equity firm based in New York. In connection with that transaction the Company entered into a term sheet with ABG-Jones, LLC ("**ABG**"), the licensor of the "Jones New York" brand, giving the Company the right to use the "Jones New York" brand in the sale of womenswear in Canada.[2]

4. The Company is a wholly-owned subsidiary of Grafton-Fraser Inc. ("**Grafton**"), a privately held company that owns and operates retail stores in Canada selling menswear under the Tip Top Tailors, George Richards Big and Tall, Mr. Big and Tall and Kingsport Big and Tall Clothier brands.[3]

5. The Company is facing a liquidity crisis as a result of, among other things, unexpectedly high inventory costs, an excess inventory hangover from the acquisition of the business in 2015 and lower than expected retail sales.[4]

6. The Company is in default of certain covenants with its operating lender, Canadian Imperial Bank of Commerce ("**CIBC**"). The Company is also a guarantor of Grafton's term loan obligation to GSO Capital Partners, LP ("**GSO**") under the GSO Credit Agreement (as defined below) and certain events have occurred that have triggered one or more events of

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2 Sun Affidavit, para 5; Application Record, Tab 3.

3 Sun Affidavit, para 6; Application Record, Tab 3.

4 Sun Affidavit, para 7; Application Record, Tab 3.

default under the GSO Credit Agreement permitting GSO to demand on the GSO Guarantee (as defined below).[5]

7. The Company has entered into forbearance agreements with CIBC and with GSO, respectively, each of which contemplate, among other things, an orderly liquidation of the Company's inventory and furniture, fixtures and equipment ("**FF&E**") in the context of CCAA proceedings.[6]

8. The DIP Forbearance Agreement that the Company has entered into with CIBC further contemplates that CIBC will continue to make its revolving asset-based loan facilities available to the Company during these CCAA proceedings, subject to a number of terms and conditions, including that CIBC be granted a priority Court-ordered charge on the Company's property as security for advances it makes during these proceedings.[7]

9. In the GSO Forbearance Agreement, among other terms, GSO has agreed to capitalize interest payments in accordance with the terms thereunder.[8]

10. On or about April 21, 2016 the Company, with the assistance of the retail consulting group at Richter Consulting Canada Inc. (the "**Consultant**"), initiated a process of soliciting offers for a sale of, or investment in the Company, its business and assets (the "**SISP**"). The SISP provided, among other things, that that the deadline for submission of binding offers

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5 Sun Affidavit, para 8; Application Record, Tab 3.

6 Sun Affidavit, para 9; Application Record, Tab 3.

7 Sun Affidavit, para 10; Application Record, Tab 3.

8 Sun Affidavit, para 11; Application Record, Tab 3.

was 2:00 pm Toronto time on May 19, 2016 (subsequently extended to 5:00 pm Toronto time on May 21, 2016).[9]

11. The Company received two liquidation proposals under the SISP and selected the proposal from the Agent as the most beneficial to the Company and its stakeholders. The Company is seeking approval of the transactions contemplated in the Agency Agreement to be implemented through these CCAA proceedings.[10]

12. The Company is not able to successfully restructure its affairs outside of formal insolvency proceedings. The Company is insolvent and unable to meet its liabilities as they become due. The Company requires the protection and other provisions of an initial order under the CCAA to provide it with a stable environment to preserve its value for its stakeholders while the Company pursues an orderly liquidation of its assets through the transactions contemplated in the Agency Agreement.[11]

## PART II - THE FACTS

13. The facts with respect to this Application are more fully set out in the Affidavit of Mark Sun sworn June 6, 2016 in support of this CCAA filing (the "**Sun Affidavit**"). The facts relevant to specific issues herein are reviewed in the submissions relating to such issues.

## PART III - ISSUES

14. The issue to be determined is whether the Court should grant the relief being sought by the Company. The relief sought by the Company includes, *inter alia*:

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9 Sun Affidavit, para 12; Application Record, Tab 2.

10 Sun Affidavit, para 13; Application Record, Tab 2.

11 Sun Affidavit, para 14; Application Record, Tab 2.

(a) declaring that the Company is a company to which the CCAA applies;

(b) granting a stay of proceedings in favour of the Company and its directors and officers;

(c) approving the DIP Forbearance Agreement and granting the DIP Charge (each as defined below);

(d) establishing the Administration Charge (as defined below);

(e) declaring that the directors and officers of the Company shall be indemnified against obligations and liabilities that they may incur in their capacity as directors or officers of the Company after the commencement of these proceedings, and granting the D&O Charge (as defined below) as security for such indemnity;

(f) appointing Richter Advisory Group Inc. ("**Richter**" or the "**Proposed Monitor**") to act as the monitor (the "**Monitor**") of the Company in these CCAA proceedings;

(g) sealing an unredacted copy of the Agency Agreement and the Comparison Chart (as defined below); and

(h) approving the Agency Agreement and authorizing the Company to carry out the transactions contemplated therein.

15. The Company submits that this Application (and the Motion to approve the Agency Agreement) should be granted on the following basis:

(a) this Application complies with all requirements of the CCAA;

(b) the relief sought is consistent with the purpose of the CCAA;

(c) the relief sought is available under the CCAA; and

(d) the factual matrix supports the granting of the order.

## PART IV - THE LAW

### A. THIS APPLICATION COMPLIES WITH ALL REQUIREMENTS OF THE CCAA

#### *A.1. This Application Concerns a Debtor Company with Debts over $5 Million*

16. Section 3(1) of the CCAA states that the statute applies in respect of a "debtor company" if the total claims against the "debtor company" are more than $5,000,000.

(a) The Applicant is a "Company"

17. Section 2(1) of the CCAA sets out the definition of "company" as follows:

> *"**2(1) "company"** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;"*

**Section 2(1), *Companies' Creditors Arrangement Act*, RSC 1985, c C.36, as amended; Factum of the Applicant, Schedule B.**

18. The Company is a corporation continued under the *Business Corporations Act* (Ontario) and does not fall within the excluded categories of "company" listed in the above definition. The Company is a "company" within the meaning of the CCAA definition.[12]

(b) The Applicant is a "Debtor Company"

19. Section 2(1) of the CCAA defines a "debtor company" as follows:

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[12] Sun Affidavit, para 15; Application Record, Tab 2.

> *"**2(1) "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."*

***Companies' Creditors Arrangement Act, supra*** **at section 2(1); Factum of the Applicant, Schedule B.**

20. There is no definition of "insolvent" in the CCAA. There is a definition of "insolvent person" under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**") and it has become common practice to refer to this BIA definition when reference is made to insolvency in the context of the CCAA.

***Re Stelco Inc,*** **(2004), 48 CBR (4th) 299 (Ont Sup Ct J [Commercial List]) at paras 21-22; leave to appeal to CA ref'd, [2004] OJ No 1903; leave to appeal to SCC ref'd [2004] SCCA No 336 [*Re Stelco*]; Book of Authorities of the Applicant, Tab 1.**

21. The definition of "insolvent person" under the BIA is as follows:

> *"**2 "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."*

**Section 2, *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, as amended; Factum of the Applicant, Schedule B.**

22. A debtor need only meet one of the three prongs of the above referenced test to be determined to be "insolvent" for the purposes of the CCAA.

***Re Stelco*, *supra* at para 28; Book of Authorities of the Applicant, Tab 1.**

23. CIBC has declared the Company in default under the CIBC Credit Agreement and the Company does not have sufficient liquidity to repay the outstanding indebtedness to CIBC in full if CIBC should make a demand for repayment.[13]

24. The Company is also liable to GSO under the GSO Guarantee and the Company is unable to satisfy this obligation in full if required by GSO.[14]

25. As a result, the Company is unable to meet its obligations to creditors as they come due and has ceased meeting such obligations. The Company is therefore insolvent.[15]

(c) The Claims Against the Applicant Exceed $5 Million

26. The amount of debt for which the Applicant is liable is significantly in excess of the $5 million threshold as provided for in the CCAA.

27. As of May 20, 2016 there was approximately $30,499,706 million (including accrued interest) outstanding under the CIBC Credit Agreement.[16]

28. The Company is also liable to GSO under the GSO Guarantee in the approximate amount of $33,024,000 (including accrued interest).[17]

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[13] Sun Affidavit, para 86; Application Record, Tab 2.
[14] Sun Affidavit, para 87; Application Record, Tab 2.
[15] Sun Affidavit, para 88; Application Record, Tab 2.
[16] Sun Affidavit, para 35; Application Record, Tab 2.
[17] Sun Affidavit, para 35; Application Record, Tab 2.

## B. THE RELIEF SOUGHT IS CONSISTENT WITH THE PURPOSE OF THE CCAA

29. In addition to complying with the technical requirements of the CCAA, this application is consistent with the purpose underlying the Act.

30. In *Century Services Inc. v. Canada (Attorney General),* the Supreme Court of Canada canvassed the purpose and policy behind the CCAA and identified the following salient features:

(a) the CCAA's distinguishing feature is a grant of broad and flexible authority to the supervising court to make the order necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The courts have used CCAA jurisdiction in increasingly creative and flexible ways (para 19);

(b) CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (para 58);

(c) judicial discretion must of course be exercised in furtherance of the CCAA's purposes (para 59);

(d) judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the

process and advancing it to the point where it can be determined whether it will succeed (para 60);

(e) in doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (para 60); and

(f) CCAA courts have been called upon to innovate in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization (para 61).

***Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379; Book of Authorities of the Applicant, Tab 2.**

31. In appropriate circumstances, the purpose of the CCAA can be utilized to effect a liquidation of a debtor company's assets.

***Re Target Canada Co*, 2015 ONSC 303, 22 CBR (6th) 323 (Ont Sup Ct J [Commercial List]) at para 33 [*Re Target*]; Book of Authorities of the Applicant, Tab 3.**

***Re Anvil Range Mining Corp*, (2002) 34 CBR (4th) 157 at para 32, Book of Authorities of the Applicant, Tab 4.**

***Re First Leaside Wealth Management Inc*, 2012 ONSC 1299, 213 ACWS (3d) 266 (Ont Sup Ct J [Commercial List]) at paras 32-37; Book of Authorities of the Applicant, Tab 5.**

***Re Lehndorff General Partner Ltd*, (1993), 17 CBR (3d) 24 (Ont Sup Ct J [Commercial List]) at para 7; Book of Authorities of the Applicant, Tab 6.**

**Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2015-2016 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2014) at N§2, p 1219; Book of Authorities of the Applicant, Tab 7.**

32. The Applicant is seeking protection from its creditors to provide it with a stable environment to allow it to continue operations and maintain the status quo, while it completes the

transactions contemplated under the Agency Agreement with a view to maximizing benefits to its creditors and other stakeholders.[18]

33. The Company cannot meet its liabilities as they come due and, without the protection of the CCAA and the benefit of the DIP Forbearance Agreement and the GSO Forbearance Agreement, the ability of the Company to conduct an orderly liquidation of its assets for the benefit of its stakeholders may be seriously impaired.[19]

34. The Applicant has canvassed the market broadly for available transactions, including investment and going concern sale transactions, and only liquidation offers were received. In the circumstances, the Applicant submits that the relief requested herein is consistent with the purpose of the CCAA and is critical for the orderly liquidation of the Company's assets to maximize value for the Company's stakeholders.

## C. THIS RELIEF SOUGHT IS AVAILABLE UNDER THE CCAA

### *C.1. The Court has Jurisdiction to Receive the Application*

35. The jurisdiction of a court to receive a CCAA application is set out in section 9(1) of the CCAA:

> *"**9(1) Jurisdiction of court to receive applications** - Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated."*
>
> ***Companies' Creditors Arrangement Act, supra* at section 9(1); Factum of the Applicant, Schedule B.**

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[18] Sun Affidavit, para 96; Application Record, Tab 2.

[19] Sun Affidavit, para 88; Application Record, Tab 2.

36. The head office of the Company is located in Vaughan, Ontario and its chief place of business is also in Ontario, where 21 of its 37 retail stores are located.[20]

## *C.2. The Court Should Grant a Stay of Proceedings in Favour of the Applicant and its Directors and Officers*

37. The Applicant is seeking a court ordered stay of proceedings in favour of the Company and its directors and officers. Section 11.02(1) of the CCAA provides statutory jurisdiction for the court to grant a stay of proceedings in an Initial Order:

> *"**11.02(1) Stay etc. - initial application** - 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."*

***Companies' Creditors Arrangement Act, supra* at section 11.02(1); Factum of the Applicant, Schedule B.**

38. The stay of proceedings restrains judicial or extra-judicial conduct that could impair the ability of the debtor to operate its business or to focus its efforts on restructuring its affairs. The purpose of the stay of proceedings is to maintain the *status quo* so that steps can be taken under the CCAA for the benefit of all creditors.

***Toronto Stock Exchange Inc v United Keno Hill Mines Ltd*, (2000), 19 CBR (4th) 299 (Ont Sup Ct J [Commercial List]) at para 11; Book of Authorities of the Applicant, Tab 8.**

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[20] Sun Affidavit, paras 15 and 17; Application Record, Tab 2.

***Re Northland Properties Ltd.*, (1988), 73 CBR (NS) 141 (BCSC) at para 18; Book of Authorities of the Applicant, Tab 9.**

39. The stay provisions of the CCAA are discretionary and extraordinarily broad. The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose.

***Re Canwest Global Communications Corp*, (2009), 61 CBR (5th) 200 (Ont. Sup. Ct. J. [Commercial List]) at paras 27-28; Book of Authorities of the Applicant, Tab 10.**

40. The Company is indebted to its suppliers and other trade creditors in the amount of approximately $5.7 million, and its credit facility with CIBC and guarantee liability to GSO are the subject of defaults. Without the benefit of a stay of proceedings, which is a requirement of the DIP Forbearance Agreement and the GSO Forbearance Agreement, creditors and contractual counterparties may seek to exercise remedies against the Company.[21]

41. The Company requires an immediate stay of proceedings to provide it with stability so that it can maintain the status quo while it completes the transactions contemplated under the Agency Agreement with a view to maximizing benefits to its creditors and other stakeholders.[22]

42. The Company is also seeking customary provisions staying proceedings against the directors and officers of the Company with respect to all claims against the directors or officers that relate to any obligations of the Company whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers of the Company.[23]

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[21] Sun Affidavit, paras 35 and 44; Application Record, Tab 2.

[22] Sun Affidavit, para 96; Application Record, Tab 2.

[23] Sun Affidavit, para 97; Application Record, Tab 2.

43. Section 11.03(1) provides express statutory jurisdiction to extend the stay of proceedings in favour of directors:

> *"**11.03(1) Stays - directors** - An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court."*

***Companies' Creditors Arrangement Act, supra*** **at section 11.03(1); Factum of the Applicant, Schedule B.**

44. The stay of proceedings against the Company's officers and directors is required to ensure that they are able to focus their efforts on the orderly liquidation of the Company's assets and related activities (including reconciling payments under the Agency Agreement) and to prevent creditors and others from seeking to do indirectly what they cannot do directly by asserting claims or other relief relating to the debts and obligations of the Company against its officers and directors.[24]

45. The liquidity position of the Company is dire and the stay of proceedings, forbearance agreement approvals, and other relief sought in this application is urgently needed in the interest of the Company and its stakeholders. The stay of proceedings will benefit not only the Company and its financial creditors of the Company, but also its store-level employees (who will continue to be employed through the liquidation sale), customers and other stakeholders.

### *C.3. The Court Should Approve the DIP Forbearance Agreement and the DIP Charge*

46. The Company seeks the Court's approval of the DIP Forbearance Agreement. The Company also seeks a priority court-ordered charge on all the assets, rights, undertakings and

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[24] Sun Affidavit, para 97; Application Record, Tab 2.

properties of the Company (the "**Property**") as security for amounts advanced under the DIP Forbearance Agreement (the "**DIP Charge**").

47. It is a condition of the DIP Forbearance Agreement that in addition to its existing contractual security, CIBC be granted a priority court-ordered charge on all the assets, rights, undertakings and properties of the Company (the "**Property**") as security for amounts advanced to the Company under the DIP Forbearance Agreement (the "**DIP Charge**"), provided, however, that the DIP Charge will not charge the Term Priority Collateral (primarily the Company's furniture, fixtures and equipment) and will not rank in priority to (i) the Administration Charge; and (ii) the Agent's Charge (subject to the issuance of the Agency Agreement Approval Order, and subject to the subordination of the Agent's Charge in respect of any Unpaid Merchant's Entitlements). CIBC has advised the Company that it will not advance any funds under the DIP Forbearance Agreement unless the court approves the DIP Charge. Pursuant to the DIP Forbearance Agreement, from and after the date thereof, each of the Company and Grafton are able to borrow solely upon their own availability (as determined in accordance with the borrowing base formula). The DIP Charge will stand as security for the borrowings of the Company, and not Grafton, during the post-filing period.[25]

48. Section 11.2 of the CCAA expressly authorizes the Court to approve interim financing and to make an order declaring that all or part of the property of the debtor is subject to a priority DIP 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*

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[25] Sun Affidavit, para 99; Application Record, Tab 2.

*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.*

***11.2(3) Priority - other orders** - 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."*

***Companies' Creditors Arrangement Act, supra* at section 11.2; Factum of the Applicant, Appendix B.**

49. Section 11.2(4) sets out the factors that a court shall consider when making a DIP order:

*"**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 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."*

***Companies' Creditors Arrangement Act, supra* at section 11.2(4); Factum of the Applicant, Appendix B.**

50. In *Canwest Global Communications Corp.*, Pepall J. emphasized the importance of meeting the criteria set out in section 11.2(1) before turning to consider the enumerated factors in section 11.2(4). Hence, the first issues that a court must determine are:

(a) that notice has been given to secured creditors likely to be affected by the DIP Charge;

(b) that the amount to be granted under the proposed DIP financing facility be appropriate and required having regard to the debtors' cash-flow statement; and

(c) that the DIP Charge does not secure an obligation that existed before the DIP order was made.

***Re Canwest Global Communications Corp*, (2009), 59 CBR (5th) 72 (Ont Sup Ct J [Commercial List]) [*Re Canwest Global*] at paras 31-35; Book of Authorities of the Applicant, Tab 11.**

51. In the current application, the following factors support the granting of the DIP Charge and satisfy the criteria set out above at section 11.2(1) of the CCAA:

(a) CIBC and GSO are amenable to the DIP Charge. The only other secured creditors of the Company appear to be Xerox Canada Ltd. ("**Xerox**") (in Ontario only) with respect to its interest in specific collateral. The court-ordered charges sought by the Company in this Application are not proposed, at this time, to rank in priority to the registration in favour of Xerox, to the extent it represents a validly perfected and enforceable security interest;[26]

(b) the maximum amount of the proposed DIP facility is $8 million (with the commitment of $8 million being reduced to $2.2 million following receipt by CIBC of a distribution in the amount of the net minimum guarantee payable pursuant to the Agency Agreement less the Holdback Amount (as defined below)). Such amount is appropriate and required to fund the Company's ongoing

[26] Sun Affidavit, para 100; Application Record, Tab 2.

operations while it pursues an orderly liquidation of its assets through these CCAA proceedings. The cash-flow statement that was filed with this Application (the "**Cash-Flow Statement**") indicates that, assuming the DIP Forbearance Agreement is approved and funds are advanced to the Company in accordance with its terms, the Company will have sufficient liquidity to fund its post-filing obligations and the costs of these CCAA proceedings during the cash flow period;[27] and

(c) the DIP Charge will not secure the Company's pre-filing obligations.[28]

52. It is an express term of the DIP Forbearance Agreement that advances made thereunder cannot be used to satisfy pre-filing obligations under the CIBC Credit Agreement.[29]

53. The DIP Forbearance Agreement is an amended version of the pre-filing CIBC Credit Agreement which does provide that cash generated from the Company's operations and the Guaranteed Amount payable to the Company pursuant to the Agency Agreement will be used to reduce pre-filing amounts owing under the CIBC Credit Agreement (and thus increase the amount of funds available under the DIP facility). In *Re Comark*, Morawetz R.S.J. approved a similarly structured DIP facility and accepted that the use of cash generated from the debtor company's business to reduce amounts owing under the pre-filing credit facility did not contravene section 11.2(1) of the CCAA.

***Re Comark Inc*, 2015 ONSC 2010 [unreported] (Ont Sup Ct J [Commercial List]) at paras 26-29; Book of Authorities of the Applicant, Tab 12.**

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27 Sun Affidavit, paras 54 and 94; Application Record, Tab 2.

28 Sun Affidavit, para 102; Application Record, Tab 2.

29 *Ibid.*

54. The following additional factors support the granting of the DIP Charge and satisfy the criteria set out above at section 11.2(4) of the CCAA:

(a) the period during which the Company will be subject to CCAA proceedings is currently unknown. The initial term of the DIP Forbearance Agreement expires on September 30, 2016, subject to earlier termination or the occurrence of certain events or extension on terms satisfactory to the lender. The Agency Agreement provides that the liquidation sale will be completed by September 22, 2016, unless extended by agreement of the parties or accelerated by the agent;[30]

(b) it is expected that the Company will continue to operate its stores, with continued employment of its store-level employees and ongoing payment of rents, while it pursues the liquidation sale;[31]

(c) the Company has the support of its primary secured creditors CIBC (which has agreed to advance the DIP Loan) and GSO;[32]

(d) as the existing operating lender with first registered security on the accounts receivable and inventory of the Company, CIBC is best positioned to provide the DIP loan on commercially reasonable terms;[33]

(e) the DIP loan is necessary to permit the Company to maintain its operations while it pursues the liquidation sale;[34]

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30 Sun Affidavit, paras 53 and 80; Application Record, Tab 2.
31 Sun Affidavit, para 104(b); Application Record, Tab 2.
32 Sun Affidavit, para 104(c); Application Record, Tab 2.
33 Sun Affidavit, para 104(d); Application Record, Tab 2.
34 Sun Affidavit, para 104(e); Application Record, Tab 2.

(f) of the Company's two principal secured creditors, CIBC is providing the DIP facility and GSO has consented to the DIP Forbearance Agreement and the DIP Charge;[35]

(g) CIBC is not prepared to advance the proposed DIP facility if the DIP Charge is not granted;[36] and

(h) the Proposed Monitor has indicated that it is supportive of the DIP Forbearance Agreement and the financing contemplated therein.[37]

55. In the present case, the DIP facility provides critical committed financing that will enable the Company to continue to operate during these CCAA proceedings and allow the Company to undertake an orderly liquidation of its assets. The Cash Flow Statement demonstrates that, without financing through the cash flow period, the Company is unable to fund its operations or pursue the sale transactions contemplated in the Agency Agreement.[38]

56. The DIP facility will also work together with the stay of proceedings to provide the market with confidence that the Company will be able to meet the obligations it incurs during these proceedings. Accordingly, the Company submits that the proposed DIP Forbearance Agreement and the DIP Charge should be approved.

### *C.4. The Court Should Approve the Administration Charge*

57. The Company is seeking a charge on the Property, in priority to all other charges (with the exception of the Agent's Charge, if the Agency Agreement Approval Order is granted),

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35 Sun Affidavit, para 104(c); Application Record, Tab 2.

36 Sun Affidavit, para 99; Application Record, Tab 2.

37 Sun Affidavit, para 104(f); Application Record, Tab 2.

38 Sun Affidavit, para 101; Application Record, Tab 2.

in the maximum amount of $500,000 (the "**Administration Charge**") to secure the fees and disbursements of the Monitor, counsel to the Monitor, independent counsel to the directors of the Company and counsel to the Company, in each case incurred in connection with services rendered to the Company both before and after the commencement of these CCAA proceedings.[39]

58. The CCAA provides the court with express statutory jurisdiction to grant a priority charge in respect of certain fees and expenses:

> *"**11.52(1) Court may order security or charge to cover certain costs** - 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 a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of*
>
> > *(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;*
> >
> > *(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and*
> >
> > *(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.*
>
> ***11.52(2) Priority** - The court may order that the security or charge rank in priority over the claim of any secured creditor of the company."*

***Companies' Creditors Arrangement Act, supra* at section 11.52; Factum of the Applicant, Schedule B.**

59. In addition to the considerations specifically set out above in section 11.52(1) of the CCAA, courts have looked to the following criteria when deciding whether to approve an administration charge:

(a) the size and complexity of the businesses being restructured;

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[39] Sun Affidavit, para 105; Application Record, Tab 2.

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

***Re Canwest Publishing Inc*, 2010 ONSC 222, [2010] OJ No 188 (Ont Sup Ct J [Commercial List]) at para 54; Book of Authorities of the Applicant, Tab 13.**

60. In the present matter, the Company submits that the proposed Administration Charge in favour of the proposed beneficiaries is supported by the following factors:

(a) the Company operates 37 stores in 7 different provinces, and purchases inventory from an array of suppliers most of which are overseas;[40]

(b) it is important to the success of the orderly liquidation of the Company's assets to have the Administration Charge in place to ensure the continued involvement of critical professionals;[41]

(c) there is no anticipated unwarranted duplication of roles;

(d) the Company has worked with the Proposed Monitor and the other professionals to estimate the proposed quantum of the Administration Charge, and in so doing, has taken into account the amounts held by these firms as retainers;[42]

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[40] Sun Affidavit, paras 17 and 40; Application Record, Tab 2.

[41] Sun Affidavit, para 106; Application Record, Tab 2.

[42] Sun Affidavit, para 108; Application Record, Tab 2.

(e) CIBC and GSO have consented to the Administration Charge; and

(f) the Proposed Monitor has advised that it is supportive of the proposed Administration Charge.

61. In view of the foregoing, the Company submits that it is both appropriate and necessary for the court to approve the Administration Charge.

### *C.5. The Court Should Approve the D&O Indemnity and Charge*

62. The Company is seeking an order to: (i) indemnify its directors and officers for obligations and liabilities that they may incur in their capacity as directors or officers of the Company after the commencement of these proceedings, and (ii) create a charge on the Property in the maximum amount of $500,000 (the "**D&O Charge**"), as security for the aforesaid indemnity. The D&O Charge is proposed to rank behind the DIP Charge and the Administration Charge.

63. Section 11.51 of the CCAA expressly provides for the granting of a directors' and officers' charge on a priority basis:

> *"**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."*

***Companies' Creditors Arrangement Act, supra*** **at section 11.51; Factum of the Applicant, Schedule B.**

64. Grafton maintains directors' and officers' liability insurance that extends to its subsidiaries, including the Company (the "**D&O Insurance**"). The current D&O Insurance policies include an aggregate amount of $10 million in coverage. However, this coverage is subject to certain retentions, deductibles, exclusions, or some combination of the foregoing, all of which create a degree of uncertainty.[43]

65. Accordingly, the draft Initial Order provides that the directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified under the current policy. In *Re Timminco Ltd.* the Ontario Superior Court of Justice adopted a similar approach and approved a limited D&O charge in favour of the directors and officers.

***Re Timminco Ltd,*** **2012 ONSC 106 (Ont Sup Ct J [Commercial List]) at paras 33-36; Book of Authorities of the Applicant, Tab 14.**

66. In *Re Canwest Global Communications Corp.*, Pepall J. considered the purposes behind section 11.51 of the CCAA and stated:

> *"The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: Re General Publishing Co. [(2003), 39 CBR (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in*

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[43] Sun Affidavit, paras 112-113; Application Record, Tab 2.

> *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 is 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 the circumstances, I approved the request."*

***Re Canwest Global, supra* at para 48; Book of Authorities of the Applicant, Tab 11.**

67. In the present matter, the Company submits that the D&O Charge should be granted on the following basis:

(a) the directors and officers of the Company have indicated that, due to the risk of personal exposure associated with the Company's liabilities, they will not continue their service with the Company during the post-filing period unless the Initial Order establishes an indemnity in their favour and grants the D&O Charge;[44]

(b) to ensure the ongoing stability of the Company's business during the CCAA period, the Company requires the continued participation of its directors and officers;[45] and

(c) the Proposed Monitor has indicated that it is supportive of the indemnity and D&O Charge and its quantum.[46]

68. The D&O Charge will allow the Company to continue to benefit from the expertise and knowledge of its directors and officers. The Company respectfully submits that the D&O Charge is reasonable in the circumstances.[47]

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44 Sun Affidavit, para 114; Application Record, Tab 2.

45 Sun Affidavit, para 109; Application Record, Tab 2.

46 Sun Affidavit, para 115; Application Record, Tab 2.

47 *Ibid.*

### *C.6. The Court Should Approve the Appointment of the Monitor*

69. The Company is seeking to appoint Richter to act as the Monitor in these CCAA Proceedings.

70. Section 11.7(1) of the CCAA mandates the appointment of a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of section 2 of the BIA.

> ***Companies' Creditors Arrangement Act, supra* at section 11.7(1); Factum of the Applicant, Schedule B.**

71. The Proposed Monitor has confirmed to the Company that it is qualified and willing to act as Monitor in these proceedings.[48]

72. The Proposed Monitor is an affiliate of the Consultant. The Company did not have a prior business relationship with the Consultant or the Proposed Monitor or any of their affiliates before the engagement of the Consultant in March 2016. Given the role of the Consultant to date I anticipate that there will be a significant amount of overlap between the personnel who have been involved in the Consultant engagement to date, and those who will be involved in carrying out the duties and activities of the Monitor going forward. It is submitted that this is sensible and efficient and in the interest of the Company's stakeholders. The primary secured creditors, CIBC and GSO, are aware of the relationship between the Consultant and the Proposed Monitor and have both consented to the appointment of the Proposed Monitor as Monitor in these proceedings.[49]

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[48] Sun Affidavit, para 124; Application Record, Tab 2.

[49] Sun Affidavit, para 125; Application Record, Tab 2.

### *C.7. Sealing & Redacting Order*

73. The Proposed Monitor has filed a comparison of the two proposals that were received under the SISP as a confidential Appendix to the Proposed Monitor's first report (the "**Comparison Chart**") and is seeking an Order sealing the Comparison Chart in the Court file.

74. The Company is also seeking to file an un-redacted version of the Agency Agreement with the Court on a confidential basis.

75. In *Sierra Club of Canada v. Canada (Minister of Finance)* the Supreme Court of Canada held that a sealing order ought to 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 reasonably 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, [2002] 2 SCR 522 [*Sierra Club*] at para 53; Book of Authorities of the Applicant, Tab 15.**

76. The Comparison Chart is commercially sensitive as it contains the commercial terms of the two proposals received under the SISP. The Agency Agreement also contains sensitive information detailing the pricing information and the Guarantee Amount. The disclosure of these commercial terms would have a detrimental impact on each of the bidders as it would reveal confidential information, including pricing information, to their competitors.

Sealing the Comparison Chart, and redacting the Agency Agreement, is vital to prevent the bidders' competitors from gaining an undue advantage by having access to commercially sensitive information. In addition, there is no material prejudice that will be suffered by third parties as a result of the sealing of the Comparison Chart.

77. The Company has appended a copy of the Agency Agreement to its Application Record and is only seeking to restrict access to a small portion of the document.

78. The sealed documents would be available to the court and public access to the proceedings would not be impeded. As such, the order being sought represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects.

***Sierra Club*, *supra* at para 79.**

### *C.8. Approving the Agency Agreement*

79. The Company, in consultation with the Consultant and having regard to the results of the SISP, has determined that it is in the best interests of the Company and its stakeholders to engage in an orderly liquidation of inventory and FF&E at the Stores and in its distribution centre. The Agency Agreement provides a mechanism for doing so in an efficient manner and in advantageous economic terms.[50]

80. The Court has jurisdiction to authorize a disposition of assets outside of the ordinary course of business under section 36 of the CCAA:

> *"**36(1) Restriction on disposition of business assets** - 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*

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[50] Sun Affidavit, para 117; Application Record, Tab 2.

*authorize the sale or disposition even if shareholder approval was not obtained.*

***36(2) Notice to creditors** - 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.*

***36(3) Factors to be considered** - 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.*

[...]

***36(6) Assets may be disposed of free and clear** - 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.*

***36(7) Restriction - employers** - 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) [sic] and (5)(a) [sic] if the court had sanctioned the compromise or arrangement."*

***Companies' Creditors Arrangement Act, supra* at section 36; Factum of the Applicant, Schedule B.**

81. Section 36 of the CCAA permits a sale of all or substantially all of a debtor's assets in the case of a liquidation sale and there is no requirement that a CCAA plan be filed with the debtor's creditors. In *Re Target*, Morawetz R.S.J. held that as follows:

> *"The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business"*

***Re Target, supra* at para 33; Book of Authorities of the Applicant, Tab 3.**

***Re Fairmont Resort Properties Ltd.*, 2012 ABQB 39, (2012) 532 AR 209, at paras 26-31; Book of Authorities of the Applicant, Tab 16.**

82. CCAA courts have held that the criteria in section 36(3) overlap with the criteria set forth in *Royal Bank v. Soundair Corp.*, which include:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

***Re Canwest Publishing Inc/ Publications Canwest Inc*, 2010 ONSC 2870, (2010) 68 CBR (5th) 233 (Ont Sup Ct J [Commercial List]) at para 13; Book of Authorities of the Applicant, Tab 17.**

***Royal Bank of Canada v Soundair* Corp, [1991] OJ No. 1137 (ONCA) at para 16; Book of Authorities of the Applicant, Tab 18.**

83. In the present matter, the proposed liquidation of the Company's assets pursuant to the Agency Agreement satisfies the section 36 CCAA criteria, as well as the *Soundair* principles on the following basis:

(a) the Agency Agreement was the culmination of a comprehensive SISP undertaken by the Company, in consultation with the Consultant, to broadly canvass the

market for potential investment or sale transactions involving the Company and its assets;[51]

(b) the SISP was initiated prior to the commencement of these CCAA proceedings following the Consultant's preliminary review of the Company's present and projected financial performance and after engaging in discussions with certain of the Company's stakeholders, including CIBC and GSO. The SISP did not pre-suppose an insolvency filing. The Consultant and the Company were mindful of the fact that such a proceeding may be required and structured the SISP in a manner consistent with processes commonly employed in insolvency proceedings. The Proposed Monitor approves of the steps taken by the Company and is supportive of the Company's request for court approval of the Agency Agreement;[52]

(c) the Company understands that the Proposed Monitor will file a pre-filing report in connection with these proceedings stating that the liquidation of the Company's assets pursuant to the Agency Agreement will be more beneficial to creditors than under a bankruptcy;

(d) CIBC and GSO, the Company's primary secured creditors, were each consulted prior to the commencement of the SISP and are supportive of the Company's request for court approval of the Agency Agreement;

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[51] Sun Affidavit, para 117; Application Record, Tab 2.

[52] Sun Affidavit, para 71; Application Record, Tab 2.

(e) the Company expects that the liquidation of the Company's assets pursuant to the Agency Agreement will result in the highest possible recovery for the Company and its stakeholders in the circumstances;[53] and

(f) the Company believes that the Agency Agreement represents the best possible transaction in the circumstances for the benefit of the Company and its stakeholders. The Company and the Consultant canvassed the market, having sent teaser letters to approximately 100 potential interested parties and having provided a confidential information memorandum and granted data room access to nine interested parties. Following constructive discussions with a number of interested parties with respect to the sale or investment opportunity and significant activity in the data room, the Company ultimately received two proposals by the extended bid deadline. Both of those offers were binding liquidation proposals. The Company, in consultation with the Consultant, determined that the Agent's proposal represented the best and highest proposal and recovery for the Company and its stakeholders.[54]

84. In addition to the factors set out above, section 36(7) of the CCAA requires that the Court be satisfied that the Company can and will make payments on account of unpaid wages for services rendered in the six months preceding the Initial Order (up to a maximum amount of $2,000 or $1,000 for a travelling salesperson) and certain amounts that may be owing under a pension plan.

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[53] Sun Affidavit, para 118; Application Record, Tab 2.

[54] Sun Affidavit, paras 72-76; Application Record, Tab 2.

85. It is contemplated (and reflected in the Cash Flow Statement) that amounts for which employees have a claim under subsections 81.4 and 81.5 of the *Bankruptcy and Insolvency Act* (Canada) will be paid. The Company does not maintain a pension plan for its employees.[55]

## PART V - RELIEF REQUESTED

86. The Company therefore requests that this Application be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2016**

Per:

Stuart Brotman

Dylan Chochla

Lawyers for the Applicant, 2473304 Ontario Inc.

[55] Sun Affidavit, para 119; Application Record, Tab 2.

# SCHEDULE "A"

# SCHEDULE "A"

1. *Re Stelco Inc,* (2004), 48 CBR (4th) 299 (Ont Sup Ct J [Commercial List])
2. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379
3. *Re Target Canada Co*, 2015 ONSC 303, (2015), 22 CBR (6th) 323 (Ont Sup Ct J [Commercial List])
4. *Re Anvil Range Mining Corp*, (2002) 34 CBR (4th) 157 (ONCA)
5. *Re First Leaside Wealth Management Inc*, 2012 ONSC 1299, 213 ACWS (3d) 266 (Ont Sup Ct J [Commercial List])
6. *Re Lehndorff General Partner Ltd.*, (1993), 17 CBR (3d) 24 (Ont Sup Ct J [Commercial List])
7. Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2015-2016 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2014) at N§2, p 1219
8. *Toronto Stock Exchange Inc v United Keno Hill Mines Ltd.*, (2000), 19 CBR (4th) 299 (Ont Sup Ct J [Commercial List])
9. *Re Northland Properties Ltd*, (1988), 73 CBR (NS) 141 (BCSC)
10. *Re Canwest Global Communications Corp*, (2009), 61 CBR (5th) 200 (Ont Sup Ct J [Commercial List])
11. *Re Canwest Global Communications Corp*, (2009), 59 CBR (5th) 72 (Ont Sup Ct J [Commercial List])
12. *Re Comark Inc*, 2015 ONSC 2010 [unreported] (Ont Sup Ct J [Commercial List])
13. *Re Canwest Publishing Inc*, 2010 ONSC 222, [2010] OJ No 188 (Ont Sup Ct J [Commercial List])
14. *Re Timminco Ltd*, 2012 ONSC 106 (Ont Sup Ct J [Commercial List])
15. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522
16. *Re Fairmont Resort Properties Ltd.*, 2012 ABQB 39, (2012) 532 AR 209
17. *Re Canwest Publishing Inc/ Publications Canwest Inc*, 2010 ONSC 2870, (2010) 68 CBR (5th) 233 (Ont Sup Ct J [Commercial List])
18. *Royal Bank of Canada v Soundair Corp*, [1991] OJ No 1137 (ONCA)

# SCHEDULE "B"

# SCHEDULE "B"

## *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

**2 Definitions**

"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;

[...]

"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act.

[...]

## *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

**2(1) Interpretation**

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

"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;

[...]

**3(1) Application**

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.

[...]

**9(1) Jurisdiction of court to receive applications**

Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[...]

**11.02(1) - Stays, etc. - initial application**

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.

[...]

**(3) Burden of proof on application**

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.

**(4) Restriction**

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

**11.03(1) - Stays - directors**

An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

**[...]**

**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.

**11.2(3) Priority - other orders**

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.

**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 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.

[...]

**11.7(1) Court to appoint monitor**

When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

**(2) Restrictions on who may be monitor**

Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

[...]

**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.

**(2) Priority**

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

**(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.

**(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.

**11.52(1) Court may order security or charge to cover certain costs**

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 a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

**(2) Priority**

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

**[...]**

**36(1) Restriction on disposition of business assets**

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.

**(2) Notice to creditors**

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.

**(3) Factors to be considered**

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.

**(4) Additional factors — related persons**

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.

**(5) Related persons**

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).

**(6) Assets may be disposed of free and clear**

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.

**(7) Restriction — employers**

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.

Court File No. 16-11419-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 2473304 ONTARIO INC.

(the "Applicant")

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**[COMMERCIAL LIST]**

**Proceedings commenced in Toronto**

# FACTUM OF THE APPLICANT
**(Initial Application returnable June 7, 2016)**
**(Motion for Approval of Agency Agreement returnable June 13, 2016)**


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