*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERICAL LIST)**

Estate/Court File No. 31-2363758

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JONES CANADA, INC., A CORPORATION WITH A HEAD OFFICE IN THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO**

**Applicant**

Estate/Court File No. 31-2363759

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF NINE WEST CANADA LP, A PARTNERSHIP WITH A HEAD OFFICE IN THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO**

**Applicant**

# FACTUM OF THE APPLICANTS
**(Approval of the Liquidation Process and Administration Order)**

April 9, 2018


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## PART I - INTRODUCTION

1. On April 6, 2018, Nine West Canada LP ("**NW Canada LP**") and Jones Canada, Inc. ("**Jones Canada**", and together with NW Canada LP, the "**NW Canada Entities**" or the "**Applicants**") each filed a Notice of Intention to File a Proposal ("**NOI**") under the *Bankruptcy and Insolvency Act*, R.S.C. 1983, c B-3, as amended (the "**BIA**"). Richter Advisory Group Inc. was appointed proposal trustee of the NW Canada Entities (the "**Proposal Trustee**").

2. The NW Canada Entities' U.S. parent companies (collectively, the "**NW U.S. Entities**") also filed for protection under Chapter 11 of the U.S. Bankruptcy Code on April 6, 2018 (the "**Chapter 11 Proceedings**").

> Affidavit of Ralph Schipani sworn on April 6, 2018 (the "**Schipani Affidavit**") at para. 4; Motion Record of the Applicants, Tab 3.[1]

3. The Proposal Proceedings and the Chapter 11 Proceedings are independent processes. The NW Canada Entities are not applicants in the Chapter 11 Proceedings, and no recognition

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[1] All capitalized terms not otherwise defined herein are defined in the Schipani Affidavit.

orders are being sought in Canada with respect to the Chapter 11 Proceedings. As discussed further below, the Canadian NW Entities are not borrowers or guarantors of the debt of the NW U.S. Entities, and are not borrowers under the U.S. debtor-in-possession facility and no relief is being sought in the Chapter 11 Proceedings with respect to the NW Canada Entities.

Schipani Affidavit at para. 5; Motion Record of the Applicants, Tab 3.

4. The U.S. and Canadian insolvency proceedings were caused by the consistent decline in the financial performance of the NW Entities over the last several years. This decline was caused by a confluence of factors, including unfavourable retail market trends, changing consumer preferences, and inventory and design choices that did not align with consumer preferences. As outlined further below, attempts to revitalize the Nine West brand and associated brands have failed in both Canada and the U.S.

5. The Canadian operations have been financially dependent on and supported by the NW U.S. Entities as, *inter alia*, lender, licensor, inventory supplier and shared services provider. With the commencement of the Chapter 11 Proceedings, the NW Canada Entities have lost access to critical funding without which they are unable to continue operations. The Chapter 11 Proceedings contemplate a sale of the NW U.S. Entities' intellectual property and certain working capital assets. The extensive marketing process undertaken by the NW U.S. Entities did not generate any interest in the NW Canada Entities' assets. In the circumstances, the NW Canada Entities believe that the best way to maximize recoveries for their stakeholders is through a supervised and orderly liquidation process and wind-down of their retail operations.

6. This motion is brought by the Applicants seeking the following orders:

a) the Liquidation Process Order, seeking, among other things, approval of the Consulting Agreement between the NW Canada Entities and the Consultant with

respect to a liquidation sale of the Applicants' inventory and approving the Sale Guidelines; and

b) the Administration Order, among other things, extending the Proposal Period, approving the administrative and substantive consolidation of the NW Canada Entities' Proposal Proceedings, and approving:

   a. the D&O Charge (as defined and described below) in the amount of $700,000[2];

   b. the KERA and the KERA Charge in the amount of $100,000; and

   c. the Administration Charge in the amount of $750,000; and

ii. sealing certain materials.

## PART II - THE FACTS

### A. Overview of the NW Canada Entities' Operations

7. The NW Canada Entities are wholesalers and retailers of Nine West brand footwear and accessories in Canada. Pursuant to a series of distribution agreements, the NW Canada Entities are also the exclusive wholesalers of various brands of women's jewellery, handbags and women's footwear in Canada.

Schipani Affidavit at para. 6; Motion Record of the Applicants, Tab 3.

8. Since their founding in 1970, the NW U.S. Entities have acquired numerous licenses or trademarks for several well-known brands and currently operate several major business lines. The NW U.S. Entities licence their brands to U.S.-based and international licensees in over 60 countries, including Canada.

Schipani Affidavit at paras. 16-7; Motion Record of the Applicants, Tab 3.

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[2] All references to currency in this factum are to Canadian dollars unless stated otherwise.

9. The NW Canada Entities purchase the inventory needed for their operations from the NW U.S. Entities, who source the merchandise from third party manufacturers. The NW Canada Entities sell their inventory from 35 retail locations they operate across Canada, of which 22 are located in Ontario. Approximately 75% of the NW Canada Entities' total revenues are derived from their retail operations.

10. In addition, pursuant to a series of Distribution and Buying Agent Agreements, the NW Canada Entities are wholesalers of various brands of women's jewellery, handbags and footwear in Canada. The NW Canada Entities sell this merchandise on a wholesale basis to various department stores and other retail outlets. Approximately 25% of the NW Canada Entities' total revenues is derived from their wholesale operations.

Schipani Affidavit at paras. 17-18, 20; Motion Record of the Applicants, Tab 3.

**B. The NW Entities' Financial Difficulties**

*The NW Canada Entities' Financial Difficulties*

11. The Canadian operations of Nine West have experienced financial difficulties historically. Prior to 2015, the Nine West brand was sold through Sherson, which entered into NOI Proceedings in 2015. At that time, the NW U.S. Entities were Sherson's licensor and largest creditor. To avoid receivership proceedings and the termination of Canadian operations in 2015, the NW U.S. Entities acquired the assets of Sherson and continued the Canadian retail and wholesale operations through the NW Canada Entities.

12. The investment hypothesis behind the acquisition in 2015 was initially to protect and maintain the Canadian operations and then attempt to revitalize the Nine West brand in Canada, but this did not happen. The NW Canada Entities experienced declining financial performance since acquiring the Canadian Nine West business in 2015. Despite the well-known

and respected nature of the Nine West brand and the other brands sold by the NW Canada Entities through retail and wholesale channels, a confluence of factors have adversely affected the NW Canada Entities' financial position. First, the NW Canada Entities, like the NW U.S. Entities, have faced unfavourable trends in the retail market, such as a change in consumer preferences away from branded apparel and decreased foot traffic due to a rising preference for online shopping. Second, the NW U.S. Entities made unfavourable inventory and design choices that did not align with consumer preferences and led to substantial losses in revenue generation from the sale of footwear, which losses were echoed in Canada.

Schipani Affidavit at paras. 13-15, 42; Motion Record of the Applicants, Tab 3.

13. The financial statements show that the NW Canada Entities are insolvent. NW Canada LP's current and capital assets as of December 31, 2017 totalled US $12,088,529 (CAD $15,175,336) consisting of cash, accounts receivable, inventory, office supplies and equipment. NW Canada LP had total liabilities of US $17,893,085 (CAD $22,462,089) as at this same date. Jones Canada carries on no other business aside from being the general partner of NW Canada LP and has no significant assets or liabilities aside from those arising as a result of it being a general partner of NW Canada LP.

Schipani Affidavit at para. 45; Motion Record of the Applicants, Tab 3; Financial Statements, Motion Record of the Applicants, Tab 3I.

*The NW U.S. Entities' Financial Difficulties*

14. In light of the unfavourable retail market, changing consumer preferences and design choices inconsistent with those preferences, the NW U.S. Entities experienced significant losses in the operations related to their footwear and handbag businesses for the last three years and accumulated an overleveraged balance sheet with approximately US$1.6 billion in funded debt obligations. As noted, on April 6, 2018, the NW U.S. Entities filed for protection under Chapter

11 of the U.S. Bankruptcy Code. In conjunction with the Chapter 11 Proceedings, the NW U.S. Entities have ceased all retail operations and all store locations were closed prior to the commencement of the US proceedings. The NW U.S. Entities' e-commerce and wholesale operations will continue as the stalking horse process described below is implemented.

Schipani Affidavit at paras. 49-50; Motion Record of the Applicants, Tab 3.

*U.S. Sale and Marketing Process*

15. As described in greater detail in the Schipani Affidavit, prior to the filing, the NW U.S. Entities undertook a comprehensive marketing process of their Nine West and Bandolino brands to potential strategic and financial buyers. In the spring of 2017, the NW U.S. Entities retained Consensus to assist in marketing the Nine West brand. The NW U.S. Entities ultimately reached out to more than 50 strategic buyers regarding the potential sale of the Nine West brand. Twenty of these buyers either executed confidentiality agreements or otherwise participated in additional diligence under another party's confidentiality agreements.

Schipani Affidavit at para. 51; Motion Record of the Applicants, Tab 3.

16. On January 17, 2018 the NW U.S. Entities agreed to a letter of intent with ABG, with Marc Fisher Footwear as ABG's operating partner, and continued negotiations which ultimately resulted in the Stalking Horse APA among the NW U.S. Entities, ABG and Marc Fisher, which provides for the sale of Nine West and Bandolino brands for a total of USD $200 million. The Stalking Horse APA sets a minimum price for the sale of the purchased assets, ensures the continued viability of the Nine West brand to consumers, and allows the NW U.S. Entities to leave the footwear business.

17. Contemporaneously with the commencement of the Chapter 11 Proceedings, the NW U.S. Entities are seeking court approval of bidding procedures related to the Stalking Horse

APA. The bidding procedures being contemplated in the First Day motions contemplate a bidding procedure period of approximately 5 weeks; if an auction is required, it would be held approximately 4 days thereafter and a sale hearing thereafter to approve the winning bid.

Schipani Affidavit at paras. 52, 55; Motion Record of the Applicants, Tab 3.

18. Following the completion of the sale of the Nine West brands in the U.S., the Chapter 11 Proceedings will be focused on the execution of a turnaround strategy to enable the NW U.S. Entities to focus their operations exclusively on their wholesale business with respect to their jeanswear, women's apparel and fashion jewelry business lines.

19. During the extensive marketing process undertaken in the U.S., no party expressed any interest in the Canadian operations or in continuing to license the NW brands to the NW Canada Entities. ABG expressly excluded the Canadian assets and liabilities from the Stalking Horse APA and is not prepared to license the brands to the NW Canada Entities once it acquires the trademarks. Similarly, the Stalking Horse APA does not provide for ongoing wholesale operations in Canada. If an alternative buyer is identified in the Chapter 11 Proceedings, the alternative buyer has the right to determine whether it wants to continue wholesale operations in Canada.

Schipani Affidavit at paras. 53, 56; Motion Record of the Applicants, Tab 3.

**C. The NW Canada Entities' Dependence to the NW U.S. Entities**

20. The NW U.S. Entities are the largest creditors of the NW Canada Entities. The NW Canada Entities are tied to and dependent on the NW U.S. Entities in a number of ways including: the initial acquisition of the Canadian operations from Sherson, the licensing of the Nine West and other brands, inventory purchasing and supply, and shared administrative services, and, of critical importance, the financing of the Canadian operations.

21. The NW Canada Entities do not have separate third party financing. The funding of the Canadian operations has been provided since inception in 2015 through intercompany advances from the U.S., in large part on an unsecured, interest free basis, without the lending restrictions which would have been imposed by a third party lender. Intercompany advances from October 2017 have been provided on a secured basis. As at the time of the commencement of the Proposal Proceedings, the NW Canada Entities were indebted to the NW U.S. Entities (not including certain March 2018 advances) for a total of US $14,048,000.

Schipani Affidavit at para. 37; Motion Record of the Applicants, Tab 3.

22. Historically the Canadian operations would make periodic repayments in respect of the intercompany funding. All repayments of intercompany amounts, other than those authorized by the Proposal Trustee, have ceased at this time. By financing and permitting the funds to remain within the Canadian operations, the Applicants are not required to seek formal and often expensive DIP financing to fund the Proposal Proceedings.

Schipani Affidavit at para. 37; Motion Record of the Applicants, Tab 3.

**D. The NW Canada Entities' Winding Down Strategy**

23. With the commencement of the Chapter 11 Proceedings, the NW Canada Entities have lost access to critical funding without which they are unable to continue operations. The extensive marketing process undertaken by the NW U.S. Entities did not generate any interest in the NW Canada Entities' assets and the current proposed buyer of the Nine West trademarks is not prepared to license those brands to NW Canada Entities once it acquires the trademarks. In the circumstances, the NW Canada Entities, together with Richter as Financial Advisor and anticipating Richter's role as Proposal Trustee, determined that the manner in which to

maximize the recovery on existing retail operations was through the appointment of a liquidator to assist with the orderly wind down of the retail operations.

Schipani Affidavit at paras. 63-64; Motion Record of the Applicants, Tab 3.

24. It is currently contemplated that the Canadian wholesale operations will also be winding down as part of the Proposal Proceedings and the Chapter 11 Proceedings. A final decision relating to the Canadian wholesale operations is not known at this time but will become definitive upon the completion of the U.S. sales process to be completed within the Chapter 11 Proceedings. In the interim, in order to monetize the current value of the NW Canada Entities for existing creditors, the inventory previously purchased for wholesale distribution will be monetized either through Canadian wholesale channels or through liquidation via retail distribution channels with the assistance of the Consultant.

**E. Consulting Agreement and Sale Guidelines**

*Liquidator Selection Process*

25. On March 12, 2018, Richter commenced a RFP process on behalf of the NW Canada Entities to solicit proposals from third party liquidators to assist the NW Canada Entities in the orderly liquidation of their inventory, FF&E and other store equipment through the conduct of the Liquidation Sale. The RFP invited each of the liquidation firms to submit a single proposal with: (i) an offer to assist the NW Canada Entities in their disposition of the inventory and FF&E located in the closing locations; (ii) anticipated gross recovery identified for the liquidation of inventory and FF&E (iii) a proposal in the form of the draft Consulting Agreement, with any changes to the Consulting Agreement highlighted.

Schipani Affidavit at paras. 66-67; Motion Record of the Applicants, Tab 3.

26. Richter contacted approximately seven potential liquidators with prior experience handling large-scale liquidations, including large-scale liquidations in Canada, informing them of the RFP process and providing them with a form of NDA. Subsequently, seven parties executed NDAs and were provided with access to a virtual data room which contained relevant financial and operation data concerning the inventory and FF&E, as well as a draft of the Consulting Agreement.

27. Three proposals were received on March 26, 2018. Richter prepared a Comparative Analysis. Following consideration of the received proposals, the NW Canada Entities, in consultation with Richter, selected the bid submitted by SB360 Capital Partners, LLC as the best and successful bid. The Consultant has extensive experience conducting retail liquidations, including inventory dispositions for a wide variety of former retailers.

> Schipani Affidavit at paras. 68-69; Motion Record of the Applicants, Tab 3; Comparative Analysis, First Report, Confidential Appendix 1.

*Consulting Agreement*

28. On April 3, 2018, the Consultant and the NW Canada Entities agreed to the final form of the Consulting Agreement, which is conditional on the issuance of the Liquidation Process Order. The proposed Liquidation Sale under the Consulting Agreement will be conducted in accordance with the Sale Guidelines, and is contemplated to commence between April 14th -21st and will conclude no later than June 30, 2018 or such other dates agreed to by the NW Canada Entities and the Consultant.

29. The Consulting Agreement provides, *inter alia,* that: the Consultant will act as an exclusive consultant for the purpose of advising the NW Canada Entities with respect to the sale of the inventory and FF&E located at the retail store locations; the Consultant will be paid a fee equal to 1.25% of the gross proceeds of the sale of inventory and 15% of the gross receipts

(net of sales tax) from all sales or other dispositions of FF&E; and the NW Canada Entities are responsible for all expenses incurred in connection with the sale of inventory and FF&E at the retail locations, including supervisor costs and advertising and sign expenses, and reimbursement of the Consultant's out of pocket incurred in connection with the sale or disposition of the FF&E, all such expenses being subject to a budget which has been agreed upon by the NW Canada Entities and the Consultant.

Schipani Affidavit at paras. 71-75; Motion Record of the Applicants, Tab 3; Consulting Agreement, Motion Record of the Applicants, Tab 3L.

## PART III - ISSUES

30. The issues on this motion are whether Court should:

(a) approve the Consulting Agreement and the liquidation to be carried out pursuant to the Sale Guidelines;

(b) approve the KERA and the KERA Charge;

(c) approve the D & O Charge and the Administration Charge;

(d) approve the consolidation of the Proposal Proceedings;

(e) extend the Proposal Period to June 20, 2018; and

(f) seal the Confidential Appendices to the First Report.

## PART IV - LAW AND ARGUMENT

### A. The Proposed Liquidation, Consulting Agreement and Sale Guidelines Should be Approved

#### *I. Proposed Liquidation Should be Approved*

31. As stated above, with the commencement of the Chapter 11 Proceedings, the NW Canada Entities have lost access to critical funding without which they are unable to continue operations. There is no interest in the Canadian operations as a going concern and conducting

an orderly liquidation of inventory and winding up of operations is the only option to maximize value for the NW Canada Entities' stakeholders.

32. The NW Canada Entities, together with their advisors, have also considered the potential value of seeking to market the real estate leases and have determined that the potential of canvasing the market for recovery from such locations does not warrant the extension to the Proposal Proceedings for purposes of these efforts and/or the potential disruption with their landlords.

33. The NW Canada Entities believe that engaging a professional liquidator to undertake a sale of the inventory and FF&E in the closing retail locations will produce better results for the NW Canada Entities than an attempt to sell such inventory and FF&E without professional assistance.

34. As debtors in possession, the NW Canada Entities will carry out the orderly wind-down of their business, under the oversight of the Court and the Proposal Trustee, in the interest of maximizing recoveries for all their stakeholders. The Sale Guidelines contemplate a short liquidation period in order to maximize stakeholder recovery and minimize cost and impact on landlords.

35. As recognized by this Court, liquidation processes carried out by debtors in the context of insolvency proceedings work to the benefit of all stakeholders by permitting the controlled, fair and orderly wind-down of operations. In the *Target Canada Co.* insolvency proceeding, this Court approved a debtor-controlled liquidation process over the initial objections of landlords, noting that the use of a restructuring process to downsize or wind-down a debtor company's business is entirely appropriate.

> *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 31-35, Applicants' Book of Authorities ("**BOA**"), Tab 1.

36. Pursuant to section 65.13 of the BIA, which is analogous to section 36 of the CCAA relied upon by Justice Morawetz in the *Target Canada Co.* insolvency proceeding, the Court is authorized to approve a sale of assets in a proposal proceeding. Subsection 65.13(4) of the BIA sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business:

> *(4) 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 trustee approved the process leading to the proposed sale or disposition;*
>
> *(c) whether the trustee 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.*
>
> BIA, s. 65.13(4).

37. In the case at bar, the proposed liquidation:

(a) is the only viable option, as a result of the Applicants' poor financial performance over the last three years, their liquidity crisis and inability to access additional funding from the N.W. U.S. Entities, and the lack of interest in the Canadian operations following the comprehensive sale and marketing process undertaken in the U.S.;

(b) was the result of a competitive RFP process run by the Applicants with the assistance of its financial advisor Richter with arm's length entities;

(c) will result in the greatest realization on the inventory and FF&E, and the expected payments to creditors under the liquidation are likely to exceed recoveries under a sale of assets in a bankruptcy; and

(d) is consistent with the strategy and provisions employed in other recent retail cases including *Target Canada Co.* and *Danier Leather*.

Schipani Affidavit at paras. 53, 57, 63-65; Motion Record of the Applicants, Tab 3.

First Report at para. 51.

*Target Canada Co. (Re)*, 2015 ONSC 846, BOA, Tab 2.

*Danier Leather Inc. (Re)*, 2016 ONSC 1044 [***"Danier"***], BOA, Tab 3.

### *II. The Proposed Consulting Agreement Should be Approved*

38. Orders approving agreements with liquidation consultants are frequently made in insolvency proceedings, including under the BIA. In determining whether to approve such an agreement Courts have considered the following factors, among others:

(e) Whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(f) Whether the consultant has industry experience and/or familiarity with the business of the debtor; and

(g) Whether the fee arrangement with consultant is reasonable in the circumstances.

*Danier* at para. 47, BOA, Tab 3.

*Target Canada Co. (Re)*, 2015 ONSC 846, BOA, Tab 2.

39. In the case at bar, the following factors militate in favour of the approval of the Consulting Agreement:

(a) The Consultant's services are integral to the effective and efficient sale of the Applicants' inventory and FF&E and the maximization of value for all of the Applicants' stakeholders;

(b) The Consulting Agreement was the result of a competitive RFP process with arm's length entities and was the best bid received as evidenced in the Comparative Analysis;

(c) The Consultant has extensive experience conducting retail liquidations, including inventory dispositions for a wide variety of former retailers, and is experienced in dealing with the type of landlord and customer concerns that may arise in the type of process contemplated in the liquidation; and

(d) The board of directors of the Applicants has determined in its business judgment that the Consulting Agreement is in the best interests of the Applicants and their creditors.

Schipani Affidavit at paras.76-80; Motion Record of the Applicants, Tab 3.

40. The Consultant was chosen by the Applicants in consultation with their legal and financial advisors, both of which are experienced with agreements similar in nature to the Consulting Agreement. This Court has previously supported sales processes carried out by financial advisors who were subsequently appointed as officers of the court, where the evidence shows that the sale transaction being presented to the Court is the best available option in the circumstances and a further sales process would likely result in a greater erosion of value.

*In the Matter of the Notice of Intention to Make a Proposal of Karrys Bros. Limited, Karrys Software Limited and Karbro Transport Inc.*, Court File No. 32-1942339/1942340/1942341, Order and Endorsement of Justice Penny, dated December 24, 2014, ["***Karrys***"], BOA, Tab 4.

41. The fee under the Consulting Agreement is reasonable in the circumstances. Proper incentives are a factor in considering whether a fee arrangement is appropriate. The fee for the Consultant is commission based on actual results achieved by the Consultant. Such a fee

arrangement properly incentives the Consultant and aligns the interest of the Consultant with the NW Canada Entities' creditors.

*Danier* at paras. 50, 52, BOA, Tab 3.

42. The Proposal Trustee has noted that "the process that resulted in execution of the Consulting Agreement was reasonable in the circumstances." The Proposal Trustee (in its capacity as financial advisor, participated in the RFP process and supports the ultimate selection.

First Report at para. 51.

### *III. The Sale Guidelines Should be Approved*

43. The Applicants are also seeking approval of the Sale Guidelines with respect to the conduct of their liquidation. The Sale Guidelines were drafted with the assistance of the Richter and the Consultant, both of whom have significant experience in the area of retail liquidations. The Applicants also made reference to sale guidelines approved by this Court in other Canadian retail insolvencies such as *Grafton-Fraser Inc., HMV Canada Inc. and Strellmax Ltd.*

*In the Matter of a Plan of Compromise or Arrangement of Grafton-Fraser Inc.*, Court File No. CV-17-11677-00CL, Order of Justice Wilton-Siegel dated January 30, 2017, BOA, Tab 5.

*HUK 10 Limited v. HMV Canada Inc.*, Court File No. CV-17-11674-00CL, Order of Regional Senior Justice Morawetz dated January 27, 2017, BOA, Tab 6.

*Strellson AG v. Strellmax Ltd.*, Court File No. CV-17-11864-00CL, Order of Justice Conway dated July 7, 2017, BOA, Tab 7.

## B. The KERA and the KERA Charge Should be Approved

44. In an attempt to ensure the continued participation of employees identified as key employees during the Proposal Proceedings, the Applicants are seeking approval of the KERA in the amount of up to $100,000. The KERA uses retention bonuses to incentivize certain key

employees to continue working during the wind-down of the Applicants' operations and the completion of the liquidation process.

> Schipani Affidavit at paras. 98-90; Motion Record of the Applicants, Tab 3; KERA, First Report, Confidential Appendix 2.

45. In order to secure their obligations under the KERA, the Applicants are seeking the KERA Charge on the Property in the amount of up to $100,000.

46. Courts in both BIA and CCAA proceedings have regularly recognized the importance of retaining employees in the context of insolvency proceedings. In proposal proceedings under the BIA, courts have approved key employee retention plans and granted charges in favour of the beneficiaries of those plans.

> *Re Grant Forest Products Inc.*, [2009] O.J. No. 3344 [***"Grant Forest"***], BOA, Tab 8.
>
> *In the matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership,* Court File No. 32-1896275 [***"XS Cargo"***], Endorsement of Justice Penny, dated August 6, 2014, BOA, Tab 9.

47. In *Re Grant Forest Products*, the Court outlined the factors to be considered in approved retention plans as follows: (i) whether the Monitor supported the key employee retention agreement and charge, (ii) whether the beneficiaries of the key employee retention agreement were likely to consider other employment opportunities if the key employee retention agreement were not approved, (iii) whether the employees subject to the key employee retention agreement were considered important to the management and operations of the debtor company and whether replacements could be found in a timely manner should they choose to terminate their employment, and (iv) the business judgment of the debtor's board of directors. This Court has applied similar factors to prove employee retention plans in BIA proposal proceedings.

> *Grant Forest, supra*, BOA, Tab 8.

*In the Matter of the Notice of Intention to Make a Proposal of Shop.ca Network Inc.*, Court File No. 31-2131992, Order and Endorsement of Justice Penny dated June 9, 2016, BOA, Tab 10.

48. The factors set out in *Grant Forest* are met in the circumstances of this case: the Proposal Trustee supports the KERA and the KERA Charge, there is significant concern that employees would leave without the additional comfort of the KERA and the KERA Charge, the employees are critical to the successful wind-down of operations and liquidation process, and it would be difficult to replace them in the circumstances of the Applicants' Proposal Proceedings.

Schipani Affidavit at paras. 89-90, 93-94 Motion Record of the Applicants, Tab 3.

**C. The D&O Charge Should be Approved**

49. To ensure that the liquidation is carried out successfully and value is maximized for the NW Canada Entities' creditors, the Applicants require the continued participation of their respective directors and officers. As a group, the Applicants' directors and officers have specialized expertise or relationships with the Applicants' suppliers, employees and other stakeholders that cannot be replicated or replaced.

50. The Applicants' directors and officers are concerned about the possibility of incurring personal liability in the context of the Proposal Proceedings. The directors and officers have indicated that, due to the potentially significant personal exposure going forward, they cannot continue their service with the Applicants unless they obtain the D&O Charge in the amount of $700,000.

Schipani Affidavit at para. 83, Motion Record of the Applicants, Tab 3.

51. The granting of directors' charges on a priority basis has been codified in section 64.1 of the BIA. In *Colossus Minerals Inc. (Re)*, Justice H.J. Wilton-Siegel approved the request for a directors' and officers' charge pursuant to section 64.1 of the BIA, and in so doing, highlighted

the fact that the continued involvement of the remaining directors and officers was critical to the operations of the company during its BIA proposal proceedings and during the SISP initiated by the company.

BIA, s. 64.1.

*Colossus Minerals Inc. (Re)*, 2014 ONSC 514 [***"Colossus"***], paras. 16 -21, BOA, Tab 11.

*Danier* at para. 65, BOA, Tab 3.

52. In the present case, in order to continue to successfully carry out the liquidation and complete the wind-down of operations, the Applicants require the committed involvement and continued participation of their directors and/or officers. The D&O insurance contains certain limits and exclusions that create uncertainty as to coverage of all potential claims. Furthermore, the proposed Order provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified. Lastly, the amount of the D&O Charge takes into account a number of statutory obligations for which the directors and officers are liable if the Applicants fail to meet those obligations. However, it is expected that all of those amounts will be paid in the ordinary course and it is unlikely that the D&O Charge will be called upon. The Proposal Trustee supports the granting of the D&O Charge.

Schipani Affidavit at paras 84-85, Motion Record of the Applicants, Tab 3.

First Report at paras. 74-78.

**D. The Administration Charge Should be Approved**

53. The Applicants seek the Administrative Charge in the maximum amount of $750,000 over the Property to secure the fees and disbursements of counsel to the Applicants and the

Proposal Trustee and its counsel. Pursuant to section 64.2 of the BIA, the Court is authorized to grant a charge on property of a debtor in proposal proceedings to secure professional fees.

BIA, s. 64.2

Schipani Affidavit at paras. 86-88, Motion Record of the Applicants, Tab 3.

54. Administrative charges are routinely granted in a number of proceedings under the BIA. In this case, the granting of the Administration Charge is necessary in order to complete the liquidation and successful wind-down of the Applicants' operations. The Proposal Trustee supports the granting of the Administration Charge and is of the view that the quantum of the charge is reasonable.

*Colossus* at paras. 11-15; BOA, Tab 11.

*Danier* at para. 47, BOA, Tab 3 .

First Report at paras. 72-73.

55. The D&O Charge, the Administration Charge and the KERA Charge are to rank in priority to all other charges other than those of secured creditors without notice of this motion.

Schipani Affidavit at para. 92, Motion Record of the Applicants, Tab 3.

**E. The Confidential Appendices Should be Sealed**

56. The Applicants request that the Court seal Confidential Appendices "1" and "2" to the First Report, which contain an unreacted copy of the Comparative Analysis and the KERA, respectively.

First Report at para. 48.

57. Pursuant to the Ontario *Courts of Justice Act*, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

*Courts of Justice Act*, R.S.O. 1990, Chapter C. 43, s. 137(2).

58. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court set out the test for when a sealing order is appropriate: (i) when the order is necessary in order to prevent serious risk to an important interest, including a commercial interest in the context of litigation because alternative measures will not prevent the risk, and (ii) where the salutary effects of the order outweigh the deleterious effects.

*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53, BOA, Tab 12.

59. This Court has also made clear that sealing of confidential information is only to be requested and granted where necessary and only to the extent necessary.

*Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.*, 2018 ONSC 1591 at paras. 13-21, BOA, Tab 13.

60. In this case, the Comparative Analysis prepared by the Proposal Trustee details the Proposal Trustee's assessment of the strengths and weaknesses of the three liquidation proposals received. Protecting the disclosure of sensitive commercial information of this nature, the disclosure of which will cause harm to the bidders involved in the liquidation process, the Applicants and their stakeholders if the liquidation is not completed, is an important commercial interest that should be protected.

*Danier* at paras. 79-86, BOA, Tab 3.

First Report, at para. 48.

61. The KERA contains sensitive personal information regarding the key employees. In other proposal proceedings under the BIA and in CCAA proceedings, orders sealing

confidential supplements relating to key employee retention programs containing sensitive personal and compensation information have been granted by this Court.

> *Canwest Global Communications Corp (Re)*, 59 C.B.R. (5th) 72 [***"Canwest Publishing"***], at para. 52, BOA, Tab 14.
>
> *XS Cargo,* BOA, Tab 9.
>
> *Danier* at para. 83, BOA, Tab 3.

62. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which will cause harm to both the Applicants and the KERA participants, is an important commercial interest that should be protected. Moreover, the key employees have a reasonable expectation that their name and salary information will be kept confidential.

> First Report, at para. 48.

63. The salutary effects of sealing the Confidential Appendices, namely the protection of commercially sensitive information that could negatively affect the Applicants, their stakeholders and the liquidation bidders if disclosed and the protection of the key employee's expectation of confidentiality outweigh any deleterious effect of restricting the accessibility of court proceedings. The Applicants are only seeking to seal those materials that are necessary to be sealed and only to the extent necessary. The Proposal Trustee supports the sealing of the Confidential Appendices for substantially the reasons discussed above.

## F. Administrative and Substantive Consolidation of the Proposal Proceedings Should be Approved

64. In order to maximize efficiency and effectiveness of the Proposal Proceedings, the Applicants are seeking an order approving the administrative and substantive consolidation of their Proposal Proceedings.

65. Bankruptcy proceedings operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Court has jurisdiction under section 183 of the BIA to substantively consolidate bankrupt estates and proposal proceedings. As stated by this Court, closely-related bankruptcy proceedings ought to be consolidated.

BIA, s. 183.

*Electro Sonic Inc. (Re)*, 2014 ONSC 942 (CanLII), at para 4, BOA, Tab 15.

*Re Wasaya Airways Limited Partnership,* 2016 ONSC 5600 at paras. 35-36, BOA, Tab 16.

*Re Ornge Global GP Inc.,* 2013 ONSC 4518 at paras. 13-14, BOA, Tab 17.

66. The operations of the Applicants are closely intertwined such that it would be difficult to disentangle their affairs. The NW Canada Entities share common management and administrative support. The proposed liquidation involves the sale of all of the property of the NW Canada Entities. Jones Canada, the general partner of NW Canada LP, does not carry on business independently and has no significant assets or liabilities apart from those incurred in its role as the general partner of NW Canada LP.

Schipani Affidavit at para. 96, Motion Record of the Applicants, Tab 3.

67. The administrative and substantive consolidation of the NW Canada Entities is appropriate, as it would allow the Proposal Trustee to avoid performing, *inter alia*, the following separate actions in respect of each of Jones Canada and NW Canada LP, thereby reducing certain administrative expenses:

(a) issuing separate reports of the Proposal Trustee;

(b) making, filing, advertising and distribution of all filings and notices required under the BIA in duplicate;

(c) opening separate bank accounts;

(d) conducting separate meetings for the voting on a proposal and determining and advising the creditors of Jones Canada and NW Canada LP in the making of distributions; and

(e) conducting in duplicate all such other administrative duties and responsibilities to be carried out by a Proposal Trustee in the administration of proposal proceedings under the BIA.

68. The largest creditors of the NW Canada Entities, NW Management and NW Holdings, have no objections to the proposed consolidation. The proposed consolidation will not result in any prejudice to the creditors of the two entities.

Schipani Affidavit at paras. 97-99, Motion Record of the Applicants, Tab 3.

69. Consolidation of the Proposal Proceedings avoids duplication of efforts to file and maintain two separate sets of motion materials over the course of the proposal, which will reduce costs in the proceedings, ultimately for the benefit of the Applicants' creditors.

## G. The Extension of the Proposal Period Should be Granted

70. The initial Proposal Period expires on May 6, 2018. The liquidation process is scheduled to commence between April 14, 2018 and April 21, 2018, and to be completed on June 30, 2018. Accordingly, the Applicants seek this opportunity to extend the Proposal Period by 45 days to permit them to move forward with the liquidation.

BIA, ss. 50.4(8), (9), 69.1.

71. This Court has authority to grant the requested extension under section 50.4(9) of the BIA, which states that such an extension may be granted where the Court is satisfied that the insolvent person has acted, and is acting, in good faith and with due diligence, the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted, and no creditor would be materially prejudiced if the extension were granted.

BIA, s. 50.4(9).

72. In this instance, each of these factors has been met: the Applicants have acted, and continue to act in good faith in pursuing the liquidation and wind-down of operations, the extension will permit the Applicants to make progress towards completing the liquidation and putting together a proposal to present to their creditors, and no creditors will be prejudiced by the requested extension.

*Colossus* at paras. 38-43, BOA, Tab 11.

*Karrys* at paras. 26-28, BOA, Tab 4.

Schipani Affidavit at paras 101-103, Motion Record of the Applicants, Tab 3.

First Report, at paras. 56-57.

73. Further, the cash flow statement prepared by the Applicants with the assistance of the Proposal Trustee indicates that the Applicants have sufficient cash flow to fund their post-filing obligations while the liquidation and wind-down of operations continues through to the proposed extension to June 20, 2018. The Proposal Trustee supports the relief requested and reports that the section 50.4(9) factors appear to be met in this instance.

First Report, at para. 54.

## PART V - ORDER REQUESTED

74. The Applicants request that the Court approve the relief sought as detailed in the Liquidation Process Order and the Administration Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2018.

Lawyers for the Applicants

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

1. *Target Canada Co. (Re)*, 2015 ONSC 303

2. *Target Canada Co. (Re)*, 2015 ONSC 846

3. *Danier Leather Inc. (Re)*, 2016 ONSC 1044

4. *In the Matter of the Notice of Intention to Make a Proposal of Karrys Bros. Limited, Karrys Software Limited and Karbro Transport Inc.*, Court File No. 32-1942339/1942340/194234, Order and Endorsement of Justice Penny, dated December 24, 2014

5. *In the Matter of a Plan of Compromise or Arrangement of Grafton-Fraser Inc.*, Court File No. CV-17-11677-00CL, Order of Justice Wilton-Siegel dated January 30, 2017

6. *HUK 10 Limited v. HMV Canada Inc.*, Court File No. CV-17-11674-00CL, Order of Regional Senior Justice Morawetz dated January 27, 2017

7. *Strellson AG v. Strellmax Ltd.*, Court File No. CV-17-11864-00CL, Order of Justice Conway dated July 7, 2017

8. *Re Grant Forest Products Inc.*, [2009] O.J. No. 3344

9. *In the matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership*, Court File No. 32-1896275, Endorsement of Justice Penny, dated August 6, 2014

10. *In the Matter of the Notice of Intention to Make a Proposal of Shop.ca Network Inc.*, Court File No. 31-2131992, Order and Endorsement of Justice Penny dated June 9, 2016

11. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514

12. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522

13. *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.*, 2018 ONSC 1591

14. *Canwest Global Communications Corp (Re)*, 59 C.B.R. (5th) 72

15. *Electro Sonic Inc. (re)*, 2014 ONSC 9423 (CanLII)

16. *Re Wasayua Airways Limited Partnership*, 2016 ONSCV 5600

17. *Re Ornge Global GP Inc.*, 2013 ONSC 4518

## SCHEDULE "B"
## RELEVANT STATUTES

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

**Extension of time for filing proposal**

**50.4 (9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

**Security or charge relating to director's indemnification**

**64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

**Priority**

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

**Restriction – indemnification insurance**

**(3)** The court may not make the order if in its opinion the person 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.

**Court may order security or charge to cover certain costs**

**64.2 (1)** 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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

**Priority**

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

**Individual**

**(3)** In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

**Restriction on disposition of assets**

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

**Individuals**

**(2)** In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

**Notice to secured creditors**

**(3)** An insolvent person who applies to the court for an authorization shall 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**

**(4)** 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 trustee approved the process leading to the proposed sale or disposition;
>
> (c) whether the trustee 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**

**(5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), 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 insolvent person; 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**

**(6)** For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

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

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

**Assets may be disposed of free and clear**

**(7)** 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 insolvent person 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**

**(8)** The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

**Stay of proceedings — Division I proposals**

**69.1 (1)** Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would

otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

(c) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until

(i) the trustee has been discharged,

(ii) six months have elapsed following court approval of the proposal, or

(iii) the insolvent person becomes bankrupt; and

(d) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until

(iii) the trustee has been discharged,

(iv) six months have elapsed following court approval of the proposal, or

(v) the insolvent person becomes bankrupt.

**Limitation**

**(2)** The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the proposal was filed from dealing with those assets;

(b) unless the secured creditor otherwise agrees, to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before

(i) a notice of intention was filed in respect of the insolvent person under section 50.4, or

(ii) the proposal was filed, if no notice of intention under section 50.4 was filed

from enforcing that security;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 417]

**Limitation**

**(3)** A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the proposal and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

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

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

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

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

establishes a *provincial pension plan* as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

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

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

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

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

**Limitation**

**(4)** If, by virtue of subsection 69(3), the stay provided by paragraph 69(1)(c) or (d) does not apply or terminates, the stay provided by paragraph (1)(c) or (d) of this section does not apply.

**Secured creditors to whom proposal not made**

**(5)** Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a proposal under subsection 62(1) does not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

**Where secured creditors vote against proposal**

**(6)** Subject to sections 79 and 127 to 135 and subsection 248(1), where secured creditors holding a particular class of secured claim vote for the refusal of a proposal, a secured creditor holding a secured claim of that class may henceforth realize or

otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

**Courts vested with jurisdiction**

**183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

**(a)** in the Province of Ontario, the Superior Court of Justice;

**(b)** [Repealed, 2001, c. 4, s. 33]

**(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

**(d)** in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

**(e)** in the Province of Prince Edward Island, the Supreme Court of the Province;

**(f)** in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

**(g)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

**(h)** in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

**Superior Court jurisdiction in the Province of Quebec**

**(1.1)** In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

**Courts of appeal — common law provinces**

**(2)** Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

**Court of Appeal of the Province of Quebec**

**(2.1)** In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

**Supreme Court of Canada**

**(3)** The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

## *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

*General Principle*

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

*Proportionality*

**(1.1)** In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

*Matters Not Provided For*

**(2)** Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

**(3)** REVOKED: O. Reg. 231/13, s. 2.

*"Party and Party" Costs*

**(4)** If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs. O. Reg. 284/01, s. 3.

*"Solicitor and Client" Costs*

**(5) If** a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs. O. Reg. 284/01, s. 3.

**ORDERS ON TERMS**

**1.05** When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

**COURT MAY DISPENSE WITH COMPLIANCE**

**2.**03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

*General Powers of Court*

**3.02 (1)** Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

**(2)** A motion for an order extending time may be made before or after the expiration of the time prescribed.

*Times in Appeals*

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

*Consent in Writing*

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

***Courts of Justice Act*, R.S.O. 1990, c C. 43**

**Documents public**

**137 (1)** On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

**(2)** A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**Court lists public**

**(3)** On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

**Copies**

**(4)** On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF JONES CANADA, INC. AND NINE WEST CANADA LP**

Estate/Court File No. 31-2363758
Estate/Court File No. 31-2363759

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**
Proceeding commenced at Toronto

# FACTUM OF THE APPLICANTS (APPROVAL OF THE LIQUIDATION PROCESS AND ADMINISTRATION ORDER)


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