

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY & INSOLVENCY)
[COMMERCIAL LIST]**

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF 1348441 ONTARIO INC.**

**FACTUM OF
1348441 ONTARIO INC.
(Motion returnable April 22, 2020)**

Date: April 20, 2020

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TAB 1

**ONTARIO
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IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF 1348441 ONTARIO INC.

**FACTUM OF 1348441 ONTARIO INC.
(Motion returnable April 22, 2020)**

I – NATURE OF MOTION

1. On March 26, 2020, 1348441 Ontario Inc. (the “**Debtor**”) filed a Notice of Intention to Make a Proposal (the “**NOI**”) pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BLA**”). Dodick Landau Inc. was named proposal trustee in the Debtor’s proposal proceedings (the “**Proposal Trustee**”).

2. This factum is filed by the Debtor in support of a motion for an order, *inter alia*:
 - (a) authorizing the Debtor to enter into a term sheet (the “**DIP Term Sheet**”) with Gurmej Walia (“**Mr. Walia**” or the “**DIP Lender**”), as lender, approving the DIP Term Sheet and granting the DIP Lender a priority charge on all of the Debtor’s property, assets and undertakings as security for all of the Debtor’s obligations to the DIP Lender under the DIP Term Sheet;

- (b) approving a charge (the “**Administration Charge**”) in an amount not to exceed \$100,000 in favour of the Debtor’s legal counsel, the Proposal Trustee and its legal counsel to secure payment of their reasonable fees and disbursements; and
- (c) granting the Debtor a 45-day extension of time to make a proposal up to and including June 9, 2020.

II – FACTS

The Debtor’ Business & Operations

3. The Debtor is a corporation incorporated pursuant to the laws of the Province of Ontario and has a registered head office in Mississauga, Ontario.

Affidavit of Gurmej Walia, sworn April 17, 2020 (the “**Walia Affidavit**”), Tab 2 Motion Record of the Debtor, Exhibit “B”.

4. The Debtor operates as retailer of storage solutions under the tradename “Solutions Your Organized Living Store” or, colloquially, “Solutions”. It operates out of a head office/distribution centre located at 1775 Sismet Rd in Mississauga, Ontario, which it leases from a related party who owns the building.

Walia Affidavit, Tab 2, Motion Record of the Debtor, p. TAB 2 at paras. 4-5.

5. Until recently, the Debtor operated twelve (12) retail stores throughout Ontario, all but one of which were sublet from a related party who stood as sublandlord.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para 6.

6. As of March 1, 2020, the Debtor had 10 employees working in full-time office, administrative and management positions; and, approximately 150 hourly employees working in part-time retail or warehouse positions. The employees are non-unionized, and there is no employer-sponsored pension plan.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para. 7.

Financial Difficulties

7. The calendar year 2019 was a “down year” for the Debtor, with a decrease in sales of approximately 10% over 2018. This was a result of three principal challenges:

- (a) first, a former senior employee of the Debtor partnered with an investor, using confidential information of the Debtor, and, commencing in 2018, opened up seven (7) competing stores in key markets;
- (b) second, the loss of key supplier relationship; and
- (c) third, although the growth of digital retail did not initially impact the storage solutions market, its effects were felt in 2019 with the result being declining sales.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para. 17.

8. To counter these effects, the Debtor (a) made strategic decisions on staffing and products, (b) initiated a lawsuit against the former senior employer and his investor, which is ongoing, and (c) continued to invest in and evolve its own online retail platform.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para. 18.

9. Each of the above strategies showed promise and the Debtor was seeing improved results at the end of 2019. However, the impact of COVID-19 was too much for the Debtor to manage.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para 19.

10. The effects of COVID-19 were felt before the general business “lock-down”, as foot traffic and sales waned in early February and, of course, all locations are currently shut-down for the foreseeable future. The Debtor does not anticipate opening its retail locations until June 1, 2020.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para. 20.

11. Immediately prior to the filing of the NOI, the Bank of Nova Scotia (“**Scotiabank**”), the Debtor’s senior secured lender, issued demands for repayment and notices under Section 244 of the *BIA* as against the Debtor and all guarantors. The Debtor had previously engaged in discussions with Scotiabank and waived the notice period under the Section 244 notices, on the understanding

that Scotiabank would support the Debtor's efforts to restructure its business. Since filing the NOI, the Debtor has entered into a formal forbearance with Scotiabank to facilitate its restructuring efforts through the NOI period and any proposal.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at para. 12 and Exhibit "E".

12. The Debtor commenced these proceedings in an attempt to restructure its business. The Debtor intends to (a) reduce its physical locations; (b) enhance its digital retail platform; (c) assess its inventory and implement a plan to liquidate the surplus inventory; and, (d) present a proposal to its creditors. In order to accomplish the same, the Debtor requires the statutory protections of the stay of proceedings under the NOI and the relief sought herein.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2 at paras. 23-24.

The DIP Facility and DIP Lender's Charge

13. The Debtor's cash flow statement projects that the Debtor will require additional funds to enable it to carry on business during the restructuring process, fund working capital and the costs of the proposal proceedings. The "high water" mark of such funding requirement is projected to be \$492,398, in week ending May 31, 2020.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2, para. 25 and Exhibit "I".

14. Mr. Walia, in the capacity as the proposed DIP Lender, has offered to make available to the Debtor a debtor-in-possession loan in the maximum amount of \$500,000 (the "**DIP Loan**") pursuant to the terms of the DIP Term Sheet (the "**DIP Term Sheet**").

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2, para. 26 and Exhibit "J".

15. The DIP Term Sheet is conditional on, *inter alia*, the Court granting an order establishing a charge (the "**DIP Lender's Charge**") in favour of the DIP Lender to protect advances made under the DIP Term, which shall rank behind the Administration Charge.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2, para. 27.

Administration Charge

16. In order to protect the fees and expenses of the Debtor's legal counsel, the Proposal Trustee and the Proposal Trustee's legal counsel (collectively, the "**Administration Professionals**") throughout the proposal proceedings, the Debtor seeks the Administration Charge in the amount of \$100,000 on the Debtor's property (the "**Property**"), ranking in priority to claims ranking in priority to all claims and encumbrances, including the DIP Lender's Charge.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2, at para. 29.

17. Each of the Administration Professionals will play a critical role in the Debtor's restructuring and it is unlikely that the Administration Professionals will participate in the restructuring unless the Administration Charge is granted to secure their respective fees and disbursements.

Walia Affidavit, Tab 2, Motion Record of the Debtor, TAB 2, at para. 29.

III - ISSUES

18. The issues on this motion are as follows:

- (a) Should the Court approve the DIP Facility and the DIP Lender's Charge?
- (b) Should the Court approve the Administration Charge?
- (c) Should the Court approve the extension of time for the Debtor to file a proposal?

19. The Debtor respectfully submit that the answer to each of the foregoing questions is - *yes*.

IV – LAW AND ARGUMENT

(a) Discretion to approve the DIP Facility and grant the DIP Lender's Charge

20. The Debtor seeks approval of the DIP Facility and the DIP Lender's Charge, which DIP Lender's Charge would rank ahead of all other charges and security interests except the Administration Charge, subject only to the statutory provisions for priority payment imposed pursuant to the *BIA*.

21. The *BIA* codifies the availability of interim financing during proposal proceedings. Section 50.6 of the *BIA* confers on the Court the statutory jurisdiction to grant the DIP Lender's Charge:

50.6(1) *Interim Financing:* On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

[...]

50.6(3) *Priority:* The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

22. Subsection 50.6(5) of the *BIA* sets out a non-exhaustive list of factors to be considered by the Court in deciding whether to grant the DIP Lender's Charge:

50.6(5) *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 debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

23. In the present case, it is submitted that the Court should approve the DIP Facility together with the DIP Lender's Charge, both of which are essential to provide the Debtor with the financing it requires to continue to operate its business and make a viable proposal to its creditors. The following factors support the granting of the DIP Facility and the DIP Lender's Charge:

- (a) the necessity for the DIP Facility is demonstrated and supported by the Debtor's cash flow projections
- (b) in the absence of a DIP Facility, the Debtor will not be able to continue to carry on business or make a viable proposal to its creditors, and will become bankrupt to the detriment of its stakeholders;
- (c) the availability of the DIP Facility is contingent on this Court issuing an Order approving the DIP Facility and the DIP Lender's Charge to secure any advances made thereunder;
- (d) the Debtor's senior secured creditor supports the DIP Facility and DIP Lender's Charge and none of the Debtor's creditors will be materially prejudiced as a result of the DIP Facility or the DIP Lender's Charge; and
- (e) the Proposal Trustee supports the DIP Facility and the DIP Lender's Charge.

24. Accordingly, the Debtor submits that the Court should exercise its discretion to approve the DIP Facility and grant the DIP Lender's Charge over the Debtor's property.

(b) Discretion to grant Administration Charge

25. The Debtor seeks the Administration Charge to secure the fees and disbursements of the Administration Professionals, whose services are critical to the successful restructuring of the Debtor. The Administration Charge is to rank in priority to all other security interests in the Debtor's Property.

26. Section 64.2 of the *BIA* confers on the Court the statutory jurisdiction to grant the Administration Charge:

64.2(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 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.

64.2(2) Priority: The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

27. It is unlikely that the Administration Professionals will participate in these proceedings without benefit of the Administration Charge to secure their fees and disbursements.

28. The following additional factors support the granting of the Administration Charge:

(a) the legal advice to be provided by the Administration Professionals is essential to the Debtor throughout the proposal proceedings;

(a) the roles of each of the Administration Professionals are distinct and there is no anticipated unwarranted duplication; and

(b) the Administration Charge does not purport to prime any secured party who has not received notice of the Debtor's motion; and

- (c) the Debtor's senior secured creditor supports the Administration Charge and none of the Debtor's creditors will be materially prejudiced as a result of the Administration Charge.

29. Accordingly, the Debtor submits that this is an appropriate circumstance for the Court to exercise its discretion to grant the Administration Charge with priority over pre-existing security interests. Each of the Administration Professionals whose fees and disbursements are to be secured by the Administration Charge have played, and will continue to play, a critical role in these proposal proceedings.

(c) Discretion to extend the time for the Debtor to file a proposal

30. The Debtor seeks an extension of time to file a proposal. The stay of proceedings will expire on April 25, 2020.

31. Subsection 50.4(9) of the *BIA* confers on the Court the statutory jurisdiction to extend the time within which the Debtor may file a proposal to its creditors:

50.4(9) Extension of time for filing proposal: 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.

32. In the present case, it is submitted that the Court should grant an extension of time for the Debtor to file a proposal to and including June 9, 2020, because:

- (a) upon realizing that a formal process would be required to provide a mechanism by which to restructure its affairs, the Debtor has been working with the Proposal Trustee to facilitate these proceedings and work towards formulating a proposal to its creditors;
- (b) the Debtor diligently worked with its senior lender, Scotiabank, and has entered into a forbearance agreement that will help facilitate the Debtor's restructuring efforts through the NOI period and any proposal;
- (c) the Debtor has taken active steps to secure its inventory and identify non-essential retail locations;
- (d) the Debtor has taken steps to address direct and indirect landlords of essential locations;
- (e) the Debtor has secured interim financing the fund these proceedings;
- (f) without the extension, the Debtor will not be in a position to sell its business as a going concern and will become bankrupt to the detriment of its stakeholders;
- (g) none of the Debtor's creditors would be materially prejudiced if the extension being applied for were granted; and
- (h) the extension is supported by the major stakeholders, including the Debtor's senior secured creditors

33. In addition, eliminating a further Court attendance solely to consider an extension will allow the Debtor to preserve capital for these proceedings and its stakeholders. For this reason and those listed above, the Proposal Trustee supports the Debtor's request for an extension.

34. Accordingly, the Debtor submits that the Court should exercise its discretion to grant the Debtor an extension to file a proposal to and including June 9, 2020.

V – ORDER SOUGHT

35. The Debtor seeks an order of the Court:

- (a) authorizing the Debtor to enter into the DIP Term Sheet with the DIP Lender approving the DIP Term Sheet and granting the DIP Lender a priority charge on all

of the Debtor's property, assets and undertakings as security for all of the Debtor's obligations to the DIP Lender under the DIP Term Sheet;

(b) approving the Administration Charge, in an amount not to exceed \$100,000, in favour of the Debtor's legal counsel, the Proposal Trustee and its legal counsel to secure payment of their reasonable fees and disbursements; and

(c) granting the Debtor a 45-day extension of time to make a proposal up to and including June 9, 2020.

All of which is respectfully submitted.

Date: April 20, 2020



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Lawyers for 1348441 Ontario Inc.

TAB 1A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *[nil]*

TAB 1B

SCHEDULE “B”

RELEVANT LEGISLATION

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.

[...]

Order – interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was 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 debtor’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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

[...]

Priority

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

[...]

Factors to be considered

50.6 (5) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[...]

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

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

Bankruptcy and Insolvency General Rules, CRC, c 368

General

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that the procedure is not inconsistent with the Act or these Rules.

Ontario Rules of Civil Procedure, RRO 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.

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1348441 ONTARIO INC.**

Court File No. 32-2634165
Estate File No. 32-2634165

ONTARIO

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Proceedings commenced at Toronto

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