Court File No. _____

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 DEL EQUIPMENT INC.

Applicant

FACTUM OF THE APPLICANT

(CCAA Application returnable October 22, 2019)

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Christopher G. Armstrong LSO# 55148B
carmstrong@goodmans.ca

Andrew Harmes LSO#: 73221A
aharmes@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for Del Equipment Inc.

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PART I – INTRODUCTION

1. Del Equipment Inc. ("**DEL**" or the "**Company**"), a leading Canadian truck body and equipment "up-fitter" that engineers, designs, manufactures and sells special truck bodies, attachments, equipment and work-ready vehicles, brings this application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") seeking an initial order (the "**Initial Order**").[1]

2. DEL is initiating these CCAA proceedings to, among other things, provide the Company with the time and stability to continue restructuring efforts and implement a sale and investment solicitation process (the "**Sale Process**") to pursue a going-concern solution that maximizes the value of its business for the benefit of stakeholders, obtain DIP Financing (as defined and described below) to fund the Sale Process and the Company's working capital requirements while pursuing restructuring efforts, and provide a forum to expeditiously resolve the Payment Dispute (as defined and described below) to the extent it cannot be resolved consensually in the near-term.

PART II – OVERVIEW

3. DEL is a family-owned OEM-approved vehicle up-fitter which, together with its predecessors, has been operating for more than 70 years. DEL's primary business consists of the design, manufacture and sale of special truck bodies, attachments, and equipment, which it installs onto truck chassis supplied by original equipment manufacturer ("**OEM**") partners, including General

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[1] Capitalized terms used but not defined herein have the meaning given to such terms in the Affidavit of Douglas Lucky sworn October 20, 2019 (the "**Initial Affidavit**"). Unless otherwise stated, all monetary amounts are expressed in Canadian dollars.

Motors of Canada Company ("**GM**") and Ford Motor Company of Canada, Limited ("**Ford**"), to complete work ready vehicles. DEL employs approximately 174 people at its six manufacturing and distribution locations across Canada.

Initial Affidavit at paras. 4-5 and 18-19; Application Record of the Applicant (the "**Application Record**"), Tab 4.

4. In June 2017, an agreement was reached with Gin-Cor Industries Inc. ("**Gin-Cor**"), a company that operates in the same field as DEL, pursuant to which Gin-Cor would acquire a 40% equity interest in and management control of DEL for a nominal sum, with a view to Gin-Cor earning a 100% equity interest upon the achievement of certain profitability related milestones (the "**Gin-Cor Transaction**"). The Gin-Cor Transaction did not produce the hoped-for synergies and DEL suffered increasing losses during the period of Gin-Cor management. In July 2019, Gin-Cor and DEL's majority shareholder, Diesel Equipment Limited ("**Diesel**"), agreed to terminate the Gin-Cor Transaction such that 100% ownership and management of DEL reverted to Diesel.

Initial Affidavit at paras. 7-9 and 58; Application Record, Tab 4.

5. DEL has made efforts since Diesel re-gained control to address the operational issues that challenged its business while under Gin-Cor management. Although early initiatives have begun to improve performance, DEL is currently more than $8 million in arrears to its supplier base, many of whom have begun to compress trade terms, which has further impaired DEL's liquidity.

Initial Affidavit at paras. 10, and 59 – 60; Application Record, Tab 4.

6. To make matters worse, on September 10, 2019, DEL discovered that a significant payment owing to it from a customer, Mack Defense, LLC ("**Mack Defense**"), was instead paid to Gin-Cor. Despite DEL's good faith efforts over the past month, the Company has been unable to recover this payment, placing significant additional strain on DEL's liquidity.

Initial Affidavit at paras. 11 and 61-63; Application Record, Tab 4.

7. The Company is facing a liquidity crisis and believes that the commencement of these CCAA proceedings is in its best interests, including because it will provide stability for its business and the necessary time and breathing room to conduct the Sale Process to pursue a going-concern solution that maximizes the value of its business. The CCAA proceedings will also enable DEL to obtain interim financing to fund the Sale Process and DEL's working capital requirements while pursuing restructuring efforts, and provide a forum to expeditiously resolve the Mack Defense and Gin-Cor payment dispute (the "**Payment Dispute**") to the extent it cannot be resolved consensually in the near-term.

Initial Affidavit at para. 12; Application Record, Tab 4.

PART III – SUMMARY OF THE FACTS

A. BACKGROUND REGARDING THE COMPANY

8. DEL is a private Company incorporated under the laws of Ontario with its registered and head office located in Newmarket, Ontario.

Initial Affidavit at para. 14; Application Record, Tab 4.

9. DEL operates six distribution and manufacturing facilities across Canada in Moncton, Montréal, Calgary, Edmonton, Vancouver (Port Coquitlam) and Newmarket.

Initial Affidavit at paras. 15 and 18-19; Application Record, Tab 4.

10. DEL's primary secured debt liabilities consist of approximately $11.5 million owing to Diesel under the Second Amended and Restated Credit Agreement dated as of May 31, 2018 (the "**Secured Credit Agreement**"), which credit agreement was assigned by the original lender, Bank of Montreal ("**BMO**"), to Diesel in July 2019. All obligations under the Secured Credit

Agreement are secured by a first priority security interest on substantially all of the assets of the Company, subject to the terms of the Priority Agreements.

Initial Affidavit at paras. 36-40; Application Record, Tab 4.

11. DEL breached certain financial covenants under the Secured Credit Agreement at the end of 2018 and for subsequent periods through to the end of May 2019 due to deteriorating financial performance. Following discussions with BMO regarding the status of the Secured Credit Agreement and DEL's business more generally, Diesel agreed in July 2019 to acquire all of BMO's rights under the Secured Credit Agreement. Since acquiring BMO's position, Diesel has made discretionary advances under the Secured Credit Agreement to assist in addressing DEL's ongoing liquidity constraints.

Initial Affidavit at paras. 42-43; Application Record, Tab 4.

12. DEL is also the borrower under an amended and restated credit facilities agreement dated as of January 19, 2015, pursuant to which Royal Bank of Canada ("**RBC**") is the lender (the "**RBC Floor Plan Facility**"). The RBC Floor Plan Facility authorizes the borrowers thereunder to draw up to $4.95 million, in the aggregate, to acquire GM truck chassis. All obligations under the RBC Floor Plan Facility are secured by a security interest in the financed GM truck chassis and certain additional assets of the Company, subject to the terms of the Priority Agreements. There are currently no GM chassis in DEL's possession that were financed under the RBC Floor Plan Facility, and it is expected that GM, RBC and Unicell will enter into a transaction in the near term pursuant to which Unicell and GM will establish an independent financing arrangement for the GM truck chassis held by Unicell that are currently financed under the RBC Floor Plan Facility.

Initial Affidavit at paras. 45-47; Application Record, Tab 4.

B. THE FAILED GIN-COR TRANSACTION AND THE PAYMENT DISPUTE

13. The Gin-Cor Transaction was intended to be a transformative transaction that would achieve certain synergies. Unfortunately, most of the expected synergies failed to materialize and DEL experienced increasing losses during the period of Gin-Cor management. The Gin-Cor Transaction was terminated on or about July 18, 2019, and Gin-Cor ceased to manage DEL's business as of that date.

Initial Affidavit at paras. 7-9 and 57-58; Application Record, Tab 4.

14. Upon Diesel re-establishing management of DEL, 2255987 Ontario Limited o/a Strategic Results Advisors ("**SRA**") was engaged to conduct a review of the Company's business and to assist in developing and implementing restructuring initiatives, which, among other things, have included closing the Company's facility in Regina (expected to save over $500,000 on an annual basis) and exploring the sale of non-core assets (including the Hydraulics Transaction, which contemplates DEL receiving cash consideration of $588,721.40 for the sale of certain non-core assets). Notwithstanding these efforts, DEL remains in significant arrears to its supplier base and is unable to meet its obligations in the normal course.

Initial Affidavit at paras. 59-60; Application Record, Tab 4.

15. In addition, DEL's liquidity position has been significantly negatively impacted by Mack Defense having paid $874,107.08 (representing approximately 20% of DEL's expected September receipts) owing to DEL to Gin-Cor. The wrongful retention by Gin-Cor of these funds has exacerbated the Company's liquidity challenges.

Initial Affidavit at paras. 11, 60-63; Application Record, Tab 4.

16. In light of the above circumstances, it is now apparent that a formal restructuring process is required to stabilize the business and implement a process to explore and execute a strategic transaction.

C. PROPOSED SALE PROCESS

17. SRA, with the assistance of the Company's other professional advisors and the proposed Monitor, has assisted the Company in developing the Sale Process to seek a potential sale or restructuring transaction in respect of the Company and its business to maximize value for stakeholders. Among other things, the Sale Process contemplates that the Diesel-owned real property from which DEL primarily operates will also be marketed, provided that bidders will be permitted to submit, and DEL will be permitted to consider, potential transactions that do not include the acquisition of such real property.

Initial Affidavit at paras. 83-85; Application Record, Tab 4.

18. The Sale Process will see the Company conduct a comprehensive marketing process, provide diligence access to interested parties and receive expressions of interest by December 6, 2019, with a view to conducting a second stage of the process through January 2020 with a proposed bid deadline of January 31, 2020. The Company believes that it is in the interests of all stakeholders to proceed with the Sale Process at this time and that the Sale Process provides the Company with significant flexibility and the necessary time to explore all available strategic options.

Initial Affidavit at paras. 83-85; Application Record, Tab 4.

19. Pursuant to the CRO Engagement Letter, the Company shall pay the CRO (as defined below) a work fee of $25,000 per month and a Success Fee of $100,000 upon the completion of a restructuring transaction on the terms set forth in the CRO Engagement Letter. The CRO has

been key to the development of the Sale Process and will continue to have an important role in the CCAA proceedings in connection with the Sale Process and the implementation of a potential transaction.

Initial Affidavit at paras. 78 and 84; Application Record, Tab 4.

D. DIP FINANCING

20. As set out in the Cash Flow Forecast, the Company requires additional funding by way of the DIP Financing in order to fund the Sale Process, as well as its working capital requirements during these CCAA proceedings. Diesel has agreed to provide up to $1 million (the "**DIP Financing**") to fund DEL's operations and expenses during the CCAA proceedings, subject to the terms and conditions set forth in the DIP Term Sheet, including the granting of the proposed Initial Order. It is not proposed that the DIP Financing prime RBC's interest in its priority collateral (i.e. the GM truck chassis) or impact Ford's interest in the truck chassis it supplies to DEL.

Initial Affidavit at paras. 71-74 and 77; Application Record, Tab 4.

21. Given the Company's current financial situation and existing circumstances, the Company believes that obtaining the DIP Financing is the best available alternative for the Company at this time and is necessary to provide additional liquidity and stability for the business, while DEL pursues the Sale Process.

Initial Affidavit at para. 76; Application Record, Tab 4.

22. In advance of the initiation of these CCAA proceedings, the Company, with the assistance of SRA, sought bridge financing proposals from nine financial institutions. All of the preliminary expressions of interest received from potential third-party lenders proposed interest rates that were significantly higher than the 6.5% interest rate under the DIP Term Sheet and also included

significant additional fees and other terms that would provide significantly less flexibility to DEL in pursuing its restructuring options.

Initial Affidavit at para. 76; Application Record, Tab 4.

23. Accordingly, the Company believes that the DIP Financing is being offered on more favourable terms than any other potentially available third-party financing.

E. CHARGES

(i) Administration Charge and Success Fee Charge

24. MNP Ltd. ("**MNP**") has agreed to act as Monitor in these CCAA proceedings, subject to Court approval of its appointment. MNP became involved with the Company in August 2019 to assist the Company in its review of certain financial and restructuring matters, and has reviewed the Company's financial and liquidity position (including the Cash Flow Forecast), the development of the Sale Process, the terms of the DIP Financing and the other relief requested by the Company in these proceedings.

25. MNP and the other beneficiaries of the Administration Charge, including MNP's counsel, the Company's counsel and financial advisor and the CRO have contributed, and will continue to contribute, to the Company's restructuring efforts. The proposed Initial Order also includes a junior charge to secure the Success Fee payable to the CRO.

Initial Affidavit at paras. 86-87 and 90; Application Record, Tab 4.

(ii) Directors' Charge

26. The Company's sole director and officer (Paul Martin) and the proposed CRO (Douglas Lucky) have both been actively involved in the Company's efforts to address its challenging circumstances, including its efforts to unwind the Gin-Cor Transaction, the review and consideration of the Company's financial circumstances and business challenges, the

development of the Sale Process, and the preparation for and commencement of these proceedings. The Company requires the active and committed involvement of Mr. Martin and Mr. Lucky during these CCAA proceedings as it pursues strategic options and alternatives to address its current circumstances.

Initial Affidavit at paras. 91 and 94; Application Record, Tab 4.

27. The Company maintains directors and officers insurance policies (collectively, the "**D&O Policy**"). However, the D&O Policy contains exclusions and limitations to the coverage provided, and there is the potential for coverage limits to be exhausted and for there to be insufficient coverage. Both Mr. Martin and Mr. Lucky have expressed the desire for certainty with respect to any potential personal liability arising from their respective roles.

Initial Affidavit at para. 93; Application Record, Tab 4.

(iii) *DIP Lender's Charge*

28. As discussed above, the Company requires the DIP Financing to fund its operational needs while implementing the Sale Process. Diesel is prepared to provide the DIP Financing, provided that the Company's obligations outstanding from time to time in connection with the DIP Financing are secured pursuant to a Court-ordered charge (the **"DIP Lender's Charge**") on the terms and priority set forth in the DIP Term Sheet. Given the current financial circumstances of the Company, Diesel has indicated that it is not prepared to advance additional funds to the Company without the security of the DIP Lender's Charge, including the proposed priority thereof.

Initial Affidavit at paras. 72-73 and 77; Application Record, Tab 4.

F. URGENT NEED FOR RELIEF

29. Despite the Company's best efforts to resolve the challenges facing its business, including efforts to re-establish management of the business and address the various operational issues that

challenged the business while under Gin-Cor management, the Company's financial circumstances have worsened and it is facing an impending liquidity crunch.

Initial Affidavit at para. 68; Application Record, Tab 4.

30. Without the benefit of CCAA protection, there could be an immediate and significant erosion of value to the detriment of all stakeholders. In particular, the Company is mindful of the following risks, which could materialize without the benefit of a stay of proceedings and the other relief sought under the CCAA: (a) suppliers ceasing to supply DEL or tightening payment terms in a manner that further exacerbates the liquidity challenges facing the Company; (b) suppliers terminating exclusive and non-exclusive distribution agreements with DEL; (c) the potential termination of agreements that are critical to the operation of DEL's business, including the Company's converter agreements with its OEM partners; and (d) suppliers commencing legal action to recover amounts due and owing to them.

Initial Affidavit at para. 69; Application Record, Tab 4.

31. Accordingly, the Company requires the protection and breathing room afforded by the CCAA in order to stabilize its business, obtain the DIP Financing, conduct the Sale Process to seek to identify a potential going-concern sale or restructuring transaction, and if necessary, provide DEL with a forum to expeditiously resolve the Payment Dispute to the extent it cannot be resolved consensually in the near-term.

PART IV – LAW AND ARGUMENT

A. THE COMPANY IS A "DEBTOR COMPANY" TO WHICH THE CCAA APPLIES

32. The CCAA applies in respect of a "debtor company" if the total claims against the debtor company or affiliated debtor companies exceeds $5 million. DEL is eligible for protection under the CCAA as it is "debtor company" and the total claims against it exceed $5 million.

CCAA, Section 3(1).

33. The term "debtor company" is defined in Section 2 of the CCAA, in relevant part, as a "company" that is "bankrupt or insolvent". A "company" is defined in Section 2 of the CCAA, in relevant part, as "any company…incorporated by or under an Act of Parliament or of the legislature of a province."

CCAA, Section 2 ("debtor company" and "company").

34. DEL is a "company" within the meaning of the CCAA because it is incorporated under the laws of Ontario.

Initial Affidavit at para. 14; Application Record, Tab 4.

35. The insolvency of a debtor company is assessed as of the time of filing the CCAA application. Courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the "**BIA**"), which in relevant part provides that an "insolvent person" is a person: (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.

BIA, section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 at para. 4 (Ont. Sup. Ct. J. [Commercial List]) [*Stelco*]; Book of Authorities, Tab 1.

36. The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.

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

37. DEL meets all of the tests for insolvency under the BIA as: (i) it is not, at this time, able to pay the more than $8 million that is currently owing to its supplier base (therefore satisfying parts (a) and (b) of the test); and (ii) the Company's most recent financial statements indicate that it is insolvent on a balance sheet basis (therefore satisfying part (c) of the test). Accordingly, it is respectfully submitted that the Company is insolvent within the meaning of the CCAA and therefore a "debtor company" to which the CCAA applies.

Initial Affidavit at paras. 33-34; Application Record, Tab 4.

B. THE RELIEF SOUGHT IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(i) The CCAA is a Flexible, Remedial Legislation

38. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors. In particular, during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 at paras. 22 and 56-60 (C.A.); Book of Authorities, Tab 2.

Lehndorff General Partners Ltd., Re (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Sup. Ct. J. [Commercial List]); Book of Authorities, Tab 3.

C. THE SALE PROCESS IS APPROPRIATE AND SHOULD BE APPROVED

39. The remedial nature of the CCAA confers broad powers to facilitate a restructuring, including the power to approve a sale process in relation to a CCAA debtor's business and assets.

Nortel Networks Corp. (Re), [2009] OJ No. 3169 at para. 48 (Sup. Ct. J.) [Nortel]; Book of Authorities, Tab 4.

40. The Company has, with the assistance of its professional advisors and the proposed Monitor, developed the Sale Process to seek to identify a potential going-concern sale or other restructuring transaction that would maximize the value of DEL's business for the benefit of the Company and its stakeholders. The Company believes that in the circumstances, implementing the Sale Process within the framework of the CCAA is the best next step for the Company and its stakeholders.

41. Courts have considered a number of factors when determining whether to authorize a sale process, including:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole economic community?

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

(d) is there a better viable alternative?

Nortel, *supra* at para. 49; Book of Authorities, Tab 4.

Re Brainhunter Inc., 2009 CarswellOnt 8207 at paras. 15-17 (Sup. Ct. J.); Book of Authorities, Tab 5.

42. The Company believes that in the circumstances it is in the best interests of the Company and its stakeholders for DEL to proceed with the Sale Process given, among other things:

(a) The Company has undertaken various restructuring efforts to date in an attempt to improve its financial and operational circumstances. While these efforts have yielded some positive results, it is clear that a comprehensive restructuring transaction is required for the benefit of all stakeholders. In light of Diesel's expressed desire to exit its investments in DEL, the Company will likely require the participation of a third party to achieve a successful restructuring transaction. As such, it is imperative, and in the interests of all stakeholders, that the Company commence the Sale Process immediately so that it can fully explore all strategic options available to it.

(b) The Sale Process will enable the Company, with the assistance of its advisors and under the supervision of the Monitor, the flexibility to explore all available strategic alternatives, including the ability to consider transaction proposals that also contemplate an acquisition of the Diesel-owned real property from which DEL primarily operates.

(c) The Company will continue the ongoing operation of its business with a view to preserving value for all stakeholders while it conducts the Sale Process.

(d) There is no reason to believe that any creditors have a *bona fide* reason to object to the Sale Process, and the object of the Sale Process is to maximize the value of DEL's business and achieve a going concern solution.

(e) No creditors will be prejudiced by the approval of the Sale Process as at the end of the Sale Process, any Successful Bid(s) would then be subject to review and approval by the Court, and all affected parties retain their rights to raise any objection at a future motion to approve any such proposed transaction.

(f) It is a condition of the DIP Financing that the Sale Process be approved by the Court and that the Company implement the Sale Process on the agreed upon milestones.

Initial Affidavit, at paras. 59-60, 74 and 83-85; Application Record, Tab 4.

43. DEL believes that the Sale Process provides the best opportunity to identify a potential value-maximizing transaction for the benefit of DEL and its stakeholders, and that proceeding with the Sale Process is the best available alternative at this time. The immediate commencement of the Sale Process will allow all options and alternatives to remain available for the benefit of DEL and its stakeholders.

D. ENTITLEMENT TO MAKE CERTAIN PRE-FILING PAYMENTS

44. To preserve normal course business operations, the Company is seeking authorization in the proposed Initial Order to make pre-filing payments, including payments for pre-filing goods or services supplied to the Company if, in the opinion of the Company and with the consent of the Monitor, such payment is necessary to maintain the operation of the Company's business.

> Initial Affidavit at paras. 96 and 99-100; Application Record, Tab 4.

45. The Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. The preservation of the status quo in a CCAA proceeding does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

> *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 at paras. 41 and 43 (Ont. Sup. Ct. J. [Commercial List]) [*Canwest Global*]; Book of Authorities, Tab 6.
>
> *Re Cinram International Inc.*, 2012 ONSC 3767 at para. 37 and Sch. C at paras. 66-71 [*Cinram*]; Book of Authorities, Tab 7.
>
> *Target Canada Co., Re,* 2015 ONSC 303 at para. 63; Book of Authorities, Tab 8.

46. In granting debtors the authority to pay certain pre-filing obligations, courts have considered a number of factors, including:

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

(b) the applicant's need for the uninterrupted supply of the goods or services;

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

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

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

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

Cinram, *supra* at para. 37 and Sch. C at paras. 66-71; Book of Authorities, Tab 7.

47. The Company believes that the authority to make certain pre-filing payments pursuant to the proposed Initial Order is appropriate in the circumstances as DEL requires the ongoing commitment and support of its employees, the ongoing assistance of its advisors, and the continued supply of goods and services from its key vendors and service providers during these CCAA proceedings.

48. In particular, the Company's ability to operate its business in the normal course is dependent on its ability to obtain an uninterrupted supply of inventory on commercially reasonable terms. The Company has maintained long-term relationships with key industry suppliers, many of which are critical to the operation of its business and some of which are located in foreign jurisdictions. Preserving these relationships on an uninterrupted basis and existing trade terms is essential to DEL's ongoing operations, as discontinuance could have a material adverse impact on the operation and value of its business and the completion of a successful sale or restructuring. As noted, the Company will seek the consent of the Monitor in connection with any payments on account of pre-filing obligations.

Initial Affidavit, at paras. 99-100; Application Record, Tab 4.

49. Accordingly, the Company submits that it is appropriate in the present circumstances for the Court to exercise its jurisdiction to authorize the Company to make certain pre-filing payments, subject to the terms and conditions of the proposed Initial Order.

E. APPOINTMENT OF THE CRO IS APPROPRIATE AND SHOULD BE APPROVED

50. The Company is seeking approval of the CRO Engagement Letter and the appointment of Mr. Lucky as the Chief Restructuring Officer (the "**CRO**").

51. Section 11 of the CCAA provides the Court with the authority to allow a debtor company to enter into arrangements that facilitate a restructuring under the CCAA. CCAA courts have, on multiple occasions, held that the appointment of a chief restructuring officer is appropriate as such expertise will assist the debtor in achieving the objectives of the CCAA.

> *Walter Energy Canada Holdings Inc., Re*, 2016 BCSC 107 at paras. 25 – 31; Book of Authorities, Tab 9.
>
> *8440522 Canada Inc., Re*, 2013 ONSC 6167 at paras. 46 – 50; Book of Authorities, Tab 10.

52. The CRO has worked extensively with the Company to date in connection with the implementation of various restructuring initiatives and the development of the Sale Process, and has significant knowledge with the respect to the Company and its business (including as a result of his service as the former chief executive of the Company). The CRO has been key to the development of the Sale Process and other restructuring initiatives and will continue to play an important role in the CCAA proceedings in connection with the Sale Process and the implementation of a potential transaction.

> Initial Affidavit, at paras. 1, 6, 78 82 and 85; Application Record, Tab 4.

53. The Company believes that the appointment of the CRO pursuant to the CRO Engagement Letter is in the best interests of the Company and its stakeholders, and respectfully requests approval thereof.

F. THE CHARGES ARE APPROPRIATE AND SHOULD BE APPROVED

54. The Company is seeking approval of the Administration Charge, the Directors' Charge, the DIP Lender's Charge and the Success Fee Charge (collectively, the "**Charges**") in the proposed Initial Order.

55. The proposed Initial Order provides for the Charges to rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, except for any secured creditor of the Company who did not receive notice of the application for the Initial Order. The proposed Initial Order also authorizes the Company to seek an Order granting priority of the Charges ahead of any such secured creditors at the comeback hearing. The Company does not propose to impact RBC's priority security in any GM truck chassis or Ford's interest in Ford truck chassis through the granting of the Charges.

Initial Order at para. 46; Application Record, Tab 2.

(i) *Directors' Charge*

56. The Company is seeking a charge (the "**Directors' Charge**") in the amount of $1.2 million to secure the indemnity provided to the directors and officers (including the CRO) in the Initial Order in respect of liabilities they may incur during the CCAA proceedings in their capacities as such, including potential obligations relating to salaries and source deductions, vacation pay and certain unpaid taxes.

Initial Affidavit at para. 95; Application Record, Tab 4.

57. Section 11.51 of the CCAA provides the court with the jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.

CCAA, Section 11.51.

58. This Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global*, *supra* at paras. 46-48; Book of Authorities, Tab 6.

59. The Company submits that the Directors' Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge in favour of Mr. Martin and the CRO given that:

(a) Mr. Martin and the CRO may be subject to potential liabilities in connection with these CCAA proceedings and each has expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) the D&O Policy contains exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage;

(c) the Directors' Charge applies only to the extent that Mr. Martin and the CRO do not have coverage under the D&O Policy;

(d) the Directors' Charge would only cover obligations and liabilities that Mr. Martin and the CRO may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

(e) Mr. Martin and the CRO have been actively involved in the attempts to address the Company's current circumstances, including its efforts to unwind the Gin-Cor Transaction, the review and consideration of the Company's financial circumstances and business challenges, the development of the Sale Process, and preparing for the commencement of these CCAA proceedings;

(f) the Company will require the active and committed involvement of Mr. Martin and the CRO in connection with the Sale Process and other restructuring initiatives; and

(g) the amount of the Directors' Charge has been calculated, with the assistance of the Company's advisors and in consultation with the Monitor, based on the estimated potential exposure of the directors and officer to certain corporate liabilities.

Initial Affidavit at paras. 82, 93-95; Application Record, Tab 4.

Initial Order at para. 21; Application Record, Tab 2.

(ii) *Administration Charge and Success Fee Charge*

60. In connection with the appointment of the proposed Monitor, the Company is seeking an Administration Charge in the amount of $400,000 to secure pre- and post-filing professional fees and disbursements of the Monitor, counsel to the Monitor, counsel and financial advisor to the Company and the CRO (but excluding with respect to the Success Fee) incurred on the terms set forth in their respective engagement letters and at their standard rates and charges.

Initial Affidavit at para. 90; Application Record, Tab 4.

61. The Company is also seeking a separate and junior ranking Court-ordered charge over DEL's property (the "**Success Fee Charge**") for the $100,000 Success Fee payable to the CRO pursuant to the CRO Engagement Letter.

Initial Affidavit at para. 81; Application Record, Tab 4.

62. Section 11.52 of the CCAA provides the Court with the jurisdiction to grant the Administration Charge:

> 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.
>
> CCAA, Section 11.52(1) and (2).

63. In *Canwest Publishing*, the Court noted that Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and identified the following non-exhaustive list of factors the Court may consider in approving an administration charge:

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

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

(c) whether there is 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.

> *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54 [*Canwest Publishing*]; Book of Authorities, Tab 11.

64. The Company submits that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge in the amount of $400,000 given that:

(a) the beneficiaries of the Administration Charge will play a critical role in assisting the Company with maintaining the stability and operations of its business, implementing the Sale Process and other restructuring initiatives and advancing the overall progression of these CCAA proceedings,

(b) there is no unwarranted duplication of roles;

(c) the quantum of the proposed charge is reasonable having regard to administration charges granted in other CCAA proceedings; and

(d) the proposed Monitor is supportive of the granting and quantum of the Administration Charge.

(iii) *DIP Lender's Charge*

65. The Company is seeking approval of the DIP Financing and the granting of the DIP Lender's Charge over its assets, property and undertaking to secure the DIP Financing.

66. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession financing charge:

> 11.2(1) *Interim financing* – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2(2) *Priority – secured creditors* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, Sections 11.2(1) and (2).

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

> 11.2(4) *Factors to be considered* – In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under 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.

CCAA, Section 11.2(4).

68. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant an interim financing charge.

Canwest Publishing, *supra* at para. 42; Book of Authorities, Tab 11.

69. The following factors support the granting of the DIP Lender's Charge:

(a) the Cash Flow Forecast indicates that the Company will require additional funding to support its business operations during the CCAA proceedings while it pursues the Sale Process and its other restructuring initiatives;

(b) DEL intends to continue to operate its business on a going-concern basis during the CCAA proceedings under the direction of the CRO and current management, with the assistance of the Company's advisors and under the supervision of the proposed Monitor;

(c) the DIP Financing is expected to provide the Company with necessary liquidity to fund its operational requirements while it pursues the Sale Process and seeks to complete a going-concern restructuring or sale for the benefit of the Company's stakeholders;

(d) while Diesel has provided certain limited discretionary emergency financing to DEL in recent weeks, Diesel has indicated that it is not prepared to advance additional funds to

the Company in the absence of a formal restructuring process being commenced and the granting of the proposed charge;

(e) the DIP Financing is being offered on terms more favourable than any other potentially available DIP financing from a third-party lender;

(f) the DIP Lender's Charge is not intended to prime RBC's security in any GM chassis financed through RBC or impair Ford's ownership rights in any Ford chassis held by DEL as bailee from time to time; and

(g) the DIP Lender's Charge will not secure any pre-filing obligations.

Initial Affidavit at paras. 12, 71 – 72, 74 – 77 and 105; Application Record, Tab 4.

70. The DIP Financing is conditional on the granting of the DIP Lender's Charge and the Initial Order in form and substance acceptable to Diesel. The Company requires access to additional funding to continue to operate its business without disruption during the CCAA proceedings while it seeks to implement the Sale Process and complete a sale or restructuring transaction.

Initial Affidavit at paras. 12, 71, 74 and 105; Application Record, Tab 4.

71. The Company submits that the approval of the DIP Financing and the DIP Lender's Charge pursuant to the terms of the proposed Initial Order is warranted and necessary in the circumstances, and that it is appropriate for the Court to approve the DIP Financing and grant the DIP Lender's Charge in favour of Diesel.

PART V – CONCLUSION

72. The Company has initiated these CCAA proceedings to obtain the protection and breathing room necessary to stabilize its business while it seeks to implement the Sale Process to identify a sale

or other restructuring transaction that enables DEL's business to continue on a going-concern basis for the benefit of the Company and its stakeholders, as well as to obtain necessary interim financing and achieve an expedited and efficient resolution of the Payment Dispute with Mack Defense and Gin-Cor.

73. It is imperative that the Company obtain the critical additional financing required in order to fund its operations and receive the benefit of Court-ordered protection pursuant to the CCAA in order to implement the Sale Process and seek to identify a potential going-concern value maximizing sale or restructuring transaction.

74. Accordingly, for the reasons set out herein, the Company respectfully requests that the Court grant the requested relief pursuant to the proposed Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 21, 2019

GOODMANS LLP

Goodmans LLP

Christopher G. Armstrong
Andrew Harmes

SCHEDULE A

LIST OF AUTHORITIES

1. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299
2. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.)
3. *Lehndorff General Partners Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Sup. Ct. J. [Commercial List])
4. *Nortel Networks Corp. (Re),* [2009] OJ No. 3169 (Sup. Ct. J.)
5. *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 (Sup. Ct. J.)
6. *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List])
7. *Re Cinram International Inc.*, 2012 ONSC 3767
8. *Target Canada Co., Re*, 2015 ONSC 303
9. *Walter Energy Canada Holdings Inc., Re*, 2016 BCSC 107
10. *8440522 Canada Inc., Re*, 2013 ONSC 6167
11. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222

SCHEDULE B

STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
RSC 1985, c C-36, as amended

s. 2 ("company")

"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.

s. 2 ("debtor company")

"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.

s. 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.

s. 11

General power of court – Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances

s. 11.02(1)

General power of court – 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.

s. 11.02(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.

s. 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.

s. 11.03(2)

Exception – Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

s. 11.03(3)

Persons deemed to be directors – If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

s. 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.

s. 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.

s. 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.

s. 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 of 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.

s. 11.51(2)

Priority – The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

s. 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.

s. 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.

s. 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 proceeding 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.

s. 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.

BANKRUPTCY AND INSOLVENCY ACT
RSC 1985, c B-3, as amended, as amended

s. 2 (“insolvent person”)

“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.

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 DEL EQUIPMENT INC.

Applicant

Court File No.:_____

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

FACTUM OF THE APPLICANT
(CCAA Application)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Christopher G. Armstrong LSO# 55148B
carmstrong@goodmans.ca

Andrew Harmes LSO# 73221A
aharmes@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Del Equipment Inc.