

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

B E T W E E N:

**ROYAL BANK OF CANADA**

Applicant

- and -

**MARNLEN MANAGEMENT LTD. and LABELAD LTD.**

Respondents

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101  
OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C-43, AS AMENDED**

**FACTUM OF THE APPLICANT  
(Application Returnable July 18, 2012)**

July 17, 2012

**Norton Rose Canada LLP**  
Suite 3800  
Royal Bank Plaza, South Tower  
200 Bay Street, P.O. Box 84  
Toronto, Ontario M5J 2Z4

**Evan Cobb LSUC#: 55787N**  
Tel: (416) 216-1929  
Fax: (416) 216-3930

Lawyers for Royal Bank of Canada

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**FACTUM OF THE APPLICANTS**

**PART I - OVERVIEW**

1. Royal Bank of Canada ("RBC") is the primary secured creditor of Marnlen Management Ltd. ("Marnlen") and Labelad Ltd. ("Labelad" and, collectively with Marnlen, the "Debtors") through a loan facility provided by RBC to Labelad, which is guaranteed by Marnlen.
2. RBC holds a general security interest over all of the personal property of the Debtors.
3. RBC has become aware that Labelad has committed certain defaults under the loan facilities provided by RBC.
4. The Debtors consent to the appointment of the Receiver.
5. The appointment of the Receiver is just and convenient in the circumstances.

## **PART II - THE FACTS**

6. Labelad is based in Markham, Ontario and designs and manufactures stickers, labels, radio frequency identification labels and tags.

Affidavit of Felix Mednikov, sworn July 17, 2012 at para. 4 ("Mednikov Affidavit").

7. Labelad is the sole operating subsidiary of Marnlen.

Mednikov Affidavit at para. 5.

8. All of the Debtors' assets are located in the Province of Ontario.

Mednikov Affidavit at para. 7

### ***RBC Financing***

9. Labelad and Marnlen are indebted to RBC pursuant to an Amended and Restated Loan Agreement dated as of July 14, 2011 between RBC as lender, Labelad as borrower, and Marnlen as guarantor (the "A&R Loan Agreement"). The A&R Loan Agreement matures on July 14, 2013.

Mednikov Affidavit at para. 10.

10. The following facilities are provided under the A&R Loan Agreement:

- (a) An asset based loan facility with maximum availability of \$4,000,000 (the "ABL Facility");
- (b) Letters of credit issuable to a maximum value of \$1,200,000 (together with the "ABL Facility", the "Facilities"). Two letters of credit have been issued for \$1,000,000 and \$100,000. The \$1,000,000 letter of credit (the "Letter of Credit") is discussed in greater detail below.

Mednikov Affidavit at para. 12.

11. Over \$2.7 million is outstanding collectively on the Facilities (including the issuance of the \$1,000,000 Letter of Credit).

Mednikov Affidavit at para. 13.

12. RBC holds a perfected security interest over all of the Debtors' property, assets and undertakings, pursuant to, among other things, certain General Security Agreements (the "GSAs"). The Debtors are also subject to certain blocked account agreements with RBC.

Mednikov Affidavit at paras. 14-16.

### **Defaults**

13. The Borrower has committed certain events of default under the A&R Loan Agreement (the "Defaults"). Among other things, the Borrower and its subsidiaries breached the tangible net worth covenants contained in section 5.1(b) of the A&R Loan Agreement in May of this year. This breach occurred despite past cooperation from RBC to reduce the tangible net worth threshold to reflect the reduced size of the Debtors' business.

Mednikov Affidavit at para .18.

14. As a result of the Defaults, the security granted under the GSAs and the other ancillary security documents has become immediately enforceable.

Mednikov Affidavit at para. 19.

15. RBC has delivered demand letters to the Debtors and all necessary security enforcement notices under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, as amended (the "BIA"). The Debtors have waived the ten day enforcement notice period set forth in the BIA.

Mednikov Affidavit at para. 20-22.

### **Other Creditors**

16. All other creditors of the Debtors are subordinated to RBC, save for certain very limited rights in respect of isolated equipment. Further, once one considers the magnitude of the secured debt owing to shareholders of the Debtors, it would be impossible to conclude that any party other than RBC, Export Development Canada (by way of subrogation to RBC's claim) and those shareholders could have any material interest in the Debtors' property (again, with the exception of certain isolated pieces of equipment). The secured debt owing to the shareholders is contractually subordinated to the RBC loans and the shareholders are consenting to the appointment of the receiver.

Mednikov Affidavit at para. 23.

***The Debtors' Business***

17. The Debtors' business has operated on a consistently negative cash flow basis in the recent past.

Mednikov Affidavit at para. 33.

18. Unless the shareholders continue to fund the Debtors' losses, the Debtors will very quickly run out of liquidity and RBC's collateral will continue to erode.

Mednikov Affidavit at para. 35.

19. At this time it appears that the Debtors do not have sufficient liquidity to make even the most important basic monthly fixed payments, such as rent at their facilities.

Mednikov Affidavit at para. 36.

20. It appears that the Debtors' business is facing a liquidity crisis.

Mednikov Affidavit at para. 38.

21. A liquidation analysis for the Debtors' assets shows a significant risk that any further decrease in the asset value of the Debtors would result in the obligations to RBC being under-secured. If the Debtors continue operations for the next 30 days, is in excess of \$800,000. RBC believes that the appointment of a receiver is needed to facilitate an orderly wind down and sale of the business assets to avoid material risks to its collateral.

Mednikov Affidavit at para. 39.

***Need For A Receiver***

22. In the circumstances, it appears that the only option to preserve the value of the Debtors' assets is an expedited sale. RBC has worked for some time with the Debtors to try to find a going concern solution. No such solution has presented itself.

Mednikov Affidavit at para. 40

23. RBC believes that it requires the assistance of a court-appointed receiver to undertake a sale of the Debtors' assets. An out-of-court enforcement and realization process is not commercially feasible in the current circumstances.

Mednikov Affidavit at para. 41.

### **PART III - ISSUES TO BE DETERMINED**

24. The sole issue for determination on this motion is whether the appointment of a receiver and manager over the assets of the Debtors is appropriate.

### **PART IV - THE LAW**

#### ***Appointment of a Receiver Pursuant to the BIA and/or the Courts Of Justice Act, R.S.O. 1990, C. C-43, as amended (the "CJA")***

25. Section 243 of the BIA provides for the appointment of a receiver when it is "just and convenient" to do so:

(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

26. Section 101 of the CJA similarly provides for the appointment of a receiver when it is "just or convenient" to do so:

In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and

manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

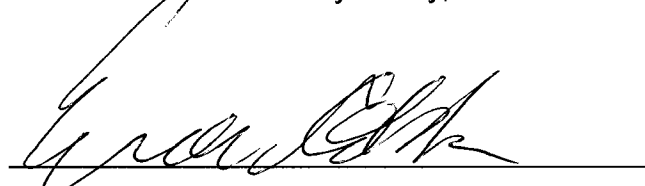
27. It is clear in the circumstances that RBC is a secured creditor entitled to make an application under Section 243 of the BIA.
28. The powers that RBC requests this Honourable Court provide to the Receiver are within the scope of those listed in Section 243 of the BIA and are consistent with the powers generally granted by the Court.
29. RBC has sent the notices required under section 244 of the BIA and the Debtors have consented to an earlier enforcement under subsection 244(2) of the BIA.
30. The Debtors are "insolvent persons" under the BIA both because they have ceased paying their current obligations, such as their rent obligations, in the ordinary course of business as they generally become due and because the aggregate value of the Debtors' 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 of the Debtors' obligations due and accruing.
31. The only remaining question is whether the appointment of a receiver is just and/or convenient in the circumstances. Authorities on this matter suggest that factors to consider in the determination of whether it is appropriate to appoint a receiver include:
  - (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
  - (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
  - (c) the nature of the property;
  - (d) the apprehended or actual waste of the debtor's assets;
  - (e) the balance of convenience to the parties;
  - (f) the fact that the creditor has the right to appoint a receiver under its loan documents;

- (g) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- (h) the effect of the order on the parties;
- (i) the length of time that a receiver may be in place;
- (j) the likelihood of maximizing return to the parties; and
- (k) the goal of facilitating the duties of the receiver.

Houlden, Lloyd W., Morawetz, Geoffrey B., and Sarra, Janis P. The 2012 Annotated Bankruptcy and Insolvency Act. (Toronto: Carswell, 2011) at 959.

- 32. In RBC's respectful submission the facts of the current case fall squarely within the types of circumstances where it would be just and/or convenient to appoint a receiver.
- 33. The value of the assets of the Debtors continue to erode.
- 34. No legitimate rights of any party are prejudiced by the appointment of a receiver.
- 35. RBC has the right under its security documents to seek the appointment of a receiver.
- 36. Given the current state of the business and assets, a receiver with the protections associated with a court appointment is necessary to take control of the assets of the Debtors' business until a sale can occur.
- 37. It is expected that this receivership will be for a very short term in order to facilitate an expedited realization on the assets of the Debtors.
- 38. In absence of a court appointed receiver, the realization process would be far more difficult, and the recoveries obtained therefrom would in all likelihood be reduced. Both the stay of proceedings and the opportunity to conduct a court approved sale are of assistance in this regard.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of July, 2012.

  
**Norton Rose Canada LLP**



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

**Authorities**

Houlden, Lloyd W., Morawetz, Geoffrey B., and Sarra, Janis P. The 2012 Annotated Bankruptcy and Insolvency Act. (Toronto: Carswell, 2011).

**SCHEDULE "B"**  
**LEGISLATION**

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

243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

***Courts of Justice Act***, R.S.O. 1990, C. C-43, as amended

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

- (2) An order under subsection (1) may include such terms as are considered just.

**ROYAL BANK OF CANADA**  
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Respondents

Court File No: CV-12-9788-00CL

**ONTARIO  
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Proceeding commenced at Toronto

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**Norton Rose Canada LLP**  
Suite 3800  
Royal Bank Plaza, South Tower  
200 Bay Street, P.O. Box 84  
Toronto, Ontario  
M5J 2Z4

**Evan Cobb LSUC#: 55787N**  
Tel: (416) 216-1929  
Fax: (416) 216-3930

Lawyers for Royal Bank of Canada