

2003 CarswellQue 13882  
SUPERIOR COURT

Boutiques San Francisco inc., Re

2003 CarswellQue 13882, [2003] Q.J. No. 18940, EYB 2003-51913

**Les Boutiques San Francisco incorporées and Les Ailes  
de la Mode incorporées and Les Éditions San Francisco  
incorporée (Petitioners) et Richter & Associés inc.( Monitor)**

MR. JUSTICE CLÉMENT GASCON J.C.S.

Heard: December 17, 2003.

Judgment: DECEMBER 17, 2003

Docket: 500-11-022070-037

Counsel: *Me Alain Riendeau et Me Stéphanie Lapierre, Attorneys*, for the Petitioners  
*Me Denis St-Onge et Me Patrice Benoit, Attorneys*, for the Bank Syndicate  
*Me Avram Fishman, Attorneys*, for Cadillac Fairview.  
*Me Guy-Paul Martel, Attorneys*, for Ivanhoe Cambridge Inc.

Subject: Corporate and Commercial

**CLÉMENT GASCON, J.S.C.:**

1 The Court is seized of two Motions.

2 The first one, presented by the BSF Group, is for the issuance of an Initial Order under Section 11 of the Companies Creditors Arrangement Act ("CCAA"). BSF Group is involved in the retail sale of men's, women's and children's apparel and accessories through boutiques and stores located primarily in Quebec but also in Ontario.

3 The second one, presented by the Bank Syndicate of the BSF Group, is for the appointment of an Interim Receiver. It is filed under a separate court number from this one.

4 As the Court concludes that there are justifications to issue here an Initial Order under the CCAA, the Motion of the Bank Syndicate will be simply continued *sine die* at this stage. This will be noted separately on the original of the Motion itself and on the « Procès-verbal d'audience » and will not form part of the conclusions of this judgment.

5 The Court is of the view that the Bank Syndicate has not established that it is presently necessary, be it for the protection of the debtor estate or in the interest of the creditor, to proceed with the appointment of an Interim Receiver.

6 Turning now to the BSF Group application, the Motion establishes that the BSF Group is entitled to make use of the CCAA. On the face of the application, the BSF Group is insolvent and is indebted for more than \$5M to various secured and non-secured creditors.

7 Prior to rendering judgment, the Court has indeed heard not only counsel for the BSF Group, but also counsels for the Bank Syndicate and for two of its landlords, namely Ivanhoe Cambridge and Cadillac Fairview.

8 Briefly summarized, the secured creditors include the Bank Syndicate, RoyNat Inc. and Ivanhoe Cambridge Inc. for amounts in excess of \$24M. The unsecured creditors include debenture holders and trade creditors for more than \$45M and inter-company advances exceeding \$37M.

9 Although the BSF Group made this application under the CCAA, neither the Motion nor the exhibits filed include a plan or an arrangement, not even a preliminary one or what can be described as an "*esquisse*" or an "*avant-goût*" thereof.

10 With respect to the arrangement, only two paragraphs of the Motion refer to it, paragraphs 4 and 57. They state:

4. BSF Group intends to file with this Court proposed arrangements with the whole or part of its secured and unsecured creditors according to the classes to which they belong and seek an order from this Court to convene a meeting of its creditors to vote on the proposed arrangements, the whole within 30 days following the issuance of the order being sought or such further delay as may be determined by this Court.

57. Although the exact form of the restructuring that will take place is in the process of being determined, it is likely to include the closing of a significant number of stores operating under various banners in BSF, the significant downsizing of Les Ailes Downtown Store in order to make it a viable location, the dismissal of employees and the resiliation of a number of leases.

11 These paragraphs refer to a mere « intent to file » a proposed arrangement and to the contemplation of potential closures and termination of leases, albeit general in nature. These allegations do not include any indications of the nature of any arrangement to be proposed to either the secured or unsecured creditors.

12 The Court is doubly cautious here as there is no indication of much support at this stage for the process followed by the BSF Group under the CCAA. For one, the Bank Syndicate does not appear to support it.

13 The Court is reminded of the comments of Mr. Justice Lebel in *Banque Laurentienne du Canada c. Groupe Bovac ltée*<sup>1</sup>, where he stated:

[ . . . ] Si les articles 4 et 5 indiquent que l'ordre de convoquer les créanciers ou, le cas échéant, les actionnaires de la compagnie dépend de la discrétion du Juge, l'exercice de celui-ci suppose l'existence d'un élément de base. Cet événement survient lorsqu'une transaction ou un arrangement « est proposé ». Il faut que, matériellement, existe un projet d'arrangement. L'on ne peut se satisfaire d'une simple déclaration d'intention. Autrement l'on transforme radicalement les mécanismes de la loi. On fait de celle-ci une méthode pour obtenir un simple sursis sans que l'on ait à établir qu'il existe un projet d'arrangement et sans que l'on puisse faire évaluer sa plausibilité. La loi n'est pas formaliste, elle n'exige pas que le projet d'arrangement soit incorporé dans le texte de la requête. Il peut se retrouver dans des documents annexes, dans des projets de lettres aux créanciers, pourvu que l'on puisse indiquer au Juge auquel on demande la convocation de l'assemblée, qu'il existe et que l'on puisse en décrire les éléments principaux. [ . . . ]

14 Further down, Mr. Justice Lebel adds:

En l'absence d'une description d'un projet d'arrangement des éléments principaux, certaines des informations nécessaires pour permettre au tribunal d'exercer sa discrétion en connaissance de cause font défaut.

15 And finally:

Le recours à la loi suppose un contrôle judiciaire. Il appartient au Juge de peser, au départ, l'intérêt pour l'entreprise de présenter une proposition, la plausibilité de sa réussite, les conséquences de cette proposition et des ordres de sursis qui sont demandés pour les créanciers, les risques qu'elle ferait courir pour ses créanciers garantis, le Juge doit examiner ces intérêts divers avant d'autoriser la convocation des créanciers et de déclencher la mise en oeuvre de la loi. La loi n'est pas une législation conçue pour accorder sans conditions ni réserves des termes de grâce à des débiteurs en difficulté. Elle se veut une loi de réorganisation d'entreprises en difficulté. À ce titre, saisi de la demande de convocation d'une assemblée et de sursis, le Juge doit être en mesure d'apprécier d'abord si l'entreprise est susceptible de survie pendant la période intermédiaire jusqu'à l'approbation du contrat promis puis s'il est

raisonnable d'estimer que l'accord projeté est réalisable. Pour savoir s'il est réalisable, l'une des conditions de base est d'en connaître les termes essentiels, quitte à ce que ceux-ci soient précisés ou modifiés par la suite. [ . . . ]

16 The Court notes that in a subsequent case, *3915611 Canada Inc. and Eicon Networks Corporation*<sup>2</sup>, Mr. Justice Chamberland of the Court of Appeal also mentioned, in commenting on an application under Section 11 of the CCAA, that the application "*donnait déjà un avant-goût assez précis de ce que sera la proposition d'arrangement* ».

17 Furthermore, in the *Mine Jeffrey Inc.* decision<sup>3</sup>, commenting on the plan, the Court of Appeal (Mr. Justice Dalphond) mentioned that, at the very least, there was an "*esquisse*" of the plan being contemplated, which the decision indeed summarized.

18 Finally, in *The 2004 Annotated Bankruptcy and Insolvency Act* by Houlden and Morawetz<sup>4</sup>, there is a reference to a decision rendered in Ontario in 1999 which is summarized as follows:

When an application is made by a group of creditors, the applicants should be in a position to submit an outline of a plan of compromise or arrangement. In the absence of a plan which would permit the continued operation of the debtor and its subsidiaries, the Court will dismiss the application.

19 While it is true that some Courts in other provinces consider that a mere « intent to file a plan » is sufficient at the Initial order stage, this Court cannot ignore the abovementioned comments made by the Court of Appeal in these three decisions.

20 As a result, while it is receptive to issue some Initial Order to allow the BSF Group the possibility to avail itself of some of the protections of the CCAA under the circumstances, the Court will not grant all the conclusions sought at this stage because of this situation and the lack of information on the proposed plan.

21 The Court will now comment on the various sections of the conclusions sought by the BSF Group.

#### **AUTHORIZATION TO FILE A PLAN**

22 The Court will be more precise than that. It will order Petitioners to file either a plan or at least a preliminary plan before January 15, 2004. It will also reconvene the Petitioners in front of this Court on January 15, 2004 to see what the situation is and determine then if the Initial Order is to be renewed and if so, on what conditions.

#### **STAY OF PROCEEDINGS**

23 These conclusions will be granted but only until January 15, 2004 so that the situation be reassessed then. It appears reasonable to allow the BSF Group to continue its operations in the meantime.

#### **THE LIMITATION OF RIGHTS**

24 These conclusions will also be granted but only until January 15, 2004 so that again the situation be reassessed at that time. These conclusions appear reasonable as the Petitioners agree to pay the landlords and suppliers for the future occupation of the premises or for the future supply of goods. The same is true for the insurance companies and the credit cards companies. The other conclusions of that section also appear reasonable at this stage.

#### **OPERATIONS**

25 Some of the conclusions pertaining to operations appear too broad at this stage, notably in view of the absence of any plan or arrangement, even preliminary.

26 The Court will simply « reserve » at this stage the rights of Petitioners, if any, to close stores and terminate agreements. While it is true that a vast majority of Courts in Canada appear to support the authority of the tribunal

in CCAA proceedings to permit the unilateral termination of contracts by the debtor, this discretion has been exercised when faced with either a plan or a preliminary plan, and if not at the very least with an "esquisse" or an "avant-goût" thereof.

27 The Court refers more specifically to the decision of this Court in *PCI Chemicals Canada Inc.*<sup>5</sup> and the decisions of the Court of Appeal in *Mine Jeffrey*<sup>6</sup>, *Uniforêt*<sup>7</sup>, *Eicon*<sup>8</sup> and *Les Ordinateurs Hypocrat Inc.*<sup>9</sup>.

28 Without at least some kind of a preliminary plan, the Court is not willing to give a « blank cheque » to Petitioners to close stores and terminate agreements at this stage. The situation will be reassessed on that issue on January 15, 2004.

29 The Court adds that there has simply been no urgency established which would require the immediate granting of such broad powers to the Petitioners.

30 As for the other conclusions on operations, some changes to the wording of the conclusions are necessary to protect the creditors. Some other wording will be deleted as unnecessary in the Court's opinion. The Court notes that there are some protections for the suppliers in the conclusions sought if a plan is not pursued and BSF Group goes in bankruptcy or receivership.

#### **THE DIRECTORS AND OFFICERS INDEMNIFICATION HYPOTHEC AND THE MONITOR AND COUNSEL FEES HYPOTHEC**

31 BSF Group asks for priority charges for the directors and officers indemnification and for the monitor and counsel fees. BSF Group wants these priority charges to rank ahead of all secured and unsecured creditors. The first one is for \$7,500,000, the second is for \$1,000,000.

32 The Court agrees with Professor Janis Sarra of the Faculty of Law of the University of British Columbia that five principles should govern a court in considering applications for priority charges of this nature.

- There should be adequate notice to creditors so that they be heard fully on the issue. It should only be considered on an ex parte basis for what is required to keep the debtor's « lights on » pending notice to all and every interested parties.
- There should be sufficient disclosure for the benefit of all creditors of what is likely to be the impact of these priority charges on their claims and securities.
- The request must be made in a timely fashion, with proper demonstration that there is a real possibility of achieving a plan. To quote Professor Sarra<sup>10</sup>:

[ . . . ] There is a difference between good faith efforts to make arrangements with creditors and then seeking the protection of the court in aid of these efforts and a situation where the debtor engages the court only to defer liquidation without any real prospect of devising a business plan acceptable to creditors.

- The Court must balance the prejudice to all creditors with the priority charges and be satisfied for an urgent need thereof. For example, courts are more lenient towards a priority for monitor fees and disbursements than for a DIP financing.
- Finally, the priority charges are an extraordinary remedy available for limited amounts and for limited time. There must be judicial control over amounts of priority charges, their precise purpose and their use.

33 With these in mind, the Court agrees to give here a priority charge for the directors and officers indemnification. There are authorities which support it and the circumstances appear to justify it.

34 However, it will not be for \$7,500,000. From the evidence presented, there is some coverage of insurance for the directors and officers for at least \$4,000,000. The Order as drafted also asks for the maintaining of insurance policies as if the BSF Group were solvent.

35 For the period of this Order, a protection of \$5,000,000 for such directors and officers indemnification appears sufficient. It will also only cover directors and officers on a « go-forward basis », for claims made after the filing of this application. The insurance policies presently in place should protect them for the past.

36 As for the priority charges for the monitor and counsel fees, the amount claimed of \$1,000,000 seems very high. An amount of \$500,000 appears amply sufficient at this stage.

#### **OTHERS**

With respect to the other conclusions sought, they will be granted with slight modifications, notably for any application to vary or rescind this Order which will be permitted upon a five-day notice.

37 *FOR THESE REASONS, THE COURT :*

#### **APPLICATION OF THE CCAA**

38 *DECLARES* that the Petitioners, Les Boutiques San Francisco Incorporées, Les Ailes de la Mode Incorporées and Les Éditions San Francisco Incorporées (the "Petitioners") are companies to which the Companies' Creditors Arrangement Act ("CCAA") applies;

#### **PLAN**

39 *ORDERS* the Petitioners to file with this Court on or before January 15, 2004 a plan or plans of compromise or arrangement, or, at the very least, a preliminary plan or a precise description thereof containing its key elements (the "Arrangement") between the Petitioners or any of them and one or more classes of their creditors, as the Petitioners deem advisable;

40 *AUTHORIZES* the Petitioners to request this Court to order the calling of one or more meetings of such creditors to consider such Arrangement, at such date as this Court may determine;

41 *RECONVENES* the Petitioners in front of this Court on January 15, 2004, at 9:00 a.m., in room 16.10, to assess the situation and determine if this Initial Order is to be renewed or extended and if so on what conditions;

#### **STAY OF PROCEEDINGS**

42 *ORDERS* that from 12:01 o'clock A.M. on the day of issuance of this Order until January 15, 2004 at 11:59 p.m. (the "Stay Termination Date"):

a) The commencement or continuance of any and all proceedings against any of the Petitioners pursuant to the *Bankruptcy and Insolvency Act*, (R.S.C., (1985), c. P-3) ("BIA") or the *Winding-up and Restructuring Act*, (R.S.C., (1985), c. W-9) is hereby stayed and restrained;

b) The commencement or continuance of any and all suits, actions or other judicial or extra-judicial proceedings, including without limitation any and all enforcement processes or remedies of any kind and the issuance or enforcement of any and all assessments or notice of assessments of any kind, against the Petitioners or any of their property, assets and undertakings is hereby stayed and restrained;

- c) The commencement or continuance of any and all arbitration proceedings or ancillary proceedings with a view to homologate or enforce any arbitration award against or respecting any of the Petitioners or any of their property, assets and undertakings is hereby stayed and restrained;
- d) All persons, including employees, are enjoined and restrained from implementing or enforcing any decision, ruling or award resulting from any process, grievance or arbitration involving any of the Petitioners pursuant to the provisions of the *Loi sur les normes du travail* (R.S.Q., N-1.1) or other similar legislation of any jurisdiction, provided that such employees or other persons are entitled to initiate, continue or pursue grievances, arbitration or similar proceedings short of enforcement;
- e) All persons are enjoined and restrained from realizing upon or otherwise enforcing their security on any or all of the property, assets and undertakings of the Petitioners or any of them, whether by way of Court proceedings, notice to third parties or otherwise;
- f) All persons are enjoined and restrained from seizing before judgment or in execution of any judgment any or all of the property, assets and undertakings of the Petitioners or any of them and from otherwise seizing, garnishing or taking, re-taking or retaining possession of any or all of the property, assets and undertaking of the Petitioners or any of them, including, without limiting the generality of the foregoing, any property consigned to or otherwise placed in the possession of or located in any of the premises, stores or boutiques of any of the Petitioners;
- g) Her Majesty in right of Canada shall not exercise rights under subsection 224 (1.2) of the Income Tax Act in respect of any of the Petitioners and Her Majesty in right of a Province may not exercise rights in respect of any of the Petitioners under any provincial legislation substantially similar to subsection 224 (1.2) of the Income Tax Act;
- h) The commencement or continuance of any and all judicial or extra-judicial proceedings, including without limitation any and all enforcement processes or remedies of any kind and the issuance or enforcement of any and all assessments or notice of assessments of any kind, against any of the past, present or future directors or officers of any of the Petitioners for any claim against such person that arose before, or is based, in whole or part, on facts in existence prior to, the issuance of this Order and relates to obligations of the Petitioners where directors or officers are under any law liable in their capacity as directors or officers for the payment of such obligations is stayed and restrained;
- i) All debenture holders and the trustee are enjoined and restrained from exercising any right of conversion under the Trust Indenture dated December 14, 2001 between Petitioner Les Boutiques San Francisco Incorporées ("BSF") and Desjardins Trust Inc.;

43 *ORDERS* that, up to and including the Stay Termination Date, no person having any agreement, lease, sublease or arrangement with the owners, operators, managers or landlords of retail commercial shopping centres or other commercial properties located adjacent to or in which there is located a store owned or operated by any of the Petitioners shall purport to take any proceedings or to exercise any rights as described in the Stay of proceedings section of this Order under such agreement, lease, sublease or arrangement that may arise upon the making of this Order or as a result of any steps taken by any of the Petitioners pursuant to this Order and, without limiting the generality of the foregoing, no person shall terminate, accelerate, suspend, modify, determine or cancel any such agreement, lease, sublease or arrangement;

#### **LIMITATION OF CERTAIN RIGHTS**

44 *ORDERS* that from 12:01 o'clock A.M. on the day of issuance of this Order until the Stay Termination Date, no person may discontinue, dishonour, terminate (except in the circumstances contemplated and to the extent and in the

manner permitted by section 18.3 of the CCAA), suspend, accelerate, amend, interfere with or fail to extend or renew in accordance with any existing terms or renewal or extension any contract, agreement, arrangement, licence, sublicense, lease, sublease or permit with or in favour of the Petitioners or any of them (whether written or oral and including, without limitation, any statutory or regulatory mandate for the supply of utilities or any other goods or services to the Petitioners or any of them) by reason that the Petitioners or any other person or persons related thereto are insolvent, by reason of the commencement of this proceeding or any admission or evidence in this proceeding or by reason of any default or non-performance by the Petitioners or any of them, and, without limiting the generality of the foregoing:

- a) All persons having access to or being in possession of information (in any form or medium) or documents relating to the businesses of the Petitioners or any of them are enjoined and restrained from removing such information or documents from any premises, store or boutique of any of the Petitioners, from restricting access by or on behalf of any of the Petitioners to such information or documents, from using any such information and documents otherwise than for the ordinary course of business of one or more of the Petitioners and from terminating any existing agreements or arrangements, written or oral, concerning the transmission, use, processing or distribution of such information or documentation;
- b) All persons are enjoined and restrained, unless otherwise agreed to in writing by the Petitioners, from disturbing or otherwise interfering with the use, occupation or possession by the Petitioners or any of them of any premises leased, subleased or otherwise occupied by the any of the Petitioners and landlords and head tenants of premises leased or subleased by any of the Petitioners are hereby enjoined and restrained from exercising any right to terminate or vary such lease or sublease or accelerating or otherwise increase the rent due for such premises and from enforcing any security or other right on the property of any of the Petitioners situated on the leased or the subleased premises or on the property of third parties situated on the leased or subleased premises with the consent of the Petitioners, provided that the relevant Petitioner pays occupation rent for any such premises of which the Petitioner enjoys actual occupation and undisturbed use, but not arrears or rent in dispute, bi-monthly, on the 1<sup>st</sup> and 15<sup>th</sup> days of each month, in advance, for the period commencing with the day of issuance of this Order, at the contractual rate of rent stipulated for such premises, calculated on a per diem basis applied proportionately to the period of actual occupation and undisturbed use;
- c) All persons having contracts, agreements or arrangements with the Petitioners or any of them (whether written or oral and including, without limitation, any statutory or regulatory mandates) for the supply to or use by the Petitioners or any of them of goods, services or other rights or property, whether corporeal or incorporeal, are enjoined and restrained, unless otherwise agreed to in writing by the Petitioners, from accelerating, terminating, suspending, modifying, cancelling, discontinuing, interfering with or failing to extend or renew in accordance with any existing terms or renewal or extension such supply or the use of such goods, services or other rights or property and must continue to perform and observe the terms and conditions contained in such contracts, agreements or arrangements, provided that the relevant Petitioners pay the price, charges, royalties or other consideration payable under such contracts, agreements or other arrangements for goods, services or other rights or property supplied after the issuance of this Order when the same become due in accordance with the existing payment terms;
- d) All persons party to any contract of insurance or indemnity with or for the benefit of the Petitioners or any of them are enjoined and restrained from terminating, suspending, modifying, determining or cancelling such policies and contracts, notwithstanding any provisions contained therein to the contrary, except with the prior written consent of the Petitioners, provided that any premium or other consideration payable on account of such policies or other contracts, or as are customarily chargeable on account of such insurance or indemnity, for the period commencing with the date of this Order are paid when the same become due in accordance with the existing payment terms;

e) All credit card issuers or merchant service providers are enjoined and restrained from cancelling or otherwise terminating or varying any contract, agreement or arrangement (oral or written) with the Petitioners or any of them with respect to the acceptance of credit cards as a means of payment and from stopping, withholding, redirecting, interfering or otherwise varying the conditions of payment to the Petitioners or any of them for goods and services charged to such credit cards in accordance with the usual practice between the relevant Petitioners and such merchant service providers as they existed immediately prior to the issuance of this Order, provided that the relevant Petitioners make all payments, if any, accruing, and perform all other acts required from them, in accordance with such contracts, agreements or arrangements after the date of this Order, when the same become due in accordance with the existing terms;

45 *ORDERS* that for the period commencing with the day of issuance of this Order until the Stay Termination Date, and subject to the other provisions of this Order, no person shall be under any obligation to make any further advances of money or credit to any of the Petitioners;

46 *ORDERS* that:

a) Any person who has provided insurance policies or indemnity at the request of the Petitioners shall be required to continue or to renew such insurance policies or indemnity provided that the Petitioners make payment of the premiums on the usual commercial terms, as if Petitioners were solvent and these proceedings had not been commenced, and otherwise comply with the provisions of such policies;

b) Any person and authority supplying goods or services (including, without limitation, utilities) under contracts, agreements or arrangements for an indefinite period of time or customarily renewed or extended from time to time shall be required to continue or to renew or extend such contract, agreement or arrangement for the provision of such goods and services, provided that the Petitioners comply with the usual or common commercial terms applied by such persons to others for the same or similar supplies of goods or services;

c) Any bank or other financial institution operating any accounts of the Petitioners or any of them as at the date of the issuance of this Order shall continue the operation of such accounts under the existing contracts, agreements or arrangements concerning the operation of such accounts and such further conditions as are customary between such bank or other financial institution and its customers in general. Any deposits made by any of the Petitioners from and after 12:01 o'clock A.M. on the day of issuance of this Order to any of its accounts shall not be applied by the applicable bank or other financial institution in reduction or repayment of any amounts owing on account of any loan, interest, reimbursable expense or any other amount due or accrued prior to the issuance of this Order, except with the written consent of the Petitioners, but this Order shall not otherwise prohibit any bank or other financial institution from taking such customary measures as are appropriate to protect against charge-back risk on uncertified cheques deposited to an account and the involuntary extension of new credit, including holding deposits until cleared, and otherwise collecting all fees and service charges relating to such accounts, by way of debits to such accounts and making debit and credit entries to the relevant accounts of the Petitioners and transferring balances between such accounts;

d) Notwithstanding the above, the Petitioners will pay the interest owed pursuant to the credit agreement dated May 2, 2003 between National Bank of Canada, Royal Bank of Canada, Canadian Imperial Bank of Commerce and Laurentian Bank of Canada and Petitioners and BSF will pay the interest owed pursuant to the secured note entered into between Roynat Inc. and BSF and Petitioners or any of them will be at liberty, but not required, to pay any principal amount and any other interest owed pursuant to any loan, term loan, leasehold improvement loan, secured note, debenture or other like instrument for the period starting from the day of issuance of this Order and ending on the Stay Termination Date. No person being a party to or holder of any such loan, term loan, leasehold improvement loan, secured note, debenture or other like instrument with one or more of the Petitioners may terminate, suspend, accelerate, amend or otherwise vary the performance of such



loan, term loan, leasehold improvement loan, secured note, debenture or other like instrument by reason that the Petitioners or any other person or persons related thereto are insolvent, by reason of the commencement of this proceeding or any admission or evidence in this proceeding or by reason of any default or non-performance by the Petitioners or any of them;

e) Any person who has provided a letter of credit, standby letter of credit, performance bond, payment bond or guarantee (the "Issuing Party") at the request of any of the Petitioners shall be required to continue honouring such letter of credit, bond or guarantee in accordance with its terms. For greater certainty, the Issuing Party shall be prohibited from terminating, suspending, modifying, determining, refusing to honour, accelerating or cancelling any such letter of credit, bond or guarantee and the beneficiary of such letter of credit, bond or guarantee shall be entitled to draw on it in accordance with their respective terms and conditions;

f) Subject to sections 18.1 and 18.3 of the CCAA, no person shall exercise any right of lien, compensation, set-off, counterclaim or consolidation with respect to any amount which may be owing and due by any of the Petitioners and more precisely, but without limiting the generality of the foregoing, any deposit made by any of the Petitioners with any person from and after the making of this Order, whether in an operating account or as a security deposit or prepayment or otherwise and whether for its own account or for the account of any other person, shall not be applied by such person in reduction or repayment of any amount owing as of the date of this Order and such person shall have no right of lien, compensation, set-off, counterclaim, consolidation, or other right in respect of such deposit;

47 *ORDERS* and *DECLARES* that the application of the Petitioners for the issuance of this Order, and admission or evidence in this proceeding, and any further proceedings entered or action taken by any of the Petitioners or any other person in respect of the Arrangement shall not in themselves constitute or be relied upon in evidence or otherwise as constituting an event of default or a default or failure on the part of any of the Petitioners or any person related thereto pursuant to any statute, regulation, licence, sublicence, permit, contract, agreement or arrangement or any other instrument or requirement;

## **OPERATIONS**

48 *ORDERS* that until the Stay Termination Date, the Petitioners shall remain in possession and control of their property, assets and undertakings and shall continue to carry on their businesses and:

a) May continue to enter into contracts with other persons and acquire goods and services necessary or desirable to continue to operate their businesses;

b) May continue to direct investment in respect of any pension funds and perform all other obligations in connection therewith and make payments with respect to the same;

c) Shall continue to operate, maintain and sell merchandise from their stores and boutiques under the banners San Francisco, New York-New York, Bikini Village, San Francisco Maillots, Victoire Delage, Moments Intimes and Les Ailes de la Mode;

49 *ORDERS* that for the period commencing with the day of issuance of this Order until the Stay Termination Date, none of the Petitioners:

a) Shall, other than in accordance with existing agreements and in the ordinary course of business, or pursuant to the other provisions of this Order, sell, dispose of, convey, transfer, release, discharge, assign, hypothec, pledge or grant security on any of their property, assets and undertakings involving an amount of consideration (in any one transaction or series of inter-related transactions) without prior leave of this Court;

b) Shall enter into any new material transaction or incur any new debt or other obligation except in the ordinary course of business or as otherwise provided for in this Order or any subsequent order;

50 *ORDERS* that, after the date of this Order and except as otherwise provided to the contrary herein, the Petitioners shall be entitled to pay all reasonable expenses incurred in the carrying on of business in the ordinary course and after the present Order, and that, pending any subsequent order of this Court, such expenses shall include, without limitation:

- a) All amounts owing for goods and services supplied to any of the Petitioners after the date of this Order;
- b) All wages, benefits, vacation pay and other amounts due or accruing due to employees of any of the Petitioners and all deductions at source and pension or other contributions in connection with such employees;
- c) Principal and interest, interest only, lease payments, costs, fees, expenses or charges to creditors and lessors, including lessors of movable property and lessors of premises, accruing from the date of issuance of this Order;
- d) All amounts due or becoming due by any of the Petitioners under any credit card arrangement including, without limitation, with respect to American Express, MasterCard and Visa cards;
- e) All insurance premiums, payments under financing arrangements for insurance premiums and other sums payable pursuant to insurance contracts or policies;
- f) All accounts of legal, accounting and other advisers and consultants advising the Petitioners in connection with the preparation of the Arrangement or generally advising the Petitioners in connection with possible restructuring, refinancing or recapitalisation;
- g) All accounts of the Monitor and its counsel, advisers and consultants;
- h) Amounts normally paid or transferred between the Petitioners and between the Petitioners and their respective subsidiaries in the ordinary course of business;
- i) All amounts reasonably necessary for the preservation of the property, assets or undertakings of the Petitioners;
- j) Any other amounts provided for by Arrangement or by the terms of this Order;
- k) Any amount to be paid or credited pursuant to a gift certificate, credit note, loyalty program, return or layaway granted by any of the Petitioners;
- l) All amounts due or become due by any of the Petitioners to their respective directors as fees and expenses;

51 *ORDERS* that no amount shall be transferred or advanced by and between any of the Petitioners other than amounts transferred by Petitioner Les Ailes de la Mode Incorporées ("Les Ailes") to BSF in amounts consistent with the estimated cash flow, filed as Exhibit R-3 which shall not exceed \$2,000,000 provided that BSF shall not exercise any right of lien, compensation set-off, counterclaim or consolidation with respect to any amount which may be owed by Les Ailes to BSF;

52 *AUTHORIZES* the Petitioners to retain and employ and make payment to such agents, servants, attorneys and other advisers and consultants as they deem reasonably necessary or desirable in the ordinary course of their businesses, for the purpose of carrying out the terms of this Order or for the preparation, negotiation or implementation of the Arrangement;

53 *ORDERS* that in the event that any of the Petitioners becomes bankrupt or a receiver within the meaning of subsection 243(2) of the BIA is appointed in respect of any of the Petitioners, the period between the date of this Order

and the Stay Termination Date shall not be counted in determining the thirty-day period referred to in subsection 81.1(a) of the BIA or the 15-day time period referred to in section 81.2 of the BIA;

54 Only *RESERVES*, at this stage, the rights, if any, of the Petitioners and each of them to, by notice to the other party or parties concerned, terminate, cancel, rescind from or repudiate such contracts, agreements, arrangements, leases, subleases, licences or sublicences, in accordance with their terms or otherwise, as they deem appropriate, and to make provision for any consequences thereof in the Arrangement;

#### **DIRECTORS AND OFFICERS INDEMNIFICATION HYPOTHEC**

55 *ORDERS* that the Petitioners shall and do hereby indemnify each of their respective directors and officers from and against :

a) All costs, claims, liabilities and obligations of any nature whatsoever that may be reasonably incurred after the date of this Order by any of such directors and officers as a result of his position as a director or officer of a Petitioner or the performance of his duties as a director or officer of a Petitioner, except to the extent that such director has actively participated in the breach of any fiduciary duty or has been grossly negligent or guilty of wilful misconduct; and

b) All costs, claims, liabilities and obligations which any such director or officer sustains and incurs after the date of this Order relating to the failure of the Petitioners or any of them at any time to make any payment in respect of which such director or officer may be liable under any law in his or her capacity as such;

55 (the "Director's and Officer's Liability")

Provided that the foregoing shall not constitute a contract of insurance and shall not alter in any way the application of existing insurance policies issued in favour of the Petitioners or any of their directors;

56 *DECLARES* and *ORDERS* that amounts to be paid as a consequence of a Director's and Officer's Liability, shall be secured by a hypothec, ranking immediately after the Monitor and Counsel Hypothec but in priority to all other security, over the universality of all the movable and immovable property, corporeal and incorporeal, present and future of the Petitioners, for a maximum amount of \$5,000,000 (the "D&O Hypothec");

57 *ORDERS* that the Petitioners or their directors and officers shall not be required to file, register, record or perfect the D&O Hypothec to render it opposable to the Petitioners, creditors and third parties;

#### **MONITOR**

58 *APPOINTS* Richter & Associés Inc. as Monitor of the Petitioners with the prescribed powers and duties of a monitor under the CCAA and such other powers and obligations as are provided in this Order;

59 *ORDERS* the Petitioners, their shareholders, directors, officers, employees and mandatories and all persons having notice of this Order to cooperate fully with the Monitor in the performance of its duties and to provide the Monitor with such access to the Petitioners' books and records, property, assets and premises as the Monitor requires to exercise its powers and perform its duties under the CCAA or this Order;

60 *ORDERS* that, without limiting the scope of the duties of the Monitor pursuant to the CCAA, the Monitor shall, until further order of this Court:

a) Notify, by regular mail, all of the known creditors of each of the Petitioners having claims of more than \$250 of the present Order, within ten (10) days after the rendering of any such order;

b) Assist the Petitioners in the development and implementation of the Arrangement;

- c) Assist the Petitioners, to the extent requested by them, in their negotiations with creditors and with the holding and administrating of any meetings to consider the Arrangement;
- d) Seek, receive and determine the amount of the claims of the creditors (within the meaning of section 12 of the CCAA) of the Petitioners, the whole with the collaboration of the Petitioners, but any decision of the Monitor to disallow, in whole or in part, the claim of any purported creditor shall be review able by this Court on motion served on the Petitioner or Petitioners concerned and the Monitor and filed with this Court within ten (10) days of the issuance of such decision by the Monitor;
- e) Report to the Court on the state of the business and financial affairs of the Petitioners at such times as are required by the CCAA and at such other times as the Court may order; and
- f) Perform such other duties as are required by this Order or subsequent order of this Court;

but the Monitor shall not otherwise interfere with the businesses carried on by the Petitioners, and the Monitor is not empowered to take possession of the property, assets and undertakings of the Petitioners nor to manage any of the businesses or affairs of any of the Petitioners;

61 *ORDERS* that the Monitor is not, nor is not deemed to be, solely as a result of this Order or the performance of its duties, an employer or a successor employer of the employees of the Petitioners or a related employer in respect of the Petitioners within the meaning of any federal, provincial or municipal legislation or regulation governing employment, labour relations, pay equity, employment equity, human rights or pensions or any other statute, regulation or rule of law and the Monitor shall not be, or be deemed to be, solely as a result of this Order or the performance of its duties, in occupation, possession, charge, management or control of the property or business or affairs of the Petitioners pursuant to any federal, provincial or municipal legislation or regulation or rule of law which imposes liability on the basis of such status including, without limitation, any labour law or environmental legislation or regulation;

62 *ORDERS* that the Monitor not be held liable for any act, omission or obligation of the Petitioners or any of them or any act or omission of the Monitor's in the actual or intended fulfillment of its duties or the carrying out of the provisions of the CCAA or this Order, save and except for gross negligence or wilful misconduct on its part, and no action, application or other proceeding shall be taken, made or continued against the Monitor without the leave of this Court first being obtained and upon further order securing, as security for costs, the judicial and extra-judicial costs and disbursements of the Monitor in connection with such any action, application or other proceeding;

63 *GRANTS* the Monitor the liberty to:

- a) Retain and employ such mandatories as are reasonably necessary for the purpose of carrying out the terms of this Order;
- b) Engage legal counsel as is reasonably necessary for the performance of its duties under the CCAA or this Order;
- c) Engage any persons related to the Monitor to assist it in the performance of its duties under the CCAA or this Order;

#### **MONITOR AND COUNSEL HYPOTHEC**

64 *ORDER*s that the Monitor, as well as counsel to the Monitor and counsel to the Petitioners or counsel to the board of directors or any special committee thereof (collectively the "Counsel"), be paid their reasonable fees and disbursements (including, in the case of the Monitor, the cost to it of any liabilities incurred in the proper exercise of its powers or discharge of its duties in accordance with the CCAA or this Order), and that such fees and disbursements be part of the costs of these proceedings;

65 *DECLARES* and *ORDERS* that the reasonable fees and disbursements of the Monitor and of the Counsel shall be secured by a hypothec, ranking in priority to the D&O Hypothec and in priority to all other security, over the universality of all of the movable and immovable property, corporeal and incorporeal, present and future of the Petitioners, for a maximum amount of \$500,000;

66 *ORDERS* that the Petitioners, the Monitor or Counsel shall not be required to file, register, record or perfect the Monitor and Counsel Hypothec in order to render it opposable to the Petitioners, creditors and third parties;

#### **SERVICE AND NOTICE**

67 *DISPENSES* with service of the motion for this Order and of the supporting affidavit and exhibits and any notice and delay of presentation relating thereto;

68 *ORDERS* that, in the event that any part or parts of, or all or substantially all of, the property, assets and undertakings of the Petitioners or any of them is sold, leased or otherwise disposed of or made subject to licence, the sale, lease or other disposition, or the interest of the licensee, shall be free and clear of the D&O Hypothec and the Monitor and Counsel Hypothec, which hypothecs shall continue instead as against the proceeds of sale, lease or other disposition or licensing;

69 *ORDERS* that:

1) The Petitioners and the Monitor may serve this Order and, subject to further order of this Court, any other orders in these proceedings and any notices, including disallowance of claims, by pre-paid ordinary mail, courier, personal delivery or electronic transmission to the relevant creditors or other persons at their respective addresses as last shown on the records of the Petitioners and any such service or notice shall be deemed good and sufficient service;

2) For the purpose of calculating the period of notice, apart from personal service effected according to the *Code of Civil Procedure*, any service or notice effected by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date thereof, and any service or notice effected by ordinary mail shall be deemed to be received on the fourth (4<sup>th</sup>) business day after mailing in Canada and in the United States or on the seventh (7<sup>th</sup>) business day otherwise;

3) Except as otherwise provided herein or subsequently ordered by this Court, no document, order or other material need be served on any person in respect of these proceedings unless such person has filed an appearance in the present proceedings in the Court record and given notice of such appearance to the respective attorneys for the Petitioners and the Monitor, as the case may be;

#### **GENERAL TERMS**

70 *PERMITS* the Petitioners or the Monitor to, from time to time, apply to this Court for directions regarding the exercise of the powers or the discharge of the duties of the Monitor pursuant to the CCAA or this Order or in respect of the proper execution of this Order;

71 *PERMITS* any interested person to apply to this Court to vary or rescind this Order or any subsequent order in this proceedings, or to seek relief from any provision of this Order or any such subsequent order, or to seek any other relief, on five (5) days' notice to the Petitioners concerned and to the Monitor and any other person or persons likely to be concerned by the order or relief being sought, or on such shorter period of notice as may be allowed by subsequent order of this Court;

72 *DECLARES* that this Order, and any other orders in these proceedings, shall have full force and effect in all provinces and territories in Canada and as against all persons and corporations against whom it may otherwise be enforceable;

73 *SEEKS* and *REQUESTS* the recognition, aid and assistance of any Court, tribunal, administrative body or other authority within any province or territory of Canada and whether constituted under the laws of Canada or any province or territory, including, without restricting the generality of the foregoing, any Court, tribunal, administrative body or other authority in Ontario, and that all such Courts and authorities make such orders and provide such assistance to the Petitioners and/or the Monitor as they may deem necessary or appropriate in aid of and complementary to this Court in carrying out the terms of this Order or any further order of this Court issued at the request of any of the Petitioners or the Monitor in the present proceedings.

74 *ORDERS* provisional execution of this Order notwithstanding appeal and without the necessity of furnishing security;

75 *WITHOUT COSTS.*

Solicitors of record:

*Fasken, Martineau, Attorneys*, for the Petitioners

*Gowlings, Lafleur, Attorneys*, for the Bank Syndicate

*Goldstein, Flanz, Fishman, Attorneys*, for Cadillac Fairview.

*Stikeman, Elliott, Attorneys*, for Ivanoe Cambridge Inc.

#### Footnotes

1 [1991] R.L. 593 (C.A.).

2 C.A. Montreal, n° 500-09-012346-029, June 11, 2002, j. Chamberland, p. 2.

3 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, [2003] R.J.Q. 420

4 Lloyd W. Houlden and Geoffrey B. Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act*, Toronto, Thomson Carswell, 2004.

5 *P.C.I. Chemicals Canada inc. (Plan d'arrangement de transaction ou d'arrangement relatif à)*, [2002] R.J.Q. 1093 (C.S.)

6 *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, *supra*, note 3.

7 *Uniforêt inc. c. 9027-1875 Québec inc.*, [2003] R.J.Q. 2073 (C.A.).

8 *3915611 Canada Inc. and Eicon Networks Corporation*, *supra*, note 2.

9 *Les Immeubles Wilfrid Poulin Itée c. Les Ordinateurs hypocrat inc.*, [1998] R.D.I. 189 (C.A.).

10 Janis SARRA, *Steel, Sulphur and Coal, Update on Debtor in Possession Financing and Priming Liens in CCAA Applications*, September 2002.