

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
NATIONAL TRAFFIC SAFETY MANAGEMENT INC.  
IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**FACTUM OF NATIONAL TRAFFIC SAFETY  
MANAGEMENT INC.  
(Returnable April 16, 2024)**

April 15, 2024

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TO: THE SERVICE LIST

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**PART I – NATURE OF THE RELIEF SOUGHT**

1. This factum is filed by National Traffic Safety Management Inc. (the “**Company**”) in support of its application for an order (the “**DIP Financing Order**”) approving the Debtor-In-Possession Term Sheet dated April 10, 2024 (the “**Interim DIP Term Sheet**”) between National Traffic Safety Management Inc. and J9 Investments Inc. (the “**DIP Lender**”) and granting a priority charge over the Company’s property and assets as security for the Interim DIP Loan (as is hereinafter defined).

2. The facts underlying this motion are more fully set out in the affidavit of Michael Spencley sworn April 11, 2024 (the “**Spencley Affidavit**”).<sup>1</sup> All capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Spencley Affidavit, and all monetary amounts referred to herein are in Canadian currency unless otherwise stated.

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<sup>1</sup> Motion Record of National Traffic Safety Management Inc., Tab 2, Affidavit of Michael Spencley sworn April 11, 2024 (the “**Spencley Affidavit**”).

## PART II – FACTS

### *Overview of the Company and Operations*

3. The Company is a private company incorporated under the Ontario Business Corporations Act whose registered head office is located in Toronto, Ontario.<sup>2</sup>

4. The Company is in the business of providing end-to-end traffic management solutions including traffic management solutions to ensure construction and infrastructure workers are safe at job sites. The Company operates throughout the province of Ontario.<sup>3</sup>

5. The Company currently has 3 long-term multi-year contracts with Aecon, Ellis-Don and West Quarter to provide traffic control services. In addition to these long-term contracts, the Company has several short-term contracts (lasting a year or less). The Company usually has 4-8 of these short-term contracts going on at any one time.<sup>4</sup>

### *Employees*

6. The Company currently employs approximately 25 hourly employees. Of these employees, only 5 are non-unionized. The Company also employs 8 salaried employees.<sup>5</sup>

7. Unionized employees are members of Laborers' International Union of North America (“LIUNA”) and four local branches: Local 837; Local 183; Local 1059 and Local 506. On the 15th day of each month, the Company remits health benefits, pension benefits, 10% vacation pay and administrative fees to the respective Local, in arrears. Union dues are deducted from the wages

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<sup>2</sup> Spencley Affidavit, at para. 3; Exhibit “A” to the Spencley Affidavit.

<sup>3</sup> Spencley Affidavit, at para. 4.

<sup>4</sup> Spencley Affidavit, at para. 5.

<sup>5</sup> Spencley Affidavit, at para. 6.

of each employee and are remitted to the corresponding Local.<sup>6</sup>

8. For the past two months, the Company's weekly payroll for its hourly employees has been approximately \$20,000 to \$25,000. As the Company enters its busier time of year, it anticipates this payroll will increase to approximately \$80,000 per week. The Company's payroll for its salaried employees is \$30,000, and is due every two weeks.<sup>7</sup>

***Financing for the Debtor and the Lender's Security***

9. A search of the Personal Property Security Registration System in Ontario ("**PPRS**") as of March 31, 2024 shows that there are registrations against the Company as follows:<sup>8</sup>

- (a) Neli Financial Incorporated registered a financing statement on June 22, 2018, listing collateral classified as "inventory", "equipment", "accounts", "other" and "motor vehicle included" in respect of certain vehicles and freightliners. The amount owing to Neli Financial Incorporated in connection with this registration has been paid off in full;
- (b) Mercedes-Benz Financial Services Canada Corporation registered a financing statement of July 5, 2019 listing collateral classified as "equipment", "other" and "motor vehicle included" in respect of certain motor vehicles and related equipment financed by Mercedes-Benz;
- (c) J9 Investments Ltd. registered a financing statement on July 23, 2020 listing collateral classified as "inventory", "equipment", "accounts", "other" and "motor vehicle included". J9 Investments Ltd. is owed \$807,000 in respect of a secured loan;
- (d) Royal Bank of Canada registered a financing statement on May 6, 2021 listing collateral classified as "inventory", "equipment", "accounts", "other" and "motor

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<sup>6</sup> Spencley Affidavit, at para. 7.

<sup>7</sup> Spencley Affidavit, at para. 8.

<sup>8</sup> Spencley Affidavit, at para. 9; Exhibit "B" to the Spencley Affidavit.

vehicle included”. Royal Bank is owed \$199,000 secured in respect of a Highly Affected Sectors Credit Availability Program (“**HASCAP**”) loan;

(e) 1555207 Ontario Inc. registered a financing statement on February 7, 2022 listing collateral classified as “inventory”, “equipment”, “accounts”, “other” and “motor vehicle included”. 1555207 Ontario Inc. is owed \$335,000 in respect of a secured loan; and

(f) Betty Copeland registered a financing statement on April 17, 2023 listing collateral classified as “inventory”, “equipment”, “accounts”, “other” and “motor vehicle included”. Betty Copeland is owed \$200,000 in respect of a secured loan. Ms. Copeland is also owed approximately \$77,000 in unsecured debt.

### ***Other Liabilities***

10. The Company is not current in respect of HST remittances. Approximately \$1,000,000 is owed to Canada Revenue Agency for HST arrears.<sup>9</sup>

11. The Company owes \$17,000 to LIUNA Local 837 in respect of unremitted union dues.<sup>10</sup>

12. The Company is current in respect of source deduction remittances.<sup>11</sup>

### ***Current Financial Position***

13. The Company has suffered financially in the following respects:<sup>12</sup>

(a) working condition constraints from the Covid-19 pandemic significantly reduced sales for 2021-2022; and

(b) the diversion of approximately \$2,000,000 in sales and other assets by the Company’s former Vice-President Operations, and his operations manager to a new company. Both are currently being investigated by Niagara Police Services.

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<sup>9</sup> Spencley Affidavit, at para. 10.

<sup>10</sup> Spencley Affidavit, at para. 11.

<sup>11</sup> Spencley Affidavit, at para. 12.

<sup>12</sup> Spencley Affidavit, at para. 13.

14. The Company has incurred losses since the start of fiscal 2024, totalling approximately \$200,000. The Company's year end loss for 2023 is estimated to be \$500,000.<sup>13</sup>

15. The Company currently owes a total of \$2,406,000 in secured debt and \$4,753,627.39 in unsecured debt.<sup>14</sup>

16. Within the past two weeks, the Company was engaged by:

(a) the City of Hamilton to provide traffic services; and

(b) Aecon to provide traffic safety services at the Eglinton Crosstown LRT project.

### *The NOI Proceeding*

17. As a result of the Company's financial difficulties, on April 5, 2024 (the "**Filing Date**"), the Company filed a Notice of Intention to File a Proposal ("**NOI**") under the Bankruptcy and Insolvency Act (the "**NOI Proceeding**"). The NOI filing was necessary to provide stability to the allow the Company to restructure. TDB Restructuring Limited ("**TDB**") is the trustee in the NOI Proceeding (the "**Proposal Trustee**").<sup>15</sup>

### *Cash Flows*

18. The Proposal Trustee has assisted the Company in preparing a cash flow forecast (the "**Cash Flow Forecast**") which sets out projected cash flows for the period ending July 5, 2024, 2024 (the "**Cash Flow Period**"), a copy of which I understand will be filed with the Court by the Trustee in connection with the Company's motion.

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<sup>13</sup> Spencley Affidavit, at para. 15.

<sup>14</sup> Spencley Affidavit, at para. 16.

<sup>15</sup> Spencley Affidavit, at paras. 18-19.

19. As set out in the Cash Flow Forecast, the Company is expected to have sufficient liquidity to operate to the end of the Cash Flow Period provided that it has access to interim financing. As reflected in the Cash Flow Forecast, without interim financing, the Company will run out of money the week of April 15, 2024.

***Interim Financing***

20. I have reviewed a term sheet for debtor-in-possession (“**DIP**”) financing from a third party lender. The proposed terms pursuant to the term sheet are acceptable to the Company. The proposed DIP lender is completing its due diligence process.<sup>16</sup>

21. In the meantime, the Company requires additional funds to pay critical operating expenses including: payroll, fuel and rent.<sup>17</sup>

22. J9 Investments Inc., a non-arms length party and an investor in the Company, has agreed to provide bridge DIP financing (the “**Interim DIP Loan**”) which is to be repaid once the third party lender completes its due diligence, and the DIP facility from the third party lender is approved by the Court and becomes available to the Company.<sup>18</sup>

23. The material terms of the Interim DIP Loan are as follows:<sup>19</sup>

<b>Key Terms</b>	<b>Description</b>
Borrower	National Traffic Safety Management Inc.
Lender	J9 Investments Inc.
Facility	A super-priority, debtor-in-possession non-revolving demand credit facility up to a maximum principal amount of one hundred fifty thousand dollars \$150,000 (the “ <b>Facility</b> ”).

<sup>16</sup> Spencley Affidavit, at paras. 22-23.

<sup>17</sup> Spencley Affidavit, at para. 24.

<sup>18</sup> Spencley Affidavit, at para. 25; Exhibit “C” to the Spencley Affidavit.

<sup>19</sup> Spencley Affidavit, at para. 26.

Interest Rate	Interest on the principal amount of the Facility outstanding from time to time shall be calculated at a rate of fifteen percent (15%) per annum, which interest shall be calculated on the daily outstanding balance owing under the Facility, not in advance, and shall accrue and be paid on the Maturity Date.
Facility Fee	A Facility fee equal to \$7,500, which shall be fully earned upon Court approval of the Interim DIP Term Sheet, and secured by the Interim Financing Charge, shall be due and payable on the Maturity Date.
Repayment	The Borrower shall repay all principal, interest, fees and other amounts owing under the Facility on the earlier of (the “ <b>Maturity Date</b> ”): (i) demand; (ii) the date the Facility is refinanced; (iii) the day on which the stay of proceedings has been terminated; (iv) the date on which the Borrower becomes bankrupt. The Borrower is entitled to repay all or any part of the Facility at any time without notice or penalty.
Conditions	The Interim DIP Term Sheet is conditional on, <i>inter alia</i> ,: (i) Court approval of the Interim DIP Term Sheet, and (ii) a charge in and to all present and future property and assets of the Company to rank in priority to any and all security interests.

24. The Company is seeking an interim DIP charge (the “**Interim DIP Charge**”) to secure the Interim DIP Loan, which is required pursuant to the terms of the J9 Term Sheet. The Interim DIP Charge is intended to rank in priority to all encumbrances.

25. The Proposal Trustee is of the view that the Company’s request for approval of the Interim DIP Loan and the Interim DIP Charge are reasonable in the circumstances and are required to provide the Company with the necessary financing to maintain ongoing operations while it formulates a restructuring plan and proposal to its creditors.

26. If this financing is not approved, the Company will not have sufficient liquidity to continue operations and will be required to cease operations, resulting in lost jobs for the Company’s employees and material losses for the Company’s creditors and other stakeholders.



### **PART III – ISSUE**

27. The sole issue before the Court is whether the Interim DIP Term Sheet should be approved, and the Interim DIP Charge should be granted.

### **PART IV – LAW AND ARGUMENT**

#### ***Interim Financing***

28. Pursuant to section 50.6 of the BIA, the Court may make an order declaring that all or part of the Company’s property is subject to a security or charge and order that the security or charge rank in priority over the claim of any secured creditor of the Company.<sup>20</sup>

29. In deciding whether to make such an order, the Court is to consider the following:<sup>21</sup>

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

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<sup>20</sup> [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 \(the “BIA”\), section 50.6\(1\) and 50.6\(3\).](#)

<sup>21</sup> [BIA, section 50.6\(5\).](#)

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

30. The Interim DIP Term Sheet should be approved and the Interim DIP Charge should be granted for the following reasons, which are consistent with the factors articulated in [\*Colossus Minerals Inc. \(Re\)\*, 2014 ONSC 514](#) at paragraphs 4 to 9:<sup>22</sup>

- (a) the Company requires the Interim DIP Loan to make its payroll due April 16, 2024;
- (b) the Company will be forced to cease operations if it does not receive interim funding;
- (c) the Company expects to enter its busy season and enter into additional contracts for the provision of its services;
- (d) the terms of the Interim DIP Term Sheet are consistent with the terms of DIP financing facilities in similar proceedings; and
- (e) the Proposal Trustee is of the view that the Company's request for the approval of the Interim DIP Loan and the Interim DIP Charge are reasonable in the circumstances and are required to provide the Company with the necessary financing to complete its restructuring.

#### **PART IV – ORDER REQUESTED**

31. The Lender seeks an Order approving the Interim DIP Term Sheet and granting the Interim DIP Charge.

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<sup>22</sup> See also [\*Mustang GP Ltd. \(Re\)\*, 2015 ONSC 6562](#), at paras. 26 to 31.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of April, 2024.



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## **SCHEDULE “A”**

### **AUTHORITIES**

1. [\*Colossus Minerals Inc. \(Re\)\*, 2014 ONSC 514](#)
2. [\*Mustang GP Ltd. \(Re\)\*, 2015 ONSC 6562](#)

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

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

##### **Order — interim financing**

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor’s cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

##### **Individuals**

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

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

##### **Priority**

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

##### **Priority — previous orders**

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

##### **Factors to be considered**

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

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor’s business and financial affairs are to be managed during the proceedings;

- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

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