

**Affidavit of Robert Hopkins  
Sworn on April 23, 2004**

Action No.:

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

**MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,  
MASSMUTUAL CORPORATE INVESTORS, MASSMUTUAL  
PARTICIPATION INVESTORS, MASSMUTUAL CORPORATE  
VALUE PARTNERS LIMITED AND  
CM EQUITY PARTNERS, L.P.**

Plaintiffs

- and -

**EVANS CONSOLES INC.**

Defendant

**AFFIDAVIT**

I, **Robert Hopkins**, of the City of New York, in the State of New York, United States of America, **MAKE OATH AND SAY THAT:**

1. I am a partner of CM Equity Partners, LP ("CM Equity") and have personal knowledge of the matters deposed to herein, except where stated to be based on information, in which case I believe such information to be true. I am authorized by CM Equity to swear this Affidavit.

**Background**

2. Evans Consoles Inc. ("Evans Canada") is a company continued pursuant to the laws of New Brunswick and is extra-provincially registered to carry on business in Alberta. Evans Canada is in the business of building, selling and distributing custom made

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consoles that primarily house computer equipment. The consoles are used in large venues such as airport control towers, stock exchange floors and 911 call centres. The majority of sales are to customers in the telecommunications industry.

3. I understand that the consoles are manufactured, sold and distributed from leased premises located at 1616-27th Avenue N.E. in Calgary, Alberta (the "Leased Premises"). The Leased Premises, which also serve as corporate headquarters for Evans Canada, are owned and managed by Dayhu Investments Ltd. (the "Landlord").
4. The consoles are sold to customers in Canada, the United States and other countries. Sales of consoles in the United States are effected by Evans Consoles Incorporated ("Evans U.S."), a company that was incorporated pursuant to the laws of the State of Colorado and is a wholly-owned subsidiary of Evans Canada. (Evans Canada and Evans U.S. are sometimes collectively referred to as "Evans").
5. In total, Evans has approximately 184 employees. Most are employed by Evans Canada which maintains a staff of 171. Of these employees, 123 are engaged in manufacturing consoles, 12 in sales, 6 in customer service, 4 in the installation of consoles, 12 in engineering and 14 in administrative and executive capacities.
6. Evans U.S. has 13 employees who operate out of their homes. Of these, 10 are sales agents and the remaining 3 install consoles.
7. Evans U.S. also operates a show room where the consoles are displayed. The showroom is located at Suite 1115, 381 Park Avenue South, New York, New York.
8. Evans Canada leases certain of the equipment it uses in manufacturing the consoles and has an extensive list of trade creditors with whom it transacts on a regular basis. Approximately one-half of Evans Canada's trade debt is owed to Alberta distributors of wood products and metal. Maintaining supply agreements with its trade creditors is critical to Evans Canada's business.

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9. In March 1998, the shares of Evans Canada were owned by David Catta and 3263878 Canada Inc. (a company owned by Ross Evans). On or about March 3, 1998, pursuant to transactions in connection with a share purchase agreement, CM Equity became the controlling shareholder of Evans Canada. Pursuant to those transactions, Massachusetts Mutual Life Insurance Company, MassMutual Corporate Investors, MassMutual Participation Investors and MassMutual Corporate Value Partners Limited (referred to individually and collectively as "MassMutual") became Evans Canada's largest non-voting shareholder and creditor. David Catta and 3263878 Canada Inc. remained shareholders of Evans Canada.
10. Particulars of the shareholdings of Evans Canada following the March 3, 1998 change in ownership are contained in the document now shown to me and marked Exhibit "A".
11. On or about March 3, 1998 Evans Canada issued notes in the total principal amount of \$2,000,000 to 3263878 Canada Inc. and David Catta (the "Sellers Notes"). Now shown to me and marked Exhibit "B" are copies of the Sellers Notes. (The Sellers Notes held by 3263878 Canada Inc. were subsequently assigned by it to Evans 2003 Family Trust.)
12. Pursuant to a Sellers Note Subordination Agreement dated March 3, 1998, 3263878 Canada Inc. and David Catta subordinated payment of the Sellers Notes to payment of all amounts due in respect of the indebtedness held by MassMutual (the "Subordination Agreement"). Now shown to me and marked Exhibit "C" is a copy of the Subordination Agreement.
13. The shareholdings of Evans Canada have changed since March 3, 1998. The changes are reflected in column 3 of Exhibit "A" to this affidavit, and reflect the following events. Evans Canada issued incentive shares to management of Evans Canada. In some cases those shares were redeemed. In August 2002, CM Equity and certain shareholders made additional equity contributions to Evans Canada in the order of \$1 million for which such shareholders took back Preferred, Series 1 shares of Evans Canada. In January 2003, the New Tranche A Notes (as described in paragraph 16 below) were issued by Evans to CM Equity and MassMutual, and in connection with rescheduling of the existing Evans debt

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which took place at that time, MassMutual received Preferred, Series 2 Shares in the capital of Evans Canada.

#### The Notes

14. On March 3, 1998 Evans entered into Securities Purchase Agreements (the "Securities Purchase Agreements") with MassMutual. Three types of notes bearing different interest rates and other terms and identified as Tranche A, Tranche B and Revolving Credit Notes, were issued pursuant to the Securities Purchase Agreements to MassMutual. The Tranche A and Tranche B Notes were issued by Evans Canada and the Revolving Credit Notes were issued by Evans U.S.
15. Pursuant to the Securities Purchase Agreements MassMutual purchased notes in the principal amount of USD \$21,300,000. Now shown to me and marked Exhibit "D" are copies of the Securities Purchase Agreements.
16. On or about January 21, 2003 Evans, MassMutual and CM Equity entered into Securities Purchase Amendment Agreements (the "Securities Purchase Amendment Agreements", sometimes referred to collectively with the Securities Purchase Agreements as the "Amended Securities Purchase Agreements"). Pursuant to the Securities Purchase Amendment Agreements MassMutual purchased New Tranche A Notes from Evans in the principal amount of USD \$1,000,000 and CM Equity purchased New Tranche A Notes in the principal amount of USD \$1,000,000. (Notes purchased under the Securities Purchase Agreements and the Securities Purchase Amendment Agreements are sometimes collectively referred to as "Notes"). Now shown to me and marked Exhibit "E" are copies of the Securities Purchase Amendment Agreements dated March 3, 1998.
17. Pursuant to the Amended Securities Purchase Agreements MassMutual purchased Notes in the total principal amount of USD \$22,300,000 and CM Equity purchased Notes in the total principal amount of USD \$1,000,000. The total principal received by Evans, pursuant to the Amended Securities Purchase Agreements is USD \$23,300,000. Of that sum, the total principal amount of USD \$18,400,000 was received by Evans Canada,

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under the Tranche A, New Tranche A and Tranche B Notes, and USD \$4,900,000 was received by Evans U.S, under the Revolving Credit Notes.

### **The Security**

18. Pursuant to a note guarantee dated March 3, 1998 as later amended by the Securities Purchase Amendment Agreements, Evans Canada guaranteed to MassMutual and CM Equity, the due and punctual payment of the principal, premium, interest on and fees and other amounts payable with respect to the Revolving Credit Notes and the due and punctual payment and performance of any and all other indebtedness and obligations of Evans U.S. under the Amended Securities Purchase Agreements, the Security Agreement (referred to below), the note guarantee and other documents (collectively referred to as the "Operative Documents"). A similar note guarantee was provided by Evans U.S. guaranteeing to MassMutual and CM Equity the obligations of Evans Canada. Now shown to me and marked Exhibit "F" are copies of the note guarantees provided by each of Evans Canada and Evans U.S., each dated March 3, 1998 (individually and collectively referred to as "Note Guarantee(s)").
19. On or about March 3, 1998 as later amended by the Securities Purchase Amendment Agreements, Evans Canada and CIBC Mellon Trust Company, as trustee for MassMutual and CM Equity (the "Trustee"), entered into a Security Agreement securing the due and punctual payment of the principal, premium, interest, fees and other amounts payable with respect to the Notes and the due and punctual payment and performance of any and all other indebtedness and obligations of Evans Canada and Evans U.S. related to the Notes or arising under or referred to in any of the Operative Documents. Evans U.S. and the Trustee entered in to a similar Security Agreement. Now shown to me and marked Exhibit "G" are copies of the Security Agreements entered into by Evans Canada and Evans U.S., each dated March 3, 1998 (individually and collectively referred to as "Security Agreement(s)").
20. Pursuant to the Security Agreement later amended by the Securities Purchase Amendment Agreements, Evans Canada mortgaged, hypothecated, charged, pledged,

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granted and assigned as collateral to the Trustee and created for the benefit of the Trustee (for the benefit of and on behalf of MassMutual and CM Equity) and, in the case of any agreement or contract, created a first fixed and specific assignment of and a continuing security interest in and lien on all of the tangible and intangible personal property and fixtures of Evans Canada, whether then owned and existing or thereafter acquired or arising, wherever located, together with any and all additions, accessions and attachments thereto and substitutions, replacements, proceeds and products thereof (the "Security").

21. Paragraph 17 of the Security Agreement with Evans Canada provides in part that the Security Agreement shall inure to the benefit of and be enforceable by each holder from time to time of any of the Notes who shall, without further action, subject to the terms of the Securities Purchase Agreements, be entitled to enforce the provisions and enjoy the benefits of the Security Agreement and Securities Purchase Agreements.
22. Financing statements in relation to the Security were registered in the Alberta Personal Property Register on February 24, 1998, February 26, 1998 and March 2, 1998 (the "Financing Statements"). Now shown to me and marked Exhibit "H" are copies of the Financing Statements dated February 24, 1998, February 26, 1998 and March 2, 1998. These registrations constitute a first registered security interest against all present and after acquired personal property of Evans Canada.

#### **Financial Downturn**

23. In 2001 Evans' sales peaked as a result of significant growth in the telecommunications industry. Evans' business has steadily declined from the peak in 2001 in tandem with the decline in the telecommunications industry.
24. In connection with the changes in management of Evans Canada over time, certain of the management shareholders of Evans Canada exercised a "put" right (under the terms of a 1998 shareholder agreement) pursuant to which Evans Canada was obligated to reacquire their shares at a prescribed price. Since Evans Canada did not have the cash to pay for these shares, in accordance with the 1998 shareholders agreement, such former management shareholders were issued junior subordinated promissory notes in a form

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pre-prescribed by the shareholders agreement. The management terminated in 2002 who were issued promissory notes for the acquisition of their shares are listed in the document now shown to me and marked Exhibit "T". These promissory notes are unsecured and remain outstanding.

25. As a result of the continued decline in Evans' business, on or about January 21, 2003 Evans sought and received further funding (USD \$2 million) from MassMutual and CM Equity pursuant to the Securities Purchase Amending Agreements. This further funding was used for working capital.
26. On or about January 21, 2003 Evans was also relieved of certain of its debt servicing obligations pursuant to the Securities Purchase Agreement, quarterly pre-payment and interest obligations under certain tranches of Notes being deferred until such Notes were due.
27. In or about January 2003 changes were made to Evans Canada's board of directors followed by further changes to its management in or about May 2003 in an effort to improve its business. However, business continued to decline, and from about June 2003 to January 2004 Evans Canada reduced the number of its employees from about 351 to 165.
28. By March 1, 2003 Evans Canada could no longer meet its obligations to the Landlord and commenced paying one-half of its monthly rental. At that time Evans Canada and the Landlord entered into a written agreement (which was entitled "Loan Agreement") under which the unpaid portion of rent was accrued with interest (the "Deferred Rent Agreement"). Pursuant to the Deferred Rent Agreement, payment in respect of the amount deferred and resumption of full rent was to commence on September 1, 2003.
29. Evans Canada was unable to make the payments stipulated under the Deferred Rent Agreement. In September 2003, Evans Canada informed the Landlord that Evans Canada could not repay the deferred rent at that time and Evans Canada advised the Landlord that it could only afford to pay half the monthly rent. Since October 1, 2003, Evans Canada

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has only paid half the monthly rent for the Leased Premises. Evans Canada informed the Landlord of its desire to renegotiate the lease arrangement based on a requirement of half the space of the Leased Premises. Evans Canada proceeded to search for a prospective tenant to take up half the space, or the whole space of the Leased Premises, in which case Evans Canada would move to another location.

30. Despite the measures undertaken to minimize the impact of the decline in its business, Evans can no longer meet its obligations to its creditors.

#### **Current Financial Picture**

31. MassMutual and CM Equity retained PricewaterhouseCoopers Inc. to undertake a valuation of Evans (the "PwC Valuation"). The valuation indicates that Evans has assets with a book value of CDN \$14.9 million, total liabilities with a book value of CDN \$37.7 million and a resultant negative net equity of CDN \$22.9 million as at February 29, 2004. Now shown to me and marked Exhibit "P" is a copy of the PwC Valuation, dated March 30, 2004.
32. The PwC Valuation estimates that as at February 29, 2004 Evans' assets have a value ranging from CDN \$6,457,000 to CDN \$7,555,000, an amount falling far below Evans' outstanding indebtedness to MassMutual and CM Equity, as explained below. The PwC Valuation estimates have been further reduced since then by reductions in cash totalling about \$700,000 for expenditures on operating and restructuring costs.

#### **The Indebtedness**

33. The indebtedness of Evans to MassMutual and CM Equity is as follows ( and I am advised by Michael Kolfas of MassMutual of the facts contained in paragraphs 34 to 37 inclusive and the portion of paragraph 39 relating to the indebtedness to MassMutual):

#### ***MassMutual***

34. As at March 31, 2004 the principal amount of USD \$10,105,761.64 and accrued interest of USD \$452,093.11 is due and owing to MassMutual under the Tranche A Notes.

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35. As at March 31, 2004 the principal amount of USD \$3,916,961.77 and accrued interest of USD \$284,628.00 is due and owing to MassMutual under the Tranche B Notes.
36. As at March 31, 2004 the principal amount of USD \$4,900,000 and accrued interest of USD \$166,113.38 is due and owing to MassMutual under the Revolving Credit Notes.
37. As at March 31, 2004 the principal amount of USD \$1,000,000 and accrued interest of USD \$55,240.65 is due and owing to MassMutual under the New Tranche A Notes.

#### *CM Equity*

38. As at March 31, 2004 the principal amount of USD \$1,000,000 and interest accrued of USD \$55,240.65, totalling USD \$1,055,240.65 is due and owing to CM Equity under the New Tranche A Notes issued by Evans pursuant to the Securities Purchase Amendment Agreements.

#### *Total Indebtedness*

39. The total indebtedness of each of Evans Canada and Evans U.S. to MassMutual is USD \$20,880,798.55. Their total indebtedness to CM Equity is USD \$1,055,240.65. Accordingly the aggregate indebtedness of Evans Canada and Evans U.S. to MassMutual and CM Equity as at March 31, 2004 is USD \$21,936,039.20 (the "Total Indebtedness"). This amounts to about CDN \$29,613,652.92 (using a conversion rate of USD \$1.00 to CDN \$1.35).

#### **The Default**

40. The Amended Securities Purchase Agreements provide that if an Event of Default occurs the principal of all Notes shall forthwith become due and payable, together with interest accrued thereon and Evans shall forthwith pay to MassMutual and CM Equity the entire principal, interest accrued on and fees payable with respect to the Notes.
41. Pursuant to the terms of the Amended Securities Purchase Agreements, the following Events of Default have now occurred:

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- (i) Evans Canada has not paid and cannot pay its debts as they become due; and
- (ii) the Consolidated Net Worth of Evans Canada and Evans U.S. has fallen below CDN \$8,820,000 plus 75% of positive Consolidated Net Income for the quarterly accounting period ending February 28, 2004.

#### **Demand and Notice of Intention to Enforce**

- 42. By letter dated April 23, 2004 MassMutual and CM Equity, by their counsel demanded payment from Evans Canada of the Total Indebtedness pursuant to the Amended Securities Purchase Agreements (the "Demand") and issued a Notice of Intention to Enforce Security in compliance with section 244 of the *Bankruptcy and Insolvency Act* (Canada) RSC 1985, c. B-3. Now shown to me and marked Exhibit "K" are copies of the Demand and the Notice of Intention to Enforce Security.
- 43. Evans Canada has not paid the Total Indebtedness in accordance with the Demand and on or about April 23, 2004 Evans Canada provided a Consent to Earlier Enforcement to MassMutual and CM Equity. Now shown to me and marked Exhibit "L" is a copy of the Consent to Earlier Enforcement.
- 44. Evans Canada has failed to pay the Total Indebtedness and the Security is valid and has become enforceable.

#### **Receivership Sought**

- 45. The PwC Valuation clearly demonstrates that MassMutual and CM Equity will not be able to recover most of the Total Indebtedness. The anticipated shortfall is at least CDN \$20,358,652.92, calculated as follows:

Total Indebtedness:	\$29,613,652.92
Less highest estimated value of assets (PwC Valuation):	\$7,555,000.00
Less statutory and purchase money security	\$1,000,000.00

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interest priorities:

Less estimated cash expenditures on operating and restructuring costs:	700,000.00
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Anticipated Shortfall	\$20,358,652.92
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After the Security held by MassMutual and CM Equity is enforced there is no possibility that any amount will be available to subordinate creditors or to shareholders.

46. MassMutual and CM Equity are opposed to a public sale of Evans Canada's assets since:
- (a) it will not yield a recovery acceptable to them having regard to the current value of Evans Canada's assets as set forth in the PwC Valuation;
  - (b) the current market for the business of Evans Canada is recessed. It is therefore not the right time to market its business and Evans Canada does not have the working capital to continue operations;
  - (c) to maintain the good will of the business and the confidence of customers, it is vital that a sale be concluded quickly so that there is a seamless transition of the business to a purchaser. A public sale would delay transition of the business and jeopardize the good will of the business and confidence of customers; and
  - (d) a public sale process would involve costs and delay that Evans Canada cannot afford and which would only further deteriorate the anticipated recovery of MassMutual and CM Equity.
47. MassMutual and CM Equity have determined that given the disparity between the Total Indebtedness and the estimated value of Evans, the best approach to minimize their losses is to restructure and recapitalize the business with a level of debt that is acceptable and serviceable by the business and a capital structure that is acceptable to them. MassMutual and CM Equity contemplate that the business should be acquired by a new company ("NewCo") that is owned by MassMutual, CM Equity and current management.

