

Action No.: 0401 - 066 28

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

NOTICE OF MOTION

TAKE NOTICE that an application will be made on behalf of Massachusetts Mutual Life Insurance Company, MassMutual Corporate Investors, MassMutual Participation Investors, MassMutual Corporate Value Partners Limited (collectively "MassMutual") and CM Equity Partners, L.P. ("CM Equity") in respect of Evans Consoles Inc. ("Evans Canada") before the Honourable Madame Justice B.E.C. Romaine in Chambers, in the City of Calgary, in the Province of Alberta, on Tuesday, the 27th day of April, 2004, at 1:30 p.m. or soon thereafter as counsel may be heard for:

1. An Order abridging the time for service of this application and the materials filed in support thereof, if necessary;

2. An Order appointing BDO Dunwoody LLP as receiver and manager (“Receiver”) of the assets and undertaking of Evans Canada pursuant to s. 13 (2) of the *Judicature Act*, R.S.A. 2000, c. J-2 (“*Judicature Act*”) and other customary ancillary relief;
3. An Order granting leave to serve the Notice of Motion together with the Statement of Claim herein and ordering that such service is deemed good and sufficient;
4. An Order granting costs of this application to MassMutual and CM Equity on a solicitor and own client full indemnity basis; and
5. An Order for such further and other relief, as the Applicant may advise.

AND FURTHER TAKE NOTICE that MassMutual and CM Equity rely upon, *inter alia*, the following grounds in support of this application:

- (a) On March 3, 1998 Evans Canada and Evans U.S. entered into Securities Purchase Agreements (the “Securities Purchase Agreements”) with MassMutual. Pursuant to the Securities Purchase Agreements MassMutual purchased notes in the principal amount of USD \$21,300,000;
- (b) On or about January 21, 2003 Evans Canada, Evans Consoles Incorporated (“Evans U.S.”, a wholly owned subsidiary of Evans Canada), 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 which MassMutual purchased notes from Evans Canada and Evans U.S. in the principal amount of USD \$1,000,000 and CM Equity purchased notes in the principal amount of USD \$1,000,000;
- (c) 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;

- (d) 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 notes and the due and punctual payment and performance of any and all other indebtedness and obligations of Evans U.S.;
- (e) 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 the Amended Securities Purchase Agreements, the Security Agreement, the guarantee and other documents;
- (f) Pursuant to the Security Agreement, Evans Canada mortgaged, hypothecated, charged, pledged, granted and assigned as collateral to the Trustee for the benefit of and on behalf of MassMutual and CM Equity 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 (the "Security");
- (g) 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. These registrations constitute a first registered security interest against all present and after acquired personal property of Evans Canada;
- (h) Evans Canada has defaulted under the terms of the Amended Securities Purchase Agreements and, pursuant to the Amended Securities Purchase Agreements and the Security Agreement, the principal of all notes is forthwith due and payable together with interest accrued thereon;

- (i) As at March 31, 2004 USD \$20,880,798.55 in principal and accrued interest is due and owing to MassMutual pursuant to the Amended Securities Purchase Agreement and USD \$1,055,240.65 in principal and accrued interest is due and owing to CM Equity, for an aggregate indebtedness of USD \$21,936,039.20, amounting to CDN \$29,613,652.92 (the "Total Indebtedness", using a conversion rate of USD \$1.00 to CDN \$1.35);
- (j) MassMutual and CM Equity have made demand for payment of the Total Indebtedness from Evans Canada and issued a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). Evans Canada has not paid the Total Indebtedness and has consented to earlier enforcement;
- (k) The Security is valid and has become enforceable;
- (l) the appointment of a Receiver is just, convenient and necessary to preserve and protect the value of Evans Canada and to protect the interests of MassMutual and CM Equity, for reasons including the following:
 - (i) The Total Indebtedness far exceeds the value of Evans Canada such that there is no possibility that proceeds would be available for unsecured creditors or shareholders;
 - (ii) Evans Canada cannot continue in business due to its insolvency and insufficient working capital;
 - (iii) MassMutual and CM Equity have determined that given the disparity between the Total Indebtedness and the estimated value of Evans Canada they are opposed to a public sale of Evans Canada's assets as, given that the current market for the business is recessed, it will not yield a recovery acceptable to them;
 - (iv) The appointment of a receiver would facilitate the purchase of the business by a new company (owned by MassMutual, CM Equity and

current management) that would assume many but not all of Evans Canada's liabilities, offer employment to substantially all of Evans Canada's employees and carry on the business; and

- (v) A public sale process would involve costs and delay that Evans Canada cannot afford and would jeopardize the good will of the business and confidence of customers, all of which would only further deteriorate the anticipated recovery of MassMutual and CM Equity;
- (m) BDO Dunwoody LLP has consented to act as Receiver and manager if appointed by the court; and
- (n) such further and other grounds as may be advanced at the hearing of the application.

AND FURTHER TAKE NOTICE that in support of the application, the Applicants, MassMutual and CM Equity, relies upon the *Judicature Act* including s. 13(2) thereof; the *BIA*, including section 244 thereof; the *Alberta Rules of Court* including Rules 384, 392, 548 and 601; the inherent jurisdiction of the Court; the Affidavits filed or to be filed on behalf of CM Equity and MassMutual; the Consent of BDO Dunwoody LLP to act as Receiver; the pleadings filed herein; and such further and other material as counsel may advise and this Court may permit.

DATED at the City of Calgary in the Province of Alberta this 23rd day of April, 2004.

BLAKE, CASSELS & GRAYDON LLP



A. Robert Anderson

Counsel for MassMutual and CM Equity

TO: Clerk of the Court
AND TO: Evans Consoles Inc.

Action No.:

0401-06628

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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., EVANS
CONSOLES INCORPORATED**

Defendants

NOTICE OF MOTION

BLAKE, CASSELS & GRAYDON LLP
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