Court File No.: CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **HUDSON'S BAY COMPANY** ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.,

Applicants

AIDE MEMOIRE OF CERTAIN HBC EMPLOYEES AND RETIREES

1. This Aide Memoire is filed on behalf of certain employees, retirees, and pension plan members of the Hudson's Bay Company ("**HBC**") who are represented by Koskie Minsky LLP ("**KM Clients**") to highlight issues that impact them caused by the HBC proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**"), which commenced on March 7, 2025.

2. In the days after HBC's CCAA filing, it has been reported that HBC will likely be liquidating.

3. The KM Clients are very concerned about the future of their jobs and the payment of their pension benefits and other benefits owing to them. Their concerns would extend to other similarly-

situated employees and retirees of HBC. There are over 9400 active HBC employees and thousands of retirees across Canada.

4. A liquidation and shut down of HBC will lead to mass employee terminations, the termination of the HBC pension plans (both registered and non-registered pension plans), and the termination of health benefits, life insurance and other important benefits that have been earned by the employees during their employment with HBC and which are vital to their livelihoods in retirement.

5. The termination of large numbers of HBC employees will require accurate and complete calculations of the employees' notice and severance pay under employment standards statutes and applicable common law. If HBC is unable to pay severance pay, a consideration of the application of the Wage Earner Protection Plan ("**WEPP**"), which provides up to $8,844.22 per employee toward unpaid severance pay and other amounts, will also immediately required, since the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 ("**WEPPA")** does not automatically apply in a CCAA proceeding.

6. HBC is the administrator of the Hudson's Bay Company Pension Plan (the "**HBC Plan**"), a pension plan registered in Ontario under the *Pension Benefits Act* R.S.O. 1990, c. P.8, Registration no. 0291419. The HBC Plan has both defined benefit and defined contribution components for different populations of pension plan members.

7. In the event of a liquidation shut down of HBC, it is highly likely that the HBC Plan will need to be terminated (a "wind up"). A pension plan wind up involves special statutory and jurisprudential rules, priorities in favour of the pension plan beneficiaries, and special processes

that apply and vary depending on whether the plan has surplus funds or a funding deficit on its wind up.

***Pension plan surplus ownership and the decision of the Ontario Court of Appeal in Sutherland v. Hudson's Bay Co.*, 2011 ONCA 606**

8. The HBC CCAA proceeding and the liquidation of HBC also invokes a situation for a population of HBC retirees with respect to surplus assets in the Dumai Pension Plan, another pension plan that HBC had administered. The surplus in the Dumai Pension Plan originates from the Simpsons Pension Plan, a defined benefit pension plan which HBC took over when it acquired the Robert Simpson Company in 1978. HBC continued to administer the Simpsons Plan with its defined benefit members from Simpsons, who had become HBC employees following the acquisition.

9. At the time when HBC acquired Simpsons, the Simpsons Pension Plan had substantial surplus assets. In 1994 and 1998, HBC amended the Simpsons Pension Plan by adding in employees of Zellers Inc. and Kmart Canada Co. to the plan in a defined contribution component to the plan, and renaming it the Dumai Pension Plan. Between 1994 and 2006, HBC used approximately $111 million of the surplus assets originating from the Simpsons Pension Plan to pay its defined contribution costs to Zellers and Kmart employees, who were now members of the Dumai Plan.

10. The HBC employees who had been members of the defined benefit Simpsons Pension Plan sued HBC to stop the use of the Simpsons Pension Plan surplus to pay for HBC's defined contribution obligations to the new Zellers and Kmart members of the Dumai Plan. The Court (Wilton-Siegel, J.) held that HBC could use the Simpsons Pension Plan surplus to pay its

obligations to the defined contribution component (which was expanded to also include other HBC employees) while the Dumai Plan was an on-going pension plan.[1] However, Wilton-Siegel, J. also held that on the wind up of the Dumai Plan, the defined benefit plan members (the former Simpsons employees) are entitled to the surplus assets in the plan, if there are surplus assets remaining. HBC appealed the surplus ownership ruling to the Court of Appeal for Ontario and was unsuccessful. The Court of Appeal held:

> [50] At paras. 90-93 of *Schmidt*, Cory J., writing for the majority, sets out the steps that courts are to use when deciding the question of surplus ownership of pension plans. Those steps can be summarized as follows.
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> > …
> >
> > 6. Surplus funds on plan termination and wind up may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when that is done, the employer cannot claim the benefit of a resulting trust if the terms of the pension plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employee's intentions that must be considered – both are settlors of the trust.
>
> …
>
> [97] ***The trial judge correctly recognized that in the absence of specific language to the contrary, trust law principles are to prevail in the face of conflicting contractual provisions. He correctly concluded that the Plan assets are impressed with a trust in favour of the Plan members and that it is the Plan members who are entitled to any surplus assets in the trust fund on Plan termination and wind up.***[2] [emphasis added]

11. In the current liquidation trajectory of HBC, there is a high likelihood that the HBC Plan will be wound up, and if the plan has surplus then the Court of Appeal's surplus ownership decision needs to be addressed. On March 5, 2025, KM wrote to the company and their lawyers with specific questions about the status of the defined benefits in the Dumai Plan and its funded status.

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[1] *Sutherland v Hudson's Bay Company*, [2007] O.J. No. 2979, 2007 CanLII 30292.
[2] *Sutherland v Hudson's Bay Company*, 2011 ONCA 606.

12. Conversely, if the HBC Plan is wound up with a funding deficit for the defined benefit component and/or the defined contribution component then the PBA statutory deemed trust in favour of the pension plan beneficiaries under subsection 57(4) of the *Pension Benefits Act,* R.S.O. 1990, c. P.8 will become applicable with respect to the amounts owing by the HBC to the fund the plan.[3]

13. With respect to defined contribution component of the HBC Plan, the company is required to provide a 2% matching contribution to each employees' 1% initial contribution to their individual defined contribution retirement account. In the event that employees are terminated without being paid severance pay, HBC will owe defined contribution payments to the employees for the relevant notice period.[4]

14. Finally, there are employees who are currently disabled and receiving vital disability benefits, which also needs to be addressed.

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[3] On April 27, 2023, the federal government passed legislation to improve protections for members of defined benefit pension plans. The *Pension Protection Act*, S.C. 2023, c. 6 amends the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-6 ("BIA") to grant super-priority to registered pension plan funding deficits. These amendments come into effect on April 27, 2027.
[4] CCAA, s. 6(6). See also BIA, ss. 81.5-81.6.

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