



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

ENDORSEMENT

COURT FILE NO.: BK-24-03050418-0031

DATE: 15 April 2024

NO. ON LIST: 1

TITLE OF PROCEEDING:

**In the Matter of the Notice of Intention to make a Proposal of
THE BODY SHOP CANADA LIMITED *et al***

BEFORE: **JUSTICE OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Natasha MacParland	Counsel to The Body Shop Canada Limited	nmacparland@dwpv.com
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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Jane Dietrich	Counsel for Alvarez & Marsal Canada Inc., in its capacity as Proposal Trustee	dietrich@cassels.com
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Andrew J. Hatnay	Counsel to Stephanie Hood and other terminated employees	ahatnay@kmlaw.ca

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ENDORSEMENT of OSBORNE, J.

1. The Body Shop Canada (“TBS Canada” or the “Company”) seeks an order:
 - a. regularizing service of the motion materials;
 - b. approving a key employee retention plan (“KERP”) for certain individuals identified as being crucial to the restructuring efforts of TBS Canada;
 - c. approving a corresponding priority charge (the “KERP Charge”) up to a maximum amount of \$470,000;
 - d. sealing the KERP documents;
 - e. extending the time for TBS Canada to file a proposal under the *BIA* to May 31, 2024; and
 - f. approving the activities and conduct of the Proposal Trustee as set out in the First Report dated March 2, 2024 and the Second Report dated April 9, 2024.
2. The Company relies upon the affidavit of Jordan Searle sworn March 1, 2024, together with Exhibits thereto, and the First and Second Report. Defined terms in this Endorsement have the meaning given to them in my Endorsement made in this proceeding on March 4, 2024, the motion materials, or the First or Second Report, unless otherwise stated.
3. I am satisfied that the Service List has been served. The Lawyer’s Certificate of Service, filed, confirms service of the Motion Record on the Service List via email on April 8, 2024, and service of the factum and brief of authorities on April 11, 2024.
4. The relief sought today is unopposed, and strongly supported by the Proposal Trustee.
5. TBS Canada filed an NOI pursuant to section 50.4(1) of the *BIA* on March 1, 2024. On March 4, 2024, I granted an extension of the time to file a proposal to April 16, 2024, together with various other relief.
6. The basis for that relief, together with the background to and context of the motion returnable today, is set out in my earlier Endorsement as well as both Reports.
7. Since March 4, the Company has worked to stabilize its operations and pay its post-filing payables as they become due, engaged with key stakeholders, the UK Administrator, the UK Parent, the US Trustee and Aurelius, liquidated inventory at 33 of its stores and reorganized its corporate structure to achieve cost savings, engaged with RBC to better understand the cash management system and Cash Pooling Arrangements, and engage in discussions to pursue a going concern solution.

8. Sales since the Filing Date have exceeded projections across the store network resulting in a strong liquidity position. One unfortunate side effect of all of this is a risk that the Company will run out-of-court merchandise, forcing it to close profitable store locations.
9. Accordingly, the Company is working with the UK Parent, the UK Administrator and the US Trustee to progress a number of work streams designed to refresh inventory.
10. The proposed KERP is designed to incentivize five key individuals, including Canadian employees and certain former TBS US employees engaged by the Company as independent contractors. They perform important management or business functions and their institutional knowledge and skills are irreplaceable, making their continued engagement vital to the operations of TBS Canada.
11. The KERP was developed with the assistance of the Proposal Trustee to take into account the existing compensation packages for these individuals as well as the circumstances of this NOI proceeding. The aggregate amount that may become payable pursuant to that KERP, if approved, is approximately \$470,000.
12. The Company also seeks approval of a corresponding KERP Charge in the same amount. Each participant will obtain the benefit of the proposed KERP Charge only up to the maximum of their respective individual entitlements under the KERP.
13. The proposed KERP Charge would rank behind the Administration Charge and the D&O Charge. The Landlord Charge expires tomorrow, on April 16, 2024. The KERP Charge would rank ahead of the Aurelius Security and HSBC Registrations, but behind the Enterprise Security.
14. Both the KERP and the KERP Charge are supported by the Proposal Trustee.
15. The sealing order in respect of the KERP would cover a detailed listing of the participants along with their current positions, compensation and proposed payments under the KERP. Salary information is highly personal and generally not public, and the Company seeks to minimize the disruption during this proceeding.
16. TBS Canada seeks an extension of the time to file a proposal by another 1.5 months to May 31, 2024. The additional time would provide the Company with the requisite time to further its inventory replenishment efforts and continue engaging with the UK Parent, the UK Administrator, Aurelius and interested parties, all with the objective of facilitating a going concern sale of the business.
17. The updated cash flow forecasts prepared by the Company demonstrate that it should have sufficient liquidity to fund operations during the requested Extension, all of which is supported by the Proposal Trustee.
18. Finally, the Company seeks approval of the activities of the Proposal Trustee.
19. I am satisfied that the relief sought should be granted.
20. First, the extension of time to file a proposal is authorized under section 50.4(9) of the *BIA*. I am satisfied that the Company has acted, and is acting, in good faith and with due diligence, will likely be able to make a viable proposal if the extension is granted, and finally that no creditor would be materially prejudiced if the extension were granted.
21. In the short period of time (only 19 days) since the Filing Date, the Company has advanced matters as set out above. There is no doubt that the proposed extension will increase the likelihood of a viable proposal by providing the Company the time it needs to continue to pursue its inventory replenishment

efforts and dialogue with key stakeholders, including but not limited to the UK Parent, Aurelius and the UK Administrator.

22. No creditors will be prejudiced as the extension will preserve the status quo, which, to date, has been positive for creditors in that the company has had the opportunity to pursue strategic options with a view to enhancing the viability of the business as a going concern. The Proposal Trustee supports the extension.
23. I am also satisfied that the proposed KERP should be approved. The proposed terms are set out above. Approval of a KERP is discretionary, but similar retention plans have been approved by this Court where the proposed participants are important for the stability of the business, difficult to replace and have extensive or specialized knowledge of the business of the debtor: *Grant Forest Products Inc. (Re)*, 2009 CarswellOnt 4699 at paras. 8, 11 and 12; and *Just Energy Group Inc. et al.*, 2021 ONSC 7630 at para. 14.
24. Similarly, the KERP Charge is also appropriate. I am satisfied that the non-exhaustive list of factors described by the court in *Grant Forest Products* has been satisfied here. The Proposal Trustee supports the KERP and the KERP Charge. The key employees are likely to pursue other opportunities absent the approval sought, and I am satisfied that the employees who are the subject of the proposed KERP are critical to a successful restructuring of the company. The quantum of the proposed retention payments is reasonable.
25. While *Grant Forest Products* was a CCAA proceeding, this Court has applied the same principles in proposal proceedings under the BIA: *Danier Leather*, 2016 ONSC 1044 at para. 77; and *In the Matter of the Notice of Intention to Make a Proposal of XS Cargo Limited Partnership*, Court File No. 32-1896275, Order dated August 6, 2014 at paras. 13-14.
26. The proposed priority ranking of the KERP Charge is also appropriate, and is not opposed by any party, including in particular, the beneficiaries of those charges to be primed by the new proposed priority. Aurelius Seven, Enterprise and RBC have all been given notice of this motion. The Aurelius Security is not enforceable on its terms, and no demand has been sent to the Company. The Company believes there is nothing owing to RBC in respect of the HSBC Registrations, with the result that neither of these parties will be prejudiced by the proposed priority ranking of the KERP Charge.
27. I am also satisfied that a sealing order in respect of the KERP is appropriate. Jurisdiction to grant such an order is found in section 137(2) of the CJA. I am satisfied here that the test articulated by the Supreme Court of Canada in *Sierra Club* as refined in *Sherman Estate* has been met. The disclosure of the KERP poses a serious risk to an important public interest; the order sought is necessary to prevent this serious risk and reasonable alternative measures will not prevent it; and, as a matter of proportionality, the benefits of the order outweigh its negative effects: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paras. 53-57, BOA, Tab15; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38, BOA, Tab 12.
28. This Court has held that there is a public interest in maximizing recovery in an insolvency that goes beyond each individual case: *Re Danier Leather*, 2016 ONSC 1044 at paras. 77 and 84. Details of KERPs have been the subject of sealing orders in CCAA and BIA proceedings where the court has been satisfied that the plans involve matters of a private, personal nature and confidential and personal information: *Ontario Securities Commission v Bridging Finance*, 2021 ONSC 4347 at paras. 23-27.
29. It is appropriate to seal the details of key employee retention plans that reveal individually identifiable information and compensation information on the basis that the protection of sensitive personnel and compensation information could, if disclosed, cause harm to the individuals and to the debtor. All of

this is an important commercial interest that should be protected: *CanWest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at paras. 49-52.

30. For all of these reasons, the Confidential Appendix I to the Second Report setting out the particulars of the KERP, is sealed until further order of this Court. The Company is directed to file with the Commercial List office a physical copy of the sealed material in a sealed envelope marked: “Confidential and not to form part of the public record subject to further order of this Court”.
31. Finally, I am satisfied that the activities and the conduct of the Proposal Trustee should be approved. There are good policy and practical reasons for this Court to approve the activities during the proceeding: *Target Canada Co. (Re)*, 2015 ONSC 7574; *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400 at para. 66; *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*, 2024 ONSC 1678 at para. 40; and *Shop.ca Network Inc. (Re)* (15 July 2016) Toronto CV-31-2131992 (Ont. S.C.J. [Commercial List]) Endorsement dated July 15, 2016.
32. I am satisfied that the activities of the Proposal Trustee are consistent with its mandate, and have been appropriate and reasonable with a view to the objective of this proceeding and the goal of maximizing recovery for stakeholders.
33. For all of the above reasons, the relief sought is granted. The order I have signed today is effective at 12:01 AM tomorrow, April 16, 2024, without the necessity of issuing and entering, although any party may take out the order through the Commercial List office if necessary.
34. Mr. Hatnay appears today on behalf of a number of terminated employees to advise that they are bringing a motion for the appointment of Representative Counsel. I will address the timetabling for that motion, including the delivery of materials and a hearing date, at a **case conference to be conducted next Wednesday, April 24 at 9:00 AM via Zoom (not 9:30 AM).**

Olson, J.