



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

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

DATE: July 5, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: 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 Natalie Renner Chenyang Li	The Body Shop Canada Limited	nmacparland@dwpv.com; nrenner@dwpv.com; cli@dwpv.com;

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Abir Shamim Andrew Hatnay	Stephanie Hood and other terminated employees of TBS Canada Ltd.	ashamim@kmlaw.ca; jharnum@kmlaw.ca; ahatnay@kmlaw.ca;
Jane Dietrich Alec Hoy	A&M Canada (Proposed Monitor)	jdietrich@cassels.com; ahoy@cassels.com;
Josh Nevsky Mitch Binder	Proposal Trustee	jnevsky@alvarezandmarsal.com; mbinder@alvarezandmarsal.com;

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
David Bish	Cadillac Fairview	dbish@torys.com;
Linda Galessiere	Counsel for various landlords (RioCan, Ivanhoe, Cushman, Morguard, Salthill and Triovest	lgalessiere@clegal.ca;
Jordan Searle	The Body Shop Canada	jordan.searle@thebodyshop.com;

ENDORSEMENT OF JUSTICE OSBORNE:

- [1] The Body Shop Canada (“TBS Canada” or the “Company”) seeks three orders:
- a. an Initial Order authorizing under the *CCAA*, the continuation of this *BIA* proposal proceeding commenced pursuant to an NOI, together with related relief;
 - b. a Sale Process Order approving the sale and investor solicitation process (“SISP”) as described in the motion materials; and
 - c. a Discharge and Termination Order discharging the Proposal Trustee upon the filing of a certificate, terminating this NOI proceeding, together with related relief, in the alternative to which the Company seeks an order extending the period within which it must file a proposal from July 12, 2024 to and including August 26, 2024, pursuant to section 50.4(9) of the *BIA*.
- [2] The Service List was served with the motion materials on June 24, 2024. The relief sought today is unopposed, and is supported by Cadillac Fairview (one of the landlords) and recommended by the Proposal Trustee (which firm is proposed to be the Court-appointed Monitor if the relief being sought is granted).
- [3] TBS Canada relies on the affidavit of Jordan Searle sworn June 24, 2024, together with exhibits thereto, and the Fifth Report of the Proposal Trustee and Pre-Filing Report of the Proposed Monitor dated June 28, 2024. Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding, in the motion materials and/or in the Fifth Report, unless otherwise stated.
- [4] For the reasons that follow, I am satisfied that the proposed relief should be granted.
- [5] The background to, and context of, this motion is set out in the motion materials, the Fifth Report, and my earlier Endorsements made in this proceeding, including but not limited to my Endorsement of yesterday, July 4, 2024.
- [6] There is currently a sale process underway in respect of the UK Parent in the UK Administration. Given the highly integrated nature of the operations of TBS Canada and TBS International, any going-concern solution for the Company is heavily reliant and dependent upon the outcome of the UK Sale Process.
- [7] If not for the stay of proceedings already granted pursuant to the *BIA*, TBS Canada would lack sufficient funds to satisfy its obligations and continue its operations. It cannot meet its obligations as they generally become due and is therefore insolvent.

- [8] The *CCAA* offers significant flexibility for the Company to reorganize its business, and in particular would permit the UK Sale Process to develop and evolve, while providing flexibility as to timing and outcome for TBS Canada and avoiding the possibility where a *BIA* proposal is rejected by creditors with the result if protection continues within the current NOI proceeding, that there would be an automatic transition into bankruptcy. That is not in the interests of any stakeholder.
- [9] The protections available under the *CCAA* will allow TBS Canada to maintain the status quo, have sufficient breathing room to allow for the UK Sale Process to conclude, and to continue its own SISP, all with a view to maximizing value for the benefit of its stakeholders.
- [10] The Court has the jurisdiction to permit the Company to continue the NOI proceeding under the *CCAA* pursuant to section 11.6(a) of the *CCAA*. The factors relevant to the decision as to whether such a conversion should be approved are met here:
- a. it has not filed a proposal under the *BIA*;
 - b. the proposed continuation is consistent with the purposes of the *CCAA*; and
 - c. it has provided the Court with the information that would otherwise form part of an initial *CCAA* application under section 10(2) of the *CCAA*.

See: *Clothing for Modern Times Ltd.*, 2011 ONSC 7522 (“*Clothing*”) at para. 9, followed with approval in *Re Comstock Canada, Ltd.*, 2013 ONSC 4756 at paras. 36-45; *Re Urbancorp. Toronto Management Inc.*, 2016 ONSC 3288 at paras. 36-48; and *Re Stantive Technologies Group Inc.*, Ct. File No. 31-BK-244835.

- [11] Obviously, the Company must also be a company with liabilities that exceed \$5 million, as required by section 3.1 of the *CCAA*.

- [12] TBS Canada has not filed a *BIA* proposal.

- [13] The purposes of the *CCAA* have been set out by the Supreme Court of Canada:

- a. to permit a company to carry on business and, where possible, avoid the adverse effects of bankruptcy or liquidation while a court-supervised attempt to reorganize the financial affairs of the debtor is made; and
- b. to preserve the status quo while attempts are made to find a reorganization solution that is fair to all stakeholders.

See: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at paras. 15, 69, 70 and 77.

- [14] A sale of the debtor's business as a going concern satisfies the purposes of the *CCAA: Clothing*, at para. 12.
- [15] TBS Canada submits, and the Proposal Trustee concurs, that there is a prospect that a going concern solution may be negotiated that would allow the Company to carry on business and Canada. Additional time is required, however, given the independent developments in the UK Administration, and particularly the UK Sale Process. As a result of all of this, it is unlikely that TBS Canada will be able to complete a sale of its business within the strict deadlines applicable to this NOI proceeding under the *BIA*, which requires a proposal to be filed by September 1, 2024, failing which the Company will automatically be deemed bankrupt.
- [16] I am also satisfied that the conversion to a *CCAA* proceeding will have the additional benefit of reducing administrative and legal costs, given the flexibility with respect to reporting and attendances. It will also preserve the status quo by allowing TBS Canada to continue operations, maintain the employment of approximately 570 individuals, and pay its obligations in the ordinary course while it pursues the *SISP*, all for the benefit of stakeholders.
- [17] TBS Canada has provided all of the information that would otherwise be filed on a *CCAA* Initial Order application, including but not limited to a cash flow forecast for the period ending October 11, 2024 and the Company's most recent financial information, as well as a report demonstrating that the Proposal Trustee and proposed Monitor believe the cash flow analysis is reasonable and that they support the request for conversion.
- [18] I am also satisfied that TBS Canada is a debtor company with liabilities that exceed \$5 million. The firm currently acting in the capacity as Proposal Trustee, Alvarez & Marsal Canada Inc., is qualified to act as Court-appointed Monitor, has consented to do so and is not affected by any restrictions as set out in section 11.7(2) of the *CCAA*.
- [19] I am satisfied that the stay of proceedings can and should be extended to and including October 8, 2024. Such a period of time is appropriate and required for the reasons set out above, and has been authorized by this Court in previous cases on a conversion from a *BIA* proceeding, such as is this case, notwithstanding section 11.02(1) of the *CCAA*. See: *Re Cannmart Labs, Inc.*, CV-24-00719639-00CL; *Re Medifocus Inc.*, CV-20-00669781-00CL and *Re Tribalscale Inc.*, CV-20-00645116-00CL.
- [20] In my view, a comeback hearing within 10 days is both unnecessary and inefficient in that it will needlessly increase professional costs. Given that this is a transition proceeding, all affected parties are on notice. The usual considerations that may apply on an Initial Order application, and the imperative for very limited relief sought on what is usually an *ex parte* a basis, do not apply the circumstances. The affected parties are here. Moreover, the proposed order contains the usual comeback clause such that any party who seeks to have the order amended or vacated has the ability to do so. The basis for the proposed stay is fully

set out in the materials and described above. Practically, nothing is going to have changed within the next 10 days. Moreover, the relief sought in the *CCAA* Initial Order is not new in the sense of being novel nor is it new even to the parties affected by this proceeding. Rather, it is simply an extension of the relief already granted in this NOI proceeding. Simply put, there is no utility in a hearing within that period of time.

- [21] For these reasons, the motion to convert and continue is more analogous to a motion contemplated under section 11.02(2) than section 11.02(1) of the *CCAA*. Pursuant to section 11.02(2), the Court may grant an extension of the stay for any period of time the Court thinks necessary where the Court is satisfied that: a) circumstances exist that make the order appropriate; and b) the applicant has acted, and is acting, in good faith and with due diligence. Those requirements are met here for the reasons set out above.
- [22] Accordingly, I am satisfied that a continuation of creditor protection under the *CCAA* is appropriate here, and that the terms of the proposed Initial Order are appropriate.
- [23] For the same reasons, I am satisfied that the Charges granted in the current NOI proceeding should be continued in the same order of priority. This is consistent with both sections 11.51 and 11.52 of the *CCAA* and the factors set out by Pepall, J. (as she then was) in *Re CanWest Publishing Inc.*, 2010 ONSC 222 at para. 54 in respect of an administration charge; and by Chief Justice Morawetz in respect of the Directors and Officers Charge as set out in *Re Jaguar Mining Inc.*, 2015 ONSC 494 at para. 45.
- [24] I am further satisfied that the KERP and the KERP Charge are appropriate, should be continued, and meet the factors set out in *Re Grant Forest Products Inc.*, 2009, CanLII 42046 at paras. 8-12.
- [25] Finally, I am satisfied that the proposed SISP should be approved. The factors set out in *Re Nortel Networks Corporation*, 2009 CanLII 39492 at para. 49, together with the additional factors identified in subsequent cases such as *CCM Master Qualified Fund v. blutip Power Technologies Inc.*, 2012 ONSC 1750 at para. 6 have all been met here.
- [26] In practical terms, the SISP and the outcome thereof, will be affected in large measure by the results of the UK Sale Process. If the ultimate purchaser of the UK Parent wishes to continue TBS Canada as a wholly-owned subsidiary, that will take the SISP here in one direction. If it does not, there will have to be an agreement between the successful purchaser in the UK and a successful purchaser of TBS Canada under the SISP with respect to intellectual property rights and other issues relevant to the continuation of the business of TBS Canada as a wholly independent enterprise. All of that remains to be seen, and the proposed SISP builds in the flexibility to account for, and adapt to, events as they develop and evolve in the UK.

- [27] Finally, it follows from all of the above that this NOI proceeding should be terminated and the conduct and fees of the Proposal Trustee and its counsel approved, and those parties be released from claims relating to this proceeding (other than claims arising from gross negligence or wilful misconduct). See: *Re Target Canada Co.*, 2015 ONSC 7574 at para. 22, which rationale applies also to proposal trustees and receivers under the *BIA*. Accordingly, the alternative relief of extending the time to file a proposal under the *BIA* is not necessary.
- [28] Here, the fees of the Proposal Trustee and its counsel are appropriate and are approved: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at paras. 33 ad 45. So too are the releases sought by the Proposal Trustee and its counsel, together with counsel for the Company: *Re Nordstrom Canada Retail, Inc.*, 2024 ONSC 1622 at para. 29.
- [29] For all of the above reasons, the Initial Order pursuant to the *CCAA*, the NOI Discharge and Termination Order under the *BIA* and the Sale Process (SISP) Order are granted.
- [30] Orders to go in the form signed by me which are effective immediately and without the necessity of issuing and entering.

Oliver, J.