ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: BK-31-3050418 **DATE:** March 4, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: In the Matter of the Notice of Intention to Make a Proposal of The Body Shop Canada Limited

BEFORE JUSTICE: Justice Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Natasha MacParland	The Body Shop Canada Ltd.	NMacParland@dwpv.com
Natalie Renner		NRenner@dwpv.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Joshua Nevsky	The Proposal Trustee	jnevsky@alvarezandmarsal.com
Mitchell Binder		mbinder@alvarezandmarsal.com
Jane Dietrich	Counsel for the Proposal Trustee	jdietrich@cassels.com
Alec Hoy		ahoy@cassels.com
D.J. Miller	Counsel to Oxford Properties & its Affiliates	djmiller@tgf.ca

David Bish	Counsel for Cadillac Fairview Corporation Ltd. and its Affiliates & other landlords	dbish@torys.com
S. Michael Citak	Counsel for Crombie Property Holdings Ltd. and agent for counsel to RioCan Real Estate Investment Trust and Cushman & Wakefield Asset Services ULC	mcitak@grllp.com

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ENDORSEMENT of OSBORNE, J.:

1. The Body Shop Canada Limited ("TBS Canada" or the "Company") seeks an order:

    a. expanding the scope of the stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c.B-3 (the "*BIA*") by way of an order directing the continuation of services and certain other protections in respect of the Company;

    b. granting an administration charge;

    c. approving an indemnity and granting a priority charge with respect thereto to idemnify the director and officers of the Company;

    d. directing all persons who have in their possession or power, any property of TBS Canada or any book, document or paper of any kind relating to the Company to produce same to the Company; and

    e. extending the time for the Company to file a proposal under the *BIA* (or seek a further extension) by 19 days from the current expiry date, through to April 16, 2024.

2. I granted the requested order at the conclusion of the hearing of this motion earlier today, with reasons to follow. These are those reasons.

3. Defined terms in this Endorsement have the meaning given to them in the motion materials and/or the First Report of the Proposal Trustee, unless otherwise stated.

4. TBS Canada relies on the Affidavit of Mr. Jordan Searle sworn March 1, 2024, together with exhibits thereto, and the First Report. Mr. Searle is the General Manager, North America and the sole director of TBS Canada. He is also an officer and director of the Company's US affiliate.

5. The Service List, including for greater certainty The Body Shop International Limited (the "UK Parent"), Auelius Group, the entity that recently acquired the UK Parent ("Aurelius"), and the Administrator who was appointed effective on February 13, 2024 (the date on which the UK Parent filed for administration in the United Kingdom), has been served. I pause to observe that none of the UK Parent, Aurelius or the Administrator has elected to be present in Court today. The hearing proceeded remotely via Zoom specifically to facilitate the convenient appearance of those located in other jurisdictions if they wished to attend.

6. As a result of discussions that occurred over the last few days and up until the hearing today between and among TBS Canada, the Proposal Trustee and key stakeholders including the landlords referred to below and represented in Court today as stated above, the relief sought today was unopposed and proceeded on the consent of all parties present and with the strong support and recommendation of the Proposal Trustee.

7. The circumstances giving rise to both this proceeding generally, and the specific relief sought today, are somewhat unusual. It is my expectation that such circumstances will remain relatively unusual.

8. TBS Canada is a retailer that sells cosmetics, skincare and perfume products through 105 retail stores located across Canada and via an e-commerce platform, branded as "The Body Shop". It filed a Notice of Intention under the *BIA* last week on March 1, 2024.

9. The circumstances leading to the filing of that NOI were both unfortunate and necessarily rushed. They are explained further below.

10. TBS Canada is incorporated under the *Canada Business Corporations Act*. It is owned by the UK Parent, and its head office is located at Toronto. The majority of its 105 stores are located in Ontario as are the majority of its 704 employees. None of the employees is unionized.

11. The Company's secured creditor is Aurelius IV UK AcquiCo Seven Limited ("Aurelius Seven"). It has a security interest over all of the assets and property of the Company pursuant to a general security agreement registered under the personal property security regimes in each province and territory across Canada. It also owns, indirectly, all of the outstanding shares of the parent company of the Company, the UK Parent.

12. Aurelius, indirectly through related entities, acquired the Company only a few months ago in December, 2023. Aurelius Seven entered into a loan agreement with the UK Parent pursuant to which it made funds available to the UK Parent for the purpose of assisting the purchaser and the acquisition (the "Aurelius Purchaser") to fund the acquisition. The acquisition, the loan agreement and the terms and circumstances of each are more fully set out in the Searle Affidavit and the First Report.

13. The obligations under that loan agreement were guaranteed by TBS Canada, and TBS Canada granted Aurelius Seven security over all of its assets. The guaranteed obligations are payable on demand.

14. I pause to observe that it is not clear to me from the motion materials, nor as counsel confirmed at the hearing of this motion is it clear to TBS Canada, what if any consideration was received by TBS Canada in exchange for the guarantee obligations. That is for another day.

15. On February 13, 2024, FRP Advisory were appointed jointed administrators of the UK Parent in the United Kingdom.

16. Historically, the UK Parent has been in full control of much of the business functions of TBS Canada including inventory, human resources, accounts payable and cash management. Effectively, the UK Parent has regularly completed a cash sweep of the accounts of TBS Canada with the result that all funds and liquidity of TBS Canada were remitted to the UK Parent, in return for it paying the payables, including rent and payroll obligations, of TBS Canada.

17. Specifically from November 1, 2023 until February 12, 2024 (the day prior to the UK Parent being placed into Administration), the UK Parent continued to sweep receivables from the bank accounts of the Company held at HSBC Bank Canada. However, during the same period, the UK Parent failed to remit payments in full to the vendors and landlords of the Company as it had done previously in exchange for sweeping the cash accounts.

18. Nor did the UK Parent give any notice whatsoever, formal or informal, to TBS Canada of its intention to file for insolvency protection.

19. As a result, and as more fully set out in the First Report of the Proposal Trustee, this caused the Company to incur debts in excess of $3.3 million that it is unable to satisfy.

20. The Company has made requests to the UK Parent, the Administrator and Aurelius to return the funds that were swept, or in the alternative, to provide funding to enable TBS Canada to satisfy its outstanding obligations. The Company expressly advised those three entities that absent this assistance, the Company would be forced to seek insolvency protection. Those entities advised nonetheless that no funding support would be provided to TBS Canada and they refused to return the cash swept and retained by them.

21. The inevitable result was the filing of the Notice of Intention by TBS Canada on March 1, 2024 to obtain the benefit of a stay pursuant to the *BIA* and to provide the stability urgently required by the Company while it reviews and advances its options going forward.

22. The relief sought today follows on the unfortunate circumstances which have just unfolded, as described above.

23. As set out in the Searle Affidavit, the company has relied on its US counterpart, Buth-Na-Bodhaige Inc. ("TBS US") for distribution and logistics services. Prior to the somewhat extraordinary events set out above, TBS US would receive inventory from TBS International on behalf of TBS Canada and hold it at its US Distribution Centre. It would then arrange for the distribution to customers for TBS Canada. TBS US also provides e-commerce services to TBS Canada and until recently fulfilled online orders also through its US Distribution Centre.

24. Also as more particularly set out in the Searle Affidavit, accounting and cash management functions for TBS US were, like those for TBS Canada, controlled by the UK Parent. The UK Parent acted in essentially the same manner with respect to TBS US as TBS Canada through continued cash sweeps but failed or refused to make cash available to TBS US or pay suppliers on its behalf, as had historically been done. The result was that on March 1, 2024, TBS US began shutting down its operations and implementing very significant employee terminations in the United States.

25. That is relevant to this motion because it has resulted in TBS Canada no longer having access to its e-commerce platform, the ability to ship to its wholesale partners (including Shoppers Drug Mart and amazon.ca) or its only means of receiving new inventory.

26. The total rent for all 105 retail stores across Canada is currently in arrears to the extent of approximately $900,000, representing rent due for the month of February.

27. In addition to the secured debt owed to Aurelius as discussed above, there are also registrations against the Company in favour of Enterprise Fleet Management Canada in respect of company vehicles leased for certain employees, and HSBC. I pause to further observe that, at least today, it is unclear to TBS Canada and to the Proposal Trustee what the HSBC registrations relate to, and TBS Canada does not believe that any amounts are owing to HSBC with respect thereto.

28. The Company has numerous unsecured creditors, including trade creditors to which it owes approximately $2.5 million, and the landlords, to which it owes, as noted above, approximately $900,000 in the aggregate at present.

29. Since the filing of the NOI last week, the Company has identified 33 underperforming stores that it will wind down during these proceedings. In an effort to improve its liquidity, on March 1, 2024 TBS Canada sent disclaimers of the leases to landlords of the stores scheduled to be closed. Employee headcount reductions will likely be necessary in addition to the 20 head office employees terminated on March 1, 2024 and additional employee terminations related to the stores being closed.

30. Accordingly, the situation is dire and was entirely unexpected. Not only did the UK Parent fail to give TBS Canada any notice of its intention to file for insolvency protection, it has not been cooperative or responsive to requests for information and documentation since the filing of the NOI here in Canada.

31. As a result of all of the above, TBS Canada seeks the relief on this motion today.

32. The issue is therefore whether and the extent to which that relief should be granted. For the reasons set out below, I am satisfied that the relief as requested in the Notice of Motion should be granted.

Expansion of the BIA Stay of Proceedings and Related Relief: Continuation of Goods and Services; Prohibiting Disbursements from the HSBC Accounts; and Weekly Rent Relief

33. The Company seeks an expansion of the stay under section 69(1) of the *BIA* and related relief providing for the continuation of goods and services; prohibiting any disbursement of funds from the HSBC Accounts without the prior consent of the Company or the Proposal Trustee; and providing for the payment of rent on a weekly basis for the month of March, 2024, and bi-weekly thereafter.

34. I am satisfied that I have the discretion to grant relief of this nature in the circumstances. As stated by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 ("*Century Services*") at para. 15:

> As I will discuss at greater length below, the purpose of the *CCAA* - Canada's first reorganization statute - is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

35. The relief sought on this motion would prohibit any person from discontinuing or interfering with or terminating the supply of goods or services to TBS Canada, provided however that no person shall be required to extend credit to the Company or be prohibited from requiring immediate payment for goods and services provided after the Filing Date.

36. Without question, this relief is more typically granted to debtors under the *CCAA*. However, and as contemplated in *Century Services*, Canadian courts have granted such relief in the context of NOI proceedings where the expanded stay and related relief is necessary for the debtor to continue operations in the ordinary course while it reviews and advances restructuring options: *Scotch & Soda Canada Inc. (Re)*, Endorsement of Justice Steele dated May 16, 2023 (Court File No. BK-23-02941767-0031) (Ont. S.C.J. [Commercial List]) at para. 10, BOA, Tab 12 ("*Scotch & Soda*"); and *Bad Boy Furniture Warehouse Limited et al. (Re)*, Endorsement of Justice Penny dated November 10, 2023 (Court File No. BK-23-03008133-0031) (Ont. S.C.J. [Commercial List]) at para. 8, BOA, Tab 2.

37. I am satisfied that the ability of the Company today to continue to operate in the ordinary course is contingent on its ability to continue to receive goods and services from its suppliers, without disruption. The practical alternative, if this relief is not granted (and the same is true with respect to the heads of relief discussed below), is that TBS Canada will have to shut down all operations effective immediately, close all 105 stores and terminate all employees, thereby materially impairing, if not foreclosing altogether, any possibility of a maximization of possible outcomes for employees and other stakeholders.

38. Accordingly, I am satisfied that an order for the continuation of goods and services is appropriate here.

39. Similarly, the relief in the form of an order prohibiting HSBC (or any other person) from dispersing any funds in the HSBC accounts without the prior consent of the Company or the Proposal Trustee will ensure that the Company can access and administer the HSBC Accounts without interference from the UK Parent.

40. I am satisfied that today that such relief is appropriate here. HSBC has not filed any materials nor made submissions to the Court today, although served with the motion materials. Moreover, and more fundamentally, although TBS International has assured TBS Canada that it will not sweep the HSBC

Accounts, it has not provided those assurances in writing. I observe that it was those very same cash sweeps that caused the liquidity crisis forcing the filing of the NOI in the first place.

41. Finally, TBS Canada is not aware of any documentation evidencing the Cash Pooling Arrangement, or its purported termination. To be clear, as of today TBS Canada has been unable to locate (indeed, if such exists), any written agreement permitting and authorizing the UK Parent to conduct the cash sweeps referred to above, or to unilaterally terminate the payment of suppliers on behalf of TBS Canada while purporting, at least for the period referred to above, to continue to transfer cash pursuant to the sweeps.

42. In these circumstances, which are odd and unusual (to put it mildly), and particularly in the absence of any opposition from any of the UK Parent, Aurelius or HSBC but with the support of the Proposal Trustee, I am satisfied that this relief is appropriate.

43. Similarly again, TBS Canada is requesting approval to pay rent for the period commencing from the Filing Date on a weekly basis for March, 2024 and on a bi-weekly basis thereafter. Again, this request enjoys the support of the Proposal Trustee.

44. The Cash Flow Forecast for the period ending May 24, 2024 demonstrates that the requested rent relief is consistent with the purpose of proposals under the *BIA* in that it preserves required liquidity and ensures that the Company can satisfy its priority obligations for payroll and sales taxes while having the flexibility required to explore a going concern solution.

45. More specifically, and as observed by the Proposal Trustee in its First Report, the relief with respect to the frequency of rent payments and the period to which they relate are critical to maintaining liquidity absent interim financing. The company would be unable to fund an entire month of rent in advance.

46. As observed by Morawetz, J. (now the Chief Justice of this Court) in *Kitchener Frame Limited (Re),* 2012 ONSC 234 at para. 70:

> The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules-based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency Law, and to the two statutory schemes to the extent possible, encouraging reorganization over liquidation.

47. Simply put, the requested rent relief does exactly what the Court in that case contemplated, and such relief is required if the Company is to be able to maintain the requisite liquidity to fund ongoing operations without obtaining interim financing.

48. The draft order provides, with the consent of the landlords, that the rent will be paid by the Company on a weekly basis (in advance). The typical language in orders made in proceedings under the *CCAA* provides for bi-weekly payments of rent. The Proposal Trustee is satisfied that an order authorizing weekly payments is necessary to appropriately preserve the liquidity of the Company.

49. Without question, this relief is unusual, and will in all likelihood remain so. However, I am satisfied that such unusual relief is appropriate in the equally unusual circumstances of this case where the NOI filing was so unanticipated only a short period of time ago. Moreover, and as noted above, declining to grant this relief would have immediate and negative effects on the Company and all of its stakeholders including employees.

50. I am satisfied that the granting of this relief does not represent a preference in the circumstances of this case. Absent any relief, the contractual provisions of the leases with the landlords require a full month's

rent to be paid, and paid in advance. The Cash Flow Forecast is clear that the Company lacks the liquidity to fulfil those existing contractual obligations.

51. Moreover, the proposed charge in favour of the landlords (the "Landlord Charge") secures only 50% of the amounts outstanding at any time (i.e., one half of the one month's rent payable pursuant to the leases). It is temporally limited and has effect only until the earlier of April 16, 2024 (the day following the extended date upon which the Company must file a Proposal), or the effective date of any disclaimer of each lease pursuant to section 65.2 of the *BIA* (i.e., 30 days after the *BIA* notices were sent). The Landlord Charge shall have a priority but rank behind the Administration Charge and the D&O Charge.

52. Finally, it is important to note that this relief is made with the express consent of the landlords referred to at the outset of this Endorsement. Accordingly, and to be clear, my decision to recognize this agreement and the compromise underlying it (as reflected in paragraphs 9 and 16 of the draft order) should not be taken as any finding or statement that such relief would be granted if it were contested, or indeed in any circumstances that were not so unusual and unforeseen as are those before me today.

53. Counsel for the Landlords present or represented today (Oxford Properties Group Inc. and its affiliates, Crombie Property Holdings Limited, The Cadillac Fairview Corporation Limited and its affiliates, and RioCan Real Estate Investment Trust and Cushman & Wakefield Asset Services ULC, have been clear in their submissions today that their consent to this agreement represents the unique facts and urgent circumstances facing TBS Canada and its approximately 800 employees, and reflects the spirit of cooperation while all parties assess the situation, and would not be given in usual circumstances.

54. On this basis, but recognizing that the rent relief preserves the liquidity of the Company here, I am satisfied that the relief is appropriate.

The Administration Charge and the Director's and Officers' Charge

55. The Company requests an Administration Charge in favour of the Proposal Trustee, its counsel and counsel to the Company in the amount of $700,000. The authority for this Court to grant such a charge is found in section 64.2 of the *BIA*. Administration charges have been approved in other proposal proceedings where, as I am satisfied is the case here, the participation of the parties whose fees are to be secured is necessary to maximize the chances of a successful proceeding under the *BIA*. I observe that none of the proposed beneficiaries have retainers. See: *Scotch & Soda* at para. 13-18; *Mustang GP Ltd., (Re)*, 2015 ONSC 6562 at para. 33; and *Colossus Minerals Inc., (Re),* Endorsement dated February 7, 2014 (Court File No. CV-14-10401-00CL) ("*Colossus*") at para. 11-15.

56. The quantum of the proposed Administration Charge was calculated in consultation with the Proposal Trustee who is of the view that the amount is reasonable and appropriate. It will rank ahead of the D&O Charge, the Aurelius Security and HSBC Registrations but behind the Enterprise Security. Again, each of Aurelius, Enterprise and HSBC received notice of this motion. I further observe that the Aurelius Security is not enforceable today according to its terms and no demand has been sent to the Company, and as noted above the Company is of the view that there is no indebtedness secured by the HSBC Registrations in any event.

57. I am also satisfied that the Director's and Officers' Charge should be granted up to a maximum of $2,100,000. It would rank behind the Administration Charge and Enterprise Security but ahead of the Aurelius Security and the HSBC Registrations.

58. The quantum reflects the statutory obligations for which the one director (the affiant on this motion) and officers are liable in the event the Company does not pay them, such as unpaid vacation pay, payroll and sales taxes.

59. Jurisdiction to approve such a charge flows from section 64.1 of the *BIA*, although there is a restriction on that jurisdiction found in section 64.1(3) in that the court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

60. TBS Canada purportedly has coverage under a global director's and officers' insurance policy held by TBS International in the UK, which is said to apply to the officers and directors of its subsidiaries. However, the Company does not have access to the wording of the UK Policy, despite repeated requests for same from the UK Parent. Nor has it received any proof that premiums have been paid and that the policy is in force.

61. In the circumstances, and unless and until it is clear that adequate insurance is available, the charge is appropriate. I observe that in *Colossus,* such a charge was approved in circumstances that were similar, in that there was uncertainty as to whether the existing insurance in that case was sufficient to cover all potential claims.

62. In this case, it is unclear whether there is any applicable insurance, and if there is, what the terms or limits are. Moreover, the proposed charge will apply only to the extent that the director and officers lack sufficient coverage under the UK Policy or the company is unable to satisfy its indemnity obligations. The Company's sole director, the affiant on this motion Mr. Searle, and the officers, have advised that they will not continue their involvement with TBS Canada absent the protection. On the other hand, I am satisfied that their continued involvement is, as submitted by the Company and supported by the Proposal Trustee, critical to the success of these proceedings.

63. I further observe that the proposed charge applies only to claims or liabilities incurred after the Filing Date and does not apply to misconduct or gross negligence.

64. The Proposal Trustee has confirmed the proposed quantum is reasonable.

65. Both charges are approved.

Relief Directing the Return of Books and Records and other Property

66. The Company seeks an order directing all persons in possession of books, records and other property belonging to it, to produce or deliver same promptly to the Company upon the request of either the Company or the Proposal Trustee.

67. Jurisdiction to make such an order is found in section 164(1) of the *BIA*. It should be noted that s. 164 does not according to the language of that subsection apply to Division I Proposals under Part III of the *BIA*. However, section 66(1) provides that "All the provisions of this Act, except Division II of this Part, insofar as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division."

68. As observed by the Federal Court of Appeal in *Hancor Inc. v. Systèmes de drainage modernes Inc*., 1995 CarswellNat 1275, [1996] 1 F.C. 725 (FCA), section 66(1) "invit[es] the courts to participate in a process of intelligent harmonization and adaptation" and permits the court, on a case-by-case basis, to adapt and apply sections of the *BIA* to an NOI proceeding where appropriate.

69. I am satisfied that, when read together (as they should be), sections 66(1) and 164(1) permit such an order in an NOI proceeding in order that the objective of section 164 can be achieved. That objective includes ensuring that the trustee can fulfil its responsibilities to investigate and value, or otherwise establish, the assets and the liabilities of the bankrupt; and to otherwise discharge its duty to the creditors of the bankrupt to value and realize the value of the estate, can be achieved. See: *Osztrovics (Trustee of) v. Osztrovics Farms Ltd.*, 2015 ONCA 463.

70. While certainly, a Proposal Trustee as here, and a Trustee in Bankruptcy, are different officers of the Court, each has duties to creditors to protect the assets of the debtor and to realize on their value. It is "just as essential that a trustee have recourse to the books and other documents of the company in the administration of a proposal as it would in the case of … a bankruptcy": *Fundy Forest Industries Ltd. (Re)*, 1972 CarswellNB 14, 21 C.B.R. (N.S.) 170 (NB SC) at para. 8.

71. In this particular case, one effect of the Cash Pooling Arrangement historically performed by TBS International, and the cash sweeping arrangements discussed above, is that the UK Parent, Aurelius and the UK Administrator are in possession of certain of the Company's accounting and other records.

72. Without those, the Company cannot perform many of the human resource, accounts payable and accounts receivable functions previously performed by TBS International and integral to the ongoing business of the Company. I am satisfied that this is a case that warrants the "intelligent harmonization of sections 164(1) and 66(1), and moreover that the order requiring production of the books and records achieves that harmonization. In short, it is obvious to me that the Company requires access to documentation that is clearly relevant.

Extension of Time to File a Proposal

73. Section 50.4(8) of the *BIA* requires the Company to file its proposal within 30 days unless extended. The extension requested here is of 19 days, well within the maximum of 45 days permitted by section 50.4(9). The Court must be satisfied that:

    a. the insolvent person has acted, and is acting, in good faith and with due diligence;

    b. the insolvent person would likely be able to make a viable proposal if the extension being applied forward were granted; and

    c. no creditor would be materially prejudiced if the extension being applied for were granted.

74. I am satisfied that each of the factors has been met here. This conclusion is fully supported by the Proposal Trustee. The First Report sets out the particulars justifying this conclusion, the highlights of which are summarized above.

75. I am satisfied that the company is working in good faith and in extremely challenging and unforeseen circumstances. The extension is clearly necessary to give the Company breathing room while it attempts to organize its affairs and stabilize operations. I am further satisfied that the extension will increase the likelihood of a viable proposal and that no creditors are prejudiced by the extension of just over two weeks. I am further satisfied that this temporally limited extension minimally impacts creditors while at the same time provides the Company with the time it needs.

Relief, Disposition and Comeback Hearing

76. For all of the above reasons, the motion is granted. Order to go in the form signed by me today which has immediate effect without the necessity of issuing and entering.

77. Given the stay extension until April 16, 2024, this matter will return before me on April 15, 2024 commencing at 10 AM.

78. In conclusion, I echo the observations I noted above, and in particular three things. First, the filing of the NOI was unanticipated, there having been no notice to TBS Canada of such an intention on the part of the UK Parent or Aurelius. Second, the filing of the NOI was brought about by the unilateral action of those same parties in continuing to sweep the cash accounts of TBS Canada, yet failing or refusing to pay the accounts of suppliers to TBS Canada. Third, there has to date been a lack of transparency and cooperation with the Company and the Proposal Trustee.

79. While there may be many substantive issues between and among the parties to be determined or resolved in the course of this proceeding, as a reflection of the principles of comity and the coordination of proceedings in different jurisdictions for the benefit of stakeholders, this Court would expect, and in fact does expect, the cooperation of the UK Parent, Aurelius and the Administrator with matters including but not limited to the production of books and records of the Company. Things like production of basic yet fundamental agreements and policies, let alone even clear and unequivocal confirmations regarding the existence of same, should not require the intervention of the Court in circumstances such as are present here.

Osborne, J.