CITATION: Hudson's Bay Company, Re, 2025 ONSC 1897
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DATE: 20250329

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

BEFORE: Peter J. Osborne J.

COUNSEL: *Ashley Taylor, Elizabeth Pillon, Maria Konyukhova, Britnney Ketwaroo, Philip Yang and Nick Avis*, for the Applicants
Davis Bish, for Cadillac Fairview
Evan Cobb, for Bank of America
Linc Rogers and Caitlin McIntyre for Restore Capital LLC
Chad Kopach, for EY in the Receivership of Woodbine Mall Holdings Inc.
Lou Brzezinski, Alexandra Teodorescu and Nadav Amar, for TK Elevator (Canada) Ltd.
Haddon Murray, for Cominar Real Estate Investment Trust & Chanel ULC
Matthew Gottlieb, Andrew Winton and Annecy Pang, for KingSett Capital Inc.
Sean Zweig, Michael Shakra and Thomas Gray, for the Court-appointed Monitor
Trevor Courtis and Heather Meredith, for Bank of Montreal and Desjardins Financial Security Life Assurance Company
Gilles Benchaya and Mandy Wu, for Restore Capital LLC and Bank of America
James D. Bunting, for Ivanhoe Cambridge Inc.
Robert J. Chadwick, Joseph Pasquariello and Andrew Harmes, for RioCan Real Estate Investment Trust
Tushara Weerasooriya, Jeffrey Levine and Guneev Bhinder, for B.H. Multi Com Corporation, B.H. Multi Color Corporation & Richline Group Canada Inc.
Gregg Galardi, US Counsel for File Agent (Restore Capital LLC) as DIP Lender
Isaac Belland, for LVMH Moet Hennessy Louis Vuitton SA
Jake Harris, for the DIP Lenders
Matthew Cressatti, for the Trustees of the Congregation of Knox's Church, Toronto

D.J. Miller and Andrew Nesbitt, for Oxford Properties Group, OMERS Realty Management Corporation, Yorkdale Shopping Centre Holdings Inc., Scarborough Town Centre Holdings Inc., Montez Hillcrest Inc., Hillcrest Holdings Inc., Kingsway Garden Holdings Inc. Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc., OMERS Realty Corporation, Oxford Properties Retail Limited Partnership, CPPIB Upper Canada Mall Inc., CPP Investment Board Read Estate Holdings Inc.
Calvin Horsten, for Toronto-Dominion Bank
Stuart Brotman and Jennifer L. Caruso, for Royal Bank of Canada
George Benchetrit, for Nike Retail Services Inc. and PVH Canada Inc.
Linda Galessiere, for Ivanhoe Cambridge II Inc./Jones Lang LaSalle Incorporation, Morguard Investments Limited and Salthill Property Managements Inc.
Steven Weisz and Dilina Lallani, for Ferragamo Canada Inc.
David Ullman and Brendan Jones, for Bentall Green Oak, Primaris REIT, Quadreal Property Group
David Preger and Stephen Posen, for 100 Metropolitan Portfolio, Mantella & Sons
Shayne Kukulowicz and Monique Sassi, for the Proposed Liquidator
Andrew J. Hatnay, Robert Drake and Abir Shamim, for certain HBC Employees and Retirees
Ken Rosenberg, Max Starnino, Emily Lawrence and Evan Snyder, for The Financial Services Regulatory Authority of Ontario
Sam Rogers, for Investment Management Corporation of Ontario
Kelly Smith Wayland, for the Department of Justice (Canada)
Blake Scott, for UNIFOR Local 240 & 40
Howard Manis for Villeroy & Boch Tableware Ltd.
Mitch Koczerginski for Cherry Lane Shopping Centre Holdings Inc. and TBC Nominee Inc.
Lindsay Miller, for West Edmonton Mall Property
Yiwei Jin, for United Food & Commercial Workers, Int'l Union Local 1006A
David Rosenblat, for Pathlight
Pavle Masic, for Samsonite Canada
Sarah Pinsonnault, for Québec Revenue Agency

HEARD: March 26 & 27, 2025

ENDORSEMENT

OSBORNE J.

1. At the hearing in this matter on March 21, 2025, the Applicants sought approval of a Restructuring Support Agreement ("RSS") between and among the Loan Parties, the ABL Agent, the FILO Agent and the Term Loan Agent. Numerous stakeholders, and particularly various

landlords with which the Company has leases, advised that they intended to oppose the RSS but requested an adjournment of the motion.

2. Since the draft RSS had been served on the Service List just prior to the commencement of the hearing, stakeholders had not had any reasonable opportunity to review it and consider their position, with the result that I adjourned the approval motion until Wednesday of this week.

3. As set out in the Affidavit of Philip Yang sworn March 26, 2025 on which the Applicants rely, the Applicants had engaged with their pre-filing lenders (the "Lenders") and landlords in the intervening period in an attempt to find common ground.

4. The Applicants, the ABL Agent, the FILO Agent and the Term Loan Agent entered into a restructuring framework agreement on March 25, 2025 (the "RFA"), which is effectively an updated and amended version of the RSS which the Applicants hoped would address many of the concerns expressed by stakeholders.

5. On this motion, the Applicants seek approval of the RFA. That position is strongly supported by the Pre-Filing Lenders (and particularly Restore Capital, LLC, the FILO Agent, and Pathlight) and is recommended by the Monitor. Approval is still opposed, however, by a number of stakeholders and principally the landlords.

6. As I observed in my Endorsement dated March 26, 2025, the Applicants submit that the RFA will allow the Company to continue to use its cash and inventory which is subject to the security of the Lenders. Distilled to its core, the argument is that the collateral for the indebtedness owing to the secured lenders is the very inventory now being sold to generate liquidity. While that liquidity is accretive to a successful restructuring, it results from the corresponding erosion of the security for the outstanding secured debt of the Company.

7. However, the landlords submit that there are no benefits to the Applicants derived from the RFA, and particularly no benefits that justify the onerous terms and obligations of the Applicants in the RFA given that DIP financing is no longer required.

8. The motion was heard on Wednesday and Thursday of this week. In the circumstances, it is critical that this decision be released as soon as possible and accordingly, it is somewhat summary in nature.

9. Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding, the motion materials and/or the Reports of the Monitor, unless otherwise stated.

10. For the reasons that follow, I decline to approve the RFA and the motion is dismissed.

11. The RFA has been provided in full and unredacted form to stakeholders, and is in the motion record. Accordingly, I need not summarize the entire RFA here.

12. In the main, it provides that the Lenders, who assert that they have priority ranking security interests in the merchandise in inventory at Hudson's Bay, will consent to the continued sale of that merchandise, but only in accordance with the terms of the RFA.

13. The Applicants, the Lenders and the Monitor candidly acknowledge that the RFA is "not perfect" and represents a negotiated solution to a significant disagreement about an important issue (the sale of merchandise that constitutes collateral to the Lenders).

14. They submit that it avoids ongoing conflict with those Lenders and this in turn will increase much-needed stability and predictability during a crucial period of this restructuring. They characterize the RFA as a positive step because it permits the ongoing liquidation sale that I approved last week to continue, but imposes various "guardrails" within which the Company must operate if it is to have the confidence of the Lenders.

15. I accept that there are positive attributes to the proposed RFA. It would require Hudson's Bay to comply with an agreed-upon Budget, subject to Permitted Variances (effectively a tolerance of up to 15%). Compliance with the Budget would, the Lenders submit, "ensure that funds are spent in a responsible manner, cognizant of all the circumstances of the case", and approval of the RFA would avoid "uncertainty, instability, cost and value destruction inherent in a contested *CCAA* process."

16. I also acknowledge that counsel for the Lenders confirmed on the second day of the hearing of these motions that in response to concerns expressed by the Court, the Lenders were agreed that section 12 of the proposed RFA should be amended to further extend the deadline by which, if the Loan Parties have not received a firm commitment in respect of a Permitted Restructuring Transaction in connection with the Excluded Stores from April 7 to April 30. That would align the dates with the deadlines provided in the SISP Order.

17. However, in my view, on balance, the RFA is neither necessary nor appropriate at this time for a number of reasons, including these:

a. as submitted by a number of the landlords, and as acknowledged in candour by the Lenders, the object and structure of the proposed RFA generally are consistent with what would typically accompany a DIP financing commitment.

   With the relatively modest interim DIP Facility approved in the Initial Order now having been repaid, and in the absence of any further commitment by the Lenders to provide DIP financing on terms agreed by the Applicants, I am not persuaded that it is appropriate in the circumstances of this case to grant these rights and protections to the Lenders, and to the exclusion of other stakeholders;

b. I acknowledge that, as submitted by the Lenders, the Company requires the continued use of collateral to pursue the ongoing liquidation sales and to permit the possibility of a restructuring transaction, including by way of the SISP and Lease Monetization Process.

However, it is not unusual in CCAA proceedings that assets of the debtor, including assets in which secured creditors assert a security interest and even a first ranking security interest, may, as appropriate in the particular circumstances of any given case and under the auspices of the Court-appointed Monitor and pursuant to Court order, sell, dispose of or encumber those assets.

Those secured creditors are not automatically entitled to a veto over the sale of such collateralized assets, and nor are they entitled to unilaterally impose terms on the sale of such assets. Such terms may be imposed if the Court considers that they are necessary and appropriate. I am not so persuaded here;

c. the proposed RFA would provide that the Company shall use its cash solely for the list of enumerated purposes and in the enumerated sequence set out in the RFA.

It would also provide that weekly variance reporting is required to be made by the Company to the Lenders (through their agent) as well as to the Monitor, essentially comparing actual receipts and disbursements as against the Budget (see more on the Budget below) and setting out all variances "on a line-item and aggregate basis in comparison to the [corresponding] amounts in the Budget; each such variance report to be promptly discussed with the [lenders] and each such variance report to include reasonably detailed explanations for any material variances".

In my view, it is the role of the Monitor, and one I expect the Monitor here to fulfil, to ensure that cash and other liquid assets of the Company are used only for appropriate purposes, in a manner accretive to the maximization of value in the *CCAA* proceeding, and in accordance with the terms of any relevant Court orders.

In this case, and at this time, that should be sufficient to give the Lenders comfort about the manner in which assets, including assets pledged as collateral for their secured loans, are dealt with.

It follows from this that if, for example, the Company sought to utilize cash on hand for a purpose inconsistent with the maximization of value in this proceeding, or in breach of the terms of any relevant Court orders, or in any other manner that the Monitor determined was not appropriate, I would expect the Monitor to seek the advice and directions of this Court with respect to those issues, and any proposed expenditure of cash by the Company that the Monitor felt was inappropriate, including but not limited to expenditures that would constitute material variances or a material adverse change in the Company's projected cash flow or financial circumstances (see s. 23(1)(d) of the *CCAA*).

It further follows that I do not think it appropriate to grant the control and veto rights to the Lenders contemplated by the RFA, particularly in circumstances where, as here, the security review of the loan and security documents underpinning the security interests of the Lenders remains ongoing by the Monitor (even

recognizing, as I do, that there is no basis before the Court at the present time to inform a reasonable belief that the security is not valid);

d. I am reinforced in the above-noted point by the fact that the RFA would permit the use of cash, intercompany advances, distributions or other payments only in accordance with a defined Budget attached to the RFA as Schedule "C".

   However, the Budget is not attached to the version of the RFA filed in the materials. It has not been shared with other stakeholders or the Court. For this reason alone, I would be reluctant to approve the RFA given its significant and substantial dependence on the Budget without having had the opportunity to review the Budget.

   While I accept the submission of the Lenders, the Applicants and the Monitor that the Budget is generally consistent with the cash flow projection appended to the Supplement to the Monitor's First Report, and while I understand the commercial sensitivity and potential risk to the ongoing SISP and Lease Monetization Process, the concern remains;

e. I am reinforced further still in the above point by the fact that, as highlighted for the parties during the hearing of this motion, the ARIO provides a "comeback" right pursuant to which any party may seek the advice and directions of this Court on seven days' notice.

   Moreover, the Commercial List routinely accommodates urgent motions or case conferences in ongoing *CCAA* proceedings on much shorter notice than that, where circumstances so require. This proceeding has already proven to be such an example;

f. the RFA would specify that all proceeds of Collateral must be applied in accordance with the priority waterfall set out at Schedule "D". Notwithstanding that the revised version of the RFA would make such distribution subject to further order of the Court, I see no reason to impose a mandatory distribution waterfall at this time. As and when a distribution is sought, all stakeholders will have the ability to make submissions with respect to any appropriate waterfall of such distributions;

g. the proposed RFA would provide that in the event the Company has Excess Cash (defined as cash from sales in excess of $15 million), it must be deposited with the Monitor and may be advanced to the Lenders to satisfy post-filing payment obligations incurred in accordance with the Budget. The submission was that cash on hand in excess of $35 million would be paid over.

   In my view, that is not appropriate or necessary at this time. Again, where a distribution is sought, the party seeking such distribution can bring a motion for such relief and the Court can make such directions are appropriate, having heard from the Monitor and other stakeholders;

h. the RFA would further provide that Excess Cash should be used, within three weeks of the date of the approval of the RFA, to cash collateralize all letter of credit obligations in an amount equal to 104% of the face amounts thereof, together with other related terms. Again, in my view, it is not appropriate to grant such prospective relief at this time, so early in the Liquidation Sale and SISP, and while events remain so fluid;

i. the RFA would impose numerous defined Negative Covenants on the Company setting out various things it would be prohibited from doing without the consent of the Lenders. Among the most problematic of these Negative Covenants is 14(k), which would prohibit and prevent the Company from seeking to obtain, or failing to oppose, any motion for approval by this Court of any Restructuring Transaction other than a Permitted Restructuring Transaction.

   The practical effect of that Negative Covenant would be contrary to the purpose and objective of the ongoing SISP, among other things, and would unduly restrict the Company from supporting (or failing to oppose) any proposed transaction that will be subject to Court approval on notice to all stakeholders anyway. In my view, it is inappropriate to place such a restriction on the Company now, in the context of an ongoing SISP, and in respect of a hypothetical, future, and as-yet unknown possible transaction.

   My concern with respect to this point is materially increased by the fact that the definition of "Permitted Restructuring Transaction" means a transaction that provides for repayment in full, in cash on closing, of all outstanding indebtedness to the Lenders. This would mean that the Company could not even bring forward for consideration by the Court and other stakeholders any possible transaction that did not provide for repayment in full of all prefiling secured debt.

   Evaluation and consideration of any proposed transaction is for another day: that is the whole point of the SISP - to generate any and all offers and fully canvass the market as to possible opportunities for Hudson's Bay. I am uncomfortable restricting the market intended to be created by the SISP and effectively pre-judge the creativity and ingenuity of participants in that process;

j. the RFA requires the Company to meet certain Milestones set out on Schedule "D", the failure of which would give certain rights to the Lenders. Those Milestones include the fact that the Court shall have made a distribution order by May, 15, 2025 and the distribution shall be completed within two days thereafter. I am not prepared to pre-determine today whether such an order will be appropriate or reasonable at a future date; and

k. finally, the RFA would provide for various Events of Default, the occurrence of which would give the Lenders various enumerated Remedies. In my view, it is not appropriate to "pre-authorize" such Remedies. If the Lenders are of the view that

> additional Remedies are appropriate and should be ordered by this Court, I am quite confident that they will move for such relief promptly.
>
> Indeed, if ironically, one of the Remedies would be the ability for the Lenders to apply to the Court for the appointment of a Receiver over the Company or the Collateral. I say "ironically" because during the hearing of this motion, the Lenders submitted that if this Court declined to approve the RFA, the Lenders would do just that - promptly seek the appointment of a Receiver.

18. I need not make any determination as to whether such a statement referred to in the last point immediately above was, in the submission of the landlords and others, in the nature of a threat, or whether it was, in the submission of the Lenders, merely an information point for the consideration of the Court. It does not matter. For all of the above reasons, in my view, approval of the RFA at this time is not appropriate. If the Lenders or any other party bring a motion in this proceeding, the Court will consider it at that time, based on the evidence in the record.

19. I recognize the submission of the Lenders that the obligations imposed on the Company by the RFA are, at least in some respects, not overly onerous, and that they are appropriate. The Lenders submit that they will be the fulcrum creditors in this proceeding, and subject to the completion of the security review now ongoing by the Monitor will be the first ranking secured creditors in any event. The protections are appropriate, they argue, given that the practical if unfortunate reality is that they are the creditors most economically affected by the success or failure of this *CCAA* proceeding, and in particular the SISP and the Lease Monetization Process already approved.

20. However, and as stated above, the controls already in place, the obligations on the Applicants as parties to this proceeding, and the oversight of the Court-appointed Monitor, are sufficient to protect the interests of the Lenders while balancing those interests against the rights of other stakeholders during this interim period when so many factors remain at play, significant unknowns remain, and the SISP and Lease Monetization Process are ongoing.

Result and Disposition

21. For all of the above reasons, I decline to approve the RFA. The motion is dismissed.

22. For greater certainty and clarity, I further order and direct (to the extent necessary) that:

a. pursuant to section 23(1)(b) of the *CCAA* and the direction of this Court, the Monitor shall continue to review on an ongoing basis the Company's cash-flow statement(s) as to their reasonableness and report to the Court with respect thereto. This applies to current and future cash flow statements, including but not limited to the cash flow statement at Appendix "E" to the Supplement to the First Report of the Monitor dated March 21, 2025 (the "Current Cash Flow Forecast");

b. the Court recognizes that it is usual and expected that that cash flow statements are updated from time to time as an insolvency proceeding progresses. The Monitor

shall advise the Court by way of a Report or Supplement, on notice to the Service List, of updated cash flow statements or material variances from existing cash flow statements, in the usual course and on a timely basis as appropriate;

c. in addition, and without in any way restricting the above, the Monitor will advise the Court, on notice to the Service List, if at any time (whether an updated cash flow statement has been prepared by the Company or not) if, in the professional opinion of the Monitor, actual results vary from the then Current Cash Flow Forecast by 15% or more;

d. in further addition, the Company shall not, without the consent of the Monitor, who shall, where appropriate, seek the advice and direction of this Court on notice to the Service List, and except in accordance with Orders of this Court already made in this proceeding, make any investments or acquisitions of any kind, direct or indirect, in any other business or otherwise. The Monitor may, as is usual, consult with stakeholders, as appropriate. This specifically includes the Lenders; and

e. the Monitor shall continue, among its other duties and responsibilities, to monitor cash receipts and disbursements by the Company. The Company should not make any disbursements other than those that are necessary and appropriate. These would include, in particular, any expenditure of cash or commitment to spend by the Company that is not contemplated by the Liquidation Sale Order, the Lease Monetization Order or the SISP already made in this proceeding, or as may be otherwise ordered by the Court on notice to the Service List.

23. Order to go to give effect to these reasons.

Osborne J.