

**CITATION:** Nordstrom Canada Retail, Inc., 2024 ONSC 1622

**COURT FILE NO.:** CV-23-00695619-00CL

**DATE:** 2024-03-20

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 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 **NORDSTROM CANADA RETAIL, INC., NORDSTROM CANADA HOLDINGS, LLC** and **NORDSTROM CANADA HOLDINGS II, LLC**

APPLICANTS

**BEFORE:** Chief Justice Geoffrey B. Morawetz

**COUNSEL:** *Jeremy Dacks, Tracy Sandler, and Martino Calvaruso, for the Applicants*

*Brendan O'Neill, Bradley Wiffen, for the Monitor, Alvarez & Marsal Canada Inc.*

*Aubrey Kauffman, Canadian Counsel Nordstrom Inc.*

*Susan Ursel and Karen Ensslen, Employee Representative*

*David Bish, for Cadillac Fairview*

**HEARD:** March 19, 2024

**ENDORSEMENT**

[1] The Applicants seek an order (the "Sanction and Vesting Order"), among other things: (i) sanctioning the Consolidated Plan of Compromise and Arrangement dated December 13, 2023 (as amended, the "Plan") and authorizing its implementation; and (ii) extending the Stay Period (and by extension, the Co-Tenancy Stay) until and including June 28, 2024.

[2] There was no opposition to the motion.

[3] The evidentiary support for the requested relief is set out in the Affidavit of Misti Heckel, sworn March 8, 2024 (the "Sanction Affidavit"), in the Eighth Report and the Ninth Report of the Monitor, Alvarez & Marsal Canada Inc. (the "Monitor"). Capitalized terms have the same meaning as in the Sanction Affidavit unless otherwise stated.

[4] The Applicants obtained the initial order on March 2, 2023 (the "Initial Order"). The stay of proceedings and other benefits and authorizations of the Initial Order were extended to Canada Leasing LP. An Amended and Restated Initial Order was subsequently granted on March 10, 2023.

The Stay Period has been extended on a number of subsequent occasions, most recently to April 5, 2024.

[5] On May 30, 2023, the Court granted an order (the “Claims Procedure Order”) establishing a process (the “Claims Process”) to determine the nature, quantum, and validity of claims against the Nordstrom Canada Entities and their directors and officers.

[6] On December 20, 2023, the Court granted an order (the “Meeting Order”) that, among other things: accepted the filing of the Plan; authorized the Nordstrom Canada Entities to call and hold the Creditors’ Meeting; and extended the Stay Period until and including April 5, 2024.

[7] The Nordstrom Canada Entities, with the oversight of the Monitor and the support of Nordstrom US as Plan Sponsor, have negotiated a global resolution to these proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”).

[8] In addition to obtaining unanimous approval of the Plan at the Creditors’ Meeting, the Nordstrom Canada Entities, in close consultation with the Monitor, have made significant progress in these CCAA proceedings since the Meeting Order’s issuance, including the following:

- (a) Claims Process: Of the 742 Claims that had been filed with the Monitor as of February 20, 2024, 699 have now been resolved.
- (b) Agreements with Landlords: The Nordstrom Canada Entities have entered into separate settlement agreements with each Supporting Rack Landlord in respect of, among other things, such Landlords’ Proven Claims pursuant to the Claims Procedure Order and the Plan (each a “Supporting Rack Landlord Settlement Agreement”).
- (c) Termination of Employee Trust: After receiving the confirmations required to terminate and wind-up the Employee Trust, the Monitor delivered the Employee Trust Termination Certificate on December 28, 2023.
- (d) Letter Agreement with the CRA: Pursuant to the CRA Agreement, NIL delivered an original irrevocable standby letter of credit in the amount of \$39,298,779 to the Minister on December 20, 2023 and a replacement standby letter of credit was subsequently delivered by NIL in accordance with the agreement. The Minister vacated the CRA NCH Assessments on January 10, 2024, and new Notices of Assessment were issued to NIL. These actions have satisfied a condition precedent to the implementation of the Plan.

[9] The meeting of the Affected Creditors (the “Creditors’ Meeting”) was held virtually on March 1, 2024. The Plan received unanimous approval from Affected Creditors holding Proven Claims that were present and voting in person or by proxy (or who were deemed to vote).

[10] The Plan includes a single class of Affected Creditors for voting and distribution purposes. An Affected Creditor was deemed to be a “Convenience Class Creditor” if their Proven Claims in the aggregate were less than or equal to \$15,000 or were in excess of that amount but they elected to be treated as such. Certain Claims are to be unaffected by the Plan and will not be compromised.



[11] The Nordstrom Canada Entities will use all of their available cash to establish the Consolidated Cash Pool, NCL ITC Cash Pool, Administrative Reserve Account, and Disputed Claims Reserve Account.

[12] On the Initial Distribution Date, each Other Priority Claim Creditor and Convenience Class Creditor will receive a distribution in the full amount of its Other Priority Claim or Convenience Class Claim, respectively. Each Affected Creditor with a Proven Claim will receive an initial distribution in an amount equal to its Pro Rata Share of the Cash in the Consolidated Cash Pool Account on that date, with further distributions to follow (except for the Supporting Rack Landlords, each of which will receive the full amount required to be paid under its Supporting Rack Landlord Settlement Agreement, with no further distributions to be made to them under the Plan). Nordstrom US will receive certain amounts distributed to the FLS Landlords pursuant to the Plan in accordance with the FLS Landlord Settlement Agreements.

[13] From and after the Initial Distribution Date, distributions will be made to each Affected Creditor with a Disputed Claim that has become a Proven Claim. Once there are no remaining Disputed Claims, additional actions on the Final Distribution Date include Nordstrom Canada's payment, on behalf of itself and each of the other Nordstrom Canada Entities, of any final Administrative Reserve Costs from the Administrative Reserve Account.

[14] On the Plan Implementation Date certain parties will be granted a release subject to certain specified carve-outs. In accordance with the Initial Order, the FLS Landlord Guarantee Claims are excluded from the release in the Plan. The FLS Landlords and Nordstrom US have reached agreements, outside of the Plan, that resolve all FLS Landlord Guarantee Claims and contractually release Nordstrom US from such claims.

[15] The implementation of the Plan is conditional upon the fulfilment or waiver of certain conditions precedent. The Plan Implementation Date will occur as soon as reasonably possible, likely in April 2024.

[16] According to the Monitor's tabulation, a total of 515 Affected Claims, representing approximately \$33.8 million in value, were voted (or were deemed to have voted). The 515 Affected Claims included 367 Convenience Class Claims deemed to be voted in favour of the Plan, representing \$2,310,076 in value, and two Disputed Claims, representing approximately \$77,080 in value, which were also voted in favour of the Plan.

[17] The issues on this motion are whether:

- (a) the Court should approve the Plan as fair and reasonable and grant the Sanction and Vesting Order; and
- (b) the Stay Period should be extended until and including June 28, 2024.

[18] In seeking approval of a plan of compromise or arrangement under the CCAA, the debtor company must establish that:

- (a) there has been strict compliance with all statutory requirements;

- (b) nothing has been done or purported to be done that is not authorized by the CCAA and prior orders of the Court in the CCAA proceedings; and
- (c) the plan must be fair and reasonable.

(See: *Laurentian University of Sudbury*, 2022 ONSC 5645 at para. 23; and *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 22)

[19] In order to determine whether there has been strict compliance with all statutory requirements, the Court typically considers a number of factors (See: *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para. 62 [*Canadian Airlines*], leave to appeal ref'd 2000 ABCA 238, variation ref'd 2001 ABCA 9, leave to appeal ref'd [2001] 2 S.C.R. xii (note); *Laurentian* at para. 24; *Lydian International* at para. 24).

[20] I find that the Applicants have satisfied all of these requirements. In particular:

- (a) Definition of "Debtor Company": In granting the Initial Order, a determination was made that the Applicants are affiliated debtor companies with total claims against them in excess of \$5 million, that each is a "company" for the purposes of s. 2 of the CCAA, and that each is insolvent (See: *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 at paras. 25-27).
- (b) Notice of Meeting: The Applicants and the Monitor have complied with all of the requirements in the Meeting Order to disseminate materials concerning the Plan and the Creditors' Meeting to the Affected Creditors and other interested persons.
- (c) Classification: The Affected Creditors voted as a single class, in accordance with the classification approved by this Court in granting the Meeting Order.
- (d) Constitution and Voting: The Creditors' Meeting was properly constituted and the voting was carried out in accordance with the Meeting Order.
- (e) Majority Vote: The required double majority of Affected Creditors approved the Plan. The approval was unanimous.

[21] A plan is not to be sanctioned unless it contains specified provisions concerning Crown, employee, and pension claims. The Plan provides that the following amounts are Administrative Reserve Costs that are to be paid in full from the Administrative Reserve no later than the Initial Distribution Date:

- (a) Government Priority Claims enumerated in section 6(3) of the CCAA;
- (b) Post-Filing Tax Claims encompassing any unremitted source deductions arising after the Filing Date to which section 6(4) of the CCAA would apply; and
- (c) Employee Priority Claims enumerated in section 6(5) of the CCAA.



[22] As the Nordstrom Canada Entities do not participate in any prescribed pension plans, s. 6(6) of the CCAA does not apply. Finally, in compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery for equity holders.

[23] I am satisfied that the statutory prerequisites to the sanction of the Plan have been satisfied.

[24] In determining whether anything has been done – or is purported to have been done – that is not authorized by the CCAA, the Monitor has filed nine reports detailing the activities of the Nordstrom Canada Entities throughout these CCAA proceedings. In each court-ordered extension of the stay of proceedings, I found that the Nordstrom Canada Entities acted in good faith and with due diligence.

[25] I am satisfied that the Plan complies with the requirements under the CCAA and the orders of this Court and there is no suggestion that anything has been done that is not authorized either by the CCAA or this Court.

[26] In assessing whether a proposed plan is fair and reasonable, the Court considers a number of factors, as referenced in *Laurentian* at para. 32, citing *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 21.

- (a) Classification: The Affected Creditors were classified in a single class to reflect their commonality of interest as unsecured creditors of one or more of the Nordstrom Canada Entities. There was no objection to this classification at the Meeting Order Hearing (See: *Nordstrom Canada Retail, Inc.*, 2023 ONSC 7194 at para. 5 [*Meeting Order Endorsement*]).
- (b) Recovery on Bankruptcy: The Monitor has expressed the view that the Affected Creditors as a whole will derive a greater benefit from the implementation of the Plan than the results that could have been achieved in a bankruptcy. The Monitor and the Nordstrom Canada Entities estimate that Affected Creditors will receive distributions of approximately 72% to 75% of their Affected Claims that are Proven Claims.
- (c) Alternatives to the Plan: The Nordstrom Canada Entities submit that the Affected Creditors will derive a greater benefit from the consolidated Plan than they would from a non-consolidated plan. I accept this submission.
- (d) No Oppression of Creditors: No Affected Creditor has raised any objection to the treatment of their Affected Claims under the Plan.
- (e) No Unfairness to Shareholders: As the Affected Creditors are not all being paid in full, there is no unfairness to shareholders in receiving no recovery under the Plan.

[27] Article 7.1 of the Plan provides for releases of the following parties, subject to certain carve-outs:

- (a) the Nordstrom Canada Entities Released Parties, consisting of each of the Nordstrom Canada Entities and their respective Directors, Officers, current and former employees, advisors, legal counsel and agents;
- (b) the Third Party Released Parties, consisting of:
  - (i) the Monitor, A&M, and their respective affiliates, and each of their current and former directors, officers, employees, representatives, advisors, legal counsel and agents;
  - (ii) counsel to the Directors and Officers;
  - (iii) the Trustee; and
  - (iv) Employee Representative Counsel; and
- (c) the Plan Sponsor Released Parties, consisting of the Plan Sponsor (Nordstrom US), the Plan Sponsor Subsidiaries and their current and former directors, officers and employees and their respective advisors, legal counsel and agents.

[28] It is well-established that the Court has jurisdiction, in appropriate circumstances, to sanction plans containing releases in favour of third parties (See: *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587 [*Metcalfe*] at para. 61, leave to appeal ref'd 2008 CanLII 46997 (S.C.C.)). In addition to approving releases of directors and officers, courts have also sanctioned plans releasing other third parties that contributed to a plan, including the debtor's affiliates, employee representatives and others (See: *Sino-Forest Corporation (Re)*, 2012 ONSC 7050 at paras. 70-74, leave to appeal ref'd 2013 ONCA 456, leave to appeal ref'd 2014 CanLII 11054 (S.C.C.) (releasing the debtor's subsidiaries); *Target Canada Co., Re*, 2016 ONSC 3651 at paras. 40-47, reproduced below in Schedule "C" [*Target*] (releasing the debtor's parent company, who was also the plan sponsor); *Laurentian* at paras. 39-45 (releasing a university with which the debtor had a relationship); *Lydian International* at paras. 50-64 (releasing senior lenders)).

[29] In determining whether to approve a third-party release, the Court will consider the following factors, none of which alone is determinative:

- (a) whether the parties to be released from claims are necessary and essential to the restructuring of the debtor;
- (b) whether the claims to be released are rationally connected to the purpose of the plan and necessary for it;
- (c) whether the plan could succeed without the releases;
- (d) whether the parties being released are contributing to the plan;



- (e) whether the release benefits the debtors as well as the creditors generally;
- (f) whether the creditors who voted on the plan had knowledge of the nature and effect of the releases; and
- (g) whether the releases are fair and reasonable and not overly broad or offensive to public policy (See: *Metcalfe* at para. 113; *Laurentian* at para. 40, citing *Lydian International* at para. 54).

[30] This Court has already applied the factors cited above to approve a release in favour of the Employee Trust Trustee of any claims relating to its activities as trustee (See: *Nordstrom Canada Retail, Inc.*, 2023 ONSC 5450 at paras. 15-19).

[31] The Monitor has expressed the view that:

- (a) The Nordstrom Canada Entities Released Parties have been essential to the restructuring, as they have been responsible for overseeing critical business functions and wind-down activities, resolving creditor and stakeholder issues in a timely manner, and developing the Plan to effect a global resolution of all matters in connection with the Nordstrom Canada Entities' exit from the Canadian marketplace.
- (b) The Third Party Released Parties contributed significantly to the restructuring process. Employee Representative Counsel's involvement in these CCAA proceedings enabled employee claims and issues arising from the former employees' employment with Nordstrom Canada to be resolved in a productive, efficient and timely manner. The Employee Trust Trustee was key in providing enhanced and timely recoveries to Nordstrom Canada's employees through the Employee Trust from the outset of these CCAA proceedings. The Monitor, with the assistance of its counsel, has filed nine reports detailing the progress of these CCAA proceedings and has overseen the Nordstrom Canada Entities' negotiations to resolve these CCAA proceedings.
- (c) The Eighth Report also addressed the contribution of the Plan Sponsor. The Plan Sponsor's efforts included:
  - (i) establishing the Employee Trust and providing it with \$15.2 million of aggregate funding (the Plan Sponsor will not recover approximately \$3.6 million to \$4.1 million of its subrogated claim for certain of these amounts under the Plan), permitting eligible employees to obtain payment in full of their statutory entitlements on a timely basis;
  - (ii) facilitating a resolution of the FLS Landlords' claims;
  - (iii) causing its wholly-owned subsidiary NIL to enter into the CRA Agreement, removing a large contingent claim from the CCAA

estate that would have delayed the development of the Plan and distributions to Affected Creditors;

- (iv) providing approximately 47% of the cash that will fund the Plan by paying the approximately \$70 million Net NCRI Transfer Pricing Claim to the Consolidated Cash Pool for the benefit of Affected Creditors in accordance with the Transfer Pricing Policy without opposition or delay; and
- (v) not recovering on over \$300 million of the NIL Canada Expansion Loan Claim and other claims of approximately \$1 million.

[32] I am satisfied that the Plan Sponsor's economic contributions have demonstrably increased the available recoveries for Affected Creditors.

[33] All Affected Creditors received full notice of the terms of the Plan and the releases contained therein, including through the Letter to Creditors distributed pursuant to the Meeting Order.

[34] Having considered the record and factors set out in [26] – [33], I find that in all respects, the Plan is fair and reasonable. I am satisfied that the proposed releases in the Plan are fair and reasonable and are not excessive in scope.

[35] The Stay Period has been extended a number of times, most recently to April 5, 2024. The Applicants submit that the Stay Period should be extended until and including June 28, 2024, as extending the Stay Period is necessary to permit the Nordstrom Canada Entities to implement the Plan. Maintaining the Co-Tenancy Stay during the next stage of the case will continue to provide stability to these CCAA proceedings. The Monitor reports that the Applicants have sufficient cash resources to continue their wind down through June 28, 2024.

[36] I am satisfied that the Applicants are continuing to work in good faith and with due diligence such that this request to extend the Stay Period is reasonable and is granted.

### **DISPOSITION**

[37] The requested Sanction and Vesting Order and related relief is granted.

### **ADDENDUM**

[38] One aspect of the release requires further comment.

[39] Court-appointed Employee Representative Counsel, Ursel Phillis Fellows Hopkinson LLP ("UPFH"), has advised the Court that UPFH's IT service provider recently experienced a data security breach of its systems (the "Data Security Breach"), which affects certain UPFH IT systems involving personal information of certain former employees of Nordstrom Canada. Employee Representative Counsel has advised the Court that UPFH is taking the necessary steps to determine the scope and extent of the Data Security Breach for the purpose of notifying former Nordstrom Canada employees. UPFH will provide appropriate notification to former Nordstrom Canada



employees. UPFH will provide regular updates to Nordstrom Canada and the Monitor about UPFH's notification and other relevant efforts in this regard.

[40] Notwithstanding the sanction and approval of the Plan in the Sanction and Vesting Order of this Court dated March 19, 2024, and in particular the approval of the releases set out in Article 7 of the Plan, for greater certainty, UPFH, the Applicants and the Monitor agree that the releases set out in Article 7 of the Plan shall not release UPFH from any claims that any Person may have against UPFH arising out of or related to the Data Security Breach.

[41] In closing, I want to state that the outcome in these CCAA proceedings was achieved in just over one year. It started with the unfortunate announcement that the Applicants had decided to cease operations in Canada. It ended with a CCAA Sanctioned Plan that will provide Affected Creditors with at least a 72¢/\$1.00 recovery. It also resulted in settlement of all landlord claims. Further, the Applicants addressed all employee claims in a timely and responsible manner with the able assistance of Employee Representative Counsel. The result was achieved through the hard work of all participants involved. The communication between parties was exceptional and the Applicants' and the Monitor's materials were consistently prepared for court hearings in advance of the scheduled dates. I express my thanks to all involved.



Chief Justice Geoffrey B. Morawetz

**Date:** March 20, 2024