

CITATION: Nordstrom Canada Retail, Inc., 2023 ONSC 4199
COURT FILE NO.: CV-23-695619-00CL
DATE: 2023-07-17

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 INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Jeremy Dacks*, for the Applicants

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

Harvey Chaiton, for the Directors and Officers of the Nordstrom Canada Entities

Susan Ursel and Emily Home, for the Proposed Employee Representative Counsel

D.J. Miller for Oxford Properties Group

David Bish, for Cadillac Fairview

Aubrey Kauffman, for Nordstrom, Inc. (U.S.)

Stuart Brotman, for G2MC Inc.

Linda Galessiere, for Ivanhoé Cambridge, Orlando Corporation and 6914861
Canada Inc.

BEFORE: Chief Justice Geoffrey B. Morawetz

HEARD: July 17, 2023

ENDORSEMENT

BACKGROUND

[1] On March 2, 2023, Nordstrom Canada Retail, Inc., Nordstrom Canada Holdings, LLC, and Nordstrom Canada Holdings II, LLC (the “Applicants”) obtained relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the “CCAA”) pursuant to an Initial Order (the “Initial Order”). The stay of proceedings in the Initial Order was extended to Nordstrom Canada Leasing LP (together with the Applicants, the “Nordstrom Canada Entities”). Alvarez & Marsal

Canada Inc. was appointed as monitor (the “Monitor”). On March 10, 2023, the Court granted an Amended and Restated Initial Order.

[2] The Nordstrom Canada Entities, in consultation with the Monitor, retained Jones Lang LaSalle Real Estate Services, Inc. (“JLL”) as real estate advisor for the purpose of facilitating the sale of leases and other property rights for some or all of the Nordstrom Rack Leases and the Nordstrom full-line Leases in Canada (the “Leases”). JLL commenced a marketing process seeking to complete transactions for the Leases for the benefit of the Nordstrom Canada Entities’ stakeholders. This marketing process gave rise to two transactions for three of the Nordstrom Rack Leases, both now subject to court approval.

[3] The Applicants bring this motion for orders (the “Approval and Vesting Orders”):

- (a) approving the transactions contemplated by the Omnibus Assignment and Assumption of Leases, dated as of June 5, 2023 (as amended, the “Winners Agreement”) between Canada Leasing LP and Winners Merchants International L.P. (“Winners LP”) solely with respect to the Vaughan Mills Lease and the Deerfoot Meadows Lease (as discussed below);
- (b) approving the transaction contemplated by the Assignment and Assumption of Lease, dated as of June 8, 2023 (as amended) (the “G2MC Agreement”) between Canada Leasing LP and G2MC Inc. (“G2MC”) with respect to the Heartland Lease (as discussed below); and
- (c) approving the activities of the Monitor and the fees and disbursements of the Monitor and its counsel.

[4] There was no opposition to the requested relief. The Monitor supported the position of the Applicants.

[5] Pursuant to the Winners Agreement and the G2MC Agreement, the Nordstrom Canada Entities’ interest in three Leases will be assigned for aggregate cash consideration of \$938,734. The Landlord of a fourth Nordstrom Rack Lease (the Train Yards Lease) elected to terminate the Lease rather than negotiate an assignment. In addition to the cash consideration payable pursuant to the transactions, the Winners Agreement and the G2MC Agreement will significantly reduce Landlord claims against the Nordstrom Canada Entities by reducing the number of Leases that will have to be disclaimed.

[6] The Nordstrom Canada Entities submit that the Winners Agreement and the G2MC Agreement should be approved and the transactions be implemented. The Winners Agreement and the G2MC Agreement represent the result of a sale process involving more than 200 potential purchasers and are the highest-value, non-overlapping bids to emerge from the process.

[7] The facts underlying this motion are more fully set out in the affidavits of Misti Heckel, sworn July 11, 2023 (the “Lease Assignment Affidavit”) and May 19, 2023 (the “Claims Process Affidavit”).

[8] The Nordstrom Canada Entities received Nordstrom Rack EOIs from third-party retailers for the assignment and assumption of four Nordstrom Rack Leases. Upon receipt of the Nordstrom Rack EOIs, the Nordstrom Canada Entities and JLL, in consultation with the Monitor, undertook negotiations with bidders who submitted the most attractive, non-conflicting bids for each Nordstrom Rack Lease, including providing draft assignment agreements to certain of the potential assignees. These negotiations resulted in the Winners Agreement and the G2MC Agreement, described more fully below, respecting initially four of the Nordstrom Rack Leases.

[9] No executable transactions acceptable to the applicable Landlords for the assignment of Nordstrom Canada full-line store Leases emerged as a result of these discussions and the lease transaction process.

[10] The Nordstrom Canada Entities, with the approval of the Monitor, issued notices of disclaimer to the Landlords of all Nordstrom Canada full-line store Leases (which disclaimers will become effective July 22, 2023), and with respect to all Nordstrom Rack stores for which no Nordstrom Rack EOIs were received (which disclaimers became effective in early June).

[11] The Nordstrom Canada Entities, with the assistance of JLL and the Monitor, sought to negotiate lease transactions for the four Nordstrom Rack Leases in respect of which Nordstrom Rack EOIs had been received. Those negotiations culminated in the execution of:

- (a) the Winners Agreement relating to the Vaughan Mills Lease, the Deerfoot Meadows Lease, and the Train Yards Lease; and
- (b) the G2MC Agreement relating to the Heartland Lease.

[12] The transaction with respect to the Train Yards Lease under the Winners Agreement has since been terminated because the Landlord of the Train Yards Lease elected to terminate the Lease rather than negotiate an assignment. The remainder of the transactions under the Winners Agreement remain valid and in full force and effect.

[13] The ultimate aggregate consideration payable under the Winners Agreement and the G2MC Agreement totals approximately \$938,734, broken down as follows:

- (a) \$150,000 for the Vaughan Mills Lease;
- (b) \$200,000 for the Deerfoot Meadows Lease; and
- (c) \$588,734 for the Heartland Lease.

[14] The proposed transactions, and the termination of the Train Yards Lease, should result in a reduction of Landlord claims against the Nordstrom Canada Entities' estate that would otherwise have arisen from disclaimers of the Heartland Lease, the Train Yards Lease, the Deerfoot Meadows Lease, and the Vaughan Mills Lease.

[15] The issue on this motion is whether this Court should approve the Winners Agreement and the G2MC Agreement and grant the proposed Approval and Vesting Orders.

[16] Section 36 of the CCAA sets out the legal test for obtaining court approval that applies where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding. Section 36 provides:

36(1) Restriction on disposition of business assets - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3) Factors to be considered - In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[17] Counsel to the Applicants submit that these factors overlap, to a certain degree, with the *Soundair* principles set out in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727, that were applied in approving sale transactions under pre-amendment CCAA case law. Under the *Soundair* test, it was necessary to consider (1) whether sufficient efforts had been made to obtain the best price and that the debtor had not acted improvidently; (2) whether the interests of all parties had been considered; (3) the integrity and efficacy of the process for obtaining offers; and (4) whether there was any unfairness in working out the process.

[18] The Applicants submit that, taking into account the factors listed in section 36(3) and with regard to the general interpretive principles of the CCAA, this Court should approve the Winners Agreement and the G2MC Agreement and grant the proposed Approval and Vesting Orders for the following reasons:

- (a) The comprehensive marketing process undertaken by JLL, under the supervision of the Monitor, involved contact with more than 200 potential bidders and led to 28 parties signing NDAs to access the confidential data room for due diligence. The Winners Agreement and the G2MC Agreement are the product of significant negotiations undertaken by the Nordstrom Canada Entities, in consultation with the Monitor, with the successful bidders. There is no evidence that the Nordstrom Canada Entities have acted improvidently. While the Amended and Restated Initial Order authorized the Nordstrom Canada Entities to pursue all avenues for the sale or assignment of the Leases, the lease marketing process itself was not formally approved by this Court. However, it was fair, reasonable and comprehensive. There are many examples where a sale was approved by the court even though the process did not receive prior court approval.
- (b) Monitor concurs – the Monitor concurs with the Nordstrom Canada Entities in respect of the sale process and supports the relief sought on this motion. The Monitor supervised the implementation of the lease transaction process, reviewed all Nordstrom Rack EOIs and Nordstrom Full-Line EOIs received during the process, and was consulted throughout during negotiations in respect of the Winners Agreement and the G2MC Agreement.
- (c) Purchase price is fair and reasonable. The Applicants submit that the consideration to be received under the Winners Agreement and the G2MC Agreement (including the G2MC Amending Agreement) is fair and reasonable. The marketing process for the sale of the Leases was rigorous, thoroughly testing the available market to obtain the best price. The Monitor agrees that the Winners Agreement and the G2MC Agreement represent the highest, non-overlapping executable offers received within the marketing process for the applicable Leases.
- (d) Transaction in the best interests of stakeholders – the Nordstrom Canada Entities, with the support of JLL and the Monitor, believe that the Winners Agreement and the G2MC Agreement (including the G2MC Amending Agreement) are in the best interests of the Nordstrom Canada Entities and their stakeholders. In addition to the aggregate payable consideration of \$938,734, a particular benefit from the proposed transactions is the significant reduction of Landlord claims in the estate that would otherwise arise from disclaimers of those Leases.

[19] Counsel to the Applicants submits it is the informed business judgment of the Nordstrom Canada Entities and JLL, supported by the Monitor, that the Winners Agreement and the G2MC Agreement are in the best interests of the Nordstrom Canada Entities and their stakeholders. In the absence of any indication that the Applicants have acted improvidently, that business judgment is entitled to deference by this Court.

[20] I accept this submission and conclude that the Winners Agreement and the G2MC should be approved.

[21] The Approval and Vesting Order in respect of the Winners Agreement also provides for approval of the reports of the Monitor filed in the CCAA proceedings to date and the activities of the Monitor referred to therein.

[22] The proposed approval incorporates the limitation adopted by the Court in *Target Canada Co. (Re)*, 2015 ONSC 7574 at para. 1-2 and 22, and expressly provides that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

[23] The Monitor reports that no adverse comment has been received in respect of the reports. I am satisfied that they should be approved.

[24] With respect to the request for fee approval, the overarching test for assessing the fees and disbursements of the Monitor and its counsel in a CCAA proceeding is whether they are “fair and reasonable” in all of the circumstances. This requires an overall assessment of the work done and a consideration of the results achieved. The value provided should predominate the consideration of what amount is fair and reasonable (*Nortel Networks Corp.*, 2017 ONSC 673 at para 21.) The factors to be considered include: (a) the nature, extent, and value of the assets being handled; (b) the time spent and the complications and difficulties encountered; (c) the Monitor’s knowledge, experience and skill; (d) the diligence and thoroughness displayed by the Monitor; (e) the responsibilities the Monitor assumed; and (f) the results of the Monitor’s efforts.

[25] The fees and disbursements of the Monitor and its counsel for which approval is sought are detailed in the Monitor’s Fourth Report and the related fee affidavit appendices. As detailed in the Monitor’s Fourth Report and its previous reports to Court, the Monitor and its counsel have been involved in overseeing and assisting the Nordstrom Canada Entities in all aspects of the CCAA proceedings to date, including with respect to matters relating to the initial CCAA filing (including establishing and administering the Employee Trust), the Liquidation Sale, the FF&E removal process, the lease transaction process, the development of the Claims Process, and other matters pertaining to employees, suppliers of goods and services, concession vendors, Landlords and other stakeholders.

[26] There was no opposition to the fee requests and I am satisfied that the fees and disbursements of the Monitor should be approved.

[27] For the foregoing reasons, the motion is granted and the Approval and Vesting Orders have been signed in the form presented.



Chief Justice Geoffrey B. Morawetz

Date: July 17, 2023