

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

APPLICANTS

FACTUM OF THE APPLICANTS

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PART I - NATURE OF THE APPLICATION

1. Nordstrom Canada Retail, Inc. (“**Nordstrom Canada**”), together with the other applicants listed above (collectively, the “**Applicants**”), seek relief under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).¹ The Applicants seek a stay of proceedings (the “**Stay**”) for the permitted initial ten-day period (the “**Initial Stay Period**”) under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants’ business and stakeholder value during the Initial Stay Period. As more fully explained below, the Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP (“**Canada Leasing LP**”) and, for limited purposes, to Nordstrom, Inc. (“**Nordstrom US**”). The Applicants and Canada Leasing LP are referred to collectively below as the “**Nordstrom Canada Entities**”.

2. Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. However, Nordstrom Canada’s stores have not performed as anticipated. In fact, Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD \$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, including design and product development, procurement, and administrative services, among others, without which Nordstrom Canada cannot operate.

¹ R.S.C. 1985, c. C-36, as amended.

3. Given Nordstrom Canada's financial performance and after considering all reasonably available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business and strategic imperatives in the US. Accordingly, Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities, and replaced them with a Wind-Down Agreement (described further below).

4. Without support from Nordstrom US, the Nordstrom Canada Entities cannot operate as a going concern and are insolvent. The Nordstrom Canada Entities require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations which will maximize value for stakeholders. As set out below, the use of the CCAA to effect such a wind-down process is well-established and has been held to be appropriate on numerous occasions. In the circumstances, it is the best alternative available to the Nordstrom Canada Entities that will maximize realizations and generate the best possible outcome for their stakeholders.

5. The requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA. The relief sought in this Application is limited to what is required for the Initial Stay Period.

6. The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, typical court-ordered administration and D&O charges in an amount required for the Initial Stay Period, as well as a co-tenancy stay of proceedings and the stay in favour of Nordstrom US. The limited, temporary stay of derivative or related claims for the benefit of Nordstrom US will not prejudice the Landlords or other contractual counterparties and is sought in order to allow for an orderly resolution of those claims within the CCAA, thereby

avoiding a multiplicity of proceedings with the attendant risk of inconsistent results. This Court has the jurisdiction to grant the requested relief and should exercise its discretion to do so.

7. At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the “**Proposed Monitor**”), also plan to solicit bids from a number of professional third-party liquidators and to seek this Court’s approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process. Ultimately, the Applicants intend to develop a plan of arrangement that would result in distributions to unsecured creditors for the benefit of all stakeholders.

PART II -SUMMARY OF FACTS

8. The facts are more fully set out in the Affidavit of Misti Heckel.²

A. The Nordstrom Canada Entities

9. Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited (“**NIL**”). NIL is a wholly-owned subsidiary of Nordstrom US, a well-established high-end retailer and a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.³

10. As of January 31, 2023, Nordstrom Canada employed approximately 1,830 full-time and 505 part-time employees. Of these, 2,010 are full-line store and 320 are Rack store employees.⁴

² Affidavit of Misti Heckel, sworn March 1, 2023 [Heckel Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the Heckel Affidavit. Dollar amounts are given in Canadian dollars unless otherwise specified.

³ Heckel Affidavit, para. 23. For a corporate chart showing the corporate structure of the Nordstrom Canada Entities, see Heckel Affidavit, para. 23.

⁴ Heckel Affidavit, para. 84.

11. Nordstrom Canada Holdings, LLC (“**NCH**”) is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC (“**NCHII**”) is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.⁵

12. Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, committing capital to build and furnish the stores, and subleasing the retail space to Nordstrom Canada.⁶

B. Business of the Applicants

(a) Leases and Retail Stores

13. Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia.⁷ These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the “**Landlords**”) pursuant to leases (the “**Leases**”), and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the “**Subleases**”). The Landlords are generally large retail landlords who own the malls and shopping centres where the stores are located.⁸

14. The Leases for Nordstrom Canada’s full-line retail stores are generally for initial terms of approximately 15 years. Nordstrom Canada’s full-line Leases have between 7 and 10 years remaining on their respective terms, and Nordstrom Canada’s Rack Leases have between 5 and 8 years remaining. The Leases all have a number of successive renewal options. There are no office,

⁵ Heckel Affidavit, paras. 24 and 25.

⁶ Heckel Affidavit, para. 26.

⁷ Heckel Affidavit, paras. 32 and 33.

⁸ Heckel Affidavit, paras. 39 to 40. See para. 40 for a list of the Landlord entities.

warehouse or industrial leases in Canada. To the best of its knowledge, Canada Leasing LP is current on all of its Lease obligations. As of January 2023, approximately USD \$54 million is owing to Canada Leasing LP by Nordstrom Canada for historical rent under the Subleases.⁹

15. Certain of the Leases contain typical provisions that impact Nordstrom Canada store operations. These include: (a) restrictions on going-out of business sales and /or requirements to operate in a manner consistent with a first class shopping centre; (b) operating covenants requiring continuous occupation and operation in the leased premises (full-line Leases); and (c) go dark rights, which allow the Landlords to recapture the Premises (defined in the Leases) operations cease in the Premises for 60 consecutive days (Rack Leases).¹⁰

16. Nordstrom US granted indemnities (the “**Indemnities**”) in favour of the applicable Landlord in respect of ten of the Leases: all six of the Nordstrom full-line store Leases and four of the Nordstrom Rack Leases. Each of these Indemnities expire upon the achievement of specified milestones and events. Nordstrom Canada is of the view that the Indemnities for the four Rack Leases have now expired in accordance with their terms. However, the full-line retail Lease Indemnities remain in effect. The remaining Indemnities provide that Nordstrom US’s obligations are not affected by the bankruptcy, winding down, liquidation, or other creditors’ proceedings in respect of Nordstrom Canada or the disclaimer of the applicable Lease.¹¹

(b) Nordstrom Canada is Dependent on Nordstrom US

17. The Nordstrom Canada Entities’ business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing,

⁹ Heckel Affidavit, paras. 34 to 38 and 46.

¹⁰ Heckel Affidavit, para. 41.

¹¹ Heckel Affidavit, paras. 42 to 43.

payroll, human resources, merchandising, strategy, and information technology project support (the “**Shared Services**”). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the “**Licence and Services Agreement**”). Nordstrom Canada cannot operate or function without the Shared Services.¹²

18. The Licence and Services Agreement incorporates the transfer pricing policy (the “**Transfer Pricing Policy**”) between Nordstrom Canada and Nordstrom US. Pursuant to the Transfer Pricing Policy, Nordstrom Canada and Nordstrom US agreed to pay the other the US dollar amount necessary such that Nordstrom Canada realizes an arm’s length Rate of Return (operating profit divided by net sales) within the range of 4.5% to 6.5%.¹³

19. Similarly, under the Licence and Services Agreement, all IP relating to the “NORDSTROM” name and brands were licenced by Nordstrom US to Nordstrom Canada.¹⁴

20. Nordstrom US has entered into inter-affiliate services agreements with NCH, NCHII, and Canada Leasing LP, whereby it provides services similar to the Shared Services it provides to Nordstrom Canada.¹⁵ Under a further inter-affiliate services agreement, Canada Leasing LP provides property management services to Nordstrom Canada, and Nordstrom Canada provides payroll, finance, and accounting services to Canada Leasing LP.¹⁶

¹² Heckel Affidavit, para. 72. See also Exhibit C of the Heckel Affidavit.

¹³ Heckel Affidavit, para. 73.

¹⁴ Heckel Affidavit, para. 82. The licensed IP is set out in Exhibit A to the License and Services Agreement. The fees are paid pursuant to Exhibit B of the License and Services Agreement.

¹⁵ Heckel Affidavit, para. 75. See also Exhibits D, E and F of the Heckel Affidavit.

¹⁶ Heckel Affidavit, para. 80. See also Exhibit H of the Heckel Affidavit.

21. On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the “**Wind-Down Agreement**”) for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.¹⁷

22. The amounts payable under the Wind-Down Agreement were developed in consultation with the Proposed Monitor and are subject to the consent of the Monitor.¹⁸ The proposed Initial Order, if granted, authorizes the Nordstrom Canada Entities, among other things, to perform their obligations under the Wind-Down Agreement.

C. Financial Position of the Nordstrom Canada Entities

(a) Assets and Liabilities

23. As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately \$500,784,000 and total liabilities of approximately \$561,024,000.¹⁹

(b) Nordstrom Canada’s Poor Financial Performance

24. Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of \$515,046,000. These results lag behind Nordstrom US’s operations and are insufficient to

¹⁷ Heckel Affidavit, para. 78. See also Exhibit G of the Heckel Affidavit.

¹⁸ Heckel Affidavit, para. 79.

¹⁹ Heckel Affidavit, paras. 121 and 128. Greater detail regarding the assets and liabilities of Nordstrom Canada and other financial information are found at paras. 121 to 131 of the Heckel Affidavit

absorb Nordstrom Canada's occupancy and other operating costs. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023 was negative \$34,563,000, prior to taking into account intercompany payments.²⁰

25. Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through the intercompany payments.²¹ However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.²²

(c) Secured Debt

26. The Nordstrom Canada Entities do not owe any secured indebtedness.²³ Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guaranty obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released.²⁴ Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.²⁵

D. The Urgent Need for Relief Under the CCAA

27. Since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD \$950 million. Taking into account the distributions of USD \$175.5 million

²⁰ Heckel Affidavit, paras. 134 to 136.

²¹ Details regarding the intercompany payments and intercompany balances owing can be found at paras. 140 to 142 of the Heckel Affidavit.

²² Heckel Affidavit, para. 137.

²³ Heckel Affidavit, para. 149. See also Exhibit P of the Heckel Affidavit.

²⁴ Heckel Affidavit, para. 147. See also Exhibit O of the Heckel Affidavit.

²⁵ Heckel Affidavit, para. 148.

made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD \$775 million.²⁶

28. After Nordstrom US and Nordstrom Canada considered all reasonable alternatives to avoid a full wind-down of the Canadian operations, none of which presented a realistic solution, Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. Due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP. Nordstrom Canada has no choice but to cease operations in Canada and to conduct an immediate, orderly, responsible wind-down of operations for the benefit of their stakeholders.²⁷

29. The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.²⁸

PART III -THE ISSUES AND THE LAW

30. This Factum addresses the following issues:

- (a) The Applicants are entitled to seek protection under the CCAA:
 - (i) The Applicants are insolvent and have obligations exceeding \$5 million;
 - (ii) The Applicants' chief place of business is Ontario; and

²⁶ Heckel Affidavit, para. 150.

²⁷ Heckel Affidavit, paras. 151 to 153.

²⁸ Heckel Affidavit, para. 155.

- (iii) The CCAA can be used to effect an orderly wind-down of the business.
- (b) The Applicants are entitled to a broad stay of proceedings:
 - (i) The stay should be extended to Canada Leasing LP;
 - (ii) A co-tenancy stay should be granted;
 - (iii) The stay should extend on a temporary basis to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities;
- (c) This Court should approve protections for employees:
 - (i) The Employee Trust mitigates financial hardship to employees;
 - (ii) The Employee Representative Counsel will represent employee interests streamline the process for Nordstrom Canada;
- (d) This Court should authorize payment of certain pre-filing claims to suppliers; and
- (e) This Court should approve the Administration and Directors' Charges.

A. The Applicants are Entitled to Seek Protection under the CCAA

(a) The Applicants are Insolvent

31. The CCAA applies to a “debtor company” or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars. The Applicants are all affiliated debtor companies with total claims against them that far exceed \$5 million. Nordstrom

Canada and the other Applicants are each a “company” for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.²⁹

32. A “debtor company” means, *inter alia*, a company that is insolvent.³⁰ Whether a company is insolvent for the purposes of this definition is evaluated by reference to the definition of “insolvent person” in the *Bankruptcy and Insolvency Act* (“BIA”), and the expanded concept of insolvency adopted by this court in *Stelco*.³¹

33. The Applicants in these proceedings are either currently insolvent under the BIA test for solvency, or facing the kind of imminent liquidity crisis that clearly satisfies the expanded *Stelco* test. Without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities’ assets will be insufficient to satisfy all of their obligations to their creditors, including the claims of the Landlords resulting from payment and other defaults under their respective Leases that will arise from the determination to exit from the Canadian operations. Such claims are inevitable following the cessation of support from Nordstrom US, even after taking into account the Landlords’ mitigation obligations.³²

²⁹ Heckel Affidavit, at para. 114; see also *Lydian International Limited (Re)*, [2019 ONSC 7473](#) [*Lydian*], at para. 35 and 36, citing *Cinram International (Re)*, [2012 ONSC 3767](#).

³⁰ CCAA, sections 2 and 3(1).

³¹ *Stelco Inc. (Re)*, [2004 CarswellOnt 1211](#) at para. 26. This approach to the insolvency criterion has been applied on countless occasions, including *Target Canada Co. (Re)*, [2015 ONSC 303](#) at para. 26 [*Target (Initial Application)*]; *Just Energy Corp. (Re)*, [2021 ONSC 1793](#) [*Just Energy*] at paras. 48 to 51.

³² Heckel Affidavit, at paras. 131 and 154.

34. This reasoning applies to each of the Nordstrom Canada Entities. In any event, when CCAA applicants are part of a significantly intertwined group of affiliated debtor companies, it may not be necessary to find that each and every applicant is insolvent on a stand-alone basis.³³

(b) Ontario Court Has Jurisdiction Over the Proceeding

35. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.³⁴ The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,330 out of Nordstrom Canada's 2,350 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled \$220 million, compared to \$148 million in British Columbia and \$77 million in Alberta.³⁵

(c) Use of the CCAA to Effect an Orderly Wind-Down of the Business

36. The Applicants intend to use the CCAA proceedings to implement a wind-down of their operations in a responsible, controlled and orderly manner. The Applicants submit that the use of the protections and the flexibility afforded by the CCAA for this purpose is entirely appropriate.

37. The CCAA case law is replete with examples of CCAA proceedings that have either been commenced for the purpose of winding down a business, or that have adopted this purpose after it

³³ *First Leaside Wealth Management Inc. (Re)*, [2012 ONSC 1299](#) (S.C.J.) [*First Leaside*] at paras. 28 to 30; see also *Dondeb Inc. (Re)*, [2012 ONSC 6087](#) at para. 16.

³⁴ CCAA, s. 9(1); *Target (Initial Application)*, paras. 29 to 30; *Bed Bath & Beyond Canada Limited (Re)*, [2023 ONSC 1014](#) at para. 25 [*BBB (Initial Endorsement)*].

³⁵ Heckel Affidavit, para. 27.

became apparent that a going-concern solution was not achievable. Recent examples include *Target Canada Co.*,³⁶ *Express Fashion Apparel Canada Inc.*³⁷ and *Bed Bath & Beyond*.³⁸

38. The controlled wind-down of the Nordstrom Canada Entities' businesses is more than a simple liquidation. The Applicants will benefit from the CCAA's flexibility, under the supervision of the Court and with the assistance of the Monitor, to: (a) mitigate the financial hardship to Nordstrom Canada employees; (b) ensure the retention of key employees without disruption during the wind-down process; (c) maximize recoveries for all stakeholders; (d) allow for the orderly unwinding of concessions which operate as stand-alone shops within Nordstrom Canada locations; and (e) provide for continued support by Nordstrom US, under the Wind Down Agreement, which is only available under the oversight of the Court within the CCAA. Further, it is the intention of the Nordstrom Canada Entities to develop a plan of compromise and arrangement that would provide distributions to their unsecured creditors with proven claims.³⁹

B. Stay of Proceedings

(a) Requested Stay and Related Relief Limited During Initial Stay Period

39. Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the Applicants have acted with due diligence and in good faith.⁴⁰ Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1)

³⁶ *Target (Initial Application)*, at para. 31.

³⁷ *Express Fashion Apparel Canada Inc. and Express Canada GC GP, Inc (Re)*, (May 4 2017), Ont S.C.J. [Commercial List] Court File No. CV-17-11785-00CL ([Initial Order](#)) at para. 10.

³⁸ *BBB (Initial Endorsement)*, at para. 26.

³⁹ Heckel Affidavit, paras. 14 to 16.

⁴⁰ CCAA, s.11.02(3)(a)-(b).

must be limited “to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period.”⁴¹ All of the relief requested in this first-day application meets these criteria.

40. In *Lydian*, one of the first cases to interpret this provision, Morawetz C.J. stated that the Initial Stay Period preserves the *status quo* and allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.⁴² Whether particular relief is necessary to stabilize a debtor company’s operations during the Initial Stay Period is an inherently factual determination, based on all of the circumstances of the particular debtor.⁴³

41. Each aspect of the relief sought by the Applicants in the Initial Stay Period is interdependent. It is critical to respond to the circumstances in which the Applicants find themselves. All of the requested relief – as submitted further below – consists of exactly the type of essential “keep the lights on” measures that are contemplated by section 11.001 of the CCAA.

(b) Stay Should be Extended to Canada Leasing LP

42. The CCAA expressly applies by its terms to debtor companies but not partnerships.⁴⁴ Where the operations of partnerships are integral and closely related to the operations of the Applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection

⁴¹ CCAA, s. 11.001.

⁴² *Lydian*, at para. 26 and 30; see also *Just Energy*, at para. 56.

⁴³ See for example *Laurentian University of Sudbury (Re)*, [2021 ONSC 659](#), in which the CCAA Court granted a variety of relief during the Initial Stay Period that was particular to the debtor company’s factual circumstances [*Laurentian University*]. See also *Just Energy; Boreal Capital Partners Ltd et al. (Re)*, [2021 ONSC 7802](#) at para. 16 [*Boreal Capital*].

⁴⁴ CCAA, s. 2, “debtor company”.

of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted on multiple occasions.⁴⁵

43. The Applicants submit that it is appropriate to extend the stay of proceedings to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.⁴⁶

(c) A Co-Tenancy Stay Should be Granted

44. Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations.⁴⁷ In order to alleviate potential prejudice, the Applicants therefore request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order (the "**Co-tenancy Stay**").

45. This Court's authority to grant the Co-tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court]

⁴⁵ See, for example, *Target (Initial Application)*, at paras 42 and 43; 4519922 *Canada Inc. (Re)*, [2015 ONSC 124](#) at para. 37; *Just Energy*, at para. 116; *BBB (Initial Endorsement)*, at para. 28.

⁴⁶ Heckel Affidavit, para. 160.

⁴⁷ Heckel Affidavit, para. 162.

may impose.” A Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these “co-tenancy” rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company. Further, such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

46. Co-tenancy stays have been granted as part of CCAA proceedings involving anchor tenants even where the restructuring took the form of an orderly wind-down. In *Target*, the Court, in very similar circumstances, granted a co-tenancy stay in order to preserve the status quo between the parties while the orderly wind-down process was underway.⁴⁸

47. The Co-tenancy Stay will postpone the contractual rights of these tenants for a finite period. Any prejudice to those tenants will be significantly outweighed by the benefits of the Co-tenancy Stay to all of the stakeholders of the Nordstrom Canada Entities during the wind-down period.

(d) Nordstrom US Protected by Parent Stay

48. The Applicants request that a stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the “**Parent Stay**”). Among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada.⁴⁹ The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The

⁴⁸ *Target (Initial Application)* at paras. 44 to 47, citing *T. Eaton Co. (Re)*, [1997 CarswellOnt 1914](#) (Gen. Div.). See also *Sears Canada Inc., et al.*, (July 13 2017), Ont. S.C.J. [Commercial List], Court File No CV-17-11846-00CL ([Amended and Restated Initial Order](#)) at para 15.

⁴⁹ Heckel Affidavit, para. 47.

proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.⁵⁰

49. This Court very recently granted similar relief during the initial stay period in *Bed Bath & Beyond*.⁵¹ It is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

50. The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes. Such proceedings would be a significant distraction for the senior management and key personnel of the Nordstrom Canada Entities and of Nordstrom US and would divert human resources needed to support the orderly wind down process in the near term.⁵²

51. The Applicants submit that section 11.04 of the CCAA does not prohibit this relief. First, the Indemnities are not "guarantees." For the purposes of section 11.04, the key features of a "guarantee" are that "there is primary and secondary liability, and only after the primary debtor defaults on some covenant or obligation is the secured party entitled to turn to the guarantor to

⁵⁰ Proposed Initial Order, para. 14.

⁵¹ *BBB (Initial Endorsement)*, at para. 34. Such relief was subsequently extended on consent on February 21, 2022: *Bed Bath & Beyond (Re)*, [2023 ONSC 1230](#) [*Comeback Endorsement*] at paras. 14 and 15; *Bed Bath & Beyond (Re)*, (February 21 2023), Ont. S.C.J. [Commercial List], Court File No CV-23-00694493-00CL ([Amended and Restated Initial Order](#)) at para 16. Note that this extension was granted on consent, and was explicitly stated by the court to be of no precedential value.

⁵² Heckel Affidavit, para. 166.

make good on the guarantee.”⁵³ The Indemnities are deliberately drafted such that “the obligations of the Indemnifier are as primary obligor and not as guarantor of the Tenant’s obligations,” and such that liability arises as soon as monies become payable.⁵⁴ The Landlords are sophisticated parties and can be taken to have intended that the Indemnities not be characterized as guarantees.

52. Secondly, even if the Indemnities could be characterized as “guarantees”, the opening words of section 11.04 do not oust the CCAA Court’s jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances. Section 11.04 provides that no order made under section 11.02 of the CCAA affects a guarantee. On its face, this wording precludes a stay **against the debtor** under section 11.02 from automatically affecting a guarantee. However, it does not preclude the CCAA Court, in its discretion, from granting a third party stay in favour of a guarantor under section 11 of the CCAA.

53. Section 11 is the accepted source of the CCAA Court’s jurisdiction to grant a third party stay. In fact, CCAA Courts have affirmed the ability to rely section 11 to grant third-party stays in respect of guarantors of a CCAA debtor in many instances, including in *Laurentian University of Sudbury*,⁵⁵ *Target Canada Co.*,⁵⁶ *McEwan Enterprises Inc.*,⁵⁷ *Lydian International Limited*,⁵⁸ and most recently, *Bed Bath & Beyond*.⁵⁹ Indeed, the fact that a non-debtor is a related company

⁵³ *Northern Transportation Company Limited (Re)*, [2016 ABQB 522](#) [*Northern Transportation*], para. 69.

⁵⁴ See paras. 1(a) and 2 of the Indemnities, attached Exhibit A and Exhibit B of the Heckel Affidavit [emphasis added].

⁵⁵ *Laurentian University*, paras. 39-40.

⁵⁶ *Target (Initial Application)*, para. 50.

⁵⁷ *McEwan Enterprises Inc.*, [2021 ONSC 6453](#), paras. 42-44.

⁵⁸ *Lydian*, para. 39.

⁵⁹ *BBB (Initial Endorsement)*, paras. 32-34.

that has guaranteed the obligations of the debtor company has been included in the list of factors militating *in favour* of extending the stay to a third party, at least on the first day.⁶⁰

54. To the extent that the Alberta Court of Queen’s Bench in *Northern Transportation* appears to conclude that Section 11.04 prohibits a CCAA court from extending third party stays to guarantors,⁶¹ the Applicants submits respectfully that this reasoning should not be followed. In particular, the court in *Northern Transportation* appears to have relied on a mistaken impression that in *Target*, Morawetz R.S.J. had not intended the stay to apply to an enforceable guarantee, and that section 11.04 had not been raised in that instance.⁶² To the contrary, the application of section 11.04 was expressly addressed before Morawetz J. in seeking the initial order in *Target*. A time-limited stay of proceedings was extended to the Target parent company on the first day in relation to the lease guarantees, with the benefit of detailed legal submissions.

55. Furthermore, and in any event, in *Northern Transportation*, Dario J. stated that she did not intend to foreclose the possibility that a CCAA Court could exercise its inherent jurisdiction to grant a third party stay to a guarantor “in exceptional cases to ensure that the intent and purpose of the CCAA proceedings are not frustrated.”⁶³ The Applicant submits that this is such a case.

56. Finally, although Penny J. indicated in *Cannapiece* that section 11.03 of the CCAA does not permit the extension of a stay in favour of a director that has guaranteed the debts of the debtor company,⁶⁴ the wording of section 11.03 is not identical to section 11.04. Even assuming Penny

⁶⁰ *Laurentian University*, paras. 39-40.

⁶¹ *Northern Transportation*, para. 92.

⁶² *Northern Transportation*, paras. 90-91.

⁶³ *Northern Transportation*, para. 101.

⁶⁴ *Cannapiece Group Inc v. Carmela Marzili*, [2022 ONSC 6379](#) at para. 34.

J. intended to preclude all reliance on section 11 under section 11.03 (which does not have to be decided here),⁶⁵ a decision made under section 11.03 of the CCAA should not preclude a Court from exercising its jurisdiction under section 11 to extend a stay of proceedings to a guarantor under section 11.04, based on its specific wording, as this Court has done on numerous occasions.

57. The Landlords will not suffer any prejudice from the Parent Stay during the Initial Stay Period – and beyond -- because of the assurance that any Landlord claim pursuant to a guarantee or indemnity in relation to Nordstrom US shall be unaffected and shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA. As a result, the Parent Stay will only defer their claims to allow them to be resolved in an orderly fashion.

58. The Landlord Claims will ultimately have to be valued in order to be resolved against both Nordstrom Canada and Nordstrom US. It is in the best interests of all stakeholders to provide the Applicants with sufficient time to establish a claims process in order to seek to resolve these claims holistically, in an orderly manner that avoids duplication and inconsistent results. This approach is entirely consistent with the well-established “single proceeding model” that favours the resolution of all claims against the debtor company and related claims within the CCAA.⁶⁶

C. Protections for Employees

59. It is expected that the vast majority of Nordstrom Canada’s employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA

⁶⁵ Note that there is contrary authority that suggests that there is still scope for the exercise of discretion under section 11: see *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Re)*, [2015 QCCS 4716](#) at paras. 50-51, Penny J. himself granted limited relief to the directors in *Cannapiece* to ensure that they had sufficient time to prepare their statement of defence in the ongoing litigation against them, in light of their need to focus on the restructuring in the near term.

⁶⁶ *Ted Leroy Trucking [Century Services] Ltd.*, [2010 SCC 60](#), at para. 22. This passage was recently cited by the Ontario Court of Appeal in denying leave to appeal in *Mundo Media Ltd. (Re)*, [2022 ONCA 607](#) at paras. 40 to 43.

proceedings. The Applicants seek to protect the interests of these employees through the following measures.

(a) Approval of the Employee Trust

60. Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US.⁶⁷ The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process. It is fully revocable until certain conditions are satisfied, including the granting of the Initial Order approving the Employee Trust and certain related relief.⁶⁸

61. The Court in *Target* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.⁶⁹

62. The Employee Trust will ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner, even if they are not required to work for their entire notice period, without requiring them to await the results of a claims process and distributions pursuant to a plan of arrangement.⁷⁰ Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.⁷¹

⁶⁷ Heckel Affidavit, para. 187.

⁶⁸ Heckel Affidavit, para. 188.

⁶⁹ *Target (Initial Application)*, at paras. 54-55.

⁷⁰ Heckel Affidavit, paras. 188 and 191 to 195.

⁷¹ Heckel Affidavit, para. 189.

63. The Employee Trust is fair and appropriate in the circumstances.⁷² It will benefit the employees, the estate and the stakeholders by: (a) providing for timely payment and satisfaction of all statutory termination and severance claims for Eligible Employees, without forcing them to wait for a claims process to quantify such claims and the approval of a plan of arrangement; (b) satisfying such claims with funds from Nordstrom US, without any funds from the Nordstrom Canada Entities (subject to the subrogation right of Nordstrom US); and (c) minimizing the effects of Nordstrom Canada's insolvency on a particularly vulnerable group of stakeholders.⁷³

(b) Appointment of Employee Representative Counsel

64. The Applicants seek the appointment of Ursel Phillips as Employee Representative Counsel, with Susan Ursel acting as senior counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust. At this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between the interests of individual or groups of employees. Should a material conflict arise, Employee Representative Counsel may attend before the Court to seek directions at that time.⁷⁴

65. Section 11 of the CCAA and the Ontario *Rules of Civil Procedure* confer broad jurisdiction on the Court to appoint representative counsel for vulnerable stakeholder groups such as employees.⁷⁵ The Applicants seek the immediate appointment of Employee Representative

⁷² See for example, *Target (Initial Application)*, para. 61.

⁷³ Heckel Affidavit para. 195.

⁷⁴ Heckel Affidavit, paras. 196 and 199.

⁷⁵ *Target (Initial Application)*, para. 61, citing *Nortel Networks Corp. (Re)*, [2009 CarswellOnt 3028](#) (S.C.J.) at paras. 10 to 12.

Counsel because of the importance of: (i) establishing the Employee Trust at the earliest possible time; and (ii) providing access to experienced counsel for employees who will have questions concerning the CCAA filing. Ursel Phillips intends to establish a dedicated toll-free phone line and email address through which employees can obtain information, and to regularly post information for employees on the Ursel Phillips website. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.⁷⁶

66. Employee Representative Counsel will benefit employees, as well as stakeholders generally. Funded by the estate, Employee Representative Counsel will assist with cost savings and streamlining of the CCAA process by serving as a single point of contact between thousands of employees, the Nordstrom Canada Entities, the Proposed Monitor and the Court.⁷⁷

D. Authority to Permit Pre-Filing Payments to Suppliers

67. The Applicants seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers, including transportation providers, customs brokers, freight forwarders and security and armoured truck carriers, and including amounts payable in respect of customs and duties for goods; (ii) providers of information, internet, telecommunications and other technology, including e-commerce providers and related services; and (iii) providers of payment, credit, debit and gift card processing related services. These categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.⁷⁸

⁷⁶ Heckel Affidavit, paras. 200, 202.

⁷⁷ Heckel Affidavit, para. 203.

⁷⁸ Heckel Affidavit, para. 178.

68. For third-party suppliers or service providers other than those listed above, the draft Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of \$1 million with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business. The Applicants anticipate requesting an increase to \$1.5 million at the Comeback Hearing.⁷⁹

69. The Court has exercised its jurisdiction on multiple occasions to grant similar relief.⁸⁰ The court in *Index Energy Mills Road Corporation* outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.⁸¹

E. Court-ordered Charges

(a) Administration Charge

70. Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of \$750,000 (the "**Administration Charge**"), which amount covers the time period

⁷⁹ Heckel Affidavit, para. 178. See also paras. 57 to 63, which describes the extent to which the Applicants' businesses depends on these suppliers.

⁸⁰ See, for example, *Target (Initial Application)*, at para. 62 to 65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, [2023 ONSC 753](#) at paras. 72-74; *Boreal Capital* at paras. 20-22.

⁸¹ *Index Energy Mills Road Corporation (Re)*, [2017 ONSC 4944](#) at para. 31.

until the Comeback Hearing. The Applicants anticipate requesting an increase to \$1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.⁸²

71. The requested Charge satisfies the well-accepted factors originally established by Pepall J. in *Canwest Publishing*. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured.⁸³ In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period.

(b) Directors' Charge

72. In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the “**Directors' Charge**”) in the amount of \$10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to \$13.25 million at the Comeback Hearing. The Director's Charge was sized in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.⁸⁴

73. The present and former officers of the Applicants are among the potential beneficiaries under a liability insurance policy that covers the directors and officers of Nordstrom US and its

⁸² Heckel Affidavit, at para. 171.

⁸³ See, for example, *Target (Initial Application)*, at para. 74, citing *Canwest Publishing Inc. / Publications Canwest Inc. (Re)*, [2010 ONSC 222](#) at para. 39; *Just Energy* at para. 112 to 113.

⁸⁴ Heckel Affidavit, para. 174.

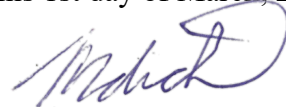
Subsidiaries. The policy has an aggregate limit of USD \$10 million. This policy will likely not provide sufficient coverage for the potential liability that the director and officers could incur in relation to these CCAA proceedings, particularly in light of the extensive operations and potential liabilities associated with Nordstrom US.⁸⁵

74. In light of the potential liabilities and the insufficiency of available insurance, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. This charge is necessary so that the Nordstrom Canada Entities may benefit from the director's and officers' experience with the business as they guide the realization and wind-down efforts.⁸⁶

PART IV - NATURE OF THE ORDER SOUGHT

75. The Applicants therefore request an Initial Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of March, 2023:



OSLER, HOSKIN & HARCOURT, LLP per Marleigh Dick

P.O. Box 50, 1 First Canadian Place Toronto, ON M5X 1B8

Lawyers for the Applicant

⁸⁵ Heckel Affidavit, para. 173.

⁸⁶ Heckel Affidavit, para. 174.

TO: THE ATTACHED SERVICE LIST

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *4519922 Canada Inc. (Re)*, [2015 ONSC 124](#)
2. *Bed Bath & Beyond Canada Limited (Re)*, [2023 ONSC 1014](#)
3. *Bed Bath & Beyond Canada Limited (Re)*, [2023 ONSC 1230](#)
4. *Bed Bath & Beyond (Re)*, (February 21 2023), Ont S.C.J. [Commercial List], Court File No. CV-23-00694493-00CL ([Amended and Restated Initial Order](#))
5. *Boreal Capital Partners Ltd et al. (Re)*, [2021 ONSC 7802](#)
6. *Cannapiece Group Inc v. Carmela Marzili*, [2022 ONSC 6379](#)
7. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, [2010 ONSC 222](#)
8. *Cinram International (Re)*, [2012 ONSC 3767](#).
9. *Dondeb Inc. (Re)*, [2012 ONSC 6087](#)
10. *Express Fashion Apparel Canada Inc. and Express Canada GC GP, Inc. (Re)*, (May 4, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11785-00CL ([Initial Order](#))
11. *First Leaside Wealth Management Inc. (Re)*, [2012 ONSC 1299](#)
12. *Index Energy Mills Road Corporation (Re)*, [2017 ONSC 4944](#)
13. *Just Energy Corp. (Re)*, [2021 ONSC 1793](#)
14. *Laurentian University of Sudbury*, [2021 ONSC 659](#)
15. *Lydian International Limited (Re)*, [2019 ONSC 7473](#)
16. *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Re)*, [2015 QCCS 4716](#)
17. *McEwan Enterprises Inc.*, [2021 ONSC 6453](#)
18. *Mundo Media Ltd. (Re)*, [2022 ONCA 607](#)
19. *Nortel Networks Corp.*, [2009 CarswellOnt 3028](#) (S.C.J.)
20. *Northern Transportation Company Limited (Re)*, [2016 ABQB 522](#)
21. *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, [2023 ONSC 753](#)
22. *Sears Canada Inc, et al*, (July 13 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([Amended and Restated Initial Order](#))

23. *Stelco Inc. (Re)*, [2004 CarswellOnt 1211](#)
24. *T. Eaton Co. (Re)*, [1997 CarswellOnt 1914](#) (Gen. Div.).
25. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
26. *Ted Leroy Trucking [Century Services] Ltd.*, [2010 SCC 60](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C., 1985, c. C-36, as amended

2. (1) [...]

debtor company means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
- (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (*compagnie débitrice*)

[...]

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[...]

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

Burden of proof on application

11.02 (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[...]

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

[...]

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

[...]

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has

not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(b) requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 421]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

NORDSTROM CANADA RETAIL, INC., ET AL
Applicants

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANTS
NORDSTROM CANADA RETAIL, INC.,
NORDSTROM CANADA HOLDINGS, LLC AND
NORDSTROM CANADA HOLDINGS II, LLC

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