Court File No. CV-25-738613-00CL

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 1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., , SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.

Applicants

FACTUM OF EMPLOYEE REPRESENTATIVE COUNSEL

July 24, 2026

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PART I. OVERVIEW

1. Royal Trust Corporation of Canada ("**Royal Trust**") brings this motion for directions on 12 questions related to four trusts and associated Supplementary Employee Retirement Plans ("**SERPs**") for the benefit of executive employees of 1242939 B.C. ULC, formerly known as Hudson's Bay Company (the "**Company**"). To the extent not otherwise defined, all capitalized terms in this factum have the meaning defined in the Affidavit of Susannah Roth sworn February 10, 2026 (the "**Roth Affidavit**") and in the Affidavit of Rita De Fazio affirmed July 17, 2026 (the "**De Fazio Affidavit**").

2. In an endorsement dated June 26, 2026, this Court bifurcated Royal Trust's motion for directions and directed that Questions 1-8, 10 and 11, as set out at para. 5 of the Roth Affidavit, as well as certain related additional questions will be addressed at the first stage of the motion.[1] These questions relate to assets held in two trusts: the HBC Main RCA and the HBC Additional RCA.

3. ERC has consulted with its employee committee, SERP Participants and the two beneficiaries of the HBC Additional RCA, as well as the Company, the Monitor, and Royal Trust. There is substantial agreement among all relevant parties that the following questions should be answered as follows:

Question:	Follow-up Question(s)	Proposed Response
1. Can interim distributions be made from the HBC Main RCA prior to a final determination of what amounts, if any, the Main SERP Participants are entitled to from the Pension Plan surplus, on the basis that recoveries of overpayments (if any) as a result thereof will be deducted from	**If the answer to this question is 1 "no":** Can interim distributions be made from the HBC Main RCA prior to a final determination of what amounts, if any, the Main SERP Participants are entitled to from the Pension Plan surplus, on another basis, and if so on what basis should that be?	The answer to Q. 1 is Yes, and therefore it is unnecessary to answer the follow-up question. A mechanism to protect any interest of the Company in relation to art. 7.08 of the HBC Main SERP Plan, and the reversionary interest in excess assets under art. 7.07 is appropriate by way of court order

[1] Case Conference Endorsement (Motion for Directions), dated June 26, 2026, at para. 7.

Question:	Follow-up Question(s)	Proposed Response
wind-up distributions of the Pension Plan surplus, if any, to each Main SERP Participant?	*If the answer to the follow-up question above is also "no", such that no interim distributions can be made from the HBC Main RCA prior to a determination of what amounts, if any, the Main SERP Participants are entitled to from the Pension Plan surplus, the Trustee still requests that the remaining questions posed be answered by the Court as these questions require answers regardless of the timing of the distributions from the HBC Main RCA.*	and/or letters of commitment executed by Main SERP Participants to ensure that appropriate calculations are conducted and any amounts owing to the Company are paid from the HBC Main SERP Participants' distribution (if any) from the registered pension plan surplus.
1(A). Could there be any excess assets under the HBC Main RCA (with or without taking into account surplus distributions under the Pension Plan) in respect of which, pursuant to section 7.07 of the HBC Main SERP plan text and section 8.3 of the trust agreement, the Company could claim a reversionary interest? **If so, what is the Company's reversionary interest in any excess assets under the HBC Main RCA?**		Yes, there could be excess assets over which the Company could claim a reversionary interest, however determination of that reversionary interest cannot be made until the Actuary has conducted its calculations following the Court's directions.
2. Should the Termination Liability for each Main SERP Participant be limited to benefits accrued prior to November 10, 2005?	**If the answer to this question 2 "no":** Should the Termination Liability for each Main SERP Participant be calculated based on benefits accrued to the termination date of the HBC Main RCA?	We believe that this question is meant to clarify whether the application of the assets of the HBC Main RCA should be limited to benefits accrued prior to November 10, 2005. If so, the answer is yes in the sense that the application of the assets of the HBC Main RCA should be limited to benefits accrued prior to November 10, 2005 and the Termination Liability should be calculated accordingly.
3. Is the date of termination of the HBC SERPs March 26, 2025?	**If the answer to this question 3 "no":** What is the date of termination of the HBC SERPs?	No. The Termination Date is March 7, 2025.
4. Can the Trustee and Mercer assume that there is no plan text for the HBC Additional SERP?	**If the answer to this question 4 is "no":** What additional steps should the Trustee take to obtain a plan text or what terms of the HBC Additional	Yes. There is no HBC Additional SERP plan text.

Question:	Follow-up Question(s)	Proposed Response
	SERP plan text should the Trustee assume exist?	
5. Are the benefits payable to the Additional SERP Participants, including any Termination Liability, to be determined in accordance with the terms of the HBC Main SERP Plan?	**If the answer to this question 5 is "no":** On what basis are the benefits payable to the Additional SERP Participants to be determined?	Yes, the Additional SERP Participants' entitlements should be determined under the HBC Main SERP Plan.
6. Are the Additional SERP Participants entitled to *security* in excess of what the HBC Main RCA provides, which was provided by the HBC Additional RCA?		Yes, the HBC Additional RCA is intended to provide additional security to the Additional SERP Participants. In connection with this answer, please also see the response to Question 9 below.
7. Should the Additional SERP Participants have priority entitlement to the HBC Additional RCA Trust Fund?	**If the answer to this question 7 is "no":** Should the HBC Additional RCA Trust Fund be considered as one fund with the HBC Main RCA Trust Fund for the purposes of making termination payments to the Main & Additional SERP Participants?	Yes, the Additional SERP Participants have priority entitlement to the assets in the HBC Additional RCA. In connection with this answer, please also see the response to Question 9 below.
8 If the Court determines the Additional SERP Participants have priority entitlement to the HBC Additional RCA Trust Fund (i.e., if the answer to question 7 is "yes"), should the methodology for allocating the remaining assets under the HBC Additional RCA include only the Additional SERP Participants' Termination Liability	**If the answer to this question 8 is "yes":** Should the Additional SERP Participants' Termination Liability used in the calculation for allocating both the HBC Main RCA and the HBC Additional RCA include all benefits accrued under the HBC Main SERP (i.e., the benefits paid under the HBC Additional RCA should not be excluded when determining the asset allocation for the HBC Main RCA and vice versa)?	Yes, the remaining assets under the HBC Additional RCA should be allocated based on <u>only</u> the Additional SERP Participants' Termination Liability and paid only to those Additional SERP Participants. Consistent with the proposed responses to Questions 2, 6 and 7 above, the Additional SERP Participants' Termination Liability should be calculated to account for benefits accrued up to November 10, 2005 from the HBC Main RCA, and to account for benefits accrued on or after November 10, 2005 from the HBC Additional RCA.
9. Should the aggregate amount payable to an Additional SERP Participant from both the HBC Main RCA and HBC Additional RCA be limited to 100% of their Termination Liability?	If the answer to this question 9 is "yes": If the aggregate amount payable to an Additional SERP Participant from both the HBC Main RCA and HBC Additional RCA is greater than 100% of the Additional SERP Participant's Termination Liability, should the termination payment to that Additional SERP Participant from the HBC Main RCA Trust Fund be	This issue may be addressed separately at a later date after the Actuary has conducted its calculations following the Court's directions, if necessary. Further clarification is included at Exhibit "B" to the De Fazio Affidavit.

Question:	Follow-up Question(s)	Proposed Response
	reduced to ensure that the Additional SERP Participant's aggregate amount payable from both the HBC Main RCA and HBC Additional RCA is no greater than their Termination Liability? Should the excess assets remaining in the HBC Main RCA Trust Fund after reducing the amount payable to the Additional SERP Participant(s) from the HBC Main RCA Trust Fund be allocated among the other HBC Main Participants based on a *pro rata* of their Termination Liability?	
10 Should the methodology set out at paragraph 172[2] be used to calculate the Termination Liability pursuant to the HBC Main SERP Plan?	**If the answer to this question 10 is "no"**: What methodology should be used to calculate the Termination Liability pursuant to the HBC Main SERP Plan?	Yes.
11 Should the actuarial assumptions in accordance with the CIA Recommendation be used to complete the Conversion Calculation for each DC Active and Deferred Main SERP Participant in determining the Basic Plan Offset Pension and the RAA Offset Pension?	**If the answer to this question 11 is "no":** What methodology should be used to complete the Conversion Calculation for each DC Active and Deferred Main SERP Participant in determining the Basic Plan Offset Pension? What methodology should be used to complete the Conversion Calculation for each DC Active and Deferred Main SERP Participant in determining the RAA Offset Pension?	Yes.

[2] Paragraph 172 of the Affidavit of Susanna Roth, sworn February 10, 2026 [the "**Roth Affidavit**"] provides: "At article 2.39, the HBC Main SERP Plan describes the methodology to be used to calculate the Termination Liability, as follows, assuming the HBC SERPs' termination date is in March 2025: (i) Employment of all Main SERP Participants is assumed to be terminated as of the date of termination of the HBC Main SERP Plan; (ii) The commuted value of each Main SERP Participant's HBC Main SERP benefits will be determined based on section 3500 – Pension Commuted Values of the Canadian Institute of Actuaries' Standards of Practice (the **"CIA Recommendation")** applicable for March 2025; and (iii) The interest rates to be used to determine this commuted value will be one-half of the interest assumed under the CIA Recommendation, (being 1.80% per annum for the first 10 years and 2.25% per annum thereafter)": Roth Affidavit, para. 172, **Royal Trust Motion Record ("RT MR"), Tab 2, p. 57.**

Question:	Follow-up Question(s)	Proposed Response
Additional Questions		
A. Should the Proposed Cost Allocation Methodology as outlined in paragraph 189[3] be adopted?	If the answer to this question 13 is "no", what methodology should be adopted?	Yes.
B. Can any excess assets remaining in the Trust Funds be paid to the Company?		Yes, subject to the responses to Question 9, above, and to be deferred pending resolution of Question 9, above.

PART II. FACTS

A. Overview of the Retirement Compensation Arrangements ("RCAs")

4. SERPs are a type of deferred compensation arrangement or plan, that provides benefits above and beyond those provided under a company's registered pension plan.[4] The obligations under a SERP derive from (among other places) individual contracts and any applicable SERP plan text.[5] They are not registered with any pension regulator, nor are they subject to pension legislation governing funding, security or actuarial valuation.[6]

5. A Retirement Compensation Arrangement ("**RCA**") is a trust vehicle provided for by the *Income Tax Act* through which a pool of assets is held and used to pay for SERP benefits.[7]

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[3] Paragraph 189 of the Roth Affidavit provides**:** "Since being instructed by HBC to wind up the HBC RCAs, the Trustee has incurred legal and actuarial fees and disbursements related to the management and wind up of the HBC RCAs (the "**Costs**"). Pursuant to Section 7.6 of each RCA Trust Agreement, the Trustee is authorized to pay the Costs out of each HBC RCA Trust Fund. Where fees and disbursements are incurred by the Trustee with respect to a specific HBC RCA, the Trustee proposes to apply those costs to the applicable HBC RCA Trust Fund, while costs related to general work covering all of the HBC RCAs will be distributed across all four HBC RCA Trust Funds ratably based on quantum of assets in such HBC RCA Trust Fund (inclusive of Refundable Tax) (the **"Proposed Cost Allocation Methodology**")": Roth Affidavit, at para. 189, **RT MR Tab 2, p. 63.**
[4] Roth Affidavit, at para. 20, **RT MR Tab 2, p. 17**.
[5] Roth Affidavit, at para. 20, **RT MR Tab 2, p. 17**.
[6] Roth Affidavit, at para. 20, **RT MR Tab 2, p. 17**.
[7] Roth Affidavit, at para. 21, 28, **RT MR Tab 2, p. 17, 19**.

6. The Company established four RCAs via trust agreements, for which Royal Trust was the trustee.[8] Each of these RCAs was associated with a SERP plan text (including as described in relation to Question 4 below, the HBC Additional RCA).[9]

7. Each of the SERPs provided defined benefit pensions to closed groups of participants, related to distinct periods of accrual of benefits. The HBC Main SERP Plan also provided DC pensions to executives hired after July 1, 2012.[10] There are a total of 305 participants in the Applicant's SERPs, as detailed in the chart below.[11] Many individuals are participants in more than one plan (and in the case of the HBC Main SERP, more than one component) and thus the total population of participants is not equal to the sum of the participants in each plan.[12]

RCA	**Associated Plan**	**Accrual Period**	**Number of participants in the Plan (based on review of Company records)**
Zellers RCA	Zellers SERP	Up to June 1, 1985	3
HBC RAA RCA	HBC RAA SERP	Up to October 29, 1999	83
HBC Main RCA	HBC Main SERP	DB Component: up to October 1, 2015 DC Component: effective October 1, 2014	DB Component: 257 DC Component: 29
HBC Additional RCA	HBC Main SERP (per answer to Question 4 below)	Up to the Additional SERP Participants' termination dates (July 17, 2008 and June 30, 2010, respectively)	2
All Plans			305

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[8] Roth Affidavit, para. 2, **RT MR Tab 2, p. 9;** Affidavit of Rita De Fazio, affirmed July 17, 2026 ("**De Fazio Affidavit**"), para. 13, **Employee Representative Counsel Responding Motion Record ("ERC RMR") Tab 1, p. 4.**
[9] Roth Affidavit, para. 4, **RT MR Tab 2, p. 10.**
[10] See generally the Supplementary Executive Retirement Plan Amended and Restated effective January 1, 2024 ("**HBC Main SERP Plan**"), Part II, **RT MR Tab 2B, p. 123-124**. However, as noted in the De Fazio Affidavit, no contributions were actually paid into an account in respect of the DC pensions accrued under the HBC Main SERP Plan or any trust fund. As such, those are unsecured debts that are not at issue in this motion for directions: De Fazio Affidavit, para. 22, **ERC RMR Tab 1, p. 10**.
[11] Source data from: De Fazio Affidavit, para. 37, **ERC RMR Tab 1, p. 15.**
[12] De Fazio Affidavit, para. 38, **ERC RMR Tab 1, p. 15.**

8. The two RCAs in issue in this stage of the motion are the HBC Main RCA and HBC Additional RCA, both described below and whose beneficiaries are referred to as the "**HBC Main SERP Participants**" and "**HBC Additional SERP Participants**", respectively. The assets of the two RCAs currently at issue were as follows as at October 31, 2025:[13]

RCA	Assets
HBC Main RCA	$58,415,496.71
HBC Additional RCA	$454,661.96

B. The HBC Main RCA, the HBC Main SERP Plan and HBC Main Trust Agreement

9. Determining Questions 2, 6, 7, and 8 requires a detailed review of the language of the HBC Main Trust Agreement and the HBC Main SERP Plan.

1. The HBC Main SERP Plan

10. The terms of the plan for which the HBC Main RCA holds the assets are set out in the HBC Main SERP Plan. The HBC Main SERP Plan was amended and restated as of January 1, 2024 and all references in this factum are to that version.

11. Article 1 of the HBC Main SERP Plan describes the history of the plan and its associated trust funds. Pursuant to arts. 1.01 and 5.05, the HBC Main SERP Plan is a non-contributory plan that the Company established effective October 29, 1999 to provide eligible executives with supplemental retirement income benefits upon retirement.[14] It provides for a defined benefit ("**DB**") component for accrued service from 1999 to 2012 (or up to 2015, for certain grand-

[13] Source data from: Roth Affidavit, para. 3, **RT MR, Tab 2, p. 10.**
[14] HBC Main SERP, Art. 1.01, 5.01, **RT MR Tab 2B, p. 97, 114**.

parented executives) and a defined contribution ("**DC**") component for executives with service from 2012 forward.[15]

12. Article 5.01 of the HBC Main SERP Plan provides that the Company was "not…obligated to pre-fund" the HBC Main SERP Plan or secure its benefits and expressly allowed the Company to pay for benefits "from general assets".[16] The sole exception was upon a "Change in Control",[17] which art. 1.02(3) of the HBC Main SERP Plan notes occurred on November 10, 2005.[18]

13. In the case of a Change in Control, art. 5.02 required the Company to "secure the Supplementary Pension benefits <u>accrued to the date of the Change in Control</u>" by "appoint[ing] a Trustee and…establish[ing] a Trust Fund…for the purpose of holding the Plan Assets" (emphasis added).[19] After that point, art. 5.02 provided that "[a]ll Supplementary Pension benefits accrued to the date of the Change in Control that are not paid directly by the Company shall thenceforth be paid from the Trust Fund".[20]

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[15] HBC Main SERP Plan, art. 1.02, 1.08, **RT MR Tab 2B, p. 97, 98**.
[16] HBC Main SERP Plan, art. 5.01, **RT MR Tab 2B, p. 114**.
[17] HBC Main SERP Plan, art. 5.02, **RT MR Tab 2B, p. 114**. Change in Control is defined in art. 2.08 of the HBC Main SERP Plan as follows:

> Change in Control means any:
>
> > (1) offer for shares of Hudson's Bay Company by any entity which, if successful, would result in the offeror beneficially owning in excess of 25% of the outstanding voting shares of Hudson's Bay Company; or
> >
> > (2) capital reorganization, amalgamation, arrangement or other scheme of reorganization, as a result of which the shares of Hudson's Bay Company outstanding immediately prior to such transaction constitute less than 50% of the voting power of the resulting company.[17]

[18] HBC Main SERP Plan, art. 1.02(3), 5.02, **RT MR Tab 2B, p. 97, 114**.
[19] HBC Main SERP Plan, art. 5.02(1), (2), **RT MR Tab 2B, p. 114**.
[20] HBC Main SERP Plan, art. 5.02(2), **RT MR Tab 2B, p. 114.**

2. The origins of the HBC Main RCA Trust Fund in the 2005 Change in Control

14. The HBC Main RCA is the trust fund established to hold assets for the HBC Main SERP Plan pursuant to the Multi Funded RCA Trust Agreement made as of January 6, 2006, between the Company as settlor and Royal Trust as trustee (the "**HBC Main Trust Agreement**").[21]

15. Consistent with art. 1.02(3) of the HBC Main SERP Plan, the recitals to the HBC Main Trust Agreement provide that the HBC Main RCA arose because of the Change in Control on November 10, 2005. The recitals state, in part, as follows:

> AND WHEREAS the Plan provides that, in the event of a change in control as defined in the Plan to mean any offer for shares of the Company by any entity which, if successful, could result in the offeror beneficially owning in excess of 25% of the outstanding voting shares of the Company (a "Change of Control" [*sic*]), the Company shall be required to secure the supplementary pension benefits accrued to the date of the Change in Control;
>
> AND WHEREAS on November 10, 2005 Maple Leaf Heritage Investments Acquisition Corporation made an unsolicited offer to purchase all of the outstanding common shares of the Company (the "Offer"),
>
> AND WHEREAS pursuant to the Plan, the Offer constitutes a Change in Control;
>
> AND WHEREAS in order to secure the accrued benefits under the Plan the Company wishes to establish a trust (the "Trust Fund" as hereinafter defined) and to appoint the Trustee to be the Trustee of the Trust Fund";
>
> NOW THEREFORE, in consideration of the premises and mutual covenants herein contained, the Company and the Trustee do hereby covenant and agree as follows:[22]

16. The Company constituted the HBC Main RCA on January 6, 2006 and made a contribution to the trust that same date, calculated based on the benefits accrued from October 29, 1999 to November 10, 2005.[23] This was the only contribution to the HBC Main RCA: the Company never funded benefits accrued after November 10, 2005 (whether under the DB or DC component of the

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[21] Roth Affidavit, para. 40, **RT MR Tab 2, p. 22**.
[22] Multi Funded RCA Trust Agreement (HBC Main RCA) dated January 6, 2006 between Hudson's Bay Company and Royal Trust Corporation of Canada ("**HBC Main Trust Agreement**"), recitals, **RT MR, Tab 2A, p. 68**.
[23] Roth Affidavit, para. 68, 125, **RT MR, Tab 2, p. 28, 44**.

HBC Main SERP Plan) through contributions to the HBC Main RCA or any other RCA (except for benefits accruing to the Additional SERP Participants, as described below).[24]

3. Provisions regarding Termination of the HBC Main Plan

17. Article 7.06 of the HBC Main SERP Plan provides that in an insolvency, the termination provisions and distribution formula at arts. 7.03, 7.04, and 7.05 are to be used to wind up the HBC Main SERP Plan.[25] On its face, art. 7.04 (which deals with the DB portion) purports to provide all the Main SERP Participants in the DB component with the right to a *pro rata* share of the assets in the HBC Main RCA. Specifically:

(a) Art. 7.04 provides that "[t]o the extent that there are Plan Assets following the termination of the Supplementary Plan, the Termination Liability payments pursuant to Section 7.03 shall be paid from the Trust Fund."[26]

(b) The term "Trust Fund" is defined under Art. 2.40 as "the trust fund established pursuant to Section 5.02 to provide benefits under the Supplementary Plan", which is the trust fund required under a Change in Control.[27]

(c) Art. 7.04 further provides that if the "Plan Assets" – which are again defined under art. 2.31 as "the assets held in the Trust Fund" – "are less than the Estimated Plan Termination Liability" regarding benefits owing to all Main SERP Participants, each of the members at the time is entitled to a *pro rata* share of the assets in the "Trust Fund" calculated based on the ratio between the total "Termination Liability

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[24] HBC Main SERP Plan, art. 5.01, **RT MR, Tab 2B, p. 114**; De Fazio Affidavit, para. 20, 22 **ERC RMR Tab 1, p. 9-10**; Roth Affidavit, para. 125, **RT MR, Tab 2, p. 44**.
[25] HBC Main SERP Plan, art. 7.06, **RT MR, Tab 2B, p. 122**.
[26] HBC Main SERP Plan, art. 7.04, **RT MR, Tab 2B, p. 120**.
[27] HBC Main SERP Plan, art. 2.40, **RT MR, Tab 2B, p. 108**.

with regard to the member" for all accrued service, divided by "the Estimated Plan Termination Liability" for all Main SERP Participants.[28]

18. As described further below, however, the formula in the HBC Main SERP Plan appears at odds with the HBC Main Trust Agreement and the purposes of the trust. As recorded in the recitals to the HBC Main Trust Agreement quoted at para. 15 above, the HBC Main RCA was set up for the express purpose of securing the accrued benefits under the HBC Main SERP Plan up to November 10, 2005.[29] The HBC Main Trust Agreement, in turn provides at art. 2.01 that assets may only be distributed "in the manner and for the purposes provided in this Trust Agreement" (emphasis added).[30]

19. Article 9.1.1 of the HBC Main Trust Agreement expressly provides that "where the terms of this Trust Agreement and the [HBC Main SERP] Plan are inconsistent in whole or in part, the terms of this Trust Agreement shall prevail over the terms of the [HBC Main SERP] Plan".[31]

4. Administration and Communications Related to the HBC Main SERP Plan and HBC Main RCA

20. Until its insolvency, the Company administered the HBC Main SERP Plan and consistently communicated to the HBC Main SERP Participants that their benefits would be paid through different sources depending on the type of benefit and period of benefit accrual and that only some of those benefits were funded.[32] In particular:

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[28] HBC Main SERP Plan, art. 7.04, **RT MR, Tab 2B, p. 120**.
[29] HBC Main Trust Agreement, recitals, **RT MR, Tab 2A, p. 68**.
[30] HBC Main Trust Agreement, art. 2.1, **RT MR Tab 2B, p. 71**.
[31] HBC Main Trust Agreement, art. 9.1.1, **RT MR Tab 2B, p. 161**.
[32] De Fazio Affidavit, paras. 26, 30, **ERC RMR Tab 1, p. 10-11, 12.**

(a) DB Benefits accrued under the HBC Main SERP Plan to November 10, 2005 were described by the Company to the HBC Main SERP Participants as “funded” and were paid from the HBC Main RCA;[33]

(b) DB Benefits accrued on and after November 10, 2005 were described by the Company to Main SERP Participants as “unfunded” and were paid from general revenue and administered by Royal Bank of Canada (“**RBC**”) through a non-trust account (except in respect of the Additional SERP Participants, as described below);[34] and

(c) All DC benefits were described by the Company to the HBC Main SERP Participants as “unfunded” and paid from general revenue and administered by RBC through a separate non-trust account.[35]

21. The Company’s communications and payment practices are described in greater detail below, in para. 54.

C. The HBC Additional RCA

1. Enhanced security provisions under certain Employment Contracts

22. The Additional SERP Participants negotiated employment agreements that gave them enhanced protections under the HBC Main SERP Plan if their employment was terminated following a Change of Control (the “**Employment Contracts**”).[36] These Employment Contracts (a) contained a more expansive definition of a “Change of Control” than the definition of a

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[33] De Fazio Affidavit, paras. 27(b), 30(c), **ERC RMR Tab 1, p. 11-12.**
[34] De Fazio Affidavit, paras. 27(c), 30(b), **ERC RMR Tab 1, p. 11-12.**
[35] De Fazio Affidavit, paras. 27(d), 30(d), **ERC RMR Tab 1, p. 11-12.**
[36] De Fazio Affidavit, para. 35(c), **ERC RMR Tab 1, p. 13.**

"Change in Control" in the HBC Main SERP Plan, and (b) required the Company to "immediately secure the supplementary pension benefits accrued to [the Additional SERP Participant] under the SERP up to the Change of Control Termination Date" if they were terminated without cause or resigned within two years of a Change of Control, to the extent that any funds already "held in trust at the time are deemed to be actuarially inadequate".[37] In the Employment Contracts, "SERP" is described as follows: "[name] will continue to be eligible to participate in the Supplementary Executive Retirement Plan (the "**SERP**"). Participation in the plan is subject to its terms and conditions."[38]

2. The Additional SERP Participants and the HBC Additional RCA

23. There are two Additional SERP Participants, who are named in Schedule "B" to the HBC Additional Trust Agreement but whose names and addresses have been redacted at Exhibit "C" to the Roth Affidavit.[39] These two individuals remain the only beneficiaries of the HBC Additional RCA.[40]

24. The Additional SERP Participants' employment with the Company was terminated on July 17, 2008 and June 30, 2010 respectively.[41]

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[37] De Fazio Affidavit, para. 35(c), **ERC RMR Tab 1, p. 13-14.**
[38] De Fazio Affidavit, at para. 35(d), **ERC RMR, Tab 1, p. 14.**
[39] RCA Trust Agreement (HBC Additional RCA) dated June 1, 2011 between Hudson's Bay Company and Royal Trust Corporation of Canada; Amending Agreement to the RCA Trust Agreement date June 18, 2019 ("**HBC Additional Trust Agreement**"), Schedule B, **RT MR, Tab 2C**, **p. 167**.
[40] Roth Affidavit, para. 39, **RT MR, Tab 2, p. 24**.
[41] De Fazio Affidavit, para. 35(b), **ERC RMR, Tab 1, p. 13**.

25. On June 1, 2011, the Company entered into a trust agreement (the "**HBC Additional Trust Agreement**") with Royal Trust and made an initial contribution to secure the benefits owing to the Additional SERP Participants.[42]

26. The recitals to the HBC Additional SERP Trust Agreement state, in full, as follows:

> WHEREAS effective October 29, 1999, the Company established the Hudson's Bay Company Supplementary Executive Retirement Plan (the "1999 Plan") to provide eligible executives with supplemental retirement income benefits upon retirement;
>
> AND WHEREAS there are participants of the 1999 Plan who have Employment Contracts (each a "Participant" and collectively the "Participants" as hereinafter defined) which require securing benefits related to the Hudson's Bay Company Additional Supplementary Executive Retirement Plan for Executives (the "Plan") in excess of the amounts provided under the 1999 Plan under certain circumstances;
>
> AND WHEREAS, in order to secure such benefits under the Plan, the Company wishes to establish a trust fund (the "Trust Fund" as hereinafter defined) and to appoint the Trustee to be Trustee of the Trust Fund;
>
> NOW THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Company and the Trustee do hereby covenant and agree as follows:[43]

27. The HBC Additional Trust Agreement uses similar language, as the HBC Main Trust Agreement, but also specifically references the Employment Contracts:

(a) Art. 2.1 provides that the Trust Fund "shall be held by the Trustee in trust and applied by the Trustee in the manner and for the purposes provided in this Trust Agreement"';[44]

(b) Art. 3.6.24 gives the Trustee the power to take all actions "as the Trustee may deem necessary to administer the Trust Fund, and to carry out the purposes of this trust";[45]

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[42] Roth Affidavit, para. 47, 71, **RT MR, Tab 2, p. 23, 29.**
[43] HBC Additional Trust Agreement, recitals, **RT MR Tab 2C, p. 141**.
[44] HBC Additional Trust Agreement, art. 2.1, **RT MR, Tab 2C, p. 143.**
[45] HBC Additional Trust Agreement, art. 3.6.24, **RT MR, Tab 2C, p. 152.**

(c) Art 8.2 provides that on termination "the Trust Fund… may not be used for or diverted to purposes other than those provided for under the terms of the Plan and each Employment Contract" aside from payment of taxes;[46]

(d) Art. 8.3 provides that on an Insolvent Date, the Trustee "shall pay to each Participant… the value of all benefits both (i) accrued to each Participant under the Plan and (ii) secured under the relevant Employment Contract, as determined by the Actuary, to the extent of the assets of the Trust Fund";[47] and

(e) Art. 9.1.1 provides that "where the terms of this Trust Agreement, the Plan and an Employment Contract are inconsistent in whole or in part, the Terms of this Trust Agreement shall prevail over the terms of the Plan and the Employment Contract."[48]

3. Administration and Communications Related to the HBC Additional RCA

28. Consistent with how it administered the HBC Main RCA, since their retirements, the Company directed the payment of benefits to the Additional SERP Participants as follows:

(a) Payment of DB Benefits accrued under the HBC Main SERP Plan to November 10, 2005 was made from the HBC Main RCA;[49] and

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[46] HBC Additional Trust Agreement, art. 8.2, **RT MR, Tab 2C, p. 160.**
[47] HBC Additional Trust Agreement, art. 8.3, **RT MR, Tab 2C, p. 161.**
[48] HBC Additional Trust Agreement, art. 9.1.1, **RT MR, Tab 2C, p. 161.**
[49] De Fazio Affidavit, para. 35(f)**, ERC RMR Tab 1, p. 14**.

(b) Payment of DB Benefits accrued under the HBC Main SERP Plan on and after November 10, 2005 and up to the Additional SERP Participants' respective termination dates was made from the HBC Additional RCA.[50]

D. ERC's consultations with the affected Main SERP Participants and Additional SERP Participants

29. As described in the De Fazio Affidavit, ERC has communicated extensively with the SERP Participants and its Employee Committee with respect to the issues before the Court, including in virtual town halls.[51] The Employee Committee supports the positions ERC is taking on this motion, as do the Additional SERP Participants.[52] ERC is not aware of any SERP Participant that objects to its positions on the issues before the Court at the time of filing this factum.[53]

PART III. ISSUES

30. The issues and the proposed answers to the issues are as stated in the overview at para. 3 above.

PART IV. LAW & ARGUMENT

A. Principles governing the interpretation of trust agreements and ancillary documents

31. The interpretation of trust agreements and their associated pension and benefits plans are governed by "principles that are the same or, analogous to contract interpretation",[54] taking into account the principles of equity that govern the administration of a trust and how a trustee must exercise its powers and discretion as set out below. In other words, contract principles dictate what

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[50] De Fazio Affidavit, para. 35(f)**, ERC RMR Tab 1, p. 14**.
[51] De Fazio Affidavit, paras. 57-58, 60-63, 65-66, **ERC RMR Tab 1, p. 21-23**.
[52] De Fazio Affidavit, para. 69**, ERC RMR Tab 1, p. 23**.
[53] De Fazio Affidavit, para. 69**, ERC RMR Tab 1, p. 23**.
[54] *Electrical Industry of Ottawa Pension Plan v Cybulski*, 2001 CarswellOnt 4214, at para 18, **Book of Authorities ("BOA") Tab 1**.

the words mean. Under that framework, courts are required to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" – i.e. the factual matrix – to give effect to "the objective intent of the parties".[55] Whether the contract in issue is a negotiated document or a standard form contract of adhesion, "the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates" are all relevant components of the factual matrix, and the surrounding circumstances are always relevant whether or not the contract is ambiguous.[56]

32. Where, as in this case, the issues require directions with respect to the interaction between a trust agreement and a retirement arrangement plan, the courts have instructed that:

(a) In the interpretation of a trust instrument, it is the settlor's intention that matters (in this case, the Company's intentions, as it is the only settlor since the HBC Main SERP is a non-contributory plan);[57]

(b) "Trustees are obliged to interpret Trust Agreements in a way that is evenhanded as between beneficiaries. Interpretative results that favour a beneficiary group or

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[55] *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, at paras 47, 49 [*Sattva*]; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, at paras. 27-28, 31-32 [*Ledcor*].

[56] *Sattva*, 2014 SCC 53, at para. 48; *Ledcor*, 2016 SCC 37, at para 31; *Starrcoll Inc v 2281927 Ontario Ltd*, 2016 ONCA 275, at paras 16-18.

[57] *Garcia v. MacKinnnon*, 2014 ONSC 4410, at para. 71 (interpreting who is a beneficiary of a union benefits trust); *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 at p. 656 ("In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust"); HBC Main SERP Plan, Art. 5.01, **RT MR Tab 2B, p. 114** ("Members are neither required nor permitted to contribute to the Supplementary Plan").

group of beneficiaries over others, are to be avoided unless, the trust document language mandates its results";[58]

(c) "In interpreting pension plan contracts, the Courts are guided not only by the language of the pension plan document, but also by the parties' conduct, statements, and representation made to each other";[59]

(d) Extrinsic evidence, "such as information given to employees, can be used as an interpretative aid in pension cases"; [60] and

(e) "If there is a conflict between Trust Agreements and pension plans text, equitable principles override common law principles."[61]

B. Questions related to the HBC Main SERP

1. Answer to Question 1: Yes, interim distributions can and should be made from the HBC Main RCA before a final determination of what amounts (if any) the Main SERP Participants are entitled to from the Pension Plan surplus, on the basis that any overpayments will be deducted from the wind-up distributions of the Pension Plan surplus (if any) owing to each Main SERP Participant

33. Article 7.08 of the HBC Main SERP Plan requires that the Termination Liability Entitlement of a Main SERP Participant be reduced by any distribution of surplus assets that a Main SERP Participant may be entitled to receive (the "**Surplus Payment**") from the Hudson's

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[58] *Electrical Industry of Ottawa Pension Plan v. Cybulski*, 2001 CarswellOnt 4214, at para. 19, **BOA Tab 1**.
[59] *Electrical Industry of Ottawa Pension Plan v. Cybulski*, 2001 CarswellOnt 4214, at para. 23, **BOA Tab 1**.
[60] *Dinney v. Great-West Life Assurance Co. et al.*, 2005 MBCA 36, at para. 62.
[61] *Electrical Industry of Ottawa Pension Plan v. Cybulski*, 2001 CarswellOnt 4214, at para. 24, **BOA Tab 1**, citing *Schmidt*, [1994] 2 S.C.R. 611 at p 641. See also *Sutherland v. Hudson's Bay Company*, 2011 ONCA 606, at para. 97 ("in the absence of specific language to the contrary, trust law principles are to prevail in the face of conflicting contractual provisions")

Bay Company Registered Pension Plan (the "**Basic Plan**").[62] For convenience, the amount of that reduction will be referred to as the "**Set-Off Amount**".

34. At the moment, it is impossible to determine whether and to what extent the HBC Main SERP Participants will be entitled to Surplus Payments, and the amount of any Set Off Amount, because the ownership of the surplus assets in the Basic Plan is currently disputed. That issue will be the subject of negotiations and potential mediation further to this Court's Pension Representative Counsel Order and the Order Appointing a Court-Appointed Mediator.[63]

35. While entitlement to the Basic Plan surplus is being resolved, ERC submits that it is desirable to distribute the assets of the HBC Main RCA to the eligible beneficiaries now, subject to a Court-approved mechanism to calculate the Set-Off Amounts (if any) and have the Independent Pension Plan Administrator make such payments directly to the Company (or to another entity as the Company directs) at a later date. This avoids any delay in winding up the HBC Main RCA and the accumulating professional fees involved, while ensuring that the amounts ultimately received by the HBC Main SERP Participants respect the formula in the HBC Main SERP Plan.

36. As set out below in relation to Question 2, ERC and the Company agree that the only Main SERP Participants entitled to monies in the HBC Main RCA are those with DB benefits accrued under the HBC Main SERP Plan before November 10, 2005 and their entitlements are limited to the extent of their benefits accrued up to that date (the "**2005 Main SERP Entitlements**").[64]

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[62] HBC Main SERP Plan, art. 7.08, **RT MR, Tab 2B, p. 122.**
[63] Case Conference Endorsement (PRC Order), dated June 26, 2026.
[64] Proposed Responses, item 2, **ERC RMR Tab 1B, pp. 30-31;** De Fazio Affidavit, at para. 11, **ERC RMR Tab 1, p. 7.**

37. As such, ERC asks that the court direct (in the form of an order anticipated to be agreed upon and filed before the hearing on September 25, 2026) that:

(a) Royal Trust pay amounts in respect of the 2005 Main SERP Entitlements from the HBC Main RCA before determination of the Surplus Payments; and

(b) No Surplus Payment or portion thereof may be distributed by the Independent Plan Administrator to a Main SERP Participant who has 2005 Main SERP Entitlements, unless and until the following has occurred:

(i) The Set-Off Amount has been calculated;

(ii) the portion of the Set-Off Amount applicable to the payment of the 2005 Main SERP Entitlement has been calculated (the"**2005 Set-Off Amount**"); and

(iii) The 2005 Set-Off Amount has been remitted to the Company or as the Company directs.

38. Upon fulfilling these requirements, the balance remaining may be distributed by the Independent Plan Administrator to each Main SERP Participant with 2005 Main SERP Entitlements.

2. Answer to Question 2: Yes, the application of the assets of the HBC Main RCA should be limited to benefits accrued prior to November 10, 2005 and the Termination Liability should be calculated accordingly

39. Properly construed, ERC and the Company agree that any payment in respect of the Termination Liability for each Main SERP Participant from the HBC Main RCA should be limited

to benefits accrued up to November 10, 2005.[65] This is based on the purpose of the HBC Main RCA as disclosed by the evidence, the text of the HBC Main Trust Agreement, the text of the HBC Main SERP Plan, and the parties' conduct in setting up and administering the HBC Main RCA and the HBC Main SERP Plan.

(a) The purpose of the HBC Main RCA was to secure the benefits owing to executives employed at the time of the 2005 Change in Control

40. The purpose of the HBC Main RCA and HBC Main Trust Agreement is derived from the Change in Control provisions in the HBC Main SERP Plan, which is the document that required the Company to constitute the trust.

41. Change in Control provisions are commonly used in executive compensation agreements and exist for the benefit of the executives employed at the time of a Change in Control. They serve the dual purpose of protecting senior executives during and after a potential or actual takeover by providing "financial security to an executive who is either terminated or resigns after a change in control", while also protecting the employer by "retaining their loyalty at a time of turmoil for the company".[66] In the context of the HBC Main SERP Plan, the Change in Control provisions also serve an additional purpose of securing the entitlements of former and existing executive employees whether or not they are terminated, since SERP benefits are by their nature deferred benefits that new management may not be willing or able to honour after the Change in Control.

42. The Change in Control provision in the HBC Main SERP Plan is a provision of general application. However, it has only been triggered once, in 2005, when the HBC Main Trust

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[65] Proposed Responses, item 2, **ERC RMR Tab 1B, pp. 30-31;** De Fazio Affidavit, at para. 11, **ERC RMR Tab 1, p. 7.**
[66] *Montreal Trust Co. of Canada v. Call Net Enterprises Inc.*, 2004 CanLII 7642 (ON CA), at paras. 12, 14. See also *Miranda v. Lake Shore Gold Corporation*, 2010 ONCA 597, at para. 22.

Agreement was entered into and the ensuing HBC Main RCA was created for the specific benefit of those executives who were employed and had accrued benefits under the HBC Main SERP Plan to the date of the Change in Control event.[67]

(b) The text of the HBC Main Trust Agreement confirms that the HBC Main RCA exists to secure accrued benefits up to November 10, 2005

43. The HBC Main Trust Agreement also identifies the purpose of the trust, which was to secure the accrued benefits under the HBC Main SERP Plan to the date of the Change in Control on November 10, 2005, as recorded in its recitals quoted at para. 15 above. The recitals identify the Change in Control provisions of the HBC Main SERP Plan, the offer made on November 10, 2005 that constituted a Change in Control, and the purpose of the HBC Main Trust Agreement, which was "to secure the accrued benefits under the Plan", specifically "the supplementary pension benefits accrued to the date of the Change in Control".[68]

44. This purpose of the trust is further acknowledged in the HBC Main SERP Plan at art. 1.02(3), which states that "following a Change in Control effective November 10, 2005, the Company established a Trust Fund and deposited into the Trust Fund an amount equal to the Estimated Plan Termination Liability <u>as of that date</u>" (emphasis added).[69]

45. Thus, is it clear that the purpose of the trust, as articulated in the recitals to the HBC Main Trust Agreement and echoed in the HBC Main SERP Plan, is to secure the benefits accrued under the HBC Main SERP Plan to November 10, 2005.

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[67] HBC Main Trust Agreement, recitals, **RT MR, Tab 2A, p. 68**.
[68] HBC Main Trust Agreement, recitals, **RT MR, Tab 2A, p. 68**.
[69] HBC Main SERP Plan, art. 1.02(3), **RT MR, Tab 2B, p. 97**.

46. This purpose governs all aspect of the HBC Main RCA's administration (as opposed to the HBC Main SERP Plan's operation), and the uses of the trust's assets. Article 2.1 of the Main SERP Trust Agreement, entitled "Establishment of Trust Fund", goes on to confirm that the Trustee's obligation is to administer the fund "in the manner and for the purposes provided in this Trust Agreement", not the HBC Main SERP Plan.[70] The Trustee is further authorized under art. 3.5.24 to take acts as the Trustee may deem necessary "to carry out the purposes of this trust", not the HBC Main SERP Plan.[71]

47. To the extent of any conflict between the provisions of the HBC Main Trust Agreement and the provision of the HBC Main SERP Plan, the Trust Agreement governs. This is so for four reasons.

48. First, as noted above, art. 9.1.1 of the Trust Agreement expressly provides that "where the terms of this Trust Agreement and the Plan are inconsistent in whole or in part, the terms of this Trust Agreement shall prevail over the terms of the Plan".[72]

49. Second, at law, as the Supreme Court explained in *Schmidt v. Air Products Canada Ltd*, the plan text "may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust".[73]

50. Third, the HBC Main SERP Plan itself acknowledges that certain participants in the HBC Main SERP Plan may have greater security and funding for their benefits than others. The HBC Main SERP Plan text acknowledges at art. 1.02 that the HBC Main RCA was established to fund

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[70] HBC Main Trust Agreement, art. 2.1, **RT MR, Tab 2A, pp. 70-71**.
[71] HBC Main Trust Agreement, art. 3.5.24, **RT MR, Tab 2A, p. 79**.
[72] HBC Main Trust Agreement, art. 9.1.1, **RT MR, Tab 2A, p. 89**.
[73] *Schmidt v. Air Products Canada Ltd.*, [1994] 2 SCR 611 at pp. 639-40.

the Estimated Plan Termination Liability as of November 10, 2005, and at art. 1.03 acknowledges that in addition to the HBC Main RCA, the Company also established other RCAs for certain individuals "to secure their benefits payable in accordance with this Supplementary Plan" (an apparent reference to the HBC Additional RCA). The plan text articulates that the individuals whose benefits are so secured have "priority entitlement over assets in those RCAs" notwithstanding the general formula governing termination liability.[74]

51. Fourth, art. 1.02 of the HBC Main SERP Plan acknowledges that there is no obligation on the Company to provide advance funding, except "in the event of a Change in Control".[75] This provision is also important in considering the conduct of the relevant parties.

52. For all of these reasons, the HBC Main Trust Agreement limits the circle of beneficiaries to those executives employed and participating in the HBC Main SERP Plan as of November 10, 2005, and the application of the assets of the HBC Main RCA to benefits accrued before November 10, 2005.

(c) Any remaining ambiguity is resolved by the parties' conduct

53. To the extent that any ambiguity remains in the interpretation of the HBC Main Trust Agreement and the HBC Main SERP Plan, that ambiguity can be resolved by reference to the parties' conduct. Evidence of the parties' subsequent conduct is admissible to shed light on the meaning of ambiguous provisions because "the meaning the parties gave to the words of their

[74] HBC Main SERP Plan, art. 1.03, **RT MR, Tab 2B, p. 97-98.**

[75] HBC Main SERP Plan, art. 1.02(2), **RT MR, Tab 2B, p. 97.**

contract after its execution … may support an inference concerning their intentions at the time they made their agreement", particularly if it is close in time to when the contract was executed.[76]

54. Contemporaneously with the Trust Agreement and thereafter, the Company's practice is consistent with an interpretation of the HBC Main Trust Agreement that would limit the uses of the trust funds HBC Main RCA for the purposes of paying benefits accrued to November 10, 2005. Among other things:

(a) The benefits accrued to November 10, 2005 formed the basis of the funding contributed by the Company to the HBC Main RCA in January 2006.[77]

(b) The Company communicated to SERP Participants that their benefits for service up to November 10, 2005 were "funded" and their benefits for service after November 10, 2005 were "unfunded".[78]

(c) Consistent with Art. 5.02(2) of the HBC Main SERP Plan, benefits accrued up to November 10, 2005 were paid from the HBC Main RCA, while benefits accrued on and after November 10, 2005 were paid by the Company through general revenue from a separate non-trust account.[79] In practice, most SERP Participants received retirement benefit payments from more than one source. [80]

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[76] *Shewchuk v. Blackmont Capital Inc*., 2016 ONCA 912, at paras. 48, 55. See also: *Dinney v. Great-West Life Assurance Co. et al*., 2005 MBCA 36, at paras. 8, 57-61, 70-72 (relying on employer and trustees' longstanding formula for indexing pensions to plan performance to construe plan as providing for a vested right to automatic and annual pension indexing in a manner that could not be divested through subsequent amendment or legislation).
[77] Roth Affidavit at para. 125, **RT MR, Tab 2, p. 44**.
[78] De Fazio Affidavit, para. 30(b), **ERC RMR, Tab 1, p. 12.**
[79] De Fazio Affidavit, paras. 27(b), 27(c), **ERC RMR, Tab 1, p. 11**; Roth Affidavit, at paras. 125-126, 128, **RT MR, Tab 2, p. 44-45**; email exchange between L. Butcher and K. Nargas, dated March 27 to August 11, 2025, **RT MR Tab 2, p. 382-390**.
[80] De Fazio Affidavit, para. 27, **ERC RMR, Tab 1, p. 11.**

(d) The actuarial valuation report prepared for the Company as of January 1, 2022 described the benefits accrued to November 10, 2005 as the "funded" portion of the HBC Main SERP Plan and the valuation of the funded portion of the HBC Main RCA was calculated exclusively based on benefits accrued for service up to November 10, 2005.[81]

(e) The establishment and administration of the HBC Additional RCA, as described further below, is consistent with an understanding that the Additional SERP Participants' entitlements under the HBC Main SERP Plan were secured by the HBC Main RCA only to the extent of their benefits accrued for service up to November 10, 2005.

55. Thus, the promise made to individuals is consistent with an interpretation of the HBC Main Trust Agreement that limits entitlement to the assets in the HBC Main RCA to benefits accrued to November 10, 2005. Furthermore, upon retirement, any Main SERP Participant with benefits accrued after 2005 would understand that the benefits paid to them from the HBC Main RCA were not their full accrued benefits under the Main SERP Plan, but rather only the value of their benefits accrued to November 10, 2005. In other words, the proposed answer to Question 2 is consistent with what a Main SERP Participant would have understood from the communications they received from the Company and from how their benefits had been administered and paid.

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[81] 2022 Actuarial Valuation Report, at pp. 7, 14, **ERC RMR, Tab 1C, pp. 45, 52**.

56. For all of these reasons, the answer to Question 2 is Yes in the sense that the application of the assets of the HBC Main RCA should be limited to benefits accrued prior to November 10, 2005 and the Termination Liability should be calculated accordingly.

(d) Answer to Question 3: the termination date is March 7, 2026

57. Article 8.3 of the HBC Main Trust Agreement provides that "[o]n an Insolvent Date, the Plan shall be deemed fully terminated".[82] The HBC Main Trust Agreement further defines an "Insolvent Date" as "...the date on which the Trustee is provided with evidence satisfactory to it that: (a) the Company has ... become bankrupt or insolvent".[83]

58. As identified in the De Fazio Affidavit, to understand the implications of the choice of termination date, the actuary would need to carry out two sets of calculations which would take time and have attendant costs that are not in the interest of Main SERP Participants to incur.[84]

59. The fact that HBC received *CCAA* creditor protection on March 7, 2025 was a notorious one confirmed by Court Order, published on the Monitor's website, and widely published in the general news media at the time. As such, ERC submits that March 7, 2025 is the appropriate termination date and Question 3 should be answered accordingly.

C. Questions related to the HBC Additional RCA

1. Answer to Question 4: there is no plan text providing different benefits to the Additional SERP Participants

60. Notwithstanding that the HBC Additional Trust Agreement makes reference to "the Hudson's Bay Company Additional Supplementary Executive Retirement Plan for Certain

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[82] HBC Main Trust Agreement, art. 8.3, **RT MR, Tab 2A, p. 88.**
[83] HBC Main Trust Agreement, art. 1 (definition of "Insolvent Date"), **RT MR, Tab 2A, p. 69**.
[84] De Fazio Affidavit, para. 51, **ERC RMR, Tab 1, p. 20.**

Executives" ("**Additional SERP Plan**"),[85] no party possesses a separate plan text for the HBC Additional RCA.[86] Neither of the Additional SERP Participants is aware that a separate plan text for the HBC Additional SERP exists or ever existed.[87] To the contrary, they understood that the purpose of the HBC Additional SERP was to secure their benefits under the HBC Main SERP Plan.[88]

61. The Company's obligation to establish the HBC Additional RCA arose from the Employment Contracts, which refer to the HBC Main SERP Plan and do not contain any terms that suggest that there is another SERP plan with different entitlements than those under the HBC Main SERP Plan.[89] As such, Question 4 should be answered Yes: it is appropriate for the Trustee to act as if there is no additional plan text for the HBC Additional SERP.

2. Answer to Question 5: benefits for the Additional SERP Participants should be determined under the HBC Main SERP Plan

62. Question 5 should also be answered Yes.

63. The HBC Additional Trust Agreement explicitly references the Employment Contracts, and describes those Employment Contracts as "requir[ing] [the Company to] secur[e] benefits… in excess of the amounts provided under the 1999 Plan [defined in this factum as the HBC Main

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[85] RCA Trust Agreement (HBC Additional RCA) dated June 1, 2011 between Hudson's Bay Company and Royal Trust Corporation of Canada; Amending Agreement to the RCA Trust Agreement date June 18, 2019, Recitals, **RT MR Tab 2C, p. 141**.
[86] Roth Affidavit, para. 133-144, **RT MR, Tab 2, pp. 47-49**; De Fazio Affidavit, para. 35(e), **ERC RMR Tab 1, p. 14**.
[87] De Fazio Affidavit, para. 35(e), **ERC RMR Tab 1, p. 14**.
[88] Roth Affidavit, at para. 51, 133-136 **RT MR, Tab 2, p. 24, 47.**
[89] Roth Affidavit, at para. 140, **RT MR, Tab 2, p. 48**.

SERP Plan] under certain circumstances."[90] However, the Employment Contracts themselves refer to the HBC Main SERP Plan and make no reference to any other SERP Plan.[91]

64. In these circumstances, it is the HBC Main SERP Plan that governs their termination entitlements, to the extent consistent with the purpose and provisions of the HBC Additional SERP Trust Agreement. This is because art. 3.1.4 of the HBC Additional Trust Agreement directs that distributions from the Trust Fund on termination are to be made "in accordance with the Actuary's interpretation of the Plan [defined as the non-existent HBC Additional SERP Plan] and each Employment Contract", which in turn incorporates the HBC Main SERP Plan.[92]

65. Reading these provisions as a whole and in their context, important weight should be given to the Employment Contracts, the understandings of the Additional SERP Participants and the Company as to the meaning of the Employment Contracts and the purposes of the trust as embodied in how the parties administered the trust to date: namely, by directing the assets of the HBC Additional RCA to pay retirement benefits accrued by the Additional SERP Participants under the HBC Main SERP Plan to their respective termination dates.

66. The combined effect of the answers to Questions 4 and 5 is that the Trustee should calculate the Additional SERP Participants' entitlements from the HBC Additional RCA based on their benefits accrued up to their termination dates, to the extent they are not otherwise secured.

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[90] HBC Additional Trust Agreement, recitals, **RT MR, Tab 2C, p. 141**.
[91] De Fazio Affidavit, at paras. 35(c), (d)**, ERC RMR, Tab 1, pp. 13-14**.
[92] HBC Additional Trust Agreement, art. 3.1.4, **RT MR, Tab 2C, p. 144**.

3. Answer to Question 6: the HBC Additional RCA is intended to provide additional security to the Additional SERP Participants

67. Consistent with the answer to Question 4, above, the answer to Question 6 is Yes: the HBC Additional RCA is intended to provide additional security to the Additional SERP Participants.

68. The HBC Additional RCA arose because the Employment Contracts required "HBC … to immediately secure the supplementary pension benefits accrued to [the Additional SERP Participant] under the SERP up to the Change of Control Termination Date", which for the Additional SERP Participants was July 17, 2008 and June 30, 2010, respectively.[93] The HBC Additional Trust Agreement, in turn, directs that:

(a) distributions and payments out of the trust fund be in accordance with "each Employment Contract" (art. 3.1.4);[94] and

(b) upon insolvency of the Company, "the Trustee shall pay to each Participant" the value of all benefits "both (i) accrued to each Participant under the Plan and (ii) <u>secured under the relevant Employment Contract</u>" (art. 8.3) (emphasis added).[95]

69. Reading the HBC Additional Trust Agreement and Employment Contracts together, the <u>only</u> purpose of the HBC Additional RCA is to secure the benefits owing to the HBC Additional SERP Participants up to their termination dates, to the extent they are not otherwise secured.

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[93] De Fazio Affidavit, paras. 35(b), (c), **ERC RMR Tab 1, p. 13.**
[94] HBC Additional Trust Agreement, art. 3.1.4, **RT MR Tab 2C, p. 144**.
[95] HBC Additional Trust Agreement, art. 8.3, **RT MR Tab 2C, p. 161.**

4. Answer to Question 7: the Additional SERP Participants have priority entitlement to the assets in the HBC Additional RCA

70. Question 7 should also be answered Yes: the Additional SERP Participants have priority entitlement to the assets in the HBC Additional RCA.

71. The HBC Additional Trust Agreement identifies two Participants by name in Schedule B to the Trust Agreement. There is no evidence suggesting any other beneficiary of this trust.

72. They are the only two beneficiaries with a claim to the assets of the HBC Additional RCA. This is because Art. 2.1 of the HBC Additional Trust Agreement provides that the assets of the HBC Additional RCA "shall be held by the Trustee in trust and applied by the Trustee in the manner and for the purposes provided in this Trust Agreement."[96] Article 8.2 of the HBC Additional Trust Agreement further provides that the assets in the HBC Additional RCA "may not be used for or diverted to purposes other than those provided for under the terms of the Plan and each Employment Contract" except for payment of taxes, fees and expenses.[97] Furthermore, Art. 1.03 of the HBC Main SERP Plan expressly acknowledges that the Applicants had created separate trusts to secure certain employees' benefits under the HBC Main SERP Plan and that those "RCAs may have a priority entitlement over assets in those RCAs", meaning that the beneficiaries of those RCAs have priority entitlement to the assets therein.[98]

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[96] HBC Additional Trust Agreement, art. 2.1, **RT MR Tab 2C, p. 143**.
[97] HBC Additional Trust Agreement, art. 8.2, **RT MR Tab 2C, p. 160**.
[98] HBC Main SERP Plan, art. 1.03, **RT MR Tab 2B, pp. 97-98**.

5. Answer to Question 8: the remaining assets under the HBC Additional RCA should be allocated based on <u>only</u> the Additional SERP Participants' Termination Liability and paid only to those Additional SERP Participants

73. Question 8 should also be answered Yes: the Actuary should be instructed to calculate the liabilities of the HBC Additional RCA based on their accrued service between November 10, 2005 and their respective Change of Control Termination Date. This calculation will allow the Actuary to account appropriately for the Additional SERP Participants entitlements under each of the HBC Main RCA (which secured the benefits for service accrued up to November 10, 2005) and the HBC Additional RCA (which secured their benefits for service accrued up to their termination dates).

74. If the calculation of the Additional SERP Participants' entitlements under the HBC Additional RCA gives rise to a deficit, the benefits of the Additional SERP Participants should be reduced on a *pro rata* basis by dividing each Additional SERP Participant's post-November 10, 2005 Termination Liability by the total of both Participants' post-November 10, 2005 Termination Liability to determine each Additional SERP Participant's share of the total assets in the HBC Additional RCA.

75. If the calculation of the Additional SERP Participants' entitlements under the HBC Additional RCA gives rise to a surplus, the parties may require further direction of the Court, as sought in Question 9. Question 9 asks: Should the aggregate amount payable to an Additional SERP Participant from both the HBC Main RCA and HBC Additional RCA be limited to 100% of their Termination Liability? To account for the possibility of surplus in the HBC Additional RCA, the parties propose that the Order direct that the assets in the HBC Additional RCA cannot be distributed unless (a) there is no surplus; (b) there is an agreement between HBC and the

Additional SERP Participants regarding the surplus amounts; or (c) upon further order of the Court after determining Question 9.[99]

6. Answer to Question 10: Yes, the methodology set out at paragraph 172 of the Roth Affidavit should be used to calculate the Termination Liability pursuant to the HBC Main SERP Plan

76. Question 10 requests the Court's confirmation of the methodology used to calculate the Termination Liability, as described at para. 172 of the Roth Affidavit.[100] Based on the evidence at para. 173 of the Roth Affidavit that Royal Trust "is not aware of any alternative methodology which could be used instead of the above-noted methodology", ERC agrees that Royal Trust should use the methodology proposed.[101]

7. Answer to Question 11: Yes, the actuarial assumptions in accordance with the CIA Recommendation should be used to complete the Conversion Calculation for each DC Active and Deferred Main SERP Participant in determining the Basic Plan Offset Pension and the RAA Offset Pension

77. Question 11 requests the Court's confirmation that the CIA Recommendation may be used to complete the Conversion Calculation for each DC Active and Deferred Main SERP Participant in determining the Basic Plan Offset Pension and the RAA Offset Pension.

78. Art. 11.01 of the HBC Main SERP Plan provides the formula for DB benefits. In general terms, the formula provides a pension calculated based on a percentage of the member's Final Average Earnings multiplied by years of DB pensionable service, and less "the amount of Basic Pension payable to the Member under the Basic Plan" (defined in part. 2.04 as "prior to January 1, 2002, the Hudson's Bay Company Executive Pension Plan and effective January 1, 2002, the

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[99] Proposed Responses, item 9, **ERC RMR Tab 1B, p. 32;** De Fazio Affidavit, at para. 11, **ERC RMR Tab 1, p. 7.**
[100] Roth Affidavit, para. 172, **RT MR, Tab 2, p. 57**.
[101] Roth Affidavit, para. 173, **RT MR, Tab 2, p. 58**.

Hudson's Bay Company Pension Plan, as amended from time to time") and benefits under the HBC RAA RCA.[102] In other words, the HBC Main SERP Plan are coordinated with (among other things) the benefits provided under the Basic Plan.

79. As identified in the Roth Affidavit at para. 178, the actuary will be required to convert the value of Main SERP Participants' benefits under the DC component of the Basic Plan into a notional pension amount to calculate entitlements under the HBC Main SERP Plan, (a step defined as the "**Conversion Calculation**").[103]

80. Although Manulife conducted the Conversion Calculation when the Company administered the HBC Main SERP Plan, Manulife has declined to share its assumptions and methodologies.[104] Furthermore, as identified at para. 55 of the De Fazio Affidavit, if a party were to retain Manulife to conduct these calculations, it would cause additional delay in these proceedings, which is not in the interests of the Main SERP Participants.[105]

81. Considering these facts, the evidence in the Roth Affidavit that actuaries typically use the CIA Recommendation to complete this type of calculation, and that arts. 11.03(1), 2.01 and 2.09 of the HBC Main SERP Plan support the use of actuarial assumptions in accordance with the CIA Recommendation,[106] Question 11 should be answered Yes.

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[102] HBC Main SERP Plan, art. 2.04, 11.01, **RT MR, Tab 2B, p. 101, 129**.
[103] Roth Affidavit, para. 178, **RT MR Tab 2, p. 59**.
[104] Roth Affidavit, para. 180, **RT MR Tab 2, p. 60**.
[105] De Fazio Affidavit, para. 55-56, **ERC RMR Tab 1, p. 20-21**.
[106] Roth Affidavit, para. 181, **RT MR Tab 2, p. 60**; HBC Main SERP Plan, arts. 2.01, 2.09, 11.03(1), **RT MR Tab 2B, pp. 100, 102, 131**.

D. Answer to Additional Question A: the Proposed Cost Allocation Methodology should be adopted

82. Royal Trust has incurred legal and actuarial fees and disbursements related to the management and wind up of the HBC RCAs (the "**Costs**"), which the Trustee is authorized to pay out of each HBC RCA Trust Fund pursuant to s. 7.6 of each RCA Trust Agreement. Where fees and disbursements are incurred by the Trustee with respect to a specific HBC RCA, the Trustee proposes to apply those costs to the applicable HBC RCA Trust Fund, while costs related to general work covering all of the HBC RCAs will be distributed across all four HBC RCA Trust Funds ratably based on quantum of assets in such HBC RCA Trust Fund (inclusive of Refundable Tax) (the "**Proposed Cost Allocation Methodology**").

83. The Proposed Cost Allocation Methodology is fair and even-handed and ensures that no HBC RCA Trust Fund bears a disproportionate share of the costs associated with the wind-up of the HBC RCAs. It is anticipated that Royal Trust will provide further evidence to the Court in support of the reasonableness of its Costs, and ERC does not anticipate any objection to the payment of Costs in accordance with the Proposed Cost Allocation Methodology.

PART V. ORDERS SOUGHT

84. ERC requests that the Court issue directions to Royal Trust in response to its questions as stated above at para. 3 in the form of an order to be provided.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF July 2026.

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SCHEDULE "A"
Authorities Referred To

1. *Dinney v. Great-West Life Assurance Co. et al*., 2005 MBCA 36
2. *Garcia v. MacKinnnon*, 2014 ONSC 4410
3. *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37
4. *Miranda v. Lake Shore Gold Corporation*, 2010 ONCA 597
5. *Montreal Trust Co. of Canada v. Call Net Enterprises Inc*., 2004 CanLII 7642 (ON CA)
6. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53
7. *Schmidt v. Air Products Canada Ltd.*, [1994] 2 SCR 611
8. *Shewchuk v. Blackmont Capital Inc*., 2016 ONCA 912
9. *Starrcoll Inc v 2281927 Ontario Ltd*, 2016 ONCA 275
10. *Sutherland v. Hudson's Bay Company*, 2011 ONCA 606

SCHEDULE "B"
Relevant Statutes, Regulations and By-laws

N/A

CERTIFICATE

Court File No. CV-25-00738613-00CL

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 1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.

CERTIFICATE

I, Catherine Fan, lawyer at Ursel Phillips Fellows Hopkinson LLP, Employee Representative Counsel, certify that:

1. I am satisfied as to the authenticity of the authorities cited in this factum.

DATE: July 24, 2026

Catherine Fan
Ursel Phillips Fellows Hopkinson LLP
Employee Representative Counsel

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Court File No.: CV-25-00738613-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1242939 B.C. UNLIMITED LIABILITY COMPANY et al.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
(Proceeding commenced in Toronto)

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