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 HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.

Applicants

FACTUM OF RIOCAN REAL ESTATE INVESTMENT TRUST
(Opposition to Restructuring Support Agreement)

March 25, 2025

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I. INTRODUCTION

1. RioCan Real Estate Investment Trust ("**RioCan**") and Hudson's Bay Company ULC Compagnie De La Baie D'Hudson SRI ("**HBC**") are partners in a real estate joint venture carried on by RioCan-HBC Limited Partnership (the "**JV**").[1] The JV and certain of its subsidiaries (collectively, the "**JV Entities**" and each a "**JV Entity**") own or co-own 12 separate freehold and head leasehold properties and have entered into lease and sublease arrangements with HBC in respect of each of such properties. RioCan holds an approximately 22% interest in the JV. HBC holds the remaining approximately 78% interest indirectly through its wholly-owned subsidiary HBC Holdings LP. RioCan is one of HBC's major stakeholders and has a significant interest in the outcome of HBC's CCAA proceedings.

2. RioCan opposes HBC's request that this Court approve the Restructuring Support Agreement that HBC proposes to enter into with the ABL Agent, the FILO Agent, and the Pathlight Agent (collectively, the "**Agents**" and the "**RSA**"). There is no reason for HBC to enter into RSA. It is effectively a cash collateral agreement and its terms expressly restrict HBC's ability to advance a going-concern solution and conflict with the Court-approved SISP and Consulting Agreement. RioCan requests that the Court give HBC a reasonable and balanced opportunity to pursue a going-concern restructuring for the benefit of its broad range of stakeholders. Approval of the RSA could limit any chance HBC has of completing such a going-concern restructuring.

3. The RSA requires that the six stores currently outside of the liquidation be added to the liquidation if a firm commitment for a transaction providing for full cash repayment of the "Senior Indebtedness" is not received by April 4, 2025. This means that HBC would have to find a solution

[1] Capitalized terms used but not defined herein have the meanings given to them in the affidavits of Jennifer Bewley sworn in these proceedings or the RSA.

within two weeks of commencing the SISP in order to keep these stores out of the liquidation. This is well earlier than the SISP's bidding deadline in the SISP of April 30, 2025, and also the binding bid deadline in the Lease Monetization Process of May 1, 2025. The RSA therefore conflicts with the SISP and the Lease Monetization Process and potentially limits any chance that the SISP will succeed in identifying a going-concern transaction.

4. Moreover, while the Court-approved Consulting Agreement permits HBC to remove stores from the liquidation, the RSA requires that HBC comply with a budget based on the liquidation of 87 stores. HBC should be given the opportunity to restructure as a going concern around more stores, not less. HBC having the ability to remove stores from the liquidation pursuant to the Consulting Agreement is a key feature that is paramount to HBC's ability to pursue a restructuring for the benefit of its stakeholders. The RSA should not limit this right.

5. HBC and its stakeholders deserve the benefit of the opportunity to explore all reasonable opportunities to find a restructuring solution that maximizes value compared to a forced liquidation. The Court-approved SISP is in place and no DIP financing is needed. No RSA or cash collateral agreement should be approved at this stage unless such agreement is in a form that does not limit the terms of the Court-approved SISP or otherwise restrict the ability of HBC to pursue a going-concern solution. HBC is under the jurisdiction of the CCAA and this Court, with protections in place for all stakeholders. HBC should be allowed sufficient time and flexibility to carry out the Court-approved SISP without being subject to aggressive lender restrictions.

6. HBC gave significant control to its pre-filing secured creditors at the outset of these proceedings on the basis of not having the necessary arrangements to facilitate a going-concern restructuring. HBC commenced these proceedings citing an urgent liquidity crisis, including an inability to fund payroll within a matter of days, but only hired its financial advisor – who is also

engaged by and provides services to Pathlight Capital LP, one of HBC's pre-filing secured lenders – approximately three weeks before its urgent CCAA filing. The Monitor was also only engaged a mere one week prior to the filing.

7. HBC also began these proceedings without adequate financing to fund a restructuring. This led HBC to obtain the Interim DIP Facility (as defined below) from certain of its pre-filing lenders, who are also liquidators, to fund operations during the initial 10-day stay period. The Interim DIP Facility required the unprecedented Rent Suspension, which HBC obtained without notice to, or consultation with, RioCan as part of its *ex parte* initial application. Then, unable to find appropriate financing in the brief period between the initial application and returning to this Court for the comeback hearing, HBC entered into the A&R DIP Agreement with the same lenders on HBC's justification of it being the "only alternative available". The A&R DIP Agreement had a mandatory obligation imposed by the DIP Lenders to immediately liquidate all of HBC's stores for the economic self-interest of the DIP Lenders.

8. With the benefit of strong sales and additional time because of RioCan and other stakeholders objecting to the relief sought at the comeback hearing, including approval of the A&R DIP Agreement, HBC has avoided the need for the A&R DIP Agreement and obtained authorization to repay the Interim DIP Facility. Not requiring DIP financing has provided much-needed flexibility for HBC. Among other things, it has enabled HBC to revise the Consulting Agreement to give HBC the ability to remove stores from the liquidation without requiring lender consent.

9. Now, with no DIP financing needed and no related DIP lender imposed restrictions on its ability to pursue a going-concern restructuring versus a liquidation, HBC proposes to again hand over significant control to its pre-filing secured creditors through the RSA. The RSA is a restructuring support agreement in name only and is more akin to the A&R DIP Agreement (except that it provides

no new post-filing financing to HBC) or a cash collateral agreement. The RSA provides little, if any, benefit to HBC, does nothing to improve the prospects of a going-concern restructuring, and could limit the prospects of a successful restructuring.

10. HBC has a long-standing established business with key real estate across Canada. Employees, suppliers and landlords have contributed to the HBC business. HBC's pre-filing secured creditors are focused on "their collateral" and not the business of HBC. Lenders who have a priority security interest in certain collateral of a CCAA debtor cannot unilaterally dictate the outcome of a CCAA proceeding without taking the interests of other stakeholders into account. A CCAA debtor should be given a reasonable opportunity to test the market and see if there is a better solution for all parties versus an immediate mandatory liquidation dictated by a pre filing secured creditor.

11. The RSA limits flexibility for HBC and should not be approved. HBC should be allowed sufficient time to carry out the Court-approved SISP without being subject to aggressive lender restrictions that may reduce the chances of identifying a going concern solution.

12. There is no evidence before the Court that the pre-filing secured creditors of HBC are to suffer any material prejudice at this time. If HBC's pre-filing secured creditors are of the view that they are suffering any prejudice as HBC advances its CCAA proceedings, such parties can immediately come back to the Court to seek appropriate relief.

II. FACTS

A. The RioCan-HBC JV

13. RioCan and HBC established the JV in 2015, into which 12 real estate assets were contributed by each of the parties. The two limited partners of the JV are RioCan (approximately 22%) and HBC

Holdings LP (approximately 78%).[2] The JV Entities are party to lease or sublease agreements with HBC in respect of store locations at each of the 12 properties in the JV's portfolio.[3]

14. The properties in the JV's portfolio consist of:

(a) *Five Head Lease Properties*: The JV and its affiliates are tenants under five head leases in the following locations: (i) Yorkdale Shopping Centre; (ii) Scarborough Town Centre; (iii) Square One; (iv) Carrefour Laval; and (v) Promenade St. Bruno;

(b) *Five 100% Owned Properties*: The JV owns four wholly-owned freehold properties in Vancouver, Calgary, Montreal and Windsor, and a JV subsidiary owns one wholly-owned freehold property in Ottawa; and

(c) *Two 50% Owned Properties*: RioCan and the JV each hold a 50% co-ownership interest the Oakville Place and Georgian Mall shopping centres.[4]

15. A number of the property interests held in the JV portfolio are subject to secured claims in respect of property specific financing arrangements.[5] RioCan is also party to various lending and other financing arrangements with HBC and the JV Entities, and holds security interests against a variety of the JV assets for obligations owing to them.[6]

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[2] Affidavit of Dennis Blasutti sworn March 14, 2025 (the "**Blasutti Affidavit**"), at paras. 2, and 16-18 [F16, F21].

[3] Blasutti Affidavit, at paras. 35-37, and 40 [F26-F27].

[4] Blasutti Affidavit, at para. 28 [F23-F24].

[5] Blasutti Affidavit, at para. 31 [F24-F25].

[6] Blasutti Affidavit, at paras. 43-46 [F29-F30].

B. Relevant Background Regarding these CCAA Proceedings

16. On March 7, 2025, HBC and certain of its affiliates (collectively, the "**Applicants**") sought and obtained the Initial Order granting them protection under the CCAA.

17. The Initial Order, among other things, approved the DIP Agreement dated as of March 7, 2025, entered into between HBC, as borrower, certain other loan parties, as guarantors, Restore Capital, LLC ("**Restore**"), as agent, and HCS 102, LLC ("**HCS**"), as lender, providing up to a maximum principal amount of $16 million (the "**Interim DIP Facility**").

18. The DIP Agreement was then amended to add Tiger Asset Solutions Canada, ULC, 1903 Partners, LLC, and GA Group Solutions, LLC (collectively, with HCS, the "**DIP Lenders**").[7] Restore is the agent under the pre-filing FILO Credit Facility, and each of the DIP Lenders are lenders thereunder.[8] Each of the DIP Lenders, through affiliates, are also part of the Hilco JV that has been approved as the Liquidation Consultant.[9]

19. At the comeback hearing on March 17, 2025, the Applicants sought approval of the A&R DIP Agreement dated as of March 14, 2025, pursuant to which the DIP Lenders agreed to advance a further $7 million to HBC.

20. The A&R DIP Agreement required the Applicants to commence a mandatory immediate liquidation of all of Hudson's Bay Canada's retail stores.

21. RioCan, among others, objected to certain of the relief sought by the Applicants at the comeback hearing, including the approval of the A&R DIP Agreement. Consequently, the Court

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[7] First Report of the Monitor, dated March 16, 2025, para 7.2 [E26].

[8] See Second Amendment to Second Amended and Restated Credit Agreement dated March 3, 2025.

[9] The First Report of the Monitor, at para 4.4 [E15] states that four entities in the Hilco JV, being Hilco, Gordon Brothers, Tiger and GA Capital, are part of the lending group in the pre-filing secured FILO Credit Facility.

reserved its decision and adjourned the matter to provide time for the parties to engage in good faith discussions.[10] The Court further adjourned the matter to March 21, 2025.

22. Sales of inventory following the start of the CCAA proceedings exceeded expectations. HBC determined in the circumstances that it no longer required DIP financing to conduct the proposed Liquidation Sale, Lease Monetization Process and SISP, and that it had sufficient funding to repay the Interim DIP Facility and to pay its ongoing post-filing obligations.[11]

23. At the reconvened comeback hearing on March 21, 2025, the Applicants sought and obtained an amended and restated Initial Order (the "**ARIO**") that, among other things, authorized the repayment of the Interim DIP Facility, as well as the Liquidation Sale Approval Order, Lease Monetization Order and SISP Order.

24. The Lease Monetization Order approved a revised Consulting Agreement, which, among other things, removed six stores from the liquidation and also removed the restriction that required HBC to obtain the consent of the Liquidation Consultant and Restore to remove any stores from the liquidation.

25. The Applicants also sought approval of the RSA pursuant to the ARIO at the hearing on March 21, 2025. The RSA was served on the service list approximately 30 minutes prior to the hearing. At the hearing, the Court deferred approval of the RSA.

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[10] *Re Hudson's Bay Company*, 2025 ONSC 1736.

[11] Affidavit of Jennifer Bewley, sworn March 21, 2025 (the "**Third Bewley Affidavit**") at para 9 [A1944].

C. The Proposed RSA

26. HBC seeks this Court's approval of the RSA, which HBC proposes to enter into with the ABL Agent, the FILO Agent, and the Pathlight Loan Agent.

27. Among its significant provisions, the RSA requires that:

(a) HBC and the Agents agree on a Budget in form and substance satisfactory to the Agents, which HBC must comply with (subject to a Permitted Variance threshold of 15%). The Budget governs how HBC may use its cash, conduct its business, and fund costs in these CCAA proceedings, and thus grants the Agents significant control over any material steps to be taken in this case. The RSA provides for an updated Budget to be provided at the request of the Agents, at HBC's election, or upon a material change, and in each case the updated Budget must be acceptable to the Agents. The Budget was not attached to the form of RSA that was publicly filed. RioCan understands that the Budget is based on the liquidation of 87 stores, being all of HBC's stores other than the six that have been temporarily removed from the liquidation;

(b) HBC deliver weekly a Variance Report to the Agents setting forth actual receipts and disbursements for the preceding week and on a cumulative basis as against the then-current Budget;

(c) only a maximum of six of the Loan Parties' retail stores be excluded from the liquidation (and that such stores only be excluded from the liquidation for a mere two weeks);

(d) the six retail stores initially excluded from the liquidation must be added to the liquidation if no firm commitment in respect of a Permitted Restructuring Transaction

in connection with such excluded stores is received by April 4, 2025. A Permitted Restructuring Transaction is defined to mean a transaction that provides for repayment in full in cash on closing of the amounts reasonably anticipated to be outstanding under the Senior Indebtedness (meaning the ABL Obligations and the Term Loan Obligations) following completion of the Lease Solicitation Process and the liquidation under the Liquidation Services Agreement and is otherwise satisfactory to the Agents;

(e) HBC use its cash solely for certain permitted purposes, being

(i) the payment of reasonable and documented legal and financial advisory fees and expenses of (i) the Loan Parties, (ii) the Monitor and those of its legal counsel, and (iii) the Agents;

(ii) the funding of operating expenditures during the CCAA proceedings *in accordance with the Budget*;

(iii) to pay interest on the Pre-Filing ABL Credit Agreement and the Pre-Filing Term Loan Credit Agreement at the default rates currently being charged under such agreements and provided for in the Budget and to pay fees and expenses owing in connection with the Pre-Filing ABL Credit Agreement and the Pre-Filing Term Loan Credit Agreement;

(f) the proceeds of the Collateral, being all of the Loan Parties' current or future assets, businesses, undertakings and properties, net of any fees or commissions in respect of the liquidation, be applied in accordance with a priority waterfall;

(g) *the Loan Parties deposit any Excess Cash in the Monitor's Trust Account*, which may only be advanced by the Monitor to HBC to satisfy post-filing payment obligations incurred in accordance with the Budget to the extent the Loan Parties have insufficient cash on hand to satisfy such obligations;

(h) the Loan Parties not seek or obtain any order from the Cour that materially adversely affects the Agents; and

(i) the Loan Parties indemnify and hold harmless the Agents and the Lenders and their respective directors, officers, employees, agents, attorneys, counsel and advisors (all such persons and entities being referred to hereafter as "**Indemnified Persons**") from and against any and all actions, suits, proceedings, claims, losses, damages, liabilities or expenses of any kind or nature whatsoever (excluding indirect or consequential damages and claims for lost profits) which may be incurred by or asserted against any Indemnified Person as a result of or arising out of or in any way related to the RSA and, upon demand, to pay and reimburse any Indemnified Person for any reasonable legal or other expenses incurred in connection with investigating, defending or preparing to defend any such action, suit, proceeding or claim.

28. The RSA also contains various representations and warranties, affirmative and negative covenants, and events of default and remedies that are similar to those set out in the Interim DIP Facility and which had been proposed in the A&R DIP Agreement.[12] The RSA is akin to the A&R DIP Agreement, except that it provides no new post-filing financing to HBC.

[12] Third Bewley Affidavit, at para. 11 [A1944].

III. ARGUMENT AND LAW

A. The terms of the RSA are inconsistent with the SISP and the Consulting Agreement, nor appropriate

29. HBC obtained Court-approval of the SISP in order to solicit interest in a sale or investment in HBC or its business. The SISP has a bidding deadline of April 30, 2025. HBC has also obtained Court-approval of the revised Consulting Agreement under which the Liquidation Consultant is to conduct the liquidation of 87 of HBC's stores, subject to HBC's right to remove stores from the liquidation (which removal right does not require consent of the Liquidation Consultant).

30. The RSA contains various restrictions, covenants and other protections in favour of the Agents and the Lenders that are substantially similar (or the same) to what was included in the Interim DIP Facility and the A&R DIP Agreement. These restrictions, covenants and protections are inconsistent with the SISP and the Consulting Agreement, and potentially significantly limit HBC's flexibility to pursue a going-concern restructuring.

31. The RSA requires that HBC use its cash in accordance with the Budget, and that HBC otherwise comply with the Budget, subject to a 15% permitted variance. The Budget has not been provided to stakeholders.

32. Assuming the Budget is based on a liquidation of 87 of HBC's retail stores, the RSA conflicts with the revised Consulting Agreement approved pursuant to the Liquidation Sale Approval Order. The Consulting Agreement has been revised to remove the restriction requiring consent from the Liquidation Consultant and Restore, as DIP agent, to remove any stores from the liquidation. The Consulting Agreement now provides that HBC is entitled to remove any stores from the liquidation sale as long as the number of remaining stores is not less than 25 and HBC complies with certain other terms. This flexibility to remove stores from the liquidation is completely negated if HBC is

required through the RSA to comply with a Budget based on the liquidation of 87 stores. If the RSA is approved, HBC will require the consent of the Agents and the Lenders to remove any stores from the liquidation. It can be assumed that the Agents and the Lenders will never grant such consent as there may be little benefit to them as pre-filing secured creditors and liquidators in granting such consent as compared to the potential significant benefit to HBC and its broader stakeholder group.

33. The RSA is also inconsistent with the terms of the Court-approved SISP and potentially limits the prospects of a successful SISP. The SISP provides for a deadline for delivery of binding bid proposals of April 30, 2025. However, the RSA requires that the six stores currently excluded from the liquidation must be added to the liquidation unless a firm commitment for a transaction providing for full cash repayment of the "Senior Indebtedness" – being the ABL Obligations and the Term Loan Obligations – is received by April 4, 2025. Section 12 of the SISP provides:

> The liquidation will commence no later than March [24], 2025, provided however that a maximum of six of the Loan Parties' retail stores may be excluded from the liquidation to assist the Loan Parties in their pursuit of a Permitted Restructuring Transaction in respect of such excluded stores. In the event that the Loan Parties have not received a firm commitment in respect of a Permitted Restructuring Transaction in connection with such excluded stores on or before April 4, 2025, then such excluded stores shall be included in the liquidation starting April 5, 2025.[13] [*emphasis added*]

34. If the RSA is approved, the Court would also be approving the contemplated indemnity in favour of the Agents and the Lenders. No justification has been provided for this indemnity. The approval of such an indemnity is not appropriate at this time.

[13] RSA, s. 12. See Exhibit "A" to the Third Bewley Affidavit [A1955].

B. Neither HBC, the Monitor, the Agents nor the Lenders provide sufficient rationale in support of the RSA

35. The only support provided for the RSA seems to be that the RSA will permit HBC to use its cash and proceeds from the sale of its inventory. The Monitor states in its supplement to the First Report that the RSA "will allow the Company to continue to use its cash (which is subject to the security of the secured lenders party thereto, among others)" and that it believes that the RSA "will be constructive as the parties work together to advance these CCAA Proceedings in an orderly manner."[14]

36. HBC's reason for seeking approval to enter into the RSA is not persuasive (nor entirely clear). HBC states that "[s]ince the Applicants are proposing to pay the DIP Financing Obligations using the proceeds from the sale of its inventory, which collateral is secured in favour of the ABL Agent, the FILO Agent, and the Pathlight Agent, the Loan Parties will enter into the form of the Restructuring Support Agreement with the ABL Agent, the FILO Agent, and the Pathlight Agent."[15]

37. Neither statement provides sufficient rationale for approving the RSA.

38. Debtors in CCAA proceedings are not restricted from using their cash or other property in circumstances where such assets form part of a pre-filing security package. It is the case in virtually every CCAA proceeding that debtors continue to use their assets and property encumbered by pre-filing security. The Agents' pre-filing security interests continue to apply to HBC's property and assets, and HBC continues to have the possession and control over such property and assets. The fact that HBC's cash is subject to pre-filing security interests does not provide sufficient rationale for

[14] Supplement to the First Report, dated March 21, 2025, at para. 4.4 [E151].

[15] Third Bewley Affidavit, at para. 10 [A1944].

entering into the restrictive RSA, which contains various restrictions akin to a DIP financing, without providing any of the corresponding benefits to HBC.

39. The RSA is effectively a cash collateral agreement being called a restructuring support agreement. The reality is that the RSA does not advance or support HBC's restructuring efforts. HBC has not satisfied the burden of providing sufficient support and justification to the Court to demonstrate that approval of the RSA is necessary, reasonable and appropriate in the circumstances.

C. There is no precedent for approving the RSA

40. HBC and its pre-filing secured creditors are asking the Court to set a new precedent in approving the RSA. No precedent has been offered by HBC, the Agents or the Lenders for the approval of an agreement in a CCAA proceeding that contains covenants and other protections in favour of the pre-filing secured creditors that are akin to those in a DIP lending scenario but does not provide any new financing to the debtor.

41. In seeking approval of the RSA, which is effectively a cash collateral agreement, HBC and its pre-filing secured creditors are seeking to provide pre-filing secured creditors with protection akin to the "adequate protection" concept in United States bankruptcy law. There is no concept of "adequate protection" for pre-filing creditors under Canadian law.

42. The Superior Court of Québec in *AbitibiBowater Inc.* considered a request from pre-filing secured creditors for the granting of an adequate protection charge to compensate them for any deterioration of their pre-filing position resulting from their security being used and continuing to be used by the debtors during the restructuring process. The Québec court denied such request, noting that the concept of adequate protection is rarely (if ever) applied in Canada outside of the context of giving effect to the granting of such relief by a U.S. court, and that the value of the collateral in that

case indicated that the requesting lender was unlikely to suffer prejudice from the use of such collateral:

> [43] As for the Adequate Protection Charge in the event of the diminishing of value of the Term Lenders' collateral because of the ongoing operations of ACI, the Court finds the request unfounded, and in fact questionable.
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> [44] On the one hand, it appears that the value of the Term Lenders' collateral is better served by the ongoing operations than by an immediate liquidation of ACI. On the other hand, the U.S. concept of Adequate Protection Charge is seldom, if ever, applied in Canadian courts. It has been issued here in the context of the Bowater Petitioners for a single reason. That is, to mirror the U.S. order approving such a charge in the context of the Chapter 11 proceedings. This hardly stands as valid precedent for the Term Lenders' request in the context of ACI.[16]

43. There is no concept of "adequate protection" for pre-filing creditors under Canadian law. While the Court may provide protective relief to address material prejudice to HBC's creditors, neither HBC, the Monitor, nor the Agents or the Lenders have provided any evidence to suggest there is material prejudice to the Lenders in the present circumstances. HBC is conducting the SISP and the Lease Monetization Process, and selling its assets and property pursuant to the Court-approved Liquidation Sale. This is all being conducted under the supervision of the Court. If the Lenders are of the view that they are suffering any material prejudice as HBC advances its CCAA proceedings, such parties can come back to the Court immediately to seek appropriate relief.

D. The RSA does not advance the prospects of a going-concern restructuring

44. It is a well-established principle that the purpose of CCAA is to permit a debtor company to carry on business and, where possible, avoid social and economic costs of liquidation, for the benefit

[16] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6453, at paras. 43-44.

of a large group of stakeholders, including employees, suppliers, trade creditors and landlords.[17] Consistent with the above, the goal of these proceedings has been to avoid a complete liquidation and restructure around a lower number of HBC stores, thereby preserving the jobs of thousands of employees and maximizing value for the broadest range of stakeholders. To this end, HBC obtained approval of the SISP in order to solicit interest in a sale or investment in HBC or its business.

45. No operational control should be given to HBC's pre-filing lenders as part of the RSA.

46. HBC took steps in December 2024 to recapitalize and separate the Company's Canadian business from its United States business. HBC did so at the expense of its stakeholders as a whole, and did not, at that time or in 2025, secure the financing needed to ensure the Canadian business was protected. HBC's existing secured lenders benefited by the HBC separation transaction.[18]

47. HBC's financial situation deteriorated after completing the December 2024 separation transaction. Without having taken the necessary pre-emptive steps to maximize value and protect its business, HBC was left with limited options and alternatives. HBC ultimately commenced these CCAA proceedings and obtained the $16 million Interim DIP Facility from the DIP Lenders (who are pre-filing secured lenders under the FILO Credit Facility and also form the Liquidation Consultant) to fund operations during the initial 10-day stay period.[19]

48. HBC's stated intention in obtaining the Interim DIP Facility was to enable it to operate until the comeback hearing, and continue negotiations over that period with a view to presenting a DIP

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[17] *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60 at paras. 15-18.

[18] Affidavit of Jennifer Bewley, sworn March 7, 2025 (the "**First Bewley Affidavit**"), at paras 16, 132-136, and 144-146 [A479, A508-A509, A511-A512].

[19] Four entities in the Hilco JV, being Hilco, Gordon Brothers, Tiger and GA Capital, are part of the lending group in the pre-filing secured FILO Credit Facility. See the First Report of the Monitor, at para 4.4 [E15].

proposal at the comeback hearing that would allow HBC to implement its restructuring strategy.[20] This restructuring strategy involved a restructuring based around a core group of high-performing store, a liquidation of certain underperforming stores, and the monetization of certain retail leases that hold value but might not be part of HBC's go-forward plans.[21]

49. HBC failed to find appropriate financing in the brief period between the initial application and returning to this Court for the comeback hearing. In such circumstances, HBC sought approval of the A&R DIP Agreement, which would have required a mandatory immediate liquidation of all stores as dictated by the DIP Lenders.

50. HBC's materials in support of the A&R DIP Agreement are clear that there was no intention in the DIP Lenders providing DIP financing to support a restructuring of the business. Rather, in providing DIP financing, the DIP Lenders were seeking to use their position as pre-filing secured creditors to control these CCAA proceedings, dictate a complete liquidation, and advance a restrictive DIP that prevented HBC from paying any rent to the JV Entities under real property leases, all in an effort to reduce the amount that they need to fund in priority to their existing pre-filing secured claims and protect their pre-filing secured position. The A&R DIP Agreement was also presented as the "only alternative available" to avoid an immediate liquidation:

> 49. I am advised by Mr. Zalev that without an immediate commencement of the Liquidation Sale across all retail stores, the DIP Lenders were not satisfied that the Applicants would be able to repay their pre-filing secured debt and meet their obligations under any DIP financing.
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> 50. I also understand that the Company's pre-filing secured creditors expressed their intention to object to any form of DIP financing which purports to take priority over their security.

[20] First Bewley Affidavit, at paras. 204-205 [A523].

[21] First Bewley Affidavit, at para. 20 [A480].

> 51. The Applicants have no alternative path forward in these CCAA Proceedings without the A&R DIP Agreement. The only alternative available to the Applicants without the A&R DIP Agreement is an immediate bankruptcy.[22] [*emphasis added*]

51. With the A&R DIP Agreement presented as the "only alternative available", the DIP Lenders attempted to push the envelope on the basis that they controlled HBC's access to funding.

52. RioCan and others objected to certain of the relief sought at the comeback hearing, including the approval of the A&R DIP Agreement and its proposed Rent Suspension. RioCan offered the Court other viable options in alternative to approving the restrictive A&R DIP Agreement. Such objections led the Court to reserve its decision to provide additional time for parties to engage in good faith discussions.

53. Sales of inventory following the commencement of the CCAA proceedings exceeded expectations and, with the benefit of the additional time resulting from the delay of the comeback hearing, the Applicants determined in the circumstances that they no longer required DIP financing to conduct the proposed Liquidation Sale, Lease Monetization Process and SISP, and that they had sufficient funding to repay the Interim DIP Facility.[23] Clearly, there were other options and alternatives available to HBC. The restrictive A&R DIP Agreement was not the "only alternative available".

54. Without needing the A&R DIP Agreement, HBC has been able to avoid a mandated complete and immediate liquidation and keep open the possibility of some form of going-concern restructuring to be advanced through the Court-approved SISP. Preserving this possibility has significant potential

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[22] Affidavit of Jennifer Bewley, sworn March 14, 2025, at paras. 49-51 [A440].

[23] Third Bewley Affidavit at para 9 [A1944].

benefits for HBC and its broad range of stakeholders who would benefit from the continuation of HBC's business, such as employees, suppliers, trade creditors and landlords.

55. But HBC proposes to significantly limit its ability to advance a going-concern restructuring by entering into the RSA with the Agents.

56. The discretion conferred by the CCAA is broad, but not boundless.[24] According to the Supreme Court of Canada, the discretion must be exercised in furtherance of the remedial objectives of the CCAA.[25] Among these objectives, the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company".[26]

57. Clearly there are limits to a CCAA court's discretion. It should not be used to allow pre-filing secured creditors to impose conditions on a debtor that restrict the debtor's ability to advance a going-concern solution for the benefit of such secured creditor's own interests and to the detriment of other stakeholders. Doing so would present serious risk to the integrity of the CCAA process. This is particularly the case here where the rights and controls bring granted to pre-filing secured creditors are not in return for the provision of new capital.

58. If the RSA is fundamentally flawed, it cannot be approved by the Court.[27] As stated in *Target* by Regional Senior Justice Morawetz (as he then was), "[i]t is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner."[28]

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[24] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 49 [*Callidus*].

[25] *Callidus*, at para. 40.

[26] *Callidus*, at para. 41, citing *Century Services*, at para. 70.

[27] See, e.g., *Nortel Networks Corp., Re*, 2010 ONSC 1708 at para. 100 in which Justice Morawetz (as he then was) refused to approve a "flawed" settlement agreement and *Nortel Networks Corporation (Re)*, 2010 ONSC 1977 in which the identical settlement agreement, subject to the deletion of the "flawed", was then approved by Justice Morawetz (as he then was).

[28] *Target Canada Co.*, 2016 ONSC 316 at para. 72.

Similarly, in *Canadian Airlines Corp*., Justice Paperny stated that the obligation of the supervising CCAA judge is to "always have regard to the particular facts" and "to balance" the interests.[29]

59. RioCan submits that the RSA is fundamentally flawed. The RSA is inconsistent with the SISP and the Consulting Agreement, both of which have been approved by the Court, and if approved, the RSA will grant significant operational and other controls and restrictions to HBC's pre-filing secured creditors that potentially limit HBC's ability to pursue a going-concern restructuring outcome for the benefit of a broad range of stakeholders.

IV. CONCLUSION

60. There is no reason for HBC to enter into the RSA. It is a restructuring support agreement in name only and is effectively a cash collateral agreement. The RSA provides little, if any, benefit to HBC and the other Applicants. At the same time, the restrictions contained in the RSA conflict with the Court-approved SISP and Consulting Agreement, and could limit any chance HBC has of completing a going-concern restructuring for the benefit of its broad range of stakeholders. The RSA is fundamentally flawed.

61. It is remarkable that HBC seeks approval of the RSA. HBC should be allowed sufficient time and flexibility to carry out the Court-approved SISP without being subject to aggressive lender restrictions that may reduce the chances of identifying a going concern solution. There is no evidence before the Court that the pre-filing secured creditors of HBC are to suffer any material prejudice at this time. To the contrary, the evidence before the Court is that there is a broad range of stakeholders who will suffer material prejudice if HBC is to cease operations and complete a full liquidation. If HBC is to have any chance of completing a going-concern restructuring, it must have the flexibility

[29] *Canadian Airlines Corp., Re*, 51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para. 15.

to explore and pursue all potential options and alternatives that may be available in the circumstances. The RSA limits this flexibility and should not be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 25, 2025

GOODMANS LLP

Goodmans LLP

SCHEDULE A
LIST OF AUTHORITIES

1. *Re Hudson's Bay Company*, 2025 ONSC 1736
2. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 645
3. *Ted Leroy Trucking [Century Services] Ltd, Re*, 2010 SCC 60
4. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10
5. *Target Canada Co.*, 2016 ONSC 316
6. *Canadian Airlines Corp., Re*, 51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)

Lawyer's Statement (Rule 4.06.1(2.1)):

I certify that I am satisfied as to the authenticity of every authority cited in the factum:

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SCHEDULE B
STATUTORY REFERENCES

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HUDSON'S BAY COMPANY ULC et al.

Applicants

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

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

FACTUM OF RIOCAN REAL ESTATE INVESTMENT TRUST
(Opposition to Restructuring Support Agreement)

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