

**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 motion returnable March 17, 2025)**

March 16, 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**”). The JV and its subsidiaries, HBC YSS 1 Limited Partnership (“**YSS 1**”), HBC YSS 2 Limited Partnership (“**YSS 2**”) and RioCan-HBC (Ottawa) Limited Partnership (the “**Ottawa LP**” and, collectively with the JV, YSS 1 and YSS 2, the “**JV Entities**” and each a “**JV Entity**”), own or co-own 12 separate freehold and head leasehold properties. The JV Entities have entered into lease and sublease arrangements with HBC in respect of each of such properties.¹

2. 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. The ownership interest of RioCan and HBC in the JV is subordinate to the direct contractual obligations of the JV, which include substantial third-party secured obligations and other third-party contractual obligations. The JV satisfies these obligations through the rent received by the JV Entities from HBC.

3. HBC obtained extraordinary and unprecedented relief at its *ex parte* application for the Initial Order. HBC sought and obtained relief in the Initial Order that stays and suspends post-filing rent payable by HBC to the JV Entities except for such amount of rent that is payable by the JV Entities to their head landlords (such relief, being the “**Rent Suspension**”). HBC obtained the Rent Suspension without notice to, or consultation with, RioCan. HBC now seeks this same relief at the Comeback Hearing.

¹ Capitalized terms used but not defined herein have the meanings given to them in the Affidavit of Dennis Blasutti, sworn March 14, 2025 (the “**Blasutti Affidavit**”), or the Affidavit of Jennifer Bewley, also sworn March 14, 2025 (the “**Second Bewley Affidavit**”).

4. RioCan opposes the Rent Suspension. As discussed herein, the Rent Suspension would turn post-filing occupancy rent, which is payable in the ordinary course in priority to DIP financing and pre-filing secured claims, into an unsecured claim that is subordinate to the proposed DIP Facility and the claims of HBC's pre-filing secured creditors, and also divert funds away from the JV Entities (who are non-debtor entities) to HBC for the benefit of HBC's secured creditors at the expense of the JV Entities and their own creditors.

5. RioCan requests, among other things, that the Court grant an Order requiring HBC to pay all post-filing occupancy rent to the JV Entities for use and occupation of leased or subleased premises on the same basis as all landlords providing the same service to HBC. RioCan is requesting fair, equal and consistent treatment for the JV Entities, consistent with the long-standing legal principles of the CCAA.

II. FACTS

A. The RioCan-HBC JV

6. RioCan owns, manages and develops retail and mixed-use properties across Canada's major markets. In 2015, RioCan and HBC entered into the JV, 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%). RioCan-HBC General Partner Inc. (the "**General Partner**") is the general partner of the JV. The General Partner is owned equally by RioCan Financial Services Limited ("**RioCan Financial**"), a subsidiary of RioCan, and HBC Holdings LP.²

² Blasutti Affidavit, at paras. 2, and 16-18 [F16, F21]

7. Since mid-2017, the main purpose of the JV has been to lease and manage the 12 properties in its portfolio. This includes the lease and sublease arrangements entered into with HBC in respect of each of such properties.³

8. The JV is governed by a limited partnership agreement (the “**LPA**”). The LPA requires that the General Partner act in the best interests of the JV and the limited partners in carrying on the business of the JV, and includes restrictions on transfers, a right of first refusal, and the requirement that any transferee of an interest in the JV agree to assume the obligations of the transferor under the LPA and agree to be bound by the terms of the LPA, among other rights, restrictions and protections.⁴

9. The rights and obligations of RioCan and HBC Holdings LP, as shareholders of the General Partner, are set out by a unanimous shareholders agreement (the “**Shareholders Agreement**”). The approval of all the directors of the General Partner – which consists of four directors, two being nominees of HBC and two being nominees of RioCan – is required pursuant to the Shareholders Agreement in order to enter into, amend, modify or terminate any lease with HBC.⁵

B. The JV’s Properties

10. The JV owns or co-owns 12 separate freehold and head leasehold properties directly and through its subsidiaries. The properties in the JV’s portfolio consist of:

- (a) *Five Head Lease Properties:* The JV, YSS 1 and YSS 2 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;

³ Blasutti Affidavit, at paras. 32-33 [[F22-F25](#)].

⁴ Blasutti Affidavit, at paras. 20-21 [[F22](#)].

⁵ Blasutti Affidavit, at para. 23 [[F22](#)].

- (b) *Five 100% Owned Properties:* The JV owns four wholly-owned freehold properties in Vancouver, Calgary, Montreal and Windsor, and the Ottawa LP 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.⁶

11. A number of the property interests held in the JV portfolio are subject to secured claims in respect of property specific financing arrangements.⁷ These secured claims have priority over HBC's pre-filing secured creditors with respect to the applicable JV Entities and subject properties.⁸

C. Contractual Leasing Arrangements

12. 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. The lease and sublease agreements between the JV Entities and HBC reflect standard third party real property lease terms. Each of the leases and subleases require HBC, in return for occupancy and use, to pay the applicable JV Entity basic rent, with basic rent being an amount determined based on a specific dollar amount for each square foot of gross leasable area of the subject leased premises, plus additional rent and other amounts.⁹

13. The monthly rent obligations owed contractually by HBC to the JV Entities pursuant to the lease and sublease agreements for HBC's occupation and use of the leased premises is approximately \$10 million per month.¹⁰

⁶ Blasutti Affidavit, at para. 28 [F23-F24].

⁷ Blasutti Affidavit, at para. 31 [F24-F25].

⁸ See the affidavit of Jennifer Bewley, sworn March 7, 2025 (the "**First Bewley Affidavit**"), at para. 130 [A507].

⁹ Blasutti Affidavit, at paras. 35-37, and 40 [F26-F27].

¹⁰ Blasutti Affidavit, at paras. 12 and 50 [F19-F31].

14. HBC is only currently proposing to honour approximately 15% of such contractual rent obligation. This represents the portion of HBC's contractual rent obligation that the JV Entities pay to their landlords under the head leases for the five head lease properties.¹¹

D. Allocation of Monthly Occupancy Rent

15. Approximately 70% of the monthly occupancy rent required to be paid by HBC to the JV Entities pursuant to its leases with the JV Entities is used by the JV to fund costs and expenses to third parties. This includes property operating costs, ground lease payments to landlords under head leases, general administrative expenses, and debt service amounts in respect of the property specific mortgages and other financing obligations of the JV Entities. Debt service costs of property specific mortgages owing to parties other than RioCan represent the largest of the JV expenses.¹²

16. Only approximately 30% of total monthly rent amounts paid by HBC to the JV Entities are ultimately distributed to HBC Holdings LP and RioCan as the limited partners of the JV.¹³ Any distribution of proceeds to HBC and RioCan as limited partners of the JV is subject to the direct third-party obligations of the JV, which rank in priority to the equity interests of HBC and RioCan.

E. Impact of HBC's CCAA Proceedings and the Rent Suspension on the JV Entities

17. Without the receipt of the contractually owed rent payments, the JV Entities will not have the necessary liquidity to make the various payments required in the normal course, including, without limitation, the debt service costs for their property specific mortgages.¹⁴

¹¹ Blasutti Affidavit, at para. 50 [F31].

¹² Blasutti Affidavit, at paras. 12 and 50 [F19-F31].

¹³ Blasutti Affidavit, at para. 12 [F19].

¹⁴ Blasutti Affidavit, at para. 53 [F32].

18. This will have material consequences for the JV Entities' debt financing arrangements. A number of the JV Entities' property specific mortgages mature in the near term, and the JV Entities' ability to refinance such mortgages will be negatively impacted if they are not receiving the contractually agreed rent payments owing from HBC.¹⁵

19. The inability of the JV Entities to service their debt obligations will result in defaults and the incurrence of default interest and additional costs, among other adverse consequences.¹⁶

20. On top of the prejudice caused by the Rent Suspension, there are also various potential ramifications and defaults that may be triggered under the JV Entities' head leases in the event that HBC stops operating at the five subject premises, or takes steps to terminate or disclaim the sublease agreements between the parties.¹⁷

F. RioCan's Efforts to Reach a Resolution

21. RioCan and its advisors have sought to engage with HBC's advisors, the Monitor and its counsel, in an effort to seek to resolve the various issues and implications resulting from HBC's CCAA filing, including with respect to the Rent Suspension and the impact of the CCAA proceedings on the JV. There has been limited engagement on the issues and concerns of RioCan.¹⁸

22. On March 14, 2025, RioCan also delivered a draft term sheet to HBC setting out a debtor-in-possession financing arrangement to be provided by RioCan that would facilitate the payment in full

¹⁵ Blasutti Affidavit, at para. 53 [F32].

¹⁶ Blasutti Affidavit, at para. 53[F32].

¹⁷ Blasutti Affidavit, at para. 56 [F33].

¹⁸ Blasutti Affidavit, at para. 58[F33].

of all contractual rent amounts owing by HBC to the JV Entities under the lease and sublease agreements.¹⁹

III. ARGUMENT AND LAW

A. The CCAA proceedings are being used by the DIP Lenders as a forum to maximize and protect their pre-filing claims at the expense of HBC's business and stakeholders

23. 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 of a large group of stakeholders, including employees, suppliers, trade creditors and landlords.²⁰

24. The CCAA has an overall purpose to avoid the social and economic costs of liquidation, preserve jobs and balance and protect the interests of affected stakeholders. It is safe to say that HBC's CCAA proceedings are off to a terrible start. HBC's materials in support of the Initial Order painted a picture of a restructuring with a down-sizing of certain underperforming stores, the monetization of certain retail leases that hold value but might not be part of HBC's go-forward plans, and a restructuring around a core group of high-performing stores.²¹ In short, the CCAA proceedings were to facilitate a leaner and more financially stable restructured HBC. Less than 10 days after the Initial Order, the picture has changed drastically. HBC is now looking at a complete liquidation.

25. What is the cause of the unfortunate turn of events? It is simple. HBC has backed itself into a corner where it says has only one option at this time and that is entry into the A&R DIP Agreement with Restore Capital, LLC, as DIP Agent, and HCS 102, LLC, Tiger Asset Solutions Canada, ULC, 1903 Partners, LLC, and GA Group Solutions, LLC as lenders (collectively, the "**DIP Lenders**").

¹⁹ Blasutti Affidavit, at para. 60 [F34].

²⁰ *Ted Leroy Trucking [Century Services] Ltd, Re, 2010 SCC 60* at paras. 15-18.

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

The A&R DIP Agreement contemplates a \$23 million DIP Facility (total amount, including borrowings made prior to the Comeback hearing). This is one of the smallest DIP financing facilities provided in any CCAA proceeding relative to the size and scope of the operations and business of HBC and the other Applicants.

26. HBC took steps in December 2024 to recapitalize and separate the Company's Canadian business. HBC did so at the expense of the HBC stakeholders and did not, at that time or in 2025, secure the financing needed to ensure the Canadian business was protected. The shareholder of HBC and a number of HBC's existing secured lenders benefited by the HBC separation transaction.²²

27. The DIP Lenders are pre-filing secured creditors and part of the Hilco JV that is the proposed Liquidation Consultant, which will earn fees on the proposed liquidation.²³ They are now dictating that an immediate liquidation of all stores be approved within the first 10 days of the commencement of the CCAA proceedings in an effort to reduce their own risk on their pre-filing secured debt.

28. HBC's materials are clear that the DIP Lenders have no intention to support a restructuring of the business. HBC explains 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."²⁴ [*emphasis added*]

29. The DIP Lenders are also using their pre-filing position to control these CCAA proceedings. HBC states 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" and thus "the Applicants

²² First Bewley Affidavit, at paras 16, 132-136, and 144-146 [[A479](#), [A508-A509](#), [A511-A512](#)].

²³ 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, dated March 16, 2025, at para 4.4 [[E15](#)].

²⁴ The Second Bewley Affidavit, at para. 49 [[A440](#)].

have no alternative path forward in these CCAA Proceedings without the A&R DIP Agreement.”²⁵ The Court has the ability to grant a DIP in priority to the pre-filing secured creditors on the basis it is fair and reasonable, and assists HBC in advancing a restructuring for the benefit of a broad range of stakeholders.

30. The DIP Lenders are focused on their self-interest and are attempting to push the envelope by imposing restrictive terms preventing HBC from paying any rent to the JV Entities under real property leases. In restricting the payment of post-filing rent to the JV Entities, the DIP Lenders are turning proper post-filing operating expenses that are paid in priority in the normal course in every a CCAA restructuring into “free” occupancy, thereby reducing the amount that they need to fund in priority to their existing pre-filing secured claims. In doing so, the DIP Lenders are turning a post-filing claim payable in the ordinary course in priority to DIP financing into an unsecured claim that is subordinate to the DIP Facility and pre-filing secured claims. The Rent Suspension is an aggressive and prejudicial request by the DIP Lenders for their own self benefit.

31. HBC has unfortunately let this happen. HBC has not been proactive to explore all of its strategic alternatives or arrange proper interim financing to fund a proper restructuring. HBC only hired a financial advisor – Reflect Advisors, LLC, 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 on March 7, 2025.²⁶ Moreover, the Monitor was engaged a mere one week before the CCAA filing.²⁷ Only limited steps are now available to HBC to maximize value and protect its

²⁵ The Second Bewley Affidavit, at paras. 50-51 [[A441](#)].

²⁶ See the Reflect Engagement Letter, dated February 14, 2025, which is Exhibit “F” to the Second Bewley Affidavit [[A638](#)]. The Reflect Engagement Letter discloses that “Reflect is engaged by and provides certain consulting services to Pathlight Capital LP and certain of its managed funds on behalf of itself and its portfolio companies”.

²⁷ The Pre-Filing Report of the Proposed Monitor at para. 3.1 discloses that it was engaged to act as consultant to Hudson’s Bay and its subsidiaries on February 28, 2025 [[E59](#)]. Although an affiliate was previously engaged by an equity holder of HBC to provide advisory services, that engagement concluded in October 2023.

business. HBC left the situation too late and has eliminated options and alternatives which would have been available with more time and more resources. HBC has failed to protect the interests of its stakeholders, who are now vulnerable. HBC's stakeholders, as a whole, deserve better.

32. With the A&R DIP Agreement being presented as the "only game in town", the DIP Lenders are pushing the envelope knowing that they control HBC's access to funding. The DIP Lenders are playing a game of "catch me if you can", and the only party which has the ability to set matters right is the CCAA Court. HBC has lost control of its own destiny.

33. The discretion conferred by the CCAA is broad, but not boundless.²⁸ According to the Supreme Court of Canada, the discretion must be exercised in furtherance of the remedial objectives of the CCAA, which include, ensuring fair and equitable treatment of the claims against the debtor, and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.²⁹

34. Clearly there are limits to a CCAA court's discretion. It should not be used to allow DIP lenders to override the law and impose conditions on a debtor that are contrary to established legal principles and cause material prejudice to other stakeholders, all for the benefit of a DIP lenders' own interest to try to reduce their risk on their pre-filing secured debt. Doing so would present serious risk to the integrity of the CCAA process.

²⁸ [9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10](#) at para. 49 [Callidus].

²⁹ [Callidus](#), at para. 40.

35. The terms imposed by the DIP Lenders do not, in any way, tie the hands of the Court on the issue of payment of post-filing rent to the JV Entities. As stated by Justice Newbould in *Essar Steel Algoma Inc. et al*:

“The court’s discretion or any issue raised by the parties is not hampered or limited in any way by the terms of [a] DIP loan.”³⁰

36. Even if HBC believes that the DIP Facility represents the best agreement it could achieve under the circumstances or the “only game in town”, if the DIP Facility is fundamentally flawed, it cannot be approved by the Court.³¹ 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.”³² 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.³³

37. The need to balance rights and obligations of the debtor and its contractual counterparties motivated the Superior Court of Québec in *Groupe Dynamite inc. v. Deloitte Restructuring Inc.* to refuse the debtor’s effort to maintain the benefit of certain leases while being excused from its obligation to pay rent.³⁴ The Québec court noted that the order sought by the debtor would enhance

³⁰ [Essar Steel Algoma Inc. \(16 November 2015\), Toronto, Ont Sup Ct J \[Commercial List\] CV-15-000011169-00CL \(Endorsement of the Honourable Mr. Justice Newbould \(Unofficial Transcript\)\)](#).

³¹ 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).

³² [Target Canada Co.](#), 2016 ONSC 316 at para. 72.

³³ [Canadian Airlines Corp., Re](#), 51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para. 15.

³⁴ [Groupe Dynamite inc. c. Deloitte Restructuring Inc.](#), 2021 QCCS 3 [*Groupe Dynamite*].

its prospects of a successful restructuring, but that it was not fair to the counterparty, and commented that:

“[A]chieving the Act’s remedial purpose is not a simple matter of analyzing the debtor’s financial situation. As the Supreme Court of Canada affirmed in *Century Services*, “Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.”³⁵

38. It is incumbent upon the Court at this *de novo* comeback hearing to consider whether it is appropriate in the circumstances, having regard to the equities and after balancing the relative degrees of prejudice, to grant the Rent Suspension.

39. RioCan submits that the Rent Suspension causes material prejudice to RioCan, the JV Entities, and the creditors and other stakeholders of the JV Entities and should not be approved. RioCan submits that the JV Entities should be treated as any other landlord in the case. HBC has contractual obligations to the JV Entities in respect of the 12 lease or sublease arrangements. It is a fundamental principle of Canadian insolvency law that CCAA debtors are to pay for goods and services and the use of leased property during the CCAA filing period, and HBC needs to honour these contractual obligations while it has occupation and use of such properties no matter the restrictive terms that are being attempted to be imposed by the DIP Lenders.

40. HBC and the DIP Lenders are asking the Court to set a new precedent. They are requesting that the Court permit a CCAA debtor not to pay valid and proper occupancy rent and allow a liquidation to happen from such occupied premises “rent free” for the benefit of DIP Lenders who are pre-filing secured creditors and also now benefit economically as the liquidator. There are costs in any restructuring that are required to be paid in order to advance the case. These costs include post-

³⁵ [Groupe Dynamite](#), at para. [56](#).

filing operating costs, and they should be paid in priority to the interests of pre-filing secured creditors and the DIP Lenders. Occupancy rent is similar to wages, post-filing trade payables and professional costs. These are the costs of a restructuring.

B. The Rent Suspension diverts proceeds properly due and payable to the JV Entities and their creditors to the benefit of secured creditors of HBC

41. The JV is a real estate joint venture between two parties: RioCan and HBC. The JV is not wholly-owned or unilaterally controlled by HBC or any other Applicant entity. Rather, the JV has its own business and operations, and is governed by the LPA under which RioCan and HBC have various rights and protections. The JV is not a debtor in HBC's CCAA proceedings.

42. As part of carrying on its business, the JV, along with YSS 1, YSS 2 and the Ottawa LP, have their own secured creditors and other obligations owing to third parties separate and apart from HBC. A number of the property interests held in the JV portfolio are subject to secured claims in respect of property specific financing arrangements. Details of these financing arrangements are provided in the First Bewley Affidavit.³⁶

43. HBC's pre-filing secured creditors – in particular, the ABL Agent in respect of the Revolving Credit Facility and the FILO Credit Facility, the Pathlight Agent in respect of the Pathlight Credit Agreement – do not have any direct claims against the JV Entities or their assets. This is confirmed by HBC in the First Bewley Affidavit.³⁷ HBC has pledged its interest in the JV to the ABL Agent and the Pathlight Agent, but HBC's pre-filing secured lenders have no direct claims against the JV Entities

³⁶ First Bewley Affidavit, at paras. 59-61, 66-79 [[A488-A489](#), [A491-A493](#)].

³⁷ First Bewley Affidavit, at para. 130 [[A507](#)]. (“As set out above, Hudson's Bay has a 78.0136% interest as limited partner in RioCan-Hudson's Bay JV, which is its primary real estate subsidiary. Most of the freehold and leasehold real property owned by RioCan-Hudson's Bay JV, is security for multiple real estate mortgage financings in favour of third-party lenders and, in the case of several properties, RioCan (as its affiliate). These mortgages have priority over the lenders and agents under the Credit Facilities with respect to the subject properties.” [*emphasis added*])

or their assets. The JV operates in the normal course and is not a CCAA debtor and is not subject to the benefits and the restrictions of the CCAA debtors under the Initial Order.

44. The Rent Suspension, in stopping the flow of rent payments from HBC into the JV Entities, will therefore cause significant prejudice to parties with secured or unsecured claims against the JV Entities or their assets. There is prejudice in two ways. First, without receiving the full amount of contractual rent owing to them under the lease and sublease agreements, the JV Entities will not have the necessary liquidity to make debt service payments on their secured financing arrangements. This clearly prejudices the creditors of the JV Entities. Second, there is prejudice to the JV Entities' stakeholders in that funds are effectively being diverted from the non-debtor against which they have a claim to a CCAA debtor against which they do not have a direct claim. The Rent Suspension therefore benefits secured creditors of HBC, to the detriment of creditors and stakeholders of the JV Entities. HBC refers in its Factum in support of the Initial Order to rent payments potentially "pooling" with the JV Entities and resulting in a "potential windfall recovery" for their secured creditors to the detriment of Hudson's Bay and its stakeholders generally.³⁸ That is not the case. The windfall is to the DIP Lenders and the secured creditors of HBC in HBC only being required to pay approximately 15% of its contractual rent obligation to the JV Entities. The prejudice is to parties with claims against the JV Entities, not creditors of HBC.

45. Further, even though claims against the JV Entities are stayed due to HBC having extended the stay of proceedings to the JV Entities as non-applicant stay parties, this does not necessarily address the prejudice. HBC's non-payment of occupancy rent to the JV Entities will potentially have several consequences to the JV Entities, including their ability to refinance certain of their debt obligations that are maturing in the near term, the incurrence of default interest, and potentially

³⁸ Factum of the Applicants dated March 7, 2025, at para. 36 [[A362](#)].

leading to the lenders of the JV Entities incurring significant legal costs (which such additional costs, subject to the terms of applicable loan documents, will need to be paid by the JV Entities).

C. The Rent Suspension causes material prejudice to RioCan, the JV Entities and the JV Entities' creditors and other stakeholders

46. HBC relies on the fact that it holds an indirect 78% interest in the JV as its basis for obtaining the Rent Suspension. Such broad and general statement does not provide the Court with a complete picture of the interests involved and the prejudice caused by the Rent Suspension.

47. HBC focused on its 78% interest in the JV to convince the Court that there was no prejudice, or only limited prejudice, arising from the stay of post-filing rent to the JV Entities. The reality is that the Rent Suspension causes material prejudice to RioCan, the JV Entities and the JV Entities and the JV Entities' creditors and other stakeholders.

48. The key reference point for the Court is not HBC's 78% interest in the JV. The key number is 70%. Approximately 70% of the monthly rent obligations paid by HBC to the JV Entities pursuant to the existing lease and sublease arrangements between the parties is used by the JV Entities to fund various costs and expenses owing to third parties. This includes property operating costs, ground lease payments to landlords under head leases, general administrative expenses, and debt service amounts in respect of the property specific mortgages and other financing obligations of the JV Entities. Subject to the direct claims of the secured creditors and other creditors of the JV, only approximately 30% of total monthly rent amounts paid by HBC to the JV Entities can be distributed to HBC Holdings LP and RioCan as the limited partners of the JV.

49. The only cost HBC's proposed payment amount would cover is that amount of monthly rent that is payable by the JV Entities to their landlords under head leases, which is approximately 15%

of HBC's monthly contractual rent obligation. The Applicants' evidence before the Court does not make this fact clear.

50. There is material prejudice to the third-party creditors and stakeholders of the JV Entities due to the Rent Suspension diverting funds away from the JV Entities to HBC for the benefit of HBC's secured creditors.

51. The proposed non-payment of post-filing occupancy rent to the JV Entities is particularly prejudicial considering that HBC and the other Applicants are required to pay all landlords other than the JV Entities all rent amounts for the period from and after the date of the Initial Order pursuant to existing contractual terms. HBC is not following the key terms of the CCAA Model Initial Order and inventing new prejudicial terms. There are contractual arrangements in place between the JV Entities and HBC, and the terms of such arrangements need to be honoured during the CCAA proceedings while HBC is occupying the premises, just like all of HBC's other lease arrangements.

52. CCAA courts do not have the ability to rewrite lease terms or contracts. The occupancy rent is payable based on the terms of the existing lease and sublease agreements in place at the time of HBC's CCAA filing. This is a fundamental principle of landlord and tenant law under the CCAA. Debtors that are tenants must pay the contractual rent for occupation and use from and after the filing date while they are continue to occupy and use the leased premises. DIP lenders cannot amend or modify such arrangements.

D. It would be unfair for HBC to ignore its lease obligations and occupy premises post-filing without paying rent to a landlord that is not wholly-owned by an applicant

53. It is a fundamental principle of Canadian insolvency law that CCAA debtors are to pay for goods and services and the use of leased property during the CCAA filing period.³⁹ This principle is codified in section 11.01 of the CCAA which provides, among other things, that, even where a Court exercises discretion under section 11 of the CCAA to make any order that it considers appropriate in the circumstances, no such order shall have the effect of prohibiting a party from requiring immediate payment for goods, services or use of leased property provided after the order is made.⁴⁰

54. HBC, in obtaining the Rent Suspension, seeks to ignore the legitimate contractual rights and interests of the JV Entities, as well as the interests of third-party creditors and stakeholders of the JV Entities.

55. In *Quest*, the British Columbia Supreme Court stressed that an important purpose of the CCAA is to protect those who continue to supply goods and services to a company in protection: “it is commonly considered “fair” that a person continuing to supply an insolvent debtor or allow the debtor to continue using its property during the restructuring should also be compensated for that supply or use, consistent with Model Orders in place across Canada.”⁴¹ It has also been acknowledged that fairness is a cornerstone principle of insolvency proceedings.⁴²

56. It is not fair to RioCan or the JV Entities to be forced to provide HBC with occupation and use of the subject premises during the CCAA proceedings without receiving the full amount of contractual rent owing to them under the lease and sublease agreements entered into with HBC. These

³⁹ [Quest University Canada \(Re\)](#), 2020 BCSC 921, at para. 44.

⁴⁰ [CCAA](#), s. 11.01.

⁴¹ *Quest*, at para. 98, citing [Royal Bank of Canada v. Cow Harbour Construction Ltd.](#), 2012 ABQB 59 at para. 16.

⁴² [Good Natured Products Inc. \(Re\)](#), 2024 BCSC 2126 at paras. 2 and 69.

lease and sublease agreements reflect standard real property lease terms and in return for the applicable JV Entity providing occupancy to HBC requirement the payment of basic rent plus additional rent and other amounts.

57. Anything else causes material prejudice to RioCan, the JV Entities and the creditors and other stakeholders of the JV Entities for the benefit of the DIP Lenders in respect of their pre-filing secured obligations.

58. The Monitor refers to the rent obligations owing by HBC to the JV Entities to be a “financing arrangement”.⁴³ The Monitor provides no support for this statement. The lease and sublease arrangements between HBC and the JV Entities reflect normal and standard third-party real property terms and provide HBC with the right to use and occupy the premises in exchange for rent.⁴⁴ In any event, no Canadian court has applied the “true lease” vs “financing lease” analysis to real property leases to prevent the payment of post-filing rent.⁴⁵

E. There is no precedent for the Rent Suspension

59. HBC argues that there is one precedent for the Rent Suspension because the Court stayed and suspended the payment of certain post-filing amounts arising from subleases between the debtor (as sublessee) and a non-applicant stay party (as sublessor) in *Re Nordstrom Canada Retail Inc.* That is not correct.

60. The *Nordstrom* case deals with wholly-owned entities. This was not disclosed by HBC in their Factum in support of the Initial Order. In *Nordstrom*, the debtor sublessee and the non-applicant stay

⁴³ Pre-filing Report of the Proposed Monitor, dated March 7, 2025, at para. 7.8(d) [E70].

⁴⁴ Blasutti Affidavit, at paras. 34-42 [F25-F29].

⁴⁵ See *Quest*, para. 60.

party sublessor were both indirectly wholly-owned subsidiaries of Nordstrom, Inc., the ultimate parent company of the group.⁴⁶ Here, the JV Entities are not wholly-owned by HBC. The JV Entities are owned 78% by HBC and 22% by RioCan, which is a third-party to this CCAA proceeding.

61. Moreover, the leased properties held by the wholly-owned leasing entity in *Nordstrom* that were subleased to the debtor were not subject to any third-party financing arrangements. There were no secured creditors with claims against the non-applicant stay party sublessor or its properties.⁴⁷ The only claims against the leasing entity were from third-party landlords, who were paid under the initial order. That is not the case here. In this situation, there is RioCan's 22% interest in the JV, RioCan's 50% interest as the co-landlord of the co-owned properties, and various third-party lenders with secured claims in respect of the property interests held in the JV portfolio.

62. Finally, the non-payment of post-filing rent in *Nordstrom*, which was improvement rent intended to compensate the leasing entity for constructing, fixturing and furnishing the subleased premises, was consensual. The Court's reasons did not address this non-payment of post-filing rent.

63. Accordingly, HBC has not provided the Court with any law to support the Rent Suspension. Therefore, if the Rent Suspension granted, it would set a precedent, without any factual or legal principles to support it.

F. There should be no Administration Charge, D&O Charge or KERP Charge granted without ensuring protection for post-filing service providers

64. There should be no Administration Charge, D&O Charge or KERP Charge granted on the property and assets of HBC without ensuring that parties who supply goods and services to HBC on

⁴⁶ See [Nordstrom Canada Retail, Inc., 2023 ONSC 1422](#) at paras. 11 and 13-14.

⁴⁷ [Pre-filing Report of the Proposed Monitor, dated March 1, 2023, at para 7.5\(b\)](#).

a post-filing basis are protected in respect of such supply. The post-filing occupancy rent to the JV must be paid in the normal course on the same terms as other landlords and no court ordered charges should be authorized by this court until such material matter has been corrected or rectified. The Administration Charge and D&O Charge were granted as part of the *ex parte* initial application, without notice to RioCan.

G. *Ex Parte* Initial Order

65. There are serious and material issues with HBC obtaining the Rent Suspension on the *ex parte* initial application under section 11 of the CCAA. Under section 11.001, relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under section 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."⁴⁸ The relief to be granted during the initial stay period is to preserve the status quo and allow for operations to be stabilized and negotiations to occur. Expanded relief is to follow on proper notice to affected parties at the full comeback hearing.⁴⁹

66. HBC did not provide sufficient disclosure to support the granting of this unprecedented relief at the initial application. HBC did not set out the facts in proper detail. HBC did not disclose that the monthly rent obligation was approximately \$10 million, which is characterized as rent (similar to other third party leases that HBC), and that HBC was only proposing to pay approximately 15% of such amount.

⁴⁸ CCAA, s. 11.001.

⁴⁹ [Lydian International Limited \(Re\)](#), 2019 ONSC 7473, at paras [26](#) and [30](#).

67. HBC characterized the Rent Suspension as preserving the “status quo” and preventing a “potential windfall recovery” to the detriment of HBC and its stakeholders.⁵⁰ This is a mischaracterization. The Rent Suspension does not preserve status quo; it prohibits the JV Entities from requiring immediate payment for the use of property leased and in doing so upends the settled legal principles in CCAA proceedings that debtors, who are tenants, must pay for occupation and use of leased premises to their landlords. The only windfall in the circumstances is to the DIP Lenders and the pre-filing secured creditors of HBC who benefit from HBC occupying the premises while only paying 15% of the contractually owed rent.

68. HBC and the Monitor should never have put the Court in the position of granting the unprecedented Rent Suspension at the initial application on a *ex parte* basis without a proper record being before the Court. The relief sought at the initial application should have been limited to what was required to meet “keep the lights on”.⁵¹

IV. CONCLUSION AND RELIEF REQUESTED

69. The shareholder of HBC has the financial resources to fund a restructuring (for the benefit of HBC’s employees, trade suppliers and landlords) as a DIP lender or otherwise – but has chosen not to do so. The directors and the shareholder of HBC have not put HBC in the best position to be successful based on the resources it had available to them. HBC has not used the appropriate time to be pre-emptive or proactive on finding restructuring solutions or arming HBC with the necessary funding alternatives to complete a proper restructuring for the benefit of all stakeholders. HBC agreeing to advance a Rent Suspension provision and a DIP financing arrangement which requires an immediate liquidation is proof of the material missteps by HBC. The DIP Lenders are taking

⁵⁰ First Bewley Affidavit, at para 215 [A529]; Factum of the Applicants dated March 7, 2025, at para 36 [A362].

⁵¹ *Re Just Energy Corp.*, 2021 ONSC 1793, at para 58.

advantage of the circumstances. The Court needs to now use its supervisory role to assist the stakeholders of HBC. HBC has lost its power and HBC and its stakeholders need the help of the Court to balance the urgent situation.

70. HBC and the DIP Lenders are asking the Court to set a new precedent in permitting a CCAA debtor to not pay valid and proper occupancy rent post-filing to a non-wholly owned non-debtor landlord party, and allow a liquidation to happen from such occupied premises “rent free” for the benefit of the DIP Lenders (who are also pre-filing secured creditor and part of the proposed liquidator consortium).

71. In light of the foregoing, RioCan requests that this Court grant:

- (a) an Order requiring HBC to pay the JV Entities any and all obligations owing by HBC to any such parties under the terms of a real property lease;
- (b) an Order striking the following provision of paragraph 9 of the Initial Order *nunc pro tunc*:

“... Without prejudice to the rights and claims of the Non-Applicant Stay Parties, any Rent payable by Hudson’s Bay to RioCan-Hudson’s Bay JV, YSS 1, or YSS 2, under a Lease shall be stayed and suspended pending further Order of this Court, provided that Hudson’s Bay shall be required to pay to RioCan-Hudson’s Bay JV, YSS 1, or YSS 2, as applicable, that amount of Rent payable by RioCan-Hudson’s Bay JV, YSS 1, or YSS 2, as applicable, to its Landlord under the JV Head Lease until such JV Head Lease is disclaimed in accordance with the CCAA or otherwise consensually terminated.”; and

- (c) an Order declaring that any debtor-in-possession financing obtained or to be obtained in the within proceedings shall not be approved by this Court where the terms of such financing contain a provision similar to the one set out below which is fundamentally inconsistent with the principles of the CCAA and the law which supports CCAA precedents:

“... The Loan Parties covenant and agree not to do, or cause not to be done the following, other than with the prior written consent of the DIP Agent or with the express consent required as outlined below... (l) Pay any rent payable to RioCan-HBC Limited Partnership, HBC YSS 1 Limited Partnership, or HBC YSS 2 Limited Partnership under a Real Property Lease, provided however that the Loan Parties shall be permitted to pay any rent payable by to RioCan-HBC Limited Partnership, HBC YSS 1 Limited Partnership, or HBC YSS 2 Limited Partnership as applicable to its landlord under a head lease that the property subject to such Real Property Lease is subject to”.

72. As set out above, RioCan is of the view that the Rent Suspension is not fair or reasonable treatment in respect of the JV Entities, and is inconsistent with the law. The Rent Suspension is being forced upon the JV Entities by the DIP Lenders, who, in imposing such a term, are attempting to reduce the amount that they need to fund in priority to their existing pre-filing secured claims, at the expense of RioCan, the JV Entities, and their other creditors and stakeholders. In effect, the DIP Lenders are turning a post-filing claim which is payable in the ordinary course in priority to DIP financing and pre-filing secured claims into an unsecured claim that is subordinate to the DIP Facility and pre-filing secured claims, and also diverting funds away from the JV Entities (who are non-debtor

entities) to HBC for the benefit of HBC's secured creditors at the expense of the JV Entities and their own creditors.

73. The Court must prevent the DIP Lenders from trying to breach the CCAA and the well-established law which supports the CCAA. The fact is that HBC has contractual obligations to the JV Entities in respect of its 12 lease and sublease agreements. HBC is required to honour these contractual obligations to the JV Entities while it has occupation and use of such properties, the same as it is required to do for any other landlord. RioCan is requesting fair, equal and consistent treatment for the JV Entities, consistent with the long-standing legal principles of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 16, 2025

GOODMAN'S LLP
Goodmans LLP

SCHEDULE A
LIST OF AUTHORITIES

1. [*Ted Leroy Trucking \[Century Services\] Ltd, Re, 2010 SCC 60*](#)
2. [*9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10*](#)
3. [*Essar Steel Algoma Inc. \(16 November 2015\), Toronto, Ont Sup Ct J \[Commercial List\] CV-15-000011169-00CL \(Endorsement of the Honourable Mr. Justice Newbould \(Unofficial Transcript\)\)*](#)
4. [*Nortel Networks Corp., Re, 2010 ONSC 1708*](#)
5. [*Nortel Networks Corporation \(Re\), 2010 ONSC 1977*](#)
6. [*Target Canada Co., 2016 ONSC 316*](#)
7. [*Canadian Airlines Corp., Re, 51 \(2000\), 19 C.B.R. \(4th\) 1 \(Alta. Q.B.\)*](#)
8. [*Groupe Dynamite inc. c. Deloitte Restructuring Inc., 2021 QCCS 3*](#)
9. [*Quest University Canada \(Re\), 2020 BCSC 921*](#)
10. [*Royal Bank of Canada v. Cow Harbour Construction Ltd., 2012 ABQB 59*](#)
11. [*Good Natured Products Inc. \(Re\), 2024 BCSC 2126*](#)
12. [*Nordstrom Canada Retail, Inc., 2023 ONSC 1422*](#)
13. [*Lydian International Limited \(Re\), 2019 ONSC 7473*](#)
14. [*Re Just Energy Corp., 2021 ONSC 1793*](#)

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*](#)

General power of court

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

Relief reasonably necessary

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

Rights of suppliers

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

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

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

**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
HUDSON'S BAY COMPANY ULC et al.**

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF RIOCAN REAL ESTATE
INVESTMENT TRUST**
(Opposition to motion returnable March 17, 2025)

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