

**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 THE APPLICANT
(Returnable March 17, 2025)
Re: Comeback Motion**

March 16, 2025

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TO: THE SERVICE LIST

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PART I: OVERVIEW¹

1. On March 7, 2025, this Court granted the Applicants protection under the *Companies' Creditors Arrangement Act*.² The stay of proceedings under the Initial Order was extended to certain Non-Applicant Stay Parties (together with the Applicants, "**Hudson's Bay Canada**").³
2. This factum is filed in support of the Applicants' comeback hearing, at which they seek issuance of the ARIO, the Liquidation Sale Approval Order, the Lease Monetization Order, and the SISP Order, each of which is described in the Second Bewley Affidavit.

PART II: THE FACTS

3. The facts with respect to this motion are set out in the First Bewley Affidavit and the Second Bewley Affidavit. All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

PART III: THE ISSUES

4. The issues in respect of the relief sought on this motion are whether this Court should grant the ARIO, the Liquidation Order, the Lease Monetization Order, and the SISP Order.

PART IV: THE LAW

A. This Court Should Extend the Stay of Proceedings to May 15, 2025

5. The Applicants seek an extension of the Stay Period up to and including May 15, 2025. Section 11.02(2) of the CCAA allows the Court to impose a stay for any period that the court considers necessary,⁴ if the Court is satisfied that (a) circumstances exist that make the order

¹ Capitalized terms used in this factum that are not otherwise defined have the meanings given to them in the Affidavits of Jennifer Bewley sworn March 7, 2025 (the "**First Bewley Affidavit**") and March 14, 2025 (the "**Second Bewley Affidavit**").

² RSC 1985, c C-36 [CCAA].

³ The Non-Applicant Stay Parties are: HBC Holdings LP, RioCan-HBC General Partner Inc, RioCan-HBC Limited Partnership, RioCan-HBC (Ottawa) Holdings Inc, RioCan-HBC (Ottawa) GP, Inc, RioCan-HBC (Ottawa) Limited Partnership, HBC YSS 1 Limited Partnership, HBC YSS 2 Limited Partnership, HBC Centerpoint LP, and The Bay Limited Partnership.

⁴ CCAA, *supra* note 2, s 11.02(2).

appropriate, and (b) the applicant has acted, and is acting, in good faith and with due diligence.⁵

6. The Applicants' activities since the granting of the Initial Order are set out in the Second Bewley Affidavit and the First Report. The Applicants have acted in good faith and with due diligence in pursuing the orderly restructuring of their business,⁶ and their stakeholders are expected to benefit from the extension of the Stay Period.⁷ The Monitor supports extending the Stay Period to May 15, 2025, and has filed cash flow statements showing the Applicants have sufficient liquidity to operate through the proposed extension.⁸ The requested extension to the Stay Period is therefore justified.

B. The Stay of Proceedings Should Extend to Co-Tenants

7. The Applicants are asking that the Court continue to stay rights that third party co-tenants may have against the landlords, owners, operators or managers of commercial properties where Hudson's Bay Canada's stores, offices or warehouses are located which arise as a result of the Applicants' insolvency.

8. The Court has broad discretion under s. 11 of the CCAA to grant any order that it considers appropriate, with the governing test being whether the order "will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company."⁹ This broad power allows supervising judges to propose solutions "that respond to the circumstances of each case and 'meet contemporary business and social needs'".¹⁰ Judges are empowered to implement "'creative and effective' solutions"¹¹ that achieve the objective of restructuring a financially distressed company,¹² and the CCAA's provisions are to be "interpreted expansively to enable its remedial objectives to be achieved, and

⁵ *Ibid*, s 11.02(3).

⁶ Second Bewley Affidavit, *supra* note 1 at para 60.

⁷ *Ibid* at para 62.

⁸ First Report of the Monitor dated March 16, 2025 (the "**First Report**") at para 8.5.

⁹ *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#) at para 70.

¹⁰ *Montréal (Ville) c Restructuration Deloitte Inc*, [2021 SCC 53](#) at para 116.

¹¹ *Ibid* at [para 115](#).

¹² *Ibid* at [para 114](#).

in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation”.¹³

9. Co-tenancy stays of the type requested by the Applicants have been granted in previous retail CCAA proceedings to preserve the *status quo* while the debtor restructures. In *Re T. Eaton Co.*,¹⁴ Houlden J.A. concluded that it was appropriate for a tenant to be stayed from exercising its rights under its lease’s co-tenancy clauses because the benefits of the stay far outweighed the prejudice to the tenant. Among other things, the exercise of co-tenancy rights would have a negative impact on the debtor’s restructuring and a potential exodus of tenants from malls could result in a significant ripple effect throughout local economies.¹⁵

10. *Re T. Eaton Co.* was cited favourably in *Target Canada Co (Re)*, where Morawetz R.S.J. (as he then was) exercised his discretion under s. 11 of the CCAA to grant a co-tenancy stay. Once again, a balancing of interests took place: the prejudice to the tenants was outweighed by the benefits of the co-tenancy stay to all stakeholders. Among other things, the co-tenancy stay was for a “finite period” of time and it would only postpone (not extinguish) contractual rights while the restructuring process was being resolved.¹⁶

11. In both *Target Canada Co (Re)* and *Re Sears Canada Inc (Re)*, co-tenancy stays applied to the applicants’ co-tenants as well as non-applicant stay parties (partnerships) within the debtors’ corporate structure.¹⁷ A similar co-tenancy stay was granted in *Nordstrom Canada Retail Inc (Re)*, which applied to the applicants’ co-tenants as well as a corporate non-applicant stay party’s co-tenants.¹⁸

¹³ *Ibid* at para 115.

¹⁴ *T Eaton Co (Re)*, [1997 CanLII 12405](#) (ONSC).

¹⁵ *Ibid* at para 7.

¹⁶ *Target Canada Co (Re)*, [2015 ONSC 303](#) at paras 46–48 [*Target 2015*].

¹⁷ *Target Canada Co (Re)*, (January 15, 2015), Ont SCJ [Commercial List], Court File No CV-15-10832-00CL ([Amended and Restated Initial Order](#)) at para 18; *Sears Canada Inc (Re)*, (June 22, 2017), Ont SCJ [Commercial List], Court File No CV-17-11846-00CL ([Initial Order](#)) at para 15.

¹⁸ *Nordstrom Canada Retail Inc (Re)*, (March 10, 2023), Ont SCJ [Commercial List], Court File No CV-23-00695619-00CL ([Amended and Restated Initial Order](#)) at para 16.

12. The co-tenancy stay will assist Landlords in dealing with the effects of the Applicants' CCAA proceeding and the proposed liquidation of the Inventory and FF&E at Liquidating Stores, allowing for the preservation of the *status quo* during the course of Applicants' liquidation.¹⁹ The co-tenancy stay is finite in duration: it lasts only so long as the Stay Period, unless lifted earlier – which a tenant can seek to do on application to the Court.²⁰

C. The Post-Filing Rent Owing to the Joint Venture Should Remain Stayed

13. As part of the Initial Order, this Court exercised its discretion to stay the post-filing rent payable by Hudson's Bay to RioCan-Hudson's Bay JV, YSS 1, or YSS 2 (the "**JV Rent**"), other than amounts which are payable by RioCan-Hudson's Bay JV under the JV Head Leases (the "**Head Lease Rent**"). Hudson's Bay submits that the Court should continue to stay the JV Rent payable to the joint ventures (including RioCan-HBC (Ottawa) Limited Partner, which was mistakenly omitted from the Initial Order) other than the Head Lease Rent.

i. This Court has the Jurisdiction to Stay the JV Rent

14. This Court has the discretion to "make any order that it considers appropriate in the circumstances" pursuant to s. 11 of the CCAA.²¹ This is the very discretion that the Court exercised when it stayed the JV Rent in the Initial Order.

15. In *Xplore Inc. (Re)*, a proceeding under the *Canada Business Corporations Act*,²² certain satellite providers argued that the terms of the stay granted in that case effectively and improperly required them to continue supplying services to Xplore Inc. without being paid post-filing payments to which they were contractually entitled.²³

16. Justice Kimmel dismissed the satellite providers' arguments, writing:

I have considered the additional authorities and submissions made by the Satellite Providers and the Applicants on this point. Nothing new has been

¹⁹ Second Bewley Affidavit, *supra* note 1 at para 65.

²⁰ See the proposed ARIO at para 18 (Tab 3 of the Applicants' Motion Record).

²¹ CCAA, *supra* note 2, s 11.

²² RSC 1985, c C-44 [CBCA].

²³ *Xplore Inc (Re)*, [2024 ONSC 4593](#) at para 55 [*Xplore*].

raised that causes me to revisit or change the determination made at first instance that the court has the jurisdiction within its broad discretion under s. 194(2) of the CBCA to grant a Stay that prevents a critical supplier from ceasing to provide services even if they are not being paid in accordance with their contractual terms, when the circumstances warrant it. This is not re-writing their Supply Agreements. The contractual obligations remain intact; rather, it is a means of addressing a short term need for the continued supply of a critical service (and eventual transition, if need be) to protect other stakeholders in the highly regulated industry in which Xplore operates.²⁴ [emphasis added]

17. Section 11.01(a) of the CCAA provides that an order made under s. 11 or 11.02 does not have the effect of “prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property ... provided after the order is made”.²⁵ However, as Kimmel J. observed in *Xplore Inc. (Re)*, “s.11.01 of the CCAA does not specify that suppliers must be paid at their contractual rates post CCAA filing”.²⁶ In that case, Kimmel J. was referring to suppliers of services, but the observation is equally applicable in the case at hand.

18. In *Xplore Inc. (Re)*, the satellite providers also argued that there was no precedent for the court exercising its discretion to pay a service provider less than its contractual entitlement during the period of the stay. Justice Kimmel ruled that the fact that an order precisely of this nature has never been made before does not mean that the court does not have the authority to make such an order: “There is always a first time for orders to be made in the appropriate circumstances within the framework and spirit of the applicable legislation.”²⁷

19. Justice Kimmel exercised the Court’s jurisdiction under s. 192(4) of the CBCA to “make any interim or final order it thinks fit”.²⁸ This Court has similar jurisdiction to “make any order that it considers appropriate in the circumstances” under s. 11 of the CCAA.²⁹ The analogous statutory provisions in the CBCA and the CCAA, Kimmel J.’s interpretation of s. 11.01(a) of the CCAA, and

²⁴ *Ibid* at [para 56](#).

²⁵ CCAA, *supra* note 2, s 11.01(a).

²⁶ *Xplore*, *supra* note 23 at [para 59](#).

²⁷ *Ibid* at [paras 61–63](#).

²⁸ CBCA, *supra* note 22, s 192(4).

²⁹ CCAA, *supra* note 2, s 11.

the broad and liberal interpretation given by courts to both statutes in the context of debt restructurings support a determination that this Court has the jurisdiction to stay the JV Rent other than the Head Lease Rent.

20. In *Nordstrom Canada Retail Inc. (Re)*, this Court stayed and suspended the payment of certain post-filing amounts incurred in constructing, fixturing, and furnishing the premises that would otherwise be due under the sublease between the debtor (as sublessee) and a non-applicant stay party (as sublessor).³⁰

21. In this case, a stay of the JV Rent (other than the Head Lease Rent) is the only reasonable outcome. Hudson's Bay Canada has two main businesses – running a chain of premier department stores and managing a portfolio of real estate assets in Canada. Hudson's Bay is the main retail operating entity. RioCan-Hudson's Bay JV is Hudson's Bay's primary real estate subsidiary. It is appropriate to think of the Applicants and the Non-Applicant Stay Parties, who are integral to Hudson's Bay Canada's overall business, as one enterprise. In this way, Hudson's Bay Canada is continuing to comply with their rent obligations to their landlords.

22. Further, the Applicants do not have the ability to pay the full amount of the JV Rent. The aggregate monthly JV Rent is approximately \$8.5 million.³¹ The Applicants were able to negotiate DIP Financing of \$23 million, inclusive of the original \$16 million approved in the Initial Order.³² The JV Rent over the next two months alone is greater than the total remaining availability under the DIP Facility.

23. The Cash Flow Forecast does not contemplate payment of the JV Rent other than the Head Lease Rent. The A&R DIP Agreement does not permit payment of the JV Rent other than

³⁰ *Nordstrom Canada Retail Inc (Re)*, (2 March 2023), Toronto CV-23-00695619-00CL ([Initial Order](#)) at para 9, ([Application Record](#)) at Tab 7 paras 7, 44.

³¹ Second Bewley Affidavit, *supra* note 1 at para 70.

³² *Ibid* at para 54.

the Head Lease Rent.³³

ii. Equity Favours the Stay of the JV Rent

24. In deciding whether to issue an order under the CCAA, the Court is “called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing’ the relief sought”.³⁴

25. In *Re Essar Steel Algoma Inc.*, the debtor and a port facility were party to a cargo handling agreement.³⁵ The debtor refused to make post-filing payments, and the port facility brought a motion to lift the stay to collect payment on the basis that it was providing cargo handling services without payment, contrary to s. 11.01(a) of the CCAA.³⁶ The Court dismissed the motion, writing that “it is necessary to balance the various interests in determining whether the stay ... should be lifted to require those payments to be made.”³⁷ Amongst other things, the Court found that the debtor lacked the liquidity to make the payments,³⁸ that such payments would be in breach of the interim financing terms,³⁹ and that various other post-filing creditors were in arrears.⁴⁰ The Court further noted that the port facility’s lender (which had an interest in the debtor making payment so that the port facility’s debt could be serviced) could call on its guarantee from another party, mitigating any harm to the lender.⁴¹ In a related decision on the same facts, the Court expressed concern that ordering the debtor to make post-filing payments would create serious risks to the debtors’ liquidity and risk the debtor’s operations being shut down completely, contrary to the interests of all stakeholders.⁴²

26. Here, the equities weigh in favour of continuing the stay of the JV Rent (other than the

³³ *Ibid* at para 70.

³⁴ *Olympia & York Developments Ltd v Royal Trust Co*, [1993 CanLII 8492](#) (ONSC), citing *Quintette Coal Ltd v Nippon Steel Corp*, [1990 CanLII 430](#) (BCCA).

³⁵ *Essar Steel Algoma Inc et al (Re)*, [2016 ONSC 4256](#) at para 5 [*Essar 2016*].

³⁶ *Essar Steel Algoma Inc et al (Re)*, [2017 ONSC 2585](#) at paras 4, 9.

³⁷ *Ibid* at [para 13](#).

³⁸ *Ibid* at [para 19](#).

³⁹ *Ibid* at [para 17](#).

⁴⁰ *Ibid* at [para 18](#).

⁴¹ *Ibid* at [para 20](#).

⁴² *Essar 2016*, *supra* note 35 at [paras 24, 26](#).

Head Lease Rent). The prejudice to RioCan-Hudson's Bay JV is relatively insignificant in comparison to the prejudice that would be suffered by the Applicants if payment of the JV Rent was not stayed. RioCan-Hudson's Bay JV is not receiving the JV Rent (other than the Head Lease Rent) and therefore cannot service its debt. However, this prejudice is temporary and RioCan-Hudson's Bay JV and the other Non-Applicant Stay Parties have the benefit of a stay. If payment of the JV Rent is not stayed, the orderly liquidation of the Applicants would collapse, the Applicants would lose the benefit of their DIP financing, and any chance of restructuring would be lost. This would be value destructive to the Applicants' stakeholders generally.

27. The staying of the JV Rent (other than the Head Lease Rent) strikes an appropriate balance of the competing interests in this case. The landlords under the head leases will continue to be paid in full. The Applicants will have the opportunity to attempt to restructure, thereby potentially preserving jobs, supplier relations, and community engagement. Accordingly, JV Rent (other than the Head Lease Rent) should remain stayed.

D. This Court Should Approve the Consulting Agreement, the Lease Monetization Process and the SISP

28. The Applicants are seeking the approval of three distinct processes to assist with canvassing the market for potential restructuring, refinancing or going concern sale opportunities, each with a view to maximizing recovery in respect of its available assets:

- (a) the **Liquidation Sale**, for the liquidation of the Inventory and FF&E;
- (b) the **Lease Monetization Process**, for the sale, transfer, or assignment of the Leases to third parties;⁴³
- (c) the **SISP**, to identify opportunities (i) to sell all, substantially all, or certain portions of the property or the business of the Non-Applicant Stay Parties or their Business, and/or (ii) for investment in, restructuring, recapitalization, refinancing or other form

⁴³ Second Bewley Affidavit, *supra* note 1 at para 111.

of reorganization of the Applicants and the Non-Applicant Stay Parties or their business.⁴⁴

29. The Applicants intend to commence the Liquidation Sale immediately at all of their retail stores while concurrently running the Lease Monetization Process and the SISP.⁴⁵ While the Applicants remain hopeful that a restructuring solution may still be identified that will see the Company continue as a going concern, the only interim financing that the Applicants could secure requires an immediate inventory liquidation.⁴⁶ The A&R DIP Agreement requires that the Applicants obtain the Liquidation Sale Approval Order, Lease Monetization Order, and SISP Order by no later than March 17, 2025,⁴⁷ and that the Liquidation Sale start immediately.⁴⁸

30. The Court has jurisdiction to approve a sales process authorizing the realization of a debtor's assets pursuant to s. 36 of the CCAA.⁴⁹ Courts have frequently exercised this jurisdiction in the context of retail insolvencies.⁵⁰ When considering the approval of a sale processes, the

⁴⁴ *Ibid* at para 134.

⁴⁵ *Ibid* at para 8.

⁴⁶ *Ibid* at para 7.

⁴⁷ *Ibid* at para 54.

⁴⁸ *Ibid* at para 48.

⁴⁹ See i.e. *Grant Forest Products Inc (Re)*, [2013 ONSC 5933](#) at para 44; *Indalex Ltd (Re)*, [2011 ONCA 265](#) at para 180.

⁵⁰ See i.e. *Danier Leather Inc (Re)*, [2016 ONSC 1044](#) at paras 10, 27 [*Danier*]; *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc*, [2019 ONSC 1305](#) at para 9; *Comark Holdings Inc (Re)*, (January 21, 2025), Ont SCJ [Commercial List], Court File No CV-25-00734339-00CL ([Endorsement of Justice Cavanagh](#)) at para 7 [*Comark Endorsement*], endorsing *Comark Holdings Inc (Re)*, (January 17, 2025), Ont SCJ [Commercial List], Court File No CV-25-00734339-00CL ([Realization Process Approval Order](#)) [*Comark Order*]; *Ted Baker Canada Inc et al v Yorkdale Shopping Centre Holdings Inc*, (May 3, 2024), Ont SCJ [Commercial List], Court File No CV-24-00718993-00CL ([Endorsement of Justice Black](#)) at paras 13–17 [*Ted Baker Endorsement*], endorsing *Ted Baker Canada Inc et al v Yorkdale Shopping Centre Holdings Inc (Re)*, (May 3, 2024), Ont SCJ [Commercial List], Court File No CV-24-00718993-00CL ([Realization Process Approval Order](#)) [*Ted Baker Order*]; *Mastermind GP Inc (Re)*, (November 30 2023), Ont SCJ [Commercial List], Court File No CV-23-00710259-00CL ([Endorsement of Justice Steele](#)) at paras 10–18 [*Mastermind Toys Endorsement*], endorsing *Mastermind GP Inc (Re)*, (November 30 2023), Ont SCJ [Commercial List], Court File No CV-23-00710259-00CL ([Realization Sale Approval Order](#)) [*Mastermind Order*]; *Nordstrom Canada Retail Inc (Re)*, [2023 ONSC 1814](#) at paras 6–13 [*Nordstrom Endorsement*], endorsing *Nordstrom Canada Retail Inc (Re)*, (March 20, 2023), Ont SCJ [Commercial List], Court File No CV-23-0069561900CL ([Liquidation Sale Approval Order](#)) [*Nordstrom Order*]; *Bed Bath & Beyond Canada Ltd (Re)*, [2023 ONSC 1230](#) at paras 7–9 [*BBB Endorsement*], endorsing *Bed Bath & Beyond Canada Ltd (Re)*, (February 21, 2023), Ont SCJ [Commercial List], Court File No CV-23-00694493-00CL ([Sale Approval Order](#)) [*BBB Order*]; *Sears Canada Inc (Re)*, (July 18, 2017), Ont SCJ [Commercial List], Court File No CV-17-11846-00CL ([Liquidation Sale Approval Order](#)); *Target Canada Co (Re)*, [2015 ONSC 846](#) at paras 2–5 [*Target Endorsement*], endorsing *Target Canada Co (Re)*, (February 4, 2015), Ont SCJ [Commercial List], Court File No CV-15-10832-00CL ([Approval Order – Agency Agreement](#)).

Court typically applies the criteria set out in *Nortel*:⁵¹

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole economic community?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale?
- (d) is there a better viable alternative?⁵²

31. Courts have also evaluated proposed retail realization processes in light of the criteria set out in s. 36(3) of the CCAA,⁵³ namely:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale or disposition;
- (c) whether the Monitor filed a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or disposition on creditors and stakeholders; and
- (f) whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.

32. The Applicants submit that the factors set out above are satisfied in respect of the proposed Liquidation Sale process. These same factors apply and are satisfied in respect of the SISF (subsection iii below) and the Lease Monetization Process (subsection ii below).

i. This Court Should Approve the Consulting Agreement and the Sale Guidelines

33. The Liquidation Consulting Agreement, together with the Sale Guidelines provide the

⁵¹ *Comark Endorsement*, *supra* note 50 at [para 5](#); *Nordstrom Endorsement*, *supra* note 50 at [paras 6–13](#); *BBB Endorsement*, *supra* note 50 at [paras 7–9](#); *Target Endorsement*, *supra* note 50 at [para 3](#).

⁵² *Danier*, *supra* note 50 at [para 23](#), citing *Nortel Networks Corp (Re)*, [2009 CanLII 39492](#) (ONSC) at para 49 [*Nortel*].

⁵³ See i.e. *Comark Endorsement*, *supra* note 50 at [para 6](#); *Ted Baker Endorsement*, *supra* note 50 at [para 14](#).

framework for the Liquidation Sale, which is to be conducted by the Liquidation Consultant. The Company intends to conduct the Liquidation Sale at all of the Company's retail stores, but it retains the right to amend the list of liquidating stores, on certain terms and conditions (if, for example, one or more going concern transactions materializes).⁵⁴ Inventory in the Distribution Centres will also be available to be liquidated in the Sale, with the inventory in the Scarborough Distribution Centre being utilized for e-commerce sales.⁵⁵

(A) The Realization of the Inventory and FF&E is Warranted at this Time

34. Given the Applicants' limited liquidity, the Applicants are seeking approval of an orderly realization of the Company's Inventory and FF&E as soon as possible in order to maximize recoveries and limit operating costs.⁵⁶ The Liquidation Consulting Agreement provides that the Liquidation Sale shall commence by no later than March 18, 2025.⁵⁷

(B) The Process to Select the Liquidation Consultant was Reasonable

35. Retaining the services of the Liquidation Consultant is a vital element of maximizing recoveries obtained pursuant to the Liquidation Sale. The quantity of assets being liquidated is significant – as of January 31, 2025, the Company carried nearly \$415 million of inventory on its balance sheet.⁵⁸ The Liquidation Sale will be held concurrently in 96 stores across seven provinces⁵⁹ and three distribution centres in two provinces,⁶⁰ with e-commerce sales operating out of a fourth distribution centre.⁶¹ Over 9,300 employees must be coordinated.⁶² The Liquidation Sale will be complex and conducted over an expedited Sale Term: March 18 to June 15, 2025.⁶³

36. The Initial Order authorized the Applicants, in consultation with the Monitor, to discuss

⁵⁴ Second Bewley Affidavit, *supra* note 1 at paras 104(c), 105.

⁵⁵ *Ibid* at para 104(d).

⁵⁶ *Ibid* at para 102.

⁵⁷ *Ibid* at para 104(b).

⁵⁸ First Bewley Affidavit, *supra* note 1 at para 128.

⁵⁹ *Ibid* at para 44.

⁶⁰ *Ibid* at para 81.

⁶¹ Second Bewley Affidavit, *supra* note 1 at para 104(d).

⁶² *Ibid* at para 102.

⁶³ *Ibid* at para 103.

with and solicit proposals from third party in respect of the liquidation of the Inventory and FF&E. The proposal from the Hilco JV was provided to the Applicants and the Monitor as a joint venture amongst four leading liquidators.⁶⁴ The Monitor and Reflect identified and canvassed other potential liquidators of the size and experience necessary to conduct Hudson's Bay Canada's liquidation.⁶⁵ It was determined that no other proposals were anticipated to be forthcoming.⁶⁶

37. The Applicants and their advisors, in consultation with the Monitor, continued negotiations with the Hilco JV in respect of the proposal that had been received, and considered comparables from other similar liquidations to the specific circumstances facing the Applicants in an effort to negotiate a final form of Consulting Agreement.⁶⁷

38. The Applicants believe that the Liquidation Consultant is qualified and capable of conducting the liquidation of the Inventory and FF&E at Liquidating Stores in a value-maximizing manner.⁶⁸ Three factors were particularly influential in forming this view:

- (a) the Liquidation Consultant has in-depth expertise and knowledge of the Applicants' business, merchandise, and store locations, which it has gained in various capacities (e.g., members of the Hilco JV were pre-filing secured creditors, are parties in respect of a pre-filing consignment arrangements with the Company, and have reviewed and provided appraisals of the Company's inventory);⁶⁹
- (b) the Liquidation Consultant is able to commence the sale process immediately;⁷⁰
and

⁶⁴ *Ibid* at paras 97-98.

⁶⁵ *Ibid* at para 48.

⁶⁶ *Ibid* at paras 97-98.

⁶⁷ *Ibid* at para 99.

⁶⁸ *Ibid* at para 101.

⁶⁹ *Ibid* at para 100.

⁷⁰ *Ibid*.

- (c) the Liquidation Consultant has significant and relevant experience. The four liquidators who are participating are known to the Court and have had experience in a variety of liquidations in Canada and the United States.⁷¹

39. The Monitor was consulted and directly involved throughout the process and is supportive of the engagement of the Liquidation Consultant, and the terms of the Liquidation Consulting Agreement.⁷²

(C) The Liquidation Consulting Agreement is Fair and Reasonable

40. The Applicants seek approval of the Liquidation Consulting Agreement, which provides that the Liquidation Consultant will act as the exclusive consultant for the purpose of conducting the Liquidation Sale.

41. The fee structure outlined in the Liquidation Consulting Agreement is designed to align the Liquidation Consultant's compensation with stakeholder outcomes: the Liquidation Consultant is entitled to a fee based on a percentage of proceeds, meaning they earn more by maximizing the value of the Applicants' Inventory and FF&E.⁷³ Specifically, the Liquidation Consultant is entitled to a fee with respect to Inventory sold at the Liquidating Stores during the Sale Term of:

- (a) 2.0% of the Gross Proceeds of Merchandise sold through the Stores (there is no fee on the sale of e-commerce goods made direct from the Scarborough Distribution Centre);
- (b) a 5.0% fee for Added Concession Merchandise, where such Consignment or Licensor vendors agree to continue sales of their inventory during the Liquidation Sale as Participating Concession Vendors;

⁷¹ *Ibid.*

⁷² First Report, *supra* note 8 at para 4.8.

⁷³ Second Bewley Affidavit, *supra* note 1 at para 104(j).

- (c) a 7.5% wholesale fee of merchandise sold through the Liquidation Consultant's wholesale channels;⁷⁴ and
- (d) a 15.0% fee on the sale of Gross Proceeds of FF&E sold during the sale.⁷⁵

42. Under the Liquidation Consulting Agreement, the Applicants are entitled to a Consignment Goods Fee of 6.5% of the gross proceeds of each of the categories of Consigned Goods and Additional Consultant's Goods that are sold during the Liquidation Sale.⁷⁶

43. Engaging the Liquidation Consultant to assist with the Liquidation Sale will produce better results than attempting to realize on the Inventory and FF&E without the assistance of the Liquidation Consultant.⁷⁷

(D) The Sales Guidelines are Fair and Reasonable

44. The Liquidation Sale is to be conducted pursuant to the Liquidation Consulting Agreement and Sale Guidelines.⁷⁸ The Liquidation Consulting Agreement provides for sales terms including: length of the sale term; continuation of e-commerce sales; clarity in respect of sales on a final sale basis; ability to use gift cards through April 6, 2025; no refund policy; and a process for the sale and removal of FF&E.

45. The Sale Guidelines were designed by the Applicants and the Liquidation Consultant, in consultation with the Monitor.⁷⁹ The Sale Guidelines are designed to maximize recovery on the Inventory and the FF&E for the benefit of the Applicants' creditors while ensuring that the Liquidation Sale takes place in an orderly manner. The Sale Guidelines are fair and reasonable in the circumstances.

46. The terms of the Sale Guidelines are summarized at paragraph 107 of the Second Bewley

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at para 104(n).

⁷⁶ *Ibid* at para 104(k).

⁷⁷ *Ibid* at para 106; First Report, *supra* note 8 at para 4.8.

⁷⁸ Second Bewley Affidavit, *supra* note 1 at para 107.

⁷⁹ *Ibid* at para 106.

Affidavit. The Sale Guidelines include clauses on additional goods and FF&E removal:

- (a) **additional goods:** the Liquidation Consultant has a right to include in the Liquidation Sale inventory and other goods from vendors not supplying Hudson's Bay Canada, provided the additional goods do not exceed \$50 million at cost in the aggregate, and the additional goods are of like kind and category and no lesser quality;⁸⁰ and
- (b) **FF&E removal:** the Liquidation Consultant can sell FF&E owned by Hudson's Bay Canada and located in the liquidating stores, subject to certain terms including specific removal conditions.⁸¹

47. The terms of the Sale Guidelines are similar to guidelines for inventory realization sales that have been negotiated and/or approved and approved by the Court in a number of other retail insolvencies, including *Comark Holdings Inc (Re)*, *Nordstrom Canada Retail Inc (Re)*, and *Bed Bath & Beyond Canada Ltd (Re)*,⁸² bearing in mind that the guidelines in each of these cases vary to some degree on account of the unique circumstances of each case. Both the additional goods⁸³ and the FF&E removal clauses⁸⁴ are commonplace.

(E) The Monitor was Consulted and Supports the Liquidation Process

48. The involvement and support of the Monitor is an important consideration in determining whether to approve a proposed sale process.⁸⁵ The Monitor was closely involved in the process by which the Consultant was chosen, and the realization process, as set out in the Liquidation Consulting Agreement and the Sale Guidelines, was designed in close consultation with the

⁸⁰ Sale Guidelines at para 16, attached at Schedule "A" of the proposed Liquidation Order (Tab 6 of the Applicants' Motion Record).

⁸¹ *Ibid* at para 9.

⁸² See *Comark Order*, *supra* note 50; *Nordstrom Order*, *supra* note 50; *BBB Order*, *supra* note 50 at [para 11 of sale guidelines](#); First Report, *supra* note 8 at para 4.8(d).

⁸³ See e.g. *Nordstrom Order* at [para 6 of the sale guidelines](#); *Ted Baker Order*, *supra* note 50 at [para 6 of the sale guidelines](#).

⁸⁴ See e.g. *Nordstrom Order*, *supra* note 50 at [para 10 of the sale guidelines](#); *Ted Baker Order*, *supra* note 50 at [para 10 of the sale guidelines](#); *BBB Order*, *supra* note 50 at [para 11 of sale guidelines](#).

⁸⁵ See i.e. *Ted Baker Endorsement*, *supra* note 50 at [para 17](#); *Mastermind Toys Endorsement*, *supra* note 50 at [para 16](#); *Nordstrom Endorsement*, *supra* note 50 at [para 9](#); *Target Endorsement*, *supra* note 50 at [para 2](#).

Monitor.⁸⁶ The Monitor supports the proposed Liquidation Order.⁸⁷

49. For the foregoing reasons, this Court should approve the Liquidation Consulting Agreement and the Sale Guidelines.

ii. The Lease Monetization Process and Retainer of JLL

50. The proposed Lease Monetization Process is intended to enable the Applicants to pursue all avenues and offers for the sale, transfer, or assignment of the Leases of the Applicants and Non-Applicant Stay Parties to third parties.⁸⁸ The Applicants, in their reasonable business judgment, and in consultation with the Lease Monetization Consultant, the Monitor, the DIP Agent and the Pathlight Agent may, from time to time, withdraw any Lease from the Lease Monetization Process.

(A) Overview of the Proposed Lease Monetization Process

51. The Lease Monetization Process is structured in two phases. The key aspects of the Lease Monetization Process are:

- (a) **solicitation of interest:** Interested Bidders must deliver a letter of interest to the Lease Monetization Consultant on or before April 15, 2025.⁸⁹ Interested Bidders that become a Qualified LOI Bidder will be invited to participate in Phrase 2;
- (b) **qualified bids:** By May 1, 2025, Qualified LOI Bidders must submit their Qualified Bids.⁹⁰ Qualified Bids must be, among other things, accompanied by a deposit in the amount of 10% of the purchase price.⁹¹

⁸⁶ Second Bewley Affidavit, *supra* note 1 at paras 96–100.

⁸⁷ First Report, *supra* note 8 at para 4.8; Second Bewley Affidavit, *supra* note 1 at para 110.

⁸⁸ Second Bewley Affidavit, *supra* note 1 at para 111.

⁸⁹ *Ibid* at para 122.

⁹⁰ *Ibid* at para 125.

⁹¹ *Ibid* at para 127(h).

- (c) **definitive agreements:** Successful Bidders must complete all agreements no later than May 15, 2025, with the motion to approve any transaction held no later than June 17, 2025.⁹²

52. The Lease Monetization Process provides for the marketing and potential sale of lease interests of the Applicants and the Non-Applicant Stay Parties. Therefore, the Lease Monetization Process provides that nothing therein shall be construed to:

- (a) permit or require any amendments to the terms of any Lease(s) without the consent of the applicable landlord(s);
- (b) obligate any landlord to negotiate with any bidder regarding any such amendments; and
- (c) acknowledge or declare that the interests in the Leases being marketed are capable of being transferred by the Applicants or the Non-Applicant Stay Parties.⁹³

53. The DIP Lenders and any other secured lender of the Applicants do not have the right to credit bid their secured debt against the assets secured thereby.⁹⁴

(B) Retention of JLL as the Lease Monetization Consultant and Approval of the Lease Monetization Consulting Agreement

54. The Lease Monetization Process will be conducted by the Company with the assistance of the Lease Monetization Consultant and under the supervision of the Monitor.⁹⁵ JLL was selected as the Lease Monetization Consultant because (a) it is familiar with the vast majority of the Applicants' Leases and stores, having recently conducted a third party appraisal of the Company's real estate assets; (b) could conduct the monetization process on an expedited basis; and (c) has extensive experience with marketing commercial real estate properties.⁹⁶

⁹² *Ibid* at paras 129–130; First Report, *supra* note 8 at para 5.6.

⁹³ Second Bewley Affidavit, *supra* note 1 at para 131.

⁹⁴ *Ibid* at para 132.

⁹⁵ *Ibid* at para 116.

⁹⁶ *Ibid* at para 113; see also the First Report, *supra* note 8 at paras 5.2–5.6.

55. Pursuant to the Lease Monetization Consulting Agreement, the Lease Monetization Consultant is entitled to the following fees:

- (a) starting March 17, 2025, a Work Fee of \$80,000 per month, plus applicable sales tax, payable in arrears and pro-rated for partial months for services performed under the Lease Monetization Consulting Agreement during the term of the agreement and up to a maximum aggregate amount of \$240,000 plus applicable sales taxes (the “**Work Fee**”). The Work Fee is fully creditable against payment of any Success Fee (as defined below);
- (b) a one-time gross success fee per Lease conditional upon the successful closing of a sale, transfer or assignment of a Lease Transaction equal to 10% of the net proceeds payable to Hudson’s Bay from any such Lease Transaction up to a maximum aggregate amount of \$175,000 plus applicable sales taxes per Lease monetized (“**Success Fee**”).⁹⁷

56. The Monitor was involved in the negotiation of the compensation provided for in the Lease Monetization Consulting Agreement and considers such compensation to be appropriate and reasonable.⁹⁸ Accordingly, the Lease Monetization Consulting Agreement should be approved.

(C) The Lease Monetization Process Should Be Approved

57. The *Nortel* criteria and the relevant s. 36(3) factors together support the approval of the Lease Monetization Process:

- (a) the Lease Monetization Process is structured to permit the Applicants to explore and fully canvass the market all within a single comparative framework;⁹⁹
- (b) the process contemplated in the Lease Monetization Process is fair and reasonable. The Lease Monetization Consultant will assist the Company in

⁹⁷ Second Bewley Affidavit, *supra* note 1 at para 117; First Report, *supra* note 8 at para 5.5.

⁹⁸ First Report, *supra* note 8 at para 5.3.

⁹⁹ *Ibid* at para 111; First Report, *supra* note 8 at para 5.9(c).

conducting the process, all under the supervision of the Monitor.¹⁰⁰ The Monitor is of the view that the timeframes set out in the Lease Monetization Process are reasonable in the circumstances;¹⁰¹

- (c) the Lease Monetization Process has been designed to comply with the milestone dates set out in the A&R DIP Agreement; and
- (d) the Monitor supports the Applicants' request to approve and implement the Lease Monetization Process.¹⁰²

58. Any successful bids will be subject to court approval.¹⁰³ At that stage, the Court will have a full opportunity to review the execution of the Lease Monetization Process and ensure compliance with all of the relevant s. 36(3) factors.

iii. The Sale and Investment Solicitation Process Should Be Approved

59. The proposed SISP is intended to solicit interest in, and opportunities for: (a) one or more sales or partial sales of all, substantially all, or certain portions of the Property or the Business; and/or (b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants and the Non-Applicant Stay Parties or their business.¹⁰⁴

(A) Overview of the Proposed SISP

60. The SISP is a broad and flexible process intended to solicit bids for (a) standalone assets such as intellectual property and/or (b) portions of the business that can be carried on as a going concern following a sale or restructuring.¹⁰⁵ The SISP will be conducted by Reflect, in its capacity as the Financial Advisor under the SISP, and under the supervision of the Monitor.¹⁰⁶ The key aspects of this process are as follows:

¹⁰⁰ Second Bewley Affidavit, *supra* note 1 at para 116.

¹⁰¹ First Report, *supra* note 8 at para 5.9(b).

¹⁰² *Ibid* at 5.9.

¹⁰³ Second Bewley Affidavit, *supra* note 1 at para 130.

¹⁰⁴ *Ibid* at para 134.

¹⁰⁵ *Ibid* at para 135.

¹⁰⁶ *Ibid* at para 136.

- (a) **solicitation of bids:** the Financial Advisor, in consultation with the Applicants, the Monitor, the DIP Agent and the Pathlight Agent, will prepare a list of Known Potential Bidders and an invitational Teaser Letter, and the Applicants will issue a press release;¹⁰⁷
- (b) **submission of bids:** Qualified Bidders must submit final binding proposals by April 15, 2025. Proposals must include evidence of financing, amongst other criteria;¹⁰⁸ and
- (c) **selection of and finalizing successful bid(s):** If one or more Final Qualified Bids is received, the most favourable Final Qualified Bid(s) may be selected by the Applicants. An Auction may be held, if needed, by no later than April 29, 2025. The Applicants, after consultation with the Monitor, the Financial Advisor, the DIP Agent, and Pathlight Agent, reserve the right to reject any or all Final Qualified Bids.¹⁰⁹

61. Under the SISP, to the extent any offers received in the SISP are for portions of the property that is also subject to the Liquidation Sales Process or the Lease Monetization Process, such offer must provide for repayment in full in cash on closing of the amounts reasonably anticipated to be outstanding under the Senior Indebtedness following completion of the Lease Monetization Process and the Liquidation Process or otherwise acceptable to the DIP Agent, the ABL Lender and the Pathlight Agent.¹¹⁰

62. The Applicants retain the discretion, with the consent of the Monitor, in consultation with the Financial Advisor, the DIP Agent and the Pathlight Agent, to modify, amend, vary or supplement the SISP from time to time.¹¹¹

¹⁰⁷ *Ibid* at para 139.

¹⁰⁸ *Ibid* at paras 137, 143.

¹⁰⁹ *Ibid* at paras 137, 145.

¹¹⁰ *Ibid* at para 135.

¹¹¹ *Ibid* at para 148.

63. The SISP provides that the DIP Lenders, the lenders under the FILO Credit Facility, and any other secured lender of the Applicants do not have the right to credit bid their secured debt against the assets secured thereby, except the DIP Lender may submit a credit bid for the intellectual property of the Applicants if no Successful Bid for the intellectual property (alone or as part of an offer to purchase and operate a portion of the business) emerges through the SISP.¹¹²

64. Like the Lease Monetization Process, the SISP provides that nothing therein shall be construed to acknowledge or declare that the assets and interests being marketed in the SISP are capable of being transferred by the Applicants or the Non-Applicant Stay Parties.¹¹³

(B) The SISP Should Be Approved

65. The *Nortel* criteria and the relevant s. 36(3) factors together support the approval of the SISP:

- (a) the SISP is structured as a broad and flexible process that permits the Applicants to explore and fully canvass the market all within a single comparative framework;¹¹⁴
- (b) the process contemplated in the SISP is fair and reasonable. The Financial Advisor will assist the Company in conducting the process, bringing to bear its considerable expertise.¹¹⁵ The Monitor is of the view that the timeframes set out in the SISP are reasonable in the circumstances.¹¹⁶ The SISP will be conducted under the supervision of the Monitor to ensure its integrity;¹¹⁷
- (c) the SISP has been designed to comply with the milestone dates set out in the A&R DIP Agreement; and

¹¹² *Ibid* at para 132.

¹¹³ Amended SISP at para 37.

¹¹⁴ Second Bewley Affidavit, *supra* note 1 at para 135; First Report, *supra* note 8 at para 6.6(a).

¹¹⁵ Second Bewley Affidavit, *supra* note 1 at para 136.

¹¹⁶ First Report, *supra* note 8 at para 6.6(c).

¹¹⁷ *Ibid* at para 6.2(b); Second Bewley Affidavit, *supra* note 1 at para 136.

- (d) the Monitor supports the Applicants' request to approve and implement the SISP.¹¹⁸

66. Any successful bids will be subject to court approval. At that stage, the Court will have a full opportunity to review the execution of the SISP and ensure compliance with all of the relevant s. 36(3) factors.

E. The DIP Should be Approved

67. Pursuant to the Initial Order, Hudson's Bay was granted interim funding in an amount not to exceed \$16 million. This financing was secured by the DIP Charge. Since the granting of the Initial Order, the DIP Lenders (now a group of four lenders)¹¹⁹ have agreed to provide additional funding to Hudson's Bay, as borrowers, during these CCAA proceedings, and the Guarantors, as guarantors, under the DIP Facility, on the terms set out in the A&R DIP Agreement, to a maximum principal amount of \$23 million (including the interim borrowings made prior to the Comeback Hearing).¹²⁰

68. Pursuant to s 11.2 of the CCAA, the Applicants seek approval of the DIP Charge to secure the DIP Facility. The proposed DIP Charge priority is set out in paragraph 55 of the Second Bewley Affidavit. It is proposed to be secured by the Loan Parties' Property and, depending on the collateral, to rank behind the Administration Charge, the KERP Charge, all amounts owing under the Revolving Credit Facility and the FILO Credit Facility (other than Excess ABL Obligations), all amounts owing under the Pathlight Credit Facility (other than Excess Term Loan Obligations), and the Directors' Charge (to the maximum amount of \$13.5 million), and ahead of all other security interests, charges and liens.¹²¹

¹¹⁸ First Report, *supra* note 8 at para 6.6.

¹¹⁹ The DIP Lender was originally HCS 102, LLC. The DIP Lenders under the A&R DIP Agreement are HCS 102, LLC, Tiger Asset Solutions Canada, ULC, 1903 Partners, LLC, and GA Group Solutions, LLC. These lenders are a subset of the lenders under the Amended ABL Credit Agreement.

¹²⁰ Second Bewley Affidavit, *supra* note 1 at para 54.

¹²¹ *Ibid* at para 55.

69. Section 11.2(1) of the CCAA provides the court with the authority to grant an interim financing charge “in an amount that the court considers appropriate”, subject to the limitation that the security or charge may not secure an obligation that exists before the order is made.¹²² The emphasis under s. 11.2(1) is on ensuring that the proposed financing is consistent with the pre-filing *status quo*, such that it upholds the relative priority of each secured creditor.¹²³ Section 11.2(4) of the CCAA lists the factors to be considered by the court in deciding whether to approve interim financing and grant an interim financing charge.¹²⁴

70. The factum of the Applicants filed in connection with the Initial Order set out in detail how the aforementioned factors favoured the approval of the original DIP Facility and DIP Charge. The Applicants repeat those submissions and note that the DIP Facility is the only available source of DIP financing for the Company.¹²⁵ Reflect, on behalf of the Company, began soliciting potential DIP lenders in early February.¹²⁶ None of the 19 parties contacted by Reflect were prepared or able to provide DIP financing to support a global restructuring transaction.¹²⁷ The Company also entered into discussions with a number of its major Landlords in an effort to secure financial assistance. To date, no Landlords have agreed to engage in substantive discussions with the Company around DIP financing or a potential restructuring.¹²⁸

71. The Company’s source of DIP financing is the A&R DIP Agreement, which provides for the commencement of the Liquidation Sale in all the Company’s retail stores commencing forthwith after the issuance of the Liquidation Sale Approval Order (if approved by the Court).¹²⁹ Without the A&R DIP Agreement, the alternative for the Applicants is an immediate bankruptcy.¹³⁰

¹²² CCAA, *supra* note 2, s 11.2(1).

¹²³ *BZAM Ltd (Re)*, (February 28, 2024), Ont SCJ [Commercial List], Court File No CV-24-00715773-00CL ([Endorsement of Justice Osborne](#)) at para 56.

¹²⁴ CCAA, *supra* note 2, s 11.2(4).

¹²⁵ Second Bewley Affidavit, *supra* note 1 at para 48.

¹²⁶ *Ibid* at para 43.

¹²⁷ *Ibid* at para 46.

¹²⁸ *Ibid* at para 47.

¹²⁹ *Ibid* at paras 48–49.

¹³⁰ *Ibid* at para 51.

72. The A&R DIP Agreement preserves Hudson's Bay Canada's ability to solicit interest in, and opportunities for: (a) one or more sales or partial sales of all, substantially all, or certain portions of the Property or the Business; and/or (b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of Hudson's Bay Canada or their business.¹³¹

73. The Monitor has advised that it is supportive of the approval of the A&R DIP Agreement and the DIP Lenders' Charge in the circumstances.¹³²

F. The KERP Should Be Approved

i. The Basis for the KERP

74. The Applicants seek the approval of the KERP. Retaining employees who are critical to the operational success of the business is of vital importance to the Applicants.¹³³

75. There are approximately 121 Key Employees, with an aggregate of approximately \$2.7 million in potential KERP Payments. Key Employees will receive KERP payment upon the earlier of (a) September 30, 2025; or (b) the date on which the liquidation is complete and the Company or Monitor has advised the Key Employees that their services are no longer required. Key Employees forfeit their entitlement if they resign or have their employment terminated with just cause prior to payment.¹³⁴

ii. The KERP Should be Approved

76. Section 11 of the CCAA gives the Court the discretion to authorize a KERP.¹³⁵ KERPs have been approved in numerous CCAA proceedings, including in situations that similarly involved an orderly wind-down of Canadian retail operations.¹³⁶

77. The factors that the Court considers in approving a KERP include (a) the approval of the

¹³¹ *Ibid* at para 52.

¹³² *Ibid* at para 57.

¹³³ *Ibid* at para 73.

¹³⁴ *Ibid* at paras 76–77; First Report, *supra* note 8 at para 8.24–8.27.

¹³⁵ CCAA, *supra* note 2, s 11.

¹³⁶ See e.g. *Target 2015*, *supra* note 16 at [para 59](#); *BBB Endorsement*, *supra* note 50 at [para 12](#).

Monitor; (b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP is not approved; (c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (e) the business judgment of the board of directors of the debtor.¹³⁷

78. Three criteria underlie the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (a) arm's length safeguards; (b) necessity; and (c) reasonableness of design.¹³⁸ Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact dependent, based on the needs of the particular CCAA debtor and the role of the beneficiaries in the business and the restructuring.¹³⁹

79. In the present case, each of these factors is satisfied:

- (a) **Monitor approval:** The Monitor supports the approval of the KERP and is of the view that the KERP will provide stability to, and facilitate, an orderly wind-down. The Monitor has reviewed the Key Employees list and is satisfied that the list is appropriate. The Court traditionally places "a great deal of confidence" in the Monitor's support for a KERP;¹⁴⁰
- (b) **beneficiaries likely to consider other opportunities:** Key Employees are likely to consider other employment opportunities if the KERP is not approved;¹⁴¹
- (c) **beneficiaries are crucial to restructuring success:** Given the scale and complexity of the business, it is imperative that the Key Employees remain

¹³⁷ *Just Energy Group Inc et al*, [2021 ONSC 7630](#) at para 7 [*Just Energy 1*]; *Aralez Pharmaceuticals Inc (Re)*, [2018 ONSC 6980](#) at para 29 [*Aralez*].

¹³⁸ *Aralez*, *supra* note 137 at [para 30](#).

¹³⁹ *Just Energy 1*, *supra* note 137.

¹⁴⁰ First Report, *supra* note 8 at para 8.28; *Grant Forest Products Inc (Re)*, [2009 CanLII 42046](#) (ONSC) at paras 18–19 [*Grant Forest 2009*].

¹⁴¹ Second Bewley Affidavit, *supra* note 1 at para 80.

employed by Hudson's Bay Canada lest the Liquidation Sale, Lease Monetization Process, and SISP be impaired;¹⁴²

- (d) **replacements cannot be found in a timely manner:** This CCAA proceeding is moving quickly. Finding alternative, qualified individuals will be challenging, disruptive, costly, and time consuming;¹⁴³ and
- (e) **board approval:** Courts will defer to the business judgment of a debtor regarding the scope and quantum of a KERP where the process for designing the KERP has been fair and objectively reasonable, and where the end result is also reasonable.¹⁴⁴ The board approved the proposed KERP.¹⁴⁵

80. On this basis, the KERP should be approved by the Court.

iii. The KERP Should be Secured by the KERP Charge

81. The Applicants propose that payments under the KERP be secured by a charge up to a maximum aggregate amount of \$3 million. The KERP Charge is proposed to rank behind the Administration Charge, but in priority to all other charges.¹⁴⁶

82. The Monitor supports the KERP Charge.¹⁴⁷

iv. The KERP Should Be Sealed

83. The Applicants request a sealing order in relation to the KERP overview, which is attached as a confidential exhibit to the First Report. The KERP overview contains confidential and sensitive information about the identity and compensation of the Key Employees.

84. Jurisdiction to grant a sealing order is found in s. 137(2) of the *Courts of Justice Act*.¹⁴⁸ The test for a sealing order was established by the Supreme Court of Canada in *Sierra Club*, and

¹⁴² *Ibid* at para 79.

¹⁴³ *Ibid*.

¹⁴⁴ *Grant Forest 2009*, *supra* note 140 at paras 17-18.

¹⁴⁵ Second Bewley Affidavit, *supra* note 1 at para 75.

¹⁴⁶ *Ibid* at para 82.

¹⁴⁷ *Ibid* at para 85; First Report, *supra* note 8 at para 8.30.

¹⁴⁸ *Courts of Justice Act*, RSO 1990, c C.43, s 137(2). See also *Target Canada Co (Re)*, 2015 ONSC 1487 at paras 28-30.

subsequently recast in *Sherman Estate*. The test requires the court to consider whether:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.¹⁴⁹

85. Each of these considerations supports the proposed sealing order. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an “important public interest” for purposes of this test.¹⁵⁰

86. This Court has previously granted sealing orders with respect to KERPs.¹⁵¹

87. The Applicants submit that the sealing relief is limited, proportionate and appropriate.

G. The Reflect Engagement Letter Should Be Approved

88. Hudson’s Bay Canada seeks approval of (a) the Reflect Engagement Letter and (b) an amendment to the Administration Charge to secure the fees that may become payable to Reflect pursuant to the Reflect Engagement Letter.

89. Section 11 of the CCAA provides the Court with authority to allow debtor companies to enter into arrangements to facilitate a restructuring, which may include the retention of expert advisors where necessary to help with the restructuring efforts.¹⁵²

90. Agreements with financial advisors are regularly approved in CCAA proceedings. In determining whether to approve such agreements and the fees payable thereunder, courts have

¹⁴⁹ *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#) at para 53 [*Sierra Club*]; *Sherman Estate v Donovan*, [2021 SCC 25](#) at paras 38, 43 [*Sherman Estate*].

¹⁵⁰ *Sierra Club*, *supra* note 149 at [para 55](#); *Sherman Estate*, *supra* note 149 at [paras 41–43](#).

¹⁵¹ *Just Energy Corp (Re)*, [2021 ONSC 1793](#) at paras 123–124 [*Just Energy 2*]; *Indiva Limited et al*, [2024 ONSC 3691](#) at paras 28–29; *Tacora Resources Inc (Re)*, [2023 ONSC 6126](#) at paras 160–161 [*Tacora*].

¹⁵² *Victorian Order of Nurses for Canada (Re)*, [2015 ONSC 7371](#) at para 27.

considered the following factors, among others:

- (a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;
- (b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor;
- (c) whether the success fee is necessary to incentivize the financial advisor; and
- (d) the complexity of the debtor's business, and whether that complicates any monetization or restructuring efforts.¹⁵³

91. Courts have considered similar factors when deciding whether to grant a charge to secure a financial advisor's fees.¹⁵⁴ It is not uncommon for the Court to grant orders securing the fees of a financial advisor.¹⁵⁵

92. In the present case, the Reflect Engagement Letter should be approved and Reflect should have the benefit of the Administration Charge:

- (a) the Monitor supports Reflect's engagement and its inclusion in the Administration Charge. The Initial Order provided for an Administrative Charge in the amount of \$2.8 million. The Applicants are not proposing that it increases;¹⁵⁶ and
- (b) Reflect has worked extensively with the Company since its engagement in February 2025, including by assisting with the solicitation and negotiation of the DIP Agreement and the A&R DIP Agreement.¹⁵⁷

H. The Directors' Charge Should Be Increased

93. The Initial Order provided for a Directors' Charge in the amount of \$26.3 million. Hudson's

¹⁵³ *Just Energy 2*, *supra* note 151 at [para 113](#); *Danier*, *supra* note 50 at [para 47](#), citing *Sino-Forest Corporation (Re)*, [2012 ONSC 2063](#) at paras 46–47; *Colossus Minerals Inc (Re)*, [2014 ONSC 514](#) at paras 30–36.

¹⁵⁴ *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, [2019 ONSC 1215](#) at paras 30–33; see also *Target 2015*, *supra* note 16 at [paras 72–75](#).

¹⁵⁵ *Tacora*, *supra* note 151 at [paras 152, 158](#).

¹⁵⁶ First Report, *supra* note 8 at paras 8.32, 8.42.

¹⁵⁷ *Ibid* at paras 8.40–8.42.

Bay Canada now seeks to increase the Directors' Charge to \$49.2 million.

94. As noted in the Applicants' factum in connection with the Initial Order, the Court has the jurisdiction to grant and increase the Directors' Charge pursuant to s. 11.51 and 11.52 of the CCAA. At the time of the Initial Order, the quantum of the Directors' Charge was circumscribed given that relief on an initial application is limited to what is reasonably necessary.¹⁵⁸

95. The Applicants submit that it is appropriate for the Court to exercise its jurisdiction and increase the Directors' Charge. The increased quantum is calculated based on an estimate of the maximum potential liability the D&Os could incur at any given time during the CCAA proceedings. The Monitor is supportive of the Directors' Charge and its increased quantum.¹⁵⁹

PART V: ORDER SOUGHT

96. The Applicants therefore request that the Court grant the ARIO, the Liquidation Order, the Lease Monetization Order, and the SISP Order substantially in the forms included at Tabs 3, 6 and 7 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March 2025.

Per N. Avis


 Stikeman Elliott LLP
 Lawyers for the Applicants

¹⁵⁸ CCAA, *supra* note 2, s 11.001.

¹⁵⁹ Second Bewley Affidavit, *supra* note 2 at para 94; First Report, *supra* note 8 at para 8.35.

**SCHEDULE A
LIST OF AUTHORITIES**

1. *Aralez Pharmaceuticals Inc (Re)*, [2018 ONSC 6980](#)
2. *Bed Bath & Beyond Canada Ltd (Re)*, (February 21, 2023), Ont SCJ [Commercial List], Court File No CV-23-00694493-00CL ([Sale Approval Order](#))
3. *Bed Bath & Beyond Canada Ltd (Re)*, [2023 ONSC 1230](#)
4. *BZAM Ltd (Re)*, (February 28, 2024), Ont SCJ [Commercial List], Court File No CV-24-00715773-00CL ([Endorsement of Justice Osborne](#))
5. *Century Services Inc v Canada (Attorney General)*, [2010 SCC 60](#)
6. *Colossus Minerals Inc (Re)*, [2014 ONSC 514](#)
7. *Comark Holdings Inc (Re)*, (January 17, 2025), Ont SCJ [Commercial List], Court File No CV-25-00734339-00CL ([Realization Process Approval Order](#))
8. *Comark Holdings Inc (Re)*, (January 21, 2025), Ont SCJ [Commercial List], Court File No CV-25-00734339-00CL ([Endorsement of Justice Cavanagh](#))
9. *Danier Leather Inc (Re)*, [2016 ONSC 1044](#)
10. *Essar Steel Algoma Inc et al (Re)*, [2016 ONSC 4256](#)
11. *Essar Steel Algoma Inc et al (Re)*, [2017 ONSC 2585](#)
12. *Grant Forest Products Inc (Re)*, [2009 CanLII 42046](#) (ONSC)
13. *Grant Forest Products Inc (Re)*, [2013 ONSC 5933](#)
14. *Indalex Ltd (Re)*, [2011 ONCA 265](#)
15. *Indiva Limited et al*, [2024 ONSC 3691](#)
16. *Just Energy Corp (Re)*, [2021 ONSC 1793](#)
17. *Just Energy Group Inc et al*, [2021 ONSC 7630](#)
18. *Mastermind GP Inc (Re)*, (November 30 2023), Ont SCJ [Commercial List], Court File No CV-23-00710259-00CL ([Realization Sale Approval Order](#)) and ([Endorsement of Justice Steele](#))
19. *Montréal (Ville) c Restructuration Deloitte Inc*, [2021 SCC 53](#)
20. *Nordstrom Canada Retail Inc (Re)*, (2 March 2023), Toronto CV-23-00695619-00CL ([Initial Order](#)) and ([Application Record](#))
21. *Nordstrom Canada Retail Inc (Re)*, (March 10, 2023) Ont SCJ [Commercial List], Court File No CV-23-00695619-00CL ([Amended and Restated Initial Order](#))

22. *Nordstrom Canada Retail Inc (Re)*, (March 20, 2023), Ont SCJ [Commercial List], Court File No CV-23-0069561900CL ([Liquidation Sale Approval Order](#))
23. *Nordstrom Canada Retail Inc (Re)*, [2023 ONSC 1814](#)
24. *Nortel Networks Corp (Re)*, [2009 CanLII 39492](#) (ONSC)
25. *Olympia & York Developments Ltd v Royal Trust Co*, [1993 CanLII 8492](#) (ONSC)
26. *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc*, [2019 ONSC 1305](#)
27. *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, [2019 ONSC 1215](#)
28. *Quintette Coal Ltd v Nippon Steel Corp*, [1990 CanLII 430](#) (BCCA)
29. *Sears Canada Inc (Re)*, (June 22, 2017), Ont SCJ [Commercial List], Court File No CV-17-11846-00CL ([Initial Order](#))
30. *Sears Canada Inc (Re)*, (July 18, 2017), Ont SCJ [Commercial List], Court File No CV-17-11846-00CL ([Liquidation Sale Approval Order](#))
31. *Sherman Estate v Donovan*, [2021 SCC 25](#)
32. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#)
33. *Sino-Forest Corporation (Re)*, [2012 ONSC 2063](#)
34. *T Eaton Co (Re)*, [1997 CanLII 12405](#) (ONSC)
35. *Tacora Resources Inc (Re)*, [2023 ONSC 6126](#)
36. *Target Canada Co (Re)*, (February 4, 2015), Ont SCJ [Commercial List], Court File No CV-15-10832-00CL ([Approval Order – Agency Agreement](#))
37. *Target Canada Co (Re)*, (January 15, 2015) Ont SCJ [Commercial List], Court File No CV-15-10832-00CL ([Amended and Restated Initial Order](#))
38. *Target Canada Co (Re)*, [2015 ONSC 1487](#)
39. *Target Canada Co (Re)*, [2015 ONSC 303](#)
40. *Target Canada Co (Re)*, [2015 ONSC 846](#)
41. *Ted Baker Canada Inc et al v Yorkdale Shopping Centre Holdings Inc*, (May 3, 2024), Ont SCJ [Commercial List], Court File No CV-24-00718993-00CL ([Endorsement of Justice Black](#)) and ([Realization Process Approval Order](#))
42. *Victorian Order of Nurses for Canada (Re)*, [2015 ONSC 7371](#)
43. *Xplore Inc (Re)*, [2024 ONSC 4593](#)

SCHEDULE B STATUTES

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.

[...]

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

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

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

[...]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[...]

Factors to be considered

11.2 (4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in [paragraph 23\(1\)\(b\)](#), if any.

Courts of Justice Act, RSO 1990, c C.43

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Canada Business Corporations Act, RSC 1985, c C-44

Powers of court

192 (4) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

- (a) an order determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;
- (b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;

- (c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;
- (d) an order permitting a shareholder to dissent under section 190; and
- (e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, AS AMENDED, AND IN THE MATTER OF HUDSON'S BAY COMPANY
ULC et al.

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

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

Proceeding commenced at Toronto

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(RE: COMEBACK MOTION)**

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