

Court File No. _____

**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 7, 2025)**

March 7, 2025

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TO: THE SERVICE LIST

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PART I – OVERVIEW¹

1. This factum is filed in support of an application by Hudson’s Bay and the other applicants listed above (each an “**Applicant**”, and collectively the “**Applicants**”) for relief under the *Companies’ Creditors Arrangement Act*², including an initial stay of proceedings that extends to certain Non-Applicant Stay Parties.

2. The Applicants are facing a severe liquidity crisis.³ Without a stay of proceedings and immediate access to DIP financing, Hudson’s Bay will be unable to meet its obligations as they come due and will be forced to shut down operations, which would be extremely detrimental to their landlords, suppliers, lenders, customers, and their approximately 9,364 employees.⁴

3. If the proposed Initial Order is granted, the Applicants will be able to access the DIP Facility and secure the interim financing necessary to provide Hudson’s Bay Canada with breathing room to advance a process to address their current financial circumstances and maximize the value of their businesses. At present, this includes: (a) conducting an orderly liquidation of certain retail stores; (b) conducting a process to monetize certain retail leases that hold value due to below-market rent; and (c) restructuring Hudson’s Bay Canada’s operations around a core number of locations.⁵

PART II – THE FACTS

4. The facts with respect to this application are set out in the Affidavit of Jennifer Bewley sworn March 7, 2025 (the “**Bewley Affidavit**”). All references to currency in this factum are references to Canadian dollars, unless otherwise indicated.

PART III – THE ISSUES

5. The issues in respect of the relief being sought in the Initial Order are whether:
- (a) the Applicants are entitled to protection under the CCAA;
 - (b) the Stay should be granted during the Stay Period;

¹ Capitalized terms used herein and not otherwise defined have the meanings given to them in the Affidavit of Jennifer Bewley sworn March 7, 2025 (the “**Bewley Affidavit**”).

² RSC 1985, c C-36, as amended.

³ Bewley Affidavit at para 189, Application Record of the Hudson’s Bay dated March 7, 2025 [“**Application Record**”] at Tab 2.

⁴ *Ibid* at paras 102 and 180.

⁵ *Ibid* at para 20.

- (c) the Stay should be extended to the Non-Applicant Stay Parties;
- (d) the payment of rent from Hudson’s Bay to the JV Landlords, as applicable, other than post-filing rent due to the landlords under the JV Head Leases, should be stayed;
- (e) continued and uninterrupted access to the Cash Management System should be approved;
- (f) A&M should be appointed as Monitor;
- (g) the DIP Agreement should be approved and the Applicants should be authorized to access the DIP Facility;
- (h) the Applicants should be authorized to pay pre-filing arrears owing to Critical Suppliers, subject to approval of the Monitor; and
- (i) the Administration Charge, the Directors’ Charge, and the DIP Charge, including the proposed priorities of such Charges, should be granted and approved.

PART IV – THE LAW

A. This Court Should Grant Protection to Hudson’s Bay Canada Under the CCAA

(i) The Applicants are either “Debtor Companies” or “Affiliated Debtor Companies” to which the CCAA Applies

6. The CCAA applies to a “debtor company” or “affiliated debtor companies” whose liabilities exceed C\$5 million. A “debtor company” is defined, *inter alia*, as a “company” that is “insolvent” or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.⁶

7. The CCAA defines “company” as, among other things, “[a]ny company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated [...]”.⁷ The Applicants, as corporations existing under the laws of the Province of Ontario and British Columbia, meet the definition of “company”.

⁶ CCAA, s. 2(1) and s. 3(1).

⁷ CCAA, s 2(1).

8. The term “insolvent” is not defined in the CCAA; however, it is well-established that in a CCAA application, this term can be interpreted by reference to “insolvent person” in s. 2(1) of the BIA.⁸ The definition of “insolvent person” in the BIA is:

a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due⁹

9. Each of the factors for “insolvent person” under the BIA are disjunctive.

10. In *Re Stelco*, Farley J. modified the first prong—part (a)—of the definition of “insolvent person” to include a financially troubled corporation that is “reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”¹⁰ This expanded definition reflects the “rescue” nature of a CCAA proceeding.¹¹

11. The Applicants satisfy part (a) of the definition of “insolvent person”. Hudson’s Bay is unable to make payments in full to many of its creditors, including to landlords, service providers, and vendors. The Company has deferred payments for many months. Most recently, it was unable to pay certain critical trade creditors in the ordinary course of business. Within the next several days, it will be unable to meet its employee payroll obligations.¹²

12. The Applicants have significant financial obligations that exceed the \$5 million threshold for protection under the CCAA.¹³

⁸ *Laurentian University of Sudbury*, 2021 ONSC 659 [“*Laurentian*”] at para 30; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 [“*Nordstrom*”] at para 26.

⁹ BIA, s. 2(1).

¹⁰ *Stelco Inc., Re*, [2004] O.J. No 1257 [“*Stelco*”] at para 26; *Laurentian* at para 32.

¹¹ *Ibid* at para 25.

¹² Bewley Affidavit at para 19, Application Record at Tab 2.

¹³ *Ibid* at para 128.

13. Accordingly, the Applicants are debtor companies to which the CCAA applies and therefore eligible for creditor protection.

(ii) Jurisdiction to Grant the Relief Sought

14. Subsection 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its “head office or chief place of business.”¹⁴

15. In *Nordstrom Canada Retail, Inc.*, this Court found that the company’s “chief place of business” was Ontario, notwithstanding the fact that the debtor was incorporated and had significant business operations in British Columbia.¹⁵ In determining whether the court had jurisdiction over the proceedings, this Court considered multiple factors, including the location of the company’s assets, employees and sales. This Court found that there was sufficient evidence establishing Ontario as the proper jurisdiction based on the following:

[...] 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled \$220 million, compared to \$148 million in British Columbia and \$77 million in Alberta.¹⁶

16. The same determination should be made in this case: 41 of the Applicants’ 96 stores are located in Ontario—more than any other province—and its head office is in Toronto. Approximately 51.6% of the Applicants’ employees are also located in Ontario, and its pension plan is registered with the Financial Services Regulatory Authority of Ontario.¹⁷

(iii) The Relief Sought is Reasonably Limited to What is Necessary

17. While this Court has broad discretion under s. 11 of the CCAA to make any order it considers appropriate in the circumstances,¹⁸ s. 11.001 of the CCAA requires that the relief sought on an initial application be limited to what is “reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.”¹⁹ This provision is intended to “limit the decisions that can be taken at the outset of a CCAA proceeding to measures

¹⁴ CCAA, s. 9(1); *Bed Bath & Beyond Canada Limited (Re)*, [2023 ONSC 1014](#) at para. 25 [*BBB (Initial Endorsement)*].

¹⁵ *Nordstrom* at paras. 11, 27.

¹⁶ *Ibid* at para 27.

¹⁷ Bewley Affidavit at para 105, Application Record at Tab 2.

¹⁸ CCAA, s. 11.02(1).

¹⁹ CCAA, s. 11.001.

necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players.”²⁰ Whether particular relief is necessary to stabilize a debtor company’s operations during the initial stay period is inherently a factual determination, based on all of the circumstances of a particular debtor.²¹

18. Each aspect of the relief sought by the Applicants in the proposed Initial Order is critical to respond to the circumstances in which the Applicants find themselves. The Applicants have worked with their advisors and the Proposed Monitor to limit the relief being sought to what is reasonably necessary to stabilize the business, continue operations in the ordinary course and protect the value of the property for the duration of an initial stay period. The Applicants intend to seek additional relief, as necessary, at a comeback motion.

B. The Applicants Require a Stay of Proceedings

19. The Applicants require a stay of proceedings to prevent a rapid erosion of enterprise value and to permit Hudson’s Bay Canada to continue as a going concern.

(i) Requested Stay is Necessary to Preserve the Applicants

20. This Court has the authority under subsection 11.02(1) of the CCAA to grant an order staying all proceedings against a debtor company for a period of not more than ten days on an initial application.²² The stay is the “primary tool” that allows the CCAA to achieve its restructuring objective, with the direct effect of such a stay being the creation of a status quo period that shields the debtor from its creditors while the restructuring is underway.²³

21. The Applicants require a stay of proceedings to maintain the status quo and preserve the value of their business.²⁴ The debtors are in a liquidity crisis. They have many creditors and, absent a stay of proceedings, there is a risk that individual creditors will seek to enforce their rights in multiple proceedings without regard for the debtors’ survival or maximization of their value. A stay of proceedings will provide the Applicants with the breathing space to develop and oversee an orderly restructuring process while maintaining business operations in the ordinary course.²⁵

²⁰ CCAA, s 11.001; *Lydian International Limited (Re)*, 2019 ONSC 7473 at para 25.

²¹ *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802 at para 16.

²² CCAA, s 11.02(1).

²³ *Montreal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 [“*Montreal v Deloitte*”] at para 46.

²⁴ *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 [“*Century Services*”] at para 60.

²⁵ Bewley Affidavit at paras 20, 193 and 200, Application Record at Tab 2.

(ii) The Stay Should be Extended to the Non-Applicant Stay Parties

22. The proposed Initial Order extends the stay of proceedings to the Non-Applicant Stay Parties, which includes RioCan-Hudson’s Bay JV. The Court has the discretion to grant such an extension pursuant to s. 11 and 11.02(1) of the CCAA, which allow the Court to grant “any order that it considers appropriate in the circumstances”²⁶ and to make a stay order “on any terms that it may impose”.²⁷

23. The Supreme Court of Canada has described this judicial discretion—which plays a prominent role in CCAA restructurings—as the “true ‘engine’” driving the statutory scheme of the CCAA.²⁸ In considering whether to extend a stay of proceedings to non-applicant parties, this Court has previously considered factors including whether (a) the non-applicant parties had guaranteed the debtor’s secured loans; (b) the non-applicant parties were deeply integrated into the business operations of the debtor; and (c) the claims against the non-applicant parties were derivative of the primary liability of the debtor.²⁹

24. Certain of the Non-Applicant Stay Parties are partnerships. Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships to ensure that the purposes of the CCAA can be achieved.³⁰ To decide otherwise would “defeat the entire purpose” of a CCAA restructuring.³¹

25. One of the Non-Applicant Stay Parties, RioCan-Hudson’s Bay JV, is a joint venture between Hudson’s Bay and a third-party non-applicant, RioCan Real Estate Investment Trust. Hudson’s Bay, through its wholly owned subsidiary Hudson’s Bay Holdings LP, holds a 78.0136% interest as a limited partner in RioCan-Hudson’s Bay JV. The general partner of RioCan-Hudson’s Bay JV is RioCan-Hudson’s Bay GP. Hudson’s Bay Holdings GP, a wholly owned subsidiary of Hudson’s Bay, has a 50% share ownership interest in RioCan-Hudson’s Bay GP and RioCan Financial Services Limited has the remaining 50% share ownership interest in RioCan-Hudson’s

²⁶ CCAA, s. 11.

²⁷ CCAA, s. 11.02(1).

²⁸ *Montreal v Deloitte* at para 48.

²⁹ *BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645 [“**BZAM**”] at para 42.

³⁰ *Nordstrom* at para 30.

³¹ *Re Just Energy Corp.*, 2021 ONSC 1793 [“**Re Just Energy**”] at para 117.

Bay GP.³² Certain of RioCan-Hudson's Bay JV's subsidiaries are proposed Non-Applicant Stay Parties.³³

26. This Court has previously granted stays of proceedings over entities in which the applicants lacked majority control. In *Re Imperial Tobacco Canada Limited*, the Court granted a stay over an entity in which the debtors held a 50% voting interest and 70% equity interest, writing that the non-applicant stay entity was "highly integrated with the [a]pplicants and indispensable to the [a]pplicants' business and restructuring."³⁴ The Court concluded by noting that extending the stay to the non-applicant entity would not prejudice any claimants.³⁵

27. In the present case, the Non-Applicant Stay Parties are highly integrated with and indispensable to the business of the Applicants. RioCan-Hudson's Bay JV and the other Non-Applicant Stay Parties are the Applicants' real estate subsidiaries (whether wholly or partially owned by Hudson's Bay) and represent all of Hudson's Bay Canada's owned real property interests and certain head leasehold interests.³⁶

28. The business and operations of the Non-Applicant Stay Parties is fully intertwined with those of the Applicants. Any proceedings commenced against the Non-Applicant Stay Parties would necessarily involve the Applicants' key personnel and consume the Applicants' limited resources. Extending the stay to the Non-Applicant Stay Parties prevents uncoordinated realization and enforcement attempts in different jurisdictions, all of which would be counterproductive to the maximization and protection of value for Applicants' stakeholders.³⁷ Accordingly, the Applicants submit that it is appropriate to extend the stay of proceedings to the Non-Applicant Stay Parties.

(iii) The Stay of Proceedings Should Prohibit Pre-Post Set-Off

29. The proposed Initial Order includes a provision prohibiting any person from setting off pre-filing obligations against post-filing obligations.

30. Section 21 of the CCAA, which contemplates the possibility of set-off within the CCAA, does not explicitly address the treatment of pre-post set-off. The Supreme Court of Canada held

³² Bewley Affidavit at paras 33-34, Application Record at Tab 2.

³³ *Ibid* at para 4(b).

³⁴ *Imperial Tobacco Canada Limited, et al, Re*, [2019 ONSC 1684](#) at paras 11-12.

³⁵ *Ibid* at para 11.

³⁶ Bewley Affidavit at para 197, Application Record at Tab 2.

³⁷ *BZAM* at para 44.

in *Montréal (City) v. Deloitte Restructuring Inc.* that the Court can stay pre-post set-off pursuant to its jurisdiction under s. 11 and 11.02 of the CCAA.³⁸ In *Re Tacora Resources Inc.*, the Court granted an order with language prohibiting pre-post set-off similar to the language in the proposed Initial Order.³⁹

C. The Payment of Rent by Hudson’s Bay to RioCan-Hudson’s Bay JV Should be Stayed

31. The proposed Initial Order stays and suspends the payment of rent by Hudson’s Bay to RioCan-Hudson’s Bay JV, YSS 1 or YSS 2 (the “**JV Sublandlords**”) under a lease pending further order of the Court, other than with respect to that amount of rent payable by the JV Sublandlords, as applicable, to a third party Landlord under the JV Head Lease until such JV Head Lease is disclaimed or terminated.⁴⁰

32. 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.”⁴¹ Within this framework, Courts have held that ensuring the equitable treatment of claims made against a debtor is an “overriding objective” and “fundamental principle” of the CCAA, and that the “chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.”⁴²

33. The unique circumstances of the present case warrant the exercise of judicial discretion to stay the post-filing rent owing to the JV Sublandlords (other than amounts which are payable by the JV Sublandlords to the third party landlords). Here, the JV Sublandlords are Non-Applicant Stay Parties in which Hudson’s Bay indirectly owns a 78.0136% equity interest and form an integrated and integral part of the Applicants’ business.⁴³

34. Five of the leases between the Applicants and the JV Sublandlords are subleases.⁴⁴ The JV Sublandlords, in turn, have head leases with third party Landlords. Most of the sublease structures are subject to third party property specific mortgages. The rent payable to the Landlords

³⁸ *Montreal v Deloitte* at [para 62](#).

³⁹ *Re Tacora Resources Inc.* (October 2023), Toronto CV-23-00707394-00CL ([Initial Order](#)) at para. 13.

⁴⁰ Draft Initial Order at para 9, Application Record at Tab 3.

⁴¹ *Century Services* at [para 70](#).

⁴² *Timminco Limited (Re)*, 2012 ONSC 4471 at [para 53](#); *Montreal v Deloitte* at [para 71](#).

⁴³ Bewley Affidavit at paras 4(b) and 51, Application Record at Tab 2.

⁴⁴ *Ibid* at para 56.

is much lower than current market rents. The rent payable to the JV Sublandlords by Hudson's Bay reflects market rents in 2015 when the structure was put in place. In the normal course, the rent paid by Hudson's Bay to the JV Sublandlords would be used to pay the rent payable to the Landlords under the head lease, some administrative costs, to service the mortgage debt and the remainder would be distributed to Hudson's Bay and RioCan by way of equity distribution.⁴⁵

35. The extension of the stay to the Non-Applicant Stay Parties, will stay the pre-filing debt obligations of the JV Sublandlords owed to the third party mortgage lenders. While RioCan and Hudson's Bay would normally receive equity distributions from RioCan-Hudson's Bay JV, such distributions will be stayed by the CCAA proceedings. The Applicants are requesting a stay of the payment of rent by Hudson's Bay to the JV Sublandlords (other than any amount necessary to satisfy the amount of rent payable under any head leases, thereby mitigating any prejudice to the Landlords and promoting compliance with s. 11.01 of the CCAA).⁴⁶

36. The Applicants are facing a severe liquidity crisis and require immediate access to DIP financing to continue operating. The Applicants' ability to avoid a complete liquidation and restructure around a lower number of locations – thereby preserving the jobs of thousands of employees – is dependant upon preserving as much liquidity as possible. If Hudson's Bay is required to pay rent in full to the JV Sublandlords, that cash (net of payments to Landlords and for other expenses) would pool in the JV Sublandlord entities resulting in a potential windfall recovery for the JV Sublandlords' secured creditors to the detriment of Hudson's Bay and its stakeholders generally.

37. The terms of the DIP Facility do not permit Hudson's Bay to make post-filing payments to RioCan Hudson's Bay JV.

38. In *Re Nordstrom Canada Retail Inc.*, this 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). Basic rent was not stayed, but amounts incurred in constructing, fixturing, and furnishing the premises that would otherwise be due under the subleases were stayed.⁴⁷

⁴⁵ *Ibid* at paras 57-58.

⁴⁶ *Ibid* at para 215.

⁴⁷ *Re Nordstrom Canada Retail Inc.* (2 March 2023), Toronto CV-23-00695619-00CL ([Initial Order](#)) at para. 9, ([Application Record](#)) at Tab 7 paras. 7 and 44.

39. The British Columbia and Québec courts declined to relieve debtors of paying post-filing rent in *Re Quest University Canada* and *Groupe Dynamite inc.*⁴⁸ Both of these cases, however, are easily distinguishable from the present situation as they did not involve a related-party landlord, and the debtors in those cases proposed deferring or not paying *all* of the rent owing under their leases.

40. For the foregoing reasons, Hudson's Bay requests that this Court stay post-filing rent payments to the JV Sublandlords other than any amount necessary to pay the rent due on the head lease.

D. The Court Should Authorize Certain Pre-Filing Payments to Critical Suppliers

41. The proposed Initial Order authorizes, but does not require, the Applicants to make payments for goods or services supplied to the Applicants prior to the date of the Initial Order if, in the opinion of the Applicants following consultation with the Monitor, such supplier or service provider is critical to the Business. In all cases, the consent of the Monitor is required to make any such payment.

42. Section 11.4 of the CCAA gives the Court the specific authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing for services provided after the filing. Here, however, the Applicants are seeking authority to pay pre-filing critical suppliers.

43. Section 11.4 of the CCAA does not oust the court's inherent jurisdiction to make provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor.⁴⁹ Case law demonstrates that this Court may grant such authority, particularly where the pre-filing payments are integral to the debtor's ability to operate, the debtor has a need for the uninterrupted supply of the goods or services, the requirement that the monitor approve any such payments, and monitor's support and willingness to ensure pre-filing payments are appropriate, whether the applicants have sufficient inventory of goods on hand to meet their needs, and the effect of not making such pre-filing payments on the debtors' operations and ability to restructure.⁵⁰

⁴⁸ *Quest University Canada (Re)*, [2020 BCSC 921](#); *Group Dynamite inc. C. Deloitte Restructuring Inc.*, [2021 QCCS 3](#).

⁴⁹ *BZAM* at [para 73](#); *Cline Mining Corporation (Re)*, [2014 ONSC 6998](#) at [paras 39-40](#).

⁵⁰ *Clover Leaf Holdings Company, Re.*, [2019 ONSC 6966](#) at [para 25](#); *Re Just Energy* at [para 99](#); *BZAM* at [paras 73-74](#).

44. The Applicants require the ability to make pre-filing payments to critical suppliers to ensure that their business continues uninterrupted throughout these proceedings. The Applicants do not have any readily available means to replace the critical suppliers, and even if they did, doing so would be time consuming and costly.

E. The DIP Facility and DIP Charge Should be Approved

(i) The Proposed DIP Financing Satisfies s. 11.2(1) and (4) of the CCAA

45. Section 11.2(1) of the CCAA gives the Court the statutory authority and discretion to grant a debtor-in-possession (“DIP”) financing charge.⁵¹ Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

Factors to be considered

(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.⁵²

46. When considering the s. 11.2(4) factors, the Court “must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring.”⁵³ The Court is to make an “independent determination” when selecting a DIP proposal, having regard to the factors in subsection 11.2(4).⁵⁴

⁵¹ CCAA, s 11.2.

⁵² CCAA, s 11.2(4).

⁵³ *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459, at para 15.

⁵⁴ *Crystallex (Re)*, 2012 ONCA 404 [“*Crystallex*”] at para 85

47. On this initial application, the Applicants are seeking a DIP Charge of a principal amount of \$16 million, which charge will rank according to the waterfall priority set out in the proposed Initial Order. For the following reasons, the DIP Facility and the DIP Charge should be approved by this Court:

- (a) the Applicants are facing an urgent liquidity crisis. They are unable to meet their commitments to suppliers, and they will be unable to fund payroll within a matter of days. Any loss of employees or important contracts could devastate the Applicants' business;⁵⁵
- (b) the cash flow projections demonstrate that debtor-in-possession financing is urgently required to provide the Applicants with the required liquidity for continued business operations in the ordinary course the proposed DIP Facility will preserve the value and going concern operations of the Company's business by ensuring the continued operations of the key business segments, which is in the best interests of the Applicants and their stakeholders;⁵⁶
- (c) the DIP Lenders require the DIP Charge to provide the DIP Facility;⁵⁷
- (d) the DIP Lenders were selected after discussions with multiple potential lenders, although given the urgency of this initial application a comprehensive canvas of the market was not undertaken. The Applicants believe that the DIP Facility represents the best interim financing that is available in the circumstances;⁵⁸
- (e) the DIP Lender is an existing pre-filing secured creditor;
- (f) the Proposed Monitor believes the economic terms of the DIP Facility are reasonable in the circumstances and is supportive of the proposed DIP Facility.⁵⁹

⁵⁵ Bewley Affidavit at para 19, Application Record Tab 2.

⁵⁶ *Ibid* at para 195.

⁵⁷ *Ibid* at para 206.

⁵⁸ *Ibid* at paras 202-204.

⁵⁹ *Ibid* at para 209.

48. In accordance with subsection 11.2(1) of the CCAA, notice has been given to the secured creditors that are proposed to be primed by the DIP Charge.⁶⁰ The Initial Order expressly states that the proposed DIP Charge does not secure any pre-filing obligations of the Applicants.⁶¹

49. The Applicants submit that approval of the proposed DIP Facility and the DIP Lenders' Charge is appropriate in the circumstances, consistent with the terms of the CCAA, and in the best interests of the Applicants and their stakeholders.

(ii) The Proposed DIP Financing Satisfies s. 11.2(5) of the CCAA

50. Pursuant to s. 11.2(5) of the CCAA, interim financing on an initial application is to be limited to what is "reasonably necessary" to meet the debtor's needs.⁶² Courts have approved DIP financing where it provides stability to the debtor's business, ensures liquidity, prevents customers from going elsewhere, and ensures the day-to-day operations of the debtor's business.⁶³

51. In *MJardin Group Inc. (Re)*, this Court granted DIP financing as part of the initial order on the basis that the debtor had urgent liquidity needs and without the DIP financing, the debtor company would have been unable to continue its business and make payroll in the near term.⁶⁴

52. Absent the proposed DIP Facility, the Applicants will be unable to continue their business operations in the ordinary course. The DIP Facility is required to pay ordinary course operating disbursements. The amount of the DIP Facility and the quantum of the DIP Charge are both limited to what is strictly necessary for the continued operations of the Applicants from now until the Comeback Motion.

53. For the foregoing reasons the Board determined, following advice and recommendations from the Companies' advisors, that the DIP Facility should be implemented.⁶⁵

⁶⁰ CCAA, [s. 11.2\(1\)](#).

⁶¹ Draft Initial Order at para 36, Application Record at Tab 3.

⁶² CCAA, [s. 11.2\(5\)](#).

⁶³ *Re: Mobilicity Group*, [2013 ONSC 6167](#) ["**Mobilicity**"] at [para 30](#); see also *Re Just Energy*.

⁶⁴ *MJardin Group, Inc (Re)*, [2022 ONSC 3338](#) at [para 31](#).

⁶⁵ Bewley Affidavit at paras 201 and 210.

F. A&M should be Appointed as Monitor

54. When an order is made on the initial application in respect of a debtor company, the Court shall appoint a person to monitor the business and financial affairs of the company.⁶⁶ The person appointed must be a trustee within the meaning of subsection 2(1) of the BIA.⁶⁷

55. The Applicant seeks to appoint A&M as Monitor in these CCAA Proceedings. A&M is a trustee within the meaning of subsection 2(1) of the BIA and is not subject to any of the restrictions as to who may be appointed as monitor pursuant to subsection 11.7(2) of the CCAA. A&M has a significant amount of experience acting as a court-appointed monitor and has consented to act as the Monitor in these CCAA Proceedings.⁶⁸

G. Court-ordered Charges

(i) Administration Charge

56. The proposed Initial Order provides for an administrative charge on the Property in the amount of \$2,800,000 (the “**Administrative Charge**”) to secure the professional fees and disbursements of the Proposed Monitor, its counsel, and the Applicants’ counsel, incurred prior to, on, or subsequent to the date of the Initial Order, incurred at their standard rates and charges.⁶⁹

57. Section 11.52 of the CCAA expressly provides the Court with the jurisdiction to grant the Administration Charge. The list of non-exhaustive factors to be considered when granting an administration charge include: the size and complexity of the business being restructured; the proposed role of the beneficiaries of the charge; whether there is unwarranted duplication of roles; whether the quantum of the proposed charges appears to be fair and reasonable; the position of the secured creditors likely to be affected by the charge; and the position of the monitor.⁷⁰

58. The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

- (g) the beneficiaries of the Administration Charge have the requisite knowledge with respect to those regulations and have, and will continue to, contribute to these CCAA Proceedings and assist the Applicants with their business;

⁶⁶ CCAA, [s 11.7](#).

⁶⁷ CCAA, [s 11.7](#); BIA, [s 2\(1\)](#).

⁶⁸ Bewley Affidavit at paras 220-222.

⁶⁹ Bewley Affidavit at para 225.

⁷⁰ *Canwest Publishing Inc*, [2010 ONSC 222](#) [“*Canwest*”], at [para 54](#).

- (h) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;
- (i) the quantum of the proposed Administration Charge is fair and reasonable; and
- (j) the Proposed Monitor supports the Administration Charge.⁷¹

(ii) Directors' Charge

59. The Applicants seek a directors' charge in the amount of \$26,300,000 (the "**Directors' Charge**") to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings.⁷²

60. Section 11.51 of the CCAA affords the Court the jurisdiction to grant the Directors' Charge. This Court has held that the purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities that could be incurred during restructuring.⁷³ A court may not make the order if "the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost", and the court shall make an order declaring that the charge does not apply in respect of a specific obligation or liability incurred by a director or officer "if in its opinion, the obligation or liability was incurred as a result of the director's or officer's gross negligence or willful misconduct."⁷⁴

61. The Applicants submit it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

- (a) the directors and officers have indicated their continued service and involvement in these CCAA Proceedings is conditional upon the granting of the Directors' Charge;
- (b) the Directors' Charge will only apply to the extent that the directors' and officers' respective insurance is insufficient or ineffective;

⁷¹ Bewley Affidavit at para 228.

⁷² *Ibid* at para 231.

⁷³ *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ONSC) at paras 46-48.

⁷⁴ CCAA, s 11.51; see also *Laurentian University of Sudbury*, 2021 ONSC 1098, *supra* at para 81; *Jaguar Mining Inc, Re*, 2014 ONSC 494 at para 45.

- (c) the Applicants require the active and committed involvement of certain directors and officers in order to continue business operations in the ordinary course;
- (d) the Directors' Charge would only cover obligations and liabilities that the Directors and Officers incur after the commencement of the CCAA Proceedings and does not cover wilful misconduct or gross negligence;
- (e) the amount under the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure during the initial 10-day period; and
- (f) the Proposed Monitor is supportive of the Directors' Charge.⁷⁵

PART V – ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of March, 2025.

per 

Stikeman Elliott LLP
Lawyers for the Applicants

⁷⁵ Bewley Affidavit at para 229-233.

**SCHEDULE A
LIST OF AUTHORITIES**

- 1) *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014
- 2) *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802
- 3) *BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645
- 4) *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114
- 5) *Canwest Publishing Inc*, 2010 ONSC 222
- 6) *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
- 7) *Cline Mining Corporation (Re)*, 2014 ONSC 6998
- 8) *Clover Leaf Holdings Company, Re.*, 2019 ONSC 6966
- 9) *Crystallex (Re)*, 2012 ONCA 404
- 10) *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459
- 11) *Group Dynamite inc. C. Deloitte Restructuring Inc.*, 2021 QCCS 3
- 12) *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684
- 13) *Jaguar Mining Inc, Re*, 2014 ONSC 494
- 14) *Laurentian University of Sudbury*, 2021 ONSC 1098
- 15) *Laurentian University of Sudbury*, 2021 ONSC 659
- 16) *Lydian International Limited (Re)*, 2019 ONSC 7473
- 17) *MJardin Group, Inc (Re)*, 2022 ONSC 3338
- 18) *Montreal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53
- 19) *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422
- 20) *Quest University Canada (Re)*, 2020 BCSC 921
- 21) *Re Just Energy Corp.*, 2021 ONSC 1793
- 22) *Re: Mobilicity Group*, 2013 ONSC 6167
- 23) *Stelco Inc., Re*, [2004] O.J. No 1257
- 24) *Tacora Resources Inc. (October 2023)*, Toronto CV-23-00707394-00CL (Initial Order)
- 25) *Timminco Limited (Re)*, 2012 ONSC 4471

SCHEDULE A STATUTES

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

Definitions

2(1) In this Act,

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of [section 2](#) of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

debtor company means any company that

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

[...]

Application

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

[...]

Jurisdiction of court to receive applications

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

[...]

General power of court

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

Relief reasonably necessary

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

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

[...]

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.

Additional factor — initial application

11.2 (5) When an application is made under subsection (1) at the same time as an initial application referred to in [subsection 11.02\(1\)](#) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Critical supplier

11.4 (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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Security or charge relating to director's indemnification

11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

[...]

Bankruptcy and Insolvency Act matters

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

11.7 (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

- (a) if the trustee is or, at any time during the two preceding years, was
 - i. a director, an officer or an employee of the company,
 - ii. related to the company or to any director or officer of the company, or
 - iii. the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
- (b) if the trustee is
 - i. the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
 - ii. related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Definitions

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

trustee or licensed trustee means a person who is licensed or appointed under this Act.

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: _____

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

Proceeding commenced at Toronto

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