

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 **EXPRESS FASHION APPAREL
CANADA INC.** and **EXPRESS CANADA GC GP, INC.**

APPLICANTS

FACTUM OF THE APPLICANTS

May 4, 2017

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PART I - NATURE OF THIS APPLICATION

1. Express Fashion Apparel Canada Inc. ("**Express Canada**") and Express Canada GC GP, Inc. ("**Express Canada GC**" and, together with Express Canada, the "**Applicants**"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). While the limited partnership Express Canada GC, LP ("**Express Canada LP**") is not an Applicant in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an Initial Order under the CCAA extend to Express Canada LP, which is wholly owned by the Applicants and which is integral to the Applicants' retail operations. Together, the Applicants and Express Canada LP are referred to below as the "**Express Canada Entities**".

2. The Express Canada Entities have developed a filing platform under the CCAA that takes into account the interests of their stakeholders, including employees and landlords. The Express Canada Entities are proposing to give these key stakeholders certainty by conducting an orderly liquidation run by a professional liquidator that will (1) see the employees fairly compensated for their continued involvement as the enterprise winds down and (2) see the liquidation complete and

leased premises vacated by June 15, 2017. Express Canada believes that its proposed CCAA proceeding will maximize value for, and minimize disruption to, its significant stakeholders.

3. Express Canada operates 17 retail stores in premium malls in Ontario, Alberta, and British Columbia, selling apparel, accessories, and other products under the “EXPRESS” brand-name. The Canadian business constitutes approximately 2% to 3% of the consolidated operations of Express Canada’s ultimate parent, Express, Inc., a publicly-traded company operating over 650 stores (through its affiliates) and generating over US\$2 billion in annual sales.

4. Express Canada has generated losses every year since entering the Canadian marketplace in 2011. Its immediate parent, Express, LLC (“**Express U.S.**”), initially invested approximately \$30 million in the Canadian expansion and has since absorbed over \$56 million in additional losses. Express Canada is financially and operationally wholly dependent on Express U.S.

5. After carefully considering Express Canada’s increasingly poor financial performance and negative cash flow, along with all reasonably available options, Express U.S. has concluded that it is in its stakeholders’ best interests to discontinue further financial and operational support of Express Canada. As a result, Express Canada has no choice but to cease operations and wind down its business.

6. Without Express U.S.’s ongoing financial and operational support, the Express Canada Entities are insolvent. Lacking any reasonable alternatives, Express Canada’s resolution to cease operations places it in default under its long-term retail store leases and either accelerates, or allows landlords to accelerate, the rent obligations for the remaining terms of the leases. These crystalized obligations amount to approximately \$120 million. Even taking into account the landlords’

obligations to mitigate damages, these obligations will exceed \$5 million (for application of the CCAA) and cause the Express Canada Entities' total liabilities to exceed their total assets.

7. A responsible and orderly wind down under Court supervision, with the benefit of the inherent flexibility of the CCAA and the oversight of the proposed Monitor, Alvarez & Marsal Canada Inc. (the "**Proposed Monitor**" and if appointed, the "**Monitor**"), provides a framework in which the Express Canada Entities can, *inter alia*:

- (a) pursue the sale of remaining inventory and furniture, fixtures and equipment under a Court-supervised process, thereby creating opportunities to materially enhance recoveries for all stakeholders during the critical window of time to complete this process before the upcoming summer months;
- (b) secure arrangements with Express U.S. to have it continue to provide the critical back-office business and administrative support services that it has provided since the business expanded into Canada, without which any realization process and wind down would be chaotic, and to continue licencing the intellectual property ("**IP**") associated with the "EXPRESS" brand, which is needed for Express Canada (or any other) to maximize realization of the inventory;
- (c) develop and implement an employee retention plan to fairly compensate and incentivize employees to continue working during the Court-supervised realization process, so that the wind down of the business is controlled and orderly, and to maximize recoveries;

- (d) create a level playing field to ensure that affected stakeholders of the Express Canada Entities are treated as fairly and equitably as the circumstances allow; and
- (e) avoid the significant maneuvering among creditors and other stakeholders (and the resulting chaos) that would inevitably occur in any wind down of an insolvent debtor, to the detriment of stakeholders, in the absence of the Court's supervision.

8. In sum, the Applicants seek "breathing space" to develop and conduct an orderly wind down of operations for the benefit of their stakeholders. The relief requested makes appropriate use of the flexibility of the CCAA to ensure that the Express Canada Entities can take all necessary and appropriate steps to wind down the business in a controlled, responsible, and orderly fashion.

9. The Applicants are also seeking an initial stay of proceedings and other relief under the CCAA with a view to developing a consensual plan of compromise or plan of arrangement with broad support among stakeholders.

10. The Express Canada Entities have, with the assistance of the Proposed Monitor, prepared 13-week cash flow projections in accordance with the CCAA, showing that they have sufficient liquidity to continue operating during the proposed initial stay period. The Express Canada Entities will not require debtor-in-possession financing.

PART II - SUMMARY OF FACTS

11. The facts are more fully set out in the Affidavit of Todd Painter.¹ Capitalized terms used in this factum that are not otherwise defined have the same meanings as in the Painter Affidavit.

¹ Affidavit of Todd Painter sworn May 3, 2017 [Painter Affidavit].

A. Expansion into Canada

12. Since 2011, Express U.S. has invested approximately \$30 million to capitalize Express Canada and expand “EXPRESS”-branded retail stores into Canada.² Express Canada and Express U.S. are both members of a larger corporate family that collectively operates approximately 650 stores across the United States, Canada, and Puerto Rico and which together have approximately 18,000 employees and approximately US\$2.2 billion in annual revenues.³

13. The Canadian business has never expanded beyond a small proportion of the larger “EXPRESS” retail chain. With 17 retail stores operating in Ontario, Alberta, and British Columbia employing fewer than 340 employees and generating only approximately \$45 million in annual revenues, the Canadian business constitutes between 2% and 3% of total annual sales.⁴

B. Structure of the Canadian Business

14. The Canadian business is operated by Express Canada (a New Brunswick corporation), which is a wholly-owned direct subsidiary of Express U.S. (a Delaware limited liability company).⁵ The ultimate parent of both Express U.S. and Express Canada, through several entities, is Express, Inc. (a Delaware corporation), which is traded on the New York Stock Exchange.⁶

15. All of Express Canada’s approximately 340 employees are store-level employees (store managers, co-managers, assistant managers, and sales associates), other than a single district

² Painter Affidavit, paras. 6, 53, 93, 99

³ Painter Affidavit, para. 5.

⁴ Painter Affidavit, para. 5, 65, 102.

⁵ Painter Affidavit, paras. 22-23.

⁶ Painter Affidavit, paras. 22, 25.

manager.⁷ The majority of these employees work in Ontario.⁸ None of the employees are represented by a union, and there is no registered pension plan or stock option plan for employees.⁹

16. Express Canada is wholly dependent on Express U.S. for administrative and business support services, such as accounting, procurement, real estate, marketing, logistics, and many other back-office services (“**Shared Services**”). Express Canada does not have the internal capacity to perform these Shared Services and accordingly relies on a shared services agreement with Express U.S.¹⁰ Without the Shared Services, Express Canada could not operate.¹¹

17. The other Express Canada Entities are direct or indirect subsidiaries of Express Canada:

- (a) *Express Canada GC*: a New Brunswick corporation that acts as the general partner of Express Canada LP. Express Canada GC is a wholly-owned direct subsidiary of Express Canada.¹²
- (b) *Express Canada LP*: a New Brunswick limited partnership which is wholly-owned by Express Canada (99%) and Express Canada GC (1%). Express Canada LP supports Express Canada’s business as the issuer of gift cards that are redeemable for Express merchandise in Canada and online (“**Gift Cards**”).¹³ As of April 1,

⁷ Painter Affidavit, para. 65.

⁸ Painter Affidavit, para. 30.

⁹ Painter Affidavit, para. 67.

¹⁰ Painter Affidavit, para. 56.

¹¹ Painter Affidavit, paras. 14, 56.

¹² Painter Affidavit, paras. 26, 28.

¹³ Painter Affidavit, paras. 28-29.

2017, Express Canada LP had an outstanding Gift Card liability of approximately \$370,000.¹⁴

C. Overview of the Canadian Retail Business

(a) Retail Store Operation

18. Express Canada operates 17 stores in premium malls and shopping centres in Ontario (11 stores), Alberta (four stores), and British Columbia (two stores).¹⁵ Each of these stores is leased.¹⁶

19. Express Canada stores typically offer for sale apparel and accessories (including clothing and apparel for men and women, accessories, and shoes) and personal care products (including fragrances and cosmetics).¹⁷ Although Canadian customers can also purchase “EXPRESS” merchandise online from www.express.com, this website is operated by U.S.-based companies.¹⁸

20. All of Express Canada’s credit and debit card transactions are processed exclusively by Bank of America Merchant Services (“BAMS”). These card processing services are critical to Express Canada’s retail operation, as otherwise it would be unable to accept credit or debit cards.¹⁹

21. Express Canada has no third party inventory suppliers, as all merchandise is purchased from Express U.S.²⁰ Express Canada thus has a much smaller creditor profile than other retailers

¹⁴ Painter Affidavit, para. 73.

¹⁵ Painter Affidavit, paras. 5, 36-37.

¹⁶ Painter Affidavit, para. 38.

¹⁷ Painter Affidavit, para. 34.

¹⁸ Painter Affidavit, para. 35.

¹⁹ Painter Affidavit, para. 79.

²⁰ Painter Affidavit, para. 77.

who purchase inventory directly from third parties.²¹ Trade claims by Express Canada's suppliers are expected to be less than \$1 million.²²

(b) Leases and Landlords

22. Express Canada's store leases ("**Leases**") are generally with large retail landlords who own malls and shopping centres across Canada (the "**Landlords**").²³ The lease terms are generally approximately 10 years, with between approximately 4 $\frac{3}{4}$ and 7 $\frac{3}{4}$ years remaining.²⁴ Express Canada generally has no renewal options, except for one Lease for a location in Toronto.²⁵

23. The Leases are escalating leases, meaning that rent increases over the term of the Lease.²⁶ Occupancy costs are very high. Express Canada's gross occupancy costs are trending in the range of 40% of sales, which is significantly higher than industry benchmarks.²⁷ Although certain Landlords granted Express Canada temporary rent concessions in recent years (approximately \$3 million in cash savings per year for two years), Express Canada's occupancy costs remain at levels that are unsustainable.²⁸

²¹ Painter Affidavit, para. 77.

²² Painter Affidavit, para. 121.

²³ Painter Affidavit, para. 40.

²⁴ Painter Affidavit, para. 39.

²⁵ Painter Affidavit, para. 39.

²⁶ Painter Affidavit, paras. 18, 106.

²⁷ Painter Affidavit, paras. 18, 106.

²⁸ Painter Affidavit, paras. 18, 106.

24. Nine of Express Canada's 17 Leases are currently subject to indemnities granted to the applicable Landlord by Express U.S.²⁹ These indemnities generally expire between 2022 and 2025 and are generally capped at the amount of rent relief recently given by the Landlords in respect of those Leases.³⁰ However, one indemnity is not capped and runs the entire Lease term.³¹

25. As is typical in the Canadian retail industry, each of the Leases contains provisions which require Express Canada to continuously occupy the leased space and to continue operating.³² Each of the Leases also contains restrictions relating to going out of business sales, in most cases with blanket prohibitions on "bankruptcy sales", "going out of business sales", or "liquidation sales".³³

26. The Leases each provide that if Express Canada ceases operations, this default either automatically accelerates some or all rents due under the Lease, or it gives the Landlord the ability to accelerate all rents due.³⁴ Subject to the obligation of the Landlords to mitigate their damages claims, the remaining obligations under the terms of the Leases are approximately \$120 million.³⁵

²⁹ Painter Affidavit, para. 43.

³⁰ Painter Affidavit, para. 44.

³¹ Painter Affidavit, para. 45.

³² Painter Affidavit, para. 42(b).

³³ Painter Affidavit, para. 42(a).

³⁴ Painter Affidavit, paras. 11, 129.

³⁵ Painter Affidavit, para. 11.

(c) **Express U.S. Support: Inventory, Shared Services, and IP**

27. As noted above, Express Canada sources all merchandise for retail sale from Express U.S. Express U.S. ships inventory to Express Canada multiple times each month, with legal title transferring when merchandise leaves the Ohio shipping building destined for Canadian stores.³⁶

28. Inventory sales are invoiced monthly, with the invoiced prices based on Express U.S.'s original acquisition costs.³⁷ However, Express Canada effectively pays significantly less for the inventory due to Express U.S.'s transfer pricing policy (the "**Transfer Pricing Policy**"), the overall objective of which is to price intercompany transactions in accordance with arm's length terms and conditions.³⁸ Express U.S. has determined that a third party retailer comparable to Express Canada that purchases inventory (and other services) from an arm's length supplier would expect to achieve operating income of approximately 3% of sales.³⁹ Accordingly, Express Canada's performance is reviewed each month and a market support adjustment (an intercompany transfer pricing adjustment) is recorded to ensure that Express Canada achieves that target.⁴⁰ As Express Canada has operated at a loss since inception, the market support adjustment provides a benefit to Express Canada, effectively reducing the price paid for inventory and other purchases.⁴¹

29. The market support adjustments also effectively provide Express Canada with significant discounts on the costs of Shared Services. As noted above, Express Canada is wholly dependent

³⁶ Painter Affidavit, para. 48.

³⁷ Painter Affidavit, para. 51.

³⁸ Painter Affidavit, para. 50.

³⁹ Painter Affidavit, paras. 50-51.

⁴⁰ Painter Affidavit, para. 51.

⁴¹ Painter Affidavit, para. 51.

on Express U.S. for Shared Services and has no internal capacity to perform them itself or operate independently.⁴² Without these Shared Services, Express Canada would be forced to immediately cease operations.⁴³ Under the Transfer Pricing Policy and an intercompany services agreement, Express Canada remunerates Express U.S. for Shared Services at cost, invoiced quarterly, based on the allocation of enterprise-wide costs (such as wages and benefits for Express U.S.'s Ohio-based employees that perform the Shared Services).⁴⁴ For the 2016 fiscal year, Express Canada's share of these costs totalled approximately \$1.1 million (approximately \$1.5 million in previous years).⁴⁵ However, due to the market support adjustments discussed above, Express Canada effectively pays significantly less.⁴⁶

30. The monthly market support adjustments result in Express U.S. generating consistent losses on the sale of retail products and the provision of Shared Services to Express Canada. Since inception, the market support adjustments have cost Express U.S. approximately \$56.4 million.⁴⁷ For the past three fiscal years (2014, 2015, and 2016), these support adjustments have cost Express U.S. (and benefited Express Canada by) approximately \$12.8 million, \$12.3 million, and \$11.5 million, respectively.⁴⁸

⁴² Painter Affidavit, para. 56.

⁴³ Painter Affidavit, para. 56.

⁴⁴ Painter Affidavit, paras. 56-57.

⁴⁵ Painter Affidavit, para. 58.

⁴⁶ Painter Affidavit, paras. 52, 60.

⁴⁷ Painter Affidavit, paras. 9, 53, 100, 122.

⁴⁸ Painter Affidavit, para. 52.

31. Express Canada requires a licence from Express U.S. to use the “EXPRESS” name, trademarks, copyrights, and related advertising/marketing IP.⁴⁹ Without this IP, Express Canada could not conduct the Canadian business.⁵⁰ Express U.S. has provided this essential IP through a licencing agreement, although it has never charged any royalty fees under this agreement.⁵¹ Given the start-up nature of Express Canada, no royalty fees have accrued under the agreement.⁵²

32. In early May, 2017, Express U.S. and Express Canada consensually terminated the agreements under which Express U.S. provided inventory, Shared Services, and IP to Express Canada at substantial discounts (or in the case of IP, for free).⁵³ However, Express U.S. has agreed to continue providing Shared Services and IP to Express Canada under revised administrative services and licencing agreements, solely for the purposes of effecting an orderly wind down of Express Canada’s business as part of a CCAA proceeding.⁵⁴ The terminated purchasing agreement for inventory has not been replaced, as Express Canada does not intend to order any additional merchandise from Express U.S. during the CCAA proceedings.⁵⁵

(d) Cash Management

33. Express Canada is wholly dependent on Express U.S. to administer its centralized cash management system to collect, transfer, and disburse funds generated by Express Canada (the

⁴⁹ Painter Affidavit, para. 62.

⁵⁰ Painter Affidavit, para. 14(c).

⁵¹ Painter Affidavit, para. 63.

⁵² Painter Affidavit, para. 63.

⁵³ Painter Affidavit, paras. 54, 59, 64.

⁵⁴ Painter Affidavit, paras. 59, 64.

⁵⁵ Painter Affidavit, para. 54.

“Cash Management System”).⁵⁶ Express Canada’s bank accounts are maintained at Fifth Third Bank. Deposit accounts are maintained for receipts, which are electronically transferred on a daily basis to a single master account, which in turn funds five disbursement accounts for processing outgoing wires, ACH and cheque payments to landlords, vendors, employees, and Express U.S., and for taxes.⁵⁷ Express Canada also provides a credit card for business expense use to its sole Canadian district manager.⁵⁸

34. Express U.S.’s Cash Committee meets on a regular basis to monitor, among other things, the cash needs of Express Canada.⁵⁹ When the intercompany balance reflected a net balance owing by Express Canada to Express U.S. (as it did throughout the 2016 calendar year), periodic payments against the debt owing for inventory and Shared Services were made.⁶⁰ As at the end of March, 2017, the intercompany balance reflected that Express U.S. owed amounts to Express Canada.⁶¹ However, this balance had likely reversed by the date that the Applicants filed this CCAA application, with Express U.S. becoming a secured creditor of Express Canada.⁶²

⁵⁶ Painter Affidavit, paras. 81-82.

⁵⁷ Painter Affidavit, paras. 83-84.

⁵⁸ Painter Affidavit, para. 85.

⁵⁹ Painter Affidavit, para. 86.

⁶⁰ Painter Affidavit, para. 112.

⁶¹ Painter Affidavit, para. 115.

⁶² Painter Affidavit, paras. 109, 115, 119. The fact that the intercompany balance has reversed is based on the best information available as of May 3, 2017. The Applicants understand that if appointed, the Monitor will provide an update of the intercompany balance to the Court in a post-filing report.

D. Express Canada Encounters Significant Problems in Achieving Profitability

35. Express Canada has experienced yearly losses across the majority of its store locations since entering the Canadian marketplace in 2011.⁶³ Reflecting the high occupancy costs and depressed sales (shrinking 9% in 2016), Express Canada's EBITDA in 2016 was negative \$7.4 million prior to accounting for the market support adjustments.⁶⁴ Without the \$3 million of short-term rent relief, Express Canada's EBITDA for 2016 would have been even more unfavourable.⁶⁵

36. Most of Express Canada's losses are absorbed by Express U.S. through the market support adjustments effected under the Transfer Pricing Policy, which effectively allow Express Canada to purchase inventory and Shared Services from Express U.S. at significantly discounted prices.⁶⁶ Thus, although the Express Canada Entities' balance sheets on their face reflect positive earnings for some years, this is because the losses were actually absorbed by Express U.S.⁶⁷ In any event, notwithstanding Express U.S. absorbing most losses, Express Canada has accumulated negative retained earnings exceeding \$12 million, reflecting asset impairments that it has had to take to account for certain stores' lack of viability.⁶⁸

37. Factoring out the market support adjustments, Express Canada's retained earnings would reflect additional losses of approximately \$56 million since 2011.⁶⁹

⁶³ Painter Affidavit, para. 101.

⁶⁴ Painter Affidavit, paras. 103, 105.

⁶⁵ Painter Affidavit, para. 103.

⁶⁶ Painter Affidavit, paras. 60, 104.

⁶⁷ Painter Affidavit, para. 104.

⁶⁸ Painter Affidavit, paras. 99(c), 104.

⁶⁹ Painter Affidavit, para. 100.

38. Express Canada attributes its inability to achieve profitability in Canada to a number of principal factors, including its unsustainable operating costs, which will only worsen in time as rents escalate under the Leases.⁷⁰ The business has also suffered from depressed sales in Western Canada and unfavourable exchange rates (as the inventory is purchased in U.S. dollars but sold in less valuable Canadian dollars).⁷¹

E. Attempts to Develop Solutions Are Unsuccessful

39. With the assistance of Express U.S., Express Canada has attempted to address its operating challenges with strategic initiatives focused on improving profitability.⁷² Significantly, Express Canada approached its Landlords seeking to reduce occupancy costs. Although certain Landlords were supportive (resulting in approximately \$3 million in annual savings for two years), other Landlords did not provide relief.⁷³ Even with the relief, occupancy costs remain unsustainable.⁷⁴

40. Express Canada has subsequently explored other strategies to reduce occupancy costs, including potentially seeking larger, more permanent rent reductions or variable rent structures based on future sales. Express Canada has also considered closing certain of its more poorly performing locations.⁷⁵ However, none of these potential strategies provides realistic solutions.⁷⁶

⁷⁰ Painter Affidavit, para. 106.

⁷¹ Painter Affidavit, paras. 107-108, 126.

⁷² Painter Affidavit, paras. 16, 123.

⁷³ Painter Affidavit, paras. 16, 123.

⁷⁴ Painter Affidavit, para. 106.

⁷⁵ Painter Affidavit, paras. 17, 124.

⁷⁶ Painter Affidavit, para. 17.

41. In addition to addressing the problem of unsustainable occupancy costs, Express Canada, with the assistance of Express U.S., has implemented numerous operational improvement initiatives, including modifying merchandising strategies, investing in marketing and analytics, and implementing strategies to address foreign exchange.⁷⁷ However, these operational initiatives have not been sufficient to address declining sales revenues and unsustainable occupancy costs.⁷⁸

42. After reviewing all remaining options to address Express Canada's poor financial performance and resulting negative cash flow, Express U.S. resolved on May 3, 2017 to discontinue its support of Express Canada and to focus on other regional markets.⁷⁹ As Express Canada cannot continue to operate without Express U.S.'s ongoing support (both financial support through the market support adjustments and operational support through the Shared Services), Express Canada has no choice but to cease operations, and its sole director has therefore resolved to wind down the business.⁸⁰

F. Financial Position of the Canadian Business

43. Based on the stand-alone balance sheet for the Canadian operations as of April 1, 2017, the Express Canada Entities had total assets of approximately \$29 million (approximately \$15 million of which was cash) and total liabilities of approximately \$12 million.⁸¹ However, this does not reflect the contingent claims of Landlords for future rent for the remaining terms of the Leases, which were crystallized by Express Canada's decision to cease operations and the Landlord's

⁷⁷ Painter Affidavit, paras. 16, 125.

⁷⁸ Painter Affidavit, para. 126.

⁷⁹ Painter Affidavit, para. 127.

⁸⁰ Painter Affidavit, paras. 98, 128.

⁸¹ Painter Affidavit, paras. 89, 95.

ability to accelerate rent.⁸² As noted above, before taking into account Landlords' duty to mitigate their damages, the remaining obligations over the Lease terms are approximately \$120 million.⁸³

44. The only creditor holding a security interest over any assets of the Express Canada Entities is Express U.S., which holds a general security interest over substantially all of the assets of Express Canada for any amounts owing by Express Canada to Express U.S. arising after January 5, 2017.⁸⁴

G. Urgent Need for Relief

45. The decision of Express U.S. to cease further financial and operational support of Express Canada has cascading implications for Express Canada, leading to its insolvency. Express Canada must immediately wind down its operations, crystalizing its Landlord's contingent claims for the remaining terms of the Leases. Express Canada has insufficient assets to cover these obligations.⁸⁵

46. Urgent relief is needed to stay potential creditor remedies and allow Express Canada to realize the maximum possible value from the sale of its remaining inventory, furniture, fixtures, and equipment. This realization process must take place immediately before the looming summer months (which are slow for Canadian retailers). Slippage of time into the summer will harm all stakeholders.⁸⁶

⁸² Painter Affidavit, para. 95.

⁸³ Painter Affidavit, para. 11.

⁸⁴ Painter Affidavit, paras. 116-117.

⁸⁵ Painter Affidavit, paras. 11, 127-129.

⁸⁶ Painter Affidavit, para. 14(b).

47. As submitted further below, an immediate stay of proceedings and the flexibility of the CCAA are essential to undertake a controlled and orderly wind down of Express Canada's operations in a manner that treats stakeholders as fairly and equitably as possible. Through this relief, the Applicants seek to maximize recoveries with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings.⁸⁷

PART III - ISSUES AND THE LAW

48. This factum addresses the following issues:

- (a) The Applicants are entitled to seek protection under the CCAA:
 - (i) The Applicants are insolvent and have obligations exceeding \$5 million;
 - (ii) The Applicants' chief place of business is Ontario;
 - (iii) The CCAA can be used to effect an orderly wind-down of the Applicants' business;
- (b) The Applicants are entitled to a broad stay of proceedings:
 - (i) The stay should be extended to Express Canada LP;
- (c) The Court should approve a retention plan for employees;
- (d) This Court has the jurisdiction to authorize paying pre-filing claims to "critical" suppliers;

⁸⁷ Painter Affidavit, para. 135.

- (e) This Court should exercise its discretion to approve the Court-ordered charges:
 - (i) The Administration Charge (defined below) will ensure the continued engagement of the advisors needed to achieve the orderly wind down; and
 - (ii) The Directors' Charge (defined below) will ensure continued services of the director and officer throughout the wind down period.

A. The Applicants Are Entitled to Seek Protection Under the CCAA

(a) The Applicants Are Insolvent and Claims Exceed \$5 Million

49. The CCAA applies to a “debtor company”, or affiliated debtor companies, where the total of claims against the debtor or its affiliates exceeds \$5 million. Pursuant to section 2 of the CCAA, a “debtor company” means, *inter alia*, a company that is insolvent.⁸⁸

50. The CCAA does not define “insolvent.” However, whether a company is insolvent for purposes of the CCAA is evaluated by reference to the three disjunctive tests for insolvency within the definition of “insolvent person” in the *Bankruptcy and Insolvency Act* (“BIA”).⁸⁹ The BIA definition of “insolvent person” in the BIA is as follows:

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, [“**Test (a)**”]

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or [“**Test (b)**”]

⁸⁸ CCAA, sections 2 and 3(1).

⁸⁹ *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (S.C.J.), para. 30.

(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; [“**Test (c)**”]

51. In *Stelco*,⁹⁰ Farley J. gave Test (a) and Test (c) within the BIA definition expanded meanings when applied to the CCAA, reflecting the CCAA’s remedial and rehabilitative purposes:

- (a) ***Expanded Test (a) Under the CCAA:*** Under the *Stelco* approach, a Court will determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the applicant running out of money to pay its debts as they generally become due in the future without the benefit of a stay of proceedings. As Farley J. wrote:

It seems to me that the CCAA test of insolvency advocated by *Stelco* and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.⁹¹ [Emphasis added.]

- (b) ***Expanded Test (c) Under the CCAA:*** Under the *Stelco* approach to Test (c), the question is whether, if there were a notional sale of all of the debtor’s assets, would the sale proceeds be sufficient to satisfy the debtor’s obligations?⁹² Courts will take into account *all* of the debtor’s obligations, interpreted broadly, *including any*

⁹⁰ (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused [*Stelco (Re)*].

⁹¹ *Stelco (Re)*, above note 90, para. 26.

⁹² *Stelco (Re)*, above note 90, paras. 50, 55.

contingent and/or unliquidated liabilities.⁹³ All obligations “due and accruing due” are included, meaning “all obligations of whatever nature or kind and leave nothing in limbo.”⁹⁴ As Farley J. wrote, “*every obligation* of the corporation in the hypothetical or notional sale must be treated as ‘accruing due’ to avoid orphan obligations. In that context, it matters not that a [...] liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test.”⁹⁵

52. Express Canada became insolvent under Tests (a) and (c) on May 3, 2017, when the decision to wind down operations crystalized the substantial future claims of the Landlords.

53. As noted, Express Canada has no choice but to cease operations and to wind down its business.⁹⁶ The Express Canada Entities are entirely dependent on the continued financial and operational support of Express U.S.,⁹⁷ which has advised that it will discontinue further support, except for the limited purposes of an orderly wind down under the CCAA.⁹⁸ As a result, Express Canada cannot continue to operate as a going concern.⁹⁹ Since Express Canada commenced operations in Canada in 2011, it has consistently operated at a significant loss and has only been able to maintain operations as a result of the financial and operational support of Express U.S.¹⁰⁰

⁹³ *Stelco (Re)*, above note 90, paras. 49-52, 56.

⁹⁴ *Stelco (Re)*, above note 90, para. 50. Farley J. rejected the narrower approach to “due and accruing” in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (S.C.J.) for purposes of the CCAA.

⁹⁵ *Stelco (Re)*, above note 90, paras. 59-60. See also *4519922 Canada Inc. (Re)*, 2015 ONSC 124, paras. 30-31.

⁹⁶ Painter Affidavit, para. 128.

⁹⁷ Painter Affidavit, paras. 56, 82.

⁹⁸ Painter Affidavit, paras. 10, 15, 127.

⁹⁹ Painter Affidavit, paras. 10, 128.

¹⁰⁰ Painter Affidavit, para. 7.

54. Far from being remote or speculative,¹⁰¹ the claims of Express Canada's Landlords for future rent obligations under the Leases crystallized on May 3, 2017.¹⁰² Express Canada's resolution to cease operations has resulted in events of default under each of the 17 Leases, resulting in either the automatic acceleration of some or all rents due under the Leases or the ability of the Landlords to accelerate all rents due under the Leases.¹⁰³ These obligations to the Landlords must be taken into account under the *Stelco* approach. As Farley J. wrote, "all the obligations which would be triggered by such sale [of all the debtor's assets] would have to be taken into account."¹⁰⁴

55. The remaining obligations over the terms of the Leases are approximately \$120 million.¹⁰⁵ Even after taking into account the obligation of the Landlords to mitigate, the aggregate amount owing to the Landlords under these Leases far exceeds \$5 million (required for the application of the CCAA) and renders the Express Canada Entities insolvent under both Test (a) and Test (c):

- (a) Express Canada is insolvent under Test (a) because it became, after the Landlords' contingent claims crystallized on May 3, 2017, unable to meet its obligations generally as they become due. For the Leases with automatic rent acceleration, these obligations became due on May 3, 2017.¹⁰⁶ For the remaining Leases, it is reasonably foreseeable that the Landlords would take steps to accelerate the rent

¹⁰¹ *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, para. 36.

¹⁰² Painter Affidavit, paras. 11, 95.

¹⁰³ Painter Affidavit, paras. 11, 129.

¹⁰⁴ *Stelco (Re)*, above note 90, para. 55.

¹⁰⁵ Painter Affidavit, para. 11.

¹⁰⁶ Painter Affidavit, para. 11.

absent a stay of proceedings. Accordingly, under *Stelco*, there is a reasonably foreseeable expectation that Express Canada will run out of cash to pay its debts as they become due.¹⁰⁷

- (b) Express Canada is also insolvent under Test (c) because the crystalized obligations to the Landlords, combined with Express Canada's other liabilities, exceed its assets of under \$29 million (assuming that the non-cash assets can be realized upon or sold at book value).¹⁰⁸

56. Likewise, the limited partnership structure (Express Canada LP and its general partner, Express Canada GC, which is liable for the partnership's debts) is insolvent. Express Canada LP's Gift Card liability exceeds the realizable value of the only asset in this structure (a receivable from Express Canada, which is insolvent).¹⁰⁹

57. The Applicants are therefore insolvent debtor companies to which the CCAA applies, and all of the Express Canada Entities are insolvent.

(b) Ontario Court Has Jurisdiction Over the Proceeding

58. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in: (a) the province in which the head

¹⁰⁷ Painter Affidavit, paras. 11, 129.

¹⁰⁸ Painter Affidavit, paras. 11, 89, 129.

¹⁰⁹ Painter Affidavit, para. 73.

office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.¹¹⁰

59. These criteria are satisfied on the basis that the chief place of business of the Applicants is Ontario.¹¹¹ Although the Applicants' registered head offices are located in New Brunswick, 11 of their 17 retail stores are located in Ontario. Express Canada therefore has more retail stores and sales in Ontario than in any of the other provinces in which it operates. Further, the majority of Express Canada's employees work in Ontario (more than all other provinces combined), and none are located in New Brunswick.¹¹²

(c) Use of the CCAA to Effect an Orderly Wind Down of the Business

60. The purpose for seeking the proposed Initial Order in these proceedings is to effect a fair, controlled, and orderly wind down of the Canadian retail business of the Express Canada Entities, with a view to developing a plan of compromise or arrangement to present to creditors as part of these proceedings.¹¹³ Although there is no prospect that a restructured "going-concern" solution involving the Express Canada Entities will result, the Applicants submit that the use of the protections and the flexibility afforded by the CCAA is entirely appropriate in the circumstances.

61. It is well-established that the CCAA is a flexible instrument and that debtor companies are entitled to seek the CCAA's protection in the context of a very wide range of restructuring options. As Topolniski J. of the Alberta Court of Queen's Bench has stated, "[...] reorganization of a

¹¹⁰ CCAA, s. 9(1); *Target Canada Co. (Re)*, 2015 ONSC 303, para. 29 [*Target Canada Co.*].

¹¹¹ Painter Affidavit, para. 30.

¹¹² Painter Affidavit, para. 30.

¹¹³ Painter Affidavit, paras. 21, 135.

company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organization and management restructuring, downsizing, refinancing, or debt to equity conversion – the solutions are generally limited only by the creativity of those structuring the plan of arrangement.”¹¹⁴

62. The Supreme Court of Canada expressly noted in *Century Services Inc. v. Canada (Attorney General)* that “[c]ourts frequently observe that ‘[t]he CCAA is skeletal in nature’ and does not ‘contain a comprehensive code that lays out all that is permitted or barred.’”¹¹⁵ The flexibility of the CCAA allows for innovation and creativity, in contrast to the more “rules-based” approach of the BIA.¹¹⁶

63. Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, a debtor company is entitled to seek the protection of the CCAA where the outcome will not be a going-concern restructuring, but instead, a “liquidation” or wind down of the debtor company's assets or business. Thus, Farley J. stated in *Lehndorff* that a restructuring under the CCAA “may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors

¹¹⁴ 843504 *Alberta Ltd. (Re)*, 2003 ABQB 1015 at para. 14.

¹¹⁵ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para. 57, citing *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 44.

¹¹⁶ *Century Services*, above note 115, para. 61.

generally.”¹¹⁷ The Court similarly recognized as appropriate the use of the CCAA to wind down or liquidate a business in both *Olympia & York*¹¹⁸ and *Anvil Range*.¹¹⁹

64. The 2009 amendments did not expressly address whether the CCAA could be used generally to wind down the business of a debtor company. However, as Morawetz J. held in *Target Canada Co (Re)*., the enactment of s. 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle through which a debtor company’s business is down-sized or wound-down.¹²⁰

65. The CCAA case law is replete with examples of CCAA proceedings that have either been commenced for the purpose of winding down a business, or that have adopted this purpose after it became apparent that a going-concern solution was not achievable. Examples include:

- (a) *Nortel Networks*: Nortel sought CCAA protection in January 2009 with a view to restructuring its business, but, by June 2009, it was clear that the CCAA would be used to “liquidate” its assets. As Newbould J. noted, “[i]t is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of

¹¹⁷ *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) [*Lehndorff*] at para. 7.

¹¹⁸ The “CCAA need not be employed to revitalize a corporation but can also involve a liquidation scenario”: *Olympia & York Developments Ltd. (Re)* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at para 18.

¹¹⁹ “While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company — or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances.”: *Anvil Range Mining Corp. (Re)*, 2001 CarswellOnt 1325 (S.C.J.), aff’d 2002 CarswellOnt 2254 (C.A.).

¹²⁰ *Target Canada Co.*, above note 110, para. 33; CCAA, s. 36.

proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.”¹²¹

- (b) *Grant Forest Products Inc.*: GFPI commenced CCAA proceedings for the purpose of winding down its business. In this context, Campbell J. recognized that “[w]hat has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating CCAA of which both *Indalex Ltd., Re* and GFPI are leading examples.”¹²²
- (c) *First Leaside Wealth Management*: the Court expressly recognized that “the reality is that ‘reorganizations of differing complexity require different legal mechanisms.’ That reality has led courts to recognize that the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership, or to wind-up or liquidate it.”¹²³
- (d) *Target Canada Co.*: the Court held that “although there is no prospect that a restructured ‘going concern’ solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances.”¹²⁴

66. It is entirely appropriate in the circumstances of this case for the proposed orderly wind down of the Express Canada Entities’ business to be carried out with the benefit of the protections

¹²¹ *Nortel Networks Corp. (Re)*, 2014 ONSC 5274 at para. 23.

¹²² *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933 at para. 44.

¹²³ *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (S.C.J.) at para. 32.

¹²⁴ *Target Canada Co.*, above note 110, para. 31.

and flexibility afforded by the CCAA. The “skeletal” nature of the CCAA is ideally suited to overseeing the process through which Express Canada liquidates its inventory with the assistance of a third-party professional liquidator (the “**Liquidator**”) and to vacate its leased retail space, all with the goal of developing consensus on a plan of arrangement as part of these proceedings.¹²⁵

67. First, this is not a normal liquidation. Express Canada’s inventory predominately consists of private-label merchandise with its own brand identity, the value of which depends within the proposed realization process on the active involvement of Express Canada and its experienced sales associates.¹²⁶ This realization process will involve many stakeholders, including employees, landlords, critical suppliers, and, because Express Canada does not have the necessary back-office management capacity or own the essential IP to use the “EXPRESS” brand-name, Express U.S.¹²⁷

68. Express Canada must work with these stakeholders in real-time, as there remains only a matter of weeks for Express Canada to finalize and fully implement the realization process before the looming summer months (which are traditionally slow for Canadian retailers).¹²⁸ Given the urgency and complexity of this situation, Court supervision and the flexible powers of the CCAA are essential to ensure that the process runs smoothly and that recoveries are maximized.

69. Should the Initial Order be granted, the Applicants intend to promptly serve a motion to approve the realization process, including approval of the arrangements with the Liquidator.¹²⁹ To

¹²⁵ Painter Affidavit, paras. 12-13, 21.

¹²⁶ Painter Affidavit, paras. 14, 33, 148.

¹²⁷ Painter Affidavit, para. 14.

¹²⁸ Painter Affidavit, paras. 14, 148.

¹²⁹ Painter Affidavit, paras. 13, 147.

achieve the necessary timing while allowing for stakeholder engagement, the Applicants propose the following timeline (subject to court direction):

Proposed Date	Step
May 4, 2017	Hearing of application for Initial CCAA Order
May 5, 2017	Serve motion seeking approval of realization process and sale guidelines
May 10, 2017	Hearing to approve the realization process and sale guidelines
May 11, 2017	Commence liquidation of Canadian Stores
May 25, 2017	Hearing for CCAA claims process motion, comeback motion, and stay extension
June 15, 2017	Projected liquidation sale end date and Express Canada to vacate leased premises
July 5, 2017	Proposed CCAA claims process claims bar date (deadline to file claims in the CCAA process)

70. Second, the exercise of creditor remedies could affect the time-sensitive realization process.¹³⁰ It is appropriate for this Court to grant a stay proceedings under s. 11.02 of the CCAA to allow all stakeholders to focus on maximizing recovery in the limited period of time available.

71. Third, Express U.S. has advised that it will only continue providing essential Shared Services (including virtually all management) and licencing the IP needed to use the “EXPRESS” brand for the limited purposes of an orderly wind down under the CCAA.¹³¹ Express Canada is wholly dependent on these Shared Services to operate, and no party could conduct an orderly realization of remaining inventory without a licence to use the IP.¹³² Outside of the CCAA process,

¹³⁰ Painter Affidavit, para. 20.

¹³¹ Painter Affidavit, paras. 15, 130.

¹³² Painter Affidavit, paras. 56, 82, 130.

where Express U.S. would terminate all further support of Express Canada, the situation would be chaotic.¹³³ Court-supervision under the CCAA is thus essential to maximize recovery for creditors.

72. The Applicants therefore submit that the proposed Initial Order extending the protections of the CCAA to the Express Canada Entities – and engaging a flexible process – should be granted.

B. The Applicants Are Entitled to a Broad Stay of Proceedings

(a) Stay Should be Extended to Express Canada LP

73. The CCAA expressly applies, by its terms, to debtor companies, but not partnerships.¹³⁴ Where the operations of partnerships are integral and closely related to the operations of the Applicants, it is well-established that the Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to achieve the remedial purposes of the CCAA.¹³⁵

74. The Applicants submit that it is appropriate to extend the stay of proceedings to Express Canada LP. First, Express Canada LP is wholly owned by the Applicants, who are the sole partners of the partnership.¹³⁶ Second, Express Canada LP performs an integral role in the business by issuing Gift Cards that are redeemable for Express merchandise in brick-and-mortar Express stores

¹³³ Painter Affidavit, para. 56.

¹³⁴ CCAA, s. 2, “debtor company”.

¹³⁵ See *Lehndorff*, above note 117, para. 21; *Smurfit-Stone Container Canada Inc. (Re)*, 2009 CarswellOnt 391 (S.C.J.) at para. 19 [*Smurfit-Stone*]. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222 [*Canwest Publishing (Application)*] at paras. 33 and 34; *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 [*Canwest Global (Initial Application)*] at paras. 28 and 29; *Target Canada Co.*, above note 110, para. 42.

¹³⁶ Painter Affidavit, para. 28.

in Canada and online.¹³⁷ As the predominant issuer of the Gift Cards, Express Canada LP has approximately \$400,000 of obligations in respect of Gift Card holders.¹³⁸

75. As Express Canada LP is subject to potential claims from consumers holding Gift Cards issued by it, it is essential to extend the stay to Express Canada LP in order to address the Gift Cards in the context of the CCAA proceeding and to ensure an orderly and fair wind down of operations. The proposed Initial Order proposes that the Express Canada Entities shall be entitled but not required to honour Gift Cards.¹³⁹ The Express Canada Entities and the Liquidator believe that honouring Gift Cards will promote goodwill among customers during the orderly wind down and will assist in maximizing value for stakeholders, including by attracting customers to the stores.¹⁴⁰

C. Approval of Employee Retention Plan

76. The orderly wind down of retail operations means that Express Canada's approximately 340 employees will receive a notice that their employment is to be terminated. Express Canada proposes to provide its sales associates and store management with working notice of termination effective June 15, 2017.¹⁴¹ In addition, given the essential role of employees during an orderly wind down and to assist the employees generally, the Express Canada Entities seek approval of an employee retention plan ("ERP"):

¹³⁷ Painter Affidavit, paras. 29, 72.

¹³⁸ Painter Affidavit, para. 73.

¹³⁹ Proposed Initial Order, para. 6(c).

¹⁴⁰ Painter Affidavit, para. 76.

¹⁴¹ Painter Affidavit, para. 149.

- (a) First, Express Canada proposes to top up employees' pay with a retention payment equal to the employee's regular wages for any period not worked because his or her store closed before the targeted end of the realization process on June 15, 2017. This would compensate and incentivize employees to conduct an efficient liquidation of the inventory.¹⁴²
- (b) Second, Express Canada proposes a bonus program for the district manager and store management to incentivize them to remain in their positions until their respective release dates (60% of the budgeted bonus) and to achieve sales targets during the realization process (40% of the budgeted bonus). The total bonus pool for all eligible employees is anticipated to be approximately \$56,500.¹⁴³

77. The approval of an ERP is in the discretion of the CCAA court. Although the proposed ERP recognizes the key role of all employees in the wind-down of retail operations, and does not require a charge on the property of the Express Canada Entities,¹⁴⁴ it can be analogized to programs for key employees commonly approved in CCAA proceedings (“**KERPs**”).¹⁴⁵

78. In *Grant Forest Products*, Newbould J. took into account several factors when determining whether to grant approval of a KERP (including a charge in that case), including the following: (1) the approval of the monitor; (2) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP is not approved; (3) whether the beneficiaries of the

¹⁴² Painter Affidavit, para. 150.

¹⁴³ Painter Affidavit, para. 151.

¹⁴⁴ Painter Affidavit, paras. 14(a), 149-151.

¹⁴⁵ E.g., *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 1330 (S.C.J.); *Grant Forest Products Inc. (Re)*, 2009 CarswellOnt 4699 (S.C.J.) [*Grant Forest (KERP)*].

KERP are crucial to the successful restructuring; (4) how difficult it would be to find replacements for the employees; and (5) the business judgment of the board of directors of the debtor company.¹⁴⁶

79. The ERP was developed by the Express Canada Entities, together with the Liquidator in respect of the bonus program.¹⁴⁷ The Proposed Monitor supports the ERP.¹⁴⁸ All employees who will be offered benefits under the ERP are essential to the orderly wind down: the sales associates have critical expertise to leverage in the realization process; and the district manager and store management are essential to winding up operations at the regional and store-level.¹⁴⁹ Moreover, it is the business judgment of the Express Canada Entities that offering the ERP to active employees is essential to retain employees during the orderly wind down process and to properly compensate and incentivize employees to conduct an efficient realization process, which is ultimately to the benefit of all stakeholders.¹⁵⁰

80. Finally, although the ERP is expected to create appropriate incentives for employees, the size of the bonus program is relatively modest within the context of the larger body of creditors.¹⁵¹

D. Authority to Permit Pre-Filing Payments to “Critical” Suppliers

81. In the proposed Initial Order, the Applicants also seek authorization, if necessary and with the consent of the Monitor, to make payments for pre-filing amounts to certain critical third parties

¹⁴⁶ *Grant Forest (KERP)*, above note 145, paras. 11-12, 18.

¹⁴⁷ Painter Affidavit, paras. 149-151.

¹⁴⁸ Painter Affidavit, para. 149.

¹⁴⁹ Painter Affidavit, paras. 14(a), 150-151.

¹⁵⁰ Painter Affidavit, paras. 14(a), 149.

¹⁵¹ Painter Affidavit, para. 151.

that provide services that are integral to Express Canada's ability to operate during, and to implement, a controlled and orderly wind down process, such as the credit/debit card processor and logistics or supply chain providers.¹⁵²

82. Ample authority decided prior to the 2009 amendments to the CCAA supports the Court's general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed "critical" to the ongoing operations of the debtor.¹⁵³ Although the aim of the CCAA is to maintain the *status quo* while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the *status quo* does not necessarily entail the preservation of the relative pre-stay debt status of each creditor:

The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.¹⁵⁴

83. Section 11.4 of the CCAA, which was enacted as part of the 2009 amendments to the CCAA, gives the Court the specific authority to declare a person to be a critical supplier and to

¹⁵² Painter Affidavit, para. 145; Proposed Initial Order, para. 6(e).

¹⁵³ See *e.g. Smurfit-Stone*, above note 135, para. 21.

¹⁵⁴ *Alberta-Pacific Terminals Ltd.*, (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at para. 23.

grant a charge on the debtor's property to secure amounts owing to that supplier for services provided after the filing. However, section 11.4 of the amended 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, even where the debtor does not propose to secure payment of post-filing supplies with a critical supplier charge.¹⁵⁵

84. As noted by Pepall J. in *Canwest Global*, the 2009 amendments, including under s. 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the CCAA process.¹⁵⁶ The Supreme Court of Canada has also affirmed in *Century Services* that: "[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders."¹⁵⁷

85. Case law under both section 11.4 of the CCAA and under the inherent jurisdiction of the CCAA to authorize payment of pre-filing amounts demonstrates that a supplier is viewed as "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be: (1) materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services; and/or (2) difficult to secure an alternate supplier.¹⁵⁸

¹⁵⁵ *Canwest Publishing (Initial Application)*, above note 135, para. 50.

¹⁵⁶ *Canwest Global (Initial Application)*, above note 135, para. 24.

¹⁵⁷ *Century Services*, above note 115, para. 70.

¹⁵⁸ See *Canwest Global (Initial Application)*, above note 135, para. 43, this Court recognized certain suppliers as critical to the debtor companies' operations for the purposes of paying pre-filing amounts, including television programming suppliers, newsprint suppliers, as well as the American Express Corporate Card Program and Central Billed Accounts that enabled the debtors' employees to perform their job functions. See also *Target Canada Co.*, above note 110, paras. 64-65.

86. The Express Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary, and with the consent of the Monitor. These include:

- (a) providers of credit, debit and gift card processing related services (namely, BAMS);
- (b) logistics or supply chain providers, including customs brokers and freight forwarders and security and armoured truck carriers; and
- (c) other third party suppliers up to a maximum aggregate amount of \$50,000, if, in the opinion of the Express Canada Entities, the supplier is critical to the wind down.¹⁵⁹

87. The first two categories of suppliers are fundamental for Express Canada to continue in operation and any disruption of their services could jeopardize the orderly wind down, given the expedited timelines of the orderly wind down.¹⁶⁰ This Court also has jurisdiction to authorize the Express Canada Entities, where necessary and appropriate, and only with the consent of the Monitor, to pay pre-filing amounts owing to other suppliers who are determined to be critical to post-filing operations.¹⁶¹

E. Court-Ordered Charges

(a) Administration Charge

88. In the draft Initial Order, the Applicants are requesting that the Monitor, along with its counsel and counsel to the Express Canada Entities, be granted a Court-ordered charge on all of

¹⁵⁹ Proposed Initial Order, para. 6(e); Painter Affidavit, para. 145.

¹⁶⁰ Painter Affidavit, para. 145.

¹⁶¹ *Target Canada Co.*, above note 110, paras. 64-65.

the property of the Express Canada Entities up to a maximum amount of \$650,000 as security for their respective fees and disbursements (the “**Administration Charge**”).¹⁶²

89. The Administration Charge is proposed to have first priority over all other charges.¹⁶³

90. Prior to the 2009 amendments to the CCAA, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides that the Court has jurisdiction to grant an administration charge:

11.52(1) Court may order security or charge to cover certain costs

– 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 a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

91. This section is permissive, and does not contain any specific criteria for a court to consider in granting such a charge.

¹⁶² Painter Affidavit, para. 138; Initial Order, para. 32.

¹⁶³ Painter Affidavit, para. 138; Initial Order, para. 33.

92. In *Canwest Global* and *Canwest Publishing*, administration charges were granted pursuant to s. 11.52(1). In *Canwest Publishing*, Pepall J. provided a non-exhaustive list of factors to be considered in approving an administration charge, including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.¹⁶⁴

93. In this case, it is vital that the wind down of the Canadian business take place in an orderly fashion, in order to minimize prejudice to stakeholders and maximize value. Professional advisors are essential for this wind down to occur in an orderly and controlled manner.

94. The Applicants submit that the amount of the proposed Administration Charge is commensurate with the nature of the Applicants' businesses and the tasks required to effect a fair and controlled wind down of the Canadian retail operations. The magnitude of the proposed Charge is consistent with the proposed expedited timeline for the CCAA proceedings.

95. The Proposed Monitor is of the view that the Administration Charge is reasonable and appropriate in the circumstances, having regard to the nature of these proceedings and the work involved.¹⁶⁵

¹⁶⁴ *Canwest Publishing (Initial Application)*, above note 135, para. 54; *Canwest Global (Initial Application)*, above note 135, paras. 37-40.

¹⁶⁵ Proposed Monitor's Pre-filing Report, para. 13.3.

(b) Directors' Charge

96. The Applicants seek a directors' and officers' charge (the "**Directors' Charge**") in the amount of up to \$500,000. The Directors' Charge is proposed to be secured by the property of the Express Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Express Canada Entities' indemnification obligations for directors' potential liabilities that may be incurred after the commencement of the CCAA proceeding.¹⁶⁶ This charge would only be relied upon to the extent liabilities are not covered by existing insurance.¹⁶⁷

97. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.

11.51(1) Security or charge relating to director's indemnification

– 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.

11.51(2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) Restriction – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

¹⁶⁶ Painter Affidavit, para. 139, 141; Proposed Initial Order, paras. 21-22.

¹⁶⁷ Painter Affidavit, para. 141; Proposed Initial Order, para. 23.

11.51(4) *Negligence, misconduct or fault* – The court shall make an order declaring that the security or 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 wilful misconduct or, in Quebec, the director’s or officer’s gross or intentional fault.

98. In *Canwest Global*, Pepall J. set out some of the factors to be considered by the court when applying s. 11.51. In approving the requested directors’ charge, Pepall J. stated:

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 they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216)]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors’ and officers’ liabilities in the worst case scenario. In all of these circumstances, I approved the request.¹⁶⁸

99. With the assistance of the Proposed Monitor, the Express Canada Entities have estimated the potential exposure of the directors and officers for unpaid statutory amounts, including unpaid accrued wages, unpaid accrued vacation pay and unpaid taxes. The proposed amount of the Directors Charge is based on this estimate.

100. The Applicants’ present and former directors and officers are among the potential beneficiaries under a liability insurance policy that has an aggregate annual limit of US\$10 million, with a US\$1 million deductible. The policy only covers directors’ statutory liabilities for taxes (provided the Canada Revenue Agency has commenced collection proceedings against the

¹⁶⁸ *Canwest Global (Initial Application)*, above note 135, para. 48.

individual directors), including employee income tax withholdings, but not unpaid accrued wages. This policy will likely not provide sufficient coverage for the potential liability that the directors could face related to this proceeding, both in terms of the scope of coverage and the deductible.¹⁶⁹

101. The sole director of each of the Applicants has indicated that, due to the potential for significant personal liability associated with the CCAA proceeding, he could not continue his service and involvement in the process unless the Initial Order includes the Directors' Charge.¹⁷⁰ This charge is both necessary and appropriate since the ability of the Express Canada Entities to carry out the orderly wind down depends on the continued participation of an experienced director.

102. The requested Directors' Charge is reasonable given the nature of the Express Canada Entities' retail business, the number of employees in Canada and the corresponding potential exposure of the director and officer to personal liability. The Proposed Monitor supports the quantum of the Directors' Charge as reasonable and appropriate in the circumstances.¹⁷¹

PART IV - NATURE OF THE ORDER SOUGHT

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

¹⁶⁹ Painter Affidavit, para. 140.

¹⁷⁰ Painter Affidavit, para. 141.

¹⁷¹ Proposed Monitor's Pre-filing Report, para. 13.7.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of May, 2017.

Jeremy Dacks per WOR
Jeremy Dacks

Tracy C. Sandler per WOR
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TAB A

SCHEDULE "A": LIST OF AUTHORITIES

Cases

1. *843504 Alberta Ltd. (Re)*, 2003 ABQB 1015
2. *4519922 Canada Inc. (Re)*, 2015 ONSC 124
3. *Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.)
4. *Anvil Range Mining Corp. (Re)*, 2001 CarswellOnt 1325 (S.C.J.), aff'd 2002 CarswellOnt 2254 (C.A.), leave to appeal to the S.C.C. refused
5. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (S.C.J.)
6. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, para. 44, leave to appeal to the S.C.C. refused
7. *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184
8. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222
9. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
10. *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (S.C.J.)
11. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299
12. *Grant Forest Products Inc. (Re)*, 2009 CarswellOnt 4699 (S.C.J.)
13. *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933, aff'd 2015 ONCA 570
14. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.)
15. *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 S.C.R. 443
16. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 1330 (S.C.J.)
17. *Nortel Networks Corp. (Re)*, 2014 ONSC 5274
18. *Olympia & York Developments Ltd. (Re)* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.)
19. *Smurfit-Stone Container Canada Inc. (Re)*, 2009 CarswellOnt 391 (S.C.J.)

20. *Stelco (Re)* (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused
21. *Target Canada Co. (Re)*, 2015 ONSC 303

TAB B

SCHEDULE "B": TEXT OF STATUTES, REGULATIONS & BY-LAWS

BANKRUPTCY AND INSOLVENCY ACT

R.S.C., 1985, c. B-3, as amended

2. [...]

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*)

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C., 1985, c. C-36, as amended

2. (1) [...]

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.

[...]

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. — 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 30 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.

[...]

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.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

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.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or 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 wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52 (1) 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 a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(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 with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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

Court File No:

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF EXPRESS FASHION APPAREL CANADA INC. and EXPRESS
CANADA GC GP, INC.**

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

PROCEEDING COMMENCED AT TORONTO

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