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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **HUDSON'S BAY COMPANY** ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.,

Applicants

AIDE MEMOIRE OF CERTAIN HBC EMPLOYEES AND RETIREES

1. This Aide Memoire is filed on behalf of certain employees, long-term disability beneficiaries, retirees, and pension plan members of the Hudson's Bay Company ("**HBC**") who are represented by Koskie Minsky LLP ("**KM Clients**") to bring to the Court's attention issues that are impacting the KM Clients, and other similarly-situated HBC employees and retirees, on the return of a motion by HBC for the Court to approve the Restructuring Support Agreement ("**RSA**") put forward by certain lenders to HBC.

2. When HBC filed for protection from its creditors on March 7, 2025, it was deeply in debt: It only had $3,304,000 in its bank account.[1] It was paying rent during cure periods, not as it came due. It had not paid suppliers. It owed its credit lenders $430,273,291 and mortgage lenders

[1] Affidavit of Jennifer Bewley sworn March 7, 2025, at para. 128.

$724,441,000.[2] At the time of the CCAA filing, its proposed plan was only to liquidate "selected retail stores" and "realign its operations around a core group of high-performing retail locations".[3]

3. However, within days of obtaining CCAA protection, HBC announced it would be liquidating all its stores and putting all its assets, including leases, up for sale. The trajectory for HBC in these circumstances will culminate in the complete liquidation of the company, the termination of all employees (without severance pay), and the wind up of the registered and unregistered supplemental pension arrangements and the termination of disability, health and other benefits.

4. HBC entered into discussions with a consortium of lenders, including liquidators, (Restore Capital, LLC, HCS 102, LLC, Tiger Asset Solutions Canada, ULC, 1903 Partners, LLC, and GA Group Solutions, LLC) who agreed to lend HBC an additional $7M as a debtor-in-possession loan provided that HBC proceeds to liquidate. The uptick in HBC's sales revenue from a surge of store sales following news of its CCAA filing now means that the DIP can be repaid, but the punitive terms of the DIP loan continue in the RSA, which is back before the Court for approval.

HBC Employees and Retirees are vulnerable and at high risk of losses in this proceeding

5. The KM Clients have reported numerous issues and concerns to date which have been reported to the Court in the previous Aide Memoire and in oral submissions at recent court attendances and raised with the company. Some of the major issues include:

[2] *Ibid.*, at para. 131
[3] *Ibid.*, at para. 20.

(a) **Mass termination of employees without severance pay:** The 9400 active employees will be terminated as the liquidation of HBC concludes and the company is shut down. The severance claim for a population of 9400 employees will likely be in excess of $100 million dollars. HBC has already confirmed it will not pay severance pay. The active employees are a major contingent creditor group. The amount and timing of future distributions on unsecured claims, if any, are unknown.

(b) **WEPP may not be available:** a WEPP payment, which would pay $8500 toward each employee's severance claim, will likely not be available until "all" the employees are terminated and the Court issues an order making WEPPA applicable to the proceeding under section 5(1)(b)(iv) of the *Wage Earner Protection Program Act* , S.C. 2005, c. 47, s. 1 ("**WEPPA**"). Given those uncertainties, the time frame for the employees becoming eligible to apply for a WEPP payment to provide partial compensation for unpaid severance pay is unknown.

(c) **Existing employee creditors:** There are previously terminated employees who are currently owed amounts from HBC under severance arrangements that HBC is not paying. These former employees are creditors.

(d) **Multiple pension plan issues.** The liquidation shut down of HBC will necessitate the wind up of the HBC Pension Plan which has both defined benefit ("**DB**") and defined contribution ("**DC**") components that operate differently. A wind up of the DB component is expected to have surplus that will need to be distributed. The Court of Appeal for Ontario decision on *Sutherland v. HBC*[4] holds that the surplus

[4] 2011 ONCA 606

belongs to the plan members. Whether this conclusion is opposed is not yet known. Any surplus sharing arrangement that may be reached in the future will require representation for all the pension plan members.

The wind up of the DC component will entail the transfer out of all the DC members' DC accounts to other plans as directed by the employee on the termination of the employee and the wind up of the DC component. Employer contributions will become owing during the severance period as the active employees are terminated. This scenario engages section 6(6)(a)(ii)(B) of the CCAA (or its counterpart in section 81.5(1) of the BIA) which states that contributions owing by an employer to a DC plan are to be paid ahead of the claims of other secured creditors. and making the active DC plan members contingent priority secured creditors.

(e) **Disabled HBC employees are facing exceptional hardships**: employees who are in receipt of long-term disability benefits from HBC are extremely vulnerable as they cannot work and are highly dependent on their LTD benefits for their livelihoods. It appears that the HBC LTD benefits are paid through an "ASO" plan (administrative services only), as opposed to an insured plan with an insurance company, which means that when HBC shuts down, the LTD payments to disabled employees are expected to stop. This will cause immediate and significant hardships.

The LTD hardship situation for employees is not new to Canadian insolvency proceedings. The LTD benefits for disabled employees in the *T. Eaton Company*

Ltd. proceeding were stopped when Eaton's stopped paying them while it was under CCAA protection, causing significant hardships for the Eaton's employees. The same result occurred for the employees in the *Nortel Networks Corporation* CCAA proceedings. In those cases, court-approved "hardship" funds were set up to provide quick funds to the disabled employees, and that will likely be required in this case as well.[5]

Counsel to the KM Clients have written to counsel to HBC raising these issues, and others and specifically requested the company's intentions with respect to the LTD and when they will be terminated.

(f) **Health benefits and supplemental pension plans will likely be terminated:** There are underfunded health benefit plans and supplemental pension plans for senior employees that are also expected to be terminated, creating more employee creditor claims.

6. The above issues indicate that there will be a strong need for a Representative Counsel to be appointed for the employees and retirees. This has been raised in discussions with HBC lawyers.

[5] In the aftermath of the harms visited upon disabled employees in the Eaton's and Nortel CCAA proceedings, the provincial government passed legislation in 2014 to amend the *Insurance Act* R.S.O. 1990, c. I.8 (Ontario) to require an employer to provide LTD benefits through an insured arrangement only, and not by an ASO arrangement. However, this proposed amendment of the Insurance Act was never proclaimed into force and on December 31, 2024, section 115.1 of the *Insurance Act* was administratively repealed.

At the federal level, in 2010 legislation was introduced at both the Senate and House of Commons to amend the CCAA and BIA to confer the status of a preferred claim to the liabilities of a fund established for the purpose of LTD benefits, and that such fund be used to continue the payment of benefits to beneficiaries. The Senate Bill passed second reading, but did not get out of committee. The House bill passed first reading. Neither Bill received Royal Assent.

The RSA operates to prevent the future appointment of Employee and Retiree Representative Counsel

7. Article 14(f) of the RSA requires that HBC covenant and pre-commit to: (a) opposing the appointment of any representative counsel; and, (b) if granted, not providing funding for such counsel. Those conditions would be imposed at this early stage without even considering how the liquidation/ restructuring unfolds and how the employees and retirees will be impacted as summarized above. That article provides:

> **14. Negative Covenants**: ***The Loan Parties covenant and agree not to*** do, or cause not to be done the following, other than with the prior written consent of the Agents or as otherwise determined by the Court:
>
> (f) ***Pay, incur any obligation to pay, or establish any retainer with respect to the fees, expenses or disbursements of a legal, financial or other advisor of any party***, (other than (i) the Monitor and its legal counsel, (ii) the respective legal, financial and other advisers of the Loan Parties, (iii) respective legal advisors of the Agents to the terms of this Agreement and provided for in the Budget (or paid out of proceeds of ABL Priority Collateral and Term Loan Priority Collateral respectively) unless such fees, expenses or disbursements, as applicable, are reviewed and confirmed in advance by the Agents, and (iv) any advisor other than in accordance with the Liquidation Services Agreement or the Lease Solicitation Process approved by the Court [Emphasis added]

8. The RSA cannot foreclose the ability of HBC, the Court, or any other party (such as the KM Clients) to seek to appoint representative counsel for the soon-to-be terminated 9,400 HBC employees, the disabled employees, and to represent the much larger HBC retiree population. The effective pre-judgment in Article 14(f) is contrary to CCAA case law and its flexible and contextual purpose, and it also purports to oust the jurisdiction of the Court on any future representative counsel motion.

9. In *Canwest*[6], Justice Pepall held that a DIP term cannot oust the jurisdiction of the Court on a motion to appoint and fund Representative Counsel for the employees in that case:

> [25] The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.
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> [26] I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. ***It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.*** [Emphasis added]

10. In the alternative, if this Court decides to approve the RSA, then paragraph 14 should be amended to carve out the restriction on the appointment of Representative Counsel for the HBC employees and retirees.

11. HBC's employees and retirees are important stakeholders in these proceedings. Surrounded by well-represented company, monitor, lenders, landlords, suppliers and other commercially sophisticated parties, they are also uniquely vulnerable to losses and they will need representation. The RSA, with its vice-like grip on what HBC can do in these proceedings, pre-emptively prohibits any attempts to provide representative counsel to those employees who are

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[6] *Canwest Publishing Inc.*, 2010 ONSC 1328 at paras. 25-26.

now tasked with ensuring that HBC's liquidation actually happens so that those same lenders will be repaid. The RSA is antithetical to the flexibility of the CCAA process, its focus on all stakeholders, and the discretionary powers of the CCAA Court. It should not be approved.

March 25, 2025

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