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 HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.

(Applicants)

RESPONDING FACTUM OF THE APPLICANTS
(Re: Hilco Motion)
(Returnable July 15, 2025)

July 14, 2025

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TO: THE SERVICE LIST

PART I – OVERVIEW[1]

1. Hilco's motion is designed with the single purpose of terminating the Central Walk APA. Hilco does not support the CW Transaction because Pathlight stands to reap most of the benefit of the CW Transaction and proceeds from Hilco's priority collateral are currently funding rent payments for the CW Leases. Hilco's intentions are clearly articulated at paragraphs 28 and 46 of its Factum:

> "It is the FILO Agent's position that unless Pathlight or Ruby Liu Corp. agrees to cover the costs related to the pursuit of the Central Walk Transaction, something the FILO Agent requested in the June 22 Letter, the Central Walk Transaction should be terminated and no further funds should be spent in its pursuit and the Central Walk Leases should be disclaimed"[2]

> "In the alternative, if the Court declines to expand the powers of the Monitor at this time, the FILO Agent asks that the Applicants be directed to terminate the Central Walk APA and disclaim the Central Walk Leases."[3]

2. Hilco does not support the CW Transaction. Pathlight does. This is essentially an intercreditor dispute between Hilco and Pathlight. Both lenders claim to represent the fulcrum creditor. The question of which lender represents the fulcrum creditor in the CCAA Proceedings drives both Hilco's and Pathlight's views of which party should most influence material monetization decisions going forward and which lender should bear the funding risk of pursuing the CW Transaction. While it is impossible at this time to determine with certainty which lender is the fulcrum creditor, the Applicants, in consultation with its financial advisor, believe that it is more likely than not that Pathlight holds the fulcrum position.

3. Hilco does not have the ability to force the termination of the Central Walk APA pursuant to the CCAA and presumably pursuant to the Intercreditor Agreement. Therefore, Hilco is seeking to have the Court remove Hudson's Bay's Board of Directors, grant additional powers to the Monitor and direct the Monitor to terminate the Central Walk APA. The CCAA sets forth the test for removal of directors, however Hilco has not even mentioned the test, let alone attempted to satisfy the significant threshold such test requires. The Board has acted and continues to act in good faith and with due diligence to maximize recovery for all stakeholders, and exercise its

[1] Capitalized terms used herein and not otherwise defined have the meanings ascribed to such terms in the Affidavit of Michael Culhane sworn July 13, 2025 (the "**Third Culhane Affidavit**").
[2] Factum of ReStore Capital, LLC, dated July 12, 2025, at para. 28.
[3] *Ibid* at para. 46.

business judgment. No evidence has been submitted that would justify removing the Board.

PART II – THE FACTS

4. The facts with respect to this motion are more fully set out in the Third Culhane Affidavit.

A. Hilco's Influence on the CCAA Proceedings

5. Hilco is a large, sophisticated, advisory and investment firm specializing in asset monetization, restructuring and valuation services across various industries. Hilco wears multiple hats in these CCAA Proceedings through separate corporate vehicles that are all under common control. These roles include serving as: (a) a pre-filing secured lender and agent; (b) a provider and financer of consignment goods (both pre and post filing); (c) a DIP Lender; (d) the appraiser of inventory on behalf of the lenders; and (e) the lead liquidator in the joint venture forming the Liquidation Consultant.[4]

6. In its capacities as FILO Agent, FILO Lender, DIP Lender, proposed Agent under the RFA the Court declined to approve, lead Liquidation Consultant, and appraiser, Hilco had significant input into, influence over and involvement in various matters within the CCAA Proceedings and the monetization processes, including but not limited to:

(a) The terms of, timing and parameters of the various monetization processes, including start and finish dates;

(b) Organizing four of the most prominent North American retail liquidators (Hilco, Gordon Brothers, Tiger and GA Capital) to submit a joint bid for the liquidation, with the fifth major Liquidator, SB360, joining the syndicate thereafter. These parties represented the only liquidators operating in North America who could have provided the liquidation services required by the Company. As all major liquidators were party to a single bid, the Company was left with limited alternatives or bargaining power on the economics of the arrangements;

(c) Significant involvement (as lead Liquidation Consultant and DIP Lender) in the negotiation and/or review of the Liquidation Consulting Agreement, Liquidation Sale Approval Order and Sale Guidelines; and

[4] Third Culhane Affidavit at paras. 6 and 18.

(d) As lead Liquidation Consultant, day-to-day control and oversight of the Liquidation Sale, including marketing, discount rates and cadence, supply of inventory into Stores including consignment and augment inventory levels, FF&E sales, pricing and discounting, and condition of the Stores at the conclusion of the Liquidation Sale.[5]

7. Hilco's financial advisor, Richter, was provided with information throughout the course of the CCAA Proceedings, including (a) cashflows (both draft and final versions) and updates on asset monetization processes and having opportunities to review them and frequently discuss with the Monitor, including receipt of weekly cash flow variance reporting, and (b) daily updates on sales and FF&E reports as well as a dashboard that summarized the Company's cash position, daily sales and liquidation to date sales, inventory and gross margin.[6] In addition, Hilco and the FILO Lenders received regular updates regarding the CCAA Proceedings.[7]

B. Liquidation Sale

8. While Hilco contends that it is suffering substantial prejudice to its financial position in these CCAA Proceedings, a conservative estimate of the fees and other amounts earned by the Liquidation Consultant through liquidator fees from the Liquidation Sale total approximately $16 million as well as expense reimbursements of approximately $14 million paid to date, for a total of approximately $30 million. Additionally, Hilco made a profit margin on augmented and consignment goods it provided to the Company (over $87 million of sales). The Company estimates Hilco has profited well in excess of $40 million through the Liquidation Sale when taking into account their fees, expense reimbursement, and profit margins on augment and consignment sales.[8]

9. Representatives of Hilco as Liquidation Consultant were involved on a daily basis in the Liquidation Sale. Hudson's Bay and Reflect, financial advisor to the Applicants, reviewed the status of the Liquidation Sale and communicated on a regular basis with Hilco as Liquidation Consultant in respect of the same. This included the timing for completion of the Liquidation Sale in particular Stores, and the subsequent timing for the disclaimer of Store Leases in circumstances where the Stores were not subject to any offers received in the SISP or Lease

[5] *Ibid* at para. 24.
[6] *Ibid* at para. 25.
[7] *Ibid* at para. 7.
[8] *Ibid* at para. 37.

Monetization Process.[9]

10. The Liquidation Consultant in its sole discretion determined the timing and pricing for FF&E sales, discount cadences, potential sources of bulk sale buyers and other potential purchasers.[10] In practice, the Liquidation Consultant's focus on augmented merchandise ultimately required significant additional support and resources from Hudson's Bay during the sale in coordinating goods for sale, and prolonged use of FF&E to display goods, which slowed the pace of the FF&E sales.[11]

11. Hilco projected sales attributable to Store FF&E in the Liquidation Sale to be approximately $17 million, however, Store FF&E sales receipts were approximately $10.7 million, resulting in a shortfall relative to Hilco's expectations by approximately $6.3 million (37%). A number of factors and decisions made by the Liquidation Consultant contributed directly to the reduction including: (a) delayed start time and reduced overall timeline for sale of FF&E (from the originally planned 55 days to less than 30 days in total); (b) failure to discount FF&E appropriately and aggressively to ensure sales (despite repeated requests by Hudson's Bay and its advisors for greater discounting); (c) failure to secure more bulk buyers; and (d) extended use of FF&E to display augmented goods late in the sales process, making it more challenging to sell the FF&E.[12]

12. In addition to the reduced sales revenue from FF&E, because the Fourth Cash Flow contemplated that most of the FF&E would be sold, there were only typical and non-material FF&E removal costs included in the Fourth Cash Flow. As a direct result of the Liquidation Consultant's underperformance with respect to FF&E sales relative to its own projections reflected in the Fourth Cash Flow, the Company is required to incur the costs of removing the unsold FF&E, the cost of which is now estimated to be $7.9 million in Fifth Draft Cash Flow.[13]

13. Hilco directed that all representatives of the Liquidation Consultant vacate all Stores by June 7, 2025, leaving the majority of FF&E clean up work to be completed by Hudson's Bay.[14] Since the completion of the Liquidation Sale, Hudson's Bay and Reflect have been coordinating the FF&E removal directly and in consultation with the Landlords. The estimated costs of FF&E removal, as outlined in the Fifth Draft Cash Flow, have since been reduced relative to initial

[9] *Ibid* at paras. 31-32.
[10] *Ibid* at para. 33.
[11] *Ibid* at para. 34.
[12] *Ibid* at para. 41.
[13] *Ibid* at para. 42.
[14] *Ibid* at para. 39.

estimates through: (a) obtaining additional quotes from contractors assisting with the removal, and in some cases working directly with Landlords; (b) entering into arrangements with bulk consumers to remove the FF&E at no consideration for or cost to Hudson's Bay; and (c) ongoing discussions with landlords who in some cases have maintained unsold FF&E for future tenant use or otherwise.[15]

14. During the course of the negotiations of the Sale Guidelines involving the Landlords and Hilco, the concept of removal of external signage was discussed in the context of paragraphs 8 and 9 of the Sale Guidelines. Prior to putting a hold on signage removal at Hilco's demand, Hudson's Bay has had some success in arranging for removal at a lower cost than reserved in the Fifth Draft Cash Flow through alternative contractors as well as Landlords' involvement.[16]

C. Central Walk APA

15. The Applicants are pursuing the CW Transaction to maximize stakeholder recoveries. Hilco seeks to prematurely terminate the Central Walk APA.[17]

16. The Central Walk APA and the Affiliate Lease Assignment Agreement were the culmination of the Applicants, with the assistance of its advisors and in consultation with the Monitor, following and adhering to the Lease Monetization Process and the SISP. With respect to the vast majority of the Leases subject to the Central Walk APA, the Applicants did not have any alternative transactions with a higher prospect of completion.[18]

17. The Company entered into the Central Walk APA with the support of Hilco as well as Pathlight. Hilco was advised that the Company intended to enter into an agreement with Central Walk, pursuant to which 25 Leases would be assigned subject to Landlord consent or Court order. Hilco was also provided with a breakdown of the number of such Leases that are the priority collateral of the FILO Lender and the Pathlight Lenders pursuant to the Intercreditor Agreement.[19]

18. The Central Walk APA, if completed, is expected to generate significant recoveries from the sale of the 25 CW Leases. In addition, Hudson's Bay has already received $6 million in connection with the completion of the sale of three Leases to Central Walk pursuant to the Affiliate

[15] *Ibid* at para. 45.
[16] *Ibid* at paras. 48 and 50.
[17] *Ibid* at para. 51.
[18] *Ibid* at para. 52.
[19] *Ibid* at para. 53.

Lease Assignment Agreement which was approved by this Court on June 23, 2025.[20]

19. Hilco's criticism of the costs associated with pursuing the CW Transaction fails to consider the fact that the Company intentionally negotiated to separate the three CW Leases subject to the Affiliate Lease Assignment Agreement approved by this Court on June 23, 2025, from the 25 Leases subject to the Central Walk APA. Separation of the CW Leases into two separate agreements was therefore designed to generate $6 million of proceeds from the three CW Leases to mitigate anticipated costs, including rent, incurred by the Company in advancing the larger Central Walk APA. Hudson's Bay recognized and identified the potential difficulties or delays which could be faced given that Central Walk may not be viewed as an established retailer by the Landlords.[21]

20. The fact that a substantial majority of proceeds from the Affiliate Lease Assignment Agreement and Central Walk APA transactions would ultimately be distributable to Pathlight while proceeds of Hilco's priority collateral is being used to pay rent on the 25 CW Leases, is an intercreditor issue between Hilco and Pathlight. Hilco and Pathlight are both experienced, sophisticated lenders who negotiated a 70-page Intercreditor Agreement to govern their relationship.[22]

21. In addition, the question of which lender is actually incurring the rent costs of maintaining the CW Leases will not be known until it is determined who the fulcrum creditor is. The Fourth Cash Flow, the Fifth Draft Cash Flow, and all previous cash flow projections prepared in these CCAA Proceedings are based on highly conservative assumptions and were not prepared on the same basis that a net realization analysis would be.[23]

22. When considering the likely ultimate range of recoveries to the lenders, positive adjustments are likely to be made to future cash flow forecasts. These adjustments include, among other things, receipts from the closing of the Affiliate Lease Assignment Agreement, another Lease assignment transaction that the Company intends to seek Court approval for on July 31, 2025, proceeds from the Art Collection, as well as a holdback adjustment, and a general decrease in disbursements for, among other things, final Store closure costs. The exact amount and timing of receipts of anticipated proceeds remain uncertain. For that reason, such receipts

[20] *Ibid* at para. 54.
[21] *Ibid* at paras. 55-56.
[22] *Ibid* at para. 57.
[23] *Ibid* at para. 58.

were not included in the Fifth Draft Cash Flow.[24]

23. The Company is also asserting a claim of an interest in the pension surplus for the benefit of its creditors. It is possible, and appears likely, that given the quantum of the pension surplus, Hilco and the other FILO Lenders will eventually be paid in full.[25]

24. Therefore, it is reasonable to assume that the Pathlight Lenders are very likely to be the fulcrum secured creditor and are the parties assuming the financial risk associated with the Company advancing the CW Transaction. Pathlight supports the CW Transaction.[26]

D. Hilco's Mischaracterization of Financial Data

25. The Fredericks Affidavit attempts to paint a picture of mismanagement through the picking and choosing of discrete financial information. Hilco's statements are misleading for the following reasons:

(a) Hilco often compares figures drawn from different cash flow forecasts prepared over the course of these CCAA Proceedings. Each of these forecasts, by definition, covered different time periods and incorporated different receipts and disbursements. Comparing figures across multiple forecasts without accounting for these differences does not provide an accurate or fair representation of the Company's finances;

(b) In presenting certain financial results, Hilco has selectively chosen a time period to avoid capturing proceeds while capturing costs which are directly attributable to the ignored proceeds; and

(c) Hilco ignores the fact that a majority of the "increased costs" relate to the Liquidation Sale, a process which was controlled by Hilco.[27]

26. The Fredericks' Affidavit does not provide an accurate comparison between the Fourth Cash Flow and the Fifth Draft Cash Flow. At a high level, the comparison fails to:

[24] *Ibid* at para. 59.
[25] *Ibid* at par. 60.
[26] *Ibid* at para. 61.
[27] *Ibid* at para. 62.

(a) Acknowledge that the Fifth Draft Cash Flow was provided to Richter and the FILO Lenders in draft and was subject to material change. Since providing the Fifth Draft Cash Flow, the Company, the Monitor, Reflect, Richter and Hilco have all worked collaboratively to identify potential cost savings that will have a material impact on the cash flow forecast;

(b) The Fourth Cash Flow was presented for a 13-week forecast period. All parties involved understood there would be expenses related to winding down the business after the 13-week forecast period;

(c) The increased disbursements are largely related to concession and consignment payments, the Liquidation Consultant's share of additional consultant goods, sales tax remittances, and the Liquidation Consultant fees and expenses, which can all be directly attributed to increased sales receipts during the same period; and

(d) The Fifth Draft Cash Flow does not include cash receipts from other areas outside the liquidation, such as the Affiliate Lease Assignment Agreement and other lease transactions, proceeds from the Art Collection, and realization of the pension surplus, all of which have costs included in the cash flow.[28]

27. Variances between the Fourth Cash Flow and the Draft Fifth Cash Flow were detailed in a bridge analysis prepared by the Monitor that was provided to and presented to Hilco, Pathlight, and their respective advisors at a meeting held at the office of Bennett Jones LLP on June 26, 2025. In addition, in the weekly cash flow variance reporting provided by the Monitor to Richter, it was repeatedly explained that multiple substantial positive disbursement variances were attributable to timing and were expected to reverse in future weeks. These included variances related to the timing of payments in respect of Participating Concession Vendors, sales taxes, and shared services.[29]

E. Hudson's Bay is Properly Governed

28. The Board has acted appropriately and in the best interests of the Company and its stakeholders, with a clear focus on maximizing recoveries from the estate. It is important to note that the members of the Board do not receive any compensation for their services. As a result,

[28] *Ibid* at para. 64.
[29] *Ibid* at para. 65.

the Board's oversight does not impose any additional cost on the Company's creditors.[30]

29. Management costs have been steadily decreasing over the course of these CCAA Proceedings. With the closing of all Stores by June 1, 2025, and the completion of certain monetization transactions at the end of June 2025, positions have been quickly eliminated with the oversight of and in consultation with the Monitor to ensure that staffing levels remain appropriate. Total headcount was reduced from approximately 8,374 as of May 31, 2025, to 113 as of July 11, 2025. Headcount will be further reduced after July 15, 2025.[31]

30. Professional fees will necessarily continue to be incurred in connection with the administration and wind-down of the Applicants' estates. Enhancing the Monitor's powers in these CCAA Proceedings will not reduce such costs and may actually result in increased costs to the detriment of the Applicants' creditors.[32]

31. In refusing to approve the RFA, this Court provided for enhanced reporting requirements on the part of the Monitor. The Monitor has not sought the advice and directions of the Court in respect of any of the enhanced reporting requirements placed on the Monitor by this Court. The Monitor has also supported the Applicants' requested relief for stay extensions throughout these CCAA Proceedings and has opined that the Applicants have acted in good faith and with due diligence in these CCAA Proceedings.[33]

PART III – ISSUES

32. The issues to be determined on this motion are whether this Court should:

(a) remove the directors of the Applicants pursuant to Section 11.5(1) of the CCAA and enhance the powers of the Monitor to allow the Monitor to conduct the affairs and operations of the Applicants; and

(b) direct the Monitor to cause the Company to terminate the Central Walk APA.

[30] *Ibid* at para. 67.
[31] *Ibid* at para. 69.
[32] *Ibid* at para. 70.
[33] *Ibid* at paras. 71 and 73.

PART IV – LAW & ARGUMENT

A. The Court Should Not Remove the Applicants' Directors and Appoint a *De Facto* Receiver through an Enhancement of the Monitor's Powers

(i) Significant Threshold to Remove Directors

33. Subject to the typical limitations set out in an initial CCAA order, a CCAA debtor retains control of its business and affairs during the proceedings. However, in certain exceptional circumstances, the CCAA empowers the Court to depart from the usual debtor-in-possession model and intervene directly. Section 11.5(1) of the CCAA provides:

> "Removal of directors
>
> 11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

34. The statutory discretion provided to the Court pursuant to Section 11.5(1) of the CCAA is limited and requires the moving party to meet a "significant threshold". The following statements by Justice Wilton Siegel in *Unique Broadband*, highlight the significant threshold the Court must be satisfied of when exercising its discretion to remove directors under Section 11.5(1) of the CCAA, the continued application of the business judgement rule in CCAA proceedings, and the cautious approach the Court should adopt when intervening in corporate governance during a CCAA proceeding:

> "There is nothing in the wording of s.11.5 that displaces the ordinary standard of proof on a balance of probabilities. However, the language of s.11.5(1) does establish a significant threshold for the entitlement to relief thereunder."[34]
>
> "A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and feasible options available to the debtor. A similar examination of the actions of the directors is required for a determination that a director has acted inappropriately in the circumstances of a particular restructuring. I note, in particular, that given this language, the fact that a shareholder or creditor may not

[34] *Unique Broadband Systems (Re)*, 2011 ONSC 224 at para. 32. ["***Unique Broadband***"]. A copy of this decision is attached to this factum as **Schedule "C"**.

> agree with a decision of a director is far from being a sufficient ground for the director's removal. As a related matter, there is nothing in s.11.5 that evidences an intention to displace the "business judgment rule."[35]
>
> "The language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring or are "inappropriate", or are likely to be "inappropriate", in the circumstances."[36]
>
> "In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made."[37]
>
> "First, removing and replacing the directors of a corporation, even a debtor corporation, subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of a corporation. The Shareholders have elected the directors and remain entitled to bring their own action or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders."[38]
>
> "Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s.11.591), a court would ordinarily take into consideration the presence or absence of any recommendation from the Monitor."[39]
>
> "A particular objective of 206 [the moving party seeking the removal of directors] is to have a new board of directors review the decision of the UBS Directors to defend the DOL action brought against UBS. **However, section 11.5 cannot be used to replace a board of directors to the extent that the purpose of such relief is to have a new board of directors revisit decisions taken by the existing boar**d. …Equally important, as mentioned above, the "business judgment rule" continues to govern judicial intervention in the affairs of a debtor company under the CCAA. To succeed on this motion, 206 must provide evidence that establishes the elements of the test in section 11.5. It cannot do so on the factors before the court on this motion."[40] (Emphasis added).

35. Justice Fitzpatrick adopted the reasoning of the Court in *Unique Broadband*, including in respect of the significant threshold that the moving party must meet and the factors outlined by Justice Wilton Siegel, in addressing a motion in *Quest University* by a moving party seeking to remove and replace various governors of the CCAA debtor, being a post-secondary institution. Justice Fitzpatrick cited *Unique Broadband* with approval and held "[I]n addition, reading between

[35] *Unique Broadband* at para. 33.
[36] *Unique Broadband* at para. 34.
[37] *Unique Broadband* at para. 35.
[38] *Unique Broadband* at para. 36.
[39] *Unique Broadband* at para. 37.
[40] *Unique Broadband* at para. 56.

the lines, VF's main complaint is that the Board disagrees with its vision as to how Quest's financial difficulties may be solved. This disagreement is not a basis upon which to overhaul the Board's composition under section 11.5 so as to give VF control of it."[41]

(ii) These Circumstances Do Not Warrant Enhancement of the Monitor's Powers

36. Hilco has failed to meet the significant threshold required in section 11.5 of the CCAA in seeking to remove the current directors and replace them through the use of a Super Monitor. Hilco alleges mismanagement by the Company and feigns surprise or criticizes the the Applicants for matters that were foreseeable, inevitable and/or, in many instances, driven by or contributed to by Hilco's own conduct and commercial decisions.

37. Hilco's motion is instead framed as seeking to enhance the Monitor's powers to that of a Super Monitor.

38. Hilco claims that due to the Applicants' mismanagement of the CCAA Proceedings, the Monitor should be impressed with additional powers so that it can decide whether to pursue the CW Transaction. However, in addition to seeking an order granting additional powers to the Monitor, Hilco is also seeking an order directing the Monitor to terminate the Central Walk APA.

39. Hilco's underlying strategy is clear: adopt the FILO Agent's views of the intercreditor rights and obligations and require Pathlight to contribute to the carrying costs of seeking to implement the Central Walk Transaction, failing which the Central Walk APA should be terminated immediately, despite the views of current management or of other stakeholders. Hilco is effectively seeking to remove the Board and achieve its own objectives. The use of Section 11.5 for this very purpose, was cautioned against in *Unique Broadband* and *Quest University*.

40. Replacing the Board with a Super Monitor, or in the alternative, the appointment of Richter as Receiver, does not guarantee that the competing interests of the secured lenders will not require further debate, and is likely to require more advice and direction of this Court if the Court officer is placed between the major stakeholders.

41. Whie this Court has enhanced the powers of a CCAA Monitor in prior proceedings, such relief is generally sought at the request of the Applicants and Monitor, in anticipation of the resignation of existing management or the Board, where there has been a void of management

[41] *Quest University Canada (Re)*, 2020 BCSC 318 at para. 65. ["***Quest University***"]

leading up to a proceeding or in the period at or near completion of a CCAA Proceedings.[42]

42. Courts have repeatedly expressed that such discretion should only be exercised in extraordinary circumstances. The traditional role of the Monitor in proceedings under the CCAA is that of the "eyes and ears" of the Court.[43] While this Court may use its discretion to enhance a monitor's powers beyond its supervisory role, it can only do so in “extraordinary circumstances” where “absolutely necessary”. As held in *Fiera*, empowering a Monitor with broad powers should not be a routine or regular occurrence.[44]

43. The Court in *Fiera* also cautioned that the ability of the Court officer to remain neutral, through the imposition of the requested enhanced powers, should also be considered when it held: “… Finally, it is important that the Monitor retain (and be seen to retain) its neutrality. The Court should be careful not to risk potentially undermining that important objective unless there are exigent circumstances which necessarily demand that the Monitor be vested with increased powers.“[45]

44. Given the significant threshold for removing directors under section 11.5(1) of the CCAA and the traditional role of the Monitor which should only be expanded in exceptional circumstances, the Court should not remove the Board or enhance the Monitor’s powers in these CCAA Proceedings given, among other reasons:

(a) While indirectly seeking to remove the Board, Hilco has failed to engage Section 11.5(1) of the CCAA or asserted any inappropriate behaviour on the part of any director. The Applicants are actively engaged as debtors-in-possession, carrying out their roles and responsibilities under the Court-ordered monetization processes;

(b) The Board is exercising its business judgment, with a clear recognition of their obligation to consider and appropriately balance the interests of its stakeholders[46];

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[42] Old GI Inc. et al., CCAA Super Monitor and Termination Order dated August 30, 2023 (Court File No. CV-23-0699824-00CL); *Body Shop Canada Limited*, Ancillary Order dated December 13, 2024 (Court File No. CV-24-00723586-00CL.
[43] *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014 at para 10
[44] *Fiera Private Debt Fund v. Saltwire Network Inc*. 2024 NSSC 89 at para. 15 [“***Fiera***”], *Arrangement relative a Bloom Lake General*, 2021 QCCS 2946 at para. 80.
[45] ***Fiera*** at para. 15.
[46] Third Culhane Affidavit at para. 17.

(c) The evidence filed by the FILO Agent in support of any alleged mismanagement, is incomplete and inappropriately taken out of context and should not form the basis of a motion to remove directors, where the appointing shareholders have not requested such extreme actions be taken;

(d) Many of the results about which Hilco now complains are a direct consequence of Hilco's own actions taken in its various capacities or were outcomes Hilco knew or should have known could occur when Hilco agreed to and participated in the various processes that it now criticizes[47]; and

(e) The Monitor has supported the Applicants' requested relief for stay extensions throughout these CCAA Proceedings and has opined that the Applicants have acted in good faith and with due diligence in these CCAA Proceedings.[48]

45. Hilco is effectively seeking to appoint a receiver, either in the form of a Super Monitor with restricted decision-making powers or remove the Monitor entirely and replace it with its own financial advisor, Richter. While courts have articulated that the role of a receiver should also consider the rights of all creditors, given Hilco's clear tactics in the current motion, it is inevitable that Hilco will expect any Court Officer to act in accordance with its wishes, or risk future motions for "directions" and/or outright replacement.

46. Courts have held that it is just and convenient to appoint a receiver where:

(a) The lender's security is at risk of deteriorating;

(b) There is a loss of confidence in the debtors' management;

(c) There is a need to stabilize and preserve the debtors' business; and

(d) The positions and interests of other creditors militate in favour of appointing a receiver.[49]

47. In these circumstances, in addition to the considerations noted above with respect to why the Board should not be removed pursuant to Section 11.5(1) of the CCAA and why the Monitor's powers should not be enhanced, the following factors, among others, militate against a finding

[47] *Ibid* at para. 8.
[48] *Ibid* at paras. 71 and 73.
[49] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at para. 45.

that the Court should appoint a *de facto* receiver in the form of a Super Monitor or appoint Richter as receiver:

(a) It is reasonable to assume that the Pathlight Lenders are very likely to be the fulcrum secured creditor and are the parties assuming the financial risk associated with the Company advancing the CW Transaction; and

(b) As the fulcrum secured creditor, Pathlight supports the CW Transaction.[50]

B. The Central Walk APA Should Not be Terminated

48. At the heart of Hilco's motion, is an attempt to impose its objectives on the Applicants and their stakeholders. Which creditor should fund the rent pending a motion seeking approval of the CW Transaction is an intercreditor issue. Hilco and Pathlight are parties to a 70-page intercreditor agreement, negotiated between experienced and sophisticated parties. Having failed to persuade its fellow senior lender of the clarity and certainty of Hilco's rights in respect of the use of collateral and allocation of costs during these proceedings as (allegedly) governed by the Intercreditor Agreement, Hilco is seeking to effect an end run.

49. The Applicants are pursuing the CW Transaction to maximize stakeholder recoveries. The successful completion of the CW Transaction represents significant potential recoveries to the Applicants' creditors [51]

50. To the extent Hilco is upset that Pathlight has refused to share the rent costs related to pursuing the CW Transaction beyond the conclusion of the Liquidation Sale, that is entirely an intercreditor issue between Hilco and Pathlight. The fact that a substantial majority of proceeds from the Affiliate Lease Assignment Agreement and Central Walk APA transactions would ultimately be distributable to Pathlight, is also an intercreditor issue between Hilco and Pathlight.

51. In Justice Osborne's Endorsement dated March 29, 2025, in refusing to approve the RFA, His Honour acknowledged that it is not unusual that a secured creditor's collateral may be sold, disposed of or encumbered during the CCAA Proceedings and stated that such an action does not grant the secured creditor a veto over such a transaction.[52]

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[50] Third Culhane Affidavit at para. 61.
[51] *Ibid* at paras. 51 and 54.
[52] Hudson's Bay Company ULC et al., Endorsement of Justice Osborne dated March 29, 2025 (Court File No. CV-25-00738613-00CL) at para. 17(b).

52. Approval of the CW Transaction is not currently before the Court. The merits of the CW Transaction will be the subject matter of a separate motion, with a proper evidentiary record and legal briefs. Hilco's attempt to pre-empt a proper approval hearing is improper and unfair to the Applicants and their stakeholders as well as Central Walk.

53. Additionally, as set out above, it is reasonable to assume that the Pathlight Lenders are very likely to be the fulcrum secured creditor and are the parties assuming the financial risk associated with the Company advancing the CW Transaction. Pathlight supports the CW Transaction.[53]

PART V – RELIEF SOUGHT

54. The Applicants therefore request that the Court dismiss the Hilco Motion in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of July, 2025.

Stikeman Elliott LLP

Stikeman Elliott LLP
Lawyers for the Applicants

[53] Third Culhane Affidavit at para. 61.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Unique Broadband Systems (Re)*, 2011 ONSC 224.
2. *Quest University Canada (Re)*, 2020 BCSC 318.
3. *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014.
4. *Fiera Private Debt Fund v. Saltwire Network Inc*, 2024 NSSC 89.
5. *Arrangement relative a Bloom Lake General*, 2021 QCCS 2946.
6. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.,* 2020 ONSC 1953.

SCHEDULE "B"
TEXT OF STATUTES AND REGULATIONS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

SCHEDULE “C”
[ATTACHED]

CITATION: Unique Broadband Systems (Re), 2011 ONSC 224
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-01-25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Wilton-Siegel J.

COUNSEL: *Peter Roy* and *Sean Grayson*, for the Applicant, 2064818 Ontario Inc.

E. Patrick Shea, for the Applicant, Unique Broadband Systems, Inc.

Peter C. Wardle, for the UBS Directors, Grant McCutcheon, Henry Eaton and Robert Ulicki

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

Raj Sahni, for Jolian Investments Inc., in its capacity as a creditor

HEARD: December 20, 2011

ENDORSEMENT

[1] 2064818 Ontario Inc. ("206") seeks an order pursuant to ss. 11.5(1) and (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") removing Grant McCutcheon ("McCutcheon") and Henry Eaton ("Eaton") as directors of Unique Broadband Systems, Inc. ("UBS"). UBS seeks an amendment to the initial order under the CCAA dated July 5, 2011 (the "Initial Order") granting protection to UBS that would extend the stay thereunder to include a stay of an oppression action against the UBS directors commenced by 206 on December 22, 2010 (the "Oppression Action"). I will deal with each matter in turn after briefly setting out the background.

Background

The Parties

[2] UBS is a public corporation incorporated in Ontario under the *Business Corporations Act*, R.S.O. 1990, c. B16 (the "OBCA").

[3] LOOK Communications Inc. ("Look") is a public corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA").

[4] UBS owns shares in Look carrying 39.2% of the equity and 37.6% of the votes. UBS also provides management services to Look pursuant to a management services agreement described below.

[5] 206 is a corporation controlled by Alex Dolgonos ("Dolgonos"). 206 is a substantial shareholder of UBS holding slightly less than 20% of the outstanding shares of UBS. Dolgonos also owns all of the outstanding shares of DOL Technologies Inc. ("DOL"), a private corporation incorporated under the OBCA.

The Election of the UBS Directors

[6] Each of the current UBS directors, being McCutcheon, Eaton and Robert Ulicki ("Ulicki") (collectively, the "UBS Directors"), was elected to the UBS board of directors at a special meeting of the shareholders held on July 5, 2010 to replace the former directors, being McGocy, Douglas Reesan and Louis Mitrovich, pursuant to s. 122 of the OBCA. The election of these directors was the subject of a proxy contest between the existing management and the shareholders who supported the UBS Directors.

[7] On July 6, 2010, UBS advised Look that it had the support of shareholders of Look possessing sufficient votes to effect a change of control of the board of directors of Look. UBS requested that the then-current board of Look resign and appoint a replacement slate of directors proposed by UBS, which included the UBS Directors, Laurence Silber ("Silber") and David Rattee ("Rattee"), without calling a special meeting of shareholders.

[8] On July 20, 2010, all five Look directors resigned and McCutcheon, Eaton and Ulicki were appointed directors of Look. On July 21, 2010, McCutcheon was also appointed the chief executive officer of Look, replacing McGocy who had previously served in that position pursuant to the provisions of a management services agreement between UBS and Look, described below. Silber and Rattee were subsequently elected directors of Look on July 27, 2010. Ulicki resigned from the board of directors on September 29, 2010, with the result that there are currently four directors of Look.

[9] The UBS Directors were re-elected at the annual general meeting of UBS shareholders on February 25, 2011. 206 opposed the current slate of directors and proposed its own slate, which included the two directors it seeks on this motion to have installed as directors in place of McCutcheon and Eaton.

The Current Litigation

[10] UBS had previously retained DOL pursuant to an agreement dated July 12, 2008 (the "DOL Technology Agreement") to provide the services of Dolgonos as a "chief technology officer" to UBS. The DOL Technology Agreement was terminated by DOL after the election of the UBS Directors based on "change of control" provisions in the Agreement. DOL then commenced an action against UBS claiming amounts totalling approximately $8.6 million. This action is being defended by UBS, which asserts that the largest component of the DOL claim is

not payable pursuant to the terms of the DOL Technology Agreement. UBS has also counterclaimed to set aside the DOL Technology Agreement.

[11] UBS had also previously retained Jolian Investments Inc., a corporation controlled by Gerald McGoey ("McGoey"), to provide his services as chief executive officer of UBS pursuant to an agreement dated January 1, 2006 (the "Jolian Agreement"). The Jolian Agreement was also terminated by Jolian after the election of the UBS Directors based both on the failure to elect McGoey to the UBS board and on "change of control" provisions in the Agreement. Jolian then commenced an action against UBS claiming amounts totalling approximately $7.5 million. This action is also being defended by UBS, which asserts that the largest component of the Jolian claim is also not payable pursuant to the terms of the Jolian Agreement. UBS has also counterclaimed to set aside the Jolian Agreement. On July 5, 2010, McCutcheon was appointed the chief executive officer of Look to replace McGoey.

[12] In the DOL action and the Jolian action, DOL, Dolgonos, Jolian and McGoey brought motions seeking confirmation of their right to an advancement of funds in respect of the legal costs of pursuing their respective claims and defending the UBS counterclaims against them. UBS resisted such relief and sought an order requiring the parties to return certain retainers previously advanced by UBS to counsel for such parties. By order dated April 11, 2011, Marrocco J. held that these parties were entitled to an advancement of funds as more particularly specified therein. UBS has appealed this order to the Court of Appeal and, pending the hearing of such appeal, has refused to advance or pay any of the amounts addressed in the order of Marrocco J.

[13] In addition, on July 6, 2010, Look also commenced an action against Dolgonos, DOL, McGoey and Jolian, among others, seeking damages based on allegations of breach of fiduciary duty and negligence. The action relates to certain restructuring awards paid by Look in 2009, for which Look seeks recovery.

The Oppression Action

[14] On December 22, 2010, DOL commenced the Oppression Action against both UBS and the UBS Directors. At the hearing of this motion, 206 advised that it is not pursuing the claims against UBS. The statement of claim in the Oppression Action seeks nine separate heads of relief against the UBS Directors in addition to interest and costs.

[15] The Oppression Action centres on two principal allegations. First, it is alleged the UBS Directors acted oppressively in approving a settlement between UBS and Look that was made pursuant to an agreement dated December 3, 2010 (the "Amending Agreement"), that amended a management services agreement dated May 19, 2004 between UBS and Look (collectively, with the Amending Agreement, the "Look MSA"). Second, it is alleged that, by failing to re-elect McGoey to the UBS board of directors on July 5, 2011, the UBS Directors intentionally triggered certain provisions of the Jolian Agreement, giving rise to a right in favour of Jolian to terminate the Agreement. It is alleged that these actions of the UBS Directors exposed UBS to the consequences of the default. 206 also alleges that the UBS Directors acted improperly in

defending the DOL claim described above. More generally, 206 alleges that the UBS Directors have depleted the funds of UBS by these actions contrary to their announced intention at the time of the proxy fight in July 2010 to minimize UBS' expenses and conserve its funds.

[16] 206 seeks damages for oppressive behavior against the UBS Directors in the amount of any loss suffered as a result of execution of the Amending Agreement and in the amount of any payment required to be made to Jolian under the Jolian Agreement. It also seeks declarations that the UBS Directors had a conflict of interest in respect of the execution of the Amending Agreement and have preferred the Look shareholders over the UBS shareholders. On these grounds, 206 further seeks an order removing the UBS Directors from the UBS board.

The CCAA Proceedings

[17] UBS is insolvent. It obtained protection under the CCAA pursuant to the Initial Order. Duff & Phelps Canada Restructuring Inc. (the "Monitor") has been appointed the monitor in the CCAA proceedings. Under the Initial Order, the Oppression Claim is currently stayed against UBS but not against the UBS Directors.

[18] Pursuant to an order dated August 4, 2011, the court approved a claims process in respect of claims against UBS. In accordance with this order, 206 filed a proof of claim in an amount "to be determined" that specifically referred to, and attached, the statement of claim in the Oppression Action.

[19] The largest claims filed in the claims process are: the DOL and Jolian claims described above; a contingent claim by Look for the remainder of the monies due to it under the Amending Agreement, which will expire in June 2012 provided UBS continues to provide services to Look in accordance with the terms of the Look MSA; and the 206 claim in respect of the Oppression Action. Each of the UBS Directors also filed contingent claims respecting indemnification of legal fees that may be incurred in defending the Oppression Action, based on indemnities dated July 5, 2010 granted to them by UBS.

[20] 206 took the position that McCutcheon and Eaton should not review any of the claims filed against UBS in the claims process by virtue of the alleged conflict of interest addressed below. While UBS disputes the existence of such a conflict of interest, these directors did not participate in the UBS review of the claims filed with it, which were therefore reviewed by Ulicki alone together with legal counsel. The UBS position regarding each of these claims was provided to the Monitor by letter dated December 9, 2011.

The Oppression Claim

[21] UBS seeks to have the court exercise its authority under s. 11.03(1) of the CCAA to extend the stay of proceedings in the Initial Order to include the Oppression Action in respect of the UBS Directors. It seeks to have the Oppression Action determined in its entirety in the CCAA proceedings.

[22] UBS makes several arguments in support of this relief. Among others, it submits that the requested relief will further the purposes of the CCAA by allowing the directors to focus on the restructuring rather than diverting their time and effort to other litigation. 206 says that this argument is of no force if the court finds that McCutcheon and Eaton are conflicted and grants its motion to replace them. Given the determination below on 206's motion, I accept this argument of UBS.

[23] In addition to the forgoing reason for extending the stay, there are three other considerations that also support such an order.

[24] First, unless and until a court determines that the UBS Directors are not entitled to indemnification by UBS in respect of the claims made against them in the Oppression Action, the UBS Directors have claims against UBS in the CCAA proceedings arising out of the Oppression Action that must be addressed in the restructuring. As a result, the restructuring cannot proceed until the Oppression Action and related indemnification claims are determined.

[25] Second, the Jolian claim against UBS is already proceeding in the CCAA proceedings. Given the similarity in the factual matrix between the claims in the Jolian action and the Oppression Action, any determination in the Jolian action will also likely apply to the claims and defences in the Oppression Action. Accordingly, the Oppression Action must proceed within the CCAA proceedings to avoid the possibility of both a multiplicity of actions and potentially conflicting decisions.

[26] Lastly, I note that there is no suggestion of any material prejudice to 206 if the determination of the Oppression Action also proceeds within the CCAA proceedings.

[27] Based on the foregoing considerations, the UBS motion to extend the stay in the Initial Order is granted.

Removal Motion

[28] I propose to first address the applicable law in respect of this motion before considering the specific issue in this proceeding.

Applicable Law

[29] Section 11.5 of the CCAA provides as follows:

> (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

(2) The court may, by order, fill any vacancy created under subsection (1).

[30] Accordingly, to succeed on this motion, 206 must demonstrate that the actions of McCutcheon and Eaton, or their positions as directors of both UBS and Look, are such that either (1) they are unreasonably impairing or are likely to impair the possibility of a viable restructuring; or (2) they are acting or are likely to act improperly as directors. Further, it should be noted that any such order, while it requires such a finding, remains subject to the discretion of the court.

[31] 206 does not propose a particular standard applicable to a determination under s. 11.5, apart from stating that the CCAA is remedial legislation and should therefore be construed liberally in accordance with the modern purposive approach to statutory interpretation. I understand this to mean that 206 would interpret s. 11.5(1) to establish a low threshold for entitlement to relief thereunder. UBS submits that there must be a "clear demonstration" of facts supporting a determination under s. 11.5, which appears directed more toward the standard of proof required than the nature of the threshold established under s. 11.5(1).

[32] There is nothing in the wording of s. 11.5 that displaces the ordinary standard of proof on a balance of probabilities. However, the language of s. 11.5(1) does establish a significant threshold for the entitlement to relief thereunder.

[33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. A similar examination of the actions of the directors is required for a determination that a director has acted inappropriately in the circumstances of a particular restructuring. I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director's removal. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the "business judgment rule".

[34] Further, the language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring or are "inappropriate", or are likely to be "inappropriate", in the circumstances.

[35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.

[36] First, removing and replacing directors of a corporation, even a debtor corporation subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.

[37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would ordinarily take into consideration the presence or absence of any recommendation from the Monitor.

Analysis and Conclusions

Positions of the Parties

[38] 206 asserts that McCutcheon and Eaton have a conflict of interest as directors of both UBS and Look which prevents them from fulfilling their responsibilities as directors in the restructuring and justifies an order under s. 11.5 of the CCAA.

[39] 206 has advised the court that it does not allege a monetary conflict based on a larger personal economic interest in Look than in UBS. Instead, 206 alleges that McCutcheon and Eaton are conflicted by virtue of their concurrent positions as directors of both UBS and Look. 206 says that, as a result, these directors can have no role in the UBS CCAA proceedings and should be removed.

[40] UBS takes the position that these directors are not conflicted and are not prevented from participating in any aspect of the CCAA proceedings except for (1) the determination of the Look contingent claim; and (2) the determination of their individual contingent claims for indemnification. It says that, as a result of the position taken by 206 regarding the review of the claims filed under the CCAA proceedings, McCutcheon and Eaton voluntarily did not participate in the UBS review of these claims. However, they intend to be involved on a going-forward basis after determination of this motion, subject to the exceptions described above.

Analysis and Conclusions

[41] For the purposes of this motion, I accept the premise of 206's argument — that the presence of a conflict of interest may prevent directors from fulfilling their responsibilities in a CCAA proceeding to the extent that their continued involvement unreasonably impairs, or is likely to unreasonably impair, the possibility of a viable compromise or arrangement being made in respect of the insolvent company. I also accept that McCutcheon and Eaton have a conflict of interest as directors of both Look and UBS that prevents them from acting in respect of any matter within the CCAA proceedings that pertains to the relationship between the two corporations.

[42] However, such a conflict of interest is not, by itself, sufficient to satisfy the requirements of s. 11.5. Courts have long recognized that interlocking directorships are acceptable, often inevitable or necessary, in the corporate context. Further, the Court of Appeal expressly recognized that "a reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders" is insufficient for removal of directors: see *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.), at para. 76. Instead, courts recognize that conflicts of interest may exist that are to be dealt with in accordance with applicable fiduciary law principles. There is nothing in s. 11.5 that evidences an intention to alter the

general rule, stated by Blair J.A. in *Stelco*, at paras. 74-76, that apprehension of bias is insufficient, on its own, to remove a director.

[43] More generally, as Blair J.A. made clear in *Stelco*, at paras. 74-76, directors will only be removed if their conduct, rather than the mere existence of a conflict of interest, justifies such a sanction:

> In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.
>
> Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.
>
> If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair* v. *Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors, they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

[44] Accordingly, on this motion, 206 must demonstrate either (1) that McCutcheon and Eaton have breached their duties as directors in respect of the conflict that exists in a manner that constitutes acting inappropriately in the circumstances; or (2) that the existence of such conflict of interest prevents them from acting as directors of UBS in a meaningful manner in the restructuring such that they are unreasonably impairing the possibility of a viable restructuring.

[45] I am not persuaded that the fact that McCutcheon and Eaton are directors of both UBS and Look justifies an order replacing them as directors of UBS under s. 11.5 of the CCAA on either ground. I reach this conclusion for the following reasons.

[46] First, the evidence does not disclose that this conflict of interest has prevented the USB board from functioning. Prior to the CCAA proceeding, the Amending Agreement was negotiated between Rattee, on behalf of Look, and Ulicki on behalf of UBS with the benefit of legal counsel. 206 may object to the result on the basis that the agreement was not in the best interests of UBS. However, that is a matter to be addressed in the Oppression Action. It cannot be said that the fact that the other two directors were unable to participate in the decision prevented the negotiations between UBS and Look from proceeding to a conclusion or would have resulted in a different agreement.

[47] Moreover, it should be noted that the Amending Agreement was negotiated and signed before the CCAA proceedings began. In the current proceeding, the only issue that is relevant to the progress of a restructuring of UBS in which the two directors have a conflict of interest is the Look contingent claim. Apart from their individual indemnification claims, there is nothing that prevents these directors from acting in respect of all other aspects of the CCAA proceedings. The fact that they have not done so to date is attributable not to any legal impediment but to the position taken by 206, which cannot survive the order giving effect to these Reasons.

[48] Second, I am not persuaded that the record demonstrates a preference by these directors for the shareholders of Look over the shareholders of UBS. I will first address three specific matters raised by 206 as evidence of this alleged preferment. I will then address the issue more generally.

[49] The first allegation pertains to the terms of the Amending Agreement, which involved a release of a payment obligation of Look to UBS of $900,000. This has been addressed above — the determination of this allegation is a matter for the Oppression Action. The court cannot reach any conclusion on this issue at this time based on the record before the court.

[50] The second allegation is that the UBS Directors are spending the remaining cash of UBS rather than causing Look to pay a dividend to the Look shareholders, including UBS. This allegation is part of a larger allegation that the UBS Directors are taking an inordinate amount of time to deal with the claims filed in the CCAA proceeding and refuse to consider financing alternatives, with the result, if not the intention, that the Look shares owned by UBS will be ultimately sold at a discount to Look or its other principal shareholder, a brother of Silber.

[51] The evidence does not support this allegation for a number of reasons. Whether or not McCutcheon and Eaton are on the Look board, the non-UBS directors of Look will determine

whether to pay a dividend based on their view of the best interests of Look. UBS cannot cause such a dividend to be paid. On this basis, I do not see how the failure of the Look board to consider such a dividend is a relevant consideration. Further, for the moment at least, the evidence does not support 206's position that there is an imminent likelihood that UBS will run out of cash to fund its operations. Moreover, there can be no restructuring plan until the principal claims in the claims process are resolved. While the time spent responding to the claims filed may have been longer than desirable, the evidence does not, at the present time, support the conclusion that the three-month period was inordinate and without reasonable explanation. Lastly, and in any event, 206 has failed to put a specific, alternative funding proposal to the directors for their consideration.

[52] The third allegation is that the Look shareholders have benefitted from the UBS proxy fight by which the UBS Directors were nominated. UBS bore the $600,000 cost of the proxy fight. Referring to a letter of Ulicki to Rattee and Silber dated November 17, 2010, 206 says that, absent the UBS proxy fight, UBS would have controlled Look and the cost of any Look action against Dolgonos, DOL, McGoey and Jonah would have been borne by individual 206 shareholders.

[53] While this may be factually correct, there is no evidence before the court that would justify a conclusion that, in taking such action, the UBS Directors preferred the Look shareholders to the UBS shareholders. Their position is that there is a common interest in initiating claims against the defendants in the Look action. On the current evidence, this position is at least as probable as 206's position. The court cannot determine this issue on this motion.

[54] More generally, the fact that UBS and Look have adopted a common position in regard to Dolgonos and McGoey, and their respective companies, since the election of the UBS Directors is not, *per se*, evidence that McCutcheon and Eaton are preferring the interests of the Look shareholders over the interests of the UBS shareholders. The actions that the UBS Directors, including McCutcheon and Eaton, have taken may not be supported by Dolgonos and 206, but that is not evidence of the alleged preferment absent proof as to the absence of any reasonable basis for the actions of the UBS Directors. At this stage in the proceedings, such proof is not before the court.

[55] In reaching the foregoing conclusions, I should add that the court has also had regard to the Monitor's advice that it has not observed any conduct of these directors that will compromise the CCAA proceeding or UBS's attempt to restructure, and that it has also not observed any conduct that the Monitor would consider inappropriate or would cause the Monitor concern that they would act inappropriately in the future. Further, the Monitor has advised that, in its view, there would be no benefit and substantial harm to the CCAA proceedings if these directors were removed from their position. This advice would argue against the exercise of the court's discretion in the present circumstances even if 206 had otherwise established activity on the part of these directors that satisfied the requirements of s. 11.5.

[56] Lastly, the backdrop to this motion is a dispute between two opposing groups of UBS shareholders. A particular objective of 206 is to have a new board of directors review the

decision of the UBS Directors to defend the DOL action brought against UBS. However, s. 11.5 cannot be used to replace a board of directors to the extent that the purpose of such relief is to have a new board of directors revisit decisions taken by the existing board. At this stage, the court cannot decide the merits of the issues of the appropriateness of the past payments to Dolgonos and McGocy, the actions of the UBS Directors in respect of the Amending Agreement, or their competing visions for the future of Look/UBS. These issues involve all three of the UBS Directors. These issues are the subject of the litigation between the parties, including the Oppression Action, to be addressed in the claims process with the CCAA proceedings. Equally important, as mentioned above, the "business judgment rule" continues to govern judicial intervention in the affairs of a debtor corporation under the CCAA. To succeed on this motion, 206 must provide evidence that establishes the elements of the test in section 11.5. It cannot do so on the facts before the court on this motion.

[57] Based on the foregoing, the 206 motion to replace McCutcheon and Eaton as directors of UBS is dismissed.

Costs

[58] The parties will have thirty days from the date of this Endorsement to make written submissions as to costs not to exceed five pages in length.

Wilton-Siegel J.

Date: January 25, 2012

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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