

**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
IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF THE BODY SHOP CANADA LIMITED,
IN THE CITY OF TORONTO, IN THE PROVINCE OF
ONTARIO (the “**Applicant**”)

**FACTUM OF THE BODY SHOP CANADA LIMITED
(“TBS CANADA” OR THE “COMPANY”)**

(MOTION FOR DECLARATION ORDER)

December 12, 2024

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PART I – OVERVIEW¹

1. Following a thorough Court-approved sale process (the “**Sale Process**”), the Company has entered into an agreement (the “**APA**”) with Body and Lotion Inc., formerly 1001072685 Ontario Inc. (the “**Purchaser**”), pursuant to which the Purchaser will acquire substantially all of the assets of the Company as a going concern (the “**Transaction**”).
2. The Transaction represents the best viable going concern transaction available. If the Transaction is approved, it will result in the continuation of a significant number of TBS Canada’s retail stores, provide continued employment to at least 400 of the Company’s employees and approximately 100 of its seasonal employees, preserve relationships with landlords and continue the “The Body Shop” business in Canada as a going concern.
3. The closing date of the Transaction is December 16, 2024, and cannot be deferred without significantly impacting TBS Canada’s business and stakeholders as well as the economics of the Transaction.
4. The closing of the Transaction requires a franchise agreement between the Purchaser and the UK Purchaser (as defined below), who owns the intellectual property and will be the source of “The Body Shop” branded inventory. Due to timing constraints, the UK Purchaser is unable to satisfy franchise disclosure obligations that are potentially

¹ Capitalized terms used but not defined in this factum have the meaning given to them in the Affidavit of Jordan Searle sworn on December 7, 2024 (“**Searle Affidavit**”), Declaration Order Motion Record of the Applicant (“**DOMR**”), Tab 2 and Affidavit of Michael Serruya sworn on December 6, 2024 (“**Serruya Affidavit**”), DOMR, Tab 3.

engaged in connection with the franchise agreement. This failure could result in liability for the parties involved, including the Monitor, TBS Canada, and the UK Purchaser.

5. Therefore, as a threshold issue before seeking the approval of the APA and the Transaction and certain related relief, the Company first requests, on this Motion, an order (the “**Declaration Order**”) declaring that no party, including the Company, the Monitor and the UK Purchaser (as defined below), shall have any liability or obligation arising from the failure to provide the Purchaser with any disclosure that may be required by applicable franchise laws. The Declaration Order is a condition to the closing of the Transaction.

6. The Declaration Order is appropriate in the circumstances, because it: (a) advances the objectives of the CCAA; (b) does not offend the purposes of franchise legislation and disclosure requirements; and (c) will not prejudice any party or any stakeholders of the Company, and is in fact supported by the Purchaser (the sole party whose rights will be affected), the Monitor, and the UK Purchaser.

PART II – SUMMARY OF FACTS

A. The Sale Process

7. On July 5, 2024, this Court approved a sale process to identify one or more purchasers of TBS Canada, its business or assets (the “**Sale Process**”).² The Sale Process is discussed in detail in the Factum of the Company in support of its parallel motion seeking the approval of the APA and the Transaction and other related relief. To the extent relevant to this Motion, certain facts have been repeated below.

² Searle Affidavit at para. 10, DOMR, Tab 2, p. A21.

8. The Sale Process was designed with two key considerations. First, TBS Canada did not own “The Body Shop” trademark or its associated intellectual property. Instead, the Company held a license to sell “The Body Shop” products through a distribution and franchise agreement with TBSI Realisations Limited (formerly The Body Shop International Limited) (the “**UK Parent**”).³ Second, that a separate process was ongoing in the UK to find potential buyers for the UK Parent’s business or assets.⁴

9. On September 6, 2024, The Body Shop International Limited (the “**UK Purchaser**”) acquired the UK Parent’s assets, including the “The Body Shop” intellectual property, and announced plans to transition the Canadian business into a franchise.⁵ This influenced the Sale Process, including the bid deadline and the unique factors and risks that bidders had to consider, such as the need to enter into a franchise agreement with the UK Purchaser.⁶

10. Potential purchasers must consider a number of issues in connection with negotiating and finalizing a franchise agreement with the UK Purchaser, including guidelines for operations, merchandising and intellectual property, pricing and payment terms for inventory and the terms of a transition services agreement to ensure the UK Purchaser continued to provide certain critical services (e.g. IT services) following the closing of any transaction.⁷ TBS Canada and the Monitor worked with the UK Purchaser

³ Searle Affidavit at para. 17, DOMR, Tab 2, pp. A22-A23.

⁴ Searle Affidavit at para. 18, DOMR, Tab 2, p. A23.

⁵ Searle Affidavit at para. 25, DOMR, Tab 2, pp. A25-A26.

⁶ Searle Affidavit at paras. 26-29, DOMR, Tab 2, pp. A26-A27.

⁷ Searle Affidavit at para. 33, DOMR, Tab 2, p. A28.

throughout the Sale Process to advance these issues with interested parties participating in the Sale Process.⁸

11. The Monitor and TBS Canada engaged with over 55 parties to solicit interest in acquiring the business or assets of TBS Canada.⁹ The Purchaser was ultimately identified as the successful bidder through the Sale Process, and by the UK Purchaser as its preferred franchise partner.¹⁰

B. Extensive Disclosure to, and Due Diligence by, the Purchaser

12. Like other prospective bidders, the Purchaser was advised and understood from the outset that to operate the “The Body Shop” business in Canada or sell any branded inventory, any purchaser of TBS Canada’s assets and business would need to enter into a franchise or alternative agreement with the UK Purchaser.¹¹

13. The due diligence conducted by the Purchaser involved: (a) receiving and reviewing a significant amount of information regarding TBS Canada’s business; and (b) extensive discussions regarding a potential franchise arrangement with the UK Parent.¹²

14. Among other things, the Purchaser:

⁸ Searle Affidavit at para. 37, DOMR, Tab 2, p. A29.

⁹ Searle Affidavit at para. 22, DOMR, Tab 2, pp. A24-A25.

¹⁰ Searle Affidavit at paras. 37, 39, DOMR, Tab 2, p. A29.

¹¹ Serruya Affidavit at para. 6, DOMR, Tab 3, p. A192.

¹² Searle Affidavit at paras. 23-24, DOMR, Tab 2, p. A25.

- (a) received historical and projected financial and operational information, employee information, material contracts and agreements, and other detailed diligence information regarding TBS Canada;¹³
- (b) was provided with a template master franchise agreement and a business planning model from the UK Purchaser;¹⁴
- (c) regularly engaged with the UK Purchaser and its franchise team to conduct business and financial diligence and discuss a Canadian master franchise agreement, covering several key areas, such as licensing, intellectual property, pricing and payment terms for branded inventory, and establishing operational and merchandising guidelines;¹⁵ and
- (d) negotiated with the UK Purchaser in respect of the terms of a shared services agreement for various shared services and operating platforms to be provided to the Canadian operations, including IT, which was ultimately appended to the agreed form of master franchise agreement.¹⁶

15. On or about November 25, 2024, the Purchaser settled franchise terms with the UK Purchaser, and was prepared to enter into a master franchise agreement (together with all related or ancillary agreements, the “**Franchise Agreement**”) which would allow the “The Body Shop” business to continue to operate in Canada.¹⁷

¹³ Searle Affidavit at para. 23, DOMR, Tab 2, p. A25.

¹⁴ Searle Affidavit at para. 24, DOMR, Tab 2, p. A25.

¹⁵ Serruya Affidavit at paras. 7-8, DOMR, Tab 3, pp. A192-193.

¹⁶ Serruya Affidavit at para. 9, DOMR, Tab 3, p. A193.

¹⁷ Serruya Affidavit at para. 12, DOMR, Tab 3, p. A194.

16. However, as discussed below, the parties have not executed the Franchise Agreement due to the need for the UK Purchaser to satisfy certain disclosure requirements that may be applicable under certain provincial franchise legislation, which is not possible within the required timeframe for the Transaction to proceed.¹⁸

C. Franchise Disclosure Issues

(i) Requirement to Deliver a Franchise Disclosure Document (FDD)

17. Under provincial franchise legislation in effect in six provinces,¹⁹ a franchisor (the UK Purchaser) must provide a franchisee (the Purchaser) with a franchise disclosure document (“**FDD**”) containing all material facts, including any information and documents prescribed by regulation, to assist the franchisee to make an informed investment decision.²⁰ The required information and documents include financial statements as prescribed and copies of all proposed franchise agreements or related agreements.²¹

18. The FDD must be provided at least 14 days **prior to** the earlier of the franchisee signing the franchise agreement or the payment of consideration on behalf of the prospective franchisee, unless there is an available exemption from the application of provincial franchise statutes or the requirement to deliver an FDD.²²

19. Unfortunately, due to time constraints and in light of its recent acquisition of the “The Body Shop” brand, the UK Purchaser has advised that the FDD would take, at minimum, several weeks to months to prepare and deliver.²³ This will impact the timing

¹⁸ Serruya Affidavit at para. 12, DOMR, Tab 3, p. A194.

¹⁹ Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Prince Edward Island.

²⁰ Searle Affidavit at para. 44, DOMR, Tab 2, p. A31.

²¹ Searle Affidavit at para. 44, DOMR, Tab 2, p. A31.

²² Searle Affidavit at para. 44, DOMR, Tab 2, p. A31.

²³ Searle Affidavit at para. 48, DOMR, Tab 2, p. A32.

of the closing of the Transaction, and as more particularly described below, reduce the recoveries available for TBS Canada's stakeholders.²⁴

(ii) Statutory Consequences of Failure to Deliver an FDD

20. If a franchisor fails to provide the FDD or provides a deficient FDD, the franchisee may have the right to rescind the franchise agreement.²⁵ Additionally, the franchisee may be entitled to claim damages for any losses incurred due to this failure.²⁶

21. The UK Purchaser is unwilling to enter into the Franchise Agreement due to the risk that the Purchaser would assert claims under certain provincial franchise legislation.²⁷

22. The Company and the Monitor share similar concerns about their exposure to potential damages claims.²⁸ Under certain provincial franchise laws, a franchisee who suffers loss as a result of the franchisor's failure to comply with its obligations to deliver an adequate FDD may claim damages against not only the franchisor, but also any "broker" of the franchisor.²⁹ A "franchisor's broker" is defined broadly as "a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, **markets** or otherwise offers to grant **a franchise**, or **who arranges for the grant of a franchise**."³⁰

23. The Company and the Monitor may be alleged to be franchise "brokers" under certain provincial franchise laws due to their involvement in discussions with the UK

²⁴ Searle Affidavit at para. 49, DOMR, Tab 2, pp. A32-A33.

²⁵ Searle Affidavit at para. 45, DOMR, Tab 2, p. A31.

²⁶ Searle Affidavit at para. 45, DOMR, Tab 2, p. A31.

²⁷ Searle Affidavit at para. 46, DOMR, Tab 2, pp. A31-A32.

²⁸ Searle Affidavit at para. 46, DOMR, Tab 2, pp. A31-A32.

²⁹ Searle Affidavit at para. 45, DOMR, Tab 2, p. A31.

³⁰ See for instance the *Arthur Wishart Act (Franchise Disclosure)*, 2000, SO 2000, c 3 at [s. 7\(1\)\(c\)](#).

Purchaser and prospective bidders (including the Purchaser) aimed at promoting the sale of TBS Canada's business during the Sale Process.³¹

(iii) The Purchaser's Willingness to Enter into the Franchise Agreement Despite the Absence of an FDD

24. The Purchaser is willing to enter into the Franchise Agreement notwithstanding the UK Purchaser's inability to provide an FDD. The Purchaser has delivered an affidavit from one of its principals, Mr. Serruya, confirming that the Purchaser:

- (a) "intends to enter into the Franchise Agreement with the UK Purchase[r]";³²
- (b) "ha[s] all the important and material facts and documents needed to make an informed investment decision regarding TBS Canada, the UK Purchaser, the proposed APA, and the Franchise Agreement";³³
- (c) "do[es] not require any additional disclosure, in the form of an FDD or otherwise, as it will not improve [its] understanding of TBS Canada and the UK Purchaser or affect [its] decision to proceed with the Transaction or sign the Franchise Agreement";³⁴
- (d) "do[es] not have any intention of exercising any potential right the Purchaser may have to rescind the Franchise Agreement owing to the UK Purchaser's inability to deliver an FDD";³⁵

³¹ Searle Affidavit at para. 46, DOMR, Tab 2, pp. A31-A32.

³² Serruya Affidavit at para. 23, DOMR, Tab 3, pp. A197-A198.

³³ Serruya Affidavit at para. 22, DOMR, Tab 3, p. A197.

³⁴ Serruya Affidavit at para. 22, DOMR, Tab 3, p. A197.

³⁵ Serruya Affidavit at para. 23, DOMR, Tab 3, pp. A197-A198.

- (e) is “agreeable, as a condition precedent of the Transaction closing, to provide the Company, the Monitor and the UK Purchaser with a release”, which will be effective concurrent with the execution of the Franchise Agreement (the “**Release**”), releasing them from any known claims that may be available to the Purchaser under Canadian franchise law arising from the failure of the UK Purchaser to deliver an FDD in connection with the execution of the Franchise Agreement by the Purchaser;³⁶ and
- (f) “ha[s] received independent legal advice in respect of this issue, including in respect of signing the Release”, confirms its full understanding and acceptance of “all implications of waiving the Purchaser’s entitlement to receive an FDD and releasing all claims related thereto, and intend[s] to be bound by the Release”.³⁷

25. Even though the Purchaser has agreed to provide the Release, TBS Canada, the Monitor and the UK Purchaser remain concerned about their potential liability under certain provincial franchise laws.³⁸ As discussed in more detail below, applicable provincial franchise statutes prohibit any prospective waiver or release of an obligation to deliver the FDD. Although the parties believe that the Release (once given) should be valid in the circumstances of this case, the uncertainty that remains concerning this issue is an impediment to the parties entering into the Franchise Agreement and closing the

³⁶ Serruya Affidavit at para. 23, DOMR, Tab 3, pp. A197-A198.

³⁷ Serruya Affidavit at para. 23, DOMR, Tab 3, pp. A197-A198.

³⁸ Searle Affidavit at para. 46, DOMR, Tab 2, pp. A31-A32.

Transaction, particularly in light of the risks to the Monitor and TBS Canada if they were found to be franchise brokers.³⁹

26. In the circumstances, each of the UK Purchaser, the Purchaser, the Monitor and TBS Canada agreed to finalize the APA and the Franchise Agreement on the understanding that TBS Canada would seek the Declaration Order to provide parties with the assurance that they will be insulated from any rescission or damage claims arising from non-compliance with franchise disclosure obligations.⁴⁰

D. The APA and the Transaction

27. On December 6, 2024, TBS Canada entered into the APA pursuant to which it agreed to sell substantially all of its assets to the Purchaser (defined above as the **“Transaction”**).⁴¹

28. The closing of the Transaction is subject to, among others, the following conditions: (a) the condition that TBS Canada obtains the Declaration Order; (b) the Purchaser entering into the Franchise Agreement with the UK Purchaser; and (c) the Purchaser delivering the Release in favour of the UK Purchaser, TBS Canada and the Monitor.⁴²

29. The purchase price payable under the APA is comprised of cash, and the assumption of certain liabilities. The overall investment by the Purchaser will be in excess of \$5 million.⁴³

³⁹ Serruya Affidavit at paras. 23-24, DOMR, Tab 3, pp. A197-A198.

⁴⁰ Searle Affidavit at para. 51, DOMR, Tab 2, p. A33.

⁴¹ Searle Affidavit at para. 52, DOMR, Tab 2, p. A33.

⁴² Searle Affidavit at para. 72, DOMR, Tab 2, p. A39.

⁴³ Searle Affidavit at para. 63, DOMR, Tab 2, p. A367; Confidential Appendix C to Second Report of the Monitor Alvarez & Marsal Canada Inc. dated December 9, 2024 (the **“Second Report”**).

30. The Transaction will offer numerous benefits to TBS Canada and its stakeholders.

If approved and implemented, the Transaction will:

- (a) result in the continuation of a substantial majority of TBS Canada's retail stores;
- (b) provide continued employment to approximately 400 of TBS Canada's employees plus approximately 100 additional seasonal employees,
- (c) preserve relationships with landlords; and
- (d) continue the "The Body Shop" business in Canada as a going concern.⁴⁴

31. The Monitor supports the Transaction and is of the view that it is "fair and reasonable in the circumstances".⁴⁵

32. The closing date of the Transaction is December 16, 2024 (the "**Closing Date**").⁴⁶ The Closing Date cannot be deferred without significantly impacting TBS Canada's business and stakeholders as well as the economics of the Transaction (or any potential transaction, for that matter). As explained by the Monitor in its Second Report and by Mr. Searle in his Seventh Affidavit:

- (a) the Company's highest revenues are generated during the holiday season, and there will be significant difficulty in identifying a going concern transaction in the new year;

⁴⁴ Searle Affidavit at para. 15, DOMR, Tab 2, p. A22.

⁴⁵ Second Report at s. 5.2(vi), p. E22.

⁴⁶ Searle Affidavit at para. 53, DOMR, Tab 2, p. A33.

- (b) a number of the Company's leases expire at the end of 2024 and the first quarter of 2025, and landlords may look to replace the Company as the tenant in these locations;
- (c) the Company will lose access to certain of the shared services historically provided by the UK Parent, including IT services and point-of-sale systems, after December 31, 2024;
- (d) the Company does not have sufficient inventory on hand for the 2025 calendar year; and
- (e) the Company will be unable to operate unless it orders new inventory and negotiates new agreement(s) with the UK Purchaser, at additional costs and expenses.⁴⁷

33. In the circumstances, deferring the Closing Date of the Transaction to permit the UK Purchaser to comply with the requirement to deliver an FDD is not a practicable or realistic option. Accordingly, the parties have agreed that TBS Canada should seek the Declaration Order to facilitate the closing of the Transaction.⁴⁸

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

34. The sole issue on this Motion is whether this Court should grant the Declaration Order. TBS Canada submits that the answer is “yes”.

⁴⁷ Searle Affidavit at para. 49, DOMR, Tab 2, pp. A32-A33; Second Report at s. 5.3, pp. E22-E23.

⁴⁸ Searle Affidavit at para. 50, DOMR, Tab 2, p. A33.

A. This Court Has Broad Discretion to Make the Declaration Order

35. The Supreme Court of Canada has now repeatedly affirmed that “[t]he most important feature of the CCAA ... is the broad discretionary power it vests in the supervising court”.⁴⁹

36. The primary source of the court’s discretionary jurisdiction is section [11](#) of the CCAA, which empowers the court to “make any order that it considers appropriate in the circumstances”. Appropriateness is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA.⁵⁰ As explained below, the Declaration Order furthers those objectives.

37. This Court has granted relief similar to the Declaration Order in a different context, by permitting CCAA debtors to avoid further expenses related to filings required under securities laws, and declaring that none of the directors, officers, employees and other representatives of CCAA debtors or the monitor shall have any liability for failure by the debtors to make those filings.⁵¹ Among other reasons, these orders were appropriate because: (a) they furthered the purposes of the CCAA by allowing the CCAA debtors to avoid further drain on their finances associated with securities filing obligations; (b) shareholders of those CCAA debtors would receive alternative disclosure through the

⁴⁹ *Canada v. Canada North Group Inc.*, 2021 SCC 30 (“**Canada North**”) at para. [21](#) (per Côté J.’s majority reasons); *9354-9186 Quebec inc. v Callidus Capital Corp.*, 2020 SCC 10 (“**Callidus Capital**”) at paras. [47-48](#).

⁵⁰ *Canada North* at para. [21](#) (per Côté J.’s majority reasons).

⁵¹ For example: *Indiva Limited et al* (CV-24-722044-00CL), Endorsement of the Honourable Justice Osborne dated June 13, 2024 at [para. 29](#); *MAV Beauty Brands Inc. et al* (Court File No. CV-23-00709610-00CL), Endorsement of the Honourable Justice Conway dated November 14, 2023 at [paras. 24-25](#).

public filings in the CCAA proceedings; and (c) as a result, those shareholders would not suffer any significant prejudice.⁵²

38. Similarly, as discussed below, the Declaration Order is appropriate because: (a) it is necessary to achieve the purposes of the CCAA; (b) the Purchaser has already received sufficient disclosure, such that the purpose of franchise legislation has already been achieved; and (c) no party or stakeholder would suffer any prejudice.

B. The Declaration Order is Appropriate in the Circumstances

(i) The Declaration Order Advances the Purposes of the CCAA

39. As the Supreme Court of Canada recently explained, the CCAA “has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress ... and enhancement of the credit system generally”.⁵³ The CCAA is thus “remedial” legislation aimed at permitting debtors to carry on business and, where possible, avoid the social and economic costs of bankruptcy and liquidation.⁵⁴

40. These objectives are the foundation of the Transaction outlined in the APA. As previously discussed, the Transaction will provide significant benefits, including preserving “The Body Shop” business as a going concern, saving approximately 500 jobs, and maximizing recoveries for TBS Canada’s stakeholders.⁵⁵

⁵² *Indiva Limited et al* (CV-24-722044-00CL), Endorsement of the Honourable Justice Osborne dated June 13, 2024 at [para. 29](#); *MAV Beauty Brands Inc. et al* (Court File No. CV-23-00709610-00CL), Endorsement of the Honourable Justice Conway dated November 14, 2023 at [paras. 24-25](#).

⁵³ *Callidus Capital*, at para. [42](#), quoting J.P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed 2013), at p. 14.

⁵⁴ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. [15](#).

⁵⁵ Searle Affidavit at para. 15, DOMR, Tab 2, p. A22.

41. As described above, a condition of closing the Transaction is that the Purchaser and the UK Purchaser must enter into the Franchise Arrangement, which is essential for the continuation of “The Body Shop” brand in Canada. Although the terms of the Franchise Agreement have been agreed upon, the parties have not yet executed that Agreement due to uncertainties and risks related to franchise disclosure requirements under certain provincial franchise legislation, affecting all involved parties, including the Company and the Monitor.

42. The Declaration Order will eliminate the uncertainty impeding the execution of the Franchise Agreement and the implementation of the Transaction. Without the Declaration Order, the Franchise Agreement cannot be executed for several weeks, if not months, making it impossible to close the Transaction by the Closing Date of December 16, 2024.⁵⁶

43. As explained by both the Monitor and Mr. Searle (on behalf of the Company), any delay in closing the Transaction will significantly affect its economic viability and the recoveries for TBS Canada’s creditors. It may even necessitate TBS Canada to begin a liquidation process and terminate over 500 employees, which would undermine the purposes of the CCAA.⁵⁷

44. The Declaration Order is thus necessary to further the remedial objectives of the CCAA.

⁵⁶ Searle Affidavit at para. 48, DOMR, Tab 2, p. A32.

⁵⁷ Searle Affidavit at para. 49, DOMR, Tab 2, pp. A32-A33; Second Report at s. 5.3, pp. E22-E23.

(ii) The Declaration Order Does Not Undermine the Purpose of Franchise Legislation

45. Courts and provincial Legislatures have repeatedly emphasized that the purpose of franchise legislation is to “obligate a franchisor to make full and accurate disclosure to a potential franchisee so that the latter can make a properly informed decision about whether or not to invest in a franchise”,⁵⁸ as part of a broader mission to “protect franchisees from the power imbalance arising in the franchisor-franchisee relationship”.⁵⁹

46. These objectives have already been achieved in the circumstances of this case. Before settling the terms of the Franchise Agreement with the UK Purchaser, the Purchaser had received significant disclosure and conducted extensive due diligence regarding TBS Canada, its business, and the proposed franchise arrangement with the UK Purchaser. The Purchaser has provided unequivocal evidence that it has all the important and material facts and documents needed to make an informed investment decision regarding TBS Canada or the Franchise Agreement, and does not require any additional disclosure, in the form of an FDD or otherwise, to do so.⁶⁰

47. In circumstances where strict compliance with the requirement to provide an FDD would not achieve any incremental benefit in furtherance of the objectives of franchise legislation, it is appropriate to provide assurance to the Company, the Monitor and the UK

⁵⁸ *Raibex Canada Ltd. v. ASWR Franchising Corp.*, 2018 ONCA 62 at [para. 49](#). See for instance, commentary in parliamentary debates in Ontario and British Columbia: (a) Ontario: “Bill 33, Franchise Disclosure Act, 1999”, 1st Reading, Ontario, *Official Report of Debates (Hansard)*, 37th Parl., 1st Sess., No. 28A (14 December 1999) at [1397](#) (Hon. Robert W. Runciman); and (b) British Columbia: “Bill M219, Franchise Act, 2014”, 1st Reading, British Columbia, *Official Report of Debates of Legislative Assembly (Hansard)*, 40th Parl., 4th Sess., Vol. 26, No. 5 (13 May 2015) at [8440](#) (Hon. Carole James).

⁵⁹ *Premium Host Inc. v. Paramount Franchise Group*, 2023 ONSC 1507 at [para. 45](#). See also: *Canadian Mortgage Experts Inc. v. Dominion Lending Centres Inc.*, 2022 BCSC 911 at [paras. 37-38](#); *1777453 Alberta Ltd v. Got Mold Disaster Recovery Services Inc.*, 2021 ABCA 9 at [para. 25](#).

⁶⁰ Serruya Affidavit at para. 22, DOMR, Tab 3, p. A197.

Purchaser that they will not be exposed to claims of rescission and damages arising from non-compliance.

48. As a more general matter, the Purchaser is not the type of “small business investors” that franchise statutes were enacted to protect.⁶¹ It is telling that the Ontario and British Columbia Legislatures specifically created an exemption from the requirement to provide an FDD where the franchisee “can be considered reasonably sophisticated business entities”.⁶²

49. That exemption applies where the franchisee makes an initial investment in excess of \$3 million in Ontario, and \$5 million in British Columbia.⁶³ The Purchaser’s investment in connection with the grant of the franchise by the UK Purchaser qualifies for this exemption in both provinces, as its investment easily exceeds \$5 million.⁶⁴ Notably, this means that an FDD is not required under the laws of the two provinces where the significant majority of TBS Canada retail stores are located. Out of the 59 retail stores to be acquired by the Purchaser as part of the Transaction, 41 of them are located in Ontario or British Columbia.

⁶¹ “Bill 33, Franchise Disclosure Act, 1999”, 1st Reading, Ontario, *Official Report of Debates (Hansard)*, 37th Parl., 1st Sess., No. 28A (14 December 1999) at [1397](#) (Hon. Robert W. Runciman): “Franchising is important to the men and women who see a franchise as a way to achieve their dreams of a better tomorrow. This legislation is a result of extensive consultation and will at the end of the day help small business investors make more informed decisions and encourage marketplace fairness.”

⁶² Ontario, Legislative Assembly, Standing Committee on Regulations and Private Bills, “Subcommittee Report on the Franchise Disclosure Act, 1999, Bill 33”, (6 March 2000) at [0920](#) (Mr. Joseph Hoffman).

⁶³ In Ontario: *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 at [s. 5\(7\)\(h\)](#); *Regulations*, O. Reg. 581/00 at [s. 9\(3\)](#). In British Columbia: *Franchises Act*, SBC 2015, c 35, [s. 5\(8\)\(i\)](#); *Franchises Regulation*, BC Reg 238/2016, at [s. 10](#). The investment amount is “determined by all of the franchisee’s costs associated with the establishment of the franchise”: see *Regulations*, O. Reg. 581/00 at [s. 9\(1\)](#).

⁶⁴ See: Confidential Appendix C to the Second Report.

50. The policy rationale behind that exemption is instructive: the Ontario and British Columbia Legislatures recognized that franchisees whose investments trigger this exemption would be working “with legal and financial advisors”, and “*are not the typical franchisees that need the protection of franchise legislation*”.⁶⁵ This description applies aptly to the Purchaser. The Purchaser is: (a) advised by experienced in-house and external counsel; (b) familiar with franchise laws;⁶⁶ and (c) led by retail industry veterans with considerable success founding or acquiring a number of franchise concepts and retailers, including Yogen Früz, Pinkberry, Swensen’s Ice Cream, St. Louis Bar and Grill and Second Cup Coffee Co., among others.⁶⁷

(iii) No Prejudice Will Flow from the Declaration Order

(a) The Declaration Order Will Not Prejudice Any Stakeholders

51. Granting the Declaration Order will not prejudice any stakeholder of TBS Canada. To the contrary, as discussed above, TBS Canada’s stakeholders stand to benefit from the Declaration Order, as it is necessary: (a) for the survival of “The Body Shop” business in Canada as a going concern;⁶⁸ (b) to maximize recoveries for TBS Canada’s creditors;⁶⁹ and (c) to ensure the continued employment of approximately 400 of the Company’s employees and 100 of its seasonal employees on substantially similar terms to their existing employment.⁷⁰

⁶⁵ “Bill 38, Franchises Act”, Committee of the Whole House, British Columbia, *Report of Debates of the Legislative Assembly (Hansard)*, 40th Parl., 4th Sess., Vol. 29, No. 7 (8 October 2015) at [9563](#) (Hon. Coralee Oakes). See also: Ontario, Legislative Assembly, Standing Committee on Regulations and Private Bills, “Subcommittee Report on the Franchise Disclosure Act, 1999, Bill 33”, (6 March 2000) at [0920](#) (Mr. Joseph Hoffman).

⁶⁶ Serruya Affidavit at paras. 17-19, DOMR, Tab 3, pp. 195-196.

⁶⁷ Serruya Affidavit at para. 30, DOMR, Tab 3, p. A200.

⁶⁸ Searle Affidavit at paras. 15 & 74, DOMR, Tab 1, pp. A22 & A39.

⁶⁹ Searle Affidavit at para. 49, DOMR, Tab 1, pp. A32-A33.

⁷⁰ Searle Affidavit at paras. 15, 67 & 89, DOMR, pp. A22, A37 & A42.

52. As of the date of this Factum, TBS Canada is not aware of any stakeholders who have expressed any concerns with the Declaration Order or an intention to oppose this Motion.

(b) The Declaration Order is Supported by the Monitor, the UK Purchaser and the Purchaser

53. The Company's request for the Declaration Order is supported by the Monitor, the UK Purchaser and the Purchaser.⁷¹

54. In particular, as the sole party whose rights will be affected by the Declaration Order, the Purchaser has provided an affidavit of Mr. Serruya in support of the granting of the Declaration Order, with a view to completing the Transaction expeditiously. In his Affidavit, Mr. Serruya confirms that he "support[s] the Declaration Order and believe[s] it reflects the realities of the commercial relationship and the commercial agreement between the parties..."⁷²

(c) The Purchaser Has Agreed to Provide a Release

55. Furthermore, the Purchaser has agreed to provide TBS Canada, the Monitor and the UK Purchaser with the Release. This is further evidence that the Declaration Order will not prejudice the Purchaser.

56. The Release will become effective concurrent with the execution of the Franchise Agreement, when any potential claims for the failure to provide an FDD are crystallized. Pursuant to the Release, the Purchaser and its related parties will release the Company, the Monitor, the UK Purchaser and their respective related parties from any known and

⁷¹ Searle Affidavit at para. 92, DOMR, Tab 1, p. A43; Second Report at s. 6.2, pp. E28-E29.

⁷² Serruya Affidavit at para. 25, DOMR, Tab 3, pp. A198-A199.

existing claims or liability, including a statutory right to rescission or damages, that may be available under Canadian franchise law in connection with the failure to deliver an FDD.⁷³ The Declaration Order mirrors, and simply confirms, the effect of the Release.

57. From a practical perspective, notwithstanding the Purchaser's willingness to provide the Release, the parties require relief in the form of the Declaration Order to provide the certainty necessary to complete the Transaction.

58. Applicable provincial statutes prohibit prospective waivers and releases of rights available to franchisees under those statutes. For instance, in Ontario, section 11 of the *Arthur Wishart Act (Franchise Disclosure), 2000* provides that: "Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void."⁷⁴

59. This prohibition is subject to limited exceptions, including a judicially-developed exception in Ontario known as "*Tutor Time*" releases. "*Tutor Time*" releases are "voluntarily-negotiated settlement of existing statutory claims, entered into with the benefit of legal advice, in settlement of a dispute for existing and known breaches of the Act".⁷⁵

60. The parties have carefully prepared a draft of the Release that is intended to be, and is stated on its face to be, a valid "*Tutor Time*" release. The Purchaser will be

⁷³ Serruya Affidavit at para. 23, DOMR, Tab 3, pp. A197-A198.

⁷⁴ See also equivalent provisions, in Alberta: *Franchises Act*, RSA 2000, c F-23 at [s. 18](#); in British Columbia: *Franchises Act*, SBC 2015, c 35 at [s. 13](#); in Manitoba: *The Franchises Act*, CCSM c F156 at [s. 11](#); in New Brunswick: *Franchises Act*, RSNB 2014, c 111 at [s. 12](#); in Prince Edward Island: *Franchises Act*, RSPEI 1988, c F-14.1 at [s. 12](#).

⁷⁵ *Trillium Motor World Ltd. v General Motors of Canada Limited*, 2017 ONCA 545 at [para. 42](#). See also: *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, 2006 CanLII 25276 (ON SC) at [para. 108](#); *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 at [para. 24](#); *New Vision Renaissance MX Ltd. v. The Symposium Café Inc.*, 2020 ONSC 1119 at [para. 39](#).

providing the Release voluntarily, after having received legal advice, in settlement of known statutory claims that may be asserted against the Company, the Monitor and the UK Purchaser arising from the latter's failure to deliver an FDD as required.⁷⁶

61. Nevertheless, because purported franchise-related releases are typically subject to rigorous judicial scrutiny, there continues to be considerable uncertainty regarding the exposure faced by the Company, the Monitor and the UK Purchaser, arising out of the latter's failure to deliver an FDD to the Purchaser. The risks to the parties, especially the Company and the Monitor, associated with closing the Transaction in the absence of an FDD being delivered to the Purchaser, are simply too great without the certainty and assurance provided by the Declaration Order.

PART IV – ORDER REQUESTED

62. For the above reasons, TBS Canada respectfully requests that this Court grant the Declaration Order in the form requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of December, 2024.


 For: **DAVIES WARD PHILLIPS & VINEBERG LLP**
 Natalie Renner, Rui Gao and Alexander
 Barnes

⁷⁶ Serruya Affidavit at para. 23, DOMR, Tab 3, pp. A197-A198.

SCHEDULE “A” — LIST OF AUTHORITIES

A. Cases

1. 1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC, 2006 CanLII 25276 (ON SC)
2. 1777453 Alberta Ltd v. Got Mold Disaster Recovery Services Inc., 2021 ABCA 9
3. 405341 Ontario Limited v. Midas Canada Inc., 2010 ONCA 478
4. 9354-9186 Quebec inc. v Callidus Capital Corp., 2020 SCC 10
5. Canada v. Canada North Group Inc., 2021 SCC 30
6. Canadian Mortgage Experts Inc. v. Dominion Lending Centres Inc., 2022 BCSC 911
7. Century Services Inc. v. Canada (Attorney General), 2010 SCC 60
8. Indiva Limited et al (CV-24-722044-00CL), Endorsement of the Honourable Justice Osborne dated June 13, 2024
9. MAV Beauty Brands Inc. et al (Court File No. CV-23-00709610-00CL), Endorsement of the Honourable Justice Conway dated November 14, 2023
10. New Vision Renaissance MX Ltd. v. The Symposium Café Inc., 2020 ONSC 111
11. Premium Host Inc. v. Paramount Franchise Group, 2023 ONSC 1507
12. Raibex Canada Ltd. v. ASWR Franchising Corp., 2018 ONCA 62
13. Trillium Motor World Ltd. v General Motors of Canada Limited, 2017 ONCA 545

B. Hansards

14. “Bill 33, Franchise Disclosure Act, 1999”, 1st Reading, Ontario, Official Report of Debates (Hansard), 37th Parl., 1st Sess., No. 28A (14 December 1999).
15. “Bill 38, Franchises Act”, Committee of the Whole House, British Columbia, Report of Debates of the Legislative Assembly (Hansard), 40th Parl., 4th Sess., Vol. 29, No. 7 (8 October 2015)
16. “Bill M219, Franchise Act, 2014”, 1st Reading, British Columbia, Official Report of Debates of Legislative Assembly (Hansard), 40th Parl., 4th Sess., Vol. 26, No. 5 (13 May 2015).

17. Ontario, Legislative Assembly, Standing Committee on Regulations and Private Bills, "Subcommittee Report on the Franchise Disclosure Act, 1999, Bill 33", (6 March 2000)

SCHEDULE B — TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

11. General power of court

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.

B. Provincial Franchise Legislation

Province	Statute & Provision
1) Franchise Disclosure Requirement	
Ontario	<p><i>Arthur Wishart Act (Franchise Disclosure)</i>, 2000, S.O. 2000, c. 3 at s. 5(1)</p> <p>A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,</p> <ul style="list-style-type: none">(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise, other than an agreement described in subsection (1.1); and(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise, excluding the payment of a deposit if it,<ul style="list-style-type: none">(i) does not exceed the prescribed amount,(ii) is refundable without any deductions, and(iii) is given under an agreement that in no way binds the prospective franchisee to enter into a franchise agreement.

Province	Statute & Provision
British Columbia	<p><i>Franchises Act</i>, SBC 2015, c 35 at s. 5(1)</p> <p>A franchisor must provide a prospective franchisee with a disclosure document as set out in this section, and the prospective franchisee must have received the disclosure document at least 14 days before the earlier of</p> <ul style="list-style-type: none"> (a) the signing, by the prospective franchisee, of the franchise agreement or any other agreement relating to the franchise, and (b) the payment, by or on behalf of the prospective franchisee to the franchisor or the franchisor's associate, of any consideration relating to the franchise.
Alberta	<p><i>Franchises Act</i>, RSA 2000, c F-23 at ss. 4(1)-(2)</p> <p>(1) A franchisor must give every prospective franchisee a copy of the franchisor's disclosure document.</p> <p>(2) The disclosure document must be received by the prospective franchisee at least 14 days before</p> <ul style="list-style-type: none"> (a) the signing by the prospective franchisee of any agreement relating to the franchise, or (b) the payment of any consideration by the prospective franchisee relating to the franchise, <p>whichever is earlier.</p>
Manitoba	<p><i>The Franchises Act</i>, CCSM c F156 at ss. 5(1)-(2)</p> <p>(1) A franchisor must give every prospective franchisee a copy of the franchisor's disclosure document.</p> <p>(2) The disclosure document must be received by the prospective franchisee at least 14 days before</p> <ul style="list-style-type: none"> (a) the signing of the franchise agreement or any other agreement relating to the franchise by the prospective franchisee; or (b) the payment of any consideration relating to the franchise by or on behalf of the prospective franchisee to the franchisor or franchisor's associate; <p>whichever is earlier.</p>
New Brunswick	<p><i>Franchises Act</i>, RSNB 2014, c 111 at s. 5(1)</p>

Province	Statute & Provision
	<p>A franchisor shall provide a prospective franchisee with a disclosure document, and the disclosure document shall be received by the prospective franchisee, not less than 14 days before the earlier of</p> <ul style="list-style-type: none"> (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise, and (b) the payment by or on behalf of the prospective franchisee to the franchisor or franchisor's associate of any consideration relating to the franchise.
Prince Edward Island	<p><i>Franchises Act</i>, RSPEI 1988, c F-14.1 at s. 5(1)</p> <p>A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,</p> <ul style="list-style-type: none"> (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.
2) Franchise Disclosure Exemption for Sophisticated Investors	
Ontario	<p><i>Arthur Wishart Act (Franchise Disclosure)</i>, 2000, S.O. 2000, c. 3 at s. 5(7)(h)</p> <p>(7) This section [section 5] does not apply to, [...]</p> <p>(h) the grant of a franchise if the prospective franchisee is required to make a total initial investment, determined in the prescribed manner, of an amount that is greater than a prescribed amount.</p>
British Columbia	<p><i>Franchises Act</i>, SBC 2015, c 35 at s. 5(8)(i)</p> <p>5 (8) This section does not apply to the following: [...]</p> <p>(i) the grant of a franchise, if the prospective franchisee is investing an amount greater than a prescribed amount in the acquisition of the franchise.</p>

Province	Statute & Provision
3) Prescribed Amount Required for Sophisticated Investor Exemption	
Ontario	General, O Reg 581/00 at s. 9(3) For the purposes of clause 5 (7) (h) of the Act, the prescribed amount is \$3,000,000
British Columbia	<i>Franchises Regulation</i> , BC Reg 238/2016 at s. 10 For the purposes of section 5 (8) (i) of the Act, the prescribed amount is \$5 million.
4) Definition of “Total Initial Investment”	
Ontario	General, O Reg 581/00 at s. 9(1) For the purposes of subclause 5 (7) (g) (i) and clause 5 (7) (h) of the Act, a total initial investment is determined by all of the franchisee’s costs associated with the establishment of the franchise, including, <ul style="list-style-type: none"> (a) the amount of any deposits or franchise fees; (b) an estimate of the costs for inventory, leasehold improvements, equipment, leases, rentals and all other tangible and intangible property necessary to establish the franchise; and (c) any other costs or estimates of costs associated with the establishment of the franchise not listed in clause (a) or (b), including any payment to the franchisor, whether direct or indirect, required by the franchise agreement.
5) Definition of “Broker” or “Franchisor’s Broker”	
Ontario	<i>Arthur Wishart Act (Franchise Disclosure)</i> , 2000, S.O. 2000, c. 3 at s. 7(1)(c) the franchisor’s broker, being a person other than the franchisor, franchisor’s associate, franchisor’s agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise
British Columbia	<i>Franchises Act</i> , SBC 2015, c 35 at s. 1(1) "franchisor's broker" means a person, other than a franchisee, franchisor or franchisor's associate, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise

Province	Statute & Provision
Manitoba	<p><i>The Franchises Act</i>, CCSM c F156 at s. 1(1)</p> <p>"franchisor's broker" means a person — other than the franchisor, franchisor's associate or franchisee — who, on behalf of the franchisor,</p> <p style="padding-left: 40px;">(a) grants, markets or otherwise offers to grant a franchise; or</p> <p style="padding-left: 40px;">(b) arranges for the grant of a franchise.</p>
New Brunswick	<p><i>Franchises Act</i>, RSNB 2014, c 111 at s. 1(1)</p> <p>"franchisor's broker" means a person, other than the franchisee, franchisor or franchisor's associate, who, on behalf of the franchisor, grants, markets or otherwise offers to grant a franchise or who arranges for the grant of a franchise.</p>
Prince Edward Island	<p><i>Franchises Act</i>, RSPEI 1988, c F-14.1 at s. 1(1)(h)</p> <p>"franchisor's broker" means a person, other than the franchisor, franchisor's associate or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise</p>
6) Prohibition on Waiver of Rights	
Ontario	<p><i>Arthur Wishart Act (Franchise Disclosure)</i>, 2000, S.O. 2000, c. 3 at s. 11</p> <p>Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.</p>
British Columbia	<p><i>Franchises Act</i>, SBC 2015, c 35 at s. 13</p> <p>(1) Any purported waiver or release by a franchisee, or by a prospective franchisee, of a right conferred under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate under this Act is void.</p> <p>(2) Subsection (1) does not apply to a waiver or release by a franchisee, or by a prospective franchisee, made in accordance with a settlement of an action, claim or dispute.</p>
Alberta	<p><i>Franchises Act</i>, RSA 2000, c F-23 at s. 18</p> <p>Any waiver or release by a franchisee of a right given by this Act or the regulations or of a requirement of this Act or the regulations is void.</p>

Province	Statute & Provision
Manitoba	<p><i>The Franchises Act</i>, CCSM c F156 at s. 11</p> <p>Any purported waiver or release by a franchisee or a prospective franchisee of a right conferred by or under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.</p>
New Brunswick	<p><i>Franchises Act</i>, RSNB 2014, c 111 at s. 12</p> <p>A purported waiver or release by a franchisee or a prospective franchisee of a right conferred by or under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.</p>
Prince Edward Island	<p><i>Franchises Act</i>, RSPEI 1988, c F-14.1 at s. 12</p> <p>Any purported waiver or release by a franchisee or a prospective franchisee of a right conferred by or under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void</p>

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE BODY SHOP CANADA LIMITED, IN THE CITY OF
TORONTO, IN THE PROVINCE OF ONTARIO (the “Applicant”)

Court File No. CV-24-00723586-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE BODY SHOP CANADA LIMITED
(MOTION FOR DECLARATION ORDER)**

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