

**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 **NORDSTROM CANADA RETAIL,  
INC., NORDSTROM CANADA HOLDINGS, LLC and  
NORDSTROM CANADA HOLDINGS II, LLC**

APPLICANTS

**FACTUM OF THE APPLICANTS  
(SALE APPROVAL MOTION)**

March 16, 2023

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## PART I - NATURE OF THE APPLICATION

1. On March 2, 2023, Nordstrom Canada Retail, Inc., Nordstrom Canada Holdings, LLC, and Nordstrom Canada Holdings II, LLC (the “**Applicants**”) were granted protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the “**CCAA**”) pursuant to an Initial Order (the “**Initial Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”). The stay of proceedings in the Initial Order was extended to Nordstrom Canada Leasing LP (together with the Applicants, the “**Nordstrom Canada Entities**”). At the same time this Court granted two third-party stays – the Parent Stay and the Co-Tenancy Stay. Alvarez & Marsal Canada Inc. was appointed as monitor within these CCAA proceedings (the “**Monitor**”).

2. As outlined in the Applicants’ Initial Order Factum, these CCAA proceedings were undertaken to effect an orderly wind-down of the Nordstrom Canada Entities’ business through a liquidation of their assets, followed by a distribution to unsecured creditors pursuant to a plan of arrangement. The Applicants now file this factum seeking a Liquidation Sale Approval Order (the “**Sale Approval Order**”). The Sale Approval Order would, among other things:

- (a) approve an amended and restated consulting agreement (the “**Consulting Agreement**”) dated March 16, 2023 between Nordstrom Canada and Canada Leasing LP (together, the “**Merchant**”) and a contractual joint venture comprised of Hilco Merchant Retail Solutions ULC and Gordon Brothers Canada, ULC (together, the “**Consultant**”);
- (b) approve the proposed sale guidelines (the “**Sale Guidelines**”) for the orderly liquidation of certain Merchandise and FF&E (each as defined below) at each of

the Merchant's stores through a "store closing", "everything must go", "everything on sale" or similar themed sale;

- (c) authorize the Merchant, with the assistance of the Consultant, to undertake a liquidation process in accordance with the terms of the Sale Approval Order, the Consulting Agreement, and the Sale Guidelines; and
- (d) extend the Stay Period, the Parent Stay, and the Co-Tenancy Stay until June 30, 2023.

3. After service of this motion, the Monitor and the Nordstrom Canada Entities continued to engage in discussions with counsel for certain landlords and/or the Consultant. As a result of those discussions, the Nordstrom Canada Entities have revised the Sale Guidelines, Sale Approval Order, and Consulting Agreement to be responsive to certain matters raised by the landlords. Revised versions of those documents are appended to the Second Report of the Monitor. All references to the Sale Guidelines, Consulting Agreement, and Sale Approval Order in this factum refer to the revised versions of those documents.

4. As the Merchant's stores are all closing, there can be no doubt that an orderly, transparent process for realizing on the value of inventory and FF&E is both necessary and appropriate. Inventory liquidation processes have been approved in a number of retail insolvencies. The terms of the Consulting Agreement and the Sale Guidelines are generally consistent with similar agreements and guidelines approved in other retail liquidations carried out under the CCAA. The Consultant was selected through a fair and reasonable bidding process and the Consulting Agreement and Sale Guidelines were developed with the oversight and support of the Monitor.

5. The liquidation process embodied in the Consulting Agreement and the Sale Guidelines represents the best opportunity to maximize recoveries for stakeholders in a manner that is transparent, orderly and efficient. The Applicants therefore seek this Court's immediate approval of the Consulting Agreement and the Sale Guidelines to allow the inventory liquidation to commence as soon as possible.

6. The stay extension is required to maintain stability and a level playing field for all stakeholders while this process occurs. The Applicants are acting in good faith and with due diligence in effecting this orderly wind down.

## **PART II - SUMMARY OF FACTS**

7. The facts regarding this motion are more fully set out in the affidavit of Misti Heckel.<sup>1</sup>

8. As detailed further below, the Nordstrom Canada Entities have acted in good faith and with due diligence in pursuing the orderly wind down of their business.<sup>2</sup>

9. Among other things, the Nordstrom Canada Entities have given notice of these CCAA proceedings to stakeholders including, most significantly, all landlords, employees, an extensive number and wide variety of vendors and suppliers, and customers. In particular, the Merchant (through its counsel) and the Monitor have engaged in extensive consultations and discussions with counsel for certain landlords to provide information with respect to the CCAA proceedings and proposed sale process and address to the best of their ability any comments or concerns.<sup>3</sup> These consultations led to revisions to the Sale Guidelines, Sale Approval Order, and Consulting

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<sup>1</sup> Affidavit of Misti Heckel, sworn March 14, 2023 ("**Third Heckel Affidavit**"). The Applicants further rely on the facts as set out in the Affidavit of Misti Heckel, sworn March 8, 2023 ("**ARIO Heckel Affidavit**") and the Affidavit of Misti Heckel, sworn March 1, 2023 in support of the Initial Order ("**Initial Heckel Affidavit**"). Unless otherwise specified, capitalized terms in this factum have the same meaning as in the Third Heckel Affidavit.

<sup>2</sup> Third Heckel Affidavit at para. 33.

<sup>3</sup> Third Heckel Affidavit at para. 23.

Agreement to be responsive to the landlords' concerns in a manner that preserves the benefits of the Sale to the Nordstrom Canada Entities and their stakeholders. In consultation with the Monitor, the Nordstrom Canada Entities have engaged, and will continue engaging, in discussions with their stakeholders as these CCAA proceedings progress.<sup>4</sup>

### **PART III - ISSUES AND LAW**

10. The issues on this motion are whether this Court should grant the requested Sale Approval Order, including whether:

- (a) this Court should approve the Consulting Agreement and the Sale Guidelines and authorize the commencement of a liquidation process; and
- (b) this Court should extend the Stay Period, the Parent Stay, and the Co-Tenancy stay until June 30, 2023.

#### **A. This Court should approve the Liquidation Process**

##### **(a) Jurisdiction of the CCAA Court to Approve Inventory Liquidation Processes**

11. The Applicants' purpose in obtaining the Initial Order in these proceedings, as approved by this Court, was to effect a fair, controlled, and orderly wind-down of the Nordstrom Canada Entities' business. As submitted to this Court in obtaining the Initial Order, the use of the CCAA for this purpose is well-established.<sup>5</sup> Moreover, the CCAA has been used for this purpose on a number of occasions to address issues specific to retail insolvencies, including the accepted

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<sup>4</sup> Third Heckel Affidavit at para. 33.

<sup>5</sup> [Applicants' Initial Order Factum](#) at paras. 36-38.

processes for maximizing value for stakeholders where one of the key assets consists of the debtor's store inventory and related FF&E.<sup>6</sup>

12. It is also well-recognized that a CCAA court has jurisdiction to approve a sale process authorizing the liquidation of a debtor's assets,<sup>7</sup> and has frequently done so in the context of retail liquidations.<sup>8</sup> There is no specific test set out in the CCAA regarding the approval of inventory and FF&E liquidation processes, including the approval of an agreement (like the Consulting Agreement) for engaging a third party liquidator or related Sale Guidelines. Nor are there any requirements or restrictions in the CCAA regarding the form that such an agreement or Sale Guidelines can take.

13. Thus, the jurisdiction of the CCAA court to approve an inventory liquidation process is found, among other things, in the Court's jurisdiction to make any order it thinks fit under section 11 of the CCAA.<sup>9</sup> The Court's jurisdiction under section 11 has been interpreted broadly, with a view to achieving the objectives of the CCAA. As the Supreme Court of Canada noted in *Century Services*, CCAA courts have jurisdiction that extends well beyond merely staying proceedings against the debtor and CCAA courts are frequently asked to sanction measures for which there is no explicit authority in the CCAA.<sup>10</sup>

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<sup>6</sup> See, for example, the proceedings in respect of [Target Canada Co.](#), [Sears Canada Group](#), [Forever XXIV ULC](#), [Express Fashion Apparel Canada Inc.](#), and [Bed Bath & Beyond](#).

<sup>7</sup> See, for example, *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, [2013 ONSC 5933](#) at para. 44; *Indalex Ltd. (Re)*, [2011 ONCA 265](#) at para. 180, rev'd on other grounds [2013 SCC 6](#), [2013] 1 SCR 271.

<sup>8</sup> *Target Canada Co. (Re)*, [2015 ONSC 846](#) at paras. 2-5, endorsing [In the Matter of a Plan of Compromise or Arrangement of Target Canada Co. \(et al.\)](#), Court File No. CV-15-10832-00CL, Approval Order – Agency Agreement issued by Morawetz J. dated February 4, 2015; [In the Matter of a Plan of Compromise or Arrangement of Sears Canada, Inc \(et al.\)](#), Court File No. CV-17-11846-00CL, Liquidation Sale Approval Order issued by Conway J. dated July 18, 2017; [In the Matter of a Plan of Compromise or Arrangement of Forever XXI ULC](#), Court File No. CV-19-00628233-00CL, Sale Approval Order issued by Hainey J. dated October 7, 2019.

<sup>9</sup> CCAA, s. 11: "Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances."

<sup>10</sup> *Ted Leroy Trucking (Century Services) (Re)*, [2010 SCC 60](#) at para. 61 [*Century Services*].

14. More specifically, the Supreme Court of Canada has held that the introduction of section 11 into the CCAA codifies the discretionary authority of the Court under the CCAA that had been historically exercised by CCAA courts under its inherent jurisdiction.<sup>11</sup> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. As the Court further held:

...the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganization are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.<sup>12</sup>

15. These principles must be interpreted in light of the objectives of the particular type of restructuring. Where the restructuring takes the form of a liquidation, the Court's jurisdiction to make orders that further the restructuring are no less expansive than in any other restructuring. In these circumstances, the primary objective is to maximize recoveries for all stakeholders, and the evaluation of what is appropriate and fair must be viewed from this perspective.

16. As a general matter, it is well accepted that CCAA proceedings involve a “balancing of prejudices” in the sense that all stakeholders may be adversely affected, and the potential prejudice to individual stakeholders in relation to particular steps in the proceeding must be balanced against the benefits to stakeholders as a whole. Whether this balance has been appropriately struck depends on all of the circumstances.<sup>13</sup> Where an inventory liquidation process has been designed in close

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<sup>11</sup> *Century Services* at para. 68.

<sup>12</sup> *Century Services* at para. 70 (emphasis added).

<sup>13</sup> *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008 ONCA 587](#) at para. 117. See also *Skydome Corp. (Re)*, [1998 CarswellOnt 5914](#) at para. 11.

consultation with the Monitor, on the basis of principles and guidelines that have applied in many other retail insolvencies, and is supported by evidence that it provides the best chance of maximizing recoveries for stakeholders as a whole, the balance weighs heavily in favour of approval.

**(b) Factors Supporting Approval of Inventory Liquidation Processes**

17. In prior cases involving the approval of inventory and FF&E liquidation processes, Courts have considered the “*Nortel*” factors for determining generally whether a sale process is appropriate and should be approved. The Court considers the following questions:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole economic community?
- (c) do any of the debtors’ creditors have a *bona fide* reason to object to a sale?
- (d) is there a better viable alternative?<sup>14</sup>

18. Within the context of this orderly wind-down of the Canadian retail business of the Nordstrom Canada Entities, there can be no doubt that a sale process is warranted at this time. In fact, the evidence is clear that such a process is essential to achieve the goals of carrying out the wind-down in a manner that is fair, transparent, efficient, and that maximizes value to stakeholders. By the same token, the sale will benefit the stakeholders as a whole by realizing proceeds to be applied against the claims of the creditors of the Nordstrom Canada Entities. There is no reasonable alternative in the circumstances.

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<sup>14</sup> *Nortel Networks Corp (Re)*, [2009 CanLII 39492](#) (SCJ [Commercial List]) at para 49. While the *Nortel* factors were formulated before the 2009 amendments to the CCAA, CCAA courts have since confirmed that these criteria still apply: *Brainhunter Inc (Re)*, [2009 CarswellOnt 8207](#) (SCJ [Commercial List]) [*Brainhunter*] at paras 15-17.



19. Although section 36(3) of the CCAA does not directly apply at this stage, the *Nortel* criteria are often evaluated in light of the additional criteria set out in section 36(3),<sup>15</sup> namely:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale or disposition;
- (c) whether the Monitor filed a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a bankruptcy;
- (d) the extent to which creditors were consulted;
- (e) the effects of the proposed sale or disposition on creditors and stakeholders; and
- (f) whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.<sup>16</sup>

20. In CCAA proceedings involving the liquidation of retailers, this Court has particularly focused on the reasonableness of the process used to solicit potential liquidators and the reasonableness of the proposed sale process itself as key factors in determining whether to approve a proposed liquidation sale.<sup>17</sup> The Applicants submit that these factors, as well as the *Nortel* factors and the factors in section 36(3), support granting the Sale Approval Order.

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<sup>15</sup> *Brainhunter* at para 17.

<sup>16</sup> CCAA s. 36(3).

<sup>17</sup> *Target Canada Co (Re)*, 2015 ONSC 846 (SCJ [Commercial List]) ([Endorsement – Agency Agreement](#)) [*Target - Agency Agreement Endorsement*] at paras 2-5; *Sears Canada Inc (Re)*, 2017 ONSC 6235 (SCJ [Commercial List]) ([Endorsement – Agency Agreement](#)) at paras 6-8.

**(c) The Process to Select the Consultant was Reasonable**

21. The process to select the Consultant to oversee and implement the proposed liquidation was fair and reasonable and the Monitor has been consulted and/or directly involved throughout the process. In accordance with the Initial Order, on March 2, 2023, the Monitor sent emails to five potential third-party liquidators seeking proposals for the liquidation of the Merchant's inventory and furniture, fixtures and equipment.<sup>18</sup> Subsequently, five additional third-party liquidators contacted the Monitor to express interest in submitting proposals.<sup>19</sup> Of these ten parties, nine signed non-disclosure agreements, were granted access to the data room and were permitted to coordinate site visits to select Stores.<sup>20</sup>

22. All liquidators were instructed to submit their respective proposals before March 10, 2023 at 12:00PM. They were instructed to specify whether the liquidation of the Merchandise would proceed on a guaranteed minimum recovery basis (i.e. an agency arrangement), a fee-for service basis (i.e. a consulting agreement), or another structure to be agreed upon by the parties.<sup>21</sup> In total, four proposals were received.<sup>22</sup>

23. Following a careful review of the proposals and discussions with each of the liquidators regarding the terms of their respective proposals, and in consultation and with the support of the Monitor, the Nordstrom Canada Entities selected the Consultant to effect the liquidation of the Nordstrom Canada Entities' saleable assets (discussed more fully below).<sup>23</sup>

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<sup>18</sup> Third Heckel Affidavit at para. 6.

<sup>19</sup> Third Heckel Affidavit at para. 7.

<sup>20</sup> Third Heckel Affidavit at para. 7.

<sup>21</sup> Third Heckel Affidavit at para. 8. The deadline for submitting proposals was extended from March 9, 2023 to March 10, 2023 through a communication to each potential liquidator.

<sup>22</sup> Third Heckel Affidavit at para. 9.

<sup>23</sup> Third Heckel Affidavit at para. 10.

24. The members of the joint venture selected as the Consultant have extensive experience conducting retail liquidations in Canada, including *Target Canada*, *Sears Canada*, *American Apparel Canada*, *BCBG Canada*, *Express Fashion Apparel*, *Danier Leather*, and *Forever 21*.<sup>24</sup> They are involved in the joint venture recently approved by the CCAA Court to conduct the liquidation of the *Bed Bath & Beyond* retail stores across Canada.<sup>25</sup>

25. Following the selection of the contractual joint venture as the Consultant, the Merchant, in consultation with the Monitor, negotiated and finalized the terms of the Consulting Agreement and Sale Guidelines with the Consultant (which have both been subsequently amended as discussed above).<sup>26</sup> In its business judgment and with the support of the Monitor, the Merchant elected to structure the engagement as a consulting agreement (as opposed to an agency agreement). Such structure is expected to provide the best result for the Nordstrom Canada Entities and their stakeholders.<sup>27</sup>

26. After careful consideration, the Nordstrom Canada Entities and the Monitor are of the view that the Consultant's proposal was the most favourable for the Nordstrom Canada Entities and their stakeholders as a whole.<sup>28</sup> The Nordstrom Canada Entities are of the view that engaging the Consultant to assist with the liquidation process will produce better results than attempting to liquidate without professional assistance.<sup>29</sup>

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<sup>24</sup> Third Heckel Affidavit at para. 11.

<sup>25</sup> Third Heckel Affidavit at para. 11.

<sup>26</sup> Third Heckel Affidavit at para. 12.

<sup>27</sup> Third Heckel Affidavit at para. 12.

<sup>28</sup> Third Heckel Affidavit at para. 10.

<sup>29</sup> Third Heckel Affidavit at para. 22.

**(d) The Consulting Agreement and Sale Guidelines are Fair and Reasonable**

27. The terms of the Consulting Agreement, Sale Guidelines and Sale Approval Order are generally similar to and typical of agreements and orders for inventory liquidation sales that have been negotiated and/or approved in a number of other retail insolvencies, including *Sears Canada*,<sup>30</sup> *Target Canada*,<sup>31</sup> and *Forever 21*.<sup>32</sup> Consistent with the differing circumstances of each case, each agreement and order inevitably varies to some degree to reflect the particular circumstances. This is consistent with the flexibility provided by the CCAA to make orders that are appropriate to the needs of the specific restructuring.

28. The manner in which the Sale will be conducted pursuant to the Consulting Agreement and the Sale Guidelines is fair and reasonable. Among other things:

- (a) the Consultant is appointed as exclusive consultant for the purposes of conducting a “store closing”, “everything must go”, “everything on sale”, or similar themed sale of certain inventory owned by the Merchant (the “**Merchandise**”) and certain furniture, fixtures, and equipment located in the Nordstrom Canada Entities’ stores and distribution centre (the “**FF&E**”),<sup>33</sup>
- (b) “Merchandise” expressly does *not* include, among other things, (a) goods that belong to sublessees, licensees or concessionaires of the Merchant or are leased or licensed from third parties by the Merchant, (b) goods held by the Merchant on memo, consignment, or pursuant to license or similar arrangement with third

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<sup>30</sup> *Sears Canada Inc (Re)*, 2017 ONSC 6235 (SCJ [Commercial List]) ([Liquidation Sale Approval Order](#)).

<sup>31</sup> *Target Canada Co. (Re)*, 2015 ONSC 846 (SCJ [Commercial List]) ([Approval Order – Agency Agreement](#)) [*Target – Agency Agreement Order*].

<sup>32</sup> *Forever XXI ULC (Re)*, Court File No. CV-19-00628233-00CL (SCJ [Commercial List]) ([Sale Approval Order](#)).

<sup>33</sup> Third Heckel Affidavit at para. 13(a).

parties, or (c) FF&E (including FF&E owned by third parties, which will be removed from stores by the applicable vendors pursuant to a retrieval schedule);<sup>34</sup>

- (c) the sale of all Merchandise will commence on the first business day following the granting of the Sale Approval Order, or such later date as agreed by the parties in consultation with the Monitor (the “**Sale Commencement Date**”) and will conclude by no later than June 30, 2023 (the period of sale, the “**Sale Term**”);<sup>35</sup>
- (d) all active gift cards, gift certificates, and unexpired Nordstrom Notes issued prior to the Sale Commencement Date will be honoured during the Sale Term;
- (e) all Merchandise will be sold on behalf of the Merchant and will be “final sale”, and FF&E will be sold on an “as is, where is” basis;
- (f) as consideration for its services under the Consulting Agreement, the Consultant is entitled to payment of the following: (i) a base fee of 1.5% of the gross receipts (net only of sales taxes) from the sales of Merchandise during the Sale Term and 15% of the gross proceeds (net only of sales taxes) of FF&E; and (ii) payment of an incentive fee equal to the aggregate sum of the percentages set forth in the Third Heckel Affidavit for the corresponding Gross Recovery Percentage (as defined in the Consulting Agreement) achieved. In no event will the Consultant’s compensation equal more than 3.1% of gross proceeds (net only of sales taxes);<sup>36</sup>
- (g) the Merchant is responsible for all expenses of the Sale as delineated in the aggregate budget established by the Merchant and the Consultant, in consultation

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<sup>34</sup> Third Heckel Affidavit at paras. 13(a)(ii) and 20-21.

<sup>35</sup> Third Heckel Affidavit at para. 13(b).

<sup>36</sup> Third Heckel Affidavit at para. 13(h).

with the Monitor (as may be modified further in accordance with the terms of the Consulting Agreement, the “**Expense Budget**”), and other budgets as agreed by the Merchant and the Consultant pursuant to the Consulting Agreement;<sup>37</sup> and

- (h) The Consultant has the right to supplement the Merchandise in the Sale with certain additional goods which are of like kind and category and no lesser quality to the Merchandise and procured from current vendors of the Merchant (the “**Additional Consultant Goods**”); provided that, the Additional Consultant Goods will not exceed \$10 million at cost in the aggregate, the Additional Consultant Goods will be distributed among the “Full Line Stores” such that no such store receives such goods with an aggregate cost in excess of \$2 million, and the inclusion of Additional Consultant Goods will not extend the Sale.

29. Throughout the Sale Term, the Consultant will, among other things, (i) provide qualified supervisors engaged by the Consultant and approved in advance by the Merchant to oversee the management of the Stores and the Sale, (ii) recommend appropriate in-Store, point-of-sale and external advertising for the Stores, all of which must be approved in advance by the Merchant, (iii) recommend appropriate discounts of Merchandise, staffing levels for the Stores, and appropriate bonus and incentive programs, if any, for the Stores’ employees, in each case approved in advance by the Merchant in consultation with the Monitor, (iv) oversee display of Merchandise for the Stores, and (v) provide such other related services deemed necessary or appropriate by the Merchant and the Consultant, in consultation with the Monitor.<sup>38</sup>

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<sup>37</sup> Third Heckel Affidavit at para. 13(i).

<sup>38</sup> Third Heckel Affidavit at para. 13(g).

30. The Merchant intends to work cooperatively with each landlord throughout the Sale, and has already undertaken significant discussions with counsel for certain landlords in an effort to address questions or comments respecting the Sale.<sup>39</sup> The Consultant is experienced in addressing the suite of landlord matters that typically arise in the type of Sale process contemplated by the Consulting Agreement, Sale Guidelines, and Sale Approval Order.<sup>40</sup>

31. The Sale Guidelines are appended to the Consulting Agreement and the Sale Approval Order, and contain a number of other provisions designed to set the ground rules and to ensure that the Sale takes place in an orderly, respectful fashion. These guidelines have been adapted to the circumstances of this case based on similar sale guidelines approved in other retail insolvencies, most recently and particularly in *Bed Bath & Beyond*.<sup>41</sup>

32. Specifically, subject to the Sale Approval Order, any further order of the CCAA Court, and any subsequent written agreement between the Merchant and its landlord(s), the Sale will be conducted in accordance with the terms of the applicable lease.<sup>42</sup> Among other things, the Sale Guidelines also preclude the Merchant from engaging in any auctions of Merchandise or FF&E at the Stores and require the Sale to be conducted during normal hours of operation.<sup>43</sup>

**(e) The Consulting Agreement and Sale Guidelines should be approved**

33. For all of the above reasons, the Applicants submit that the *Nortel* criteria and the criteria in section 36(3) of the CCAA are satisfied and that the Court has both the jurisdiction and the discretion to approve both the Consulting Agreement and the Sale Guidelines.

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<sup>39</sup> Third Heckel Affidavit at para. 23.

<sup>40</sup> Third Heckel Affidavit at para. 24.

<sup>41</sup> *In the Matter of a Plan of Compromise or Arrangement of BBB Canada Ltd*, 2023 ONSC 1230 ([Sale Approval Order](#)), Schedule “A”, Sale Guidelines [*BBB – Sale Approval Order*].

<sup>42</sup> Third Heckel Affidavit at para. 18(a).

<sup>43</sup> Third Heckel Affidavit at paras. 18(b), (c), (e).

34. The Nordstrom Canada Entities believe that the Sale must be commenced as soon as possible to maximize recoveries available to their respective stakeholders and to limit ongoing operating costs, thereby ensuring that the Merchant can exit from all Stores as soon as practicable. Any delay in commencing the Sale could compromise the net recoveries generated from the sale of the Merchandise and FF&E.<sup>44</sup>

**B. The Stay Should be Extended to June 30, 2023**

35. The Applicants seek to extend the Stay Period, the Parent Stay, and the Co-Tenancy Stay<sup>45</sup> up to and including June 30, 2023 to allow the Applicants to complete the sale process as planned.

36. S. 11.02(2) of the CCAA provides that the Court may extend a stay order for any period necessary, if the Court is satisfied that (a) circumstances exist that make the order appropriate, and (b) the applicant has acted, and is acting, in good faith and with due diligence. The Applicants have acted and are acting in good faith and with due diligence in pursuing the orderly wind-down of their business.

37. Extending the Stay Period is necessary and appropriate in the circumstances to enable the Applicants to implement an orderly liquidation pursuant to the Consulting Agreement and the Sale Guidelines and for the Applicants to focus on the orderly wind-down of their business. As noted above, the targeted sale termination date is June 30, 2023 – the same date as the requested extension.<sup>46</sup> The Monitor has determined that the Nordstrom Canada Entities will have sufficient funds to continue their operations and fund these CCAA proceedings through June 30, 2023.

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<sup>44</sup> Third Heckel Affidavit at para. 27.

<sup>45</sup> The legal basis for the Parent Stay and the Co-Tenancy Stay is set out in the [Applicants' Initial Order Factum](#) at paras 48-58 and paras 44-48.

<sup>46</sup> Third Heckel Affidavit at para. 32.



38. The extension of the Co-Tenancy Stay is necessary and appropriate to assist the landlords in dealing with the effects of the wind-down of the Nordstrom Canada Entities' operations, including the completion of the proposed Sale in each Store over the coming months, on an orderly basis.<sup>47</sup>

39. Similarly, the extension of the Parent Stay will allow the Nordstrom Canada Entities the breathing space and time necessary to complete the Sale while continuing to engage with vendors and landlords who may be affected. The Applicants do not believe that any party will be prejudiced by the requested extension to the Parent Stay, which will provide the necessary time and space for claims to be addressed in an efficient and consistent manner.<sup>48</sup>

#### **PART IV - NATURE OF THE ORDER SOUGHT**

40. For the foregoing reasons, the Applicants submit that this Court should grant the Sale Approval Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of March, 2023:



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**TO: THE ATTACHED SERVICE LIST**

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<sup>47</sup> Third Heckel Affidavit at para. 36.

<sup>48</sup> Third Heckel Affidavit at para. 38.

## SCHEDULE “A”: LIST OF AUTHORITIES

### *Cases*

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008 ONCA 587](#)
2. *BBB Canada Ltd.*, (February 21 2023), Ont. S.C.J. [Commercial List] ([Sale Approval Order](#))
3. *Brainhunter Inc (Re)*, [2009 CarswellOnt 8207](#) S.C.J., [Commercial List]
4. *Forever XXI ULC*, (October 7, 2019), Ont. S.C.J. [Commercial List] Court File No. CV-19-00628233-00CL ([Sale Approval Order](#))
5. *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, [2013 ONSC 5933](#)
6. *Indalex Ltd. (Re)* , [2011 ONCA 265](#)
7. *Nortel Networks Corp (Re)*, [2009 CanLII 39492](#), S.C.J., [Commercial List]
8. *Skydome Corp. (Re)*, [1998 CarswellOnt 5914](#)
9. *Sun Indalex Finance, LLC v. United Steelworkers*, [2013 SCC 6 \(CanLII\)](#), [\[2013\] 1 SCR 271](#)
10. *Target Canada Co. (et al.)*, (February 4, 2015), Ont. S.C.J. [Commercial List] Court File No. CV-15-10832-00CL ([Approval Order](#))
11. *Target Canada Co. (Re)*, (February 5, 2015) ONSC 846, S.C.J. [Commercial List] ([Endorsement – Agency Agreement](#))
12. *Target Canada Co. (Re)*, [2015 ONSC 846](#)
13. *Ted Leroy Trucking (Century Services) (Re)*, [2010 SCC 60](#)
14. *Sears Canada Inc. (et al)*, (July 18, 2017)., Ont. S.C.J. [Commercial List] Court File No. CV-17-11846-00CL ([Liquidation Sale Approval Order](#))
15. *Sears Canada Inc (Re)*, (October 24, 2017) ONSC 6235, S.C.J. [Commercial List] ([Endorsement – Agency Agreement](#))

**SCHEDULE “B”**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

***COMPANIES’ CREDITORS ARRANGEMENT ACT***

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

**General power of court**

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

[ ... ]

**Restriction on disposition of business assets**

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

- **Factors to be considered**

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

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d)** the extent to which the creditors were consulted;
- (e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

Court File No: CV-23-00695619-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORDSTROM  
CANADA RETAIL, INC., NORDSTROM CANADA HOLDINGS, LLC and NORDSTROM CANADA  
HOLDINGS II, LLC

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM**

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