

**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
(MOTION RETURNABLE OCTOBER 4, 2024)**

October 2, 2024

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PART I - OVERVIEW

1. The Body Shop Canada Limited (“**TBS Canada**” or the “**Company**”) is a retailer of bath and body products in Canada. On March 1, 2024, TBS Canada filed a notice of intention (the “**NOI**”) to make a proposal under section 50.4 of the *Bankruptcy and Insolvency Act*¹ (the “**BIA**”). Alvarez & Marsal Canada Inc. (“**A&M**”) was appointed to act as the proposal trustee (the “**Proposal Trustee**”). This Court granted the Company extensions of time to file a proposal in that proceeding (the “**NOI Proceeding**”) on March 4, 2024, April 15, 2024 and May 30, 2024.²
2. On July 5, 2024, this Court issued an order continuing the NOI Proceeding under the BIA into a proceeding (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act* (“**CCAA**”).³ On the same day, this Court also issued an order approving a sale process to identify a purchaser of the Company, its business, or its assets (the “**Sale Process**”), as well as an order discharging the Proposal Trustee and terminating the NOI proceeding.⁴
3. Pursuant to the Initial Order, this Court appointed A&M to act as the monitor (the “**Monitor**”), issued a stay of proceedings until October 8, 2024 (the “**Stay Period**”), and granted the Existing Charges (as defined below)⁵ on the Company’s assets.⁶
4. The Sale Process is underway and the deadline for parties to submit bids is October 8, 2024.⁷

¹ [Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3](#), s. 50.4 [[BIA](#)].

² First Report of Alvarez & Marsal Canada Inc. dated September 30, 2024 (“**First Report**”), at paras. 1.4-1.7 [[E3-E4](#)].

³ [Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36](#) [[CCAA](#)].

⁴ First Report, at para. 1.8 [[E4-E5](#)].

⁵ *Infra*, para. 14(c).

⁶ First Report, at para. 1.8 [[E4-E5](#)].

⁷ First Report, at paras. 6.1-6.8 [[E14-E16](#)].

5. As a result, an extension of the Stay Period is necessary to allow time for the Sale Process to run to its conclusion, as well as time to finalize and implement any transaction resulting from the Sale Process. TBS Canada therefore seeks an extension of the Stay Period to December 13, 2024.

6. In addition, to permit TBS Canada to secure inventory to maintain operations while the Sale Process is ongoing, the Company seeks a declaration from the Court that the UK Purchaser is a critical supplier of TBS Canada's inventory and therefore entitled to a charge on certain of the Company's inventory to secure the outstanding purchase price for such inventory. The inventory is expected to allow the Company to maintain ordinary course operations into the first quarter of 2025.

7. A copy of the draft order sought by the Company on this motion is attached as Tab 3 to the Motion Record of TBS Canada dated September 25, 2024.⁸

PART II - SUMMARY OF FACTS

8. The facts in support of this motion are more fully set out in the Sixth Searle Affidavit and the First Report of the Monitor dated September 30, 2024 (the "**First Report**").⁹

A. OVERVIEW OF THE COMPANY

9. TBS Canada is a business specializing in the sale of skincare, haircare, bath and body products with 71 leased stores across Canada.¹⁰ The Company and its U.S. affiliate, Buth-Na-Bodhaige Inc. ("**TBS US**"), are wholly owned subsidiaries of its United Kingdom

⁸ Draft Order [Motion Record, Tab 3] [\[A260-A266\]](#).

⁹ Affidavit of Jordan Searle sworn on September 25, 2024 ("**Sixth Searle Affidavit**") [Motion Record dated September 25, 2024 ("**Motion Record**"), Tab 2] [\[A16-A43\]](#); and First Report [\[E1-E23\]](#).

¹⁰ Sixth Searle Affidavit, at para. 15 [Motion Record, Tab 2] [\[A22\]](#).¹¹ As described below, the UK Parent changed its name following the sale of its business and assets to the UK Purchaser (defined below, *infra*, para. 18).

parent company, TBSI Realisations Limited (formerly The Body Shop International Limited)¹¹ (the “**UK Parent**”).¹²

B. INSOLVENCY OF TBS CANADA

10. The UK Parent historically provided several accounting and cash management services for the Company. These services were provided pursuant to a cash management system and cash pooling arrangement.¹³

11. TBS Canada found itself in a liquidity crisis when the UK Parent unexpectedly filed for administration in the United Kingdom on February 13, 2024 (the “**UK Administration**”)¹⁴ and failed to remit payment for amounts owing to certain of the Company’s creditors. This sudden and unannounced cessation of funds resulted in a severe liquidity crisis for TBS Canada, effectively halting all financial support for the Company and its operations within Canada.¹⁵

12. Accordingly, TBS Canada filed the NOI to provide it with the breathing room and expanded protections necessary to organize its financial affairs and develop a plan for the continuation of the business as a going concern.¹⁶

13. On July 5, 2024, the NOI proceeding was continued under the CCAA to provide TBS Canada with additional time to conduct a process for the sale of the Company, its business, or its assets.¹⁷

¹¹ As described below, the UK Parent changed its name following the sale of its business and assets to the UK Purchaser (defined below, *infra*, para. 18).

¹² Sixth Searle Affidavit, at paras. 1 and 4 [Motion Record, Tab 2] [\[A16-A17\]](#).

¹³ Sixth Searle Affidavit, at para. 4 [Motion Record, Tab 2] [\[A17\]](#).

¹⁴ The joint administrators of the UK Administration are Tony Wright, Geoff Rawley, and Alastair Massey (the “**UK Administrators**”).

¹⁵ Sixth Searle Affidavit, at para. 5 [Motion Record, Tab 2] [\[A18\]](#).

¹⁶ Sixth Searle Affidavit, at para. 6 [Motion Record, Tab 2] [\[A18\]](#).

¹⁷ *Re The Body Shop Canada Limited*, [2024 ONSC 3882](#), at paras. 4-19.

(a) Charges Granted and Security Registrations in this Proceeding

14. Three charges have been granted by this Court in this proceeding to date, in the following order of priority:

- (a) an administration charge in the amount of \$700,000 to secure the fees of the Monitor, counsel to the Monitor, and counsel to TBS Canada (the **“Administration Charge”**);
- (b) a directors and officers’ charge in the amount of \$2,100,000 to secure liabilities for claims that may be advanced against the director and officers of the Company personally (the **“D&O Charge”**); and
- (c) a key employee retention program charge in the amount of \$315,000 to secure retention payments to be made to retain key employees of TBS Canada during this proceeding (the **“KERP Charge”**, and collectively with the Administration Charge and D&O Charge, the **“Existing Charges”**).¹⁸

15. In addition, two parties have security registrations against TBS Canada:

- (a) Enterprise Fleet Management Canada, Inc. has a security interest that relates to corporate vehicles that are leased by TBS Canada for certain employees (the **“Enterprise Security”**).¹⁹
- (b) Royal Bank of Canada (as successor to HSBC Bank Canada) holds certain security registrations (the **“RBC Registrations”**), but no amounts are owing by TBS Canada in connection with the RBC Registrations.²⁰

¹⁸ Pre-Filing Report of the Proposed Monitor dated June 28, 2024, at paras. 7.1-7.13 [\[E41-E44\]](#).

¹⁹ Sixth Searle Affidavit, at para. 77 [Motion Record, Tab 2] [\[A40\]](#).

²⁰ Sixth Searle Affidavit, at para. 77 [Motion Record, Tab 2] [\[A40\]](#).

C. DEVELOPMENTS ASSOCIATED WITH OPERATIONAL ACTIVITIES SINCE THE INITIAL ORDER

16. Since the Initial Order, TBS Canada has acted in good faith and made diligent efforts to stabilize its operations and preserve its enterprise value, all with the goal of facilitating a going concern sale of the “The Body Shop” business in Canada.²¹ These efforts have included the following:

- (a) negotiating and entering into a short-term lease to replace an expired lease for the Company’s store in the CF Polo Park shopping centre in Winnipeg, Manitoba;²²
- (b) negotiating short-term renewals of the leases for its storage facilities in six locations across Canada;²³
- (c) negotiating and entering into a service transfer agreement whereby TBS Canada assumed responsibility for and control over its critical information technology systems from the UK Parent;²⁴ and
- (d) negotiating and entering into an agreement with a logistics supplier which is essential to the continuous operations of TBS Canada and ensures that the Company has the capacity to stock and manage its stores effectively.²⁵

D. DEVELOPMENTS IN THE UK SALE PROCESS

17. On May 20, 2024, the UK Administrator commenced a sale process for the sale of the business and assets of the UK Parent (the “**UK Sale Process**”).²⁶

²¹ Sixth Searle Affidavit, at para. 14 [Motion Record, Tab 2] [\[A22\]](#).

²² Sixth Searle Affidavit, at para. 16 [Motion Record, Tab 2] [\[A22\]](#).

²³ Sixth Searle Affidavit, at para. 17 [Motion Record, Tab 2] [\[A22-A23\]](#).

²⁴ Sixth Searle Affidavit, at paras. 18-24 [Motion Record, Tab 2] [\[A23-A24\]](#).

²⁵ Sixth Searle Affidavit, at paras. 25-28 [Motion Record, Tab 2] [\[A24-A25\]](#).

²⁶ Sixth Searle Affidavit, at para. 10 [Motion Record, Tab 2] [\[A19\]](#).

18. On or about July 17, 2024, the UK Administrator announced that they had selected a consortium bid led by Aurea Group (now The Body Shop International Limited) (the “**UK Purchaser**”) as a preferred bidder for the UK Parent and had entered into an exclusivity period to enable the UK Purchaser to complete their due diligence. The UK Administrator emphasized in their announcement that the transaction (the “**UK Transaction**”) was not yet finalized and that a period of final diligence and negotiations was underway.²⁷

19. On September 6, 2024, it was announced that the UK Purchaser had successfully acquired the assets of the UK Parent and that the UK Transaction had closed. As part of the UK Transaction, the UK Purchaser acquired the “The Body Shop International Limited” name and the inventory owned by the UK Parent. The UK Parent subsequently changed its name to “TBSI Realisations Limited”.²⁸

20. The completion of the UK Transaction has not impacted TBS Canada’s operations. TBS Canada continues to function as usual, maintaining the same operational practices it has followed since the initiation of the NOI proceeding. This includes the ongoing sale of “The Body Shop” products and the receipt of back-office support from the UK Parent (and following the closing, from the UK Purchaser).²⁹

E. THE CANADIAN SALE PROCESS

21. In the period from the date of the Initial Order to September 6, 2024, the Company, the Monitor, and their advisors meaningfully advanced the Sale Process to ensure that it could be completed in a timely manner following finalization of the UK Transaction.³⁰

²⁷ Sixth Searle Affidavit, at para. 31 [Motion Record, Tab 2] [\[A26\]](#).

²⁸ Sixth Searle Affidavit, at para .37 [Motion Record, Tab 2] [\[A28\]](#).

²⁹ Sixth Searle Affidavit, at para .38 [Motion Record, Tab 2] [\[A28\]](#).

³⁰ Sixth Searle Affidavit, at para. 46 [Motion Record, Tab 2] [\[A30-A31\]](#).

22. As part of the discussions in the weeks leading up to the closing of the UK Transaction, TBS Canada and the Monitor were notified that the UK Transaction did not contemplate the purchase of equity in TBS Canada, and the UK Purchaser intended that the Canadian business would continue under a franchise relationship.³¹

23. On September 6, 2023, following the receipt by TBS Canada and the Monitor of confirmation that the UK Transaction closed, the Monitor launched the next phase of the Sale Process by sending a process letter (the “**Process Letter**”) to, among others, those parties that had approached the Company, the Proposal Trustee, the Monitor, the UK Parent or the UK Administrator indicating an interest in the Company, or its business or assets (each an “**Interested Party**”) and the service list for this CCAA Proceeding.³²

24. The Process Letter establishes three critical dates for the Sale Process as follows:

- (a) a bid deadline of 5:00 PM on October 8, 2024 (the “**Bid Deadline**”);
- (b) the selection of the successful bid by October 11, 2024, or such later date as may be determined by the Company in consultation with the Monitor; and
- (c) an outside date of November 15, 2024.³³

25. As a practical matter, as a result of the intended continuance of the Canadian business under a franchise relationship, the issuance of the Process Letter was necessarily delayed until the UK Transaction as closed and TBS Canada and the Monitor were obtained certainty as to the intended treatment of the Canadian business.

³¹ First Report, at paras. 4.3-4.4 [E8-E9].

³² First Report, at para. 6.5 [E15].

³³ First Report, at paras. 6.5-6.7 [E15-E16].

26. The Sale Process, Process Letter, and Bid Deadline take into account the intended treatment of the Canadian business as a franchise market, as it informs the bids submitted by Interested Parties.³⁴

27. TBS Canada and the Monitor continue to advance the Sale Process and engage with Interested Parties, and the UK Purchaser with respect to the terms of a franchise relationship, with the goal of settling the terms of a going-concern transaction for the Company's business.³⁵

F. ADDITIONAL INVENTORY REQUIRED FROM THE UK PURCHASER

28. Historically, TBS US managed the storage, freight, and logistics for TBS Canada's inventory orders, and TBS Canada sourced its inventory from the UK Parent through a distribution centre that was owned and operated by TBS US in the United States (the "**US Distribution Centre**").³⁶

29. Following the closing of the UK Transaction, the UK Purchaser has stepped into the shoes of the UK Parent and is now the Company's exclusive supplier of "The Body Shop" branded items that are sold in Canada.

30. When TBS US commenced proceedings under chapter 7 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York on March 8, 2024 (the "**Chapter 7 Proceeding**"), TBS US ceased providing freight, logistics and warehousing support services to TBS Canada.

31. However, TBS Canada has been able to source inventory from the US Distribution Centre during the Chapter 7 Proceeding through (a) a license arrangement entered into

³⁴ First Report, at paras. 6.3-6.4 [E15].

³⁵ First Report, at para. 6.8 [E16].

³⁶ Sixth Searle Affidavit, at para. 25 [Motion Record, Tab 2] [A24].

between TBS Canada and Rimon, P.C. (the “**Chapter 7 Trustee**”)³⁷, and (b) its engagement of National Logistics Services Inc. (“**National Logistics**”), which delivers inventory purchased by TBS Canada from the US Distribution Centre and warehouses it in Canada.³⁸

32. Recently, however, the Chapter 7 Trustee took steps to attempt to liquidate approximately \$20 million (retail value) of inventory remaining at the US Distribution Centre (the “**Remaining Inventory**”), which was acquired by the UK Purchaser as part of the UK Transaction.³⁹

33. In order to secure a continued flow of inventory, and to ensure that TBS Canada was appropriately stocked throughout the Sale Process, TBS Canada and the Monitor entered into negotiations with the UK Purchaser to purchase the Remaining Inventory.⁴⁰

34. On September 20, 2024, the UK Purchaser agreed to sell all of the Remaining Inventory to TBS Canada. At this time, however, TBS Canada does not have sufficient liquidity to pay the UK Purchaser in full for the Remaining Inventory. As a result, the UK Purchaser has agreed as follows:

- (a) TBS Canada will pay 50% of the purchase price for the Remaining Inventory (approximately \$1,300,000) to the UK Purchaser upon shipment of all of the Remaining Inventory (expected during the week ending October 4, 2024);
- (b) TBS Canada will pay an additional 10% of the purchase price for the Remaining Inventory (approximately \$300,000) to the UK Purchaser within 15 days of the final shipment of the Remaining Inventory;

³⁷ First Report, at para. 1.5 [E4].

³⁸ Sixth Searle Affidavit, at paras. 26-28 [Motion Record, Tab 2] [A24-A25].

³⁹ Sixth Searle Affidavit, at para. 69 [Motion Record, Tab 2] [A37-A38].

⁴⁰ Sixth Searle Affidavit, at para. 71 [Motion Record, Tab 2] [A38].

- (c) the remaining 40% of the purchase price for the Remaining Inventory (approximately \$1,100,000) shall be paid by November 29, 2024 (together with the payment contemplated in paragraph 34(b), the “**Outstanding Purchase Price**”);⁴¹ and
- (d) TBS Canada shall secure the Outstanding Purchase Price with a Court-ordered charge in favour of the UK Purchaser over the Remaining Inventory up to the maximum amount of \$1,500,000 (the “**Critical Supplier Charge**”).⁴²

35. As of the date of this factum, the majority of the Remaining Inventory has been delivered to TBS Canada’s warehouse, with the remaining deliveries to occur in the coming days. Accordingly, TBS Canada has scheduled the first 50% installment of the purchase price to be paid this week.⁴³

36. Without the Remaining Inventory, the Company cannot sustain its operations in the ordinary course through to the end of the Sale Process.⁴⁴ With the purchase of the Remaining Inventory, the Company expects to maintain adequate merchandise levels to sustain operations throughout the holiday season and into the first quarter of 2025. This stability will enable TBS Canada to further progress the Sale Process and assure Interested Parties that they can smoothly transition the Company’s business if a sale transaction is finalized.⁴⁵

⁴¹ First Report, at para. 5.1 [E12].

⁴² First Report, at para. 5.3 [E12-E13].

⁴³ First Report, at para. 5.3 [E12-E13].

⁴⁴ First Report, at para. 5.4(iii) [E14].

⁴⁵ Sixth Searle Affidavit, at para. 75 [Motion Record, Tab 2] [A40].

G. THE EXTENSION OF THE STAY PERIOD

37. Given that the Sale Process cannot be concluded before the expiration of the stay of proceedings on October 8, 2024, the Company requests an extension of the Stay Period until December 13, 2024. The requested extension will provide the Company, any Interested Party, and the UK Purchaser with enough time to settle the terms of a franchise arrangement and finalize and implement a transaction if the Sale Process produces a successful bid.

PART III - ISSUES

38. The issues on this motion are as follows:

- (a) whether this Court should declare the UK Purchaser to be a Critical Supplier and to order the continued supply of the Remaining Inventory;
- (b) whether this Court should grant a Critical Supplier Charge; and
- (c) whether this Court should grant the extension of the Stay Period.

39. TBS Canada submits that the answer to these issues is “yes”.

PART IV - LAW & ARGUMENT

A. THE UK PURCHASER SHOULD BE DECLARED A CRITICAL SUPPLIER AND BE COMPELLED TO SUPPLY INVENTORY

40. This Court has the power to declare the UK Purchaser, as the Company’s only supplier of inventory, to be a “critical supplier” pursuant to its inherent jurisdiction as well as section 11.4 of the CCAA. In this regard, section 11.4(1) of the CCAA provides as follows:

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, ***the court may make an order declaring a person to be a critical supplier*** to the company if the court

is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

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

[Emphasis added.]

41. This Court recently held in *Pride Group Holdings* that a “critical supplier” is a supplier that provides “particular goods or services [that] are sufficiently integrated into the operations of the debtor company [and where] it would be materially disruptive to the operations and restructuring of the debtor for the particular supplier to cease providing such [goods or] services and/or it would be difficult or impossible to secure an alternate supplier”.⁴⁶

42. In this CCAA proceeding, the UK Purchaser is a critical supplier. And the Monitor supports the order sought to declare the UK Purchaser to be a critical supplier.⁴⁷

43. As explained above, the Company does not manufacture any of the inventory it sells. All of the inventory sold by the Company is manufactured by or on behalf of the UK Purchaser outside of Canada. In addition, the Company has no ability to source its inventory from any other supplier, as the UK Purchaser is the owner of the trademarks and intellectual property associated with “The Body Shop” brand. Consequently, without

⁴⁶ *Re Pride Group Holdings Inc.*, [2024 ONSC 2026](#), at para. 46 [*Pride Group*]. See also *Re Target Canada Co.*, [2015 ONSC 303](#), at paras. 62-65; and *Re Clover Leaf Holdings Company*, [2019 ONSC 6966](#), at paras. 24-27.

⁴⁷ First Report, at para. 5.4 [[E13](#)].

the agreement of the UK Purchaser to provide the Company with inventory, the Company cannot continue operations in the ordinary course.

44. As the gatekeeper of the goods sold and used by the Company to carry on business, the UK Purchaser is a critical supplier of the Company. There is no alternate party that could supply the goods sold. The UK Purchaser should therefore be declared a Critical Supplier under section 11.4(1) of the CCAA.

45. In addition, although the Remaining Inventory is being delivered to TBS Canada, it is an important fact that at least 40% of the purchase price for the Remaining Inventory is not anticipated to be paid until November 29, 2024. Consequently, there remains the risk that the UK Purchaser could decide to demand that the corresponding portion of the Remaining Inventory be returned to it, or take steps to inhibit TBS Canada's ability to sell that portion of the Remaining Inventory.⁴⁸ If that were to happen, it would put TBS Canada into a precarious position and threaten the Company's ability to maintain ordinary course operations until the Sale Process is complete.⁴⁹

46. Consequently, in conjunction with a declaration that the UK Purchaser is a Critical Supplier, this Court should also order the UK Purchaser to supply the Remaining Inventory to TBS Canada under section 11.4(2) of the CCAA even though the Remaining Inventory will have largely been delivered to TBS Canada by the time that this motion is heard.

⁴⁸ First Report, at para. 5.4(ii) [[E13-E14](#)].

⁴⁹ First Report, at para. 5.4(iii) [[E14](#)].

B. THE CRITICAL SUPPLIER CHARGE SHOULD BE GRANTED

(a) A Critical Supplier Charge is Appropriate

47. On this motion, the Company requests that the Court grant a Critical Supplier Charge over the Remaining Inventory in an amount not to exceed \$1,500,000 to secure the Outstanding Purchase Price. The Monitor is also of the view that the Critical Supplier Charge is required and reasonable in the circumstances.⁵⁰

48. The power to grant a charge on the Company's assets in favour of critical suppliers, like the UK Purchaser, flows from this Court's inherent jurisdiction as well as under section 11.4 of the CCAA.

49. Sections 11.4(3) and 11.4(4) of the CCAA provide as follows:

Security or charge in favour of critical supplier

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

Priority

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

[Emphasis added.]

50. As the British Columbia Supreme Court held in *Re Soccer Express Trading Corp.*,⁵¹ the CCAA requires this Court to grant the Critical Supplier Charge in an amount equal to the value of the goods supplied if this Court declares the UK Purchaser to be a Critical Supplier and requires the UK Purchaser to supply the Remaining Inventory.

⁵⁰ First Report, at para. 5.4 [E13-E14].

⁵¹ *Re Soccer Express Trading Corp.*, 2020 BCSC 749, at paras. 92-96.

51. In addition, this Court retains the inherent jurisdiction to grant a Critical Supplier Charge on the terms requested by TBS Canada even if the Court does not strictly order the UK Purchaser to continue supplying the Remaining Inventory under section 11.4(2) of the CCAA.⁵²

52. Here, the Outstanding Purchase Price for the Remaining Inventory as of the date of this factum is approximately \$1.4 million.⁵³ This Court should grant the Critical Supplier Charge in favour of the UK Purchaser in the maximum amount of \$1,500,000, secured against the unpaid portion of the Remaining Inventory pursuant to section 11.4(3) of the CCAA and its inherent jurisdiction for the following reasons:

- (a) It will be impossible for the Company to continue operations in the ordinary course during the extension of the Stay Period if the UK Purchaser is not declared a Critical Supplier and a Critical Supplier Charge is not granted in its favour.⁵⁴
- (b) If the Remaining Inventory is not made available to TBS Canada, the Company will not have sufficient inventory to maintain its current 71 store network during the Sale Process, and it will not be able to deliver the business to a potential purchaser with sufficient inventory levels to properly trade during the important upcoming holiday shopping season.⁵⁵

⁵² [Pride Group](#), *supra* note 46, at para. 45; and *Re Cinram International Inc.*, [2012 ONSC 3767](#), at para. 67.

⁵³ This is calculated as the sum of the amounts specified in paragraphs 34(b) (\$300,000) and 34(c) (\$1,100,000) above.

⁵⁴ First Report, at para. 5.4(iii) [\[E14\]](#).

⁵⁵ First Report, at para. 5.4(iii) [\[E14\]](#).

- (c) If the Critical Supplier Charge is not granted, the consideration that might be offered to purchase TBS Canada, its business, or its assets will likely be reduced materially.⁵⁶
- (d) It was a condition of the agreement between TBS Canada, the Monitor, and the UK Purchaser that TBS Canada would secure the Critical Supplier Charge in exchange for the UK Purchaser's release of the Remaining Inventory.⁵⁷

(b) *The Ranking of the Critical Supplier Charge*

53. The Critical Supplier Charge will rank behind the Existing Charges, but ahead of the RBC Registrations.⁵⁸ The Enterprise Security is not secured against TBS Canada's inventory, and will not be affected by the Critical Supplier Charge.

54. Pursuant to section 11.4(4) of the CCAA, this Court has the power to grant the Critical Supplier Charge in priority over other security interests or charges, provided that the parties had notice of this motion seeking the Critical Supplier Charge. Here, RBC, the only party whose priority is being affected by the Critical Supplier Charge, was served with the notice of motion.⁵⁹

55. Moreover, the Critical Supplier Charge does not cause any material prejudice to any secured interests.⁶⁰ As Mr. Searle explains in his Sixth Affidavit, there is no amount owing to RBC in connection with the RBC Registrations.⁶¹ As such, RBC should not be affected substantively by the Critical Supplier Charge.

⁵⁶ First Report, at para. 5.4(iii) [E14].

⁵⁷ Sixth Searle Affidavit, at para. 72(d) [Motion Record, Tab 2] [A39].

⁵⁸ Sixth Searle Affidavit, at para. 78 [Motion Record, Tab 2] [A40].

⁵⁹ Sixth Searle Affidavit, at para. 79 [Motion Record, Tab 2] [A41].

⁶⁰ First Report, at para. 5.4(iv) [E14].

⁶¹ Sixth Searle Affidavit, at para. 77 [Motion Record, Tab 2] [A40].

56. For all of these reasons, this Court should declare that the UK Purchaser is a Critical Supplier of the Company and should grant a Critical Supplier Charge over the Remaining Inventory.

C. THE EXTENSION OF THE STAY PERIOD SHOULD BE GRANTED

57. On this motion, the Company requests an extension of the Stay Period until December 13, 2024.

58. This Court has the jurisdiction to grant an extension of the Stay Period “for any period the court considers necessary” under subsection 11.02(2) of the CCAA.⁶² In determining whether it should exercise its power to grant such an extension, subsection 11.02(3) requires this Court to consider whether: (i) circumstances exist that make the extension appropriate; and (ii) the party seeking the extension has acted, and is acting, in good faith and with due diligence.⁶³

59. This Court has held that the jurisdiction to extend a stay of proceedings under section 11.02 of the CCAA “should be construed broadly to accomplish the legislative purposes of the CCAA”.⁶⁴

60. These purposes include, among others, enabling the continuation of the debtor’s business, avoiding the social and economic costs of a liquidation, and facilitating a value-maximizing restructuring.⁶⁵ An extension of a stay of proceedings is therefore appropriate where it maintains the *status quo* and provides the debtor with breathing room while it

⁶² *Re Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#), at para. 7 [[Nordstrom](#)].

⁶³ [Nordstrom](#), *supra* note 62.

⁶⁴ *Re Canwest Global Communications Corp.*, [2011 ONSC 2215](#), at para. 24 [[Canwest](#)].

⁶⁵ [Canwest](#), *supra* note 64 at para. 24.; *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#), at para. 15 [[Century Services](#)]; *Re Timminco Limited*, [2012 ONSC 2515](#), at para. 15 [[Timminco](#)].

seeks to arrange an acceptable restructuring plan (including a sale) in order to maximize recoveries for stakeholders.⁶⁶

61. This Court should grant an extension of the Stay Period in this CCAA proceeding, including because:

- (a) throughout the NOI proceeding and this CCAA proceeding, the Company has acted in good faith and with due diligence to stabilize and continue the Company's business in the ordinary course, cooperate with stakeholders, and advance the Sale Process;⁶⁷
- (b) the Company and the Monitor have significantly advanced the Sale Process;⁶⁸
- (c) an extension to the Stay Period is necessary to allow the Sale Process to run properly and effectively;⁶⁹
- (d) an extension of the Stay Period is required to avoid an immediate, uncoordinated, and distressed sale or forced liquidation of the Company's assets to the detriment of the Company's stakeholders;
- (e) an extension of the Stay Period is required to preserve the *status quo* operations of the Company in the ordinary course and provide the Company with the breathing space and time required to complete the Sale Process;

⁶⁶ [Century Services](#), *supra* note 65 at para. 14; and [Timminco](#), *supra* note 65.

⁶⁷ First Report, at para. 9.2(iii) [E20].

⁶⁸ First Report, at para. 6.8 [E16].

⁶⁹ First Report, at paras. 9.1-9.2 [E20].

- (f) the Company is forecast to have sufficient liquidity to support its ordinary course operations and the costs of this CCAA Proceeding throughout extension of the Stay Period;⁷⁰
- (g) the Monitor is supportive of an extension of the Stay Period because, among other reasons, the Company continues to act in good faith and with due diligence and continues to seek to preserve and maximize value for their stakeholders;⁷¹ and
- (h) provided the Critical Supplier Charge is granted, the Company is forecast to have sufficient inventory to support its ordinary course operations throughout the extension of the Stay Period.⁷²

62. Both of the requirements of subsection 11.02(3) are satisfied on this motion. An extension of the Stay Period is in the best interests of all stakeholders, consistent with the purposes of the CCAA, and appropriate in the circumstances. The Company therefore submits that an extension of the Stay Period should be granted.

⁷⁰ Sixth Searle Affidavit, at para. 83 [Motion Record, Tab 2] [\[A41-A42\]](#); and First Report, at para. 9.2(ii) [\[E20\]](#).

⁷¹ First Report, at para. 9.2 [\[E20\]](#).

⁷² First Report, at para. 5.4(iii) [\[E14\]](#).

PART V - ORDER REQUESTED

63. TBS Canada requests the issuance of an Order in the form attached as Tab 3 of the Company's Motion Record dated September 25, 2024⁷³ that grants the extension of the Stay Period, declares the UK Purchaser to be a Critical Supplier, compels continued supply of the Remaining Inventory, and grants the Critical Supplier Charge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of October, 2024.



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Lawyers for the
The Body Shop Canada Limited

⁷³ Draft Order [Motion Record, Tab 3] [[A260-A266](#)].

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, [2010 SCC 60](#)
2. *Re Canwest Global Communications Corp.*, [2011 ONSC 2215](#)
3. *Re Cinram International Inc.*, [2012 ONSC 3767](#)
4. *Re Clover Leaf Holdings Company*, [2019 ONSC 6966](#)
5. *Re Nordstrom Canada Retail, Inc.*, [2023 ONSC 1631](#)
6. *Re Pride Group Goldings Inc.*, [2024 ONSC 2026](#)
7. *Re Soccer Express Trading Corp.*, [2020 BCSC 749](#)
8. *Re Target Canada Co.*, [2015 ONSC 303](#)
9. *Re The Body Shop Canada Limited*, [2024 ONSC 3882](#)
10. *Re Timminco Limited*, [2012 ONSC 2515](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangements Act, R.S.C. 1985, c. C-36

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company’s continued operation.

Obligation to supply

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

Security or charge in favour of critical supplier

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

Priority

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

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 RETURNABLE OCTOBER 4, 2024)**

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