

Court File No.: BK-24-03050418-0031  
Estate /Court File No.: BK- 31-3050418

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF THE NOTICE OF INTENTION TO  
MAKE A PROPOSAL OF THE BODY SHOP CANADA  
LIMITED, IN THE CITY OF TORONTO, IN THE PROVINCE  
OF ONTARIO

**FACTUM OF  
THE BODY SHOP CANADA LIMITED  
(MOTION RETURNABLE MAY 30, 2024)**

May 27, 2024

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**TO: THE SERVICE LIST**

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## PART I – OVERVIEW

1. On March 1, 2024 (the “**Filing Date**”), The Body Shop Canada Limited (“**TBS Canada**” or the “**Company**”) filed a notice of intention (the “**NOI**”) to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”). Alvarez & Marsal Canada Inc. was appointed as the proposal trustee (the “**Proposal Trustee**”). On April 15, 2024, this Court made an order granting the Company an extension of time to file a proposal to May 31, 2024 (the “**April 15 Order**”), along with other related relief, which is more particularly described below.

2. On this motion, TBS Canada seeks an order (the “**Proposed Order**”):
- (a) extending the time for the Company to file a proposal under the BIA to July 12, 2024; and
  - (b) approving the activities and conduct of the Proposal Trustee as set out in its Third Report dated May 15, 2024 (the “**Third Report**”) and Fourth Report dated May 27, 2024, filed in connection with this motion (the “**Fourth Report**”).

## PART II – FACTS

3. The facts in support of this motion are more fully set out in the Affidavit of Jordan Searle, sworn May 23, 2024 (the “**Fourth Affidavit**”).<sup>1</sup>

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<sup>1</sup> The Fourth Affidavit of Jordan Seale sworn May 23, 2024 (“**Fourth Affidavit**”), Motion Record of the Applicant (“**MR**”), Tab 2, pp. 11-39.

## A. Background and Overview

4. TBS Canada is a federally incorporated corporation specializing in the sale of skincare, haircare, bath and body products with 72 stores<sup>2</sup> across Canada.<sup>3</sup> The Company and its U.S. affiliate, Buth-Na-Bodhaige Inc. (“**TBS US**”) are wholly owned subsidiaries of The Body Shop International Limited (“**TBS International**” or the “**UK Parent**”), which is indirectly owned by Aurelius IV UK Acquico Eight Limited (the “**Aurelius Purchaser**”, and together with its affiliates, “**Aurelius**”).<sup>4</sup>

5. The UK Parent historically provided several accounting and cash management services for the Company and TBS US. These services were provided pursuant to a cash management system and cash pooling arrangement.<sup>5</sup> TBS Canada and TBS US found themselves in a liquidity crisis when TBS International unexpectedly filed for administration (the “**UK Administration**”)<sup>6</sup> on February 13, 2024, and funding for the Company and TBS US was cut off with no advance notice.<sup>7</sup>

6. In the weeks before the UK Administration, the UK Parent swept cash from TBS Canada’s bank accounts held at the Royal Bank of Canada (formerly HSBC Bank Canada) but failed to remit payment for amounts owing to the Company’s

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<sup>2</sup> At the Filing Date, the Company operated 105 stores but 33 of the stores were identified as underperforming and closed. See Fourth Affidavit at paras. 5, 16, MR, Tab 2, pp. 13, 16-17.

<sup>3</sup> Fourth Affidavit at para. 5, MR, Tab 2, p. 13.<sup>4</sup> Fourth Affidavit at para. 5, MR, Tab 2, p. 13.

<sup>4</sup> Fourth Affidavit at para. 5, MR, Tab 2, p. 13.

<sup>5</sup> Fourth Affidavit at paras. 8-9, MR, Tab 2, p. 14.

<sup>6</sup> Tony Wright, Geoff Rowley and Alastair Massey of FRP Advisory were appointed as joint administrators of the UK Parent (collectively, the “**UK Administrators**”). See Fourth Affidavit at para. 7, MR, Tab 2, p. 13.

<sup>7</sup> Fourth Affidavit at paras. 7-10, 43-44, MR, Tab 2, pp. 13-15, 25.

vendors/suppliers and landlords.<sup>8</sup> This created an immediate liquidity crisis for TBS Canada and left the Company with significant overdue payables that it could not pay.<sup>9</sup>

7. 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.<sup>10</sup>

8. On March 4, 2024, this Court made an order (the “**March 4 Order**”) that, among other things, (a) granted charges in favour of the Proposal Trustee, counsel to the Proposal Trustee and counsel to the Company in the amount of \$700,000 and the director and officers of TBS Canada in the amount of \$2,100,000, (b) directed all persons who have in their possession or power, any property of TBS Canada, or any book, document or paper of any kind relating to the Company, to produce the book, document or paper for TBS Canada, or to deliver to the Company any property of TBS Canada in their possession; and (c) prohibited any person, specifically Royal Bank of Canada, from disbursing any funds in TBS Canada’s bank accounts without the prior consent of TBS Canada or the Proposal Trustee.<sup>11</sup>

9. On April 15, 2024, this Court made the April 15 Order granting, among other things, an extension of time for TBS Canada to file a proposal to May 31, 2024 and approving a

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<sup>8</sup> Fourth Affidavit at para. 10, MR, Tab 2, pp. 14-15.

<sup>9</sup> Fourth Affidavit at para. 10, MR, Tab 2, pp. 14-15.

<sup>10</sup> Fourth Affidavit at para. 11, MR, Tab 2, p. 15.

<sup>11</sup> Fourth Affidavit at paras. 12-13, MR, Tab 2, p. 15; March 4 Order, Exhibit C to the Fourth Affidavit, MR, Tab 2C, pp. 105-106.

key employee retention plan and related charge for certain employees and independent contractors of TBS Canada (the “**KERP Charge**”).<sup>12</sup>

10. On March 8, 2024, TBS US filed a voluntary petition under chapter 7 of title 11 of the United States Bankruptcy Code (the “**Chapter 7 Proceedings**”) in the United States Bankruptcy Court for the Southern District of New York (the “**US Bankruptcy Court**”).<sup>13</sup> Mr. Kenneth Silverman from Rimon P.C. was appointed as the trustee for TBS US under the Chapter 7 Proceedings (the “**Chapter 7 Trustee**”).<sup>14</sup>

11. Since the Filing Date, TBS Canada has acted in good faith and made diligent efforts to improve its liquidity position, stabilize its operations and pursue a going concern solution for the continuation of “The Body Shop” business in Canada. These efforts have included, among others: (a) closing and liquidating 33 underperforming stores (the “**Closing Stores**”); (b) terminating the employment of 197 store-level employees related to the Closing Stores and approximately 20 head-office employees (together with the terminated store-level employees, the “**Former Employees**”); (c) operating its remaining 72 stores (the “**Going Concern Stores**”); (d) engaging with its key stakeholders;<sup>15</sup> (e) appointing UK counsel to assist its efforts in navigating the UK Administration;<sup>16</sup> and (f) settling on arrangements for the Company to meet its immediate and longer-term inventory needs.<sup>17</sup>

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<sup>12</sup> Fourth Affidavit at para. 14, MR, Tab 2, p. 16; April 15 Order, Exhibit D to the Fourth Affidavit, MR, Tab 2D, pp. 125-126.

<sup>13</sup> Fourth Affidavit at para. 44, MR, Tab 2, p. 25.

<sup>14</sup> Fourth Affidavit at para. 44, MR, Tab 2, p. 25.

<sup>15</sup> Fourth Affidavit at paras. 15-16, MR, Tab 2, pp. 16-17.

<sup>16</sup> Fourth Affidavit at paras. 24-26, MR, Tab 2, pp. 19-20.

<sup>17</sup> Fourth Affidavit at paras. 49-54, MR, Tab 2, pp. 27-31.

12. The principal purpose of this NOI proceeding is to enable TBS Canada to devise a viable proposal for the benefit of its stakeholders. The Company, with the assistance of the Proposal Trustee, is actively pursuing discussions with the UK Administrators, the UK Parent, Aurelius, and interested parties in connection with implementing a transaction that would allow TBS Canada to make a proposal to its creditors and continue as a going concern.<sup>18</sup>

13. In the interim, the Company seeks the relief requested herein to facilitate its ongoing, good-faith efforts to preserve The Body Shop business in Canada. If granted, the relief sought herein will provide TBS Canada with the time it needs to allow the sale process in the UK Administration (described below) to unfold and further the Company's efforts to implement a proposal and continue as a going concern.

## **B. Overview of TBS Canada's Activities since the April 15 Order**

### **(i) Engagement with Stakeholders and Other Parties**

14. Since the April 15 Order, the Company continues to engage with its key stakeholders, including, employees, the Former Employees, landlords, trade creditors, the UK Administrators, the UK Parent, the Chapter 7 Trustee, and Service Canada, among others, on various issues, including providing updates on developments in the UK Administration, payment of rent, updates regarding the Company's operations, calculation of claims of TBS Canada stakeholders, and exploring the availability of the *Wage Earners Protection Program Act* ("**WEPPA**") for the Former Employees.<sup>19</sup>

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<sup>18</sup> Fourth Affidavit at paras. 15-17, MR, Tab 2, pp. 16-17.

<sup>19</sup> Fourth Affidavit at paras. 19, 68-70, MR, Tab 2, pp. 18, 35-36.

15. TBS Canada has served a copy of the March 4 Order and April 15 Order on the service list for this matter, including counsel for its landlords and counsel for certain Former Employees.<sup>20</sup> To date, none of the Company's stakeholders, the Royal Bank of Canada, Aurelius, the UK Parent nor the UK Administrators has raised any issues or concerns with the relief obtained in the March 4 Order or April 15 Order.<sup>21</sup>

**(ii) Update on TBS International**

16. TBS has engaged Macfarlanes LLP ("**Macfarlanes**") as its legal advisors in the UK to help assist it in navigating the UK Administration.<sup>22</sup> Macfarlanes submitted a proof of debt (the "**Proof of Debt**")<sup>23</sup> setting out the Company's claim against the UK Parent in the amount of \$44,015,347.21 (£25,770,985.79) and appointed Macfarlanes as its proxy in order to attend an in-person meeting of creditors of the UK Parent which was ultimately held on May 2, 2024 (the "**UK Meeting of Creditors**").<sup>24</sup> The Proof of Debt includes the Company's claim against the UK Parent for the net intercompany receivable position of TBS Canada as of February 13, 2024 (the date the UK Administration commenced) as well as claims by TBS Canada for the financial, legal and other professional fees and costs associated with this NOI proceeding.<sup>25</sup>

17. The purpose of the UK Meeting of Creditors was to approve certain remuneration of the UK Administrators and approve other related matters.<sup>26</sup> The outcome of these votes

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<sup>20</sup> Fourth Affidavit at para. 20, MR, Tab 2, p. 19; Second Affidavit of Jordan Seale sworn April 8, 2024 (the "**Second Affidavit**"), Exhibit B to the Fourth Affidavit at paras. 16-18, 21, MR, Tab 2B, pp. 76-78.

<sup>21</sup> Fourth Affidavit at para. 21, MR, Tab 2, p. 19; Second Affidavit, Exhibit B to the Fourth Affidavit at para. 22, MR, Tab 2B, p. 78.

<sup>22</sup> Fourth Affidavit at para. 24, MR, Tab 2, pp. 19-20.

<sup>23</sup> Proof of Debt, Exhibit I to the Fourth Affidavit, MR, Tab 21, pp. 203-209.

<sup>24</sup> Fourth Affidavit at paras. 24-26, MR, Tab 2, pp. 19-20.

<sup>25</sup> Fourth Affidavit at para. 39, MR, Tab 2, p. 24.

<sup>26</sup> Fourth Affidavit at para. 25, MR, Tab 2, p. 20.

ultimately determined whether the UK Administrators would be permitted to pursue a rescue of TBS International through a company voluntary arrangement (“**CVA**”), or would be required to pursue an alternative process, including the sale of the UK Parent’s assets as a going concern or potentially in a liquidation.<sup>27</sup>

18. On May 17, 2024, there were reports in the UK press that the UK Administrators determined that it would not be possible to reach the necessary agreements with stakeholders of the UK Parent for a CVA to proceed, notwithstanding that the requisite approvals had been obtained at the UK Meeting of Creditors.<sup>28</sup>

19. On May 21, 2024, the UK Administrators issued a creditor update letter confirming their determination to commence a sale process in respect of the UK Parent.<sup>29</sup> The UK Administrators have advised that at this time, they are inviting initial bids for the business and assets of the UK Parent by June 10, 2024, with a target completion date of June 27, 2024.<sup>30</sup> It is not clear at this time whether any sale will preserve the current organizational structure with TBS Canada as a subsidiary of the UK Parent.<sup>31</sup>

20. Two entities, ALMA24 Limited and Aurelius IV UK Acquico Seven Limited (“**Aurelius Seven**”), the immediate parent company of the Aurelius Purchaser, registered security interests against the UK Parent at Companies House, the executive agency of the British Government where personal property security is registered against

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<sup>27</sup> Fourth Affidavit at para. 25, MR, Tab 2, p. 20.

<sup>28</sup> Fourth Affidavit at para. 28, MR, Tab 2, p. 21.

<sup>29</sup> Creditor Update Letter dated May 21, 2024, Exhibit G to the Fourth Affidavit, MR, Tab 2G, pp. 198-199.

<sup>30</sup> Email Correspondence between the UK Administrators and Macfarlanes dated May 20, 2024, Exhibit H to the Fourth Affidavit, MR, Tab 2H, pp. 200-202.

<sup>31</sup> Fourth Affidavit at para. 32, MR, Tab 2, p. 22.

companies.<sup>32</sup> The UK Administrators have determined that these security interests are susceptible to challenge under the *Insolvency Act* 1986 and that these findings have been communicated to Aurelius Seven and ALMA24 Limited.<sup>33</sup> The UK Administrators are seeking a consensual release of this security by both parties.<sup>34</sup>

21. Given the potential for the security interests held against the UK Parent to be invalidated, there is a reasonable expectation for TBS Canada to benefit from a distribution of funds resulting from the sale of TBS International's assets or operations.<sup>35</sup> However, the specifics regarding the value and timing of such a distribution remain uncertain at this juncture.<sup>36</sup>

### (iii) Inventory Replenishment Efforts

22. Prior to the commencement of the UK Administration and Chapter 7 Proceeding, TBS Canada accessed inventory through shared services with both TBS US and the UK Parent. The Company purchased all of its inventory from the UK Parent for sale in its retail stores. In the ordinary course, the UK Parent would ship products designated for TBS Canada to TBS US, who held them at a distribution centre located in the United States that is owned and operated by TBS US (the "**US Distribution Centre**"). TBS US would then arrange for transport from the US Distribution Centre to TBS Canada's stores, and the UK Parent would retain title to the inventory located in the US Distribution Centre until it was paid for by TBS Canada.<sup>37</sup>

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<sup>32</sup> Fourth Affidavit at para. 35, MR, Tab 2, pp. 22-23.

<sup>33</sup> Fourth Affidavit at paras. 36-37, MR, Tab 2, p. 23.

<sup>34</sup> Fourth Affidavit at paras. 37-38, MR, Tab 2, p. 23.

<sup>35</sup> Fourth Affidavit at para. 40, MR, Tab 2, p. 24.

<sup>36</sup> Fourth Affidavit at para. 40, MR, Tab 2, p. 24.

<sup>37</sup> Fourth Affidavit at para. 46, MR, Tab 2, pp. 25-26.

23. Consequentially, the commencement of the UK Administration, Chapter 7 Proceedings and the cessation of TBS US's operations have posed challenges for TBS Canada in its efforts to purchase inventory stored at the US Distribution Centre, which had an estimated retail value of approximately US\$85 million at April 8, 2024.<sup>38</sup>

24. Accordingly, TBS Canada, the Proposal Trustee, the Chapter 7 Trustee and the UK Administrators have engaged in numerous discussions to settle on arrangements for the Company to meet its immediate and long-term inventory needs.<sup>39</sup>

25. To fulfil its near-term inventory needs, TBS Canada, with the assistance of the Proposal Trustee and the engagement of the Chapter 7 Trustee and the UK Administrators, was able to source approximately \$11.5 million (retail value) of inventory that is projected to provide TBS Canada with sufficient merchandise levels into August 2024, at which point additional merchandise will be required.<sup>40</sup>

26. The inventory consists of approximately \$1.3 million (retail value) of inventory that was en-route to TBS Canada but was stopped at the border and turned back to the US Distribution Centre; approximately \$3.5 million (retail value) of inventory that was in-transit to the US Distribution Centre that was owned by the UK Parent but was held by a brokerage company who was owed freight and storage costs; and approximately \$6.7 million (retail value) of inventory owned by the UK Parent and located at the US Distribution Centre.<sup>41</sup>

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<sup>38</sup> Fourth Affidavit at paras. 46-48, MR, Tab 2, pp. 26-27.

<sup>39</sup> Fourth Affidavit at para. 49, MR, Tab 2, p. 27.

<sup>40</sup> Fourth Affidavit at paras. 50-51, MR, Tab 2, pp. 27-29.

<sup>41</sup> Fourth Affidavit at para. 50, MR, Tab 2, pp. 27-29.

27. TBS Canada has, through a temporary hiring agency, engaged the services of 13 former TBS US employees (the “**US DC Contractors**”) to assist with the fulfilment of the inventory orders from the US Distribution Centre.<sup>42</sup>

28. The Company has received approximately \$4.8 million (retail value) of the inventory at the Going Concern Stores.<sup>43</sup> Shipping of the balance of the inventory is underway and it is anticipated it will all be delivered to the Going Concern Stores by early June.<sup>44</sup>

29. In connection with the Company’s inventory replenishment efforts, TBS Canada, the Chapter 7 Trustee and the Proposal Trustee entered into a real estate license agreement that would allow TBS Canada to access the inventory stored in the US Distribution Centre (the “**License Arrangement**”).<sup>45</sup>

30. The key terms and conditions of the License Arrangement, among other things, are as follows: (a) TBS Canada is granted a license to use and occupy a portion of the US Distribution Centre for the purpose of picking, packing and arranging for the delivery of inventory to Canada; (b) the license period commenced as of April 1, 2024 and will expire on June 30, 2024 (the “**License Period**”), subject to the ability of TBS Canada to extend the License Period; (c) the Chapter 7 Trustee will provide basic utilities and pay for all operating costs; (d) TBS Canada shall pay the Chapter 7 Trustee a license fee in the amount of US\$100,000 per month through the License Period plus a US\$50,000 security deposit; (e) the Chapter 7 Trustee has provided TBS Canada with an offsetting

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<sup>42</sup> Fourth Affidavit at para. 50, MR, Tab 2, pp. 27-29.

<sup>43</sup> Fourth Affidavit at para. 50, MR, Tab 2, pp. 27-29.

<sup>44</sup> Fourth Affidavit at paras. 50-51, MR, Tab 2, pp. 27-29.

<sup>45</sup> License Arrangement, Exhibit J to the Fourth Affidavit, MR, Tab 2J, pp. 210-223.

credit of US\$79,000 to reflect amounts paid by TBS Canada for the benefit of the Chapter 7 Trustee; and (f) the License Arrangement remains subject to the approval of the US Bankruptcy Court at a hearing scheduled for June 13, 2024 in the Chapter 7 Proceedings.<sup>46</sup>

31. The Company, with the assistance of the Proposal Trustee, has prepared an updated cash flow forecast which sets out the projected cash flows for the 13-week period ending August 16, 2024 (the “**Updated Cash Flow**”).<sup>47</sup> The Updated Cash Flow shows that TBS Canada has sufficient liquidity to satisfy its obligations under the License Arrangement and the payment of the US DC Contractors.<sup>48</sup>

**(iv) Canadian Employee Matters**

**(a) Incentive Bonus**

32. Since April 15, 2024, when this Court approved the KERP Charge, TBS Canada has identified an additional employee who is critical to TBS Canada’s operations and restructuring efforts that it wishes to incentivize to continue their employment with TBS Canada.<sup>49</sup> The beneficiary will receive an incentive bonus, calculated as a percentage of their salary that is payable on the closing of a going concern transaction.<sup>50</sup> TBS Canada is not seeking to secure the incentive bonus with the KERP Charge.<sup>51</sup>

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<sup>46</sup> Fourth Affidavit at para. 53, MR, Tab 2, pp. 29-31.

<sup>47</sup> Fourth Report at paras. 7.1-7.4, pp. 13-15.

<sup>48</sup> Fourth Report at para. 9.2(ii), p. 17.

<sup>49</sup> Fourth Affidavit at paras. 56-57, MR, Tab 2, p. 32.

<sup>50</sup> Fourth Affidavit at para. 56, MR, Tab 2, p. 32.

<sup>51</sup> Fourth Affidavit at para. 57, MR, Tab 2, p. 32.

**(b) Representation Motion**

33. On April 12, 2024, TBS Canada was served with a motion (the “**Representation Motion**”) brought by a Former Employee seeking an order, among other things, (a) appointing Koskie Minsky LLP as representative counsel to certain of the Former Employees (“**Representative Counsel**”), and (b) that the costs incurred by Representative Counsel before and after the date of the order shall be paid by TBS Canada.<sup>52</sup>

34. A scheduling case conference was held on April 24, 2024, which set July 4, 2024 for the hearing of the Representation Motion.<sup>53</sup> Following the case conference, counsel for TBS Canada proposed a timetable for the delivery of materials in connection with the Representation Motion.<sup>54</sup> As of May 23, 2024, counsel for TBS Canada has not received any objection to the timetable from Koskie Minsky.<sup>55</sup>

35. TBS Canada has determined to oppose the Representation Motion, and served its responding motion record on the service list on May 10, 2024.<sup>56</sup> The rationale behind TBS Canada’s decision to oppose the Representation Motion includes the view of the Company that appointment of Representative Counsel would duplicate efforts, increase costs and undermine efficiency.<sup>57</sup>

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<sup>52</sup> Fourth Affidavit at para. 58, MR, Tab 2, pp. 32-33.

<sup>53</sup> Fourth Affidavit at para. 61, MR, Tab 2, p. 33.

<sup>54</sup> Fourth Affidavit at para. 63, MR, Tab 2, pp. 33-34.

<sup>55</sup> Fourth Affidavit at para. 63, MR, Tab 2, pp. 33-34.

<sup>56</sup> Fourth Affidavit at para. 64, MR, Tab 2, p. 34.

<sup>57</sup> Fourth Affidavit at para. 65, MR, Tab 2, p. 35.

36. In the Third Report, the Proposal Trustee concluded that based on the information available, it is of the view that the appointment of Representative Counsel is currently unnecessary.<sup>58</sup>

37. The endorsement from the April 24, 2024 case conference (the “**April 24 Endorsement**”) reflects an undertaking by TBS Canada to continue to keep all stakeholders, including Former Employees, aware of significant events or matters.<sup>59</sup> To date, TBS Canada has complied with its undertakings in the April 24 Endorsement.<sup>60</sup>

(c) **WEPPA**

38. On May 3, 2024, TBS Canada, through its counsel, Davies Ward Phillips & Vineberg LLP, emailed Service Canada and the Department of Justice to explore the possibility of allowing the Former Employees to access WEPPA,<sup>61</sup> notwithstanding that TBS Canada does not currently meet the criteria.

39. The Company considered the feasibility of the appointment of the Proposal Trustee to act as the receiver for specific assets of TBS Canada.<sup>62</sup> On May 22, 2024, a lawyer at the Department of Justice advised that Employment and Social Development Canada takes the position that receiverships created for the sole purpose of triggering WEPPA,

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<sup>58</sup> Third Report, Exhibit M to the Fourth Affidavit at paras. 8.1-8.8, MR, Tab 2M, pp. 267-270.

<sup>59</sup> April 24 Endorsement, Exhibit K to the Fourth Affidavit, MR, Tab 2K, pp. 224-226.

<sup>60</sup> Fourth Affidavit at paras. 61-62, MR, Tab 2, p. 33.

<sup>61</sup> Email Correspondence Between Davies and Service Canada between May 3, 2024 and May 22, 2024, Exhibit N to the Fourth Affidavit, MR, Tab 2N, pp. 276-281.

<sup>62</sup> Fourth Affidavit at para. 68, MR, Tab 2, p. 35.

as is the case with the proposed receivership in respect of TBS Canada, would be inconsistent with both the legislative intent of the BIA and WEPPA.<sup>63</sup>

**(v) Efforts to Pursue a Going Concern Solution**

40. TBS Canada is pursuing alternatives to keep the business in Canada operating as a going concern. Given that TBS International owns the right to the “The Body Shop” brand and all of the Company’s inventory is sourced from the UK Parent,<sup>64</sup> the ability for TBS Canada to emerge from these restructuring proceedings and continue as a going concern requires the UK Parent to be amenable to the structure of any transaction and is contingent on the outcome of the UK Administration.<sup>65</sup>

41. The Company is in active discussions with the UK Parent, the UK Administrators, Aurelius and interested parties with respect to settling the terms of a going concern solution for the business in Canada.<sup>66</sup>

42. In this regard, TBS Canada recently provided these parties with a confidential term sheet that would provide for a going concern solution for the Canadian business.<sup>67</sup> TBS Canada, with the assistance of the Proposal Trustee, has continued to advance discussions with the UK Parent and the UK Administrators in connection with the sale process currently underway for the UK Parent’s business and assets.<sup>68</sup>

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<sup>63</sup> Email Correspondence Between Davies and Service Canada between May 3, 2024 and May 22, 2024, Exhibit N to the Fourth Affidavit, MR, Tab 2N, pp. 276-281.

<sup>64</sup> Fourth Affidavit at para. 72, MR, Tab 2, p. 36.

<sup>65</sup> Fourth Affidavit at para. 72, MR, Tab 2, p. 36.

<sup>66</sup> Fourth Affidavit at para. 71, MR, Tab 2, p. 36.

<sup>67</sup> Fourth Affidavit at para. 73, MR, Tab 2, pp. 36-37.

<sup>68</sup> Fourth Affidavit at paras. 74-75, MR, Tab 2, p. 37.

**PART III – ISSUES AND THE LAW**

43. The principal issues for this Court to determine are whether it should:
- (a) extend the time for the Company to file a proposal under the BIA to July 12, 2024; and
  - (b) approve the activities and conduct of the Proposal Trustee as set out in the Third Report and the Fourth Report.

**A. This Court Should Extend the Time to File a Proposal**

44. TBS Canada seeks a 45-day extension of time to file a proposal from the current deadline of May 31, 2024, to July 12, 2024 (the “**Extension**”). Section 50.4(9) of the BIA provides the court with the express authority to grant an extension of the time required to file a proposal where the court is satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and,
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.<sup>69</sup>

45. In this instance, each of the foregoing factors have been met.

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<sup>69</sup> BIA, s. 50.4(9).

46. First, the Proposal Trustee agrees that TBS Canada has acted in good faith and with due diligence since commencing this NOI proceeding.<sup>70</sup>

47. Since the Filing Date and since the April 15 Order, the Company has, among other things, (a) engaged with its key stakeholders, the UK Administrators, the UK Parent, the Chapter 7 Trustee and Aurelius,<sup>71</sup> (b) experienced greater-than-forecast sales across its store network,<sup>72</sup> (c) liquidated inventory at the Closing Stores, resulting in headcount reductions and cost savings,<sup>73</sup> (d) entered into a number of arrangements in order to replenish TBS Canada's immediate and long-term inventory needs,<sup>74</sup> (e) filed a proof of debt claim against the UK Parent for the unremitted swept cash, as well as claims by TBS Canada for the financial, legal, and other professional fees and costs associated with this NOI proceeding;<sup>75</sup> (f) stabilized its operations and pursued discussions with interested parties regarding a potential sale of the business in Canada;<sup>76</sup> (g) circulated a confidential term sheet that contemplates a proposal and going concern solution for the Company;<sup>77</sup> (h) calculated the claims of TBS Canada stakeholders;<sup>78</sup> and (i) explored the availability of WEPPA for the Former Employees.<sup>79</sup>

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<sup>70</sup> Fourth Report at para. 9.2(iv), p. 17.

<sup>71</sup> Fourth Affidavit at paras. 19-21, MR, Tab 2, pp. 18-19.

<sup>72</sup> Fourth Affidavit at para. 48, MR, Tab 2, pp. 46-47.

<sup>73</sup> Fourth Affidavit at para. 16, MR, Tab 2, pp. 16-17.

<sup>74</sup> Fourth Affidavit at paras. 49-54, MR, Tab 2, pp. 27-31.

<sup>75</sup> Fourth Affidavit at para. 39, MR, Tab 2, p. 24.

<sup>76</sup> Fourth Affidavit at paras. 16, 71-75, MR, Tab 2, pp. 16-17, 36-37.

<sup>77</sup> Fourth Affidavit at para. 73, MR, Tab 2, pp. 36-37.

<sup>78</sup> Fourth Affidavit at para. 19, MR, Tab 2, p. 18.

<sup>79</sup> Fourth Affidavit at paras. 68-70, MR, Tab 2, pp. 35-36.

48. Second, the Extension will increase the likelihood of a viable proposal by providing TBS Canada with the ongoing benefit of the stay of proceedings while the UK Parent continues to advance its sale process within the UK Administration.<sup>80</sup>

49. TBS Canada is making progress towards being able to make a viable proposal and the Company and the Proposal Trustee believe that if the Extension is granted, that progress will continue.<sup>81</sup>

50. Finally, the Extension will not prejudice or affect any of TBS Canada's creditors for the following reasons:<sup>82</sup> (a) the Extension will continue to preserve the status quo - which has been positive for the Company's creditors to date- allowing TBS Canada to continue to pursue strategic options that will enhance the viability of the business as a going concern; (b) the Updated Cash Flow shows that TBS Canada has sufficient liquidity to operate to the end of the requested Extension;<sup>83</sup> and (c) the Company has and will continue to engage with its stakeholders and keep them apprised of significant matters affecting TBS Canada or this NOI proceeding during the Extension.<sup>84</sup>

51. The Proposal Trustee supports the requested Extension.<sup>85</sup>

## **B. The Activities and Conduct of the Proposal Trustee Should be Approved**

52. TBS Canada seeks this Court's approval of the activities and conduct of the Proposal Trustee, as set out in the Third Report and Fourth Report.

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<sup>80</sup> Fourth Affidavit at para. 77, MR, Tab 2, pp. 37-38.

<sup>81</sup> Fourth Affidavit at para. 78, MR, Tab 2, p. 38; Fourth Report at para. 9.2(v), p. 17.

<sup>82</sup> Fourth Affidavit at para. 79, MR, Tab 2, p. 39; Fourth Report at para. 9.2(vi), p. 17.

<sup>83</sup> Fourth Report at para. 9.2(ii), p. 17.

<sup>84</sup> Fourth Affidavit at para. 77, MR, Tab 2, pp. 37-38.

<sup>85</sup> Fourth Report at para. 9.2, pp. 16-17.

53. In *Target*,<sup>86</sup> Morawetz R.S.J. (as he then was) stated that “there are good policy and practical reasons for the court to approve of Monitor’s activities and providing a level of protection for Monitor during the CCAA process.”<sup>87</sup> This Court has found that this proposition applies equally to proceedings under the *BIA* because “the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.”<sup>88</sup>

54. Having regard to the considerations outlined in *Target*, this Court’s approval of the Proposal Trustee’s activities is appropriate because it will:

- (a) bring the Proposal Trustee’s activities before the Court;
- (b) allow an opportunity for the concerns of stakeholders to be addressed, and any problems to be rectified,
- (c) enable the Court to satisfy itself that the Proposal Trustee’s activities have been conducted in prudent and diligent manners;
- (d) provide protection for the Proposal Trustee not otherwise provided by the *BIA*; and

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<sup>86</sup> [Target Canada Co. \(Re\), 2015 ONSC 7574](#), BOA, Tab 7 [*Target Canada*].

<sup>87</sup> *Target Canada* at [para. 22](#), BOA, Tab 7.

<sup>88</sup> *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400 at [para. 66](#), BOA, Tab 9; *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*, 2024 ONSC 1678 at [para. 40](#), BOA, Tab 3; *Shop.ca Network Inc. (Re)* (15 July 2016) Toronto CV-31-2131992 (Ont, S.C.J. [Commercial List]) Endorsement of The Honourable Mr. Justice Penny Dated July 15, 2016 at para. 2, BOA, Tab 6 [*Shop.ca*].

- (e) protect the creditors from the delay that would be caused by (i) re-litigation of steps taken to date, and (ii) potential indemnity claims by the Proposal Trustee.<sup>89</sup>

55. The Proposed Order contains language following this Court's past practice<sup>90</sup> of limiting this Court's approval to the Proposal Trustee's activities and not to the activities of other parties.<sup>91</sup>

56. The activities undertaken by the Proposal Trustee have been conducted in a prudent and diligent manner, consistent with the mandate given to the Proposal Trustee to, *inter alia*, assist TBS Canada in making a viable proposal.<sup>92</sup> The Proposal Trustee has, among other things, provided assistance to the Company in its engagement with stakeholders, the UK Parent, the UK Administrators, Aurelius and the Chapter 7 Trustee, assisted in the preparation of the Updated Cash Flow and monitoring the Company's receipts and disbursements, assisted the Company with the calculation of the claims of its stakeholders, reviewed TBS Canada's intercompany accounts with TBS International<sup>93</sup> and facilitated TBS Canada's inventory replenishment efforts.<sup>94</sup>

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<sup>89</sup> *Target Canada* at [para. 23](#), BOA, Tab 7

<sup>90</sup> *Clover Leaf Foods (Re)* (29 September 2020), Toronto CV-20-00641220-00CL (Ont. S.C.J. [Commercial List]) Order (Re Approval of Monitor's Activities and Fees and for Stay Extension) at para. 3, BOA, Tab 1; *Target Canada* at para. [23-24](#), BOA, Tab 7; *Laurentian University of Sudbury (Re)* (11 May 2022), Toronto CV-21-656040-00CL (Ont. S.C.J. [Commercial List]) Order (Re Approval of Monitor's Activities and Fees) at para. 3, BOA, Tab 4; *Shop.ca* at para. 3, BOA, Tab 5.

<sup>91</sup> *The Body Shop Canada Limited (Re)* (15 April 2024), Toronto BK-24-03050418-0031 (Ont. S.C.J. [Commercial List]) Endorsement of the Honourable Mr. Justice Osborne Dated April 15, 2024 at paras. 31-32, BOA, Tab 8.

<sup>92</sup> *EnerNorth Industries Inc. (Re)*, 2007 CarswellOnt 7322 at [para. 19](#), BOA, Tab 2.

<sup>93</sup> Fourth Report at paras. 8.1-8.4, pp. 15-16.

<sup>94</sup> Fourth Report at para. 10.1, pp. 17-18.

57. TBS Canada respectfully submits that in the circumstances, the Court should approve the activities of the Proposal Trustee described in the Third Report and Fourth Report.

**PART IV – ORDER SOUGHT**

58. For all of the foregoing reasons, TBS Canada requests that this Court grant the proposed relief by making an order substantially in the form of the Proposed Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27<sup>th</sup> day of May, 2024.



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Lawyers for The Body Shop Canada  
Limited

## SCHEDULE "A"

### LIST OF AUTHORITIES

#### CASE LAW

1. *Clover Leaf Foods (Re)* (29 September 2020), Toronto CV-20-00641220-00CL (Ont. S.C.J. [Commercial List]) Order (Re Approval of Monitor's Activities and Fees and for Stay Extension).
2. [\*EnerNorth Industries Inc. \(Re\)\*, 2007 CarswellOnt 7322 \(Ont. S.C.J \[Commercial List\]\)](#).
3. [\*KEB Hana as Trustee v. Mizrahi Commercial \(THE ONE\) LP et al.\*, 2024 ONSC 1678](#).
4. *Laurentian University of Sudbury*, 2022 ONSC 5850 (Re) (11 May 2022), Toronto CV-21-656040-00CL (Ont. S.C.J. [Commercial List]) Order (Re Approval of Monitor's Activities and Fees).
5. *Shop.ca Network Inc. (Re)* (15 July 2016), Toronto CV-31-2131992 (Ont. S.C.J. [Commercial List]) Approval and Vesting Order.
6. *Shop.ca Network Inc. (Re)* (15 July 2016) Toronto CV-31-2131992 (Ont, S.C.J. [Commercial List]) Endorsement of The Honourable Mr. Justice Penny Dated July 15, 2016.
7. [\*Target Canada Co. \(Re\)\*, 2015 ONSC 7574](#).
8. *The Body Shop Canada Limited (Re)* (15 April 2024) Toronto BK-24-03050418-0031 (Ont. S.C.J. [Commercial List]) Endorsement of the Honourable Mr. Justice Osborne Dated April 15, 2024.
9. [\*Triple-I Capital Partners Limited v. 12411300 Canada Inc.\*, 2023 ONSC 3400](#).

#### LEGISLATION

10. [\*Bankruptcy and Insolvency Act\*, R.S.C. 1985, c. B-3](#).

## **SCHEDULE "B"**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

#### **1. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.**

##### **50.4(9) Extension of time for filing proposal**

The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF THE BODY SHOP CANADA LIMITED, IN THE CITY OF  
TORONTO, IN THE PROVINCE OF ONTARIO

Court File No.: BK-24-03050418-0031  
Estate/Court File No.: BK- 31-3050418

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
IN BANKRUPTCY AND INSOLVENCY**

Proceeding Commenced at Toronto.

**FACTUM OF THE BODY SHOP CANADA LIMITED**

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