

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF DANIER LEATHER INC., a corporation  
incorporated pursuant to the laws of the Province of Ontario,  
with a head office in the City of Toronto, in the Province of  
Ontario**

**BRIEF OF AUTHORITIES OF  
DANIER LEATHER INC.  
(Motion Returnable March 7, 2016)**

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# INDEX

## INDEX

1. *Re Outdoor Broadcast Networks, Inc.*, 2010 ONSC 5647 [Commercial List]
2. *Re Komtech Inc.*, 2011 ONSC 3230
3. *Re Canwest Publishing Inc.*, 2010 ONSC 2870 [Commercial List]
4. *In the Matter of a Plan of Compromise or Arrangement of TBS Acquireco Inc., Bargain Shop Holdings Inc. and TBS Stores Inc.* Approval Order (Court File No. CV-13-10018-00CL, dated March 27, 2013)
5. *In the Matter of a Plan of Compromise or Arrangement of Target Canada Co. et al.*, Approval Order – Agency Agreement (Court File CV-15-10832-00C, dated February 4, 2015)
6. *Re Stelco Inc.*, [2006] O.J. No. 275 (S.C.J. [Commercial List])
7. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 (S.C.J. [Commercial List])
8. *Re Hollinger Inc.*, 2011 ONCA 579

## **TAB 1**



2010 ONSC 5647  
Ontario Superior Court of Justice

Outdoor Broadcast Networks Inc., Re

2010 CarswellOnt 7710, 2010 ONSC 5647, 196 A.C.W.S. (3d) 319, 71 C.B.R. (5th) 311

## **In Bankruptcy and Insolvency**

In the Matter of the Proposal of Outdoor Broadcast Networks  
Inc. of the City of Toronto, in the Province of Ontario

Reg. Scott W. Nettie

Heard: September 27, 2010  
Judgment: October 13, 2010  
Docket: Estate No. 31-1385780

Counsel: Jonathan H. Wigley for Proponent  
Sanjeev Mitra for Trustee  
John C.M. Sayers for ATEC  
Lisa Brost for Maple Leaf Sports & Entertainment Ltd.

Subject: Insolvency; Civil Practice and Procedure

**Related Abridgment Classifications**  
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.  
**Bankruptcy and insolvency**

VI Proposal  
VI.1 General principles

### **Bankruptcy and insolvency**

VI Proposal  
VI.10 Practice and procedure

### **Headnote**

#### **Bankruptcy and insolvency --- Proposal — General principles**

O Inc. filed Notice of Intention (NOI) to make proposal under Bankruptcy and Insolvency Act  
— Amendments were made to Act such that s. 65.13(1) provides that where insolvent person  
has filed NOI under s. 50.4 of Act, that person may not dispose of assets outside ordinary

course of business, unless authorized by Bankruptcy Court — O Inc. brought application seeking Court's approval to sell six billboards as liquidation of its assets, to raise cash to fund intended proposal — Application granted — Grant of order was appropriate exercise of Registrar's jurisdiction — Factors set out in s. 65.13(4) of Act were considered in determining whether to exercise discretion to authorize sale — Process leading to sale was reasonable, trustee was in support and had filed requisite report, creditors had been consulted, and consideration proposed was reasonable — O Inc.'s major secured creditor supported sale — Any deemed bankruptcy flowing from failure of proposal process would result in no funds for ordinary unsecured creditors; thus, proceeding without broader notice to ordinary unsecured creditors was appropriate.

### **Bankruptcy and insolvency --- Proposal — Practice and procedure**

O Inc. filed Notice of Intention (NOI) to make proposal under Bankruptcy and Insolvency Act (BIA) — Amendments were made to BIA such that s. 65.13(1) provides that where insolvent person has filed NOI under s. 50.4 of BIA, that person may not dispose of assets outside ordinary course of business, unless authorized by Bankruptcy Court — O Inc. brought application seeking Court's approval to sell six of its billboards as liquidation of assets to raise cash to fund intended proposal — Application granted on other grounds — All appropriate parties were involved in application, and it proceeded as unopposed — Registrar in Bankruptcy has jurisdiction under s. 192(1)(f) of BIA to hear and determine any unopposed matter — Prima facie conclusion that Bulk Sales Act (BSA) ought to apply to proposed sale of signs was ousted by s. 65.13(7) of BIA — Section 65.13(7) of BIA authorizes Court making order under s. 65.13(1) to authorize sale free and clear of "other restriction" implicit in application of BSA to sale — So long as Court makes proceeds of s. 65.13(1) BIA sale transaction subject to restrictions of BSA, compliance with s. 65.13(7) is had, and application of BSA is not only ousted, but may be so ousted not by judge of Superior Court of Justice, but by duly authorized judicial officer of Bankruptcy Court, be that judge or registrar.

### **Table of Authorities**

#### **Statutes considered:**

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

Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

s. 65.13(7) [en. 2007, c. 36, s. 27] — considered

s. 192(1)(f) — referred to

*Bulk Sales Act*, R.S.O. 1990, c. B.14

Generally — referred to

s. 2 — considered

s. 3 — considered

APPLICATION for order approving sale of assets.

***Reg. Scott W. Nettie:***

1 On September 27, 2010, I granted the requested approval of a certain sale, and vesting Order, for Reasons to follow. These are those Reasons.

2 Outdoor Broadcast Networks Inc. ("OBN") has filed a Notice of Intention to make a proposal, in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). Schonfeld Inc. (the "Trustee") is the trustee in the proposal estate.

3 OBN is in the business of providing marketing solutions to advertisers. In particular, it owns a number of large, full motion LED digital billboards. These billboards are located in the Provinces of Ontario and British Columbia.

4 OBN would like to sell six such signs, located in five locations. Four of those locations are in the City of Toronto, comprising five signs. The fifth location is in the City of Pitt Meadow, British Columbia.

5 Ordinarily, OBN would be at liberty to sell its signs, without application to this Court. Having filed an NOI, the assets of OBN remain vested in it, and it retains capacity to deal with its own assets. It would have been, of course, subject to the provisions, in Ontario, of the *Bulk Sales Act*, R.S.O. 1990, c. B-14 ("BSA"), if any proposed sale constituted a sale in bulk, out of the ordinary course of business.

6 That changed September 18, 2009, with the most recent amendments to the BIA. Section 65.13(1) BIA now provides that where an insolvent person has filed an NOI under s. 50.4 BIA,

as OBN has, then that person may not sell or dispose of assets outside of the ordinary course of business, unless authorized to do so by the Bankruptcy Court.

7 According to the Affidavit of Kevin Clay, filed on the application, the sales by OBN of these billboards are intended to be a liquidation of its assets, so as to raise cash to fund the proposal which it intends to make. No one disputes that such a liquidation constitutes a sale outside of the ordinary course of business for OBN. Hence this application.

8 Section 65.13(4) BIA sets out the factors which the Court is to consider in exercising its discretion to authorize such a sale, or not. All six of those factors were addressed by counsel or in the materials, or both, and I duly considered them in granting the requested Order. The process leading to the sale was reasonable; the Trustee was in support, and had filed the requisite report; creditors had been consulted; and the consideration proposed is reasonable.

9 On the point of creditor consultation, I note that Fraser Kearney Capital Corporation ("FKCC") is the major secured creditor of OBN. Kevin Clay, the affiant in support of the application, is an officer of FKCC and a director of OBN. FKCC supports the sale transactions, and intends to permit the proposal to proceed despite its apparent prior security position over the assets of OBN (including the sale proceeds of the signs) in order to benefit from certain tax losses of OBN. The evidence before me was that the security of FKCC is in a shortfall position, such that any deemed bankruptcy flowing from a failure of the proposal process would result in no funds for ordinary unsecured creditors. Thus, I was satisfied that proceeding without broader notice to the ordinary unsecured creditors was appropriate. Further, a number of the larger unsecured creditors, being landlords where the signs are located, were waiving their lease claims as part of the sale terms of the signs to them. In short, I was satisfied that the grant of the Order was an appropriate exercise of my jurisdiction.

10 Ordinarily, the record could have simply reflected my satisfaction, and that an Order was to go as signed. These Reasons were required in respect of two points, both of which relate to my jurisdiction, as Registrar in Bankruptcy, to hear and determine this application.

11 The first, and least contentious, is my jurisdiction to hear an application under s. 65.13(1) BIA. In the case at bar, all appropriate parties were involved in the application, and it proceeded as unopposed, subject only, of course, to my being persuaded to exercise my discretion in favour of OBN, which I was. A Registrar in Bankruptcy has the jurisdiction, under s. 192(1)(f) BIA to hear and determine any unopposed matter. Thus, I had jurisdiction to hear the application.

12 The second point is whether or not I have the ability, as Registrar, to not only approve the sale, under s. 65.13(1) BIA, but to make that sale not subject to the provisions of the BSA which might otherwise apply, absent the Order of a Judge of the Superior Court of Justice exempting the sale from the BSA under s. 3 BSA. As all who regularly practise in this area know, a s. 3 BSA

exemption is routinely added into the majority of vesting orders, even where the sales are by a trustee, and thus expressly already exempt from the BSA under s. 2 BSA.

13 *Prima facie*, it would seem that the BSA ought to apply to the proposed sale of the signs by OBN. While the sale in bulk is broken up amongst a number of purchasers, it is admittedly a sale out of the ordinary course of business, and, in effect, a liquidation. It is not being conducted by a trustee or FKCC as a creditor realizing under its security, but directly by OBN itself, as OBN still owns and controls the assets.

14 This *prima facie* conclusion is ousted, in my view, by the provisions of s. 65.13(7) BIA. That section provides that in making the within Order, the Court may authorize the sale to be "free and clear of any security, charge or *other restriction* (emphasis added), and, if it does, it shall also order that...the proceeds of the sale...be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order."

15 I find that s. 65.13(7) BIA authorizes the Court making the Order under s. 65.13(1) BIA to authorize the sale free and clear of the "other restriction" implicit in application of the BSA to the sale. After all, what is the BSA but a series of restrictions on alienability by a property owner of its assets, in order to protect ordinary creditors, who may be unaware of the alienation, occurring as it must, out of the ordinary course of the seller's business. So long as the Court makes the proceeds of the s. 65.13(1) BIA sale transaction themselves subject to the restrictions of the BSA, compliance with s. 65.13(7) BIA is had, and the application of the BSA is not only ousted, but may be so ousted not by a Judge of the Superior Court of Justice, but by the duly authorized judicial officer of the Bankruptcy Court, be that a Judge or a Registrar.

16 I am equally confident in this conclusion when I consider further the issue of paramountcy between a validly enacted Dominion statute, made in pursuit of the Dominion's clear jurisdiction over bankruptcy and insolvency and that of a validly enacted Provincial statute going to issues of property and civil rights in the Province. Where they conflict, precedence must be given to the Dominion legislation, especially when it serves to continue to protect the interests of the very creditors which the BSA seeks to safeguard.

17 By way of illustration of this latter point, let us consider to what use OBN might put the sale proceeds. If OBN dispenses them in the ordinary course of business, both the BIA and the BSA will be content. If, however, OBN were to dispose of them outside of the ordinary course of business, both s. 65.13(1) BIA and s. 2 BSA would be invoked, and the creditors would have all of the same protections which they had before this Court authorised the sale of the signs.

18 Moreover, this analysis permits the proper pursuit by an insolvent, OBN, of its rights to compromise its debts under the BIA. A finding which serves both the intent of the Dominion and Provincial acts, while protecting creditors and allowing an insolvent debtor proper access to the Dominion statute is in my view the proper conclusion.

19 Any remaining doubt that this conclusion is correct is dispelled, I find, by a consideration of the November, 2003, *Report of the Standing Senate Committee on Banking, Trade and Commerce*<sup>1</sup>, a report by a Committee of the Upper House of the Dominion Parliament. That Report, at page 148 recommended to Parliament that:

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangements Act* be amended to permit the debtor, subject to prior approval of the Court, to sell part or all of its assets out of the ordinary course of business, during reorganization and *without complying with bulk sales legislation* (emphasis added). Similarly, the debtor should be permitted to sell all or substantially all of its assets on a going concern basis. On an application for permission to sell, the Court should take into consideration whether the sales process was conducted in a fair and reasonable manner, and whether major creditors were given reasonable notice, in the circumstances, of the proposed sale and had input into the decision to sell. No such sale to controlling shareholders, directors, officers or senior management of the debtor having a significant financial interest in the purchaser or in the sales transaction should be permitted, other than in exceptional circumstances.

20 A review of s. 65.13 indicates that essentially every other of the recommendations, above, were adopted by Parliament. One can but conclude from that that the intent of s. 65.13(7) BIA, in respect of the "other restrictions" language was also an adoption by Parliament of the recommendation that the BIA provide for sale by insolvent debtors of assets out of the ordinary course - free from compliance with the BSA, including s.3 thereof.

21 Having concluded that I had jurisdiction to hear the application under s. 192(1)(f) BIA, and having concluded that sitting in such a capacity constituted my actions as those of the Court under s. 2 BIA, and having concluded that the Court has the ability to authorize the proposed sale by OBN free and clear of the other restriction of the BSA, I granted my Order herein on September 27, 2010.

*Application granted.*

#### Footnotes

1 [http://www.cfs-fcee.ca/html/english/campaigns/Senate\\_Cmte\\_Report\\_2003\\_11-a.pdf](http://www.cfs-fcee.ca/html/english/campaigns/Senate_Cmte_Report_2003_11-a.pdf)

## **TAB 2**

2011 ONSC 3230  
Ontario Superior Court of Justice

Komtech Inc., Re

2011 CarswellOnt 6577, 2011 ONSC 3230, 106 O.R.  
(3d) 654, 205 A.C.W.S. (3d) 24, 81 C.B.R. (5th) 256

**In the Matter of the Proposal of Komtech Inc. pursuant  
to the Law of the Province of Ontario, with a Head  
Office in the City of Kanata, in the Province of Ontario**

Paul Kane J.

Heard: April 27, 2011

Judgment: July 8, 2011

Docket: 33-1469781

Counsel: Keith A. MacLaren for Komtech Inc.

John O'Toole, André Ducasse for Business Development Bank of Canada

Karen Perron for Hubbell Canada LP

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

**Related Abridgment Classifications**  
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.  
**Bankruptcy and insolvency**

XIV Administration of estate

XIV.6 Sale of assets

XIV.6.f Jurisdiction of court to approve sale

**Headnote**

**Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction  
of court to approve sale**

Where no proposal — Company became insolvent — Company issued notice of intent to make proposal under Bankruptcy and Insolvency Act — Company sought auction for sale of assets — Company brought motion for approval of sale — Motion granted — Trustee and primary lenders of company approved of sale process — Proposed process was likely to see higher price than forced sale of assets — Company made reasonable efforts in search of alternate financing, equity partnership or purchaser of business — Company cooperated



with trustee to identify and engage prospective purchasers — Position of creditors would not improve if motion dismissed — Sale could still be authorized under s. 65.13 of Act despite fact that proposal had not been filed, as court had jurisdiction to do so.

## Table of Authorities

### Cases considered by *Paul Kane J.*:

*Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — considered

*Hypnotic Clubs Inc., Re* (2010), 68 C.B.R. (5th) 267, 2010 CarswellOnt 3463, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) — considered

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

### Statutes considered:

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3  
Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — pursuant to

s. 64.1 [en. 2005, c. 47, s. 42] — referred to

s. 64.2 [en. 2005, c. 47, s. 42] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(3) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — referred to

s. 65.13 [en. 2005, c. 47, s. 44] — considered

s. 81.4(4) [en. 2005, c. 47, s. 67] — referred to

s. 81.6(2) [en. 2005, c. 47, s. 67] — referred to

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

Generally — referred to

s. 36 — considered

*Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, Act to establish the, S.C. 2005, c. 47

Generally — referred to

MOTION by company for approval of sale of assets.

**Paul Kane J.:**

1 The applicant, Komtech Inc., ("Komtech") designs and manufactures plastic injection products at two facilities in Ontario and employs approximately 150 employees. Faced with serious financial difficulties, Komtech filed a Notice of Intention ("NOI") to make a proposal ("Proposal") under s. 50.4 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*BIA*") on March 2, 2011. A. Farber & Partners Inc. was appointed Proposal Trustee ("Trustee").

2 This Court on March 31, 2011, granted an extension to file the Proposal until May 16, 2011.

3 On April 20, 2011, Komtech by motion sought approval of a bidding process ("Bid Process") for the auction of its assets and the preliminary approval of the Stalking Horse Asset Purchase Agreement, the ("APA") between itself as vendor and 2279591 Ontario Inc. as purchaser. Pursuant to the APA, most of the assets of the vendor including, accounts receivable, inventory equipment, assigned contracts, intellectual property, products and prepaid expenses, are to be sold subject to the Bid Process, for a purchase price of \$2,800,000 ("the Purchase Price", or the "MBA").

4 All secured creditors of Komtech were served with this motion pursuant to s. 65.13(3) of the *BIA*. Section 65.13(3) of the Act does not require service on unsecured creditors.

5 The two primary secured lenders support this motion namely: the Business Development Bank of Canada ("BDB") and HSBC Canada ("HSBC"). Demand for payment by each of these secured lenders has been made of Komtech. Komtech has been unsuccessful in obtaining alternative credit facilities. Combined, these two secured lenders are presently owed approximately \$6,000,000. The NOI dated February 26, 2011, lists approximately \$3,600,000 additional debt owing to other creditors of Komtech in addition to BDB and HSBC.

6 The Purchase Price may be increased in an auction under the Bid Process. The Trustee recommends that the motion be granted and in support thereof, filed a Second Report dated April 19, 2011, and a supplement to the Second Report dated April 27, 2011. The Trustee expresses the opinion that the greatest chance of return to creditors of Komtech is proceeding with the APA coupled with an auction using the APA and the Purchase Price as the floor.

7 The Trustee in the Second Report confirms that the purchaser under the APA will carry on the business now being operated by Komtech and continue the employment of most of the 150 unionized and non-unionized employees of Komtech.

### **Evaluation of the APA and Bid Process**

8 I have reviewed the asset realization value estimate of Komtech's assets, the analysis prepared by the Trustee as well as an independent manufacturing equipment evaluation dated April 8, 2011. This estimate of liquidation value strongly supports the recommendation of the Trustee that Komtech be authorized to execute the APA as it represents consideration materially in excess of the liquidation value likely obtainable on a forced sale of assets.

9 I am satisfied on the material filed that Komtech has made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business. I am further satisfied that Komtech has cooperated with the Trustee to identify and engage prospective purchasers of the company and its assets.

10 In the event this motion is granted, the Trustee has undertaken to conduct further marketing in the hope of obtaining higher bids from prospective purchasers above that contained in the APA. That potential may increase consideration and payment to secured and unsecured creditors.

11 It is my understanding that 2279591, as purchaser in the APA, is not a related party to Komtech.

12 The position of Komtech's secured and unsecured creditors will not improve if this motion is dismissed given the past unsuccessful attempts to sell the business and the estimate of the realizable value of the company's assets. The use of the Stalking Horse APA in the marketing and Bid Process represents the only remaining potential recovery for creditors beyond BDB and HSBC.

13 The Trustee in his reports has satisfied the requirements under s. 65.13(4). Alternative sources of financing were sought and are unavailable. A process was undertaken to identify and seek interest from potential purchasers under the direction of the Proposal Trustee. Negotiations took place with the knowledge of BDB and HSBC which led to the presentation for approval of the APA.

14 Involvement by the BDB since April 20, 2011 has increased the level of consideration payable under the APA by \$100,000.

15 The APA represents continued employment to a large majority of the existing employees of Komtech. The APA represents a lower level of financial disruption to the existing customer base and suppliers of Komtech.

16 Given the realization value estimate, it appears that the consideration to be paid under the APA is reasonable and fair considering the book value, the market value and the estimate of liquidation value of such assets.

17 It is contemplated that a motion seeking a vesting order will be brought in the next several weeks. The Trustee has undertaken to provide all secured creditors and a representative group of the largest unsecured creditors with notice of that motion. That motion will provide creditors with an opportunity to express concerns regarding this initial approval of the APA, the auction bid process and amounts.

18 There is also value to suppliers and the greater community if this business is continued by a purchaser under the APA or the Bid Process.

19 Subject to the issue stated below, the moving party has satisfied me as to the requisite elements under s. 65.13 of the *BIA*.

### **Remaining Issue**

20 On the facts in this case, it is unlikely that Komtech will be able to present a Proposal for approval by its creditors. The issue is whether court approval of the sale of assets is available under s. 65.13 of the *BIA* when the debtor is unable to present a Proposal to its creditors.

21 Parliament enacted s. 65.13 of the *BIA* at the same time as enacting s. 36 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Both amendments were enacted in 2005.

22 The wording of s. 65.13 under the *BIA* and s. 36 under the *CCAA*, are remarkably similar.

23 Section 65.13(1) of the *BIA* prohibits the sale and disposition of assets outside the ordinary course of business in respect of an insolvent person which has filed an NOI under s. 50.4, unless authorized by the court to do so.

24 *Hypnotic Clubs Inc., Re* (2010), 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) involved an NOI by the debtor under the *BIA* and a motion for approval of a sale of assets to a related third party under s. 65.13. The trustee was this Proposal Trustee. The Court refused to approve that asset

purchase agreement as it was not satisfied that good faith efforts had been made to sell the debtor's assets to unrelated parties. In coming to that conclusion, the court at paras. 36 and 37 states:

**36** Given these circumstances, and taking into account the underlying policy of the *BIA* of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.

**37** It is obvious that a deemed assignment into bankruptcy by s. 50.1(8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

25 Under s. 65.13, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not expressed as limited to cases where the debtor is capable of presenting a Proposal to its creditors. The ability to present a Proposal is not one of the listed factors to be considered on a motion under s. 65.13(4). Parliament could have, but did not include language in s. 65.13 requiring the presentation of or the ability to present a Proposal and the vote thereon by creditors, as a condition to the exercise of the court's jurisdiction to authorize a sale of assets.

26 A comparable issue under the *CCAA* with wording remarkably similar to s. 65.13 of the *BIA* has concluded that the court has jurisdiction to authorize the sale of business assets absent a formal plan of compromising arrangement under s. 36 of the *CCAA*.

27 Section 36 of the *CCAA* reads as follows:

**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.

**Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

**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.

#### **Additional factors — related persons**

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

#### **Related persons**

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

#### **Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

### **Restriction — employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

28 In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), the court found jurisdiction under the *CCAA* absent a plan of an arrangement which was described as "skeletal in nature". That court held that an important consideration, in addition to whether the business continues under the debtor stewardship or under a new equity structure, is whether the business can be continued as a going concern in the form of a sale by the debtor.

29 Following the amendments creating s. 36 of the *CCAA*, the Court in *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), determined that s. 36 of the *CCAA* expressly permits the sale of substantially all of the debtor's assets even in the absence of the presentation and vote upon a plan of arrangement.

30 Section 65.13 of the *BIA* and s. 36 of the *CCAA* were introduced in 2005 in "An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts" (Bill C-55).

31 There were two Senate Committee meetings. At one of those, the Honourable Jerry Pickard, Parliamentary Secretary to the Minister of Industry, stated:

It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as the Minister of Labour has pointed out. ...

Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.

To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.

(Emphasis added)

32 The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees.

33 Although different legislation, the similarity of language of s. 65.13 of the *BIA* and s. 36 of the *CCAA*, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding: (a) the filing of an NOI, or (b) an order under the *CCAA*, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors, is not a condition to this Court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the *BIA*.

### Interim Charges

34 The Stalking Horse Bidders Charge as security for the breakup fee and expense reimbursement under the APA, the Director's and Officer's charge to indemnify against statutory liability and the administration charge related to the fees of the Proposal Trustee and the debtor as presented, are authorized under s. 64.1 and s. 64.2 of the *BIA*. They are appropriate priorities and charges in this case subject to ss. 14.06(7); 81.4(4); and 81.6(2) of the *BIA*.

35 For the above reasons, the relief sought in this motion is granted.

*Motion granted.*



## **TAB 3**

2010 ONSC 2870  
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 3509, 2010 ONSC 2870, 189 A.C.W.S. (3d) 598, 68 C.B.R. (5th) 233

**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 CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC.,  
CANWEST BOOKS INC., AND CANWEST (CANADA) INC. (Applicants)

Pepall J.

Judgment: May 21, 2010  
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Betsy Putnam for Applicant, LP Entities  
Mario Forte for Special Committee of the Board of Directors  
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.  
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders Syndicate  
M.P. Gottlieb, J.A. Swartz for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders  
Robert Chadwick, Logan Willis for 7535538 Canada Inc.  
Deborah McPhail for Superintendent of Financial Services (FSCO)  
Thomas McRae for Certain Canwest Employees

Subject: Insolvency; Estates and Trusts

**Related Abridgment Classifications**  
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.  
**Bankruptcy and insolvency**

XIV Administration of estate  
XIV.6 Sale of assets  
XIV.6.b Sale by tender  
XIV.6.b.ii Miscellaneous

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act  
XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.i "Fair and reasonable"

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

**Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous**

Companies' Creditors Arrangement Act — Sale and investor solicitation process — In earlier order, court approved support agreement between LP entities and senior lenders (support transaction) and commencement of sale and investor solicitation process (SISP) — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — AHC transaction would be implemented pursuant to plan of compromise or arrangement — LP entities brought application for order authorizing them to enter into asset purchase agreement based on AHC bid and conditionally sanctioning support transaction, among other relief — Application granted — AHC transaction was approved — Proposed disposition of assets met criteria in s. 36 of Companies' Creditors Arrangement Act and common law — Process was reasonable — Sufficient efforts were made to attract best possible bid — AHC bid was better than support transaction — Effect of proposed sale on interested parties was positive.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous**

Procedure — Court approved commencement of sale and investor solicitation process (SISP) in earlier order — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — LP entities brought application for order approving amended claims procedure, authorizing them to call meeting of unsecured creditors to vote on AHC plan, and amending SISP procedures so LP entities could advance AHC transaction, among other relief — Application granted — Requested claims procedure order was approved — Because AHC plan was approved, scope of process had to be expanded to ensure as many creditors as possible could participate in meeting to consider AHC plan — Meeting order to convene meeting of unsecured creditors to vote on AHC plan was granted — On consent, SISP was amended to extend date for closing of AHC transaction and to permit proposed dual track procedure — Amendments were warranted as practical matter and to procure best available going concern outcome for stakeholders and LP entities.

## **Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"**

In earlier order, court approved support agreement between LP entities and senior lenders (support transaction) and commencement of sale and investor solicitation process (SISP) — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — AHC transaction would be implemented pursuant to plan of compromise or arrangement — LP entities brought application for order authorizing them to enter into asset purchase agreement based on AHC bid and conditionally sanctioning support transaction, among other relief — Application granted — It was prudent for LP entities to simultaneously advance AHC transaction and support transaction — Support transaction was conditionally sanctioned — Excess of required majorities of senior lenders voted in favour of support transaction — Absent closing of AHC transaction, support transaction was fair and reasonable as between LP entities and creditors — There were no available commercial going concern alternatives to support transaction — There had been strict compliance with statutory requirements.

### **Table of Authorities**

#### **Cases considered by *Pepall J.*:**

*Canadian Airlines Corp., Re* (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — followed

*Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

*Canadian Airlines Corp., Re* (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

*Canadian Airlines Corp., Re* (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

**Statutes considered:**

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

Generally — referred to

s. 6 — referred to

s. 6(3) — referred to

s. 6(5) — referred to

s. 6(6) — referred to

s. 11 — referred to

s. 36 — considered

APPLICATION by LP entities for various relief relating to *Companies' Creditors Arrangement Act* proceedings.

***Pepall J.:***

**Endorsement**

***Relief Requested***

1 The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support Transaction concurrently. They also seek an order authorizing them to call a meeting of unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

***AHC Bid***

2 Dealing firstly with approval of the AHC Bid, in my Initial Order of January 8, 2010, I approved the Support Agreement between the LP Entities and the Administrative Agent for the Senior Lenders and authorized the LP Entities to file a Senior Lenders' Plan and to commence a sale and investor solicitation process (the SISP). The objective of the SISP was to test the market and obtain an offer that was superior to the terms of the Support Transaction.

3 On January 11, 2010, the Financial Advisor, RBC Capital Markets, commenced the SISP. Qualified Bids (as that term was defined in the SISP) were received and the Monitor, in consultation with the Financial Advisor and the LP CRA, determined that the AHC Bid was a Superior Cash Offer and that none of the other bids was a Superior Offer as those terms were defined in the SISP.

4 The Monitor recommended that the LP Entities pursue the AHC Transaction and the Special Committee of the Board of Directors accepted that recommendation.

5 The AHC Transaction contemplates that 7535538 Canada Inc. ("Holdco") will effect a transaction through a new limited partnership (Opco LP) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain liabilities including substantially all of the operating liabilities for a purchase price of \$1.1 billion. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities who will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicated that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management. The AHC Bid will also allow for a full payout of the debt owed by the LP Entities to the LP Secured Lenders under the LP credit agreement and the Hedging Creditors and provides an additional \$150 million in value which will be available for the unsecured creditors of the LP Entities.

6 The purchase price will consist of an amount in cash that is equal to the sum of the Senior Secured Claims Amount (as defined in the AHC Asset Purchase Agreement), a promissory note of \$150 million (to be exchanged for up to 45% of the common shares of Holdco) and the assumption of certain liabilities of the LP Entities.

7 The Ad Hoc Committee has indicated that Holdco has received commitments for \$950 million of funded debt and equity financing to finance the AHC Bid. This includes \$700 million of new senior funded debt to be raised by Opco LP and \$250 million of mezzanine debt and equity to be raised including from the current members of the Ad Hoc Committee.

8 Certain liabilities are excluded including pre-filing liabilities and restructuring period claims, certain employee related liabilities and intercompany liabilities between and among the LP Entities and the CMI Entities. Effective as of the closing date, Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to 10% of the non-unionized part-time or temporary employees employed by the LP Entities.

9 The AHC Bid contemplates that the transaction will be implemented pursuant to a plan of compromise or arrangement between the LP Entities and certain unsecured creditors (the "AHC Plan"). In brief, the AHC Plan would provide that Opco LP would acquire substantially all of the assets of the LP Entities. The Senior Lenders would be unaffected creditors and would be paid in full. Unsecured creditors with proven claims of \$1,000 or less would receive cash. The balance of the consideration would be satisfied by an unsecured demand note of \$150 million less the amounts paid to the \$1,000 unsecured creditors. Ultimately, affected unsecured creditors with proven claims would receive shares in Holdco and Holdco would apply for the listing of its common shares on the Toronto Stock Exchange.

10 The Monitor recommended that the AHC Asset Purchase Agreement based on the AHC Bid be authorized. Certain factors were particularly relevant to the Monitor in making its recommendation:

- the Senior Lenders will received 100 cents on the dollar;
- the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;
- the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;
- the AHC Bid contemplates that the transaction will be implemented through a Plan under which \$150 million in cash or shares will be available for distribution to unsecured creditors;
- unlike the Support Transaction, there is no option *not* to assume certain pension or employee benefits obligations.

11 The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the Bid was credible, reasonably certain and financially viable. The LP Entities agreed with that assessment. All appearing either supported the AHC Transaction or were unopposed.

12 Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested.

13 The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.*<sup>1</sup> decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers;

and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

### *Claims Procedure Order and Meeting Order*

14 Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

### *SISP Amendment*

15 It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The SISP procedures must be amended. The AHC Transaction which is to be effected through the Ad Hoc Committee Plan cannot be completed within the sixty days contemplated by the SISP. On consent of the Monitor, the LP Administrative Agent, the Ad Hoc Committee and the LP Entities, the SISP is amended to extend the date for closing of the AHC Transaction and to permit the proposed dual track procedure. The proposed amendments to the SISP are clearly warranted as a practical matter and so as to procure the best available going concern outcome for the LP Entities and their stakeholders. Paragraph 102 of the Initial Order contains a comeback clause which provides that interested parties may move to amend the Initial Order on notice. This would include a motion to amend the SISP which is effectively incorporated into the Initial Order by reference. The Applicants submit that I have broad general jurisdiction under section 11 of the



CCAA to make such amendments. In my view, it is unnecessary to decide that issue as the affected parties are consenting to the proposed amendments.

### ***Dual Track and Sanction of Senior Lenders' CCAA Plan***

16 In my view, it is prudent for the LP Entities to simultaneously advance the AHC Transaction and the Support Transaction. To that end, the LP Entities seek approval of a conditional sanction order. They ask for conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.

17 The Senior Lenders' meeting was held January 27, 2010 and 97.5% in number and 88.7% in value of the Senior Lenders holding Proven Principal Claims who were present and voting voted in favour of the Senior Lenders' Plan. This was well in excess of the required majorities.

18 The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' CCAA Plan. The market was fully canvassed during the SISF; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISF. For these reasons, I am prepared to find that the Senior Lenders' CCAA Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the CCAA. As such, the three part test set forth in the *Canadian Airlines Corp., Re*<sup>2</sup> has been met. Additionally, there has been compliance with section 6 of the CCAA. The Crown, employee and pension claims described in section 6 (3),(5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

### ***Conclusion***

19 In conclusion, it is evident to me that the parties who have been engaged in this CCAA proceeding have worked diligently and cooperatively, rigorously protecting their own interests but at the same time achieving a positive outcome for the LP Entities' stakeholders as a whole. As I indicated in Court, for this they and their professional advisors should be commended. The business of the LP Entities affects many people - creditors, employees, retirees, suppliers, community members and the millions who rely on their publications for their news. This is a good chapter in the LP Entities' CCAA story. Hopefully, it will have a happy ending.

*Application granted.*

## Footnotes

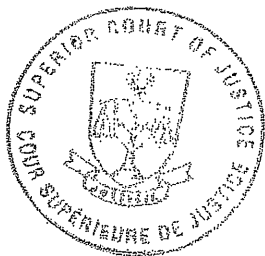
- 1 [1991] O.J. No. 1137 (Ont. C.A.).
- 2 2000 ABQB 442 (Alta. Q.B.), leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

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## TAB 4



Court File No. CV-13-10018-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR.

JUSTICE BROWN

) WEDNESDAY, THE 27<sup>TH</sup>  
)  
) DAY OF MARCH, 2013

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 TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC.  
AND TBS STORES INC. (collectively, the "Applicants")

**APPROVAL ORDER**

THIS MOTION, made by the Applicants for an order, inter alia, approving:

- (a) that the time for service of the Notice of Motion, the Motion Record and the Third Report of the Monitor, Ernst & Young Inc. (the "**Monitor**") dated March 25, 2013 (the "**Third Monitor Report**") is abridged and validated so that this Motion is properly returnable today and dispensing with further service thereof;
- (b) the agency sale transaction (the "**Transaction**") contemplated by the agency agreement among The Bargain! Shop Holdings Inc. and TBS Stores Inc. (together the "**Companies**") and a Contractual Joint Venture comprised of Merchant Trading Services ULC and GBRP, Inc. (collectively, the "**Agent**") made as of March 22, 2013 (the "**Agency Agreement**") a copy of which is attached as Exhibit "A" hereto; and
- (c) the Third Monitor Report of the Monitor dated March 25, 2013; and

ON READING the Affidavit of Clinton Wolff sworn March 22, 2013 and the Exhibits thereto, the Third Monitor Report, and on hearing the submissions of counsel

for the Applicants, the Monitor, Wells Fargo Capital Finance Corporation Canada (the "**Operating Lender**"), BlackRock Kelso Capital Corporation ("**BlackRock**"), no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service of Devka Sakhrani, sworn March 25, 2013 filed:

#### **SERVICE**

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

#### **AMENDMENT TO INITIAL ORDER**

2. THIS COURT ORDERS that paragraph 11 of the Initial Order is amended to delete the following words from that paragraph:

"all without interference of any kind from third parties, including their landlords and notwithstanding the provisions of any lease, mortgage or other instrument or law affecting the rights of the Applicants to move to liquidate the Property from leased premises, and may take any Downsizing steps at any time after the date of this Order irrespective of whether or not payments have been made subsequent to the date of this Order under any lease or mortgage, all of the forgoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**")."

and that the following words be added to that paragraph:

"all of the forgoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**")."

#### **AGENCY AGREEMENT**

3. THIS COURT ORDERS AND DECLARES that the Agency Agreement, including the Sale Guidelines attached as Schedule H thereto and as Exhibit "B" to this Order, and the Transaction are hereby approved. The execution of the Agency Agreement by the Companies is hereby authorized and approved *nunc pro tunc* and the Companies are hereby authorized to take such additional steps and execute such additional

documents as may be necessary or desirable for the completion of the Transaction. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed thereto in the Agency Agreement, or, as applicable, the Initial Order.

4. THIS COURT ORDERS that the Monitor be and is hereby authorized to assist the Companies with the implementation and the administration of the Agency Agreement and the Transaction, and is hereby directed to open and maintain the Agency Account and to administer disbursements therefrom from time to time in accordance with the Agency Agreement.

5. THIS COURT ORDERS AND DECLARES that subject to payment of the First Instalment and delivery of the Letter of Credit, the Agent is authorized to conduct the Liquidation Sale in accordance with this Order, the Agency Agreement and the Sale Guidelines, including (without limitation) to sell all Merchandise, FF&E other than Excluded FF&E, Company Consignment Goods and Additional Agent Merchandise. If there is a conflict between this Order, and the Agency Agreement and the Sale Guidelines, the order of priority of documents to resolve any such conflicts is as follows: (1) this Order; (2) the Sales Guidelines; and (3) the Agency Agreement. .

6. THIS COURT ORDERS AND DECLARES that any amounts paid by the Agent in respect of the Net Minimum Guaranteed Amount shall be deposited in the Company's Account. The Applicants' shall include all amounts received pursuant to the Agency Agreement in the cash-management system outlined in paragraph 39 of the Affidavit of Clinton Wolff dated February 25, 2013, attached as Exhibit "C" hereto (the "**Cash-Management System**") to be administered in accordance therewith.

7. THIS COURT ORDERS AND DECLARES that all amounts paid to the Applicants as disbursements or otherwise from the Agency Account pursuant to the Agency Agreement shall be deposited in the Company's Account and included in the Cash-Management System.

8. THIS COURT ORDERS AND DECLARES that the Companies and the Monitor are hereby authorized and directed, in accordance with the Agency Agreement, to remit all amounts that become due to the Agent.

9. THIS COURT ORDERS AND DECLARES that in the event that Agent overfunds any portion of the Net Minimum Guaranteed Amount, Expenses, or other amounts under the Agency Agreement to the Companies (the "**Overfunded Amounts**"), the Companies shall reimburse the Overfunded Amounts to the Agent within two (2) Business Days after Agent's request. To the extent that any Overfunded Amounts have been received by the Operating Lender or one or more of its affiliates and such Overfunded Amounts have not been reimbursed by the Companies, Agent shall provide notice to the Operating Lender of such Overfunded Amounts and the Operating Lender shall disgorge all Overfunded Amounts to the Agent within two (2) Business Days of such notice. Calculation of the Overfunded Amount shall be subject to review by the Monitor and the Operating Lender and, in the event of a disagreement as to the calculation thereof, shall be determined by this Court.

10. THIS COURT ORDERS AND DECLARES that as security for the Companies' obligations under the Agency Agreement, and upon the payment of the First Instalment and delivery of the Letter of Credit, the Agent shall be and is hereby granted a charge over the Merchandise and the proceeds thereof (the "**Agent's Charge**"), having priority over any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**"), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Morawetz dated February 26, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which under (i) and (ii) above, are collectively referred to herein as "**Encumbrances**").

11. THIS COURT ORDERS that the filing, registration, recording or perfection of the Agent's Charge shall not be required and the Agent's Charge shall be valid and enforceable for all purposes, including as against any right, title, or interest filed, registered, recorded, or perfected subsequent to the Agent's Charge coming into existence, notwithstanding any failure to file, register, record, or perfect. Absent the Agent's written consent or further order of this Court (on notice to the Agent), the

Companies shall not grant any Encumbrance over any Merchandise or proceeds thereof that rank in priority to, or *pari passu* with, the Agent's Charge

12. THIS COURT ORDERS that except as otherwise indicated in accordance with the Sale Guidelines and this Order nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of a real property lease.

13. THIS COURT ORDERS that (i) all Merchandise, FF&E and Company Consignment Goods, once sold by the Agent, shall be deemed sold free and clear of all Encumbrances and (ii) for the purposes of determining the nature and priority of the Encumbrances, the Net Minimum Guarantee Amount and the Companies' other net proceeds or reimbursements from the Transaction (the "**Companies Proceeds**"), if any, shall stand in the place and stead of the respective Merchandise, FF&E and Company Consignment Goods which generated them and all Claims shall attach to the Companies' Proceeds (including, for greater certainty, any amounts held in the Agency Account) with the same priority as they had immediately prior to the sale, as if the Merchandise, FF&E and Company Consignment Goods had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

14. THIS COURT ORDERS that subject to the Sale Guidelines the Agent is entitled, at its expense and discretion, to include in the Liquidation Sale at the Locations additional goods procured by the Agent of like kind, and of no lesser quality to the Merchandise located in the Locations ("**Additional Agent Merchandise**"). At all times and for all purposes, the Additional Agent Merchandise and its proceeds shall be the exclusive property of Agent. The transactions relating to the Additional Agent Merchandise are, and shall be construed as, a true consignment from Agent to the Companies.

15. THIS COURT ORDERS that upon delivery of a Monitor's certificate to the Agent substantially in the form attached as Exhibit "D" hereto, (the "**Monitor's Certificate**") and subject to payment in full by the Agent to the Companies of the Net Minimum Guaranteed Amount, all of the Companies' right, title and interest in and to any unsold Merchandise at the end of the Liquidation Period (the "**Remaining Merchandise**"), shall vest absolutely in the Agent, free and clear of and from any and all Claims, including



without limiting the generality of the foregoing the Encumbrances, and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Remaining Merchandise shall be expunged and discharged as against the Remaining Merchandise upon the delivery of the Monitor's Certificate to the Agent; provided however that nothing herein shall discharge the obligations of the Agent pursuant to the Agency Agreement, or the rights or claims of the Companies in respect thereof, including without limitation, the obligations of the Agent to account for and remit the proceeds of sale of the Remaining Merchandise to the Agency Account established by the Monitor pursuant to the Agency Agreement.

16. THIS COURT ORDERS THAT, except as expressly set out in paragraph 9 in respect of Over-funded Amounts, paragraph 10 in respect of the Agent's Charge and paragraph 15 in respect of Encumbrances against the Remaining Merchandise, nothing in this Order shall alter, diminish or otherwise affect the applicability, validity and priority of the Charges and the Operating Lender's Security as set out in paragraphs 36 to 41 of the Initial Order or alter, diminish or otherwise affect the Wells Facility and Operating Lender's Security or the BlackRock Facility or any provisions of the Initial Order made in respect thereof.

17. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

18. THIS COURT ORDERS that pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Companies are authorized and permitted to disclose and transfer to the Agent all human resources and payroll information in the Companies' records pertaining to the Companies' past and current employees. The Agent shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Companies.

19. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of the proceedings;
- (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the

Companies and any bankruptcy order issued pursuant to any such applications;

- (c) any assignment in bankruptcy made in respect of the Companies;
- (d) the provisions of any federal or provincial statute; or
- (e) any negative covenants, prohibitions, or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement to which the Companies are a counterparty

the Transaction, the Agency Agreement, the Agent's Charge, the payment of amounts due to the Agent under the Agency Agreement, and any transfer of Remaining Merchandise shall be binding on any trustee in bankruptcy that may be appointed in respect of the Companies and shall not be void or voidable by creditors of the Companies, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

20. THIS COURT ORDERS that the Agency Agreement shall not be repudiated or disclaimed by the Companies or compromised in any plan of compromise or arrangement filed by the Companies. For greater certainty, the parties acknowledge and agree that the termination rights included in the Agency Agreement approved herein are not affected by this paragraph.

21. THIS COURT ORDERS AND DECLARES that the Transaction and any transfer of Remaining Merchandise is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent or applicable legislation under any other province or territory in Canada.

22. THIS COURT ORDERS that, during the Liquidation Period, the Agent is hereby authorized to conduct the Liquidation Sale in accordance with the Agency Agreement but subject to the terms of the Sale Guidelines and shall have access to and the right to use and occupy the Locations and all related services, FF&E, and other assets and

services of the companies as designated under the Agency Agreement for purposes of conducting the Liquidation Sale, free of any unlawful interference from any utility, entity, landlord, creditor, or other person, subject to compliance with this Order, the Agency Agreement, and the Sale Guidelines.

23. THIS COURT ORDERS that nothing in this Order or the Agency Agreement shall deem the Agent to be an employer, or joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or any other statute, regulation, or rule of law or equity for any purpose whatsoever, and, further, that the Agent shall be deemed not to be an owner or in possession, care, control or management of the Property of the Companies whether pursuant to any legislation enacted for the protection of the environment, the regulations thereunder or any other statute, regulation or rule of law or equity under any federal, provincial or other jurisdiction for any purpose whatsoever.

24. THIS COURT ORDERS that the Agent shall be an unaffected creditor in these proceedings and shall not be affected by any stay of proceedings granted by this or any other Court, and the Agent shall, subject to the terms of the Agency Agreement, be entitled to exercise its remedies under the Agency Agreement and all security granted by the Companies in connection therewith notwithstanding the pendency of these proceedings.

#### **MONITOR'S ACTIVITIES**

25. THIS COURT ORDERS that the Third Monitor's Report and the conduct and activities of the Monitor described therein be and are hereby approved.

#### **SEALING ORDER**

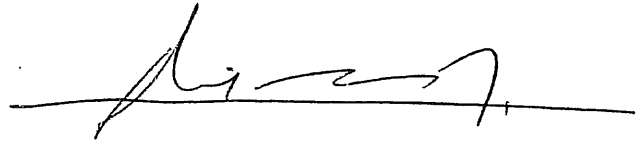
26. THIS COURT ORDERS that the bid comparison chart, filed separately with the Court, be and is hereby sealed by the Court until further Order of this Court.

#### **GENERAL**

27. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada against all persons, firms, corporations,

governmental, municipal and regulatory authorities against whom it may otherwise be enforceable.

28. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable to give effect to this Order.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

MAR 27 2013

NB

## EXHIBIT "A" – AGENCY AGREEMENT

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**DATED            March 22, 2013**

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**A Contractual Joint Venture comprised of  
Merchant Trading Services ULC  
And  
GBRP, Inc.  
as Agent**

---

**and**

**The Bargain! Shop Holdings Inc.  
and  
TBS Stores Inc.**

**AGENCY AGREEMENT**

## TABLE OF CONTENTS

Section 1 - INTERPRETATION.....	2
1.1    Definitions.....	2
1.2    Extended Meanings.....	7
1.3    Schedules, etc.....	7
Section 2 - APPOINTMENT OF AGENT AND CONSIDERATION.....	7
2.1    Appointment of Agent.....	7
2.2    The Monitor .....	7
2.3    No Warranty .....	7
2.4    Physical Inventory .....	8
2.5    Payment by Agent.....	8
2.6    Payment of Net Minimum Guaranteed Amount .....	8
2.7    Letter of Credit.....	9
2.8    Augmented Inventory .....	10
2.9    Allocation of Sale Proceeds .....	10
2.10    Trust Account for Sale Proceeds.....	10
2.11    Accounting for Sale Proceeds.....	12
2.12    Access to Locations .....	12
2.13    Surrender of Locations .....	12
2.14    Expenses .....	13
2.15    Personnel .....	14
2.16    Security.....	14
2.17    Trade-marks and Trade Names .....	15
2.18    Advertising.....	15
2.19    Authorizations and Remittance of Taxes .....	15
2.20    Insurance.....	16
2.21    Extended Sales .....	16

2.22	Consolidation of Merchandise .....	17
2.23	Conduct of the Liquidation Sale .....	17
2.24	Grant of Security Interest .....	18
2.25	Value of Merchandise .....	18
2.26	Excluded Goods .....	19
2.27	Sale of FF&E .....	19
2.28	Extension of Credit .....	19
Section 3 - ORDERS .....		19
3.1	Orders .....	19
3.2	Interim Occupation .....	20
Section 4 - TERMINATION .....		20
4.1	Termination .....	20
Section 5 - REPRESENTATIONS AND WARRANTIES .....		21
5.1	Representations and Warranty of the Companies .....	21
5.2	Representations and Warranty of the Agent .....	22
Section 6 - GENERAL .....		22
6.1	Notices .....	22
6.2	Dispute Resolution .....	24
6.3	Time of Essence .....	24
6.4	Currency .....	24
6.5	Further Assurances .....	24
6.6	Obligations to Survive .....	24
6.7	Entire Agreement .....	24
6.8	Governing Law .....	25
6.9	Benefit of Agreement .....	25
6.10	Severability .....	25
6.11	Counterparts .....	25
6.12	Offset .....	25



6.13 Facsimile Execution .....	25
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## AGENCY AGREEMENT

This AGENCY AGREEMENT made as of this 22<sup>nd</sup> day of March, 2013,

BETWEEN:

A Contractual Joint Venture Comprised of,  
Merchant Trading Services ULC, an Nova Scotia unlimited liability  
company with a principal place of business at 5 Revere Drive, Suite 206,  
Northbrook, IL 60062

And

GBRP, Inc., a Delaware corporation authorized to carry on business in  
the Province of Ontario, with a principal place of business at 101  
Huntington Ave., 10<sup>th</sup> Floor, Boston, Massachusetts 02199

(the "Agent")

AND

The Bargain! Shop Holdings Inc.,  
a New Brunswick corporation with a principal place of business at  
Mississauga, Ontario

("TBSHI" or the "Company")

AND

TBS Stores Inc.  
a New Brunswick corporation with a principal place of business at  
Mississauga, Ontario

("TBSI"),

(together TBSHI and TBSI are hereinafter referred to as the  
"Companies")

### WHEREAS

- A. ~~On February 26, 2013, the Companies commenced proceedings pursuant to the Companies'~~  
*Creditors Arrangement Act ("CCAA") and obtained an initial order (the "Initial Order").*
- B. Pursuant to the Initial Order, Ernst & Young Inc. was appointed as Monitor in the CCAA Proceedings.
- C. Subject to the terms therein, the Initial Order authorized the Companies to continue, with the assistance of the Monitor, a process for the engagement of a liquidator for the liquidation of certain of the Companies' stores.
- D. The Companies and the Agent wish to enter into this Agreement in accordance with the terms hereof.

NOW THEREFORE in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged) the parties hereto agree as follows:

## **Section 1 - INTERPRETATION**

### **1.1 Definitions**

In this Agreement:

**Accounting Deadline** shall have the meaning ascribed to it in Section 2.11;

**Additional Agent Merchandise** shall have the meaning ascribed to it in Section 2.8;

**Agency Account** shall have the meaning ascribed to it in Section 2.10, the details of which are set out in Schedule A;

**Agency Documents** shall have the meaning ascribed to it in Section 5.1(b);

**Agent** means a contractual joint venture comprised of Merchant Trading Services ULC and GBRP, Inc.;

**Agent's Charge** shall have the meaning ascribed to it in Section 2.24(a);

**Agent's Personnel** shall have the meaning ascribed to it in Section 2.15;

**Agreement** means this agency agreement, together with the attached schedules;

**Approval Date** means the date on which the Approval Order is granted;

**Approval Order** shall have the meaning ascribed to it in Section 3.1(a)(i);

**Benefits** shall have the meaning ascribed to it in Section 1.1;

**BlackRock Kelso** means BlackRock Kelso Capital Corporation;

**Business Day** means any day that is not Saturday, Sunday or a day on which banks (in the City of Toronto) are authorized or required to close;

**CCAA** shall have the meaning ascribed to it in the recitals;

**CCAA Proceedings** means the proceedings commenced by the Companies pursuant to the CCAA;

**Company Consignment Goods** shall have the meaning ascribed to it in Section 2.26;

**Company's Account** means the Company's concentration account the details of which are set out in Schedule A;

**Consignment Proceeds** shall have the meaning ascribed to it in Section 2.26;

**Court** means the Ontario Superior Court of Justice (Commercial List);

**Court Condition Date** shall have the meaning ascribed to it in Section 3.1(a);

**Defective Merchandise** means any item of inventory (i) that is worn, scratched, faded, torn, soiled, mismatched, mismatched, or affected by other similar defects rendering it not first quality and (ii) for which the Agent and the Company agree upon the Retail Value;

**Employees** shall have the meaning ascribed to it in Section 2.15;

**Excluded FF&E** means FF&E identified by the Companies in a schedule to be provided by the Companies to the Agent within 14 days of the Sale Commencement Date;

**Expenses** shall mean actual and paid (whether or not paid during or after the Liquidation Period) Location-level operating expenses that arise during the Liquidation Period and are attributable to the Liquidation Sale, calculated without duplication or profit, limited to the following:

- (a) base payroll (including, for greater certainty, payroll for statutory holidays and vacation pay accruing during the Liquidation Period based on the number of days/hours worked) payable by the Companies to Employees for actual days/hours worked in the conduct of the Liquidation Sale, but not including vacation pay accrued prior to the Liquidation Period;
- (b) actual amounts of any statutory deduction amounts and amounts payable by the Companies for benefits for Employees during the Liquidation Period on terms existing prior to the date of this Agreement, including in respect of Canada Pension Plan, employment insurance, employer health tax, workers compensation, lifestyle benefit programmes, long term disability, sick days, birthday days and bereavement days and all other benefits, insurance, and coverages and an amount equal to the accruals for self-insured benefits (all being pro-rated for the Liquidation Period), more clearly defined in Section 2.14 (collectively, the "**Benefits**") capped at 11% of the aggregate base payroll for all Locations for the Liquidation Period; Benefits specifically exclude maternity leave or other leaves of absence (unless insured as part insurance described in this Section 1.1(b) outlined as a Benefit in this Section 1.1(b)), termination or severance pay, union dues, pension benefits and similar contributions;
- (c) 50% of the fees and costs of the inventory taking service to conduct the Inventory Taking;
- (d) all costs and expenses associated with Agent's on-site supervision of the Locations, including (but not limited to) any and all fees, wages, bonuses, benefits, and deferred compensation of Agent's supervisors and other field personnel and travel to, from or between the Locations and incidental out-of-pocket and commercially reasonable expenses relating thereto (including reasonable and documented corporate travel to monitor and manage the Location), and third party payroll fees, costs, and expenses;
- (e) postage, courier and overnight mail charges to and from or among the Locations and central office to the extent relating to the Liquidation Sale;
- (f) advertising, promotional (including sign walkers and direct mailings), marketing (under Section 2.21(a)(iii)), and signage (including banners (interior and exterior) and in-store signs) expenses including costs of production (at the Companies contract rates, if available);
- (g) to the extent not included in Occupation Costs, long distance telephone expenses from the Locations incurred in the conduct of the Liquidation Sale;
- (h) credit card and bank card fees, chargebacks relating to the Merchandise sold during the Liquidation Period and discounts and the costs associated with the Company's credit card systems;

- (i) costs of security personnel in the Locations;
  - (j) costs of transfers, consolidation, and delivery of Merchandise between and among the Locations during the Liquidation Period at the Agent's direction;
  - (k) Retention Bonuses for Employees;
  - (l) Agent's reasonable legal fees and expenses, and other Transaction costs;
  - (m) costs and expenses of additional supplies (excluding those located at the Locations on the Sale Commencement Date) if requested by Agent;
- 
- (n) actual Occupation Costs per Location on a per diem basis for such period of time as the Liquidation Sale is conducted at each Location in an amount not to exceed the respective actual per diem totals for each Location set forth on **Schedule G**;
  - (o) costs and expenses of permitting to the extent applicable, if any;
  - (p) to the extent not included in Occupation Costs, cash register maintenance;
  - (q) all costs of the Agent related to insurance maintained in accordance with Section 2.20(a);
  - (r) to the extent not included in Occupation Costs, all costs related to leases pertaining to store level assets listed in **Schedule D**;
  - (s) the costs and expenses listed in Section 2.14(b);
  - (t) to the extent not included in per diem totals, Locations' snow and trash removal;
  - (u) Locations' cash theft and other cash shortfalls in the cash registers;
  - (v) costs and expenses associated with temporary help (which may be coordinated and implemented using the Company's ordinary course practices) if requested by Agent;
  - (w) bank service charges (for Locations, Company corporate accounts, and the Agency Account), cheque guarantee fees, and bad cheque expenses, to the extent attributable to the Liquidation Sale; and
  - (x) such additional costs that the parties agree is an "Expense" pursuant to this Agreement.

~~Provided that, the Agent's expenses in subsections (d)(f) and (l) above shall not exceed \$950,000 in aggregate without the prior consent of the Companies, the Monitor and Wells Fargo. For greater clarity any disbursement of Expenses from the Agency Account pursuant to Section 2.10(b), will be subject to prior consent of the Monitor;~~

**Governmental Authority** means any (a) multinational, federal, provincial, territorial, state, municipal, local or other governmental or public department, central bank, court, commission, board, tribunal, bureau or agency, domestic or foreign, (b) any subdivision or authority of any of the above, or (c) any quasi-governmental or private body exercising any regulatory, expropriation or tax authority under or for the account of any of the above;

**Greeting Card Inventory** means all greeting cards, holiday cards, and similar cards;

**Gross Rings** shall have the meaning ascribed to it in Section 2.4;

**Gross Rings Period** shall have the meaning ascribed to it in Section 2.4;

**File** means, together, the "21- Store Inventory SKU Feb 23 2013.xlsx" and the "SKU\_LISTING.CSV" files in the dataroom established by the Companies in connection with the Transaction;

**Final Instalment** shall have the meaning ascribed to it in Section **Error! Reference source not found.**;

**First Instalment** shall have the meaning ascribed to it in Section 2.6(a);

**FF&E** means furnishings, removable trade fixtures, equipment and improvements to real property which are located in the Locations and owned by the Companies;

**FF&E Commission** shall have the meaning ascribed to in Section 2.27;

**Initial Order** shall have the meaning ascribed to it in the recitals;

**Interim Occupation Period** shall have the meaning ascribed to it in Section 3.2;

**Inventory Date** shall have the meaning ascribed to it in Section 2.4;

**Inventory Taking** shall have the meaning ascribed to it in Section 2.4;

**Laws** means any and all (a) laws, constitutions, treaties, statutes, codes, ordinances, orders, decrees, rules, regulations and municipal by-laws, (b) judicial, arbitral, administrative, ministerial, departmental or regulatory judgments, orders, decisions, rulings or awards of any Governmental Authority, (c) policies, guidelines and protocols to the extent they have force of law and, (d) general principles of common or civil law;

**LC Date** shall have the meaning ascribed to it in Section 2.7(a);

**Letter of Credit** shall have the meaning ascribed to it in Section 2.7(a);

**Liquidation Period** means the period during which the Merchandise is being sold by the Agent pursuant to this Agreement from the Sale Commencement Date to the date on or before the applicable date set out in Section 2.12;

**Liquidation Sale** means the sale of the Merchandise during the Liquidation Period in accordance with this Agreement;

**Locations** means those store locations described in **Schedule B**;

**Merchandise** means (i) the first quality, finished goods inventory that is owned by the Companies located at the Locations at the commencement of the Liquidation Sale (ii) Defective Merchandise, (iii) Greeting Card Inventory, and (iv) Out of Season Inventory, but excludes:

- (a) goods which belong to third parties including sublessees, licensees or concessionaires of the Companies;
- (b) goods that would be "Defective Merchandise" but for the parties inability to agree upon the Retail Value of such goods;
- (c) FF&E;
- (d) Additional Agent Merchandise;

- (e) Company Consignment Goods; and
- (f) goods held by the Company on memo, on consignment, or as bailee.

**Monitor** means Ernst & Young Inc. in its capacity as monitor pursuant to the Initial Order;

**Net Minimum Guaranteed Amount** means the amount referred to in Section 2.5(a);

**Net Minimum Guaranteed Percentage** means the amount referred to in Section 2.5(a);

**Occupation Agreements** means the leases, subleases or other occupation agreements to which TBSHI or TBSI is a party relating to the Locations;

**Occupation Costs** means the costs and obligations that TBSHI or TBSI, as applicable, is responsible for under the Occupation Agreements, which may include, base rent, percentage rent, HVAC, utilities, CAM, real estate and use taxes, the Companies' association dues and expenses, building insurance relating to the Locations, base telephone charges, trash removal, the Companies' liability insurance, building maintenance, landscaping and structural repairs, building alarm service and alarm service maintenance, and rental for furniture, fixtures and equipment;

**Out of Season Inventory** means all Christmas, Halloween, and Valentine's Day inventory and other inventory related to holidays that do not occur during the Liquidation Period;

**Overfunded Amounts** shall have the meaning ascribed to it in Section 2.6(c);

**Payroll Adjustment Period** shall have the meaning ascribed to it in Section 2.14(e);

**Payroll Expenses** means (a) and (b) under the definition of "Expenses" at Section 1.1;

**Pre-Sale Returned Merchandise** shall have the meaning ascribed to it in Section 2.23(d);

**Privacy Policy** means the privacy policy of the Companies as set out on their websites at [www.tbsstores.com](http://www.tbsstores.com);

**Property** means all of the property (present and future, wherever situate), assets and undertaking of the Companies including the Merchandise;

**Refund** shall have the meaning ascribed thereto in Section 2.23(d);

**Retail Value** means for each item of Merchandise, on a store by store basis, the lower of (i) the lowest of the hard-marked, stickered, ticketed, or shelf price or (ii) the file (SKU report) price;

**Retention Bonus** shall have the meaning ascribed to it in Section 2.15(d);

**Sale Commencement Date** means April 1, 2013;

**Sale Guidelines** means the sale guidelines annexed as **Schedule H**;

**Sales Taxes** shall have the meaning ascribed to it in Section 2.19;

**Second Instalment** shall have the meaning ascribed to it in Section 2.6(b);

**TBSHI** means The Bargain! Shop Holdings Inc.;

**TBSI** means TBS Stores Inc.;

**Transaction** means the liquidation of the Merchandise contemplated by this Agreement;

**Wells Fargo** means Wells Fargo Capital Finance Corporation.

## 1.2 Extended Meanings

Words importing the singular include the plural and vice versa, words importing gender include all genders and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term "including" means "including, without limitation," and such terms as "includes" have similar meanings.

## 1.3 Schedules, etc.

The following Schedules are incorporated in and form part of this Agreement:

Schedule "A":	Account Information
Schedule "B":	Locations
Schedule "C":	Form of Approval Order
Schedule "D":	Leases for Store Level Assets
Schedule "E":	Adjustments to the Net Minimum Guaranteed Amount
Schedule "F":	Companies policies regarding employee conduct
Schedule "G"	Per Diem Occupancy Costs
Schedule "H"	Sale Guidelines
Schedule "I"	Letter of Credit

## Section 2 - APPOINTMENT OF AGENT AND CONSIDERATION

### 2.1 Appointment of Agent

The Companies hereby appoint the Agent, and the Agent agrees to serve as the Companies' exclusive agent for the limited purpose of conducting the Liquidation Sale at the Locations in accordance with the terms and conditions of this Agreement.

The Agent hereby covenants that it will not hold itself out as Agent of the Companies except as specifically provided for in this Section 2.1 and that the Agent's authority as Agent of the Companies is limited to the powers specifically provided for in this Agreement.

### 2.2 The Monitor

The Agent acknowledges that the Monitor shall be entitled but not obligated to assist the Companies with respect to any or all of their respective obligations under this Agreement whether specifically stated or not.

### 2.3 No Warranty

The Agent covenants that it has made such inspections of the Merchandise as it deems appropriate and that neither the Companies nor the Monitor have made to the Agent or any other person any



representation, warranty or condition, whether statutory (including under the *Sale of Goods Act* (Ontario) or similar legislation), express or implied, oral or written, legal, equitable, collateral or otherwise, as to title, encumbrances, fitness for purpose, marketability, condition, quantity or quality thereof or in respect of any other matter or thing whatsoever.

The parties agree that from the date hereof through to the Sale Commencement Date, there shall be no additional promotions and/or discounting above and beyond the level of promotional activity now in place any of the Locations.

#### 2.4 Physical Inventory

The Agent and the Companies shall cause to be taken a physical inventory of the Merchandise located at the Locations, by RGIS Canada, commencing, subject to the inventory taking service's availability, no later than four Business Days from the Sale Commencement Date or as the parties shall otherwise agree (the "**Inventory Taking**" and the date on which the Inventory Taking is taken at a Location shall be referred to as the "**Inventory Date**"), using such procedures as the parties may agree, in order to confirm the physical description, quantity and Retail Value of the Merchandise. Fifty-percent of the cost of the Inventory Taking shall be included as an Expense under Section 2.14 hereof and fifty percent of the cost shall be borne by the Companies. The Companies, the Monitor and the Agent shall each be entitled to have representatives present during the Inventory Taking and shall each have the right to review and verify the listing and tabulation of the inventory taking service. The Companies agree that during the conduct of the Inventory Taking at each Location, such Location shall be closed to the public and no sales or other transactions shall be conducted.

For the period from the Sale Commencement Date until the Inventory Date for each Location (the "**Gross Rings Period**"), the Company and Agent shall keep a strict count of cash register receipts and reports to determine the actual Retail Value of the Merchandise sold by SKU and retail price ("**Gross Rings**") during the Gross Rings Period. All such records and reports shall be made available to the Company and Agent during regular business hours upon reasonable notice. Any Merchandise included in the Liquidation Sale using the Gross Rings shall be included in Merchandise.

With respect to Defective Merchandise, the Company and Agent shall agree upon the Retail Value of each such item of inventory during the Inventory Taking process. With respect to Greeting Card Inventory and Out of Season Inventory, the Retail Value of each such item shall be equal to the lower of (i) Retail Value and (ii) 50% of the original retail price.

#### 2.5 Payment by Agent

- (a) As a guarantee of Agent's performance hereunder, the Companies shall receive from the Agent an amount (the "**Net Minimum Guaranteed Amount**") equal to 43.25% of the Retail Value of the Merchandise (the "**Net Minimum Guaranteed Percentage**") based on the Inventory Taking conducted pursuant to Section 2.4.
- (b) Any adjustments to the Net Minimum Guaranteed Amount shall be made in accordance with Section 2.25 and the attached **Schedule E**.

#### 2.6 Payment of Net Minimum Guaranteed Amount

The Agent shall pay the Net Minimum Guaranteed Amount as follows:

- (a) Promptly following the issuance of the Approval Order, an amount equal to 75% of the estimated Net Minimum Guaranteed Amount (the "**First Instalment**"), which estimate shall be based on the Retail Value of the Merchandise and the quantities reflected on the Companies' most recent stock status report available. Such amount shall be deposited in the Company's Account (and for greater certainty shall not be held by the Monitor in the

Agency Account). The Agent shall initiate a wire transfer payable to the Company to be deposited in the Company's Account promptly following the issuance of the Approval Order (and, in any event no later than the Business Day after the Approval Date) and provide the Company, Wells Fargo and the Monitor with a routing confirmation number.

- (b) Subject to Section **Error! Reference source not found.**, the balance of the Net Minimum Guaranteed Amount (the "**Second Instalment**"), after crediting the amount paid under Section 2.6(a) above, shall be paid to the Companies within two Business Days of the conclusion of the Inventory Taking in accordance with Section 2.4, such amount to be paid in the same manner as subsection (a) above (and for greater certainty shall not be held by the Monitor in the Agency Account);
- (c) In the event that the Agent and the Companies disagree on the Retail Value of any Merchandise, the Agent may withhold the Net Minimum Guaranteed Amount payable with respect to such unreconciled Merchandise from the Second Instalment pending reconciliation of the Inventory Taking. Following the reconciliation of the Inventory Taking by the Companies and the Agent (which reconciliation shall be completed no later than seven Business Days after receipt of the Inventory Taking report), the final balance of the Net Minimum Guaranteed Amount will be adjusted in accordance with the reconciliation of the Inventory Taking (the "**Final Instalment**") and the Agent shall forthwith pay the Companies the Final Instalment, if any, in the same manner as Section 2.6(a) above (and for greater certainty the Final Instalment shall not be held by the Monitor in the Agency Account);
- (d) In the event that Agent overfunds any portion of the Net Minimum Guaranteed Amount, Expenses, or other amounts under this Agreement to the Companies (the "**Overfunded Amounts**"), the Companies shall remit the Overfunded Amounts to the Agent within two (2) Business Days after Agent's request, subject to review by the Monitor to verify the Overfunded Amount.

All monies payable to the Company pursuant to Section 2.6(a) shall be paid by wire transfer, made payable to the Company to be deposited in the Company's Account. All monies payable to the Company pursuant to subsections (b)**Error! Reference source not found.**(c) and (d) shall be paid by wire transfer, certified cheque or draft drawn on a major Canadian bank, made payable to the Company to be deposited in the Company's Account.

## 2.7 Letter of Credit

- (a) As security for the Agent's obligations under this Agreement, and in addition to the Agent's indemnification obligations under this Agreement, within one Business Day after the Approval Date, the Agent shall furnish the Companies with an irrevocable standby Letter(s) of Credit (in form and substance satisfactory to the Company and Wells Fargo) naming the Company as beneficiary in the aggregate original face amount equal to twenty-five percent (25%) of the estimated Net Minimum Guaranteed Amount plus \$1,293,000 (based on an estimate of three (3) weeks of Expenses), which shall be substantially in the form of **Schedule I** hereof (collectively, the "**Letter of Credit**"). The Letter of Credit shall have an expiry date of no earlier than July 31, 2013 (the "**LC Date**").
- (b) At the Agent's request (which request shall not be made more frequently than bi-weekly and shall not be made by the Agent until the Companies have received the Second Instalment), the Agent may, with the consent of the Companies and Wells Fargo, take all actions reasonably required to reduce the Letter of Credit to the amount of the Net Minimum Guaranteed Amount then remaining unpaid (as estimated by the Companies) and an amount equivalent to three (3) weeks of estimated Expenses.

- (c) If the Companies have not received the full amount of the Net Minimum Guaranteed Amount at least ten (10) days prior to LC Date or any subsequent expiry date, the Agent shall provide an amended Letter of Credit, with the sole amendment being the extension of the LC Date (or further extending, as the case may be) by no less than sixty (60) days from the LC Date (or any subsequent extension thereof). If the Agent has not delivered such amended Letter of Credit, then all amounts hereunder (being, without limitation, the balance of the Net Minimum Guarantee Agreement and Expenses) shall become immediately due and payable and the Companies shall be entitled to immediately draw the full amount of the Letter of Credit and apply such amount to the amounts due and owing hereunder. After applying such draw on the Letter of Credit to the amounts owing to the Companies under this Agreement, the Companies shall hold the balance of the amount drawn as security for amounts that may become due and payable to the Companies hereunder.
- (d) In the event that Agent fails to pay the Net Minimum Guaranteed Amount, or portion thereof, or any Expenses or other obligations hereunder when due, the Companies may draw on the Letter of Credit in an amount to equal such unpaid obligations after providing the Agent with two (2) Business Days advance notice and provided the Agent has not paid such unpaid obligations prior to the expiration of such two (2) Business Day period.

## 2.8 Augmented Inventory

Agent shall be entitled, at its expense, to include in the Liquidation Sale at the Location additional goods procured by Agent of like kind, and no lesser quality to the Merchandise located in the Locations ("**Additional Agent Merchandise**"). At all times and for all purposes, the Additional Agent Merchandise and its proceeds shall be the exclusive property of Agent and the Approval Order shall provide as such. The transactions relating to the Additional Agent Merchandise are, and shall be construed as, a true consignment from Agent to the Company. The Additional Agent Merchandise shall be at all times subject to the control of Agent at its sole risk and shall not be insured by the Companies. In order to distinguish the Additional Agent Merchandise from the Merchandise located in the Locations, Agent shall mark the Additional Agent Merchandise using either a "dummy" SKU or department number or in such other manner so as to distinguish the sale of Additional Agent Merchandise from the sale of Merchandise. Agent shall pay the Companies a fee equal to 4% of the gross receipts (net of Sales Taxes) from the sale of Additional Agent Merchandise.

## 2.9 Allocation of Sale Proceeds

Subject to provision for and remittance of all Sales Taxes collected, the sale proceeds arising out of the Liquidation Sale with respect to the Merchandise shall be allocated and paid to the parties out of the Agency Account in the manner set out in Section 2.10.

## 2.10 Trust Account for Sale Proceeds

- (a) The Monitor (on behalf of the Companies and the Agent) shall establish one trust account at a Schedule I Bank (the "**Agency Account**"). The Agency Account shall be in the name of the Monitor. All proceeds (including Sales Taxes) from the sale of Merchandise, Agent's Additional Merchandise, Company Consignment Goods and FF&E, during the Liquidation Sale shall be: (i) deposited by the Agent on a daily basis to the Company's Location-specific deposit accounts; and (ii) such deposits, together with credit card proceeds, shall be wired by the Company to the Agency Account on a daily basis. Disbursements from the Agency Account, including reimbursements for remitted Sales Taxes, may only be made by cheque or wire transfer by the Monitor. No disbursements will be made by the Monitor without prior approval of the Agent and the Companies, or pursuant to an order of the Court. The Monitor will provide the Agent with daily reports of any activity in the Agency Account. The Monitor shall maintain a reserve in the Agency Account for reimbursement of unremitted Sales Taxes.

- (b) Following the payment of the First Instalment and the delivery to the Companies of the Letter of Credit and as often as practicable, but in no event less than weekly, the Monitor, subject to the prior approval of the Agent and the Companies or pursuant to an order of the Court, will disburse funds on deposit in the Agency Account representing proceeds from the sale of Merchandise, Agent's Additional Merchandise, Company Consignment Goods and FF&E, during the Liquidation Sale (subject to the payment of Expenses and unremitted Sales Taxes, if any), as follows in the following order of priority:

- (i) the Companies shall have received all outstanding reimbursements for remitted Sales Taxes;
- (ii) the Companies shall have received their portion if any of: (1) the Consignment Proceeds; (2) gross receipts (net of Sales Taxes) from the sale of Additional Agent Merchandise; and (3) proceeds from the sale of FF&E;
- (iii) the Agent shall have received its portion if any of: (1) the Consignment Proceeds; (2) gross receipts (net of Sales Taxes) from the sale of Additional Agent Merchandise; and (3) proceeds from the sale of FF&E;
- (iv) the Companies shall have received all outstanding reimbursements for Expenses paid by the Companies, from time to time;
- (v) the Agent shall be reimbursed for all Expenses incurred by Agent;
- (vi) the Agent shall receive an amount equal to the adjusted Net Minimum Guaranteed Amount actually paid to the Companies by the Agent in accordance with Sections 2.6 and 2.25;
- (vii) thereafter, the Agent shall receive an amount equal to 1.5% of the Retail Value of the Merchandise; and
- (viii) thereafter, the Companies shall receive 70% of the remaining proceeds from the sale of Merchandise and the Agent shall receive 30% of the remaining proceeds from the sale of Merchandise.

The Agent shall be entitled to retain all amounts received by it pursuant to this Section as its compensation for performing its obligations pursuant to this Agreement.

All monies payable to the Company shall be paid by wire transfer, certified cheque or draft drawn on a major Canadian bank, made payable to the Company to be deposited in the Company's Account.

- (c) On each Thursday during the Liquidation Period, commencing on the second Thursday after the Sale Commencement Date, the Companies and Agent shall cooperate to jointly prepare a reconciliation of the weekly proceeds from the sale of Merchandise, Consignment Proceeds; gross receipts from the sale of Additional Agent Merchandise, proceeds from the sale of FF&E, Expenses, Sales Taxes, and any other Sale related items that either party may reasonably request, in each case for the prior week or partial week (i.e. Monday through Sunday), all pursuant to procedures agreed upon by the Companies, the Monitor, and the Agent. Within thirty (30) days after the end of the Liquidation Period, the Companies and Agent shall jointly prepare a final reconciliation of the Liquidation Sale, including, without limitation, a summary of proceeds (net of Sales Taxes) from the sale of Merchandise, Consignment Proceeds; gross receipts from the sale of Additional Agent Merchandise, proceeds from the sale of FF&E, Expenses, Sales Taxes, and any other accounting related to the Liquidation Sale.

#### 2.11 Accounting for Sale Proceeds

- (a) The Companies shall provide to the Agent and the Monitor, on a daily basis, a listing of the deposits received at the Location deposit accounts and transferred to the Agency Account together with a detailed listing of the Merchandise, Company Consignment Goods, and Additional Agent Merchandise sold, such listing to include the prices for all Merchandise, Company Consignment Goods, and Additional Agent Merchandise sold.
- (b) The Agent shall provide to the Companies and the Monitor, on a daily basis, a detailed listing of the FF&E sold, such listing to include the prices for all FF&E sold.
- (c) During the course of the Liquidation Sale, the Companies and the Monitor shall have access to the Locations and access to all of the books, records and other accounting documents of the Companies and the Agent related to the Transaction and shall be entitled to all information necessary in order to investigate and audit the information provided in (a).
- (d) The Agent shall provide the Companies and the Monitor with a complete, detailed final accounting with respect to the sale of all Merchandise, Company Consignment Goods, and Additional Agent Merchandise and FF&E, arising out of the Liquidation Sale within thirty (30) days following the expiration of the Liquidation Period (the "**Accounting Deadline**"), unless the Agent and the Companies agree to extend the Accounting Deadline to provide for extended sales in accordance with Section 2.21.

#### 2.12 Access to Locations

- (a) The Companies shall provide the Agent with access to the Locations for the purposes of carrying out the Liquidation Sale. The Companies shall be responsible for payment of and shall pay all Occupation Costs for the Locations that are required to ensure the continued occupation of the Locations pursuant to the Occupation Agreements for the purposes of this Agreement until May 31, 2013 and the Agent shall reimburse the Companies for all such Occupation Costs in accordance with Section 2.14; provided, however, that the Agent may terminate the Liquidation Sale at any Location by providing the Companies and the Monitor with at least 15 days' notice setting forth the Locations at which the Liquidation Sale is being terminated prior to May 31, 2013.
- (b) The Agent may elect to occupy one or more of the Locations for an additional 30 days, or such shorter period of time, on a Location by Location basis, as the Agent determines by providing the Companies with not less than 15 days' notice, before the above-mentioned date of May 31, 2013 and any additional period of time shall be subject to the approval of the applicable landlord as may be necessary in the event that notice to disclaim has already been provided to the landlord by the Companies. If the Agent chooses to occupy the Locations for an additional 30-day (or shorter) period in accordance with this Section, the Companies shall pay and the Agent shall be responsible for reimbursing the Companies for payment of all Occupation Costs, for such period of occupation only, relating to such Locations and such Occupation Costs shall be an Expense.
- (c) The Agent, in its sole discretion after consultation with the Companies and the Monitor, shall determine the most cost effective manner to conduct the Liquidation Sale, including the closing of Locations and the consolidation of Merchandise.

#### 2.13 Surrender of Locations

- (a) Subject to the terms and conditions of this Agreement, the Agent shall deliver vacant possession of the Locations to the Companies as soon as possible for each Location

and, in any event, on or before the dates set out in Section 2.12 for each Location (if earlier than the date specified under Section 2.12(a) herein). The Agent agrees to provide, upon execution of this Agreement, a tentative schedule for closing of the Locations and to give the Companies at least 15 days' written notice prior to the surrender of vacant possession of any Location. Except as provided below, the Agent shall be responsible for all costs of clean-up of the Locations and is to leave the Locations in a clean and broom-swept condition and otherwise in the same physical state and condition (reasonable wear and tear excepted) as the relevant Location was found on the Sale Commencement Date. Subject to the Agent's right of abandonment pursuant to Section 2.27, the Agent undertakes to restore the Locations to their condition as at the Sale Commencement Date and repair any damages caused by the Agent, its employees or Employees acting under the direction of the Agent during the Liquidation Period at its sole expense, including but not limited to damage caused in the removal of FF&E disposed of by the Agent.

- (b) The Agent shall not be responsible for the removal or disposition of files or other paper records currently located at the Locations (provided, however, that such files and records shall be maintained in their current storage locations, or alternate locations agreed to by the Companies).
- (c) The Agent agrees to indemnify and hold the Companies harmless from and against all claims for damages, losses or injury resulting from a breach of its obligations under this Section 2.13 and for damages, losses or injury caused to property or persons through the actions or negligence of the Agent or its employees and for those for whom it is responsible at law.
- (d) The Agent shall have no liability for the removal of any FF&E from the Locations that is Excluded FF&E and FF&E not disposed of by the Agent in keeping with Section 2.27 herein.

#### 2.14 Expenses

- (a) The Agent shall be responsible for all Expenses. The Agent shall, on a weekly basis, reimburse the Companies to the extent that such Expenses are paid by the Companies and such amounts paid to the Companies are in addition to and shall not reduce or otherwise affect the amount of the Net Minimum Guaranteed Amount.
- (b) The Agent shall, on the first Business Day of every week during the Liquidation Period, pay \$5,000 per week to the Companies for corporate overhead expenses, which shall include the Companies' central administrative services necessary for the Liquidation Sale.
- (c) The parties hereby acknowledge that during the course of the Liquidation Sale, the Agent shall use the Companies' credit card systems and shall be responsible for all related processing costs and chargebacks related to the Liquidation Sale, which costs shall be an Expense.
- (d) Notwithstanding anything herein to the contrary, there shall be no double counting of Expenses whether or not an Expense is listed in more than one category or in a category and on a schedule.
- (e) Payroll Expenses for the period of time from the end of the immediately preceding payroll period up to the day before the Sale Commencement Date ("**Payroll Adjustment Period**") shall remain the responsibility of the Companies, the amount of which shall be calculated on a pro-rated basis (as number of days in the Payroll Adjustment Period over

fourteen (14) days) based on the amount of Payroll Expenses for the next ensuing payroll period within which the Sale Commencement Date occurs. The reimbursement to the Companies under subsection (a) herein for Payroll Expenses shall occur on the first Business Day following each bi-weekly payroll payment date.

## 2.15 Personnel

- (a) Subject to Section 2.15(c), the Agent shall provide adequate and competent personnel to facilitate the Transaction (the "**Agent's Personnel**"). The Agent's Personnel shall comply with all Laws and the Companies policies regarding employee conduct, as set out in **Schedule F** hereto. It is understood that neither the Companies nor the Monitor are or will be an employer of any such Agent's Personnel or liable to pay any amounts to or with respect to such Agent's Personnel. In addition, the Company shall direct the employees of the Company at the Locations (the "**Employees**") to assist the Agent in conducting the Liquidation Sale. The Company does not warrant or guarantee that the employment of any Employee can be continued for all or any part of the Liquidation Period.
- (b) Employees shall at all times remain employees of the Company, and shall not be considered or deemed to be employees of Agent. The Company and the Agent agree that nothing contained in this Agreement and none of the Agent's actions taken in respect of the Liquidation Sale shall be deemed to constitute an assumption by the Agent of any of the Company's obligations relating to any of the Employees including, without limitation, termination type claims and obligations, or any other amounts required to be paid by contract, statute or law; nor shall the Agent become liable under any collective bargaining or employment agreement or be deemed a joint or successor employer with respect to such Employees. The Company shall not, without the Agent's prior written consent, change the salary or wages or change the benefits for, or pay any bonuses or make any other extraordinary payments to, any of the Employees prior to the expiry of the Liquidation Period, except to the extent such change is in the ordinary course of the Companies' business.
- (c) The Agent may in its discretion stop using any Employee at any time during the Liquidation Sale. In the event that the Agent decides to stop using any Employee, the Agent will use all reasonable efforts to notify the Company and the Monitor at least five days prior thereto, except where the Agent's use of the Employee is terminated for cause (such as dishonesty, fraud or breach of employee duties), in which event no prior notice to either the Company or the Monitor shall be required, provided the Agent shall notify the Company and the Monitor as soon as practicable after such termination. From and after the date of this Agreement and until the expiry of the Liquidation Period, the Company shall not transfer or dismiss Employees of the Locations except "for cause" without the Agent's prior written consent.
- (d) Agent shall have the right to elect to pay, as an Expense, retention bonuses (each a "**Retention Bonus**") (less statutory or other authorized deductions), up to a maximum aggregate amount equal to ten percent (10%) of aggregate base payroll, to certain Employees who do not voluntarily leave employment and whose assignment is not ceased "for cause". Subject only to a limitation of ten percent (10%) of aggregate base payroll, the actual amount of the Retention Bonus to be paid to any Employee shall be in an amount to be determined by Agent, and shall be payable within thirty (30) days after the end of the Liquidation Period, and shall be processed through the Companies' payroll system. Agent shall provide the Companies and Monitor with a copy of Agent's Retention Bonus plan as soon as practicable following the Sale Commencement Date.

## 2.16 Security

The Agent shall be responsible for taking all security measures it deems prudent and the cost of such measures shall be included as Expenses.

#### 2.17 Trade-marks and Trade Names

The Agent shall be permitted to use the names "The Bargain! Shop", "Red Apple", and "My Mark" for the purposes of this Agreement and any advertising pursuant to Section 2.18 during the Liquidation Period. The Agent acknowledges that it is not acquiring any interest in or other rights to the Companies' names and trade-marks.

#### 2.18 Advertising

All advertising copy is to be submitted initially by the Agent to the Companies and the Monitor for approval (which shall not be unreasonably withheld) not less than two Business Days prior to its placement for publication and use by the Agent. If neither the Companies nor the Monitor has objected to the Agent's proposed advertising within such two Business Days, the Companies will be deemed to have approved such advertising. The Agent shall be responsible for paying directly all costs of advertising and such costs shall be an Expense. The Approval Order shall approve, and the Agent shall comply with, the Sale Guidelines. The Agent hereby agrees that following the Agent's delivery of notice under Section 2.12(a), or in any event no later than May 15, 2013, the Companies may post advertising in the Edmonton, Winnipeg and Kitchener stores included in the Locations to draw customers to other stores operated by the Companies.

The Agent agrees to indemnify and hold the Companies harmless from and against all claims resulting from false advertising by the Agent.

#### 2.19 Authorizations and Remittance of Taxes

- (a) The Agent with the assistance and cooperation of the Companies shall be responsible for ensuring that all necessary governmental or other approvals, permits or authorizations are obtained in order to conduct the Liquidation Sale.
- (b) The Agent shall add Sales Taxes to the sales price of Merchandise, Additional Agent's Merchandise, FF&E and Company Consignment Goods and collect Sales Taxes at the time of sale to enable the Companies to remit Sales Taxes as required. The Companies shall ensure that all applicable taxes and duties including goods and services taxes and provincial retail sales taxes ("Sales Taxes") following receipt are remitted to the proper authorities if and when due. Upon providing Sales Taxes to the Companies, Agent shall have no further obligation to the Companies, or any taxing authority on account of Sales Taxes. The Companies and the Monitor will be given access to the computation of gross receipts for verification of all such Sales Tax collections. Provided the Agent performs its responsibilities in accordance with this subsection, the Companies shall indemnify and hold harmless Agent from and against any and all costs, expenses, losses or damages including, but not limited to, reasonable attorneys' fees and disbursements, assessments, fines, levies, or penalties which the Agent sustains or incurs as a result or consequence of the failure by the Companies to remit Sales Taxes when due to the proper taxing authorities and/or the failure by the Companies to file with such taxing authorities all reports and other documents required, by applicable law, to be filed with or delivered to such taxing authorities in relation to the Sales Taxes collected by the Agent and received by the Companies. If the Agent fails to perform its responsibilities in accordance with this subsection, and provided the Companies comply with their obligations in accordance with this subsection, Agent shall indemnify and hold harmless the Companies from and against any and all costs including, but not limited to, reasonable legal fees, assessments, fines or penalties which the Companies sustain or incur as a result or consequence of the failure by Agent to, when required, collect Sales Taxes remit to the Companies, and/or, to the extent Agent is required hereunder to prepare reports and



other documents, the failure by Agent to promptly deliver any and all reports and other documents required to enable the Companies to file any requisite returns with such taxing authorities.

- (c) Sales Taxes remitted by the Companies will be reimbursed from the Agency Account pursuant to Section 2.10(b)(i).
- (d) Without limiting the generality of Section 2.19(a), it is hereby agreed that as the Agent is conducting the Liquidation Sale solely as agent for the Companies, various payments that this Agreement contemplates that one party may make to the other party do not represent consideration for a taxable supply for HST/GST purposes (or for a sale of tangible personal property) and, accordingly do not attract HST/GST (or other Sales Taxes).

## 2.20 Insurance

- (a) The Agent will be responsible for arranging third-party liability insurance with respect to the Agent's occupation and use of the Locations during the Liquidation Period, and the Agent's Additional Merchandise, and shall be responsible for the costs of such insurance as an Expense hereunder. The Agent shall provide proof of such insurance and have the Companies, Wells Fargo and BlackRock Kelso added as additional insured parties. The Companies shall be responsible for arranging or maintaining all of its existing insurance coverage in such amounts as it currently has in effect and shall be responsible for the costs of such insurance until the date the Agent has delivered vacant possession of the Locations to the Companies. The Companies shall provide proof of such insurance in their respective interests and shall use their best efforts to have the Agent added as an additional insured.
- (b) In the event that all or any material part of the Merchandise is destroyed or damaged by fire or other casualty at any time prior to the earlier of: (i) the expiry of the Liquidation Period; or (ii) the transfer of title pursuant to Section 2.21, the insurance proceeds received for such damaged Merchandise shall be deemed to be the proceeds of the Liquidation Sale of such Merchandise for the purposes of this Agreement. The Companies and the Agent agree not to settle any insurance claim without the prior written consent of the other, such consent not to be unreasonably withheld. The Companies shall be responsible for the payment of any deductibles associated with such claims. Notwithstanding anything to the contrary herein, in the event that the Agent elects to remove, move or consolidate Merchandise under Section 2.22(b), the Agent shall do so at its sole risk and liability with respect to any loss or damage thereto while the Merchandise is in transit between the Locations.

## 2.21 Extended Sales

- (a) In the event there are any unsold Merchandise remaining at the end of the Liquidation Period, the Agent shall move such Merchandise to a location or locations to be agreed upon with the Companies for subsequent sale.
- (b) If, at the end of the Liquidation Period, the Agent has paid to the Companies the Net Minimum Guaranteed Amount, the Company shall, at the option of the Agent, transfer title to any unsold Merchandise to the Agent free and clear of all liens, charges and encumbrances.
- (c) Any proceeds (net of any Expenses and Sales Taxes) from the subsequent sale by the Agent of Merchandise moved or transferred under Section 2.21(a) and (b) shall be treated as sales proceeds in accordance with Sections 2.9 and 2.10.

## 2.22 Consolidation of Merchandise

- (a) Subject to Section 2.22(b), the Agent shall not remove any Merchandise from the Locations without the prior written consent of the Companies, Wells Fargo and BlackRock Kelso which consent shall not be unreasonably withheld. The Agent shall submit a written request for such consent setting out details of the proposed movement of the Merchandise not less than two Business Days in advance. If the Companies have not objected to the proposed movement within two Business Days after receipt of such written request, they will be deemed to have approved such request.
- (b) Notwithstanding anything in subsection (a), the Agent may move or consolidate Merchandise from Location to Location, in its discretion, in connection with the closing of locations or the conduct of the Liquidation Sale during the Liquidation Period, or as provided in Section 2.21(a), provided that adequate records of the Merchandise being moved is maintained.

## 2.23 Conduct of the Liquidation Sale

- (a) The Agent shall be permitted to conduct the Liquidation Sale as a "store closing", "sale on everything", "everything must go", or similar themed sale throughout the Liquidation Period. Notwithstanding the foregoing, the Agent shall not conduct the Liquidation Sale as a "going out of business" sale. The Agent shall conduct the Liquidation Sale under the applicable trade name outlined in Section 2.17 and on behalf of the Companies in a commercially reasonable manner and in compliance with the Initial Order and the Approval Order and all Laws. In addition to any other rights granted to the Agent hereunder, in conducting the Liquidation Sale, the Agent, in the exercise of its sole discretion, shall have the right, subject to the immediately preceding sentence:
  - (i) to establish sale prices and implement advertising, signage, and promotion programs consistent with the themes above (including, without limitation, by means of media advertising, banners, A-frame, sign walkers, and similar interior and exterior signs);
  - (ii) to establish Liquidation Sale prices and Location hours;
  - (iii) subject to the Company's Privacy Policy, to use without charge during the Liquidation Period (unless and to the extent included in Expenses), all FF&E, advertising materials, Location-level customer lists and email and mailing lists (with the sender at all times being the Company), internet websites (by way of link only, with the form and content subject to the Company's approval), social media accounts, computer hardware and software, supplies, intangible assets (including the Companies' name, logo and tax identification numbers), Location keys, case keys, security codes, and safe and lock combinations required to gain access to and operate the Locations, and any other assets of the Companies, as the case may be, located at the Locations; and
  - (iv) to transfer Merchandise between Locations.
- (b) The Companies shall provide its central office facilities, POS systems, central and administrative services and personnel to process payroll, perform MIS services, inventory handling and processing, sales audit and cash reconciliation and reporting, and provide other central office services, as the Agent reasonably requests or are necessary for the Liquidation Sale. The Agent shall use the Companies' POS systems for the sale of Merchandise, Additional Agent Merchandise and Company Consignment Goods.

- (c) All sales of Merchandise will be "final sales" and "as is," and all advertisements and sales receipts will reflect the same. The Agent and its employees shall not warrant the Merchandise in any manner, but will, to the extent legally permissible, pass on all manufacturer's warranties to customers, to the extent such exist. The sale of Merchandise shall be free and clear of all liens, claims and encumbrances. All sales will be made only for cash and by debit cards, by approved cheque and by bank credit cards currently accepted by the Companies.
- (d) Agent shall accept returns of merchandise sold by the Company prior to the Sale Commencement Date consistent with the Company's return policy (the "**Pre-Sale Returned Merchandise**"), provided that any item of Pre-Sale Returned Merchandise is saleable as first-quality inventory and is received during the applicable returns period under the Company's return policy and then such item shall be included in the Sale and as Merchandise at the Retail Value multiplied by the then prevailing discount offered by Agent for such item (or for such substantially similar item if the same item is not then being offered for sale). The Company's return or exchange policy is sixty (60) days from the date of purchase with the receipt provided that any item of Pre-Sale Returned Merchandise is saleable as first-quality inventory with original packaging and in un-used condition. The aggregate Retail Value of the Merchandise shall be increased by the applicable Retail Value of any Pre-Sale Returned Merchandise included in Merchandise as provided for in this Section. Agent shall reimburse customers for Pre-Sale Returned Merchandise in the same tender as such item was purchased (as the case may be, the "**Refund**"). The Company shall promptly reimburse Agent in cash for any Refunds that the Agent is required to issue to customers in respect of any Pre-Sale Returned Merchandise as part of the weekly reconciliation process and such amounts shall not reduce proceeds under this Agreement.
- (e) Agent shall accept valid gift certificates, gift cards, and Merchandise credits issued by the Company prior to the Sale Commencement Date. The Company shall reimburse Agent in cash for all of the gift certificates, gift cards, and Merchandise credits honoured, and such amounts shall be reconciled, remitted and deposited in the Agency Account as part of the weekly reconciliation. Agent shall not honour employee discounts.
- (f) The Agent shall have the right to use, without charge, all existing supplies located at the Locations. In the event that additional supplies are required in any of the Locations during the Liquidation Sale and requested by Agent, the Companies agree to promptly provide the same to Agent, if available, for which Agent shall reimburse the Companies at the Companies cost therefor. The Companies do not warrant that the existing supplies in the Locations as of the Sale Commencement Date are adequate for the purposes of the Liquidation Sale.

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#### 2.24 Grant of Security Interest.

- (a) To secure the obligations of the Companies to the Agent hereunder, the Approval Order shall grant the Agent a first priority security interest in, and lien and charge upon, all goods constituting Merchandise and all proceeds received therefrom (the "**Agent's Charge**") which Agent's Charge shall attach and become effective upon payment of the First Instalment and delivery of the Letter of Credit.
- (b) The Approval Order shall provide that the Agent's Charge shall be automatically perfected without the necessity of the filing of financing statements or other documents. The Companies shall execute and deliver all such documents and take all such other actions as are reasonably required to perfect and maintain such security interest as a valid and perfected first priority security interest.

#### 2.25 Value of Merchandise

As of the Sale Commencement Date, goods constituting Merchandise located at the Locations shall have a Retail Value of not less than \$19,600,000. To the extent the Retail Value of the Merchandise on such date is less than \$19,600,000, the Net Minimum Guaranteed Percentage shall be adjusted as per **Schedule E** attached.

#### 2.26 Excluded Goods

The Company shall retain all rights and responsibility for any goods not included as Merchandise hereunder and shall remove such goods, other than FF&E, from the Locations prior to the Sale Commencement Date, or as soon thereafter as reasonably practicable. If the Company elects at the beginning of the Liquidation Period, Agent shall accept those goods not included as "Merchandise" hereunder and as identified by the Company for sale as "**Company Consignment Goods**". The Agent shall retain twenty percent (20%) of the Consignment Proceeds (as defined below) for all sales of the Company Consignment Goods, and the Company shall receive eighty percent (80%) of the Consignment Proceeds in respect of such sales. Where Company Consignment Goods are paid for in cash, the Agent shall deposit the Company's share of the Consignment Proceeds on a weekly basis, immediately following the weekly reconciliation by the Company and Agent hereof. Where Company Consignment Goods are paid for by way of credit or debit card, the Company shall, on a weekly basis immediately following the weekly reconciliation by the Company and Agent hereof: (A) remit the Agent's portion of the Consignment Proceeds to the Agent; and (B) transfer the Company's portion of the Consignment Proceeds in the Agency Account. Except as expressly provided in this Section, Agent shall have no cost, expense or responsibility in connection with any goods not included in Merchandise, including but not limited to, sales commissions and percentage rent. "**Consignment Proceeds**" shall mean the total amount (in dollars) of all sales of the Company Consignment Goods made under this Agreement, but exclusive of (i) Sales Taxes and (ii) returns, allowances and customer credits.

#### 2.27 Sale of FF&E

With respect to FF&E, Agent shall have the exclusive right to dispose of all of the FF&E, other than the Excluded FF&E, located in the Locations. For greater certainty, the Agent shall not have the right to dispose of Excluded FF&E without prior written consent of the Company. Agent shall be entitled to receive (i) a commission equal to twenty percent (20%) (the "**FF&E Commission**") of the gross receipts from the sale of such FF&E (net of Sales Taxes), plus (ii) reimbursement by the Company of Agent's out of pocket costs and expenses related to the disposition of the FF&E in accordance with a budget mutually agreed upon between the Company and Agent. The Agent shall be responsible for supervising the workmanlike removal of any FF&E sold by the Agent, and ensure such sold FF&E has been removed prior to surrendering the Location in accordance with Section 2.13. Agent may abandon, in place, in a neat and orderly manner any unsold FF&E at the Locations.

#### 2.28 Extension of Credit

The Agent shall not extend credit (other than by way of credit cards) to any customer in the course of the Liquidation Sale.

### Section 3 - ORDERS

#### 3.1 Orders

- (a) The obligations of the Companies and the Agent hereunder are subject to and conditional upon the following:
  - (i) An Order shall have been granted on or prior to March 28, 2013 (the "**Court Condition Date**") by the Court, or such other court as has jurisdiction in the matter in Ontario, substantially in the form attached hereto as **Schedule C** and otherwise satisfactory to the Companies, the Monitor, the Agent, Wells Fargo and

BlackRock Kelso approving this Agreement and the Transaction as contemplated by this Agreement (the "Approval Order"); and

- (ii) no order shall have been made which in any material respect limits or impairs the ability of the Agent to carry out the terms of this Agreement and to obtain the benefits therefrom.
- (b) In the event that the Approval Order has not been granted by the Court Condition Date, the Companies and the Agent may elect, in writing, to extend the Court Condition Date to allow the Companies to continue to attempt to obtain the Approval Order.

### 3.2 Interim Occupation

Provided that the Approval Order has not been granted as of the date hereof, pending the granting of the Approval Order but before the Court Condition Date, subject to the terms of the Initial Order, the Agent shall be entitled to have reasonable access to the Locations during normal business hours at its expense, for the sole purpose of preparing for the Liquidation Sale ("Interim Occupation Period"). The Agent's occupation and use of the Locations during the Interim Occupation Period shall be subject to the terms set out in Sections 2.12 and 2.13. The Interim Occupation Period shall be deemed to be automatically terminated if the Approval Order has not been granted on or before the Court Condition Date and the Agent shall thereupon vacate the Locations and comply with its obligations as set out in Section 2.13.

## Section 4 - TERMINATION

### 4.1 Termination

- (a) If the Approval Order has not been obtained on or before the Court Condition Date, this Agreement shall be terminated without any penalty or liability whatsoever to the Companies or the Agent other than the return by the Companies to the Agent of the First Instalment, if paid prior to the date of the Approval Order. Each of the Companies and the Agent shall be released from all obligations hereunder except for the obligations of the Agent, if any, arising under or as a result of the provisions of Sections 2.13 hereof.
- (b) If, prior to the Liquidation Period, the condition in Section 3.1(a)(ii) has not been or is no longer satisfied, either party may, at its option, choose to terminate this Agreement as provided for in (a) above; provided that if the amount contemplated in Section 2.5(a) has also been paid, the Companies shall also return such amount and any interest which has accrued on such amount up to the Court Condition Date to the Agent.
- (c) If, after the commencement of the Liquidation Period, the condition in Section 3.1(a)(ii) is no longer satisfied, the parties shall, using reasonable efforts, attempt to obtain an Order of the Court in order to comply with such condition. Thereafter, either party may, at its option, choose to terminate this Agreement.
- (d) In the event that this Agreement is terminated pursuant to Section 4.1(c) at any time after the amount contemplated in Section 2.5(a) has been paid, (i) the Liquidation Period, if commenced, shall be deemed to have expired upon such termination, (ii) the parties shall make an adjustment to the Retail Value of the Merchandise and the Net Minimum Guaranteed Amount to reflect the impact of such order or appointment on the ability of the Agent to carry out the terms of this Agreement and to obtain the benefits therefrom, and (iii) notwithstanding the termination of this Agreement, the provisions of Section 2.11 shall survive and apply *mutatis mutandis*.

## Section 5 - REPRESENTATIONS AND WARRANTIES

### 5.1 Representations and Warranty of the Companies

The Companies represent and warrant to the Agent that Recitals A, B and C of this Agreement are true in substance and fact. Additionally, the Companies hereby represent, warrant, covenant and agree as follows:

- (a) The Companies (i) are corporations duly established under the laws of the Province of New Brunswick, and (ii) are and during the Liquidation Period will continue to be, duly authorized, and qualified to do business and in good standing in each jurisdiction where the nature of their business or properties requires such qualification, including all jurisdictions in which the Locations are located, except, in each case, to the extent that the failure to be in good standing or so qualified could not reasonably be expected to have a material adverse effect on the ability of the Companies to execute and deliver this Agreement and perform fully its obligations hereunder.
- (b) Subject to the entry of the Approval Order: (i) the Companies have the right, power and authority to execute and deliver this Agreement and each other document and agreement contemplated hereby (collectively, together with this Agreement, the "Agency Documents") and to perform the obligations of the Companies thereunder; (ii) all necessary action has been taken by or on behalf of the Companies to authorize the execution and delivery by the Companies of the Agency Documents and no further consent or approval is required for the Companies to enter into and deliver the Agency Documents, to perform the obligations thereunder, and to consummate the Transaction; (iii) each of the Agency Documents has been duly executed and delivered by or on behalf of each Company and constitutes the legal, valid and binding obligation of each Company enforceable in accordance with its terms; and (iv) no court order or decree of any federal, state, local, or provincial governmental authority or regulatory body is in effect that would prevent or materially impair, or is required for the Companies consummation of, the transactions contemplated by this Agreement, and no consent of any third party which has not been obtained is required therefor, other than as shall be obtained prior to the Sale Commencement Date or identified by the Companies to the Agent on or prior to the Sale Commencement Date, except for any such consent the failure of which to be obtained could not reasonably be expected to have a material adverse effect on the ability of the Companies to execute and deliver this Agreement and perform fully the obligations of the Companies hereunder.
- (c) The Company owns, and will own at all times during the Liquidation Sale, good and marketable title to all of the Merchandise and FF&E.
- (d) The Company has maintained its pricing files (including the File) in the ordinary course of business. The Company represents that (i) the ticketed prices of all items of Merchandise do not and shall not include any Sales Taxes and (ii) all cash registers located at the Locations are programmed to correctly compute all Sales Taxes required to be paid by the customer under applicable law.
- (e) Through the Sale Commencement Date, the Company shall ticket or mark all items of inventory received at the Locations prior to the Sale Commencement Date in a manner consistent with similar Merchandise located at the Locations. The removal from such merchandise of any sale stickers or other markings indicating items are on sale prior to the Sale Commencement Date, if any, will be done only in the ordinary course of the Company's business.

- (f) To the best of the Company's knowledge and without independent investigation, all Merchandise is in compliance with all applicable federal, state, provincial or local product safety laws, rules and standards.
- (g) The Companies shall, throughout the Liquidation Period, use commercially reasonable efforts to maintain in good working order, condition and repair all cash registers, heating systems, air conditioning systems, elevators, escalators and all other mechanical devices necessary or appropriate for the conduct of the Liquidation Sale at the Locations. Except any amounts owing as a result of the commencement of the CCAA Proceedings, and absent a bona fide dispute, throughout the Liquidation Period, the Companies shall remain current on all expenses and payables necessary for the conduct of the Liquidation Sale (other than those relating to any period prior to the commencement of the CCAA Proceedings), subject to any restrictions that may be imposed under the CCAA.
- (h) Except as otherwise done in the ordinary course, since February 1, 2013, the Company has not marked up or raised, and will not mark up or raise, the price of any items of Merchandise, or removed or altered any tickets or any indicia of clearance merchandise. No such Merchandise has been ticketed or marketed in contemplation of the Liquidation Sale. From the date of the execution of this Agreement, the Company has not and shall not purchase or transfer to or from the Locations any merchandise or goods outside the ordinary course in anticipation of the Liquidation Sale or of the Inventory Taking.
- (i) Other than the proceeding under the CCAA, no action, arbitration, suit, notice, or legal, administrative or other proceeding before any court or governmental body has been instituted by or against the Companies that has not been stayed under the CCAA proceedings, or has been settled or resolved, or to the best of Companies' knowledge and belief and without independent investigation: (aa) is threatened against or affects the Companies, or (bb) questions the validity of this Agreement that in either case, if lawful and adversely determined, would adversely affect the conduct of the Liquidation Sale.
- (j) The Companies have not taken, and shall not throughout the Liquidation Period take, any action, the result of which is to materially increase the cost of operating the Liquidation Sale including, without limitation, increasing salaries, wages or other amounts payable to employees, except to the extent that an employee was due a raise in the ordinary course of the Companies' business.
- (k) The Company is not party to any collective bargaining agreements with its employees at the Locations and no labour unions represent the Company's employees at the Locations and as at the date of this Agreement, there are no strikes work stoppages or other labour disruptions affecting the Locations or the Company central office facilities that would impair the ability of the Company to perform its obligations under this Agreement.

## 5.2 Representations and Warranty of the Agent

The Agent represents and warrants to the Companies that it has full right, power and authority to enter into and carry out its obligations under this Agreement and the Transaction and this Agreement has been duly and validly authorized, executed and delivered by the Agent.

## Section 6 - GENERAL

### 6.1 Notices

Any demand, notice or other communication to be given in connection with this Agreement shall be given in writing and shall be given by personal delivery (in which case it shall be left with a responsible officer of the recipient) or by electronic communication addressed to the recipient as follows:

in the case of the Agent:

GBRP, INC.  
c/o GORDON BROTHERS RETAIL PARTNERS, LLC  
101 Huntington Avenue, 10<sup>th</sup> Floor  
Boston, MA 02199  
Attn: Michael Chartock  
Tel: (617) 210-7116  
Fax: (617) 531-7906  
Email: mchartock@gordonbrothers.com

And to:

MERCHANT TRADING SERVICES ULC  
c/o HILCO MERCHANT RESOURCES, LLC  
5 Revere Drive  
Northbrook, IL 60062  
Attn: Ian Fredericks  
Fax: (847) 897-0859  
Tel: (847) 418-2075

with a copy to:

Fraser Milner Casgrain LLP  
77 King Street West, Suite 400, Toronto-Dominion Centre  
Toronto ON, M5K 0A1

Attention: R. Shayne Kukulowicz  
Facsimile No. 416 863 4592  
Email: Shayne.Kukulowicz@FMC-Law.com

in the case of the Companies:

The Bargain! Shop  
6877 Goreway Drive, Unit #3  
Mississauga, Ontario L4V 1L9

Attention: Clinton Wolff  
Facsimile No. 905.293.7686  
Email: cwolff@TBSstores.com

with a copy to:

Norton Rose Canada LLP  
Royal Bank Plaza, South Tower  
200 Bay Street, Suite 3800  
Toronto, Ontario M5J 2Z4

Attention: Mario Forte  
Facsimile No.: 416.216.3930  
Email: Mario.Forte@nortonrose.com

in the case of the Monitor:



Ernst & Young Inc.  
200 King Street West, Suite 1100,  
Toronto, Ontario M5H 3T4

Attention: Gus Tertigas  
Facsimile No. 416.932.6200  
Email: Gus.Tertigas@ca.ey.com

with a copy to:

Borden Ladner Gervais LLP  
Scotia Plaza, 44th Floor  
40 King Street West  
Toronto, ON M5H 3Y4

Attention: Edmond Lamek  
Facsimile No. 416.361.2436  
Email: elamek@blg.com

or to such other address, individual or electronic communication number as may be designated by notice given by either party to the other. Any demand, notice or other communication shall be conclusively deemed to have been given, if given by personal delivery, on the day of actual delivery thereof and, if given by electronic communication, on the day of transmittal thereof if transmitted during normal business hours of the recipient on a Business Day and on the Business Day following the transmittal thereof if not so transmitted.

#### 6.2 Dispute Resolution

If any dispute arises under this Agreement, such dispute will be determined by the Court. Each party shall be responsible for its own fees and expenses.

#### 6.3 Time of Essence

Time shall, in all respects, be of the essence hereof, provided that the time for doing or completing any matter provided for herein may be extended or abridged by an agreement in writing signed by the Companies and the Agent or by their respective solicitors.

#### 6.4 Currency

All references herein to money amounts are in Canadian currency, unless otherwise noted herein.

#### 6.5 Further Assurances

Each party shall from time to time execute and deliver, or cause to be executed and delivered, all such documents and instruments and do, or cause to be done, all such acts and things as the other party may, either before or after the Transaction, reasonably require to effectively carry out or better evidence or perfect the full intent and meaning of this Agreement.

#### 6.6 Obligations to Survive

The obligations, representations and warranties of the parties hereto shall survive the completion of the Transaction.

#### 6.7 Entire Agreement

This Agreement constitutes the only agreement between the parties with respect to the subject matter hereof and supersedes any and all prior negotiations and understandings. No amendment of this Agreement shall be binding unless in writing and signed by the parties. No waiver by a party of any breach of this Agreement shall take effect or be binding upon the party unless it is in writing and signed by the party and, unless otherwise expressly stated therein, any such waiver shall be limited to the specific breach waived.

#### 6.8 Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and each of the parties hereby irrevocably attorns to the non-exclusive jurisdiction of the Courts of the Province of Ontario.

#### 6.9 Benefit of Agreement

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns; provided that the Agent shall not assign the benefit of this Agreement without the prior written consent of the Companies.

#### 6.10 Severability

If any provision of this Agreement or any document delivered in connection with this Agreement that forms a part hereof is partially or completely invalid or unenforceable, the invalidity or unenforceability of that provision shall not affect the validity or enforceability of any other provision of this Agreement, all of which shall be construed and enforced as if that invalid or unenforceable provision were omitted. The invalidity or unenforceability of any provision in one jurisdiction shall not affect such provisions validity or enforceability in any other jurisdiction.

#### 6.11 Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same agreement.

#### 6.12 Offset

The Agent agrees that if at any time during the Liquidation Period, the Companies holds any undisputed amounts due to the Agent hereunder, the Companies may, in their discretion, offset such undisputed amounts being held by the Companies against any amounts due and owing by, or required to be paid by, the Agent under this Agreement. In addition, the Companies agree that if at any time during the Liquidation Period, the Agent holds any undisputed amounts due to the Companies hereunder, the Agent, may in its discretion, offset such undisputed amounts being held by the Agent against any undisputed amounts due and owing by, or required to be paid by the Companies under this Agreement. Any such setoffs shall be reconciled as part of the weekly reconciliations.

#### 6.13 Facsimile Execution

Receipt by facsimile or pdf transmission of an executed copy of this Agreement will be deemed to be receipt of an original.

***[The remainder of this page shall be left intentionally blank]***

IN WITNESS WHEREOF, each party has caused this Agreement to be signed and delivered by its duly authorized representative(s).

**THE BARGAIN! SHOP HOLDINGS INC.**

Per: \_\_\_\_\_

Name: Clinton Wolff  
Title: EV, CFO & CO

**TBS STORES INC.**

Per: \_\_\_\_\_

Name: Clinton Wolff  
Title: EV, CFO & CO

**MERCHANT TRADING SERVICES ULC**

Per: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**GBRP, INC.**

Per: \_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

IN WITNESS WHEREOF, each party has caused this Agreement to be signed and delivered by its duly authorized representative(s).

**THE BARGAIN! SHOP HOLDINGS INC.**

Per: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**TBS STORES INC.**

Per: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**MERCHANT TRADING SERVICES ULC**

Per: \_\_\_\_\_

Name: *Benjamin L. Northman*

Title: *Vice President*

**GBRP, INC.**

Per: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

IN WITNESS WHEREOF, each party has caused this Agreement to be signed and delivered by its duly authorized representative(s).

THE BARGAINI SHOP HOLDINGS INC.

Per: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

TBS STORES INC.

Per: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

MERCHANT TRADING SERVICES ULC

Per: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

GBRP, INC.

Per: \_\_\_\_\_

Name: *Robert Grosskopf*

Title: *Principal i M.D.*

## SCHEDULE "A" – ACCOUNT INFORMATION

### 1. Company Account

The Bargain Shop Holdings Inc.

Bank of Montreal : 001

Transit : 00022 - First Canadian Place

Account: 1360339

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Swift Code: BOFMCAM2.

### 2. Agency Account

Ernst & Young Inc., Court Appointed Monitor of The Bargain! Shop Holdings Inc. and TBS Stores Inc.

Royal Bank of Canada, Royal Bank Plaza, Toronto Business Banking Centre, 200 Bay Street, Toronto, ON M5J 2J5

Swift Code: ROYCCAT2

Trusted Account No.129-584-9 (CAD)

Transit No.: 00002

Beneficiary Address: Ernst & Young Tower, P.O. Box 251, T-D Centre, Toronto, ON M5K 1J7

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## SCHEDULE "B" – LOCATIONS

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The Bargain! Shop  
Schedule B

Locations						
Store #	Location Type	Name	Address	City	State	Selling Sq. Ft.
52706	TBS	Peterborough	819 Chemong Road	Peterborough	ON	10,080
52753	TBS	Corner Brook	53 West Street	Corner Brook	NFLD	14,637
52754	TBS	Truro	859 Prince Street	Truro	NS	12,103
52778	TBS	Midland	285 King Street	Midland	ON	5,693
52810	TBS	Kitchener	Highland Park S.C., 525 Highland Road W.	Kitchener	ON	8,183
52930	TBS	Dawson Creek	10301-10th Street	Dawson Creek	BC	8,000
52934	TBS	Antigonish	133 Church Street	Antigonish	NS	7,023
52935	TBS	Port Hope	48 Mill Street S.	Port Hope	ON	8,343
52936	TBS	Cobourg	52 King Street W.	Cobourg	ON	5,472
52937	TBS	Renfrew	282 Raglan Street S.	Renfrew	ON	8,582
52942	TBS	Blenheim	45 Talbot Street W.	Blenheim	ON	5,090
52945	TBS	LaSalle	6020 Malden Road	LaSalle	ON	8,522
52955	TBS	Chatham	835 Queen Street	Chatham	ON	7,648
52962	TBS	Tecumseh	13300 Tecumseh Road E.	Tecumseh	ON	7,146
52968	TBS	Burns Lake	354 1st Avenue	Burns Lake	BC	6,926
52973	TBS	Peterborough	81 George Street, Unit 102	Peterborough	ON	6,729
52976	TBS	Middleton	63 Commercial Street	Middleton	ON	5,974
52977	TBS	Halifax	6100 Young Street	Halifax	NS	9,674
53010	TBS	Greenwood	1065 Central Avenue, Unit 1-5	Greenwood	NS	10,466
53022	TBS	Prescott	231 King Street West, PO Box 405	Prescott	ON	6,840
53065	TBS	Pincher Creek	670 Main Street, PO Box 1450	Pincher Creek	AB	13,184
53069	TBS	Ottawa	2121 Carling Avenue, Unit 36B	Ottawa	ON	8,883
53608	TBS	Port Perry	1894 Scugog Street - 7A Hwy	Port Perry	ON	9,391
53611	TBS	Chatham	418 St. Clair Street	Chatham	ON	9,342
53613	TBS	Castlegar	610 18th Street, Unit 16	Castlegar	BC	6,506
53620	TBS	Estevan	909 - 13th Avenue	Estevan	SK	10,611
53621	TBS	Corunna	419 Lyndock Street, PO Box 756	Corunna	ON	8,180
53623	TBS	Wolfville	429 Main Street	Wolfville	NS	6,455
53624	TBS	Hinton	127 Athabasca Avenue	Hinton	AB	8,852
53625	TBS	Logan Lake	Village Centre Mall, 220 Opal Drive Unit 3-4, Box 7	Logan Lake	BC	8,506
53627	TBS	Waterdown	64 Hamilton Street North, Units 5,6&16	Waterdown	ON	6,521
53703	TBS	Chestermere	140 East Chestermere Drive	Chestermere	AB	8,681
53705	TBS	Belleville	470 Dundas Street East	Belleville	ON	9,545
53706	TBS	Lake Cowichan	33 South Shore Blvd, Box 163	Lake Cowichan	BC	7,676



The Bargain! Shop  
Schedule B

Locations

Store #	Location Type	Name	Address	City	State	Zip	Selling Sq. Ft.
53707	TBS	Almonte	430 Ottawa Street, Unit 10-12	Almonte	ON	K0A 1A0	8,870
53710	RA	Mississauga	187 - 189A Lakeshore Road East	Mississauga	ON	L5G 1G2	7,942
53711	TBS	Sarnia	145 Mitten Avenue South	Sarnia	ON	N7T 3C5	9,163
53804	TBS	Oshawa	Lake Vista Square, 199 Wentworth Ave W	Oshawa	ON	L1J 6P4	7,142
53806	TBS	Rothsay	77 Marr Road	Rothsay	NB	E2E 3J9	6,819
53807	TBS	Edmonton	11803-48th Street, N.W.	Edmonton	AB	T5W 2Y4	7,140
53808	RA	Walkerton	126 McNab Street	Walkerton	ON	N0G 2V0	8,546
53810	TBS	Florenceville-Bristol	8764 Main Street, Unit 1, Box 572	Florenceville-Bristol	NB	E7L 3G3	6,675
53811	TBS	Gananoque	110 King Street East	Gananoque	ON	K7G 1G2	4,560
53815	TBS	Exeter	193 Main Street South	Exeter	ON	N0M 1S1	10,895
53829	TBS	Liverpool	266 Main Street	Liverpool	NS	B0T 1K0	9,076
53833	TBS	Penetanguishene	Village Square Mall, 2 Poyntz St., Unit 127	Penetanguishene	ON	L9M 1M2	9,237
53840	TBS	Whitcourt	Valley Centre Mall, 4802-51st Street	Whitcourt	AB	T7S 1R9	11,253
53843	TBS	Drayton Valley	5009 - 50th Street	Drayton Valley	AB	T7A 1S8	13,137
53851	TBS	Winnipeg	Garden Oaks Sq., 2188 McPhillips St., Unit 20	Winnipeg	MB	R2V 3C8	10,252
53852	TBS	Beresford	Beresford S.C., 879 Rue Principale, Unit 9	Beresford	NB	E8K 1R3	13,893
53853	TBS	St. Stephen	Charlotte Mall, 210 King Street	St. Stephen	NB	E3L 2E3	16,530
53854	TBS	Shippagan	Le Carrefour, 229 Unite 12 Boul J.D. Gauthier	Shippagan	NB	E8S 1N2	18,923
53855	TBS	Boutouche	Place LeBouge, 193 Irving Blvd. Suite 4	Boutouche	NB	E4S 3K4	10,194
53870	TBS	Shediac	301Main Street	Shediac	NB	E4P 2A9	18,906
53871	TBS	Dalhousie	Darlington Mall, 110 Plaza Blvd, Unit 70	Dalhousie	NB	E8C 2E2	19,688
53901	TBS	Port Hawkesbury	634 Reeves Street, Unit 20, Box 7596	Port Hawkesbury	NS	B9A 2R7	17,227
53902	TBS	Warman	520 Central Street West, Unit 1	Warman	SK	S0K 4S0	8,283
54101	RA	Invermere	519-13th Street, PO Box 2740	Invermere	BC	V0A 1K0	8,809
54211	MM	Toronto	429 Parliament Street	Toronto	ON	M5A 3A1	8,293
54214	MM	Ajax	314 Harwood Avenue S.	Ajax	ON	L1S 2J1	8,742
54215	MM	Welland	300-390 Lincoln Street	Welland	ON	E3B 4N4	9,265
54216	MM	Keswick		Keswick	ON	L4P 3J4	9,426
62							9,425

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**SCHEDULE "C" – FORM OF APPROVAL ORDER**

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ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

THE HONOURABLE

) WEDNESDAY, THE 27<sup>TH</sup>

JUSTICE

) DAY OF MARCH, 2013

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 TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC.  
AND TBS STORES INC. (collectively, the "Applicants")

APPROVAL ORDER  
[SCHEDULE C]

THIS MOTION, made by the Applicants for an order, inter alia, approving the agency sale transaction (the "Transaction") contemplated by the agency agreement among The Bargain! Shop Holdings Inc. and TBS Stores Inc. (together the "Companies") and a Contractual Joint Venture comprised of Merchant Trading Services ULC and GBRP, Inc. (collectively, the "Agent") made as of March 22, 2013 (the "Agency Agreement"). Any capitalized term used and not defined herein shall have the same meaning as that ascribed to it in the Agency Agreement, a [redacted copy] of which is attached as Exhibit "●" to the Affidavit of Clinton Wolf, sworn March ●, 2013.

ON READING the Affidavit of Clinton Wolff sworn March 22, 2013 and the Exhibits thereto, the Third Report of Ernst & Young Inc., in its capacity as Court-appointed Monitor in these proceedings, (the "Monitor") dated March ●, 2013, and on hearing the submissions of counsel for the Applicants, the Monitor, Wells Fargo Capital Finance Corporation Canada (the "Operating Lender"), [Banks, Landlords], no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service of ●, sworn March ●, 2013 filed:

1. THIS COURT ORDERS AND DECLARES that the Agency Agreement, including the Sale Guidelines attached as Schedule H thereto and as Schedule [•] to this Order, and the Transaction are hereby approved. The execution of the Agency Agreement by the Companies is hereby authorized and approved *nunc pro tunc* and the Companies are hereby authorized to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed thereto in the Agency Agreement, or, as applicable, the Initial Order.

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2. THIS COURT ORDERS that the Monitor be and is hereby authorized to assist the Companies with the implementation and the administration of the Agency Agreement and the Transaction, and is hereby directed to open and maintain the Agency Account and to administer disbursements therefrom from time to time in accordance with the Agency Agreement.

3. THIS COURT ORDERS AND DECLARES that subject to payment of the First Instalment and delivery of the Letter of Credit, the Agent is authorized to conduct the Liquidation Sale in accordance with this Order, the Agency Agreement and the Sale Guidelines, including (without limitation) to sell all Merchandise, FF&E other than Excluded FF&E, Company Consignment Goods and Additional Agent Merchandise. If there is a discrepancy between this Order, and the Agency Agreement or the Sale Guidelines, the terms of this Order shall govern and the terms of the Agency Agreement and Sale Guidelines shall be read to be amended to accord with the terms of this Order.

4. THIS COURT ORDERS AND DECLARES that any amounts paid by the Agent in respect of the Net Minimum Guaranteed Amount shall be deposited in the Company's Account. The Applicants' shall include all amounts received pursuant to the Agency Agreement in the cash-management system outlined in paragraph 39 of the Affidavit of Clinton Wolff dated February 25, 2013, attached as Schedule [●] hereto (the "**Cash-Management System**") to be administered in accordance therewith.

5. THIS COURT ORDERS AND DECLARES that all amounts paid to the Applicants as disbursements or otherwise from the Agency Account pursuant to the Agency Agreement shall be deposited in the Company's Account and included in the Cash-Management System.

6. THIS COURT ORDERS AND DECLARES that the Companies and the Monitor are hereby authorized and directed, in accordance with the Agency Agreement, to remit all amounts that become due to the Agent.

7. THIS COURT ORDERS AND DECLARES that in the event that Agent overfunds any portion of the Net Minimum Guaranteed Amount, Expenses, or other amounts under the Agency Agreement to the Companies (the "**Overfunded Amounts**"), the Companies shall reimburse the Overfunded Amounts to the Agent within two (2) Business Days after Agent's request. To the extent that any Overfunded Amounts have been received by the Operating Lender or one or more of its affiliates and such Overfunded Amounts have not been reimbursed by the Companies, Agent shall provide notice to the Operating Lender of such Overfunded Amounts and the Operating Lender shall disgorge all Overfunded Amounts to the Agent within two (2) Business Days of such notice. Calculation of the Overfunded Amount shall be subject to review by the Monitor and the Operating Lender and, in the event of a disagreement as to the calculation thereof, shall be determined by this Court.

8. THIS COURT ORDERS AND DECLARES that as security for the Companies' obligations under the Agency Agreement, and upon the payment of the First Instalment and delivery of the Letter of Credit, the Agent shall be and is hereby granted a charge over the Merchandise and the proceeds thereof (the "**Agent's Charge**"), having priority over any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**"), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Morawetz dated February 26, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which under (i) and (ii) above, are collectively referred to herein as "**Encumbrances**").

9. THIS COURT ORDERS that the filing, registration, recording or perfection of the Agent's Charge shall not be required and the Agent's Charge shall be valid and enforceable for all purposes, including as against any right, title, or interest filed,

registered, recorded, or perfected subsequent to the Agent's Charge coming into existence, notwithstanding any failure to file, register, record, or perfect. Absent the Agent's written consent or further order of this Court (on notice to the Agent), the Companies shall not grant any Encumbrance over any Merchandise or proceeds thereof that rank in priority to, or *pari passu* with, the Agent's Charge

10. THIS COURT ORDERS that except as otherwise indicated in accordance with the Agency Agreement, the Sale Guidelines and this Order nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of a real property lease.

11. THIS COURT ORDERS that (i) all Merchandise, FF&E and Company Consignment Goods, once sold by the Agent, shall be deemed sold free and clear of all Encumbrances and (ii) for the purposes of determining the nature and priority of the Encumbrances, the Net Minimum Guarantee Amount and the Companies' other net proceeds or reimbursements from the Transaction (the "**Companies Proceeds**"), if any, shall stand in the place and stead of the respective Merchandise, FF&E and Company Consignment Goods which generated them and all Claims shall attach to the Companies' Proceeds (including, for greater certainty, any amounts held in the Agency Account) with the same priority as they had immediately prior to the sale, as if the Merchandise, FF&E and Company Consignment Goods had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

12. THIS COURT ORDERS that the Agent is entitled, at its expense and discretion, to include in the Liquidation Sale at the Locations additional goods procured by the Agent of like kind, and of no lesser quality to the Merchandise located in the Locations ("**Additional Agent Merchandise**"). At all times and for all purposes, the Additional Agent Merchandise and its proceeds shall be the exclusive property of Agent. The transactions relating to the Additional Agent Merchandise are, and shall be construed as, a true consignment from Agent to the Companies

13. THIS COURT ORDERS that upon delivery of a Monitor's certificate to the Agent substantially in the form attached as Schedule [●] hereto, (the "**Monitor's Certificate**") and subject to payment in full by the Agent to the Companies of the Net Minimum Guaranteed Amount, all of the Companies' right, title and interest in and to any unsold

Merchandise at the end of the Liquidation Period (the "Remaining Merchandise"), shall vest absolutely in the Agent, free and clear of and from any and all Claims, including without limiting the generality of the foregoing the Encumbrances, and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Remaining Merchandise shall be expunged and discharged as against the Remaining Merchandise upon the delivery of the Monitor's Certificate to the Agent; provided however that nothing herein shall discharge the obligations of the Agent pursuant to the Agency Agreement, or the rights or claims of the Companies in respect thereof, including without limitation, the obligations of the Agent to account for and remit the proceeds of sale of the Remaining Merchandise to the Agency Account established by the Monitor pursuant to the Agency Agreement.

14. THIS COURT ORDERS THAT, except as expressly set out in paragraph 7 in respect of Over-funded Amounts, paragraph 8 in respect of the Agent's Charge and paragraph 13 in respect of Encumbrances against the Remaining Merchandise, nothing in this Order shall alter, diminish or otherwise affect the applicability, validity and priority of the Charges and the Operating Lender's Security as set out in paragraphs 36 to 41 of the Initial Order or alter, diminish or otherwise affect the Wells Facility and Operating Lender's Security or the BlackRock Facility or any provisions of the Initial Order made in respect thereof.

15. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

16. THIS COURT ORDERS that pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Companies are authorized and permitted to disclose and transfer to the Agent all human resources and payroll information in the Companies' records pertaining to the Companies' past and current employees. The Agent shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Companies.

17. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of the proceedings;

- (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Companies and any bankruptcy order issued pursuant to any such applications;
- (c) any assignment in bankruptcy made in respect of the Companies;
- (d) the provisions of any federal or provincial statute; or
- (e) any negative covenants, prohibitions, or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement to which the Companies are a counterparty

the Transaction, the Agency Agreement, the Agent's Charge, the payment of amounts due to the Agent under the Agency Agreement, and any transfer of Remaining Merchandise shall be binding on any trustee in bankruptcy that may be appointed in respect of the Companies and shall not be void or voidable by creditors of the Companies, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. THIS COURT ORDERS that the Agency Agreement shall not be repudiated or disclaimed by the Companies or compromised in any plan of compromise or arrangement filed by the Companies. For greater certainty, the parties acknowledge and agree that the termination rights included in the Agency Agreement approved herein are not affected by this paragraph.

19. THIS COURT ORDERS AND DECLARES that the Transaction and any transfer of Remaining Merchandise is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent or applicable legislation under any other province or territory in Canada.

20. THIS COURT ORDERS that, during the Liquidation Period, the Agent is hereby authorized to conduct the Liquidation Sale in accordance with the Agency Agreement



and the Sale Guidelines and shall have access to and the right to use and occupy the Locations and all related services, FF&E, and other assets and services of the Companies as designated under the Agency Agreement for purposes of conducting the Liquidation Sale, free of any unlawful interference from any utility, entity, landlord, creditor, or other person, subject to compliance with this Order, the Agency Agreement, and the Sale Guidelines.

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21. THIS COURT ORDERS that nothing in this Order or the Agency Agreement shall deem the Agent to be an employer, or joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and safety or any other statute, regulation, or rule of law or equity for any purpose whatsoever, and, further, that the Agent shall be deemed not to be an owner or in possession, care, control or management of the Property of the Companies whether pursuant to any legislation enacted for the protection of the environment, the regulations thereunder or any other statute, regulation or rule of law or equity under any federal, provincial or other jurisdiction for any purpose whatsoever.

22. THIS COURT ORDERS that the Agent shall be an unaffected creditor in these proceedings and shall not be affected by any stay of proceedings granted by this or any other Court, and the Agent shall, subject to the terms of the Agency Agreement, be entitled to exercise its remedies under the Agency Agreement and all security granted by the Companies in connection therewith notwithstanding the pendency of these proceedings

23. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada against all persons, firms, corporations, governmental, municipal and regulatory authorities against whom it may otherwise be enforceable.

24. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable to give effect to this Order.

DOCSTOR: 2657500\10

SCHEDULE "•"

Court File No. CV-13-10018-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE ) MONDAY, THE 25<sup>TH</sup>  
JUSTICE ) DAY OF MARCH, 2013

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 TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC.  
AND TBS STORES INC. (collectively, the "Applicants")

**MONITOR'S CERTIFICATE**

**RECITALS**

A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Agency Agreement entered into by The Bargain! Shop Holdings Inc., TBS Stores Inc., Merchant Trading Services ULC and GBRP, Inc. dated March •, 2013, a copy of which is attached as Exhibit • to the Affidavit of Clinton Wolf dated •.

B. Pursuant to an Order of the Court dated March •, 2013, the Court ordered that all of the Remaining Merchandise shall vest absolutely in the Agent, free and clear of and from any and all claims and encumbrances, upon the delivery by the Monitor to the Agent of a certificate certifying that (i) the Liquidation Period is at an end, and (ii) the Net Minimum Guaranteed Amount has been paid by the Agent to the Companies.

ERNST & YOUNG INC., in its capacity as Court-appointed Monitor in the *Companies' Creditors Arrangement Act* proceedings of TBS Acquireco Inc., The Bargain! Shop Holdings Inc. and TBS Stores Inc., certifies that it has been informed by the Agent and the Companies that:

1. The Liquidation Period has ended.
2. ~~The Net Minimum Guaranteed Amount has been paid by the Agent to the~~  
Companies.
3. The Remaining Merchandise includes the assets listed on Appendix "A" hereto.

DATED as of this • day of •, 2013.

ERNST & YOUNG INC., in its capacity as  
Court-appointed Monitor of TBS  
Acquireco Inc., The Bargain! Shop  
Holdings Inc. and TBS Stores Inc., and  
not in its personal capacity

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## APPENDIX "A"

### LIST OF REMAINING MERCHANDISE

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DOCSTOR: 2657500\10

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 TBS Acquireco Inc., The Bargain!  
Shop Holdings Inc. and TBS Stores Inc.

Court File No: CV-13-10018-00CL

APPLICANTS

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

Proceeding commenced at Toronto

APPROVAL ORDER

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Lawyers for the Applicants

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**SCHEDULE "D" – LEASES FOR STORE LEVEL ASSETS**

**NONE.**

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DOCSTOR: 2657448\12A

**SCHEDULE "E" – ADJUSTMENT TO THE NET MINIMUM GUARANTEED AMOUNT**

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**The Bargain! Shop  
Schedule E**

**Adjustment to Net Minimum Guarantee**

Retail Value	Adjustment Points	Adjusted Guaranty
19,600,000		43.25%
19,500,000	0.07%	43.18%
19,400,000	0.07%	43.11%
19,300,000	0.07%	43.04%
19,200,000	0.07%	42.97%
19,100,000	0.07%	42.90%
19,000,000	0.10%	42.80%
18,900,000	0.10%	42.70%
18,800,000	0.10%	42.60%
18,700,000	0.10%	42.50%
18,600,000	0.10%	42.40%
18,500,000	0.13%	42.27%
18,400,000	0.13%	42.14%
18,300,000	0.13%	42.01%
18,200,000	0.13%	41.88%
18,100,000	0.13%	41.75%
18,000,000	0.16%	41.59%
17,900,000	0.16%	41.43%
17,800,000	0.16%	41.27%
17,700,000	0.16%	41.11%
17,600,000	0.16%	40.95%

**Note(s):**

1. Adjustments between the increments shall be on a prorata basis.
2. In the event that the Retail value of the Merchandise is less than \$17,600,000, each \$100,000 (or pro rata portion thereof) increment shall decrease the Guaranty by 0.18%.

#### **SCHEDULE "F" – COMPANIES POLICIES REGARDING EMPLOYEE CONDUCT**

The Agent acknowledges having received the following documents incorporated by reference as Schedule "F" to this Agreement:

- Manager Guide Regarding Workplace Violence and Harassment, dated May 2010;
  - Corporate Policies dated March 2013; and
  - Third Part/Liquidation Associate Sign-off Sheet
-

**SCHEDULE "G" – PER DIEM OCCUPANCY COSTS**

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**The Bargain! Shop**

## Schedule G

## Occupancy Per blem

Occupancy Per Diem																							
Store #	Store Name	RENT	ALARM SYSTEM / CCTV	ALARM SYSTEM MONITORING	BUSINESS LICENSE	COMMON AREA MAINTENANCE	EQUIPMENT RENTAL	GAS/OIL	HYDRO	INSURANCE - BUILDING	INSURANCE - COMMERCIAL	INTERNET ACCESS	LIGHT BULBS	POS EQUIPMENT R&M	PROPERTY TAX	RENT OR/CHRG EQUIPME	TELEPHONE BASIC	TELEPHONE- LONG DISTANCE	WATER	REPAIR & MAINTENANCE	Total Occupancy		
52,706	Peterborough	275	-	1	-	-	-	5	37	-	-	2	2	2	1	-	1	-	2	6	29	361	
52,753	Comer Brook	342	-	1	-	-	-	177	41	-	5	2	5	1	1	25	1	4	1	1	61	672	
52,754	Treva	243	0	1	1	-	-	70	53	-	5	2	-	-	1	1	23	1	4	1	6	30	464
52,774	Midland	94	-	1	3	-	-	4	16	-	-	2	2	-	1	1	14	1	1	2	30	464	
52,810	Kitchener	365	-	1	-	-	-	3	21	-	-	2	2	2	1	1	35	1	1	1	21	508	
52,824	Port Hope	227	-	1	-	-	-	3	21	-	-	2	2	1	1	1	3	0	-	-	41	275	
52,834	Arnprior	327	-	1	-	-	-	-	-	-	-	2	2	3	1	1	1	2	-	-	11	250	
52,835	Port Hope	313	-	1	-	-	0	9	32	-	-	1	0	1	1	1	2	0	-	-	32	406	
52,836	Cobourg	117	-	1	-	-	-	8	16	-	-	2	1	1	1	1	2	0	2	2	15	208	
52,837	Renfrew	173	-	1	-	-	-	3	45	-	-	2	-	1	1	1	25	1	8	27	289		
52,842	Blenheim	135	-	1	-	-	-	2	21	-	-	2	-	-	1	1	3	1	2	2	29	219	
52,845	LeBlanc	341	-	1	-	-	-	3	47	-	-	2	2	1	1	1	90	1	-	-	27	528	
52,855	Oranienburg	95	-	1	1	62	-	3	23	-	-	2	2	2	1	1	60	1	-	-	32	469	
52,862	Tecumseh	310	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	6	-	-	27	469	
52,863	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,864	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,865	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,866	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,867	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,868	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,869	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,870	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,871	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,872	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,873	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,874	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,875	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,876	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,877	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,878	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,879	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,880	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,881	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,882	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,883	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,884	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,885	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,886	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,887	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,888	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,889	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,890	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,891	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,892	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,893	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,894	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,895	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,896	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,897	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,898	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,899	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,900	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,901	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,902	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,903	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,904	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,905	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,906	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,907	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,908	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,909	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,910	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,911	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,912	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,913	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,914	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,915	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,916	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,917	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,918	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,919	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,920	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,921	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,922	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,923	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,924	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,925	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,926	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,927	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,928	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,929	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,930	Summers Lake	186	-	1	-	-	-	12	21	-	-	2	4	1	1	1	1	1	-	-	32	469	
52,931																							

## SCHEDULE "H" – SALE GUIDELINES

The following procedures shall apply to any sale of **Merchandise and FF&E** in connection with the **Liquidation Sale** to be held by The Bargain! Shop Holdings Inc. and TBS Stores Inc. (together, the "**Company**") with the assistance of the **Agent**, at the **Locations**:

- 1 The Liquidation Sale shall be conducted in accordance with the terms of the Initial Order dated \_\_\_\_\_, 2013 issued by \_\_\_\_\_ Court (the "**Court**") as may be amended or extended from time to time (the "**Initial Order**"), in the proceeding commenced under the *Companies' Creditors Arrangement Act* by the Company, the order of the Court approving the Liquidation Sale (the "**Approval Order**"), any further order of the Court and any agreement between the Company and the applicable landlord(s) (individually a "**Landlord**" and, collectively, the "**Landlords**"). Except as otherwise expressly provided herein, and subject to: (i) a further Order of the Court; or (ii) any written agreement between the Company and the Landlord, the Liquidation Sale shall be conducted in accordance with the terms of the applicable lease for the Company (individually a "**Lease**" and, collectively, the "**Leases**"). However, nothing contained herein shall be construed to create or impose upon the Company any additional restrictions not contained in the applicable Lease or other occupancy agreement.
- 2 The Liquidation Sale shall be conducted so that the Locations remain open no longer than the normal hours of operation provided for in the respective Leases or other occupancy agreements for the Locations.
- 3 The Liquidation Sale shall be conducted in accordance with the terms and conditions of the Agency Agreement dated March \_\_\_\_, 2013 and applicable federal, provincial and municipal laws, unless otherwise ordered by the Court.
- 4 All display and hanging signs used by the Company and the Agent in connection with the Liquidation Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. The Company and the Agent may advertise the Liquidation Sale as a "store closing", "sale on everything" or "everything must go" or similar theme sale at the Locations. Prior to the commencement of the Liquidation Sale, the Company and the Agent shall provide proposed signage packages by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlords shall notify the Company and Agent of any requirement for such signage to otherwise comply with the terms of the Leases and/or these Sale Guidelines and where the provisions of the Leases conflict with these Sale Guidelines, these Sale Guidelines shall govern. The Company and the Agent shall not use neon, day-glo signage or handwritten signs. Furthermore, except as set out below, with respect to enclosed mall locations no exterior signs or signs in common areas of a mall shall be used unless permitted by the applicable Lease. In addition, the Company and the Agent shall be permitted to utilize exterior banners at non-enclosed mall Locations; provided, however, that such banners shall be located or hung so as to make clear that the Liquidation Sale is being conducted only at the affected Location and shall not be wider than the premises occupied by the Location. All permitted exterior banners shall be professionally hung and to the extent that there is any damage to the façade of the premises of a Location as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Company.
- 5 The Company and the Agent shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre/mall premises.
- 6 Conspicuous signs shall be posted in the cash register areas of each Location to the effect that all sales are "final" (and the same shall be printed or stamped on customer receipts), the sales are on an "as is, where is" basis and that customers with any questions or complaints subsequent to the conclusion of the Liquidation Sale may contact a named representative of the Company at a specified email address.

- 7 The Company and the Agent shall not distribute handbills, leaflets or other written materials to customers outside of any of the Locations, unless permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Location is located. Otherwise, the Company and the Agent may solicit customers in the Locations themselves. The Company and the Agent shall not use any giant balloons, flashing lights or amplified sound to advertise the Liquidation Sale or solicit customers, except as permitted under the applicable Lease or agreed to by the Landlord.
- 8 During the Liquidation Period for each Location, The Company and the Agent may sell any furniture, fixtures and equipment ("FF&E"), in accordance with Section 2.26 of the Agency Agreement, owned by the Company and located in the Locations during the Liquidation Sale. The Company and the Agent may advertise the sale of FF&E consistent with these guidelines. Additionally, the purchasers of any FF&E sold during the Liquidation Sale shall only be permitted to remove the FF&E either through the back shipping areas or through other areas after store business hours, with Landlord's supervision as required by the Landlord.
- 9 Subject to provisions of the Agency Agreement between the Company and the Agent, the Company and the Agent shall not make any alterations to interior or exterior Location lighting. No property of any Landlord of a Location shall be removed or sold during the Liquidation Sale. The hanging of permitted exterior banners or other signage shall not constitute an alteration to a Location.
- 10 The Agent and its agents and representatives shall have the same access rights to the Locations as the Company under the terms of the applicable Lease, and the Landlord shall have the rights of access to the Locations during the Liquidation Sale provided for in the applicable Lease, subject, for greater certainty, to the stay of proceedings set out in the Initial Order.
- 11 The Company and the Agent shall not conduct any auctions of the Merchandise or FF&E at any of the Locations. Subject to any agreement between the Company and a Landlord, the Initial Order, the Approval Order and any further order of the Court, the Company and the Agent shall not augment the Merchandise included in the Liquidation Sale. Notwithstanding the foregoing, the Company is expressly permitted to transfer merchandise between and among the Locations and like merchandise of like quality as currently sold at the Locations from the Company's remaining retail stores to the Locations. Further, the Agent is permitted to purchase additional like merchandise of like quality after the commencement of the Liquidation Sale in keeping with Section 2.26 of the Agency Agreement. The foregoing right of the Company and the Agent to augment is subject in each case to the limitations set out in the Agency Agreement between the Company and the Agent.
- 12 Removal of other furniture, movable fixtures and equipment shall take place before or after regular hours of the Location or shopping center and through service exits and corridors designated by the Landlord. The Company and the Agent may abandon any of the FF&E not sold in the Liquidation Sale at the Locations' premises at the conclusion of the Liquidation Sale; provided however the Landlord for the subject Location shall have the right to remove and dispose of such property without liability to the Company or the Agent.
- 13 The Company shall designate a party to be contacted by the Landlords should an issue arise concerning the conduct of the Liquidation Sale. The initial contact person for the Company shall be Karen Hirst (available at 905-293-7665 or khirst@tbsstores.com). If the parties are unable to resolve the dispute between themselves, the Landlord or Company shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties.
- 14 Nothing herein is, or shall be deemed to be, a consent by any Landlord to the sale, assignment or transfer of any Lease or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

Exhibit "A"

Store No	Store	City	Province

SCHEDULE "I" - LETTER OF CREDIT

FORM OF LETTER of CREDIT

[NAME OF ISSUING CANADIAN BANK]  
[ADDRESS]

Date: \_\_\_\_\_, 2013

Irrevocable Standby Letter of Credit Number: \_\_\_\_\_

BENEFICIARY: [Merchant]

Credit Number:  
Opener's Reference No:  
Gentlemen:

BY ORDER OF: [Agent]

We hereby open in your favor our Irrevocable Standby Letter of Credit for the account of [Agent] for a sum or sums not exceeding a total of \$\_\_\_\_,000,000 Canadian Dollars (\_\_\_\_ Million Dollars) available by your draft(s) at SIGHT on OURSELVES effective immediately and expiring at OUR COUNTERS on \_\_\_\_\_, 2013, or such earlier date on which the beneficiary shall notify us in writing that this Standby Letter of Credit shall be terminated accompanied by the original Letter of Credit (the "Expiry Date").

Draft(s) must be accompanied by a signed statement in the form attached as Exhibit A, and the original Letter of Credit.

Partial and/or multiple drawings are permitted.

Merchant may draw on the Letter of Credit if Agent fails to pay any amounts due by Agent to Merchant pursuant to, and as such terms are defined in, that certain Agency Agreement dated as of \_\_\_\_\_, 2013 between Merchant and Agent.

This Letter of Credit may be increased or reduced from time to time upon receipt of a signed statement in the form attached as Exhibit B.

Each draft must bear upon its face the clause "Drawn under Letter of Credit No. \_\_\_\_\_ dated \_\_\_\_\_ of [NAME AND ADDRESS OF ISSUING CANADIAN BANK]."

Except so far as otherwise expressly stated herein, this Letter of Credit is subject to the "Uniform Customs and Practices for Documentary Credits (1993 Revision), International Chamber of Commerce Publication No. 500".



We hereby agree that drafts drawn under and in compliance with the terms of this letter of credit will be duly honored if presented to the above mentioned drawee bank on or before the Expiry Date.

Kindly address all correspondence regarding this letter of credit to the attention of our Letter of Credit Operations, [ADDRESS OF L/C DEPARTMENT OF ISSUING CANADIAN BANK] attention, mention our reference number as it appears above. Telephone inquiries can be made to \_\_\_\_\_ at \_\_\_\_\_.

---

Very truly yours,

Authorized official

EXHIBIT A

TO IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_

Re: Drawing for Amounts Due to:

[Merchant]

Ladies and Gentlemen:

\_\_\_\_\_ I refer to your Letter of Credit No. \_\_\_\_\_ (the "Letter of Credit"). The undersigned, duly authorized officers of \_\_\_\_\_ ("Merchant") hereby certifies to you that:

- (i) \_\_\_\_\_ ("Agent") has not made a payment when due of or for the Guaranteed Amount or Expenses pursuant to that certain Agency Agreement dated as of \_\_\_\_\_, 2013 between the Merchant and Agent.
- (ii) The amount to be drawn is \$ \_\_\_\_\_ (the "Amount Owing").
- (iii) Payment is hereby demanded in an amount equal to the lesser of (a) the Amount Owing and (b) the amount available on the date hereof to be drawn under the Letter of Credit.
- (iv) The Letter of Credit has not expired prior to the delivery of this letter and the accompanying sight draft.
- (v) The payment hereby demanded is requested to be made no later than two (2) business days after the date of delivery of this certificate, by wire transfer to the following account:

[Bank Name]

[Bank Address]

ABA No:

Further Credit to: [Account Title]

[Account No.]

IN WITNESS WHEREOF, I have executed and delivered this certificate as of this day of \_\_\_\_\_.

Very truly yours,

[Merchant]

\_\_\_\_\_  
By: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT B**

TO IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_  
Re: Reduction of Face Amount:

[Merchant]

Ladies and Gentlemen:

\_\_\_\_\_ I refer to your Letter of Credit No. \_\_\_\_\_ (the "Letter of Credit"). The undersigned, duly authorized officers of \_\_\_\_\_ ("Merchant"), hereby certifies to you that the face amount of the Letter of Credit No. \_\_\_\_\_ hereby shall be reduced from its original face amount to a new face amount of \$\_\_\_\_\_.

IN WITNESS WHEREOF, I have executed and delivered this certificate as of this day of \_\_\_\_\_.

Very truly yours,

[Merchant]

\_\_\_\_\_  
By:  
Title:

## EXHIBIT "B" – SALE GUIDELINES

## SALE GUIDELINES

The following procedures shall apply to any sale of **Merchandise and FF&E** in connection with the **Liquidation Sale** to be held by The Bargain! Shop Holdings Inc.

and TBS Stores Inc. (together, the "**Company**") with the assistance of the **Agent**, at the **Locations**, such Liquidation Sale to end by no later than June 30, 2013 or such later date as the applicable Landlord (as defined below) may agree or as may be ordered by further order of the Court (as defined below):

- 1 The Liquidation Sale shall be conducted in accordance with the terms of the Initial Order dated February 26, 2013 issued by the Ontario Superior Court of Justice (the "**Court**") as may be amended or extended from time to time (the "**Initial Order**"), in the proceeding commenced under the *Companies' Creditors Arrangement Act* by the Company, the order of the Court approving the Liquidation Sale (the "**Approval Order**"), any further order of the Court and any agreement between the Company and the applicable landlord(s) (individually a "**Landlord**" and, collectively, the "**Landlords**"). Except as otherwise expressly provided herein, and subject to: (i) a further Order of the Court; or (ii) any written agreement between the Company and the Landlord, the Liquidation Sale shall be conducted in accordance with the terms of the applicable lease for the Company (individually a "**Lease**" and, collectively, the "**Leases**"). However, nothing contained herein shall be construed to create or impose upon the Company any additional restrictions or obligations not contained in the applicable Lease or other occupancy agreement.
- 2 The Liquidation Sale shall be conducted so that the Locations remain open during normal hours of operation provided for in the respective Leases or other occupancy agreements for the Locations.
- 3 Subject to these Sale Guidelines which shall prevail and govern, the Liquidation Sale shall be conducted in accordance with the terms and conditions of the Agency Agreement dated March 22nd, 2013 and applicable federal, provincial and municipal laws, unless otherwise ordered by the Court.
- 4 All display and hanging signs used by the Company and the Agent in connection with the Liquidation Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. The Company and the Agent may advertise the Liquidation Sale as a "store closing", "sale on everything" or "everything must go" or similar theme sale at the Locations (save that no signs shall advertise the Liquidation Sale as a "bankruptcy", "going out of business", "liquidation" or "court ordered" sale). Forthwith upon request, the Company and the Agent shall provide proposed signage packages by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlords shall notify the Company and Agent of any requirement for such signage to otherwise comply with the terms of the Leases and/or these Sale Guidelines and where the provisions of the Leases conflict with these Sale Guidelines, these Sale Guidelines shall govern. The Company and the Agent shall not use neon, day-glo signage or handwritten signs. Furthermore, except as set out below, with respect to enclosed mall locations no exterior signs or signs in common areas of a mall shall be used unless permitted by the applicable Lease. In addition, the Company and the Agent shall be permitted to utilize exterior banners at non-enclosed mall Locations; provided, however, that where such banners are not permitted by the applicable Lease and the Landlord requests in writing within one business day of the later of the Sale Commencement Date, being April 1, 2013 and service of the Approval Order which appends the Sale Guidelines that the banners are not to be used, no banners shall be used. Any banners used shall be located or hung so as to make clear that the Liquidation Sale is being conducted only at the affected Location and shall not be wider than the premises occupied by the Location. All permitted exterior banners shall be professionally hung and to the extent that there is any damage to the façade of the premises of a Location as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Company.

- 5 The Company and the Agent shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre/mall premises.
- 6 Conspicuous signs shall be posted in the cash register areas of each Location to the effect that all sales are "final" (and the same shall be printed or stamped on customer receipts), the sales are on an "as is, where is" basis and that customers with any questions or complaints subsequent to the conclusion of the Liquidation Sale may contact a named representative of the Company at a specified email address.
- 7 The Company and the Agent shall not distribute handbills, leaflets or other written materials to customers outside of any of the Locations, unless permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Location is located. Otherwise, the Company and the Agent may solicit customers in the Locations themselves. The Company and the Agent shall not use any giant balloons, flashing lights or amplified sound to advertise the Liquidation Sale or solicit customers, except as permitted under the applicable Lease or agreed to by the Landlord.
- 8 At the conclusion of the Liquidation Sale, the Company and the Agent shall vacate the Locations in "broom swept" condition, and shall otherwise leave the Locations in the same condition as on the commencement of the Liquidation Sale, ordinary wear and tear excepted; provided, however, that the Company and the Agent shall be authorized to leave any FF&E (as the term is defined in the Agency Agreement) in the Locations; provided further that the Company does not undertake any greater obligation than set forth in an applicable Lease with respect to the Location. The Company and the Agent may abandon any FF&E not sold in the Liquidations Sale at the Locations at the conclusion of the Liquidation Sale. Any FF&E left in a Location after a Lease is repudiated, terminated or disclaimed shall be deemed abandoned with the Landlord having the right to dispose of the same as the Landlord chooses without any liability whatsoever on the part of the Landlord. No Excluded FF&E may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease. No property of any Landlord of Location shall be removed or sold during the Liquidation Sale.
- 9 During the Liquidation Period for each Location, The Company and the Agent may sell any FF&E, in accordance with Section 2.26 of the Agency Agreement, owned by the Company and located in the Locations during the Liquidation Sale. The Company and the Agent may advertise the sale of FF&E consistent with these guidelines. Additionally, the purchasers of any FF&E sold during the Liquidation Sale shall only be permitted to remove the FF&E after business hours either through the back shipping areas or through other areas after store business hours, with Landlord's supervision as required by the Landlord. The Company shall repair any damage to the Locations resulting from the removal of any FF&E. For the purpose of these Sale Guidelines, the word "fixtures" in paragraph 13 of the Initial Order dated February 26, 2013 shall be deemed to include both fixtures and improvements to real property.
- 10 The Company and the Agent shall not make any alterations to interior or exterior Location lighting. No property of any Landlord of a Location shall be removed or sold during the Liquidation Sale. The hanging of permitted exterior banners or other signage in accordance with these Sales Guidelines shall not constitute an alteration to a Location.
- 11 The Agent and its agents and representatives shall have the same access rights to the Locations as the Company under the terms of the applicable Lease, and the Landlord shall have the rights of access to the Locations during the Liquidation Sale provided for in the applicable Lease, subject, for greater certainty, to the stay of proceedings set out in the Initial Order.
- 12 The Company and the Agent shall not conduct any auctions of the Merchandise or FF&E at any of the Locations. Subject to any agreement between the Company and a Landlord, the Initial Order, the Approval Order and any further order of the Court, the Company and the Agent shall

not augment the Merchandise included in the Liquidation Sale. Notwithstanding the foregoing, the Company is expressly permitted to transfer merchandise between and among the Locations and like merchandise of like quality as currently sold at the Locations from the Company's remaining retail stores to the Locations. Further, the Agent is permitted to purchase additional like merchandise of like quality after the commencement of the Liquidation Sale in keeping with Section 2.26 of the Agency Agreement. The foregoing right of the Company and the Agent to augment is subject in each case to the limitations set out in the Agency Agreement between the Company and the Agent during the Liquidation Sale; and further subject to any Landlord having a prohibition on the conduct of liquidation sales in its applicable Lease objecting in writing by notice to the person designated in paragraph 14 below to the Agent's right of augmentation within 2 days of the earlier of the Sale Commencement Date, being April 1, 2013, and the service of the Approval Order appending the Sale Guidelines in which case, no augmentation (other than TBS branded goods) shall be permitted in respect of the applicable Location.

- 13 Removal of other furniture, movable fixtures and equipment shall take place before or after regular hours of the Location or shopping center and through service exits and corridors designated by the Landlord. The Company and the Agent may abandon any of the FF&E not sold in the Liquidation Sale at the Locations' premises at the conclusion of the Liquidation Sale; provided however the Landlord for the subject Location shall have the right to remove and dispose of such property without liability to the Company or the Agent.
- 14 The Company shall designate a party to be contacted by the Landlords should an issue arise concerning the conduct of the Liquidation Sale. The initial contact person for the Company shall be Karen Hirst (available at 905-293-7665 or khirst@tbsstores.com). If the parties are unable to resolve the dispute between themselves, the Landlord or Company shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties, during which time the Agent shall cease all activity in dispute other than activity expressly permitted herein, pending the determination of the matter by the Court.
- 15 Nothing herein is, or shall be deemed to be, a consent by any Landlord to the sale, assignment or transfer of any Lease or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

#### Exhibit "A"

Store No.	Store		City	Province

EXHIBIT "C" AFFIDAVIT OF CLINTON WOLF SWORN FEBRUARY 25, 2013



Court File No.

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 TBS  
ACQUIRECO INC., THE BARGAINI SHOP HOLDINGS INC. and TBS STORES INC.  
(collectively, the Applicants)

AFFIDAVIT OF CLINTON WOLFF  
(sworn February 25, 2013)

I, Clinton Wolff, of Brampton, Ontario, MAKE OATH AND SAY

1. I am the Executive Vice President, Chief Financial Officer and Chief Information Officer of the Applicants in this proceeding and as such I have personal knowledge of the matters deposed to in this Affidavit except where I depose to a matter based on information from a person or source that I identify, in which case I believe that both the information and the resulting statement are true.
2. I am authorized to make this affidavit on behalf of the Applicants.
3. This Affidavit is sworn in support of an application for an Initial Order (the **Application**), attached and marked hereto as **Exhibit "A"**, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C.c-36, as amended (the **CCAA**) in respect of the Applicants, among other things:
  - (a) declaring that the Applicants are companies to which the CCAA applies;
  - (b) staying all proceedings and remedies taken or that might be taken in respect of the Applicants or any of their property, except as set forth in the Initial Order or as otherwise permitted by law;

- (c) authorizing the Applicants to carry on business in a manner consistent with the preservation of their property and to make certain payments in connection with their business and the proceedings taken herein;
  - (d) appointing Ernst & Young Inc. (E&Y) as Monitor of the Applicants in these proceedings;
- 
- (e) authorizing the Applicants to continue with a solicitation process for the purposes of engaging a liquidator for certain store locations as part of the Applicants' restructuring strategy, as more particularly set out below;
  - (f) providing the Applicants with exclusive authority to file a plan of compromise or arrangement;
  - (g) approving the Administration Charge (as defined below);
  - (h) approving the D&O Charge (as defined below); and
  - (i) approving the Critical Suppliers' Charge (as defined below).

#### **Overview of the Business**

4. The Applicants operate 231 discount general merchandise retail stores throughout Canada under the following retail banners: "The Bargain! Shop", "Red Apple" and "mymark". The Applicants' products include, among others, products for the home, apparel and footwear for the entire family, as well as groceries, cleaning, health and beauty products and electronics.

5. The Applicants operate retail stores in both urban and rural locations. The Applicants flagship retail banner, "The Bargain! Shop" was traditionally located in rural locations, and specialised in offering general merchandise at reduced prices in locations geographically close to their consumer base. In 2005, "The Bargain! Shop" began accelerating its expansion into both urban and rural markets. The Applicants operate 193 "The Bargain! Shop" locations.

6. Both the "Red Apple" and "mymark" retail banners were launched by the Applicants in 2012. "Red Apple" is a refinement of the "The Bargain! Shop" retail banner, providing an improved customer shopping experience, better softlines

presentation, and "Candy Works", a bulk and other candy store located within Red Apple locations. The Applicants operate 32 "Red Apple" locations.

7. "mymark" is a distinct departure from "The Bargain! Shop" retail banner, aimed at a slightly higher-end consumer. "mymark" locations are typically located in urban areas, and do not carry consumables, food or health and cleaning products, which are generally core products under the "Red Apple" and "The Bargain! Shop" retail banners. The Applicants operate six "mymark" locations.

8. The Applicants employ approximately 2350 people. Approximately 100 people are employed in Mississauga, Ontario in a variety of head office and warehouse functions and the remainder are employed in the retail operations located across the country. The Applicants do not have any unionized employees and do not operate a pension plan. The Applicants offer an employee benefit plan for all salaried employees at both their retail locations and head office. The Applicants do not own any real property. All of their retail, warehouse and head office operations are conducted out of leased premises.

#### **Directors and Officers**

9. The current directors of each of TBS Acquireco Inc. (TBS), The Bargain! Shop Holdings Inc. (TBSHI) and TBS Stores Inc. (TBSI) are: Eric Claus, Christopher Payne, Matthew Segal, John Tomes, and Gordon Lownds. The current officers of TBS are: Eric Claus, Clinton Wolff, Tom Mitchell, Nikki Yassemi, Tracey Mikita, Laura Penso, and Mike Fitzpatrick.

#### **The Need for CCAA Protection**

10. As will be discussed in more detail below, the Applicants are currently in default of their obligations to certain of their lenders. Such default ultimately emanates from the Applicants' inability to realize sufficient value from various of their store locations, primarily located in urban areas. The overview of this operational issue and related defaults is set out in detail as follows.

11. Starting in 2005, under previous ownership, the Applicants accelerated their expansion strategy with a view to increasing penetration in urban and other markets. As competition increased, the Applicants' relevance as a general merchant with a small

retail "footprint" diminished. Cash flow from the Applicants' rural locations, which has historically been profitable, funded the expansion into urban markets and kept the Applicants afloat as the urban locations struggled. In 2012, the stores in Western Canada, Northern Ontario, and Newfoundland, largely rural locations, accounted for 60% of the Applicants' retail footprint, but made up over 70% of their revenue. Average contribution of those stores located in Southern Ontario and the Maritimes, largely urban markets, decreased by 84.7% over the past two years. The average contribution of rural retail stores has increased by 4.2% in the same time period.

12. In 2012, the Applicants adopted the "Red Apple" and "mymark" retail banners as part of a strategic rebranding and revitalization initiative. "Red Apple" locations have proven to be an economic success for the Applicants, producing revenue higher than retail stores under "The Bargain! Shop" and "mymark" banners. By contrast, the "mymark" banner, targeting a higher-end market, has proven to be capital intensive with limited growth opportunities.

13. For the 2012 holiday season, the Applicants adopted a comprehensive sales plan in line with the Applicants' rapid expansion and the launch of the "Red Apple" and "mymark" banners. The Applicants' had an aggressive sales and earnings budget, and inventories were increased to service the anticipated demand. A substantial marketing campaign was put in place by the Applicants in furtherance of these goals. The Applicants did not obtain the expected increase in sales, particularly in their urban stores, which continued to struggle. These events, coupled with the Applicants' high leverage ratios, has created a liquidity crisis.

14. In January 2013, the Applicants conducted a strategic review of financial and liquidity issues. It has become apparent that any restructuring or reorganization of the Applicants will need to be undertaken as part of an overall strategy involving a proceeding under the CCAA.

15. The Applicants have engaged, and continue to engage, in a critical evaluation of their retail stores, having reviewed the contribution of all retail locations contributing under \$50,000 annually. In total, approximately half of the chain was reviewed in detail. The Applicants identified a number of retail locations that have a negative contribution,

are located outside of the Applicants historically strong markets, and do not fit with the Applicants' long-term vision.

16. Having regard to their financial and operational circumstances, the Applicants have determined that it is necessary to seek protection under the CCAA in order to preserve enterprise value and continue going concern operations while seeking to implement a restructuring which at its first phase would see the reduction of unprofitable stores.

17. In furtherance of this intention, and if authorized by this Honourable Court, the Applicants intend to pursue certain operational restructuring initiatives while under CCAA protection, including disclaiming certain leases of unprofitable locations, liquidating surplus inventory and inventory located at locations to be closed, and rationalizing overhead. Any such operational restructuring initiatives will be undertaken for the purpose of further enhancing the Applicants' long-term financial health, liquidity and competitiveness and the prospects of a viable compromise or arrangement in respect of the Applicants.

18. Within the context of these initial steps, in the Applicants' restructuring efforts, the Applicants have commenced a solicitation process for the engagement of a liquidator to assist in inventory liquidations and store closures, as a necessary phase towards implementing their restructuring initiatives. Non-disclosure agreements were distributed to strategic prospective liquidators with a view to selecting a liquidator and implementing this initial phase of the Applicants' restructuring as expeditiously and effectively as possible if the Court so authorizes. The Applicants intend to seek this Court's authorization to continue this solicitation process and intend to return to Court to report on the results.

19. In light of the issues outlined in paragraphs 11-13 above, and the Applicants' cross-defaults to their Secured Creditors (as defined below) and holders of '06 VTB Notes (as defined below), the Applicants urgently require a stay of proceedings and the other protections afforded by the CCAA so that the Applicants may stabilize their business and pursue a restructuring for the benefit of their stakeholders.

20. It is expected that a restructuring will enable the Applicants to make necessary improvements to their business and continue as a financially sound industry competitor.

A restructuring will reduce the strain on the Applicants' liquidity position and will enable the Applicant to continue going concern operations thereby preserving the employment of a substantial percentage of the Applicants' approximate 2350 employees.

21. The Applicants are optimistic that a restructuring of their business will have the effect of significantly improving their long-term financial prospects while preserving value and permitting them to continue to operate as a going concern beyond the period of creditor protection.

22. The Applicants have engaged in discussions with their main secured creditor, Wells Fargo Capital Finance Corporation (the "Operating Lender") and Blackrock Kelso Capital Corporation ("Blackrock") (collectively, the "Secured Creditors"), in an effort to address the challenges facing the Applicants. The Secured Creditors are not opposed to the CCAA filing.

#### **Secured Creditors and Unsecured Debentures**

23. Attached and marked as Exhibit "B" to this affidavit are search results of the Ontario Personal Property Registry for each of the Applicants.

24. The Applicants do not have any secured creditors of any significance other than the Operating Lender and Blackrock.

25. The Applicants have an operating debt facility with the Operating Lender, up to a maximum of \$50,000,000 indebtedness subject to availability reductions based on the value of the Applicants' inventory and accounts. As of February 22, 2013, the Operating Lender was owed approximately \$29,940,000 under its asset based loan facility with TBSHI. The Operating Lender has a first ranking security interest over all of the Applicants' inventory, and a second ranking security interest over all of the Applicants' other assets. The loan is guaranteed by the other Applicants. Attached as Exhibit "C" is a copy of the Asset Based Loan facility entered into between TBSHI and the Operating Lender.

26. As of February 12, 2013, Blackrock was owed approximately \$23,600,000 under its Term Loan facility with TBSHI. Blackrock has a first ranking security interest over all of the Applicants' assets other than inventory, in which it holds a second ranking

security interest. The loan is guaranteed by the other Applicants. Attached as Exhibit "D" is a copy of the Term Loan facility entered into between TBSHI and Blackrock.

27. Pursuant to the 2009 Vendor Take Back Note ('09 VTB Note), TBSI is liable to debenture holders in the principal amount of \$5,410,000 plus accrued and unpaid interest of approximately \$1,790,000, as at February 22, 2013. The '09 VTB Note is unsecured and subordinated to the Secured Creditors. Attached as Exhibit "E" is a copy of the '09 VTB Note.

28. Interest under the '09 VTB Note is payable only if TBSI has excess cash flow at a simple annual interest rate of 10%. To date no payments of interest have been made or will be required to be made.

29. Pursuant to the 2006 Vendor Take Back Notes ('06 VTB Notes), TBS is liable to debenture holders in the principal amount of approximately \$14,677,000, which includes payment-in-kind (PIK) interest of approximately \$5,390,000, as at December 31, 2012. The '06 VTB Notes are guaranteed by the other Applicants and are unsecured. Attached as Exhibit "F" is a copy of a form of '06 VTB Note.

30. The Applicants' trade debt is \$23,391,376 as at February 20, 2013.

#### Defaults

31. Interest under the '06 VTB Notes is payable semi-annually in arrears on June 30 and December 31 of each year at an annual interest rate of 12.5% (4.5% in cash and 7.5% PIK). The '06 VTB Notes became due in October 2012. In December 2012, cash interest was paid and PIK accrued to holders of the '06 VTB Notes; however, the principal remains outstanding and the Applicants are currently in default thereunder. This default has triggered a cross-default with respect to the Applicants debts owed to their Secured Creditors.

32. This default has persisted since October, and while neither Secured Creditors nor VTB Note creditors have taken any steps to pursue their respective remedies, it is clear that the Applicants cannot meaningfully address the financial difficulties facing the business without recourse to the CCAA.

### **The Operations of the Applicants**

33. On an operational basis, all or substantially all of the Applicants' business activities are conducted through TBSHI and TBSI, including leasing, product supply and employment agreements. TBSHI purchases and holds all of the Applicants' inventory, and is responsible for generating substantially all of the Applicants' consolidated revenue. Furthermore, TBSHI performs all operations for the Applicants and holds the majority of leases, while TBSI holds leases acquired by the Applicants as a result of its 2008 purchase of SAAN Stores Ltd. TBSHI makes payments on behalf of both TBS and TBSI.

34. Attached as **Exhibit "G"** is a corporate chart of the Applicants.

35. The Applicants' financial reporting is done on a consolidated basis. The Applicants operate under centralized senior management, all of which is directed from the Applicants' head office in Mississauga, Ontario.

36. Attached as **Exhibit "H"** is a copy of the Applicants' consolidated audited financial statements for the years ending January 28, 2012 and January 29, 2011.

37. The Applicants operate a cash management system, accounting for both cash and credit card/debit card transactions. With respect to cash transactions, the Applicants' retail locations deposit cash on a daily basis into their applicable bank account. The Applicants maintain deposit bank accounts with 12 different financial institutions. The deposit bank accounts are consolidated into the Applicants' consolidation account.

38. With respect to credit/debit card transactions, each of the Applicants' retail locations utilize point of sale terminals for processing credit/debit payments, operated by TD Bank Visa. Credit/debit card transactions are tracked at the store level on a daily basis and reported to the Applicants' head office. All credit/debit card transactions are then applied to the Applicants' consolidation account.

39. The Applicants' consolidation account is swept twice daily by the Operating Lender. These cash sweeps are included in the daily calculation of the Applicants' borrowing base under its facility with the Operating Lender. The Applicants subsequently draw daily on the facility. Maintenance of the Applicants' current cash



management system is essential to ensuring the continued sound operation of the Applicants' business. Any changes to such system would likely be unwieldy, and potentially detrimental to the restructuring.

40. A stay of proceedings against each of TBS, TBShI and TBSI is necessary in order to preserve the value and assets of the Applicants as the Applicants seek to restructure. In light of the integrated operational structure of the Applicants, a successful restructuring cannot be implemented without each entity therein receiving the protections afforded under the CCAA.

#### **The Monitor**

41. E&Y has been retained by the Applicants to provide advice on their restructuring options with a view to acting as Monitor in the event of CCAA proceedings. In the course of fulfilling its mandate, E&Y has become familiar with the Applicants' business and their current financial challenges. Subject to court approval, E&Y has consented to act as the Monitor of the Applicants in this CCAA proceeding and in my view it is a fit and proper organization to do so.

42. I am advised by E&Y that it proposes to file a pre-filing report with the Court in conjunction with the Interim Order request for relief under the CCAA. The details of E&Y's activities are set out in the pre-filing report.

#### **Cash Flow**

43. The Applicants, with the assistance of the proposed Monitor, have prepared a weekly cash flow forecast for the next 60 days (the **Cash Flow Forecast**). Attached as **Exhibit "I"** is a copy of the Cash Flow Forecast.

44. As set out in the Cash Flow Forecast, the Applicants' principal uses of cash through the week ending Friday April 19, 2013 will consist of the payment of ongoing costs of day to day operations and professional fees and disbursements in connection with these CCAA proceedings.

45. As set out in the Cash Flow Forecast, the Applicants have sufficient cash flow to maintain day to day operations throughout the period of the Initial stay contemplated in the Initial Order. The Applicants will discuss debtor-in-possession financing

arrangements with the Secured Creditors and principally the Operating Lender and consider what, if any, arrangements should be made in that respect.

46. As part of the day to day operations of the Applicants' business, the Applicants have for many years sold pre-paid gift cards/credit notes to customers. This is standard practice in the retail industry and has been standard practice for the Applicants. Currently, there is approximately \$189,000 of pre-paid gift cards outstanding which has not been redeemed. In the Applicants' experience, and despite the pre-paid nature of gift cards, these pre-paid gift cards are not generally fully redeemed. The Applicants estimate that only approximately 10-15% of outstanding gift cards will be redeemed. In addition, gift cards are issued and redeemed at retail value, but have an estimated cost of 70% due to the gross margin achieved upon a sale. Given the Applicants' plan to operate throughout the CCAA process and emerge as an ongoing stronger business, in my view refusing to honour outstanding gift cards would significantly harm the Applicants' goodwill with their customers and would adversely affect the Applicants' customer base thereby adversely impacting its business. For this reason, the Applicants seek the ability to continue to honour gift cards purchased prior to the filing date.

#### **Critical Suppliers**

47. With the assistance of E&Y, the Applicants have identified a number of suppliers critical to their business. The Applicants have organized these suppliers into three categories: a) transportation suppliers; b) logistics; and c) wholesale suppliers.

48. The Applicants transport much of their inventory to various retail locations through third-party transportation companies, from a distribution centre owned and operated by a third-party logistics company. The Applicants do not have their own transportation capability. The Applicants' reliance on third-party transportation companies is particularly acute given the high number of stores they have in rural locations. Maritime-Ontario Freight Lines Ltd. and 7880413 Canada Limited are the Applicants' primary third-party transportation providers whose continued services are critical to the Applicants' ongoing operations. Each transportation provider performs the same services for the Applicants, but in different regions. Similarly, logistics services are provided to the Applicants by a third-party, SCI Logistics Ltd.

49. The Applicants rely on a number of third-party wholesalers to purchase inventory for a number of their rural stores. In such remote locations, continued service from wholesalers is crucial to ensuring the uninterrupted supply of inventory to the applicable retail location. Each wholesale supplier performs the same services for the Applicants, but service different regions. Carol-Wabush Distributing Company Limited, TRA Atlantic, and Snelgrove Wholesale Ltd. are the Applicants' third-party wholesale providers for their rural locations in the Atlantic and Maritime provinces. Core-mark International is the Applicants' third-party wholesale provider for many of their rural locations in Western Canada.

50. Each of the wholesale suppliers provide tobacco products to the Applicants' retail locations in specific regions. Tobacco products are critical traffic generators for the Applicants stores.

51. It is conceivable that in certain cases, alternate arrangements might be made to cope with cessation of services by critical suppliers, however, these would ultimately introduce further cost, instability and uncertainty to the chain of supply at exactly the time when such stability is most required.

52. In order to ensure the ordinary flow of inventory through its supply chain during the CCAA proceedings, and to preserve the Applicants' enterprise value, the Applicants are proposing to grant a charge to each of the Applicants' transportation, logistics and key product suppliers outlined above as security for costs incurred after the commencement of these proceedings (the **Critical Suppliers' Charge**). The Critical Suppliers' Charge will be in the amount of: (1) \$842,500 for transportation providers; (2) \$135,000 for the logistic providers; and (3) \$432,500 for wholesale suppliers, for an aggregate of \$1,410,000. The Applicants are proposing to grant the Critical Suppliers Charge with the priority as set out in the Initial Order.

53. While the Applicants' forecasted cash flows anticipate payment to critical suppliers on substantially a cash on delivery basis, the Critical Suppliers' Charge will provide the necessary comfort to ensure uninterrupted and consistent supply of goods and services. We refer to "substantially" only because there may be a day or two of lag until the delivery of the goods and services will be known to have been received by the Applicants and promptly paid upon such recognition.

### **The Administration Charge**

54. E&Y is prepared to act as Monitor during the CCAA proceeding and to assist the Applicants with preparation of cash flow projections and with all aspects in relation to a restructuring pursuant to, and subject to, the terms of the Initial Order of this Honourable Court and the statutory provisions of the CCAA. If so directed by the Court, E&Y is also prepared to monitor the operations of the Applicants, to provide direction and guidance to management during the CCAA restructuring period regarding the restructuring, and to generally assist the Applicants with the restructuring efforts.

55. The Applicants' solicitors, the proposed Monitor, and its solicitors are essential to the Applicants' restructuring. They have each advised that they are prepared to provide or continue professional services to the Applicants only if they are protected by a charge over the assets of the Applicants. Accordingly, the Applicants seek to establish a priority charge over those assets in favour of their solicitors, the Monitor, and the Monitor's solicitors.

56. In connection with its appointment, it is contemplated that the Monitor, counsel to the Monitor and counsel to the Applicants, will be granted a court-ordered charge as security for their respective fees and disbursements relating to services rendered up to a maximum amount of \$1,000,000 with the priority set out in the Initial Order.

### **Director and Officer Protections**

57. A successful restructuring of the Applicants will only be possible with continuity on the Applicants' boards of directors (collectively, the **Directors**) as well as continuity in the make-up of the Applicants' officers (collectively, the **Officers**).

58. The Officers are equally important to the Applicants as they have specialized expertise and experience with the Applicants and the retail industry generally. Over time, the Officers have developed relationships with suppliers, employees and other stakeholders that will be important to the restructuring process. These relationships are not easily duplicated or replaced.

59. The Applicants will benefit from the experience and expertise of the Directors and Officers which will be invaluable in assisting the Applicants through the CCAA process.

60. While I am not a lawyer, it is my understanding that in certain circumstances directors and officers can be held personally liable for certain of a company's obligations to the federal and provincial governments during an insolvency proceedings, including with respect to payroll remittances, harmonized sales taxes, goods and services taxes, withholding taxes, workers compensation remittances, etc. Furthermore, I understand it may be possible for directors and officers of a corporation to be held personally liable for certain wage-related obligations to employees.

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61. The Applicants maintain a directors' and officers' liability insurance policy (the **D&O Insurance**) for the Directors and Officers of the Applicants. The current D&O Insurance provides \$2,000,000 in coverage and expires on December 30, 2013.

62. In addition, there are also contractual indemnities which have been given by the Applicants to their Directors. On a cessation of going concern operations, the Applicants may not have sufficient funds to satisfy these indemnities should the Directors be found responsible for the potential directors' liabilities. Attached as **Exhibit "J"** is copy of these contractual indemnities, as excerpted from the Unanimous Shareholders Agreement amongst the shareholders of TBS.

63. The Directors have voiced significant concern with respect to potential personal liability if they continue in their current capacities. I am of the view that, in light of the potential for significant personal liability, some or perhaps all of the Directors will not continue their service and involvement in the proposed restructuring unless the Initial Order grants a charge as security for the Applicants' obligations as described above.

64. With the assistance of E&Y, a calculation has been performed to estimate the quantum of the potential director and officer liabilities based on the number of employees, the Applicants' pay cycle and various other potential sources of personal liability such as source deductions and tax amounts. After deducting for priority secured claims of employees, this amount could be in the range of approximately \$4,000,000 depending on certain assumptions.

65. The Applicants propose that a charge in favour of the Directors and Officers be granted in the amount of \$2,000,000 taking into account the available D&O Insurance Coverage which will provide a reasonable level of protection to those directors and officers prepared to stay with the Applicants to see them through the CCAA process.

The Applicants believe that the amount of the D&O Charge is fair and reasonable in the circumstances and understands the proposed Monitor and the Secured Creditors are agreeable to the proposed amount of the D&O Charge and the priority of that charge as set out in the Initial Order.

66. The D&O Charge is vital to encouraging the continued participation of the Directors and Officers, who will provide necessary experience and stability to this process and guide the Applicants' restructuring efforts. It is critical that a level of continuity be maintained within the Applicants to ensure focus on achieving a restructuring plan that will benefit the Applicants' stakeholders. The D&O Charge will also provide significant assurances to the Applicants' employees that the payment of wages, vacation pay and other statutory entitlements will be satisfied, as well as withholding and tax obligations owing to the federal and provincial authorities.

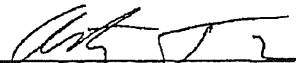
#### **Operating Lender Accommodation**

67. At the time of the serving of this affidavit the Secured Creditors have been in a dialogue regarding the terms of the continued availability of the operating facility. I am advised by my counsel, Mr. Pearlman, that such discussions are progressing well and that an update will be available upon the hearing of this matter.

#### **Requirement for Relief Requested**

68. The Applicants are currently in a very challenging financial position. After many years of success and growth, the Applicants have faced significant declines in sales at a number of their retail locations. In spite of the efforts made over the past year and the strategic avenues pursued, the Applicants are no longer able to meet their financial obligations and require the protections afforded by the CCAA while they seek to restructure their affairs.

AFFIRMED BEFORE ME at Toronto,  
Ontario, on February 25, 2013.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits for  
Ontario

Anton Igorevich Tchajkov, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires May 10, 2014.



\_\_\_\_\_  
Clinton Wolff

EXHIBIT "D"

Court File No. CV-13-10018-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

THE HONOURABLE ) MONDAY, THE 25<sup>TH</sup>  
JUSTICE ) DAY OF MARCH, 2013

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 TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC.  
AND TBS STORES INC. (collectively, the "Applicants")

MONITOR'S CERTIFICATE

RECITALS

A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Agency Agreement entered into by The Bargain! Shop Holdings Inc., TBS Stores Inc., Merchant Trading Services ULC and GBRP, Inc. dated March •, 2013, a copy of which is attached as Exhibit • to the Affidavit of Clinton Wolf dated •.

B. Pursuant to an Order of the Court dated March •, 2013, the Court ordered that all of the Remaining Merchandise shall vest absolutely in the Agent, free and clear of and from any and all claims and encumbrances, upon the delivery by the Monitor to the Agent of a certificate certifying that (i) the Liquidation Period is at an end, and (ii) the Net Minimum Guaranteed Amount has been paid by the Agent to the Companies.

ERNST & YOUNG INC., in its capacity as Court-appointed Monitor in the *Companies'* *Creditors Arrangement Act* proceedings of TBS Acquireco Inc., The Bargain! Shop Holdings Inc. and TBS Stores Inc., certifies that it has been informed by the Agent and the Companies that:

1. The Liquidation Period has ended.
2. ~~The Net Minimum Guaranteed Amount has been paid by the Agent to the~~  
Companies.
3. The Remaining Merchandise includes the assets listed on Appendix "A" hereto.

DATED as of this • day of •, 2013.

ERNST & YOUNG INC., in its capacity as  
Court-appointed Monitor of TBS  
Acquireco Inc., The Bargain! Shop  
Holdings Inc. and TBS Stores Inc., and  
not in its personal capacity

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APPENDIX "A"

LIST OF REMAINING MERCHANDISE

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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 TBS Acquireco Inc., The Bargain!  
Shop Holdings Inc. and TBS Stores Inc.

Court File No: CV-13-10018-00CL

APPLICANTS

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

Proceeding commenced at Toronto

APPROVAL ORDER

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Lawyers for the Applicants

## **TAB 5**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

THE HONOURABLE )

WEDNESDAY, THE 4<sup>TH</sup>

REGIONAL SENIOR JUSTICE )

DAY OF FEBRUARY, 2015

MORAWETZ )



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 TARGET CANADA CO., TARGET  
CANADA HEALTH CO., TARGET CANADA MOBILE GP  
CO., TARGET CANADA PHARMACY (BC) CORP., TARGET  
CANADA PHARMACY (ONTARIO) CORP., TARGET  
CANADA PHARMACY CORP., TARGET CANADA  
PHARMACY (SK) CORP., and TARGET CANADA  
PROPERTY LLC (collectively the "**Applicants**")

**APPROVAL ORDER – AGENCY AGREEMENT**

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, *inter alia*, approving: (i) the transactions contemplated under the *Agency Agreement* entered into between Target Canada Co., Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. (collectively, "**Target Canada**") and a contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "**Agent**") on January 29, 2015 (the "**Agency Agreement**") and certain related relief; and (ii) the granting of the Agent's Charge and Security Interest (as defined below), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Affidavit of Mark Wong sworn on January 29, 2015 including the exhibits thereto (the "**Wong Affidavit**"), and the First

Report (the "**Monitor's First Report**") of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "**Monitor**") filed, and on hearing the submissions of respective counsel for the Applicants and the Partnerships listed on Schedule "A" hereto, the Monitor, Target Corporation, the Agent, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Robert Carson sworn January 30, 2015 filed:

#### **SERVICE AND DEFINITIONS**

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. THIS COURT ORDERS that any capitalized term used and not defined herein and/or in Schedule D appended hereto, shall have the meaning ascribed thereto in the Initial Order in these proceedings dated January 15, 2015, the Sales Guidelines and, with regard to paragraphs 10-26 of this Order, any capitalized term used and not defined therein shall have the meaning ascribed thereto in the Initial Order or in the Agency Agreement, as applicable.

#### **APPROVAL OF THE AGENCY AGREEMENT**

##### **AGENCY AGREEMENT**

3. THIS COURT ORDERS that the Agency Agreement, including the Sales Guidelines attached hereto as Schedule "B" (the "**Sales Guidelines**"), and the transactions contemplated thereunder are hereby approved, authorized and ratified and that the execution of the Agency Agreement by Target Canada is hereby approved, authorized, and ratified with such minor amendments as Target Canada (with the consent of the Monitor) and the Agent may agree to in writing. Subject to the provisions of this Order and the Initial Order, Target Canada is hereby authorized and directed to take any and all actions as may be necessary or desirable to implement the Agency Agreement and each of the transactions contemplated therein. Without limiting the foregoing, Target Canada is authorized to execute any other agreement, contract, deed or any other document, or take any other action, which could be required or be useful to give full and complete effect to the Agency Agreement.

## THE SALE

4. THIS COURT ORDERS that subject to receipt of the Agent L/C by Target Canada, the Agent is authorized to conduct the Sale in accordance with this Order, the Agency Agreement and the Sales Guidelines and to advertise and promote the Sale within the Stores in accordance with the Sales Guidelines. If there is a conflict between this Order, the Agency Agreement and the Sales Guidelines, the order of priority of documents to resolve such conflicts is as follows: (1) the Order; (2) the Sales Guidelines; and (3) the Agency Agreement.

5. THIS COURT ORDERS that, the Agent, in its capacity as agent of Target Canada, is authorized to market and sell the Merchandise, Designated Company Consignment Goods and FF&E, free and clear of all liens, claims, encumbrances, security interests, mortgages, charges, trusts, deemed trusts, executions, levies, financial, monetary or other claims, whether or not such claims have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise, whensoever and howsoever arising, and whether such claims arose or came into existence prior to the date of this Order or came into existence following the date of this Order, (in each case, whether contractual, statutory, arising by operation of law, in equity or otherwise) (all of the foregoing, collectively "**Claims**"), including, without limitation the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, and the DIP Lender's Charge, as such terms are defined in the Initial Order, and any other charges hereafter granted by this Court in these proceedings (collectively, the "**CCAA Charges**"), and (ii) all Claims, charges, security interests or liens evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal or removable property registration system (all of such Claims, charges (including the CCAA Charges), security interests and liens collectively referred to herein as "**Encumbrances**"), which Encumbrances, subject to this Order, will attach instead to the Guaranteed Amount and any other amounts received or to be received by Target Canada under the Agency Agreement, in the same order and priority as they existed on the Sale Commencement Date.

6. THIS COURT ORDERS that subject to the terms of this Order, the Initial Order and the Sales Guidelines, or any greater restrictions in the Agency Agreement, the Agent shall have the right to enter and use the Locations and all related store services and all facilities and all

furniture, trade fixtures and equipment, including the FF&E, located at the Locations, and other assets of Target Canada as designated under the Agency Agreement, for the purpose of conducting the Sale and for such purposes, the Agent shall be entitled to the benefit of the Target Canada Entities' stay of proceedings provided under the Initial Order, as such stay of proceedings may be extended by further Order of the Court.

7. THIS COURT ORDERS that until the applicable Vacate Date for each Store (which shall in no event be later than May 15, 2015), the Agent shall have access to the Locations in accordance with the applicable leases and the Sales Guidelines on the basis that the Agent is an agent of Target Canada and Target Canada has granted the right of access to the Location to the Agent. To the extent that the terms of the applicable leases are in conflict with any term of this Order or the Sales Guidelines, it is agreed that the terms of this Order and the Sales Guidelines shall govern.

8. THIS COURT ORDERS that nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of the leases for Target Canada's leased locations. Nothing contained in this Order or the Sales Guidelines shall be construed to create or impose upon Target Canada or the Agent any additional restrictions not contained in the applicable lease or other occupancy agreement.

9. THIS COURT ORDERS that except as provided for in Section 4 hereof in respect of the advertising and promotion of the Sale within the Stores, subject to, and in accordance with this Order, the Agency Agreement and the Sales Guidelines, the Agent, as agent for Target Canada, is authorized to advertise and promote the Sale, without further consent of any Person other than Target Canada and the Monitor as provided under the Agency Agreement or a Landlord as provided under the Sales Guidelines.

10. THIS COURT ORDERS that until the Sale Termination Date, the Agent shall have the right to use the Company's trademarks and logos relating to and used in connection with the operation of the Locations solely for the purpose of advertising and conducting the Sale in accordance with the terms of the Agency Agreement, the Sales Guidelines, and this Order.

11. THIS COURT ORDERS that upon delivery of a Monitor's certificate to the Agent substantially in the form attached as Schedule "C" hereto, (the "**Monitor's Certificate**") and

subject to payment in full by the Agent to Target Canada of the Guaranteed Amount, the Expenses, any Company Sharing Recovery Amount, and all other amounts due to Target Canada under the Agency Agreement, all of Target Canada's right, title and interest in and to any Remaining Merchandise and Remaining FF&E, shall vest absolutely in the Agent, free and clear of and from any and all Claims, including without limiting the generality of the foregoing, the Encumbrances, and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Remaining Merchandise or the Remaining FF&E shall be expunged and discharged as against the Remaining Merchandise or the Remaining FF&E upon the delivery of the Monitor's Certificate to the Agent; provided however that nothing herein shall discharge the obligations of the Agent pursuant to the Agency Agreement, or the rights or claims of Target Canada in respect thereof, including without limitation, the obligations of the Agent to account for and remit the proceeds of sale of the Remaining Merchandise and the Remaining FF&E (less the FF&E Commission) to the Designated Deposit Accounts. The Agent shall comply with paragraph 14 of the Initial Order and the Sales Guidelines regarding the removal and/or sale of any FF&E or any Remaining FF&E.

12. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith-after delivery thereof.

#### **AGENT LIABILITY**

13. THIS COURT ORDERS that the Agent shall act solely as an agent to Target Canada and that it shall not be liable for any claims against Target Canada other than as expressly provided in the Agency Agreement (including the Agent's indemnity obligations thereunder) or the Sales Guidelines. More specifically:

- (a) the Agent shall not be deemed to be an owner or in possession, care, control or management of the Stores, of the assets located therein or associated therewith or of Target Canada's employees (including the Retained Employees) located at the Stores or any other property of Target Canada;
- (b) the Agent shall not be deemed to be an employer, or a joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and



safety or other statute, regulation or rule of law or equity for any purpose whatsoever, and shall not incur any successorship liabilities whatsoever;

- (c) Target Canada shall bear all responsibility for any liability whatsoever (including without limitation losses, costs, damages, fines, or awards) relating to claims of customers, employees and any other persons arising from events occurring at the Stores and at the Distribution Centers during and after the term of the Agency Agreement, or otherwise in connection with the Sale, except in accordance with the Agency Agreement. To the extent the Landlords (or any of them) have claims against Target Canada arising solely out of the conduct of the Agent in conducting the Sale for which Target Canada has claims against the Agent under the Agency Agreement, Target Canada hereby assigns free and clear such claims to the applicable Landlord (the **"Assigned Landlord Rights"**).

#### **AGENT AN UNAFFECTED CREDITOR**

14. THIS COURT ORDERS that the Agency Agreement shall not be repudiated, resiliated or disclaimed by Target Canada nor shall the claims of the Agent pursuant to the Agency Agreement and under the Agent's Charge and Security Interest (as defined in this Order) be compromised or arranged pursuant to any plan of arrangement or compromise among Target Canada and their creditors (a **"Plan"**). The Agent shall be treated as an unaffected creditor in these proceedings and under any Plan.

15. THIS COURT ORDERS that Target Canada is hereby authorized and directed, in accordance with the Agency Agreement, to remit all amounts that become due to the Agent thereunder.

16. THIS COURT ORDERS that no Encumbrances shall attach to any amounts payable or to be credited or reimbursed to, or retained by, the Agent pursuant to the Agency Agreement, including, without limitation, any amounts to be reimbursed by Target Canada to the Agent pursuant to the Agency Agreement, and Target Canada will pay such amounts to the Agent within two (2) Business Days after the Agent's written request for such reimbursement, and at all times the Agent will retain such amounts, free and clear of all Encumbrances, notwithstanding any enforcement or other process or Claims, all in accordance with the Agency Agreement.

## DESIGNATED DEPOSIT ACCOUNTS

17. THIS COURT ORDERS that no Person shall take any action, including any collection or enforcement steps, with respect to amounts deposited into the Designated Deposit Accounts pursuant to the Agency Agreement, including any collection or enforcement steps, in relation to any Proceeds or FF&E Proceeds, that are payable to the Agent or in relation to which the Agent has a right of reimbursement or payment under the Agency Agreement.

18. THIS COURT ORDERS that amounts deposited in the Designated Deposit Accounts by or on behalf of the Agent or Target Canada pursuant to the Agency Agreement including Proceeds and FF&E Proceeds shall be and be deemed to be held in trust for Target Canada and the Agent, as the case may be, and, for clarity, no Person shall have any claim, ownership interest or other entitlement in or against such amounts, including, without limitation, by reason of any claims, disputes, rights of offset, set-off, or claims for contribution or indemnity that it may have against or relating to Target Canada.

## AGENT'S CHARGE AND SECURITY INTEREST

19. THIS COURT ORDERS that subject to the receipt by Target Canada of the Agent L/C, the Agent be and is hereby granted a charge (the "**Agent's Charge and Security Interest**") on all of the Merchandise, Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and, if any, the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to Agent with respect thereto) (and, for greater certainty, the Agent's Charge and Security Interest shall not extend to other Property of the Target Canada Entities as defined in paragraph 5 of the Initial Order) as security for all of the obligations of Target Canada to the Agent under the Agency Agreement, including, without limitation, all amounts owing or payable to the Agent from time to time under or in connection with the Agency Agreement, which charge shall rank in priority to all Encumbrances; provided, however, that the Agent's Charge and Security Interest shall be junior and subordinate to all Encumbrances, but solely to the extent of any unpaid portion of the Unpaid Company's Entitlements due to Target Canada under the Agency Agreement (the "**Subordinated Amount**").

## PRIORITY OF CHARGES

20. THIS COURT ORDERS that the priorities of the Agent's Charge and Security Interest, the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge and the DIP Lender's Charge, as among them, shall be as follows:

First - The Agent's Charge and Security Interest (but only in respect of the Merchandise, the Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and, if any, the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto)) each as defined in the Agency Agreement, (but not in respect of any other Property as defined in paragraph 5 of the Initial Order); provided, however, that the Subordinated Amount, as defined in paragraph 19 hereof shall be subordinated in accordance with that paragraph;

Second - Administration Charge (to the maximum amount of \$6.75 million);

Third - KERP Charge (to the maximum amount of \$6.5 million);

Fourth - Directors' Charge (to the maximum amount of \$64 million);

Fifth - Financial Advisor Subordinated Charge (to the maximum amount of \$3 million); and

Sixth - DIP Lender's Charge.

21. THIS COURT ORDERS that the filing, registration, recording or perfection of the Agent's Charge and Security Interest shall not be required; and the Agent's Charge and Security Interest shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected prior or subsequent to the Agent's Charge and Security Interest coming into existence, notwithstanding any failure to file, register or perfect any such Agent's Charge and Security Interest. Absent the Agent's written consent or further Order of this Court (on notice to the Agent), Target Canada shall not grant or suffer to exist any Encumbrances over any Merchandise, Proceeds, FF&E Proceeds (to the extent of the FF&E Commission) and, if any, proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto) that rank in priority to, or

*pari passu* with the Agent's Charge and Security Interest. For clarity, no Encumbrances shall attach to the Agent Additional Goods or proceeds relating thereto (net of the Additional Agent Goods Fee).

22. THIS COURT ORDERS that the Agent's Charge and Security Interest shall constitute a mortgage, hypothec, security interest, assignment by way of security and charge over the Merchandise, the Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto) and, if any, other than in relation to the Subordinated Amount, shall rank in priority to all other Encumbrances of or in favour of any Person.

23. THIS COURT ORDERS that notwithstanding (a) the pendency of these proceedings; (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("BIA") in respect of Target Canada or any of the Applicants, or any bankruptcy order made pursuant to any such applications; (c) any assignment in bankruptcy made in respect of Target Canada or any of the Applicants; (d) the provisions of any federal or provincial statute; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other document or agreement (collectively "Agreement") which binds Target Canada:

- (i) the Agency Agreement and the transactions and actions provided for and contemplated therein, including without limitation, the payment of amounts due to the Agent thereunder and any transfer of Remaining Merchandise and Remaining FF&E,

- (ii) the Agent's Charge and Security Interest, and

- (iii) Assigned Landlord Rights,

shall be binding on any trustee in bankruptcy that may be appointed in respect to Target Canada or any of the Applicants and shall not be void or voidable by any Person, including any creditor of Target Canada or any of the Applicants, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable reviewable transaction,

under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

#### **BULK SALES ACT AND OTHER LEGISLATION**

24. THIS COURT ORDERS AND DECLARES that the transactions contemplated under the Agency Agreement and any transfer of Remaining Merchandise or Remaining FF&E shall be exempt from the application of any applicable *Bulk Sales Act* and any other equivalent federal or provincial legislation.

25. THIS COURT ORDERS that Target Canada is authorized and permitted to transfer to the Agent personal information in Target Canada's custody and control, and Agent is permitted to use and disclose such personal information subject to and in accordance with the terms of the Agency Agreement.

#### **GENERAL**

26. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

27. THIS COURT HEREBY REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effects to this Order and to assist Target Canada, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to Target Canada and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist Target Canada and the Monitor and their respective agents in carrying out the terms of this Order.

EXTE. DE LA COUR FÉDÉRALE  
ON / ONZ / 40  
LE / DANS LE MONDÉ

FEB 5 2015

  
Regional Senior Justice Morawetz

**SCHEDULE "A"**  
**PARTNERSHIPS**

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

**SCHEDULE "B"**  
**SALES GUIDELINES**

The following procedures shall apply to any Sales to be held at Target Canada's retail stores (the "Stores").

1. Except as otherwise expressly set out herein, and subject to: (i) the Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated February 4, 2015 approving the Agency Agreement between a contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "Agent") and Target Canada Co., Target Canada Pharmacy Corp., and Target Canada Pharmacy (Ontario) Corp. ("Target Canada") dated January 29, 2015 ("Agency Agreement") and the transactions contemplated thereunder (the "Approval Order"); or (ii) any further Order of the Court; or (iii) any subsequent written agreement between Target Canada and the applicable landlord(s) (individually, a "Landlord" and, collectively, the "Landlords") and approved by Agent, the Sale shall be conducted in accordance with the terms of the applicable leases/or other occupancy agreements for each of the affected Stores (individually, a "Lease" and, collectively, the "Leases"). However, nothing contained herein shall be construed to create or impose upon Target Canada or the Agent any additional restrictions not contained in the applicable Lease or other occupancy agreement.
2. The Sale shall be conducted so that each of the Stores remain open during their normal hours of operation provided for in the respective Leases for the Stores until the respective Vacate Date of each Store. The Sale at the Stores shall end by no later than May 15, 2015. Rent payable under the respective Leases shall be paid as provided in the Initial Order of the Court dated January 15, 2015 (the "Initial Order").
3. The Sale shall be conducted in accordance with applicable federal, provincial and municipal laws, unless otherwise ordered by the Court.
4. All display and hanging signs used by the Agent in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. The Agent may advertise the Sale at the Stores as a "everything on sale", "everything must go", "store closing" or similar theme sale at the Stores (provided however that no signs shall advertise the Sale as a "bankruptcy", a "liquidation" or a "going out of business" sale, it being understood that the French equivalent of "clearance" is "liquidation" and is permitted to be used). Forthwith upon request, the Agent shall provide the proposed signage packages along with proposed dimensions by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlord shall notify the Agent of any requirement for such signage to otherwise comply with the terms of the Lease and/or the Sales Guidelines and where the provisions of the Lease conflicts with these Sales Guidelines, these Sales Guidelines shall govern. The Agent shall not use neon or day-glo signs or handwritten signage other than "you pay" or "topper" signs. If a Landlord is concerned with "Store Closing" signs being placed in the front window of a Store or with the number or size of the signs in the front window, Target Canada, the Agent and the Landlord will work together to resolve the dispute. Furthermore, with respect to enclosed mall Store locations without a separate entrance from the exterior of

the enclosed mall, no exterior signs or signs in common areas of a mall shall be used unless permitted by the applicable Lease. Nothing contained herein shall be construed to create or impose upon Target Canada or the Agent any additional restrictions not contained in the applicable Leases. In addition, the Agent shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Store locations with a separate entrance from the exterior of the enclosed mall; provided, however, that where such banners are not permitted by the applicable Lease and the Landlord requests in writing that the banners are not to be used, no banners shall be used absent further Order of the Court, which may be sought on an expedited basis on notice to the Service List. Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the façade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of the Agent.

5. The Agent shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.
6. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final" and customers with any questions or complaints shall call Target Canada's hotline number.
7. The Agent shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on Landlord's property, unless permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, the Agent may solicit customers in the Stores themselves. The Agent shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as permitted under the applicable Lease or agreed to by the Landlord.
8. At the conclusion of the Sale in each Store, the Agent and Target Canada shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than FF&E for clarity) may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease and in accordance with the Initial Order and the Approval Order. Nothing in this paragraph shall derogate from or expand upon the Agent's obligations under the Agency Agreement.
9. Subject to the terms of paragraph 8 above, the Agent may sell furniture, fixtures and equipment ("FF&E") owned by Target Canada and located in the Stores during the Sale. Target Canada and the Agent may advertise the sale of FF&E consistent with these Sales Guidelines on the understanding that the Landlord may require such signs to be placed in discreet locations within the Stores reasonably acceptable to the Landlord. Additionally, the purchasers of any FF&E sold during the Sale shall only be permitted to remove the FF&E either through the back shipping areas designated by the Landlord or through other



areas after a given Store has closed and, after regular Store business hours or, through the front door of the Store during Store business hours if the FF&E can fit in a shopping bag, with Landlord's supervision as required by the Landlord and in accordance with the Initial Order and the Approval Order. The Agent shall repair any damage to the Stores resulting from the removal of any FF&E by Agent or by third party purchasers of FF&E from Agent. Notwithstanding section 5.1(h) of the Agency Agreement, Target Canada shall ensure that all Remaining FF&E will be removed from the Stores and that such removal will be in compliance with paragraph 14 of the Initial Order and the Agency Agreement.

10. The Agent shall not make any alterations to interior or exterior Store lighting, except as authorized pursuant to the affected Lease. The hanging of exterior banners or other signage shall not constitute an alteration to a Store.
11. The Agent and its agents and representatives shall have the same access rights to the Stores as Target Canada under the terms of the applicable Lease, and the Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).
12. Target Canada and the Agent shall not conduct any auctions of Merchandise or FF&E at any of the Stores.
13. The Agent shall be entitled to include in the Sale the Additional Agent Goods provided that: (a) the value of the Additional Agent Goods will not exceed the lesser of (i) \$25 million; or (ii) 5% of the aggregate Cost Value of the Merchandise; (b) the Additional Agent Goods will be distributed amongst the Stores such that no Store receives more than 5% of the aggregate Cost Value of Merchandise sold at such Store during the Sale; (c) the Additional Agent Goods are purchased from Target Canada's existing suppliers; and (d) the Additional Agent Goods shall be of like kind and category and no lesser quality to the Merchandise.
14. The Agent shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact person for Agent shall be Jane Dietrich who may be reached by phone at 416-860-5223 or email at [jdietrich@casselsbrock.com](mailto:jdietrich@casselsbrock.com). If the parties are unable to resolve the dispute between themselves, the Landlord or Target Canada shall have the right to schedule a "status hearing" before the Court on no less than **two (2) days** written notice to the other party or parties, during which time the Agent shall cease all activity in dispute other than activity expressly permitted herein, pending determination of the matter by the Court; provided, however, if a banner has been hung and is the subject of a dispute, the Agent shall not be required to take any such banner down pending determination of any dispute.
15. Nothing herein or in the Agency Agreement is, or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or shall, or shall be deemed to, or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.
16. These Sales Guidelines may be amended by written agreement between the Agent, Target Canada and the applicable Landlord.

**SCHEDULE "C"**

Court File No. CV-15-10832-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF TARGET CANADA CO., TARGET  
CANADA HEALTH CO., TARGET CANADA MOBILE GP  
CO., TARGET CANADA PHARMACY (BC) CORP., TARGET  
CANADA PHARMACY (ONTARIO) CORP., TARGET  
CANADA PHARMACY CORP., TARGET CANADA  
PHARMACY (SK) CORP., and TARGET CANADA  
PROPERTY LLC (collectively the "**Applicants**")

**MONITOR'S CERTIFICATE**

**RECITALS**

All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Agency Agreement entered into between Target Canada Co., Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. (collectively, "**Target Canada**") and the contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "**Agent**") on January 29, 2015, a copy of which is attached as Exhibit D to the Affidavit of Mark Wong dated January 29, 2015.

Pursuant to an Order of the Court dated February 4<sup>th</sup>, 2015, the Court ordered that all of the Remaining Merchandise and the Remaining FF&E shall vest absolutely in the Agent, free and clear of and from any and all claims and encumbrances, upon the delivery by the Monitor to the Agent of a certificate certifying that (i) the Sale has ended, and (ii) the Guaranteed Amount, the

Expenses, any Company Sharing Recovery Amount, and all other amounts due to Target Canada under the Agency Agreement have been paid in full to the Company.

**ALVAREZ & MARSAL CANADA INC.**, in its capacity as Court-appointed Monitor in the *Companies' Creditors Arrangement Act* proceedings of Target Canada Co., *et al* certifies that it has been informed by the Agent and Target Canada that:

The Sale has ended.

The Guaranteed Amount, the Expenses, any Company Sharing Recovery Amount, and all other amounts due to Target Canada under the Agency Agreement have been paid in full to the Company.

The Remaining Merchandise includes the Merchandise listed on Appendix "A" hereto.

The Remaining FF&E includes the FF&E listed on Appendix "B" hereto.

DATED as of this • day of •, 2015.

**ALVAREZ & MARSAL CANADA INC.**,  
In its capacity as Court-appointed Monitor  
of Target Canada Co., *et al*. and not in its  
personal capacity

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**APPENDIX "A"**  
**LIST OF REMAINING MERCHANDISE**

- 18 -

**APPENDIX "B"**

**LIST OF REMAINING FF&E**

**SCHEDULE "D"**  
**GLOSSARY**

**"Additional Agent Goods"** means the additional goods procured by Agent which supplement the Merchandise in the Sale, which additional goods are of like kind, and no lesser quality to the Merchandise in the Sale;

**"Designated Company Consignment Goods"** means if the Company elects at the beginning of the Sale Term to have the Agent sell some or all of the Excluded Goods, such Excluded Goods which shall be accepted by the Agent (including Company Consignment Goods for which the Company has obtained all necessary approvals from third parties, or authorizations as may be required), as may be designated by the Company to be sold as part of the Sale at prices and through sales channels mutually acceptable to the Company and Agent;

**"FF&E"** means all (i) furnishings, and (ii) removable trade fixtures, equipment and improvements to real immovable property which are located in the Locations and owned by the Company, including all artwork located at the Corporate Office, but excluding the Excluded FF&E;

**"Guaranteed Amount"** means as a guaranty of Agent's performance under the Agency Agreement, the seventy four percent (74%) of the aggregate Cost Value of the Merchandise that the Agent guarantees the Company shall receive;

**"Locations"** means collectively, the Stores, the Corporate Office and the Distribution Centers;

**"Merchandise"** means all finished goods inventory, saleable in the ordinary course of business, that are owned by the Company, and located at the Locations, on the Sale Commencement Date including Unscheduled Drugs, merchandise subject to Gross Rings and On Order Merchandise, Distribution Center Merchandise and Defective Merchandise, but, in each case, expressly excluding Excluded Goods;

**"Remaining FF&E"** means any FF&E that is not sold by the Agent prior to the FF&E Removal Deadline;

**"Sale"** means the sale by the Agent of the Merchandise, the FF&E (including if the Company so elects pursuant to Section 5.1(i) of the Agency Agreement, the DC FF&E), the Designated Company Consignment Goods (if the Company so elects pursuant to Section 4.4 of the Agency Agreement) and, if procured by Agent, Additional Agent Goods during the Sale Term in accordance with the Agency Agreement;

**"Sale Commencement Date"** means the date that is one (1) calendar day after the making of the Approval Order or such other date as the parties may mutually agree in writing;

**"Stores"** means all of the Company's retail store locations as described in Schedule "B" of the Agency Agreement; and

**“Vacate Date”** means the date that the Agent shall be entitled to surrender vacant possession of each such Location, as applicable.

Capitalized terms not otherwise defined in this Glossary have the meaning ascribed to them in the Agency Agreement.

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 TARGET CANADA CO., *et al.*

Applicants

Court File No. CV-15-10832-00C

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT  
TORONTO

**APPROVAL ORDER –  
AGENCY AGREEMENT**

**OSLER, HOSKIN & HARCOURT LLP**  
Box 50, 1 First Canadian Place  
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)  
Jeremy Dacks (LSUC #: 41851R)  
Shawn Irving (LSUC #: 50035U)  
Robert Carson (LSUC #: 57364H)

Tel (416) 362-2111  
Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785



## **TAB 6**

Case Name:  
**Stelco Inc. (Re)**

**APPLICATION UNDER the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as amended  
IN THE MATTER OF the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as amended  
AND IN THE MATTER OF a proposed plan of compromise or  
arrangement with respect to Stelco Inc. and the other  
applicants listed in Schedule "A"**

[2006] O.J. No. 275

17 C.B.R. (5th) 76

145 A.C.W.S. (3d) 230

2006 CarswellOnt 394

Court File No. 04-CL-5306

Ontario Superior Court of Justice  
Commercial List

**J.M. Farley J.**

January 17, 2006.

(8 paras.)

*Civil evidence -- Documentary evidence -- Publication bans and confidentiality orders -- Motion for permanent sealing order of confidential information allowed -- There was minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability -- Disclosure of such information to competitors, suppliers and customers could be injurious to Stelco's business activities, and benefits of confidentiality order with respect to elements redacted outweighed deleterious effects of confidentiality order -- Accordingly there was to be a permanent sealing order. -- Three lines of an affidavit that were inadvertently not blacked out were to be treated as having been blacked out ab initio.*

*Civil procedure -- Discovery -- Production and inspection of documents -- Confidentiality orders -- Motion for permanent sealing order of confidential information allowed -- There was minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability -- Disclosure of such information to competitors, suppliers and customers could be injurious to Stelco's business activities, and benefits of confidentiality order with respect to elements redacted outweighed deleterious effects of confidentiality order -- Accordingly there was to be a permanent sealing order -- Three lines of an affidavit that were inadvertently not blacked out were to be treated as having been blacked out ab initio.*

**Counsel:**

Geoff R. Hall, for the Stelco Applicants

Kyla Mahar, for the Monitor

Peter Jacobsen, for Globe & Mail

Kevin Zych, for the 8% and 10.4% Stelco Bondholders

Peter Jervis and Karen Kiang, for the Equity Holders

Sharon White, for USW Local 1005

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**ENDORSEMENT**

(Motion by Applications for permanent sealing order  
of confidential information)

**1** J.M. FARLEY J. (endorsement):-- This Endorsement deals with two of the three issues, the third will be forthcoming.

**2** I am satisfied that there has been minimal redaction of material related to Stelco's revenues, costs, selling prices and profitability (directly or implied) which would be ordinarily kept confidential as disclosure of such information to competitors, suppliers and customers would be injurious to Stelco's business activities. Reasonable alternative measures would not prevent the risk to Stelco. The salutary effects of a confidentiality order as to the elements redacted, including the ability of the participants in this CCAA proceeding to deal reasonably pursuant to Non-Disclosure Agreements with submissions related to such confidential financial information, outweigh the deleterious effects of such confidentiality order.

3 I am satisfied that there has been a minimal effect negative to the concept of an open court. The Globe was not opposed to this redaction effort.

4 It appears to me that the principles and tests involved in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.) has been met. See also *Re Air Canada* (S.C.J.) released September 26, 2004.

5 There is to be a permanent sealing order subject to any interested party asking for a review of same upon notice to Stelco.

6 The second issue relates to the inadvertence as to not blanking/blacking out three lines in an affidavit of one Fabrice Taylor. The first part of the paragraph, all on the preceding page, had been blacked out. Upon reasonable reflection, it would be obvious to a person receiving same that the part not so blacked out did not make any sense on any stand-alone basis. Unfortunately, the incompletely blacked-out affidavit was flipped over to a reporter at the Globe who was not permitted to review unredacted copy (Stelco and the Globe had worked out a very reasonable and common sense arrangement whereby unredacted copy could be reviewed by counsel for the Globe and a Globe employee who was restricted from using same or disclosing such to others). The flip-over by counsel for the Globe was "innocent" as he had not reviewed the material before doing the flip and he had not expected that there would have been a problem with the blacking out.

7 The reporter has quite responsibly agreed to treat the three lines not previously blacked-out as having been blacked out ab initio.

8 The remaining third issue is whether the portion of the affidavit and exhibits which were blacked out (including the subject 3 lines) and as agreed by Stelco and the equity holders' counsel were to be blacked-out qualify for such redaction. I will deal with that in a further endorsement.

J.M. FARLEY J.

cp/e/qw/qljxh

## **TAB 7**

2009 CarswellOnt 4467  
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169,  
179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

**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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS  
LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,  
NORTEL NETWORKS INTERNATIONAL CORPORATION AND  
NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 29, 2009  
Written reasons: July 23, 2009  
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al  
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel  
Networks Limited  
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.  
M. Starnino for Superintendent of Financial Services, Administrator of PBGF  
S. Philpott for Former Employees  
K. Zych for Noteholders  
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global  
Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.  
David Ward for UK Pension Protection Fund  
Leanne Williams for Flextronics Inc.  
Alex MacFarlane for Official Committee of Unsecured Creditors  
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)  
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited  
A. Kauffman for Export Development Canada

D. Ullman for Verizon Communications Inc.

G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts

### **Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

#### **Bankruptcy and insolvency**

XIV Administration of estate

XIV.6 Sale of assets

XIV.6.f Jurisdiction of court to approve sale

#### **Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.e Jurisdiction

XIX.1.e.i Court

### **Headnote**

#### **Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues**

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

#### **Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale**

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process

under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

## Table of Authorities

### Cases considered by *Morawetz J.*:

*Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership* (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

*Boutiques San Francisco Inc., Re* (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — referred to

*Calpine Canada Energy Ltd., Re* (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

*Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

*Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.) — referred to

*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished



*Consumers Packaging Inc., Re* (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

*PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

*Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re*) 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

*Stelco Inc., Re* (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

*Tiger Brand Knitting Co., Re* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — referred to

*Winnipeg Motor Express Inc., Re* (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

#### **Statutes considered:**

*Bankruptcy Code*, 11 U.S.C.  
s. 363 — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36  
Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

***Morawetz J.:***

### **Introduction**

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CDMA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

## Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

## Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5<sup>th</sup>) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3<sup>rd</sup>) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra, Re PSINet, supra, Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra, Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re, supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

39 In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining

factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting



of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4<sup>th</sup>) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (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 of the business?
- (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

### **Disposition**

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

*Motion granted.*

End of Document

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## **TAB 8**

*Case Name:*  
**Hollinger Inc. (Re)**

**IN THE MATTER OF the Companies' Creditors Arrangement Act,  
R.S.C. 1985, c. C-36, as amended  
AND IN THE MATTER OF a Proposed Plan of Compromise or  
Arrangement with Respect to Hollinger Inc., 4322525 Canada  
Inc. and Sugra Limited, Applicants**

[2011] O.J. No. 3977

2011 ONCA 579

283 O.A.C. 264

107 O.R. (3d) 1

84 C.B.R. (5th) 79

341 D.L.R. (4th) 182

12 C.P.C. (7th) 29

2011 CarswellOnt 9272

207 A.C.W.S. (3d) 234

Docket: C53706

Ontario Court of Appeal  
Toronto, Ontario

**S.T. Goudge, R.J. Sharpe and A. Karakatsanis JJ.A.**

Heard: August 24, 2011.  
Judgment: September 8, 2011.

(32 paras.)

*Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents --*

*Confidentiality orders -- Privileged documents -- Documents prepared for the purpose of settlement -- Appeal by Black and Conrad Black Corporation from sealing order redacting amounts to be paid by law firm and accounting firm to Hollinger pursuant to proposed settlement agreements dismissed -- After Hollinger, law firm and accounting firm entered into settlement agreement, amounts agreed to be paid were redacted and agreements were distributed to other parties and sealing order was obtained -- Sealing order protected litigation settlement privilege and fostered public interest in settling disputes -- Litigation settlement privilege applied as Hollinger, law firm and accounting firm had legally protected interest in settlement and salutary effects of sealing order outweighed deleterious effects.*

*Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Discovery -- Appeal by Black and Conrad Black Corporation from sealing order redacting amounts to be paid by law firm and accounting firm to Hollinger pursuant to proposed settlement agreements dismissed -- After Hollinger, law firm and accounting firm entered into settlement agreement, amounts agreed to be paid were redacted and agreements were distributed to other parties and sealing order was obtained -- Sealing order protected litigation settlement privilege and fostered public interest in settling disputes -- Litigation settlement privilege applied as Hollinger, law firm and accounting firm had legally protected interest in settlement and salutary effects of sealing order outweighed deleterious effects.*

Appeal by Black and Conrad Black Corporation from a sealing order redacting the amounts to be paid by a law firm and an accounting firm to Hollinger Inc pursuant to two proposed settlement agreements. In 2007, Hollinger and two related corporations were granted Companies' Creditor Arrangement Act ("CCAA") protection. Black made a claim against Hollinger in the CCAA proceedings. In addition, he claimed for contribution and indemnity against the law firm and the accounting firm in relation to several claims asserted against him by Hollinger. Hollinger, the law firm and the accounting firm entered into settlement agreements that required court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid redacted. Hollinger, the law firm and the accounting firm brought a motion for a sealing order. The motions judge granted the sealing order, finding that litigation settlement privilege applied and that a sealing order was in the public interest. The sealing order provided for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment. In addition, the sealing order provided that any non-settling party could access the redacted information to use in the settlement approval process upon signing a confidentiality agreement. Black and his corporation sought to appeal the sealing order on the basis that the evidence was insufficient to justify a sealing order and departure from the open court principle, that the requirement that a party seeking disclosure of the settlement amounts sign a confidentiality agreement imposed an undue burden, and that the parties to the agreements waived privilege.

HELD: Appeal dismissed. The motions judge made no error in granting the sealing order as it protected litigation settlement privilege and fostered public interest in settling disputes. Litigation

settlement privilege applied as Hollinger, the law firm and the accounting firm had a legally protected interest in the proposed settlement. It was open to the motions judge to find that the salutary effects of the sealing order outweighed its deleterious effects on the right to freedom of expression and the public interest in open and accessible court proceedings. Requiring parties who sought disclosure of the redacted information to sign a confidentiality agreement was not an undue burden as sanctions would only be imposed if the party used the information for an impermissible reason. Finally, as the terms of the order were imposed by the court, abiding by those terms did not result in a waiver of privilege.

**Statutes, Regulations and Rules Cited:**

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

**Appeal From:**

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice dated February 5, 2011.

**Counsel:**

Earl A. Cherniak Q.C., Kenneth D. Kraft and Jason Squire, for Conrad Black and Conrad Black Capital Corporation.

Paul D. Guy and Faren Bogach, for Daniel Colson.

Michael E. Barrack and Megan Keenberg, for Hollinger Inc.

John Lorn McDougall, Q.C., Norman J. Emblem and Matthew Fleming, for KPMG LLP.

Ronald Foerster, for Torys LLP.

David C. Moore, for Catalyst Fund General Partner I Inc.

George Benchetrit, for the Indenture Trustee.

Lawrence Thacker for Ernst & Young Inc., Monitor.

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The following judgment was delivered by

1 THE COURT:-- Conrad Black and Conrad Black Capital Corporation ("Black") appeal a



sealing order redacting the amounts to be paid by the respondents, Torys LLP and KPMG LLP Canada, to the respondent, Hollinger Inc., pursuant to two proposed settlement agreements. The settlement agreements were made in the context of a *Companies' Creditor Arrangement Act* ("CCAA") proceeding and are subject to court approval. The sealing order provides for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment in the Torys agreement. The sealing order further provides that any non-settling party may have access to the redacted information upon signing a confidentiality agreement only to use the redacted information in the settlement approval proceeding. The sealing order terminates upon final approval of the settlements.

2 For the following reasons, we reject Black's argument that the sealing order constitutes a serious and unjustified infringement of the open court principle and dismiss the appeal.

## FACTS

3 Hollinger and two related corporations have been granted CCAA protection pursuant to a Commercial List order made in August 2007. The order appoints a Litigation Trustee to deal with the assets available to Hollinger's creditors which consist almost entirely of Hollinger's claims against former officers, directors and advisors, including Black, Torys and KPMG.

4 Black asserts a claim against Hollinger in the CCAA proceedings, as well as claims for contribution and indemnity against Torys and KPMG in relation to several claims asserted against him by Hollinger.

5 Settlement discussions and mediations between Hollinger, the Litigation Trustee, Torys and KPMG led to two settlement agreements that require court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid by way of settlement redacted. The respondents moved before the judge dealing with the CCAA proceedings for the sealing order that is the subject of this appeal. The crucial paragraph of the affidavit filed by Hollinger in support of that motion reads as follows:

21. In my view, disclosure of the commercially sensitive terms contained in the Settlements and the strategy of the Litigation Trustee and other confidential details relating to Litigation Assets set out in the Litigation Trustee's Report would undermine the Litigation Trustee's initiatives with respect to the remaining Litigation Assets including, without limitation, any possible settlements the Litigation Trustee may reach in respect of any of the remaining Litigation Assets and litigation with KPMG or Torys, in the event that the settlements are not approved.

6 The Litigation Trustee's Report has since been disclosed. There was no cross-examination on that affidavit.

7 Although the terms of the settlements are not directly at issue on this appeal, Black relies on the fact that both settlement agreements provide for a "bar order" that would prevent anyone sued by Hollinger; any shareholder, officer, director, or creditor of Hollinger; and any person who could claim rights or interest through Hollinger, from making any claim against Torys or KPMG in relation to the advice given by those parties to Hollinger. Black points out that the bar orders would extinguish his indemnity claims against Torys and KPMG. On the other hand, the respondents submit that the bar orders are economically neutral for Black and other non-settling defendants. This is because Hollinger waives its right to claim joint and several liability with respect to shared liability between settling and non-settling defendants if the non-settling defendant can establish a right to contribution and indemnity from a settling defendant.

### DECISION OF THE MOTION JUDGE

8 The motion judge found that litigation settlement privilege applied to the terms of the two settlement agreements. He concluded that the onus to establish that a sealing order protecting the confidentiality of the amounts of the settlements was in the public interest had been satisfied and that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 ("*Sierra Club*") had been met.

9 On the motion judge's suggestion, the sealing order included a "comeback" clause, permitting any party affected by the settlement motion to request relief from the sealing order if it operated in a manner that would prevent that party from making full submissions as to the approval of the settlement.

### ISSUES

10 Black submits:

1. That the evidence was insufficient to justify a sealing order and departure from the open court principle;
2. That the requirement that a party seeking disclosure of the settlement amounts must sign a confidentiality agreement imposes an undue burden; and
3. That the respondents have waived privilege.

### ANALYSIS

#### *1. Sufficiency of the evidence to justify a sealing order.*

11 It is common ground that the motion judge applied the correct legal test, namely that laid down by the Supreme Court of Canada in *Sierra Club* at para. 53:

A confidentiality order ... should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

12 Before us, there were two significant concessions.

13 First, the respondents indicated that they place no reliance upon the portions of the Litigation Trustee's affidavit referring to the "commercial sensitivity" of the redacted terms of the settlement. They rely solely upon the evidence that public disclosure of the settlement amounts before the agreements had been approved "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved."

14 Second, Black conceded that his attack on the terms of the sealing order rests on the open court principle and that he does not assert that the terms of the sealing order give rise to any procedural disadvantage.

15 The respondents assert that their interest in maintaining the confidentiality of the amounts of the proposed settlements falls squarely within litigation settlement privilege. Simply put, the respondents say that should the settlement agreements not be approved, they would be unfairly prejudiced in the litigation that would follow if they had to disclose publicly the amounts they were prepared to pay or accept in settlement of the claims asserted by the Litigation Trustee.

16 It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where;

- 1) there is a litigious dispute;
- 2) the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed;" and
- 3) the purpose of the communication is to attempt to effect a settlement: see Bryant, Lederman & Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at p. 1033, s. 14.322); *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83 (Div. Ct.).

17 We agree with the motion judge that those conditions are met here. We see no error in the motion judge's conclusion that "[l]itigation settlement privilege ... applies in this case at least until the Court either accepts or rejects the settlement". In the context of this case, Hollinger, Torys and

KPMG have a legally protected interest in being afforded a zone of confidentiality to shelter the most sensitive aspect of their proposed settlement.

18 The sealing order protects litigation settlement privilege and thereby fosters the strong public interest in the settlement of disputes and the avoidance of litigation. "This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system," (*Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at p. 28 (emphasis added by the Supreme Court)).

19 The rationale for litigation settlement privilege is that unless parties have an assurance that their efforts to negotiate a resolution will not be used against them in litigation should they fail to resolve their dispute, they will be reluctant to engage in the settlement process in the first place. A legal rule that created a disincentive of that nature would run contrary to the public policy favouring settlements.

20 We agree with the respondents that litigation settlement privilege constitutes a social value of super-ordinate importance capable of justifying a sealing order that limits the open court principle.

21 In our view, it was open to the motion judge to conclude under the *Sierra* test that the salutary effects of the sealing order outweighed its deleterious effects on the important right to free expression and the public interest in open and accessible court proceedings.

22 While the evidence led in support of the sealing order is limited to a bald statement that full disclosure of the terms of the settlement agreement "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved," in light of the strong public policy favouring settlements and the recognized privilege that protects the confidentiality of settlement discussions, the motion judge did not err in concluding that the evidence was sufficient to satisfy the onus under the *Sierra* test.

23 We agree with the respondents that the motion judge's sealing order was a minimal intrusion on the open court principle and on the procedural rights of the non-settling parties. The sealing order protected only the amounts of the settlements and it gave the non-settling parties ready access to the amounts of the settlement upon signing a confidentiality agreement. The "come back" clause allowed any party to return to court for a reassessment of the need for the sealing order should the circumstances change.

24 We do not accept Black's submission that these are concluded agreements for which the litigation settlement privilege is spent. The settlement agreements at issue here have no legal effect until they are approved. In the context of this litigation and these settlement discussions, we are satisfied that just as the threat of disclosure of pre-resolution discussions would likely discourage parties from attempting to settle, so too would the threat of disclosure of their tentative settlement requiring court approval. We add, however, that our conclusion on the privileged nature of a

settlement requiring court approval is based on the facts and circumstances of this case, and we leave to another day the issue of whether the privilege always attaches to other settlements requiring court approval, for example, class action settlements or infant settlements, where different values and considerations may apply.

25 Nor do we agree with Black's argument that because the litigation settlement privilege would still prevent any party from introducing the terms of the settlement into evidence in any trial that might follow should the court not approve the settlements, the information can now be made available to the public at large. We know of no authority that limits the reach of litigation settlement privilege in this manner. Moreover, the argument that no harm could flow from full public disclosure appears to us to ignore the practical reality that allowing for full public disclosure of all terms of the settlement agreements prior to court approval would have a very perverse effect on the desired incentives to engage in settlement discussions in the context of high stakes, high profile litigation.

## ***2. Did the confidentiality agreement impose an undue burden?***

26 We see no merit in the submission that Black's right to obtain disclosure of the settlement amounts was unduly burdened by the term of the sealing order requiring him to sign a confidentiality agreement as a pre-condition to disclosure. This term of the sealing order protects the non-settling parties' procedural right to have full access to the terms of the settlement agreements while maintaining the protection of the litigation settlement privilege. It is only if Black uses the privileged information for some improper purpose that he would face the prospect of some sanction for breach. Contrary to the submission that that sanction would inevitably be "draconian," it would be a matter for the discretion of the court to decide an appropriate sanction in the circumstances and we see no reason to fear that the court would decide to impose a sanction that did not fit the circumstances of the case.

27 We add here that we do not consider the terms of the bar orders relevant to the issue of the sealing order. Neither the motion judge nor this court was asked to pass upon the appropriateness of the bar orders at this stage and as the sealing order allows Black to obtain full disclosure of the terms of the settlement, Black suffers no disadvantage if he chooses to challenge the settlement on the ground that the bar orders should not be approved.

## ***3. Did the respondents waive privilege?***

28 Black submits that by putting virtually all of the terms of the settlements on the public record and by disclosing the redacted portions of the settlement agreements to those non-settling parties who sign confidentiality agreements, the respondents have waived privilege.

29 We disagree. These terms were imposed by court order (albeit at the suggestion of the parties) and we fail to see how or why abiding by the terms of a court order should result in a finding that a party has waived privilege. Moreover, in our view, this argument is inconsistent with Black's

purported reliance on the open court principle as requiring disclosure of the settlement amounts. The terms of the order said to amount to a waiver of privilege were plainly motivated to ensure that the sealing order was minimally intrusive on the open court principle. To accept Black's submission that those terms of the order constitute waiver would be to require sealing orders to be more restrictive than necessary to protect the public interest in fostering settlements. Such a rule would be self-defeating and contrary to the public interest in open access to court proceedings.

#### **4. Conclusion**

**30** We conclude that the sealing order strikes an appropriate balance between the public interest in the promotion of settlements and the public interest in the open court principle:

- (i) the public interest in the promotion of settlements and the protection of settlement privileged information and communications is met by the sealing of the redacted portions of the settlement agreements from the public record; and
- (ii) the public interest in the open court principle is met by the public disclosure of all but the redacted terms of the settlement agreements, and the time-limited nature of the sealing order, lasting only so long as the settlements remain contingent on court approval.

**31** In addition, the sealing order strikes the appropriate balance between the competing private interests of the parties:

- (i) the settling parties' interest in maintaining the confidentiality of their privileged information is met by the sealing of the redacted portions of the Settlement Agreements;
- (ii) the interests of all non-settling defendants (including Black) are met by the approval of the confidentiality agreement provision affording them access to the redacted portions of the settlement agreements and thereby enabling them to respond meaningfully to the settlement approval motion.

#### **DISPOSITION**

**32** The appeal is dismissed. In accordance with the agreement of counsel, the respondents Hollinger, Torys and KPMG are entitled to costs of \$10,000 each, inclusive of disbursements and applicable taxes.

S.T. GOUDGE J.A.

R.J. SHARPE J.A.

A. KARAKATSANIS J.A.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF DANIER  
LEATHER INC., a corporation incorporated pursuant to the laws of the Province of Ontario, with  
a head office in the City of Toronto, in the Province of Ontario

Court File No. 31-CL-2084

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding commenced at Toronto

**BRIEF OF AUTHORITIES OF  
DANIER LEATHER INC.  
(Motion Returnable March 7, 2016)**

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