

Estate/Court File No.: 31-2941767
Estate/ Court File No.: 31-2941764

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF SCOTCH &
SODA RETAIL CANADA INC. IN THE CITY OF TORONTO, IN THE PROVINCE OF
ONTARIO**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
SCOTCH & SODA CANADA INC. IN THE CITY OF TORONTO, IN THE PROVINCE OF
ONTARIO**

FACTUM

**(MOTIONS FOR PROCEDURAL CONSOLIDATION, EXTENSION AND LIQUIDATION SALE
APPROVAL ORDER RETURNABLE MAY 16, 2023)**

May 14, 2023

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane Dietrich LSO #49302U
Tel: 416.860.5223
jdietrich@cassels.com

Monique Sassi LSO#63638L
Tel: 416.860.6886
msassi@cassels.com

*Lawyers for Scotch & Soda Retail Canada Inc.
and Scotch & Soda Canada Inc.*

TO: SERVICE LIST

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF SCOTCH &
SODA RETAIL CANADA INC. IN THE CITY OF TORONTO, IN THE PROVINCE OF
ONTARIO**

**AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
SCOTCH & SODA CANADA INC. IN THE CITY OF TORONTO, IN THE PROVINCE OF
ONTARIO**

TABLE OF CONTENTS

	Page No.
PART I - OVERVIEW	1
PART II - FACTS	2
PART III - ISSUES AND THE LAW	8
PART IV - ORDER REQUESTED	21

FACTUM

PART I - OVERVIEW

1. On May 8, 2023 (the “**Filing Date**”), Scotch & Soda Retail Inc. (“**Retail**”) and Scotch & Soda Canada Inc. (“**Wholesale**”, together with Retail, the “**Companies**”) each filed Notices of Intention to Make a Proposal (the “**NOI Proceedings**”) under the *Bankruptcy and Insolvency Act* (“**BIA**”). KSV Restructuring Inc. (“**KSV**”) was appointed proposal trustee in the NOI Proceedings (the “**Proposal Trustee**”).

2. This Factum is provided in support of motions (the “**Motions**”) by the Companies, for:

- (a) an order (the “**Procedural Consolidation Order**”) among other things procedurally consolidating the NOI Proceedings of Retail (Estate No. 31-2941767) and Wholesale (Estate No. 31-2941764) (each individually, a “**Proceeding**”) into one proceeding under Estate No. 31-2941767 (the “**Consolidated Proceeding**”); and
- (b) an order (the “**Extension and Liquidation Sale Approval Order**”), among other things:
 - (i) extending the time for each of the Companies to file proposals pursuant to the BIA to July 22, 2023 (being 45 days from its current expiry of June 8, 2023);
 - (ii) approving the Administration Charge and Director’s Charge (each as defined below);
 - (iii) approving the consulting agreement between the Companies and Tiger Asset Solutions Canada, ULC (the “**Consultant**”) dated as of May 11, 2023 (as may be amended and restated in accordance with the terms thereof, the “**Consulting Agreement**”) and the transactions contemplated thereby;

(iv) approving the proposed sale guidelines (as defined below) for the orderly liquidation of the Merchandise (as defined below); and

(v) approving relief in connection with the *Wage Earner Protection Program Act* (“**WEPPA**”) for any employees whose employment with the Companies may be terminated as part of the NOI Proceedings.

3. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Affidavit of Filip Tufvesson, sworn May 11, 2023 (the “**Tufvesson Affidavit**”).

PART II - FACTS

A. The Companies

4. Scotch & Soda is an international clothing brand. The Scotch & Soda group of companies was engaged in the business of designing, manufacturing, marketing and selling clothing and related products from retail stores and to other retailers located worldwide.¹

5. The Companies are the “Canadian arm” of the Scotch & Soda international group and operate a (i) retail business with four (4) direct-to-consumer retail stores (the “**Retail Business**”) and (ii) wholesale business supplying inventory to third party retailers comprised mostly of department stores (the “**Wholesale Business**”).²

6. The Companies are incorporated under the British Columbia *Business Corporations Act* and the majority of the business (being the stores, creditors and inventory of the Companies) is located in Ontario (in the Greater Toronto Region).³

¹ Tufvesson Affidavit at para 7.

² Tufvesson Affidavit at para 9.

³ Tufvesson Affidavit at para 4.

7. Wholesale was a wholly owned subsidiary of Scotch & Soda Export B.V. (“**Scotch & Soda Export**”) and Retail was a wholly owned subsidiary of Scotch & Soda Retail B.V. The subsidiaries were all ultimately owned by Scotch & Soda Group B.V. (“**Scotch & Soda Netherlands**”).⁴

B. The Businesses and Operations

8. Retail conducts business from four (4) stores located in Ontario, British Columbia and Quebec.⁵ The landlord for three (3) of the Stores is The Cadillac Fairview Corporation (“**Cadillac**”). Rent up until the end of April 2023 and rent since the Filing Date has been paid.⁶ Wholesale does not operate any stores, but has a show room in Montreal.⁷

9. Retail operated under a franchise agreement dated June 4, 2019 with Scotch & Soda Export (the “**Franchise Agreement**”) and Wholesale operated pursuant to limited risk distribution agreement, dated April 15, 2021 with Scotch & Soda Export (the “**Distribution Agreement**”).⁸

10. Retail employs approximately twenty-eight (28) employees, twenty-five (25) of which are store-level employees working in the Retail Business and three (3) provide services to the Wholesale Business along with an additional individual employed by a Scotch & Soda entity in the United States. Wholesale does not employ any employees.⁹

11. The quantum of payroll due per pay period (every two weeks) is approximately \$45,000 and accrued vacation is approximately \$12,000 and increases by approximately \$2,000 per month. Monthly sales tax obligations are approximately \$25,000 for Retail and \$70,000 for Wholesale.¹⁰

⁴ Tufvesson Affidavit at para 6.

⁵ Tufvesson Affidavit at para 11.

⁶ Tufvesson Affidavit at para 12.

⁷ Tufvesson Affidavit at para 13.

⁸ Tufvesson Affidavit at para 10.

⁹ Tufvesson Affidavit at para 14-15.

¹⁰ First Report of the Proposal Trustee dated May 11, 2023 at para 8.2(2) [First Report].

12. Although employees will be paid their full wages and vacation pay, the Companies' do not expect to be pay any termination and severance amounts to those employees whose employment will be terminated.¹¹

13. The Companies have one secured creditor which is expected to be fully satisfied pursuant to ongoing foreclosure proceedings in the United States.¹²

14. As part of the Netherlands Sale (as defined below), certain accounts receivable owing to Scotch & Soda Export, including accounts receivable owing by the Companies, was acquired by S&S Operations LLC ("**Bluestar 2**"). The acquisition of these accounts receivables made Bluestar 2 the largest unsecured creditor of Retail and Wholesale.¹³

C. The NOI Proceedings

15. On March 3, 2020, Scotch & Soda Netherlands and other related entities including Scotch & Soda Export were declared bankrupt pursuant to Dutch Law (the "**Netherlands Proceedings**").¹⁴

16. During the Netherlands Proceedings, the Dutch court appointed bankruptcy trustees entered into a sale agreement for the majority of the Scotch & Soda international business (the "**Netherlands Sale**"). The Netherlands Sale did not include the purchase of the Retail Business or Wholesale Business.¹⁵

17. Following the commencement of the Netherlands Proceedings, the Dutch bankruptcy trustees sold the Scotch & Soda intellectual property and unsecured intercompany receivables

¹¹ Tufvesson Affidavit at para 56; First Report at para 7.2.

¹² Tufvesson Affidavit at para 19. As well, ING Bank N.V. made a registration under the *Personal Property Security Act* (Ontario) and (British Columbia). The Companies believe all obligations owing to ING Bank N.V. have been repaid in full.

¹³ Tufvesson Affidavit at para 24.

¹⁴ Tufvesson Affidavit at para 22.

¹⁵ Tufvesson Affidavit at para 23.

owing by the Companies to affiliates of Bluestar Alliance LLC (“**Bluestar**”) being S&S Brand Holdings, LLC (“**Bluestar 1**”) and Bluestar 2, respectively.¹⁶

18. Following the sale, the Dutch bankruptcy trustees delivered a termination notice to the Companies in respect of both the Franchise Agreement and the Distribution Agreement.¹⁷ Bluestar 1, as owner of the intellectual property, advised the Companies that it would permit the use of the intellectual property for the limited purpose of liquidating inventory in Canada in the NOI Proceedings.¹⁸

19. After discussions with Bluestar, the Companies made the decision to file the NOIs to stabilize the business and allow time to explore business opportunities while moving forward with Store closures and the liquidation of inventory.¹⁹

D. The Consulting Agreement and Sale Guidelines

20. In order to maximize the value of the Companies’ inventory (the “**Merchandise**”) and certain furnishings, trade fixtures, and equipment located in the applicable Stores (“**FF&E**”), the Companies are seeking authority to:

(a) retain the Consultant pursuant to the Consulting Agreement to complete a liquidation of Merchandise and FF&E that is located in the applicable Stores as well as inventory owned by the Companies and delivered to the Stores by or after the Sale Commencement Date (as defined below);²⁰ and

(b) establish sale guidelines for the orderly conduct of the Sale (the “**Sale Guidelines**”).

¹⁶ Tufvesson Affidavit at para 24.

¹⁷ Tufvesson Affidavit at para 26.

¹⁸ Tufvesson Affidavit at para 28.

¹⁹ Tufvesson Affidavit at para 29.

²⁰ Tufvesson Affidavit at para 32(a).

21. The sale of all Merchandise is contemplated to run for approximately 8 weeks and to commence on the first business day following the granting of the Extension and Liquidation Sale Approval Order, which is estimated to be May 17, 2023, and is expected to conclude by no later than July 5, 2023.²¹

22. The Consulting Agreement provides, among other things, that:

- (a) the Consultant is appointed as consultant for purposes of conducting a “Store Closing”, “Everything Must Go”, “Everything on Sale” or similar themed sale (the “**Sale**”) of:
 - (i) all items of owned merchandise or inventory located in the Stores as of the applicable Sale Commencement Date (as defined below) as well as additional inventory owned by the Companies and delivered to the applicable Stores by or after the Sale Commencement Date (the “**Merchandise**”); and
 - (ii) furniture, fixtures, and equipment located in the Stores as of the applicable Sale Commencement Date for such Stores (the “**FF&E**”);
- (b) the Sale will commence on the first business day following the entry of the Extension and Liquidation Sale Approval Order, if granted, which is estimated to be May 17, 2023 (the “**Sale Commencement Date**”);
- (c) the Sale will terminate in each Store upon mutual agreement between the Companies and the Consultant but no later than July 5, 2023 (the “**Sale**”);

²¹ Tufvesson Affidavit at para 32(b)-(c).

Termination Date”). The Sale Termination Date can be extended if mutually agreed upon between the Companies and the Consultant;

- (d) Gifts cards will be honoured for fifteen (15) days following the granting of the Extension and Liquidation Sale Approval Order if approved;
- (e) all sales of Merchandise made on behalf of the Companies shall be by cash, debit or credit (no checks) and will be “final” with no returns accepted or allowed;
- (f) the Companies are responsible for all expenses incurred in operating the Stores during the Sale including the “Sale Expenses” which shall not exceed the amounts set forth in the Budget;
- (g) as consideration for its services in accordance with the Consulting Agreement, the Consultant will be entitled to a (i) base fee of \$50,000 payable in five equal instalments of \$10,000 starting on the second week of the Sale; and (ii) commission equal to 15% of the gross proceeds generated from the sale of the FF&E;
- (h) the Companies are to pay \$20,000 on execution of the Consulting Agreement and a further \$20,000 upon the Court granting the Extension and Liquidation Sale Approval Order which shall be held by the Consultant as security for payment of the Consulting Fee, the reimbursement of Sale Expenses and payment of any other amounts to Consultant under the Consulting Agreement; and
- (i) at the end of the Sale Term, the Consultant will leave the premises for each Store to the Companies in broom clean condition, reasonable wear and tear excepted.

23. The Consulting Agreement is expressly subject to, among other things, approval of this Court.²²

E. Extensions of Time to File Proposals

24. The Companies are seeking to extend the time for the Companies to file proposals pursuant to the BIA to July 22, 2023 (being 45 days from its current expiry of June 8, 2023) (the “**Filing Extension**”).

25. The Companies are projected to have sufficient funds to operate through the Filing Extension.²³ The Companies are not aware of any creditors who would be harmed by the Filing Extension.²⁴

26. Since the Filing Date, the Companies have been complying with the various requirements under the BIA²⁵ and have worked in good faith and with due diligence in the period prior to and during the NOI Proceedings.²⁶ If the Filing Extension is granted, the Companies will pursue the store closing sale and explore the possibility of making proposals to their creditors.²⁷

PART III - ISSUES AND THE LAW

27. The following issues are before the Court:

- (a) Should the Court procedurally consolidate the NOI Proceedings?
- (b) Should the Court expand the stay of proceedings?
- (c) Should the Court grant the Administration Charge and Director’s Charge?

²² Tufvesson Affidavit at para 35.

²³ First Report at para 8.2(1).

²⁴ Tufvesson Affidavit at para 62.

²⁵ Tufvesson Affidavit at para 59.

²⁶ Tufvesson Affidavit at para 60; First Report at para 9.1(a).

²⁷ Tufvesson Affidavit at para 61.

- (d) Should the Court approve the Consulting Agreement and the Sale Guidelines and authorize the commencement of the liquidation process?
- (e) Should the Court declare that, pursuant to section 5(5) of the WEPPA, the Companies meet the criteria established by section 3.2 of the WEPPR?
- (f) Should the Court extend the time for the Companies to file proposals?

A. The Court should procedurally consolidate the Proceedings

28. Courts in Canada have inherent jurisdiction to authorize the consolidation of bankruptcy estates for procedural and/or substantive purposes. In *Electro Sonic Inc. (Re)*, (“**Electro**”) Justice Brown held that courts in bankruptcy proceedings operate subject to the general principle that the litigation process should secure the just, most expeditious, and least expensive determination of every proceeding on its merits.²⁸ The Ontario Superior Court of Justice did so again in *Mustang*²⁹ and *Eureka*³⁰ based on the same principles.

29. Courts have stated that consolidation for procedural purposes is appropriate where it will provide greater administrative efficiency and prevent unnecessary duplication in the administration of the bankruptcy estates.³¹ Procedural consolidation does not merge or substantively consolidate the proposed bankruptcy proceedings or the respective estates.

30. The Court’s jurisdiction to grant such relief stems from Rule 6.01 of the Ontario *Rules of Civil Procedure*,³² which is incorporated into the bankruptcy context through Section 3 of the

²⁸ *Re Electro Sonic Inc.*, 2014 ONSC 942 at paras 4 and 6 [*Electro*], Book of Authorities [BOA], Tab 1; *Re Mustang GP Ltd.*, 2015 ONSC 6562 at para 25 [*Mustang*], BOA, Tab 2.

²⁹ *Mustang*, at para 25, BOA, Tab 2.

³⁰ *Eureka 93 Inc. et. al. (Re)*, 2020 ONSC 1482 at para 13, BOA, Tab 3.

³¹ *Re Ornge Global GP Inc.*, 2013 ONSC 4518 at paras 14 and 15, BOA, Tab 4; See, for example, *In the Matter of the bankruptcy of Walter Energy Canada Holdings Inc* (16 December 2016), No B-160976 (Bankruptcy Procedure Order), Fitzpatrick J, BOA, Tab 5.

³² RRO 1990, Reg 194 [ON Rules].

Bankruptcy and Insolvency General Rules.³³ Rule 6.01 of the Rules of Civil Procedure permits a court to consolidate proceedings where the two proceedings have (a) a question of law or fact in common; (b) the relief claimed arises out of the same transaction or occurrences; or (c) for any other reason the order should be made.³⁴ Procedural consolidation is permitted in order to avoid “unnecessary costs or delay”.³⁵

31. The Procedural Consolidation Order is appropriate in this case for the following reasons:

- (a) The Procedural Consolidation Order seeks to consolidate the NOI Proceedings only for administrative or procedural purposes and the estates will remain separate for any claims process or distribution to creditors.³⁶
- (b) Wholesale and Retail are the only Canadian subsidiaries of Scotch & Soda Export and Netherlands and are the primary entities responsible for the Canadian business.³⁷
- (c) The proposed Procedural Consolidation Order consolidating the NOI Proceedings will provide greater administrative efficiency and avoid duplicative steps across the NOI Proceedings, conserving resources;³⁸
- (d) No stakeholder or creditor will be prejudiced or affected,³⁹ and
- (e) the Proposal Trustee is supportive of this relief.

³³ *Bankruptcy and Insolvency General Rules*, CRC 1978, c 368, s. 3 [BIA].

³⁴ *ON Rules*, at r. 6.01.

³⁵ *ON Rules*, at r. 6.01.

³⁶ First Report at para 5.2.

³⁷ Tufvesson Affidavit at para 42.

³⁸ Tufvesson Affidavit at para 42; First Report at paras 5.3(a), (b) and (c).

³⁹ Tufvesson Affidavit at para 43; First Report at para 5.3(c).

B. The Expanded Stay of Proceedings is Appropriate

32. The Companies are seeking a broader stay of proceedings which is consistent with the provisions customarily granted in proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") requiring, subject to further Order of the Court, suppliers and service providers to continue to provide goods and services without disruption, provided they are not required to do so on credit.⁴⁰

33. While this type of relief has typically been granted in the context of a CCAA and receivership proceedings, it has also been granted in the context of NOI proceedings, such as *Sanderson*⁴¹ and *Nilex*⁴². This is consistent with the Supreme Court of Canada's decision in *Century Services*, that highlighted the importance of harmonization between the Canada's primary insolvency statutes the CCAA and BIA.⁴³

34. In order to provide the Companies with the greatest opportunity to successfully complete the store closing sale, and to contemporaneously consider options to continue their businesses, the Companies require time to operate without disruption during these proceedings.⁴⁴

35. The enhanced stay provisions are in the spirit of stabilizing the Companies' operations and allowing them the greatest opportunity to preserve value during the NOI Proceedings, while preserving any person's ability to return to this Court for further relief.

⁴⁰ Ontario Superior Court of Justice, Commercial List Forms, Companies Creditors Arrangement Act Initial Order Form at paras 16 and 17, online: <[intitial-order-CCAA-EN.doc \(live.com\)](#)>.

⁴¹ *Sanderson-Harold Company Limited c.o.b. as Paris Kitchens*, Estate/ Court File No.: [31-2835198 \(SCJ \[Commercial List\]\)](#) (*Extension Order* dated June 8, 2022) at paras 3 and 4 [Sanderson Harold, *Extension Order*], BOA, Tab 6.

⁴² *Nilex Inc.*, Estate/ Court File No.: [24-2878531 \(Court of King's Bench Alberta\)](#) (*Extension Order* dated November 8, 2022) at paras 3 and 4, BOA, Tab 7.

⁴³ *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para 24, BOA, Tab 8.

⁴⁴ First Report at para 6.1.

36. The Proposal Trustee is supportive of this relief⁴⁵ and believes that expanding the scope of the stay of proceedings is appropriate as the continued operation of the Companies will assist it to achieve its objectives in these proceedings.⁴⁶

C. The Administration Charge should be granted

37. The Companies are seeking an administration charge (the “**Administration Charge**”) securing the fees and disbursements of counsel to the Companies, the Proposal Trustee and counsel to the Proposal Trustee in the maximum amount of \$125,000 (before HST) against the property of Retail and \$125,000 (before HST) on the property of Wholesale.⁴⁷

38. Section 64.2 of the BIA permits the Court to grant a charge over the property of a debtor to secure the fees and expenses of professional involved in the restructuring:

64.2(1) Court may order security or charge to cover certain costs: On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee’s duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;

[...]

64.2(2) Priority: The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

⁴⁵ Tufvesson Affidavit at para 54; First Report at para 6.

⁴⁶ First Report at para 6.3.

⁴⁷ Tufvesson Affidavit at para 44.

39. Administration charges have been approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful restructuring under the BIA⁴⁸ and protect them due to the limited liquidity at this time.⁴⁹

40. The Companies submit that granting the Administration Charge to provide these professionals with security for payment of their services is necessary as they have taken on, and continue to take on, a critical role in the NOI Proceedings.⁵⁰

41. The quantum of the Administration Charge was calculated in consultation with the Proposal Trustee and is reasonable and appropriate in circumstances.⁵¹ The Proposal Trustee is supportive of the Administration Charge.⁵²

42. Canadian counsel to S&S Lender LLC, the only secured party, was consulted in connection with the Motions and served. It is expected that once the foreclosure proceedings are complete in the United States there will be no remaining secured creditors of the Companies.⁵³

D. The Director's Charge should be granted

43. The Companies are seeking a director's charge (the "**Director's Charge**") in favour of the directors and officers in the maximum amount of \$90,000 (before HST) against property of Retail and \$70,000 against the property of Wholesale.⁵⁴

44. Section 64.1 of the BIA permits the Court to grant a charge in connection with a director's indemnification:

⁴⁸ [Mustang](#), at para 33, BOA, Tab 2; See also, Sanderson Harold, [Extension Order](#), at para 5, BOA Tab 6.

⁴⁹ First Report at para 8.1(b).

⁵⁰ Tufvesson Affidavit at para 45.

⁵¹ Tufvesson Affidavit at para 46.

⁵² Tufvesson Affidavit at para 45; First Report at para 8.1.1.

⁵³ First Report at para 8.1(d).

⁵⁴ Tufvesson Affidavit at para 49.

64.1(1) Security or charge relating to director's indemnification: On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

[...]

64.1(2) Priority: The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

45. The purpose of the Director's Charge is to:
- (a) keep directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the process, and in addition avoid a potential destabilization of the business if they resigned,⁵⁵ and
 - (b) enable a debtor company to benefit from an experienced board of directors and senior management during the restructuring proceedings.⁵⁶

46. In *Colossus*, Justice Wilton-Siegel approved the request for a charge to indemnify directors and officers pursuant to section 64.1 of the BIA, and in so doing, highlighted the fact that the continued involvement of the remaining directors and officers was critical to the operations of the company during its proposal proceedings. Additionally, Justice Wilton-Siegel noted that a Director's Charge was appropriate given that limitations and exclusions of the directors' and officers' insurance policies which created uncertainty as to coverage of all potential claims.⁵⁷

⁵⁵ [Re Northstar Aerospace Inc.](#), 2013 ONSC 1780 at para 29 [*Northstar*], BOA, Tab 9; [Re Canwest Global Communications Corp.](#), 2009 CarswellOnt 6184 at para 48, BOA, Tab 10.

⁵⁶ *Northstar*, at para 29, BOA, Tab 9.

⁵⁷ [Re Colossus Minerals Inc.](#), 2014 ONSC 514 at paras 16 and 21, BOA, Tab 11. Also see [Mustang](#), at para 35, BOA, Tab 2.

47. In the present case, the directors and officers have the benefit of an insurance policy (the “**D&O Policy**”) in respect of their potential liability, however the D&O Policy is set to expire on July 1, 2023 and coverage is subject to several exclusions and limitations and there is a potential for insufficient coverage in respect of potential director and officer liabilities.⁵⁸ The Director’s Charge would only be in respect of amounts not covered by the Companies’ D&O Policy.⁵⁹

48. The Director’s Charge would only secure the Companies’ indemnity in favour of the directors and officers for post-filing obligations and would be in respect of amounts not covered by the Companies’ D&O Policy.⁶⁰

49. The quantum of the Director’s Charge was calculated based on the Director’s potential exposure for certain obligations such as unpaid vacation, payroll and accrued vacation and sales taxes.⁶¹ The Companies have worked with the Proposal Trustee to determine the quantum of the Director’s Charge⁶²

50. The Director’s Charge is proposed to form a second ranking charge on the Property in priority to all Encumbrances other than the Administration Charge.⁶³

51. The remaining director, Filip Tufvesson, is not prepared to continue as a director and officer of the Companies without the benefit of additional protection for post-filing liabilities that he may incur in those roles⁶⁴ and the continued involvement of this director is beneficial for the Companies and stakeholders and will reduce professional costs.⁶⁵

⁵⁸ Tufvesson Affidavit at para 48.

⁵⁹ First Report at para 3; Tufvesson Affidavit at para 49.

⁶⁰ Tufvesson Affidavit at para 49.

⁶¹ First Report at para 2.0.

⁶² Tufvesson Affidavit at para 51.

⁶³ Tufvesson Affidavit at para 50.

⁶⁴ Tufvesson Affidavit at para 48.

⁶⁵ First Report at para 5.

52. The Proposal Trustee is supportive of the proposed amount of the Director's Charge.⁶⁶

Based on the factors above, the Companies submit that the Director's Charge should be approved.

E. This Court should approve the Consulting Agreement and the corresponding Liquidation of Inventory

53. It is well-recognized that Courts have jurisdiction to approve a sale authorizing the liquidation of a debtor's assets in an insolvency process, and has frequently done so in the context of retail liquidations.⁶⁷

54. Section 65.13 of the BIA permits the Court to authorize a disposition of a debtor's assets outside of the ordinary course. This section is applicable when a Court is considering approval of a liquidation sale, as is being requested here in accordance with the Consulting Agreement. and the following factors will apply:⁶⁸

- (a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances: Due to the small scale and fee payable to Tiger of \$50,000, the professional fees associated with running an extensive bidding process and calling for proposals would have exceeded the benefit given the economics of scale.⁶⁹ Tiger's budget is reasonable and consistent with other retail liquidations.⁷⁰

The Companies could not carry on operating in the normal course and need to

⁶⁶ First Report at para 8.2.5.

⁶⁷ See, for example, the proceedings in respect of *Bed Bath & Beyond*, Court File No. CV-23-00694493-00CL (SCJ [Commercial List]) ([Sale Approval Order](#)) [BBB, *Sale Approval Order*], BOA, Tab 12. *Nordstrom*, Court File No. CV-23-00695619-00CL (SCJ [Commercial List]) ([Liquidation Sale Approval Order](#)) [*Nordstrom*, Liquidation Sale Approval Order], BOA, Tab 13; *Danier Leather Inc.*, Estate File No.: 31-CL-2084381 ([Approval Order dated March 7, 2016](#)), BOA, Tab 14; *Nine West Canada LP and Jones Canada, Inc.*, Estate File Nos. 31-2363758 and 31-2363759 ([Liquidation Process Order](#)), BOA, Tab 15.

⁶⁸ BIA at s. 65.13.

⁶⁹ First Report at para 4.1(b).

⁷⁰ First Report at para 4.1(b).

start the liquidation immediate. Tiger has been advising KSV and can commence the liquidation immediately.⁷¹

- (b) Whether the proposal trustee approved the process leading to the proposed sale or disposition: The selection of Tiger and the negotiation of the Consulting Agreement was undertaken in consultation with the Proposal Trustee. The Companies selected Tiger as the Consultant as Tiger has extensive experience conducting retail liquidations⁷² and specifically has experience with smaller scale liquidations of a similar size to the Companies.⁷³
- (c) Whether the trustee 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: It is expected that the recoveries will be better and more beneficial for creditors as BlueStar 1, has agreed to the use of the intellectual property for a liquidation conducted through the NOI process pursuant to the Consulting Agreement.⁷⁴ A liquidation under a bankruptcy may lead to costly disputes regarding the use of the relevant intellectual property therefore reducing recoveries.
- (d) The extent to which the creditors were consulted: BlueStar as the largest unsecured creditor and owner of the relevant intellectual property was consulted in the selection of Tiger.⁷⁵ As well, Cadillac Fairview as landlord to three of the four retail locations was also consulted in respect of the sale process and guidelines;⁷⁶

⁷¹ First Report at para 4.1(c).

⁷² Tufvesson Affidavit at para 30; First Report at para 4.1(a).

⁷³ [Trustee's Report to Creditors of Preliminary Administration](#) of *Chico's FAS Canada, Co*, Estate File No.: 31-2661908 at para 2.2 (3), BOA, Tab 16.

⁷⁴ First Report at para 2.4.

⁷⁵ Tufvesson Affidavit at para 24; First Report at para 2.3.

⁷⁶ Tufvesson Affidavit at para 36.

- (e) The effects of the proposed sale or disposition on the creditors and other interested parties: Given the termination of the Distribution Agreement and Franchise Agreement following the Netherlands Sale, the proposed liquidation sale, with the consent of Bluestar is the most practical path forward to realize value for all of the Companies' stakeholders; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value: In the circumstances, the fee payable under the Consulting Agreement is reasonable and a liquidation through the Stores is expected to produce the highest value for the Companies' stakeholders.⁷⁷

55. The Consulting Agreement is also subject to the Sale Guidelines, which are appended to the proposed Extension and Liquidation Sale Approval Order. The Sale Guidelines are substantially similar to the form of sale guidelines approved in recent retail liquidations including *Nordstrom*⁷⁸, *David's Bridal*⁷⁹ and *Bed Bath and Beyond*⁸⁰.

F. WEPPA Declaration

56. The WEPPA provides employees whose employment is terminated in connection with certain insolvency proceedings access to government funds for unpaid wages, vacation pay, severance and termination pay, up to certain limits. Although access to the WEPPA resources are available in any bankruptcy or receivership proceeding, access to the WEPPA resources for former employees in an NOI or CCAA proceeding is only available if a Court order is made under section 5(5) of the WEPPA.

⁷⁷ First Report at para 4.1(b).

⁷⁸ *Nordstrom*, BOA, Tab 13.

⁷⁹ *David's Bridal*, Court File No. CV-19-00698107-00CL (SCJ [Commercial List]) ([Recognition Order](#)), BOA, Tab 17.

⁸⁰ *BBB*, BOA, Tab 12.

57. Section 5(5) of the WEPPA provides that on application by any person in proceedings under Division I of Part III of the BIA, a Court may determine that a former employee meets the criteria prescribed by the Wage Earner Protection Program Regulations, SOR/ 2008-22 (“**WEPPR**”). Section 3.2 of the WEPPR provides that “a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations”.

58. If there is no purchaser for the Canadian business or a going-concern outcome for the Stores, Retail will need to terminate the employment of some or all of its employees during these NOI Proceedings.⁸¹ The only employees who remain would be those required to wind down business operations, and accordingly the requirements of Section 3.2 of the WEPPR would be satisfied.

59. Should Retail be required to terminated the employment of its employees during the NOI proceeding, it would be appropriate to provide those former employees with access to resources under the WEPPA for any unpaid termination and severance pay.⁸²

60. Similar relief has been granted in other insolvency proceedings including *Bed Bath and Beyond*⁸³, *FIGR*⁸⁴ and *Nilex*⁸⁵.

61. The Proposal Trustee is supportive of the relief sought in connection with WEPPA.⁸⁶

⁸¹ Tufvesson Affidavit at para 55; First Report at para 7.1.

⁸² First Report at para 7.5.

⁸³ *BBB*, ([Amended and Restated Initial Order](#)), at para 23, BOA, Tab 18.

⁸⁴ *FIGR, Brands Inc.*, CV-21-00655373-00CL ([Stay Extension, Distribution, WEPPA and Fee Approval Order](#)), at para 4, BOA, Tab 19.

⁸⁵ *Nilex Inc.*, Estate No.: 24-2878531 ([Interim Distribution Order](#)), at para 3, BOA, Tab 21.

⁸⁶ Tufvesson Affidavit at para 57; First Report at para 7.5.

G. The Court should extend the time for the Companies to file Proposals

62. The Companies each filed an NOI on May 8, 2023. Pursuant to section 50.4(8) of the BIA, the Companies are required to file proposals with the official receiver within 30 days (the “**Proposal Period**”) being June 8, 2023 unless it otherwise obtains an extension of time from the Court.

63. Pursuant to section 50.4(9) of the BIA, before the expiry of the Proposal Period, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days. The BIA provides that for a Court to grant an extension, the Court must be satisfied that:

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.⁸⁷

64. To advance a proposal to present to the Companies’ creditors, the Companies are each seeking a 45-day extension from the current deadline of July 8, 2023, to and until July 22, 2023.

65. The factors set out above are met in the circumstances of this case including: (i) the Companies have complied with all their obligations under the BIA,⁸⁸ (ii) the Companies have acted and continue to act in good faith and due diligence in the period prior to and during the NOI Proceedings,⁸⁹ (iii) the Filing Extension will not prejudice or affect any group of creditors;⁹⁰ and

⁸⁷ BIA, at s. 50.4(9); [Castle Rock Research Corp v AGC Investments Ltd.](#), 2012 ABQB 208 at para 8, BOA, Tab 20.

⁸⁸ Tufvesson Affidavit at para 59.

⁸⁹ Tufvesson Affidavit at para 60; First Report at para 9.1(a).

⁹⁰ First Report at para 9.1(c).

(iv) the Filing Extension will allow the Companies time to pursue and complete these realizations efforts and enhance the likelihood of the Companies being able to make a viable proposal to creditors.⁹¹

66. The Companies are projected to have sufficient funding during the Filing Extension⁹² and the Proposal Trustee is supportive of the Filing Extension.⁹³ The Filing Extension will provide the time necessary for the Companies to move forward with the Sale, if approved.

PART IV - ORDER REQUESTED

67. For the reasons set out above, the Companies request that this Honourable Court grant the relief sought in the Motions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of May, 2023.



CASSELS BROCK & BLACKWELL LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane Dietrich LSO #49302U

Tel: 416.860.5223

jdietrich@cassels.com

Monique Sassi LSO#63638L

Tel: 416.860.6886

msassi@cassels.com

*Lawyers for Scotch & Soda Retail Canada Inc.
and Scotch & Soda Canada Inc.*

⁹¹ First Report at para 9.1(b); Tufvesson Affidavit at para 61.

⁹² First Report at para 9.1(c).

⁹³ First Report at para 9.1.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Electro Sonic Inc.*, [2014 ONSC 942](#).
2. *Re Mustang GP Ltd.*, [2015 ONSC 6562](#).
3. *Eureka 93 Inc. et. al. (Re)*, [2020 ONSC 1482](#).
4. *Re Ornge Global GP Inc.*, [2013 ONSC 4518](#).
5. In the Matter of the bankruptcy of *Walter Energy Canada Holdings Inc* (16 December 2016), No B-160976 (Bankruptcy Procedure Order), Fitzpatrick J.
6. *Sanderson-Harold Company Limited c.o.b. as Paris Kitchens*, Estate/ Court File No.: 31-2835198 (SCJ [Commercial List]) ([Extension Order](#)).
7. *Nilex Inc.*, Estate/ Court File No.: 24-2878531 (Court of King's Bench Alberta) ([Extension Order](#)).
8. *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010 SCC 60](#).
9. *Re Northstar Aerospace Inc.*, [2013 ONSC 1780](#).
10. *Re Canwest Global Communications Corp.*, [2009 CarswellOnt 6184](#).
11. *Re Colossus Minerals Inc.*, [2014 ONSC 514](#).
12. *Bed Bath & Beyond*, Court File No. CV-23-00694493-00CL (SCJ [Commercial List]) ([Sale Approval Order](#)).
13. *Nordstrom*, Court File No. CV-23-00695619-00CL (SCJ [Commercial List]) ([Liquidation Sale Approval Order](#)).
14. *Danier Leather Inc.*, Estate File No.: 31-CL-2084381 ([Approval Order](#))
15. *Nine West Canada LP and Jones Canada, Inc.*, Estate File Nos. 31-2363758 and 31-2363759 (Liquidation Process Order).
16. *Chico's FAS Canada, Co*, Estate File No.: 31-2661908 ([Trustee's Report to Creditors of Preliminary Administration](#)).
17. *David's Bridal*, Court File No. CV-19-00698107-00CL (SCJ [Commercial List]) ([Recognition Order](#)).
18. *Bed Bath & Beyond Canada*, CV-23-00694493-00CL ([Amended and Restated Initial Order](#)).
19. *FIGR, Brands Inc.*, CV-21-00655373-00CL ([Stay Extension, Distribution, WEPPA and Fee Approval Order](#)).
20. *Castle Rock Research Corp v AGC Investments Ltd.*, [2012 ABQB 208](#).

21. *Nilex Inc.*, Estate/ Court File No.: 24-2878531 (Court of King's Bench Alberta) ([Interim Distribution Order](#)).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

[...]

- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

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

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in

respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

- (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

- (a) the court may not make the order unless the individual is carrying on a business; and
- (b) only property acquired for or used in relation to the business may be subject to a security or charge.

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall 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

- (4) 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 trustee approved the process leading to the proposed sale or disposition;
 - (c) whether the trustee 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.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

- (a) the individual's employment ended for a reason prescribed by regulation;
- (b) one of the following applies:
 - (i) the former employer is bankrupt,
 - (ii) the former employer is subject to a receivership,
 - (iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the [Bankruptcy and Insolvency Act](#) and
 - (A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and
 - (B) a trustee is appointed, or
 - (iv) the former employer is the subject of proceedings under Division I of Part III of the [Bankruptcy and Insolvency Act](#) or under the [Companies' Creditors Arrangement Act](#) and a court determines under subsection (5) that the criteria prescribed by regulation are met; and
- (c) the individual is owed eligible wages by the former employer.
- (d) [Repealed, 2009, c. 2, s. 343]

Prescribed criteria — other proceedings

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

Wage Earner Protection Program Regulations, SOR/2008-222

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

Courts of Justice Act, R.S.O. 1990, c C.43, Rules of Civil Procedure, R.R.O. 1990, Reg 194

RULE 1 CITATION, APPLICATION AND INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Orders on Terms

1.05 When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

RULE 2 NON-COMPLIANCE WITH THE RULES

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

RULE 3 TIME

Extension or Abridgment

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed. R.R.O. 1990, Reg. 194, r. 3.02 (2).

RULE 6 CONSOLIDATION OR HEARING TOGETHER

Where Order May Be Made

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

- (a) they have a question of law or fact in common;
 - (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
 - (c) for any other reason an order ought to be made under this rule,
- the court may order that,
- (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.R.O. 1990, Reg. 194, r. 6.01 (1).

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list. R.R.O. 1990, Reg. 194, r. 6.01 (2).

Discretion of Presiding Judge

6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise. R.R.O. 1990, Reg. 194, r. 6.02.

RULE 6.1 SEPARATE HEARINGS

Separate Hearings

6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages. O. Reg. 438/08, s. 9.

RULE 37 MOTIONS — JURISDICTION AND PROCEDURE

Notice of Motion

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. R.R.O. 1990, Reg. 194, r. 37.01.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF SCOTCH & SODA RETAIL CANADA INC. IN THE CITY OF TORONTO, IN
THE PROVINCE OF ONTARIO

Estate/Court File No.: 31-2941767
Estate/ Court File No.: 31-2941764

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF SCOTCH & SODA CANADA INC. IN THE CITY OF TORONTO,
IN THE PROVINCE OF ONTARIO

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

PROCEEDING COMMENCED AT
TORONTO

FACTUM

CASSELS BROCK & BLACKWELL LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane Dietrich LSO #49302U

Tel: 416.860.5223
jdietrich@cassels.com

Monique Sassi LSO#63638L

Tel: 416.860.6886
msassi@cassels.com

*Lawyers for Scotch & Soda Retail Canada Inc. and Scotch &
Soda Canada Inc.*