CITATION: *In Re Hudson's Bay Company*, 2025 ONSC 5998
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20251024

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 **HUDSON'S BAY COMPANY** ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC., Applicants

BEFORE: Peter J. Osborne J.

COUNSEL:

Maria Konyukhova, Elizabeth Pillon, Sinziana Henning, Philip Yang and Brittney Ketwaroo for the Applicants

Graham Phoenix and Jayson Thomas for Ruby Liu Commercial Investment Corp.

Jeremy Dacks, Marc Wasserman and David Rosenblatt for Pathlight Capital LP

Matthew Lerner, Brian Kolenda, Christopher Yung and Julien Sicco for ReStore Capital LLC, the FILO Agent

Jeremy Opolsky, David Bish, Alec Angle and Alina Butt for The Cadillac Fairview Corporation

Matthew Gottlieb, Andrew Winton and Annecy Pang for KingSett Capital Inc.

D. J. Miller and Andrew Nesbitt for Oxford Properties Group

Linda Galessiere for Ivanhoe Cambridge II Inc. and Morguard Investments Limited, both as Agents for certain Landlords, and Westcliff Management Ltd.

James Bunting, Anna White and Alicia Noë for Ivanhoe Cambridge Inc.

Brendan Jones and John Wolf for QuadReal Property Group and Primaris Management Inc.

Angela Hou and Emily Fan for TELUS Health, HBC Pension Administrator

Karen Ensslen as Employee Representative Counsel

Sean Zweig, Thomas Gray and Preet Gill for Alvarez & Marsal Canada Inc., the Court-appointed Monitor

REASONS for DECISION

OSBORNE J.

Overview

1. Hudson's Bay Company (or an affiliate) is the tenant under 25 department store leases for locations across Canada. It asks this court to approve the assignment of those leases to a new tenant. One assignment is unopposed. The others are vigorously opposed.

2. Every one of the counterparty landlords under those remaining leases opposes the assignment and objects to being forced into a long-term commercial relationship with a tenant to whom they never agreed to lease their properties.

3. HBC is insolvent and owes its creditors hundreds of millions of dollars. At present, it would appear unlikely that those creditors will be repaid in full. One secured creditor who, in the waterfall of recoveries, would likely benefit most from any realization of value from these leases, not surprisingly, supports the proposed assignment.

4. Another secured creditor opposes the proposed assignment and asks the court to disclaim the leases immediately, on the basis that its collateral is being eroded by the continued rent expense for vacant stores.

5. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), the federal insolvency statute that applies in the circumstances, gives this court the

discretionary power to determine whether such an assignment ought to be approved. The *CCAA* sets out the factors to be considered.

6. The fundamental question in this case, therefore, requires the court to weigh legitimate but directly competing interests of stakeholders or groups of stakeholders, neither of which caused the present situation. Should a party to a contract that it entered into with an insolvent company be compelled to continue that contractual relationship with a new party in order to maximize recoveries for creditors of the insolvent company?

7. In the particular circumstances of these motions, the answer to that question is no.

8. Defined terms in these Reasons have the meaning given to them in the motion materials and/or the Eighth Report of the Monitor, unless otherwise stated.

The Motions before the Court and the Positions of the Parties

9. The Applicants (collectively referred to as "HBC", unless the context requires differentiation) seek an order

    a. approving the amended Asset Purchase Agreement (the "APA") dated as of May 23, 2025 between HBC and Ruby Liu Commercial Investment Corp. ("Central Walk" or "the Purchaser") and Weihong (Ruby) Liu ("Ms. Liu") as guarantor;

    b. assigning all of HBC's interest in the Central Walk Leases (the "CW Leases"), together with all related rights, benefits, and advantages, to the Purchaser;

    c. declaring that certain portions of specific provisions (ss. 3.05 and 3.05(A)) of the Ivanhoe Cambridge Leases (the "IC Leases") violate the common law anti-deprivation rule and s. 34 of the *CCAA* such that they are, therefore, unenforceable; and

    d. sealing, on a temporary basis, the confidential appendix to the Eighth Report of the Monitor dated August 20, 2025, which contains a summary of the economic terms of certain bids received for the CW Leases.

10. One of HBC's senior secured creditors, ReStore Capital, LLC, in its capacity as FILO Agent and on behalf of the FILO Lenders, brought its own (amended) motion for relief that is almost completely inconsistent with the relief sought on HBC's motion. It seeks an order, according to its Amended Notice of Motion (which substantially amends the scope of relief originally sought), that

a. expands the powers of the Monitor to allow the Monitor to conduct the affairs and operations of the Applicants for the benefit of all their stakeholders;

b. authorizes the Monitor to cause the Company to terminate the Central Walk APA, as well as the transaction subject thereto (the "Central Walk Transaction" or "Transaction")

c. authorizes and directs the Monitor to cause HBC to immediately disclaim all of its remaining leases subject to the Central Walk APA for which a transaction has not closed and that are not subject to any other potential transaction (the "Remaining Leases"), unless the Pathlight Lenders or the Purchaser under the Central Walk APA agree to bear any Rent and other costs associated with the pursuit of the Central Walk Transaction (including, without limitation, any professional fees, Monitor fees, and fees of legal counsel) (the "Central Walk Costs");

d. amends paragraph 10 of the Amended and Restated Initial Order ("ARIO") to eliminate the requirement that the Applicants pay any Rent on any Remaining Leases and directs that no Rent on account of the Remaining Leases be paid from any asset-based lending ("ABL") Priority Collateral from the earlier of (1) the notice of disclaimer of any of the Remaining Leases, including, for greater certainty, during any period of notice provided for in s. 32(5) of the *CCAA* and (2) the date of any decision of the court declining to approve the Central Walk Transaction;

e. requires that, if the Central Walk Transaction is terminated or not approved, that the Purchaser under the Central Walk APA or the Pathlight Lenders reimburse the Applicants for any Central Walk Costs incurred from and after July 15, 2025, and that any such amounts be deemed to be ABL Priority Collateral;

f. requires, as a condition of any approval or implementation of the Central Walk Transaction, that a portion of any proceeds from the Central Walk APA equivalent to the Central Walk Costs incurred from and after July 15, 2025 be deemed to be ABL Priority Collateral;

g. directs HBC to distribute $4 million (originally $6 million) to the FILO Agent;

h. makes such other orders as may be necessary, pursuant to s. 11 of the *CCAA*, to ameliorate any prejudice that would otherwise be occasioned on the FILO Lenders as a result of the pursuit of the Central Walk Transaction; and

i. grants certain related and ancillary relief to better ensure that the FILO Lenders' rights and interests are safeguarded.

11. In its factum filed on this motion, the FILO Agent further refined the articulation of the relief it was seeking to include an order requiring the preservation (by the Monitor) of the deposit paid by the Purchaser in connection with the Central Walk Transaction, in the event it was not approved.

12. HBC's other senior secured creditor, Pathlight Capital LP ("Pathlight"), supports HBC's motion for approval of the proposed lease assignments.

13. HBC's landlords who are counterparties to the contested lease assignments all oppose HBC's motion. Those landlords (the "Landlords" or the "Opposing Landlords") include The Cadillac Fairview Corporation, Oxford Properties Group, KingSett Capital Inc., Ivanhoe Cambridge Inc., Primaris Management Inc., QuadReal Property Group, Morguard Investments Limited, and Westcliff Management Ltd., all of which object to the compelled lease assignments.

14. Ivanhoe Cambridge further opposes the additional relief sought by HBC which would, if the court approved the assignment of certain of its leases (the "IC Leases"), declare unenforceable certain provisions of those IC Leases. In particular, the additional relief sought by HBC would have the practical effect of amending the terms of these IC Leases as they exist today by deleting those clauses, the effect of which is to remove certain renewal rights and other benefits in favour of the tenant (i.e., HBC, or if the lease assignments are approved, Central Walk).

15. The evidence on these motions is voluminous. The record comprises thousands of pages and includes affidavits and cross-examination transcripts from both fact witnesses and experts, all as fully set out in the motion materials and summarized in the Eighth Report. I have considered all of the evidence, but specifically reference in these reasons only the key elements of that evidence where necessary.

The Law

16. The Central Walk Transaction includes two key elements: a sale of assets and an assignment of leases.

17. Accordingly, I must consider the Central Walk Transaction within the analytical framework applicable to each.

Sale of Assets: Section 36(3) of the *CCAA* and the *Soundair Principles*

18. This Court has jurisdiction pursuant to s. 36 of the *CCAA* to approve the sale of assets outside the ordinary course of business: *Nortel Networks Corporation (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.), at para. 48. Section 36(3) sets out the non-exhaustive list factors to be considered:

    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.

19. Those factors overlap and dovetail with the factors set out in *Royal Bank of Canada v. Soundair Corp*. (1991), 4 O.R. (3d) 1 (C.A.), commonly referred to as the Soundair Principles: *Re CanWest Publishing Inc.*, 2010 ONSC 2870, 68 C.B.R. (5th) 233, at para. 13. These Principles require the court to consider:

    a. whether the moving party has made a sufficient effort to obtain the best price and not to act improvidently;

    b. whether the moving party has considered the interests of all parties;

    c. the efficacy and integrity of the process by which offers were obtained; and

    d. whether there has been any unfairness in the working out of the process.

Assignment of Contracts: Section 11.3 of the *CCAA*

20. Section 11.3(1) of the *CCAA* provides that on application by a debtor company, and on notice to every party to an agreement and the Monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

21. Section 11.3(3) provides that in deciding whether to make the order, the court is to consider, among other things,

    a. whether the monitor approved the proposed assignment;

    b. whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

    c. whether it would be appropriate to assign the rights and obligations to that person.

22. Pursuant to s. 11.3(4), the court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement (other than those arising by reason only of the company's insolvency, the commencement of proceedings under the *CCAA* or the Company's failure to perform a non-monetary obligation) will be remedied on or before the day fixed by the court. These are commonly referred to as the "cure costs".

23. Certain elements of the test are clear on a plain reading of s. 11.3:

    a. approval is in the discretion of the Court.

    b. the factors set out in s. 11.3(3)

        i. are not mandatory, either individually or collectively, but rather are "to be considered"; and

        ii. are not an exhaustive list of factors to be considered.

24. Canadian courts have considered proposed lease assignments pursuant to s. 11.3 in several cases.

25. In *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678, 61 C.B.R. (6th) 68, Dunphy J. of this court considered the proposed sale of a large number of petroleum and natural gas leases together with associated equipment pursuant to s. 11.3. The monitor had approved the proposed assignment, so s. 11.3(a) was not in issue.

26. The proposed purchaser there was effectively a shell company, and substantially all of the purchase price was to be debt-financed. The court observed that, on the date of the proposed assignment, there would be little to no equity in the purchaser and that significant leverage would have to be serviced entirely from cash flow of the purchased business.

27. Dunphy J. observed the following at para. 27:

> Section 11.3 of the *CCAA* is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with.

> But for s. 11.3 of the *CCAA*, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.

28. This passage has been quoted with approval in several other cases, including *Donnelly Holdings Ltd. (Re),* 2024 BCSC 275, 11 C.B.R. (7th) 345, at para. 55; *In the Matter of a Plan of Arrangement of UrtheCast Corp.,* 2021 BCSC 1819, 92 C.B.R. (6th) 294, at para. 45.

29. The initial observation of Dunphy J. is worth repeating: the power given to the court under s. 11.3 is extraordinary. That power is not exercised primarily to affect the debtor who is insolvent. Rather, it permits the court to force third parties to accept the assignment of contracts they had with the debtor to new parties with whom they never agreed to bargain.

30. In *Donnelly*, Fitzpatrick J. of the British Columbia Supreme Court considered a proposed assignment of a property lease, which was opposed by the landlord. It was common ground that the substantial term remaining under the lease (approximately nine years in that case) had value to the tenant. The lease included an assignment clause which provided that the tenant could assign the lease only with the consent of the landlord, which was not to be unreasonably withheld.

31. At para. 52, Fitzpatrick J. observed that the reasonableness requirement in the lease in that case was also inherent in the factors set out in ss. 11.3(b) and (c), and further noted the relevance of the *CCAA* policy objectives in determining whether an assignment should be approved:

> The fact that the request for the approval is taking place within these *CCAA* restructuring proceedings brings other considerations into play. As the Court discussed in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, the policy objectives of the *CCAA* may be considered in terms of whether any relief might be "appropriate":
>
> > [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority.

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [Emphasis added.]

32. Fitzpatrick J. also observed, and I agree, that any relief granted under the *CCAA* should result in the "fair" treatment of all stakeholders commensurate with the circumstances: see para. 53, quoting with approval from *Veris Gold Corp. (Re)*, 2015 BCSC 1204, 26 C.B.R. (6th) 310, at para. 58, where Fitzpatrick J. described the approach of the courts in considering whether to approve an assignment as "based on the twin goals of assisting the reorganization process … while also treating a counterparty fairly and equitably."

33. In that case, as here, the burden is on the Applicants to satisfy the court that approval of the proposed assignment is appropriate: *Donnelly*, at para. 60.

34. Moreover, the court in that case further concluded, relying on the decision of Sharma J. in *Urthecast*, that the discretion under s. 11.3 must be exercised after consideration of all the circumstances. While it was not necessary for the debtor to establish that the assignment was absolutely required to the reorganization, "the *degree of importance* will no doubt be a factor in the balancing exercise": *Donnelly*, at para. 58. [Emphasis in original]. In *Urthecast*, the proposed assignment was "critical" and "vital" to the restructuring of the debtor's business: at paras. 22, 26, 66-67.

35. Before leaving *Donnelly*, I wish to return to one point. As noted above, Fitzpatrick J. observed, at para. 51, that "the "reasonableness' requirement on the part of the [landlord in that case] found in the lease is, naturally, inherent in the factors set out in ss. 11.3(3)(b) and (c) of the *CCAA*". I agree with that statement.

36. However, the Opposing Landlords in the present case rely on that statement for the proposition that the court must consider, in the context of ss. 11.3(3)(b) and (c), where the landlord in question has refused to consent to the assignment (as it will invariably have done on a contested s. 11.3 motion), whether the withholding of that consent was reasonable or not.

37. I do not accept that submission, and I do not think it flows from either the s. 11.3(3) factors or the statements of Fitzpatrick J. in *Donnelly*. Precisely as Fitzpatrick J. noted, an analysis of what is reasonable is inherent in the second and third factors. As I have stated above, the reasonableness standard applies to the entire analysis, including as to whether the proposed assignee would be able to perform the obligations and whether it would be appropriate to assign the rights and obligations to that person. That is an entirely different question, however, from the question of contractual interpretation and compliance with a term of a contract requiring landlord consent for an assignment, which may not be unreasonably withheld.

38. Section 11.3(3) does not require landlord consent at all, and it therefore follows that, if consent was withheld, the question of whether that withholding of consent was reasonable or unreasonable (i.e., whether the withholding amounted to a breach of that contract), is not relevant to a s. 11.3(3) analysis. Naturally, just as Fitzpatrick J. observed, a consideration of what is reasonable is inherent in a consideration of whether it would be appropriate to assign the lease, and whether the proposed assignee would be able to perform the obligations.[1]

39. Moreover, an analysis of what is reasonable within the context of s. 11.3 must take into account the interests of all affected stakeholders, including the debtor, the proposed assignee, and secured and unsecured creditors. That may be very different from what is reasonable from the perspective only of one particular landlord in the context of its lease.

40. In *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920, 86 C.B.R. (6th) 125, Chief Justice Morawetz of this court considered a contested lease assignment in the context of a receivership and observed, at para. 35, that the criteria referenced in s. 11.3 of the *CCAA* are the same as those referenced in s. 84.1 (4) of the *Bankruptcy and Insolvency Act*, R.S.C.

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[1] I should note here that the Opposing Landlords submitted both in their joint factum and in oral submissions that their refusals to consent to the proposed assignment were reasonable. They further submitted that the burden is on the Applicants to demonstrate that the refusals of the Landlords to consent were unreasonable, and they relied on Court of Appeal authorities setting out the principles applicable to a determination of whether a landlord acted reasonably in withholding consent to an assignment: *Rabin v. 2490918 Ontario Inc*., 2023 ONCA 49, 165 O.R, (3d) 498, at para. 35, citing *1455202 Ontario Inc. v. Welbow Holdings Ltd*. (2003), 33 B.L.R. (3d) 163 (Ont. S.C.), at para. 9.

In my view, these authorities do not assist the Opposing Landlords here since they address the issue of consent in the context of commercial leases that provided for assignments on consent and in which the consent could not be unreasonably withheld. These cases did not consider compelled assignments pursuant to s. 11.3(3) of the *CCAA*, in the context of which, as I have held above, the issue of whether the withholding of consent was reasonable or unreasonable is not relevant to the analysis.

1985, c. B-3 (the "*BIA*") The Chief Justice observed that the language of s. 11.3(3)(c), requiring a consideration of whether the proposed assignment is appropriate, imports the concept of what is fair and equitable in the circumstances.

41. As noted in that case, neither the lack of consent to the assignment from the counterparty nor the reasonableness or unreasonableness thereof is determinative. If the court has the discretion to approve an assignment where consent to the assignment was withheld reasonably, it must follow that the court has the same discretion where the consent was unreasonably withheld: *Urbancorp*, at para. 41.

42. As observed by the Chief Justice in *Urbancorp* with reference to *Century Services* and *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, the *BIA* and the *CCAA* are to be interpreted harmoniously, keeping in mind the remedial objectives of Canadian insolvency laws to provide timely, efficient and impartial resolution of the debtor's insolvency, to preserve and maximize the value of a debtor's assets, to ensure fair and equitable treatment of the claims against a debtor, to protect the public interest, and to balance the costs and benefits of restructuring or liquidating the debtor company: *Urbancorp*, at paras. 23-24.

43. In my view, all of these authorities are consistent in their approach to the determination of a contested lease assignment, both prior to and following the enactment of s. 11.3 of the *CCAA*, and whether the assignment is sought pursuant to s. 11.3 of the *CCAA* or s. 84.1(4) of the *BIA*. The following helpful principles emerge from these authorities:

    a. the burden is on the party seeking the assignment;

    b. compliance with the mandatory requirements of s. 11.3 must be demonstrated (i.e., the payment of cure costs in accordance with s. 11.3(4));

    c. the standard is reasonableness;

    d. the analysis is fact-specific;

    e. there must be an evidentiary basis in the record for a finding of fact that the proposed assignee would be able to perform the obligations, to the reasonableness standard;

    f. the s. 11.3(3) factors are neither mandatory nor exhaustive. They inform the analysis and are to be considered together with other factors that may be relevant to the particular circumstances of the case;

    g. if the proposed assignment is (as it usually will be) part of an asset sale, the factors set out in s. 36(3) of the *CCAA* together with the *Soundair Principles* must also be considered, notwithstanding that there may be some overlap with a consideration of the s. 11.3 factors;

h. if the proposed assignment is the result of a court-approved sales process conducted by a court officer (i.e., a monitor or receiver), compliance with that process will usually be a relevant factor;

i. the consent to the proposed assignment of the contractual counterparty or lack thereof is irrelevant to the analysis. Section 11.3 permits the court to approve the assignment of a contract, whether the counterparty has consented to the assignment or not;

j. it follows that, where the counterparty has not consented to the assignment (and even if it has a contractual right to do so), the issue of whether that refusal to consent was reasonable or unreasonable is also not relevant to the analysis;

k. a consideration of whether the assignee would be able to perform the obligations (s.11.3(3)(b)) may involve both monetary and non-monetary factors. The consideration is not limited only to the question of whether the assignee has demonstrated sufficient financial resources;

l. demonstrating that the assignee would be able to perform the obligations does not require a guarantee of such performance: the contractual counterparty ought not to be able to improve its position or require greater certainty of performance by the assignee than that to which it was entitled under the original contract with the debtor;

m. the remaining term of the contract (including renewal terms, particularly if such renewals are at the option of the assignee) will usually be a relevant factor in the analysis. A consideration of the ability of the assignee to perform is inherently different if, for example, the contract is for the purchase and sale of an asset where the performance obligation is limited to a single requirement to pay, as opposed to a long-term lease with ongoing monetary and non-monetary performance obligations; and

n. a consideration of whether the proposed assignment would be appropriate (s.11.3(3)(c)) includes a consideration of:

    i. what would be just and equitable in all the circumstances;

    ii. the interests of all stakeholders, including the debtor, the proposed assignee, the contractual counterparty, and secured and unsecured creditors;

    iii. whether the proposed assignment is in furtherance of a going concern outcome with the attendant preservation of a business enterprise, customer and supplier relationships and jobs for employees, or whether it is in furtherance of an asset sale in a liquidating proceeding;

iv. the relative importance and materiality of the proposed assignment to the overall restructuring or liquidation; and

v. whether the contract is proposed to be assigned without amendments, thereby preserving the rights and obligations of the assignor (debtor) and assignee at the date of the proposed assignment, or whether the assignment is proposed to be effected subject to amendments to the contract.

Analysis

44. The terms of the Central Walk APA are fully set out in the Applicants' motion materials and in the Eighth Report (at s. 4.3). In summary:

a. up to 25 Leases in Ontario, Alberta, and British Columbia would be assigned to the Purchaser or a permitted assignee thereof, which would be a corporation controlled by Ms. Liu;

b. of those 25 Leases, the Purchaser requires a declaration that certain provisions in the IC Leases (ss. 3.05 and 3.05(A)) are unenforceable;

c. the Purchased Assets include the Assignment Leases and Leasehold Improvements, excluding Art, Artifacts and Archives, trademarks or other intellectual property, and any property not owned by the Vendor;

d. the Vendor may exclude up to three Leases, at its sole discretion, provided the Minimum Lease Condition can otherwise be satisfied or waived;

e. the Minimum Lease Condition means at least 11 Leases which satisfy certain conditions, provided that each of the Key Leases (as set out in Schedule "G" of the Central Walk APA) are included;

f. the Vendor may also remove from the Transaction, in certain circumstances, the IC Leases;

g. the aggregate purchase price for the Leases is $69.1 million, of which a specific proportion is allocated to each individual Lease. The estimated net proceeds are approximately $50 million, comprised of the purchase price of $69.1 million less 50% of the Aggregate Accepted Cure Costs (being $15 million) and commissions payable in the amount of $4.5 million;

h. the Vendor, the Purchaser and the Monitor agreed to Aggregate Accepted Cure Costs in the amount of $30 million; and

i. the Purchaser is responsible for Assumed Liabilities in accordance with the terms of the Assigned Leases.

45. HBC entered into the Central Walk APA on May 23, 2025 following the completion of the court-approved Lease Monetization Process. It was subsequently amended three times. The Purchaser prepared a Presentation, primarily for the counterparty landlords.

46. On July 25, 2025, in accordance with the earlier order of this court, Central Walk delivered a Business Plan to the Applicants in support of this motion. That Business Plan set out (in significantly more detail than did the Presentation) the Purchaser's proposed plan to operate a national department store chain under the "Ruby Liu" banner. An unredacted version of the Business Plan is attached to Ms. Liu's affidavit. It reflects, among other things, the following:

    a. Ms. Liu and her related companies have committed to invest $375 million in equity capital in the Purchaser to complete the Central Walk Transactions and fund the launch of department store operations;

    b. the Purchaser will invest approximately $120 million in store repairs and renovations, to be incurred evenly over the 12-month period ending August 2026;

    c. the Purchaser has committed to assuming the subject leases "as is, where is" and to comply with all terms and conditions, except for the IC Leases in respect of which declarations are sought that certain terms are unenforceable;

    d. the Purchaser will make an initial inventory investment of approximately $135 million, with target average owned inventory per store of $4.5 million (compared to the HBC average of approximately $7 million per store);

    e. the Purchaser proposes to hire approximately 1800 employees and to prioritize former HBC employees;

    f. the Purchaser intends to launch store operations according to three tiers: "Flagship", "Platinum", and "Standard" formats. Renovation timelines are assumed to vary by format, with Platinum and Standard stores requiring approximately six months from receipt of building permits, and Flagship stores requiring 12 months;

    g. the Purchaser plans to have all locations open within 12 months of receiving building permits;

    h. J2 Retail Management ("J2") is expected to provide services, including supplier onboarding, category management, merchandising strategy, in-store execution, and warehousing/logistics;

    i. the management team is anticipated to include Central Walk leadership from various entities associated with Ms. Liu and the Purchaser;

j. the Business Plan included financial forecasts in a pro forma income statement, balance sheet and cash flow statement. The store-level income statement is based on a store-by-store role-up of HBC's fiscal 2025 forecast results for a 12-month period, integrated into the Financial Model on a phased basis according to proposed store openings;

k. occupancy costs are assumed to begin immediately upon assignment;

l. financial assumptions include:

i. same-store sales growth compared to actual HBC results during fiscal year ("FY") 2024 of 3%;

ii. gross margins of 41.2% compared to HBC's actual FY 2024 gross margins of 39.8%;

iii. store payroll costs equal to 15.7% of net sales, compared to HBC's actual FY 2024 store payroll costs of 23.7%;

iv. no rent escalations or inflation adjustments in respect of base rent, common area maintenance, and property taxes, all of which are consistent with HBC's FY 2024 costs; and

v. corporate payroll of $6 million annually, marketing of $10 million annually, and IT of $3 million annually.

Section 36(3) and the *Soundair Principles*

47. I will address first the factors set out in s. 36(3) of the *CCAA* and the *Soundair Principles*.

48. The Lease Monetization Process has been fully described in earlier reports of the Monitor. It is not challenged by any party on these motions. I am satisfied, as I was when the Lease Monetization Process was approved (on the recommendation of the Monitor, and with no opposition from either the FILO Agent or Pathlight), that it was reasonable in the circumstances. It was approved following significant negotiations with, and input from, various stakeholders, including many of the Opposing Landlords. I am satisfied today that the Process was followed.

49. The Monitor has stated in the Eighth Report that, in its opinion, the proposed sale would be more beneficial to creditors than would a sale or disposition under a bankruptcy and that the consideration to be received for the assets is reasonable and fair, taking into account their market value. In sum, I am satisfied as to the efficacy and integrity of the process by which offers were obtained, and there has been no unfairness in the process.

50. The only element of the section 36(3) factors and the *Soundair Principles* as to which I have concerns relates to the effects of the proposed sale on the creditors and other interested parties. I address those concerns below in the context of the analysis of the s. 11.3 factors.

Lease Assignments under s. 11.3

51. With respect to s. 11.3, I am satisfied that the mandatory technical requirements have been met. The motion is on notice to all contractual counterparties and the Monitor. All monetary defaults other than those arising by reason only of the company's insolvency, the commencement of these proceedings or the company's failure to perform, and non-monetary obligations, will be remedied.

The First Factor: s. 11.3(3)(a) – Has the Monitor Approved the Proposed Assignment?

52. The first factor for consideration pursuant to s. 11.3(3)(a) is whether the Monitor has approved the proposed assignment. Here, the Monitor has declined to approve the proposed assignment.

53. As noted above, and as is urged on me strongly by the Applicants and Central Walk, Monitor approval is not a mandatory requirement.

54. The Opposing Landlords submit that there has not been a single case in which a court has approved a contested assignment pursuant to s. 11.3 where the Monitor has refused to approve the proposed assignment.[2] That appears to be so, but that is not determinative either.

55. I address below in the context of the other two s. 11.3(3) factors and the basis for the Monitor's position. For the moment, I observe the obvious: The Monitor is a court officer. It is not a stakeholder with a beneficial interest in the outcome of these motions. It reached its decision for the reasons set out in the Eighth Report, following completion of not only the court-approved Lease Monetization Process, but a very significant process of engagement and negotiation following the execution of the Central Walk APA on May 23, 2025 and a consideration of all issues.

56. It has been observed in many cases that the Monitor is the "eyes and ears of the court" and that the business judgment of a monitor (or a receiver) should be entitled to some deference from the court.

[2] Cases exist in which the Monitor had approved the proposed assignment but the court nonetheless declined to approve the transaction, having considered all of the s. 11.3(3) factors: see *Donnelly*, at paras. 62, 89

57. In this particular case, the decision of the Monitor to not approve the proposed Transaction is significant in my view. The Monitor reached that decision, recognizing the lengthy sales process that had been followed and the technical compliance with the mandatory elements of s. 11.3.

58. Notwithstanding all of that, and perhaps most importantly, notwithstanding that the proposed Transaction represents both the highest bid for these assets and the potential for a very material recovery to creditors (approximately $50 million), the Monitor still concluded that the Transaction ought not to be approved.

The Second Factor: s. 11.3(3)(b) – Can the Assignee Perform the Obligations?

59. With respect to the second factor, whether the proposed assignee would be able to perform the obligations under the Central Walk Leases, I recognize that effort has been put into the proposed Transaction by both the Applicants and the Purchaser and the principals of that entity and related or affiliated entities.

60. However, and notwithstanding its view that the Purchaser would be able (on the reasonableness standard) to meet the *financial* obligations, the Monitor has expressed numerous concerns as to the ability of the Purchaser to satisfy the non-monetary obligations. I share those concerns in addition to others, which I address below.

61. It is not in dispute that the Purchaser itself is effectively a shell company, incorporated for the purposes of the proposed Transaction. It has no assets, no history of operations or earnings and, on its own, cannot meet a reasonableness standard in demonstrating an ability to meet the financial obligations under the subject leases.

62. Unlike the financial obligations in certain of the earlier s. 11.3 cases referred to above (such as *Urbancorp*, where the financial obligations were nominal), the financial obligations here are very material and would need to be performed continuously for decades.

63. However, in support of the motion, the evidence of the Applicants is that Ms. Liu and certain entities controlled by her have provided an equity commitment of $375 million, supported by evidence of liquid and available cash holdings in Canada.

64. There was significant disagreement at the hearing of this motion between the Applicants and Central Walk on the one hand, and the Opposing Landlords on the other hand, about this commitment.

65. The commitment itself is clear from Ms. Liu's affidavit. It is made on her own behalf and on behalf of entities that she controls. However, equally clear is the fact that the commitment is made exclusively to the Purchaser, another entity controlled by Ms. Liu. Put differently, the commitment to inject equity is enforceable at its highest only by an entity that Ms. Liu controls, not by any of the contractual counterparties.

66. That affects the commitment also made by the Purchaser to spend approximately $120 million to improve the lease premises after assignment, and to pay the cure costs (a mandatory requirement under s. 11.3).

67. I also have significant concerns about the ability of the Purchaser to perform the obligations under the leases beyond simply the quantum of the financial commitment.

68. These are based on concerns raised by the Monitor itself with respect to the Business Plan (Eighth Report, at para. 5.4) and concerns raised by the Opposing Landlords, which in my view have merit.

69. The Opposing Landlords filed two expert reports. The first is a report from Ms. Sharon Hamilton, President of Ernst & Young Inc. dated August 8, 2025 ("the EY Report"). The second is a report from Mr. Scott R. Lee, founding partner of Revesco Properties Ltd. (the "Revesco Report"). No expert evidence was tendered by the Applicants or the Purchaser.

70. The Reports are compelling.

71. The Applicants and the Purchaser submitted that the EY Report ought to be discounted for a number of reasons, of which the two principal reasons were that it was prepared relatively quickly (in a period of approximately 10 days) and that Ms. Hamilton, who led the work, has no experience managing or operating a national department store chain.

72. I am not persuaded by either of these submissions. With respect to the qualifications and experience of Ms. Hamilton, she has extensive experience conducting independent reviews of companies on behalf of various stakeholders, including regulators, lenders, creditors, and investors. She has over 30 years of experience in transaction advisory services, as a Chartered Professional Accountant, Chartered Insolvency and Restructuring Professional, and a Licensed Insolvency Trustee.

73. As is clear from the EY Report, Ms. Hamilton applied her significant expertise to an analysis of the Business Plan and financial projections, including performing a detailed financial analysis in respect of the Business Plan. Her expertise is directly applicable to the analysis undertaken here. The EY Team included individuals with experience in and knowledge of the retail sector and real estate matters.

74. Particularly in the absence of any similarly detailed and comprehensive analysis by the Applicants or the Purchaser, the concerns raised in the EY Report are shared by the court.

75. The Monitor has set out at Appendix "C" to the Eighth Report a detailed summary of each of the EY Report and the Revesco Report. I have not included all of them here, but rather focus on certain highlights.

76. Among other things, the EY Report concludes that:

a. projected revenues and gross margins are likely too high—the Purchaser assumes that it will outperform HBC on its very first day;

b. projected operating costs are almost certainly too low; and

c. the projected EBITDA (earnings before income tax, depreciation, and amortization) is unrealistic as the forecast unreasonably assumes that the Purchaser will have store-level EBITDA that is 22 times (2201%) higher than HBC stores had in 2024.

77. These are analogous to the very considerations that led Fitzpatrick, J. in *Donnelly* to conclude that the proposed assignee there was not viable: its corporate and operational history; relevant industry experience; and the viability of the business plan *(Donnelly*, at paras. 65-72).

78. The principal conclusions of Ms. Hamilton and the EY Team include the following, with which I agree:

a. the estimated costs to store opening as set out in the Purchaser's Financial Model do not appear feasible, reasonable, or realistic and are likely to be significantly higher;

b. the Business Plan is not comprehensive and does not address many key elements required to properly assess the feasibility of the plan to establish and open a new 28 department store chain. The Business Plan does not demonstrate an appreciation for the complexity of the work required and the cost of doing so. It is high-level and conceptual, but does not contain a detailed market analysis or account for the complex operating infrastructure required, including merchandising function, supply chain, information technology requirements, workforce complement, and other aspects;

c. fundamental elements such as hiring of necessary employees (at all levels), implementing IT systems, developing a detailed product and target market strategy, setting up a merchandising function, and acquiring inventory are all lacking. Established retailers such as Target, Nordstrom, and Simons took two years or more to open comparable stores, despite having direct experience and an established operating model;

d. projected operating costs depend on assumptions materially better than the actual results for HBC for the very same stores in 2024. This is unrealistic given the Purchaser being a new retailer, lacking existing operating infrastructure and processes, lacking a detailed target market or product strategy, and attempting to open 28 locations within 6-12 months;

e. the estimated timeframe for opening stores does not appear feasible, reasonable, or realistic, and it is likely to be significantly longer leading to further increased costs;

f. the projected financial results do not appear reasonable, and based on the experience of other retailers, including HBC, are at significant risk of being materially worse;

g. the $375 million equity commitment by Ms. Liu, even if supported by sufficient liquid resources, is unlikely to be sufficient to fund the Purchaser until it becomes cash flow positive, and there is a significant risk that the required funding will be "hundreds of millions of dollars greater than the $375 million"; and

h. this assessment appears to be consistent with various objective benchmarks. For example, when Target launched in Canada, it invested $7 billion or $52 million per store. Nordstrom invested over $59 million per store. The Purchaser's $375 million equity commitment translates to only $13.4 million per store, and the Purchaser lacks the established branding, back-office and logistics infrastructure that supported the above-noted investments of each of Nordstrom and Target.

79. Mr. Lee has over 35 years of specialized experience with retailers including Old Navy, PetSmart, Winners, Home Sense, Marshall's, Walmart, Nordstrom, and Target. With respect to Nordstrom and Target, Mr. Lee was retained to implement their real estate strategies across all regions of Canada.

80. Having reviewed the Business Plan and supporting materials filed, it was his professional opinion that the retail concept proposed by the Purchaser is not viable, at least in its current form, and carries a high likelihood of failure if implemented as proposed.

81. In summary, Mr. Lee's principal concerns are straightforward yet fundamental:

a. the Purchaser's existing experience (three shopping centres and a golf course) is not sufficient;

b. there is no existing precedent in any retailer, domestic or foreign, that has ever successfully opened the proposed number of department store locations in Canada within an 18-month period in anchor premises;

c. there is a complete lack of brand recognition;

d. there is inadequate management experience;

e. the distribution model is unproven (even assuming that J2 remained involved, which (as discussed below) it will not be);

f. there is a lack of evidence-based merchandising strategy, including product category, allocation, pricing, architecture, gross margin targets or positioning versus competitors; and

g. the proposed product assortment spans a wide range of categories from apparel to cosmetics to electronics, but "lacks a clearly defined customer".

82. The Applicants and the Purchaser submit that these criticisms of both Ms. Hamilton and Mr. Lee hold the Purchaser to a standard that is too high, that they are based on inappropriate or imprecise benchmarks, and that they yield an unfairly negative conclusion about what is admittedly an ambitious but viable Business Plan.

83. The analysis undertaken by the EY Team and the conclusions it yielded are certainly disputed by HBC and the Purchaser, but they are unchallenged in their comprehensiveness and detail. So too are the conclusions of Revesco.

84. In my view, the concerns set out above are amply supported by the evidence. As noted, I have not attempted to summarize the voluminous evidence here. However, I have numerous concerns, even beyond those identified by EY and Revesco (recognizing that some of the concerns are incorporated within their conclusions). Additional or more specific concerns that I have are set out below. Many flow from the evidence and submissions of the Landlords.

85. As highlighted by the Landlords, the Purchaser must hire interior designers and architects to develop concepts and detailed plans, engage contractors, secure permits and satisfy regulatory requirements, source construction and FF&E materials, and then actually complete the work to renovate the stores to the high level required. None of that has been done.

86. The evidence of the Landlords was to the effect that lead time alone for parts to renovate and repair "vertical transportation" (i.e., escalators and elevators) and HVAC units was approximately 15-20 weeks or longer. This alone puts the entire timeline for store openings in jeopardy.

87. Tellingly, and fundamentally, the renovation scope of work analysis presented by the Purchaser is based on information from HBC and Reflect Advisors LLC, and is not generated internally or by any consultants or contractors retained by Purchaser.

88. I recognize that the Purchaser and its principals do have significant experience owning three shopping centres in British Columbia. While that experience includes, as they submit, successful efforts to improve the retail experience at those properties, it comes from the perspective of a landlord and not that of a department store operator.

89. I share the concerns of EY, particularly with respect to the Business Plan and its superficial, high-level approach. It clearly remains a work in progress, as is demonstrated by the

admission of the Purchaser and the Applicants themselves that the original Business Plan (or Presentation) submitted in May 2025 was materially deficient in a number of respects. The amended Business Plan remains deficient.

90. This is particularly telling given that the Purchaser had approximately three months to prepare the Business Plan since approval of the Central Walk APA was sought (and presumably, work on what would become the Business Plan had been commenced long before the APA had been signed.

91. I also largely accept the concerns of the Landlords, supported by the EY Report about the lack of experience of senior management of the Purchaser.

92. The proposed leadership team includes individuals from affiliated entities who similarly do not have any prior track record in retail operations. While proposals have been made to hire certain former HBC executives and managers, those efforts remain incomplete. The overall lack of experience at the leadership level represents a significant risk to the operational viability of launching and managing 25 large department stores in the contemplated timeline.

93. The Purchaser represented in the Business Plan, and in submissions on the motion, that it proposed to hire certain former members of HBC management to assist in launching the new brand and opening the stores. I accept that this could be a very positive thing given both the general retail experience in managing a national department store chain and the familiarity with the specific Lease locations in particular.

94. However, Ms. Liu conceded during her cross-examination that the Purchaser had not entered into contracts with these individuals, and that she had had limited interaction with them.

95. The Purchaser submitted that the lack of contracts with senior management candidates was not unreasonable, since it could not reasonably be expected to enter into long term contracts until it had certainty that the Leases would be assigned. In my view, this is not an answer to the concern. One would reasonably expect that contracts could be entered into (and indeed would have been entered into) for a period of at least some months to prepare the Business Plan, and the extension or continuation of such contracts could readily have been made conditional upon lease assignment approval. The objective fact is that there are no binding agreements with any of these key individuals. In almost every case, there is not even an agreement in principle.

96. The circumstances about the status of the retainers of these individuals is even more concerning. As noted above, the Purchaser originally submitted its Presentation on May 26, 2025. That Presentation specifically referred to seven named members of the senior management team.

97. By the time the refined Business Plan was filed on July 29, 2025, four of those named individuals were no longer part of the proposed management team, including the Chief Financial Officer, the Chief Marketing Officer, the Chief Operating Officer, and the individual intended to have responsibility for suppliers/inventory and reviewing product mix, Mr. Wayne Drummond.[3]

98. They have either not been replaced at all, or have, in some cases, been replaced with individuals seemingly without relevant experience. The composition of the proposed senior leadership team for the Purchaser, and the manner in which it was represented before cross-examination took place, gives me significant concern. For example:

    a. the Chief Executive Officer has held that office only since May, 2025. Her most recent experience was as a residential real estate broker. She has no experience in retail or department store management. Her email signature describes her as "Assistant to Ms. Liu" as late as May 26, 2025;

    b. the Chief Human Resources Officer was an Executive Assistant with Central Walk before working as an early childhood educator;

    c. the General Counsel and Senior Vice President of Real Estate swore an affidavit on the motion. He confirmed that he had agreed to have his name included in the organization chart (by email dated July 24, 2025—only five days before the deadline for motion materials). In cross-examination, he confirmed that he has no contract of engagement, is uncertain as to which entity he would be engaged by, and has had no discussions regarding his duties or remuneration;

    d. the Vice President, Construction and Facilities, also agreed to have his name included in the Purchaser's organization chart only on July 25, 2025 (the very day the motion materials were delivered). He confirmed on cross-examination that he has no contract of employment;

    e. the new Chief Operating Officer has no agreement;

    f. the events surrounding the retainer by the Purchaser of Mr. Wayne Drummond are particularly illustrative of my broader concern in this regard and warrant setting out in detail:

[3] See Operations Presentation, Ivanhoe Motion Record, Paola Affidavit, Exhibit "G", at p. 132; and Purchaser's Business Plan, Purchaser's Motion Record, Liu Affidavit Tab 1A, at p. 79-80; all summarized in the chart at p. 13 of the factum of Morguard, Ivanhoe Cambridge and Westcliff.

i. Mr. Drummond was a former president of HBC. In the initial meetings with the Landlords, it was represented that he had been retained by the Purchaser to assist with the establishment of the new venture. His involvement was put forward as a factor that ought to give the Landlords comfort that the former President of HBC would have a senior role. His involvement was trumpeted again in correspondence dated June 6, 2025 from then counsel for the Purchaser to the Landlords as a key step to "maintain and re-engage HBC's existing value chain";

ii. however, on cross-examination, correspondence relating to the retainer of Mr. Drummond was disclosed. It revealed that he had been retained only on Saturday, May 31, 2025 specifically to attend the meetings with the Landlords scheduled for the following Monday—for a total of five hours—and that he was not retained for any further work. He was advised by email, "No more need for your help for Wednesday meetings". The Purchaser sent him an e-transfer just after 3 a.m. that morning for $3,000 total—compensation for one hour of preparation and five hours of Landlord meetings;

iii. he knew nothing of any business plan or his intended role;

iv. on the night of June 2, 2025, he was asked (via text message) to come to additional landlord meetings scheduled for two hours. The Purchaser wrote, "We can pay you $1000 for the two hours service. Is it okay? Please kindly confirm thanks." The text message thread shows him being retained, hour by hour, day by day, for the absolute minimum time required to attend the landlord meetings;

v. the next day, Tuesday, June 3, 2025, he was retained for another four hours, for an additional $2,000, in order to attend the second day of meetings with the Landlords that same day. I pause to observe, as emphasized by the Opposing Landlords, that when the correspondence dated June 6, 2025 from Purchaser's counsel referred to above was sent, emphasizing his "key" involvement, there was no agreement with Mr. Drummond whatsoever;

vi. approximately two weeks later, on June 17, 2025, the Purchaser asked Mr. Drummond to attend additional meetings the next day, including with media outlets, as a "senior consultant". Since there was still no agreement in place, that attendance was to be in exchange for a cash payment of another $1,500;

vii. while Mr. Drummond agreed, he requested particulars of the meetings: He asked, "what the outline/expectation is for this meeting tomorrow," and he said he was "looking forward to more clearly understanding of what [Ms. Lui was] proposing regarding … the contract role as senior consultant". In

reply, he was instructed simply to "talk about staff and how loyal and great they are at HBC" and how he was "happy to be hired by Ruby as a senior consultant";

viii. Mr. Drummond responded to advise, "I don't feel it is appropriate for me to participate in a media outlet event with no prior warning, limited understanding of the full details of the concept, and no agreed upon contract. I believe I should plan to meet you at 1 [p.m.] at the Lawyer's office" (i.e., skip the media outlet meeting and meet only at the lawyer's office);

ix. remarkably, the response of the Purchaser was to terminate the relationship with Mr. Drummond. Ms. Qin, the COO, replied: "I have told Ruby about your thought. She asked me to let you know that, if you don't feel comfortable to come to meet with the media outlet with us, then she does not think you need to go to the lawyer's office";

x. with that, Mr. Drummond had no further involvement with the Purchaser. Yet the Purchaser continued to represent to the media, as well as to the Landlords, the Monitor, and the Applicants, that he was involved as a key member of senior management; and

xi. approximately one week later, Mr. Drummond himself took action to put an end to the continued representations of his involvement with the Purchaser. On June 26, Mr. Drummond wrote to the Purchaser and its counsel to "formally address a serious concern." He wrote, "I have advised your legal counsel on this matter and have included them in this correspondence."

In summary, Mr. Drummond stated that he was surprised to learn that various media outlets had published reports explicitly referencing him by name and describing his "alleged involvement in the business". He quoted from one Canadian Press article, which stated that "Wayne Drummond, a former Bay president, has also been assisting with everything from securing suppliers and inventory to reviewing product mix."

Mr. Drummond stated, "I must make it unequivocally clear that this statement is false and misleading. I have no contractual relationship with your company and have not been involved in securing suppliers, inventory, or advising on the product mix in any formal or informal capacity."

Mr. Drummond demanded that the Purchaser issue a correction and refrain from using his name in any further communications until an agreed-upon contract was executed "clearly outlining the scope and terms of any involvement."

None of this chronology is challenged by the Purchaser. Clearly, it is largely based on correspondence from its own representatives. In my view, the above exchange is startling, both in the context of what is represented to be a multi-hundred-million dollar commitment from a sophisticated purchaser to build out and open a 28 store national department store chain, and as against the record put forward on this motion by the Purchaser, which did not disclose any of the above events in its own record;

g. the Business Plan allocates approximately $120 million for store repairs, renovations and leasehold improvements across the 25 locations. The evidence led by certain of the Opposing Landlords suggests that this budget is low, according to independent building assessments. If the quantum required for necessary store repairs and renovations proves to be closer to the projections of the Opposing Landlords, and absent further funding, the Business Plan will not be viable;

h. further, as the Landlord submit, even if the $120 million budget for store repairs was sufficient, the only evidence in the record supporting this proposed renovation budget is a single page "Renovation Spreadsheet". There is no backup for the figures provided. The budget breaks down to $4.7 million per store or $30.60 per square foot compared to benchmarks from other Canadian department store retailers (for the period of 2011 to 2024) ranging from $10.9 million to $37.5 million per store, and $87 (Target, 2011) to $329 (Simons, 2024) per square foot. These very aggressive budgets, without backup, represent another risk to the financial viability of the Business Plan.

   In my view, even if one accepts the submission of the Purchaser that these benchmarks are high (essentially, because the renovations proposed by the Purchaser are not as extensive as those undertaken by these other retailers), the budgetary concern very much remains;

i. I recognize that Ms. Liu and certain entities controlled by her have provided a commitment to inject equity of $375 million. I further recognize that, in her reply affidavit, Ms. Liu stated she is prepared to provide a guarantee of the payment of rent obligations under the Leases for a period of one year following closing.

   The Opposing Landlords submit that these commitments are problematic in a number of respects, and I share those concerns. They include the following:

   i. as noted above, the commitments are made only to the Purchaser itself and not to the Opposing Landlords or any other party;

   ii. the commitments appear to be materially overstated in that, as revealed on the cross-examination of Ms. Liu, there are significant (initially undisclosed) related party loans, mortgages, and/or other encumbrances on

properties of affiliates of the Purchaser that are represented to back up this equity commitment;

iii. the evidence of Ms. Liu was to the effect that her "financial backing of this venture is the critical element to its success". The submission is that she owns three successful and valuable malls in British Columbia that can in part be used to support the venture. However,

1. the July 29, 2025 equity commitment is made on behalf of three parties, all controlled by Ms. Liu: two offshore corporations that are said to have agreed to invest in the Purchaser, and the Purchaser itself. As noted above, the commitment was signed the very day the Purchaser delivered its motion record, and was addressed to a corporation that did not exist (Ruby Liu Commercial Corp.), an error that was corrected following the cross-examination of Ms. Liu when this issue was raised;

2. the equity commitment is, expressly according to its terms, unenforceable by third parties;

3. most of the funds represented as standing behind this equity commitment are not in Canada, (they are in, Barbados, Hong Kong, and Singapore) and the use of those funds is not restricted or limited to supporting this equity commitment in any way. I do recognize that the Purchaser did put forward evidence of some liquid funds available in Canada;

4. the personal guarantee of Ms. Liu in respect of one year of rent obligations is likely difficult, if not impossible, to enforce in Canada. Ms. Liu's personal assets are offshore (in Hong Kong and British Virgin Islands). While no rent guarantee is required, it was offered in order to provide additional assurance and comfort to the Landlords;

5. the ownership of one of the British Columbia shopping centres said to be owned by Ms. Liu (Tsawwassen Mills) is indirect at best: Ms. Liu owns a Hong Kong corporation, which in turn owns a British Columbia corporation, which owns 30% of the B.C. corporation, and that in turn owns the entity that holds the leasehold interest in the mall. The other 70% of the middle tier B.C. corporation is owned by Ms. Liu's sister. The land itself is owned by the Tsawwassen First Nation.

In short, any formal commitment to leverage any equity in that property would require the involvement and consent of a number of other parties, and, in the words of Fitzpatrick J., the undertaking of "a myriad of corporate procedures … the end result [of which] may hold many surprises in terms of the value of realizable assets and the presence and priority of liabilities … in those operating companies: *Smith (Re)*, 2025 BCSC 1099, at para. 79;

6. all three British Columbia malls operate at a loss, and solvency is maintained only through significant loans from related corporations on which interest is forgiven. Moreover, each of the malls is heavily mortgaged to third-party lenders (Wood Grove - $87.6 million secured by a first charge and guaranteed by Ms. Liu; Mayfair - $141.9 million secured by a first charge and an assignment of rent; and Tsawwassen Mills - $113.8 million secured by a first charge an assignment of rents);

7. all three mortgages mature before mid-2027. In short, it is not clear what net proceeds would be generated if funds were required and depended on the sale of any or all of those three malls;

8. while Ms. Liu testified that she has listed the Wood Grove Mall for sale, she has not disclosed the listing and refuses to disclose the asking price. Based on either Ms. Liu's estimate of value or the property assessment value, net proceeds after repayment of third-party debt are insufficient to repay related party loans, let alone generate further available funds; and

9. Ms. Liu testified, in support of her representations as to the value of these properties, that she had recently received a "serious and unsolicited offer to purchase" the Mayfair property, although she refused to produce the offer;

j. in the Eighth Report, the Monitor reports that during this cross-examination, there appeared to be confusion on the part of Ms. Liu about the existence of the equity commitment, and which entity was the beneficiary, as well as confusion about the structure of her companies, followed by disputes about certain aspects of the audited financial statements for at least one of the properties (the Mayfair Shopping Centre);

k. My concern about this confusion is heightened by the fact that while Ms. Liu testified that she was actively involved in preparing the Business Plan, her evidence (given through an interpreter) was to the effect that she did not speak English, and

the Business Plan was not translated into Mandarin until shortly before her cross-examination began;

l. In the Monitor's view, with which I agree, this raises reasonable concerns as to her involvement in and understanding of the Business Plan;

m. my concern is increased further still by the fact that Ms. Liu's evidence on cross-examination with respect to the June 6, 2025 letter (by which she requested the consent of the Landlords to the assignments) was that it was apparently made without her knowledge or approval. She testified that her counsel did not notify her that he was going to send out the document and that counsel "did not tell [her] about it" and that she "did not understand all these [issues]". Ms. Liu's evidence was clear that she did not approve of the letter before it went out[4];

n. the Business Plan assumes that Standard and Platinum stores (19 of the 25 locations) will open within six months of lease assignment and that the Flagship stores will open within 12 months. It is the view of the Monitor, based in part on the evidence led by the Opposing Landlords, including the expert evidence (of EY and Revesco), that this raises a risk that these timelines may not be achievable. Any delay would obviously increase the cash funding requirements of the business;

o. the Leases relate to premises that are important and significant within the malls in which they are located, as HBC was the "anchor tenant" in each case. The evidence of the Opposing Landlords emphasizes strongly the importance of an anchor tenant in a shopping mall, including as to its role in shaping the identity of each shopping Centre generally;

p. the evidence is to the effect that anchor tenants assist overall mall stability and traffic and attract other desirable retail tenants such that a change in the business of an anchor tenant can cause a negative ripple effect on other retail tenancies within the shopping mall. The Opposing Landlords were not cross-examined on this evidence, which was clear and compelling from the affidavits filed on behalf of a significant number of the Opposing Landlords. The anchor tenant space occupied by HBC represent, in the case of Cadillac Fairview, for example, between 13 and 29% of the overall retail space at shopping centres in which those premises are located;

q. the Opposing Landlords state that they will suffer material prejudice if the motion is granted in the form of (among other things) depressed rents and property values, difficulty in attracting and retaining quality tenants, significant financial exposure

[4] Transcript of cross-examination of Ms. Liu, August 15, 2025, at pp. 103-105.

in the event of tenant defaults, and overall damage to the long-term health and reputation of the shopping centres. In short, the Opposing Landlords submit that it would be materially less prejudicial to have the Leases remain without a tenant for some time than it would be to have the Purchaser as a tenant;

r. the Business Plan requires that the Purchaser build out its IT infrastructure and related systems. Those are critical to the operations of a retail department store and include, among others, point-of-sale systems, enterprise resource planning, payment service providers, and order management systems.

   The amount budgeted in the Business Plan of up to $5 million has not been allocated to specific vendors, nor does the Business Plan detail the lead times required to implement the IT systems. In the Eighth Report, the Monitor states that any meaningful delays "could have cascading effects on the Company's ability to, among other things, procure inventory and open stores in the timelines contemplated";

s. The Business Plan assumes that the Purchaser would be able to begin issuing purchase orders and secure the requisite inventory needed to support the forecast sales levels.

   This function was expected to be primarily managed by one third-party service provider, J2 (referred to above). Even if the Purchaser utilized J2, the Opposing Landlords noted significant concern that this plan may not be feasible to fully stock a department store chain as contemplated in the Subject Leases.

   Of much more fundamental concern, however, is the fact that, during her cross-examination, Ms. Liu conceded that the Purchaser no longer intends to engage J2 to manage its supply chain and logistics function.

   As observed by the Monitor in the Eighth Report, the "Potential Lease Purchaser identifies no alternative to J2 in its evidence".

   To that I would add that no alternative was identified at the hearing of the motion either. Accordingly, the evidence is that there is none.

   In its factum, at para. 19, the Purchaser submits with respect to the withdrawal of J2 only that "the Business Plan continues to be refined as matters progress and [the Purchaser] fully intends to have the necessary inventory to commence business activities within the stipulated timeframes."

   In my view, this represents a very significant deficiency in the Business Plan. There is simply no demonstrated ability to either perform this function internally or outsource it to another party. The Monitor notes that "the compressed timeline and scale of inventory ramp-up, and the Potential Lease Purchaser's ability to source

adequate inventory … through its existing inventory procurement plan, represents a risk to the execution of the Business Plan".

In my view, supply chain and logistics to manage inventory for 25 stores cannot be described as anything other than critical, yet it is missing here;

t. the forecast or operating results are based on same-store sales performance achieved by HBC in FY 2024, adjusted upward for incremental sales increases of approximately 3%. In other words, this assumes that the Purchaser will exceed HBC's actual 2024 results, an assumption about which the Monitor expresses concern that it may not be achievable. I share this concern also;

u. the Business Plan provides no coherent or complete discussion of e-commerce or an electronic retail strategy. Major department stores such as Nordstrom generated 36% of their total 2024 revenue through online channels. Walmart reported that e-commerce sales increased more than 15% year-over-year in each of the last 10 fiscal quarters. Yet, the Purchaser has no developed online shopping platform;

v. the Business Plan assumes materially reduced corporate overhead costs, more than 50% less than those of HBC (forecasted $26.3 million for FY 2027 versus $67.8 million). I recognize, as did the Monitor, that the number of stores proposed to be operated is significantly reduced as compared to HBC, but I share the concern of the Monitor that certain costs incurred by HBC would have been fixed and would not have decreased in proportion to a reduction in store count; and

w. the Business Plan projects the need to hire 1,800 staff for 25 stores (or 72 employees per store). This compares to 97 employees per store for HBC, which was regularly criticized for understaffing. There is no explanation in the Business Plan as to how the Purchaser's stores would be operated to a first-class level with 25% fewer employees.

99. The Monitor observes that the concerns outlined above should not be considered in isolation, and I agree. However, the Monitor concludes that there is a risk that meaningful delays in executing on key areas of the Business Plan could have compounding effects. (For example, delays in store repairs and renovations and/or in fully implementing the IT systems could impede inventory and procurement and, thus, delay store openings). I agree with this also.

100. Clearly, the s. 11.3 analysis must be undertaken considering all relevant factors on a holistic basis, and no concern should be evaluated in isolation. I accept that one or even a few concerns on their own may not be fatal.

101. However, in my view, and having considered all of the evidence to assess whether the assignee can perform the obligations under the leases, the Applicants and the Purchaser fall well short of any reasonableness standard with respect to the second factor in s. 11.3(3).

To be clear, I would reach the same conclusion with respect to this factor whether or not there was any issue about the availability, within Canada, of funds to back up the equity commitment and the one-year rent guarantee. The other operational concerns set out above remain.

The Third Factor: s. 11.3(3)(c) – Is the Proposed Assignment Appropriate?

102. With respect to the third factor, whether it would be appropriate to assign the leases to the Purchaser, I have a number of concerns in addition to those outlined above, and there is some obvious overlap between the second and third factors in s. 11.3(3).

103. This third element of the test requires a consideration of what is appropriate. The Supreme Court of Canada in *Century Services*, at para. 70, observed the following:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

104. The relief being sought on the motion of the Applicants is unique in a number of respects.

105. First, the sheer scale and complexity of the Transaction is unprecedented not only compared to other cases in which assignments have been sought pursuant to section 11.3, but indeed also in absolute terms.

106. The proposed assignments do not relate to one or even a small number of contracts. The Purchaser proposes to take the assignment of up to 25 major retail store leases in three provinces across Canada. Its commitment to comply with the terms of the Leases (other than the IC Leases) includes the commitment to renovate, organize, supply, and staff up to 25 first-class department stores, occupying anchor tenant premises in what are a number of the major shopping malls across the country.

107. The scale and complexity of the proposed assignments is obviously not a bar to approval, but the following review of the Purchaser's conduct to date in light of this complexity informs the reasonableness of the proposed assignee's plan to execute and its ability to do so.

108. I observe that, as fully set out in the materials, these proposed assignments have already encountered numerous challenges. The Central Walk APA was signed approximately three

months before the Applicants brought forward this motion. That is a significant amount of time in this restructuring proceeding.

109. It is clear to me that the delay was not the result of inattention or diligence, but rather it reflects the significant challenges and concerns (expressed along the way by both the Applicants and the Monitor) with respect to the ability of the Purchaser to perform the obligations under the Leases, and the significant effort of the Applicants and the Purchaser to address the problems that they themselves recognized.

110. The Central Walk APA was signed on May 23, 2025. As set out in the Sixth Report, initial meetings between the Landlords and the Purchaser were held during the week of June 2, 2025. Various follow-up information was requested by and provided to the Landlords by the Purchaser and its (then) counsel. On June 6, 2025, each of the Landlords received a request to consent to the assignment to the Purchaser from counsel.

111. During the week of July 9, 2025, Landlords representing 23 of the 25 Leases advised that, based on the information provided to date, they would not consent to the assignment of their Subject Leases. When the Sixth Report was issued on July 14, 2025, the concerns remained.

112. I agree with the submission of the Opposing Landlords that the information that had been provided by the June 6, 2025 deadline by which their consent was requested fell significantly short of providing the requisite information to establish, on a reasonableness standard, the ability of the proposed assignee to perform the obligations.

113. The June 6, 2025 letter included no evidence of financial resources, very little information on any business strategy, and no realistic or credible financial plan to be executed. Moreover, and as discussed above, Ms. Liu conceded on cross-examination that it was apparently made without her consent or approval.

114. As described by the Monitor in its Eighth Report, “despite repeated discussions, correspondence and follow-ups from the Applicants, the Monitor, and their counsel … the Potential Lease Purchaser had failed to meaningfully respond to the issues and concerns raised by the Applicants and had not taken the basic and necessary steps to advance its bid.” The Monitor continued, “[A]s of the date of the sixth Report, the Monitor understood that the Potential Lease Purchaser was no longer represented by counsel” (at paras. 3.5(d) and (e)).

115. For all of those reasons, and others set out in the Sixth Report, the Monitor expressed significant concerns with respect to the Purchaser meeting its obligations under the Central Walk APA and the likelihood of the transaction ultimately being completed.

116. At the hearing of the FILO Motion on July 15, 2025, the Purchaser and its principals were unrepresented. They subsequently retained new counsel. At that hearing, the court advised

all parties that it had received correspondence from Ms. Liu, which included a copy of correspondence dated July 5, 2025 to her counsel from counsel to the Applicants.

117. The court deferred issues relating to that correspondence until the Purchaser and its principals had retained new counsel and that counsel had had an opportunity consider next steps with respect to the correspondence.

118. Subsequently, the court was advised that new counsel to those parties, together with counsel to the Monitor and the Applicants, had reached a consensual agreement with respect to certain redactions to that correspondence necessary to maintain privilege and that the redacted correspondence had been disclosed to all parties.

119. I reference that correspondence here because the July 5, 2025 letter addresses certain issues that had been raised in correspondence dated May 29, 2025 from counsel to the Applicants to counsel to the Purchaser, as set out in the Eighth Report at para. 3.10.

120. In particular, it detailed the substantial efforts of the Applicants to assist the Purchaser in complying with the provision in the Central Walk APA, requiring it to use "commercially reasonable efforts" to obtain waivers and consents from the respective Landlords. It noted that as of that date, there was no agreement with respect to Cure Costs, and that, as described in the Eighth Report, "after adequate responses were not received to initial inquiries that were sent by the Landlords following the Initial Landlord Meetings, Landlords representing all or virtually all of the Subject Lease locations" requested further information and advised "that the Landlords would not consent to the assignment of their Leases".

121. The July 5, 2025 correspondence from counsel to the Applicants stated that the Purchaser had "failed to advance its draft business plan to the point it could credibly be put to the Court". As noted above, and as is confirmed in the Eighth Report, this conclusion was supported by each of the Monitor, the FILO Agent, and Pathlight.

122. Moreover, the July 5, 2025 letter, as summarized in the Eighth Report, asserted that the Purchaser, despite substantial offers of assistance in communications from HBC, had failed to take the steps necessary to comply with the Reasonable Efforts Clause, including by:

    a. failing to retain counsel in advance of the initial Landlord meetings;

    b. failing to prepare any substantive materials or presentation for the Initial Landlord Meetings;

    c. failing to provide adequate responses to basic questions from the Landlords regarding matters such as the proposed tenant's financial covenants, retail operating experience, capital expenditure plan for each Lease location, and intended suppliers and product mix; and

d. failing to adequately respond to the initial information requests following the Initial Landlord Meetings, or to respond at all to the Landlord Communications, despite HBC extending the date by which Landlord waivers were required to be obtained.

123. Finally, the July 5, 2025 letter set out the terms of a proposal offered by the Applicants that provided certain conditions for the Purchaser to agree to an order for the Applicants to continue to pursue the Central Walk Transaction.

124. As set out in the Eighth Report, at para. 3.11, the Monitor agreed with the assertions made by HBC in the July 5 letter. Two days later, on July 7, 2025, and in response to an inquiry from counsel for the Applicants, the Monitor advised that in the circumstances, it would support a decision by the Applicants to terminate the Central Walk APA.

125. Ultimately, the Applicants elected not to do so and the continue to seek approval on this motion.

126. The Applicants and the Purchaser delivered their motion materials on July 29, 2025. Those materials reflect that the Central Walk APA had been amended three times, on June 13, July 21 and on July 29, the day the materials were delivered. Those amendments changed a number of terms of the APA, including giving effect to the following:

a. reducing the Purchase Price to allow certain funds to be used to retain professionals to advance and complete the Central Walk Transactions; and

b. extending the Outside Closing Date.

127. All of these events increase my concern about whether the proposed assignment is appropriate.

128. Second, the Subject Leases are not being assigned as part of a broader acquisition of assets or of a business. No assets are being acquired aside from the Leases themselves and related furniture, fixtures and equipment (FF&E). In other words, the proposed assignments are not part of a broader transaction that is affected by the decision to not approve the proposed assignments.

129. Third, this is a liquidating *CCAA* proceeding. The proposed Lease assignments are not being sought in pursuit of a going concern transaction to maintain and continue an operating business. Here, regrettably, HBC has ceased all operations following a history of approximately 355 years. The stores have been "dark" for months already. HBC's intellectual property, including the name "Hudson's Bay Company", associated logos, and trademarks, have already been sold separately to another purchaser (Canadian Tire). HBC and its "The Bay" stores are not continuing, whether or not the proposed assignments are approved.

130. While liquidating *CCAA* proceedings have become relatively common and are not themselves inconsistent with the objectives of the *CCAA*, many of the policy objectives behind the *CCAA* and the statutory restructuring regime generally in Canada do not apply in the present circumstances. Here, the proposed assignments are not to further a restructuring, let alone are they critical to the success of a going concern transaction. They are proposed simply to pay a secured creditor.

131. Put simply, the reality here is that the net proceeds of the Transaction, if approved, would be paid exclusively to some combination of two secured creditor groups: the FILO Agent and Pathlight. As fully set out in the Monitor's Reports, the FILO Agent is the first ranking secured creditor with respect to most of the assets of HBC. However, if ironically, Pathlight has first ranking security on a majority of the 25 Leases proposed to be assigned as part of the Transaction.

132. There is significant debate on which of those two stakeholders is the fulcrum creditor. I make no determination in that regard today. The Monitor submits, and I agree, that it is likely that the identity of the fulcrum creditor will be unknown in any event until a determination is made with respect to entitlement to what is apparently going to be a significant surplus in the HBC pension plans. That issue has yet to be addressed and will be vigorously contested. On this motion, the only creditor to support the relief sought is Pathlight.

133. For the purposes of this motion, I observe only the simple yet indisputable fact that the net proceeds of the Transaction, if approved, would be used to pay a secured creditor. Accordingly, in the absence of any prospect of a going concern outcome for HBC, the analysis boils down, in practical terms, to the question of which stakeholder group's interests ought to be prioritized: one of the secured creditors, or the Opposing Landlords.

134. I am unable to conclude that there is any compelling reason to prefer the former over the latter in the particular circumstances of this motion. The balancing of interests, which has been described as "meeting the twin goals of assisting the reorganization process … while also treating a counterparty fairly and equitably" (*Veris Gold*, at para. 58), does not favour granting the relief here.

135. Fourth, the Purchaser is not an established business at all, let alone one established in the sphere in which it will be required to perform the Lease obligations, the operator of a major national department store chain with all that entails. By its own candid admission, the Purchaser has never undertaken a business of this nature or complexity before. While admirably ambitious, it is new and untested.

136. Indeed, and while supported by the financial commitments of Ms. Liu and other companies controlled by her, the Purchaser itself is a shell company with no assets beyond the funds that Ms. Liu decides to inject. This is exactly the circumstance that caused Dunphy J. to have "grave concerns" in *Dundee*. There, those concerns, following an adjournment, were

ultimately addressed by strong cash flow forecasts, a credible plan for cost reduction, and a National Instrument ("NI") 51.01 analysis undertaken by Deloitte.

137. None of that has been done here. I accept the submission of the Applicants and the Purchaser that a NI 51.01 analysis is not a technical requirement of s. 11.3. However, such an analysis is an indicator of the viability of the proposed business plan on a reasonableness standard. It is absent here. On the contrary, the very significant concerns set out in the EY Report and the Revesco Report remain.

138. Fifth, the remaining term on a number of the Subject Leases, to which is added the length of possible renewal terms, is also unprecedented. The court is not being asked to bind the Opposing Landlords to a new relationship with the new counterparty for a short period of time.

139. As is clear from the materials, if renewal term options on some of the Subject Leases are exercised by the Purchaser, it could be a tenant under certain of the Leases for approximately 100 years. For example, the Morguard and Westcliff leases would end, if all options were exercised, between 2060 and 2091. That is a significant factor here.

140. I recognize that the Landlords voluntarily entered into the bargains reflected in the Leases and granted the lease terms and (assuming compliance) very lengthy successive renewal terms. However, in my view, the length of time during which they would be in a compelled relationship is a relevant factor to which the submission that they retain rights to seek lease terminations in the event of default is not a complete answer.

141. In *Dundee*, Fitzpatrick J. recognized as lengthy a nine-year remaining lease term. Here, some of the Leases have remaining terms with successive renewals that are ten times that long. For example, the Cadillac Fairview leases have current lease terms extending into 2036, with ultimate lease terms, if all rights of extension and renewal were exercised, until (in the case of Sherway Gardens in the Greater Toronto Area) June 2203 - over 175 years.

142. Considering all of the circumstances of this unique case, granting the relief sought would, in my view, represent an extraordinary exercise of the discretion of the court to affect rights of private parties for almost a century, pursuant to what is already an extraordinary power under s. 11.3 of the *CCAA*.

143. In my view, the third factor set out in s. 11.3(3) is not met to the reasonableness standard.

144. For all of these reasons, the proposed assignments are not approved.

The IC Leases and the *Ipso Facto* Clauses

145. The Central Walk APA provides that the four IC Leases to be assigned must be assigned with a declaration that two provisions of each of the IC Leases (ss. 3.05 and 3.05(A)) are

declared void and unenforceable as *ipso facto* clauses that violate the common law anti-deprivation rule and s. 34 of the *CCAA*.

146. If Ivanhoe Cambridge does not agree to waive and the court does not invalidate the impugned *ipso facto* clauses, the Purchaser has the option to amend the Central Walk APA to remove the IC Leases from the Purchased Assets and reduce the purchase price by $11.5 million.

147. While this issue is moot given my determination set out above that the lease assignments are not approved, I will address this argument for completeness of the record.

148. In my view, these provisions are not in fact *ipso facto* clauses, and largely for the reasons submitted by Ivanhoe Cambridge. Even if I had otherwise approved the assignment of the leases, I would have declined to declare void and unenforceable these provisions of the IC Leases.

149. In the circumstances, this result is consistent with the correct approach to the application of s. 11.3 (as well as the general discretion found in s. 11(4)), which must be exercised sparingly so that "the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party": *Nexient Learning Inc. (Re)* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.), at para. 59.

150. In broad terms, these provisions are at issue because the long-standing IC Leases originally had multiple significant and attractive renewal options in favour of the tenant (HBC). They also included restrictive covenants that prohibited certain construction in and around the leased premises.

151. In 2023, well before this proceeding was commenced, Ivanhoe Cambridge and HBC undertook a portfolio-wide review of all of the leases to which they were both parties—11 in total. Six of those 11 original leases were for HBC stores. In November 2023, Ivanhoe Cambridge and HBC entered into a broad agreement that affected the HBC leases, but various other matters as well (including the settlement of ongoing litigation in British Columbia).

152. In the fall of 2023, HBC was facing financial challenges and requested that Ivanhoe Cambridge assist with cash or financing. The request was received favourably. Ivanhoe Cambridge was interested in removing the restrictive covenants and the lease term extensions.

153. The 2023 Agreement provided for:

    a. a monetary payment by Ivanhoe to HBC of $30 million;

b. the *termination of the remaining original leases* and the replacement of those leases with new leases (s. 3.05) [emphasis added];

c. the new leases did not contain either the restrictive development covenants or the term extensions but provided in section 3.05(A) for a conditional reversion pursuant to which, if HBC operated in good order for five years following the agreement, *the new leases would be terminated and the parties would enter into further new leases on terms substantially the same as the original leases*. [emphasis added].

154. Section 3.05 and 3.05(A) provide, in part:

> **3.05** ***Termination of the Original Lease*** Tenant and Landlord hereby agree that the Original Leases are *surrendered and terminated* effective on 11:59 PM on the date immediately preceding the Commencement Date (the "Termination Date"). [emphasis added]
>
> **3.05(A)** ***Reinstatement of Original Lease*** Tenant and Landlord hereby agree that if at November 13, 2028 (the "Original Lease Reinstatement Date") no Event (as such term is hereinafter defined) has occurred or is continuing, and there is not then any default occurring of the Tenant's obligations under this Lease, failing which this provision shall not apply and be null and void…, then the parties shall execute and deliver to one another the Reinstated Original Lease…
>
> "Event" means the occurrence of any of the following:
>
> (1) Tenant (or any of its affiliates) defaulting under any of its monetary obligations (beyond any applicable cure period) under this Lease or any HBC IC Lease (as hereinafter defined); or
>
> (2) Tenant (a) is insolvent, (b) has committed an act of bankruptcy, and/or (c) has become bankrupt.

The Common Law Anti-Deprivation Rule

155. The common law anti-deprivation rule is well established. A contractual provision that removes value from the estate of a debtor to the prejudice of creditors upon the insolvency or bankruptcy of that debtor is invalid and unenforceable.

156. The test focuses on the effect of the provision rather than the intent of the parties and is commonly referred to as an "effects-based test". The test has two parts: first, the relevant

clause must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent's estate: *Chandos Construction v. Deloitte Restructuring Inc.*, 2020 SCC 25, [2020] 3 S.C.R. 3, at para. 31.

157. The correct approach is to consider whether the effect of the contractual provision was to deprive the estate of assets upon bankruptcy, rather than whether the intention of the contracting parties was commercially reasonable: *Chandos*, at para. 41.

158. However, there are nuances with the anti-deprivation rule, examples of which include: a) contractual provisions that eliminate property from the estate but do not eliminate value; b) provisions whose effect is triggered by an event other than insolvency or bankruptcy; and c) when commercial parties protect themselves against a contracting counterparty's insolvency by taking security, acquiring insurance, or requiring a third-party guarantee: *Chandos*, at para. 40.

159. The Court of Appeal for Ontario has observed that a clause triggered by a payment default that occurred because of the debtor's insolvency was also void under the anti-deprivation rule: *Aircell Communications Inc. v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276, at paras. 9-12.

Section 34 of the CCAA

160. Section 34 of the *CCAA* effectively codified the policy underlying the common law anti-deprivation rule and added an additional statutory prohibition against such clauses that purport to terminate, amend, or accelerate obligations solely because of a debtor's insolvency or the commencement of *CCAA* proceedings. It provides as follows:

> 34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.
>
> (2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.
>
> …
>
> (5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Application to the Impugned Clauses

161. The Applicants, supported by the Monitor, submit that the effect of these provisions is that if an "Event" occurs prior to November 13, 2028, the provisions would become null and void and the tenant would no longer have the option to revert back to the Original Leases.

162. Since an "Event" includes HBC being insolvent (which has obviously occurred), and since the Original Leases have significantly more value to a tenant than the current leases (due to the less restrictive building covenants and the very favourable lease extension and renewal options), the Applicants argue that these provisions violate the common law anti-deprivation rule as well as s. 34 of the *CCAA* and, as a result, are unenforceable on either ground.

163. The Applicants submit that, by operation of s. 34, a landlord cannot amend its leases by reason only of the insolvency of the tenant or the lack of payment of rent prior to the commencement of the *CCAA* proceeding.

164. Further, they submit that since s. 3.05(A) in the New Leases provides that the relevant provisions of the New Leases become null and void if an "Event" occurs (and since an "Event" includes both default of monetary obligations and insolvency), to the extent that the effect of a provision becoming null and void is viewed as an amendment to the lease contemplated by s. 34 of the *CCAA*, they submit that a plain reading of s. 34 captures these provisions with the result that they are unenforceable.

165. Finally, the Applicants, supported by the Monitor, submit that since the provisions at issue here could only have been triggered as a consequence of the insolvency of HBC, they are inequitable and, therefore, unenforceable, just as the provisions considered by the Court of Appeal in *Aircell*.

166. In my view, and recognizing that the key issue is whether the effect of the contractual provisions at issue is to deprive the estate of assets upon bankruptcy, whatever the intentions of the parties or the reasons for agreeing to the provisions, they are not void as a result of either of the common law anti-deprivation rule or s. 34 of the *CCAA*.

167. I agree with the submission of Ivanhoe Cambridge that the starting point is to recognize that the anti-deprivation rule and s. 34 of the *CCAA* are triggered only when *existing rights* are taken away because of an insolvency.

168. Conditions precedent specify an event that must occur before a right is acquired, while conditions subsequent operate after the fact to alter or terminate an existing right: *Advantage Tool & Machine Ltd v. Cross Industries Ltd*., 2023 BSCS 104, 88 C.C.E.L. (4th) 1, at para. 137; *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 at para. 102; and *Black's Law Dictionary* "condition precedent" and "condition subsequent".

169. A right can only be said to have been acquired when the right-holder can actually exercise it, and the right cannot be acquired until all conditions precedent to the exercise of the right have been fulfilled: *R. v. Puskas,* [1998] 1 S.C.R. 1207, at para. 14.

170. The relevant provisions in the New Leases must be interpreted in accordance with the approach set out by the Supreme Court in *Sattva Capital Corp., v. Creston Moly Corp.*, 2014 SCC 53, 2014] 2 S.C.R. 633. The provisions are clear. The Original Leases were terminated on January 31, 2024. The New Leases were entered into the next day on February 1, 2024. They include numerous conditions precedent.

171. I begin with section 3.05. Nothing in section 3.05 violates either the anti-deprivation rule or section 34 of the *CCAA*. That provision simply terminates the Original Leases effective at 11:59 PM on January 31, 2024. Nothing in that provision includes any condition or triggers any right upon the occurrence of an event, let alone an event that includes insolvency or an act of bankruptcy. I can see no basis for any declaration that section 3.05 is unenforceable.

172. Accordingly, if there is an issue, the issue must flow from section 3.05(A). That provision does include a condition - a condition precedent - in that it provides that if HBC has not defaulted on any of its obligations under the leases, as of November 13, 2028, it would then acquire and be entitled to certain rights (i.e., the right to revert to the Original Leases).

173. Expressed differently, s. 3.05(A), clearly and according to the plain meaning of the words, operates to grant to HBC certain rights (to enter into further new leases, containing the same terms as were found in the Original Leases) depending on the circumstances as they exist on that date, which is still over three years in the future.

174. I pause to observe that the terms of the New Leases are clear that the conditional reversion (really a termination of an existing lease, and an execution of a new lease) requires HBC to meet four good order conditions (defined as "Events" as of November 13, 2028. Those include things well beyond the issue of whether or not there has been an insolvency, and include, for example, monetary defaults under any of the 11 leases in the Portfolio (i.e., well beyond the terms of the four leases at issue on this motion), about which there is no evidence in the record today.

175. The Applicants describe the 2023 Agreement as "amending" the original leases and as implementing a "temporary deletion" of the restrictive development covenants and renewal options. While that may have been the intention of the parties in the sense that there was a hope or expectation that on November 13, 2028 the conditions precedent would have been met, there are two challenges with this argument. First, the intention of the parties is not the focus of the anti-deprivation rule; it is an "effects-based rule": see *Chandos*. Second, the evidence (including the plain language of the agreements themselves) is clear that the Original Leases were not "temporarily amended" at all. They were terminated and replaced with new agreements.

176. The evidence of Mr. Franco Perugini (General Counsel) for HBC on cross-examination was clear as to several important facts. The Original Leases were not amended. They were terminated and were of no further force or effect. New leases were entered into. It is inaccurate to suggest that the parties continued thereafter to operate under the terms of the Original Leases. The New Leases are different in several material respects.

177. Moreover, there is no "windfall" for Ivanhoe as submitted by the Applicants, who suggest that not declaring the clauses to be unenforceable would allow Ivanhoe to keep "the benefit of the amendments … worth tens of millions of dollars". This is the very benefit that the Applicants are seeking approval to sell to the Purchaser for only $11.5 million (the agreed-upon reduction in the Purchase Price if the affected leases are excluded because the clauses are not declared to be unenforceable).

178. The submission also ignores the fact that HBC already received approximately $60 million as part of the portfolio-wide 2023 Agreement pursuant to which the original leases were terminated and replaced.

179. Accordingly, s. 3.05(A) does not offend the anti-deprivation rule.

180. Similarly, the clause does not violate s. 34 of the *CCAA* for the same reasons. Section 34 does not apply to this provision in the New Leases. Section 34 operates to render unenforceable a contractual clause that, because of an insolvency or an insolvency filing, triggers the loss of existing contractual rights by way of termination, amendment, claims for accelerated payment or forfeiture.

181. The legislative intent of Parliament in enacting s. 34 was to protect a debtor who is restructuring by preventing contractual counterparties from cancelling or terminating existing contracts that are otherwise in good stead, solely as a result of commencing a *CCAA* proceeding.

182. Section 3.05(A) does not do any of those things. The language of s. 3.05(A) provides that if, on November 13, 2028, an Event has occurred or is continuing, and there is not then any default of the tenant's obligations under the leases, the provision shall be null and void. That does not trigger the loss of any then *existing* contractual rights. There are no existing contractual rights (to revert to the terms of the Original Leases, and terminate the New Leases) unless and until certain conditions precedent have been fulfilled as of November 13, 2028.

183. Put differently, s. 3.05(A) does not operate as a condition subsequent removing existing rights upon the occurrence of an Event. Rather, it provides that if certain conditions precedent are met at a date in the future (November 13, 2028), then certain rights are acquired at that time.

184. Aside from the obvious prematurity issue in that I cannot determine today what the status of the performance by all parties will be as at a date that remains three years hence, there

is no contractual right that exists today to revert to the Original Leases, let alone one that provides that such existing rights are terminated because of an insolvency or an insolvency filing. This is exactly the nuanced exception specifically contemplated by the Supreme Court in *Chandos* and referred to above.

185. To express the question differently, does HBC have the right, today, to compel a termination of the New Leases, and bring an action to compel Ivanhoe to execute a further new lease with the reversionary conditions that were in the Original Leases? The answer is clearly no. Would HBC have that right today but for its insolvency and the commencement of this insolvency proceeding? The answer to that question is also clearly no. It has no right to do anything, regardless of whether it is insolvent, until November 13, 2028, at which time an analysis must be undertaken to determine whether it has any right even then.

186. All of this is consistent with the approach of the Supreme Court in *Chandos*, where the Court observed that the application of the anti-deprivation rule "renders void contractual provisions that, upon insolvency, remove value *that would otherwise have been available* to an insolvent person's creditors from their reach." (para. 31). [Emphasis added].

187. For all of these reasons, and even if I had found that the IC Leases ought to be assigned pursuant to s. 11.3 of the *CCAA*, I would have declined to grant a declaration that s. 3.05 and 3.05(A) are *ipso facto* clauses that violate the common law anti-deprivation rule and s. 34 of the *CCAA*.

Motion for a Sealing Order

188. The Applicants also seek on a temporary basis an order sealing the confidential appendix to the Eighth Report of the Monitor dated August 20, 2025 which contains a summary of the economic terms of certain bids received for the leases.

189. The request for the temporary sealing order is not opposed by any party, and is supported by the Monitor. In my view, the requested relief is appropriate.

190. Subsection 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides for the Court's authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.

191. The Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522:

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53).

> Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22).

192. Under the first branch of the three-part test, an "important commercial interest" is one that can be expressed in terms of the public interest in confidentiality: *Sherman Estate*, at para. 41.

193. Canadian courts, including this court, have granted in many cases sealing orders in respect of a confidential summary of bids received in the context of a sale process. See, for example: *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314, at para. 39; *Plan of Arrangement of Fire & Flower Holdings Corp. et al.*, 2023 ONSC 4934, at paras. 35-36; *Ontario Securities Commission v. Bridging Finance Inc*., 2022 ONSC 1857, at paras. 50-54; and *Attorney General of Canada v. Silicon Valley Bank*, 2023 ONSC 4703, at paras. 28-33. The first requirement is met.

194. I am also satisfied that the second requirement is met since the order sought is necessary to prevent the risks identified above. This is an important public interest because reasonably alternative measures will not prevent the risk. Disclosure of the competing bids, while the process is incomplete, could and very likely would impair both the integrity of the process and the result.

195. The third requirement is also met. While the Confidential Appendix containing the summaries of bids would be kept confidential on a temporary basis, the balance of the materials on the motion would not be sealed, and are available to the public.

196. The sealing order is to have effect only until further order of this court. Until the Lease Monetization Process previously authorized in this proceeding (which includes the present motion) has been completed and any contested matters have been finally determined, the public disclosure of this material would materially and likely irrevocably compromise any subsequent monetization or sale process, all to the detriment of the stakeholders and the objective of maximizing recoveries for their benefits.

197. On balance, I am satisfied that the benefits of the requested order outweigh its negative effects. The small amount of information over which confidentiality is sought to be maintained is discrete, proportional and limited.

198. Accordingly, the sealing order is granted.

199. To ensure that the court record is complete, counsel for the Applicants are directed to file a physical copy of the confidential appendix to the 8th Report with the Commercial List Office in a sealed envelope marked: "Confidential and sealed by court order; not to form part of the public record".

The FILO Agent's Motion

200. As stated at the outset of these reasons, the FILO Agent seeks various heads of relief on its motion.

201. Certain of the relief sought is affected by my disposition of the Applicants' lease approval motion as discussed above. The Monitor advised in submissions on the motion that if the lease assignments were not approved, the leases would be disclaimed. Accordingly, no further relief is necessary in that regard.

202. For the reasons below, the Monitor is directed to distribute $4 million to the FILO Agent as against its priority indebtedness. The motion for the balance of the relief sought by the FILO Agent is dismissed.

203. As a general observation, all of the relief sought by the FILO Agent flows from its overarching position that the FILO Lenders whom it represents are the first ranking secured creditors of HBC, that notwithstanding that the Applicants have generated material recoveries, distributions to date have been for significantly lower amounts, and the Central Walk Transaction ought to never have been pursued by the Applicants as it has eroded the collateral of the FILO Lenders.

204. This is reinforced by that FILO Agent where it states in its factum that the need for [the relief it is seeking] "is best illustrated by the simple fact that, as things stand, the FILO

> Lenders could only receive $12.5 million in proceeds from the Central Walk Transaction. This compares to the $11.7 million of the FILO Lenders' priority collateral spent … This compares to the $37.4 million expected to be available to Pathlight to recover against, at no cost to them."

205. Fundamentally, the complaints and concerns of the FILO Agent relate to costs generally and the allocation of costs in this *CCAA* proceeding. Those concerns may or may not be well-founded and they may or may not properly result in a disproportionate allocation of professional fees and other restructuring costs, awards of costs, and/or other relief. It is well established that this court has broad jurisdiction to allocate costs in a *CCAA* proceeding as among stakeholders both pursuant to s. 11 of the *CCAA* and as a result of the court's inherent and equitable jurisdiction. However, in my view, all of that is for another day.

206. At this stage, it would be extraordinary in a *CCAA* proceeding, and in my view is inappropriate in the particular circumstances here, to grant an order requiring one creditor or group of creditors to pay ongoing costs and expenses of the Applicants (such as lease costs) on the basis that ultimate recoveries for creditors seeking that relief may be compromised or reduced, or on the basis that the present motion would, if successful, have generated recoveries to be distributed primarily to the benefit of another creditor.

207. At least in large part, such an order here (i.e., an order requiring Pathlight to pay the costs under the CW Leases) would effectively be a predetermination of a number of issues: whether and to what extent the creditor rights of the FILO Agent rank in priority to those of Pathlight; over which assets; and whether either or both of those creditor groups will recover on proven claims and to what extent.

208. These issues have not been finally determined. As the FILO Agent itself submits in its factum, "[A]ll of the costs of this proceeding, including the costs of pursuing the Central Walk Transaction, will have to be addressed at some point." I accept that submission, but in my view, that point is not today. Moreover, I am not persuaded that it would be fair or appropriate at this stage to allocate costs of one particular transaction or event in isolation, as opposed to allocating costs in a just and equitable manner considering all of the circumstances, typically at the end of the proceeding.

209. As observed above in these reasons, the Monitor submits, and I agree, that it is likely that the identity of the fulcrum creditor (i.e., the FILO Agent or Pathlight) will be unknown in any event until a determination is made with respect to entitlement to what is apparently going to be a significant surplus in the HBC pension plans. That issue has yet to be addressed and will be vigorously contested.

210. Further, it would also be extraordinary and also not appropriate in the circumstances, to direct that a potential purchaser of assets pay costs as requested. I see no basis to order the

Purchaser here to pay rent or other costs on leases that have not been assigned to it or in respect of which the leasehold interests held by HBC have not been purchased by it.

211. It is important to remember with respect to the request that costs of the Central Walk Transaction be borne (particularly at this stage) by one creditor (Pathlight), or by the Purchaser, that the Transaction was pursued pursuant to the Lease Monetization Process previously approved by this court, with the input of the FILO Agent who did not oppose the Process.

212. Accordingly, in my view, it is not appropriate today to make any order requiring either Pathlight or the Purchaser to bear any costs related to the CW Leases (including the payment of rent). Given my decision to not approve the assignment of the CW Leases, there are no proceeds of the Central Walk APA, such that the request that any such proceeds equivalent to Central Walk Costs incurred from and after July 15, 2025 be deemed to be ABL Priority Collateral, is moot.

213. The FILO Agent also sought an order requiring the preservation (by the Monitor) of the deposit paid by the Purchaser in connection with the Central Walk Transaction, in the event it was not approved.

214. To the extent that this is being pursued, I see no basis to make that order. The Central Walk APA provides for the return of the deposit in the event the Transaction is not completed (and I have declined to approve it). To order the forfeiture of that deposit to stand as against amounts claimed by the FILO Agent would be inappropriate for the same reasons set out above in respect of the claims for rent and other lease costs. It would also be unfair to the Purchaser who, while unsuccessful in its support of the motion of the Applicants to have the leases assigned to it, has not engaged in conduct such that what effectively amounts to a penalty ought to be awarded against it.

215. To be clear, in dismissing the motion of the FILO Agent for the payment of rent and other lease costs, I am concluding that such a request amounts to an allocation of costs, and is premature for the reasons set out above. I am making no determination about whether any costs of this proceeding, including professional costs, are reasonable or appropriate, nor am I making any determination about the proportion of those costs for which any party or parties ought ultimately to be responsible.

216. The FILO Agent was vigourous in its submissions not only about the allocation of costs, but the quantum of costs generally. I have heard those submissions. I continue to expect the court-appointed Monitor to fulfil its role as a court officer, to work to streamline this *CCAA* process, resolve issues where that is possible, and assist the court with the efficient determination of issues where that is not possible, all to ensure that (as previously directed by my earlier order made in this proceeding) all costs and disbursements incurred by the Applicants are reasonable and appropriate, and to seek the advice and directions of this court if and as necessary.

217. In my view, it is also not appropriate at this time to grant an order expanding the powers of the Monitor to act as a "super-monitor" and replace management of the Applicants in respect of all of their affairs and operations.

218. Indeed, and while the FILO Agent does not seek the appointment of a receiver or the removal of the directors, it does seek an order granting expanded powers to the Monitor so that "it is capable of assuming all the functions currently performed by HBC's management and board". It submits that it is not seeking the removal of the directors who are not being paid in any event.

219. However, the relief being sought would have practically the same effect as the removal of directors since the directors would remain in office but have no powers. Section 11.5(1) of the *CCAA* permits the court to remove any director where the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made, or is acting or is likely to act inappropriately as a director in the circumstances. I am not satisfied that any director has so acted here.

220. Such relief is extraordinary, and while it can be appropriate in certain cases, in my view, it is neither necessary nor appropriate at this time. While super-monitor powers have been granted in numerous cases, they remain the exception and not the rule, and the determination of whether or not such relief is appropriate in any particular case is inherently fact specific.

221. While the FILO Agent is vigorously opposed, and has for some time voiced its opposition, to approval of the Central Walk Transaction, I am not persuaded that the Applicants have acted or are not acting in good faith, either generally or specifically in their efforts to pursue the Transaction.

222. The fact that I have declined to approve the Transaction does not mean that there was bad faith in bringing it forward. The Court-appointed Monitor submits that, while it is prepared to assume and fulfil any role ordered by the court, it does not believe that such super-monitor powers are necessary at this time. I agree. I would add that expanding the powers of the Monitor as requested is unlikely to resolve what are in many respects inter-creditor disputes between the FILO Agent and Pathlight, particularly since the FILO Agent is already critical of the Monitor whose powers it now seeks to expand.

223. I also observe that the situation here is further complicated by the fact that the FILO Agent or affiliated entities under common ownership and control have been involved since before the commencement of the *CCAA* proceedings and within these proceedings have acted in several capacities, including the following: pre-filing secured lender and agent; provider and financier of consignment goods (both pre-and post-filing); DIP Lender; inventory appraiser on behalf of the lenders; and the lead liquidator in the joint venture forming the Liquidation Consultant.

224. As noted above, it also supported the Lease Monetization Process from which the Central Walk Transaction emanated. The Liquidation Consultant earned considerable fees on the Liquidation Sale, and the FILO Agent's affiliate (Hilco) earned margins on the sale of consignment goods. Moreover, the Central Walk APA and related agreements were entered into with the support of Hilco at the time.

225. In short, the FILO Agent has had significant input into the direction of almost every major step in this proceeding. All of this reinforces the conclusion that it would not be appropriate at this stage to compel another creditor to bear the costs of the Transaction or to expand the powers of the Monitor to effectively replace management and the board of HBC.

226. With respect to the request for a further distribution of $4 million as against its indebtedness, HBC does not oppose that relief, and nor does the Monitor. No other party opposes the distribution. There is no issue that HBC remains indebted to the FILO Agent for amounts well in excess of the $4 million distribution requested, and that it continues to have a priority ranking security interest at least to that extent.

227. The Monitor confirmed in response to my inquiries at the hearing of the motion that there was sufficient cash flow and liquidity projected through the period of the stay of proceedings to make the additional distribution.

228. Accordingly, I direct that an additional distribution of $4 million be made to the FILO Agent as against its outstanding indebtedness owing by HBC.

Result and Disposition

229. For all of these reasons, the motion of HBC is dismissed, save for the sealing order which is granted. The proposed lease assignments are not approved.

230. The motion of the FILO Agent is dismissed, save for the order directing HBC to make an additional distribution to the FILO Agent of $4 million on account of its outstanding indebtedness.

231. Order to go in accordance with these reasons.

232. I would be remiss in closing not to acknowledge, given the complexity of these motions and the volume of material, the assistance of all counsel, through their facta and oral submissions.

Osborne J.