



**ONTARIO SUPERIOR COURT
COMMERCIAL LIST**

ENDORSEMENT

COURT FILE NO.: CV-24-00723586-00CL

DATE: DECEMBER 14, 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: *IN RE:* THE BODY SHOP CANADA LIMITED

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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For Respondent, Responding Party:

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ENDORSEMENT OF JUSTICE OSBORNE:

Relief Sought

- [1] The Applicant, The Body Shop Canada Limited (TBS Canada), brings two companion motions seeking orders:
- a. approving an asset purchase agreement dated as of December 13, 2024 and vesting in the Purchaser, an affiliate of Serruya Private Equity (SPE), all interests of TBS Canada in the Purchased Assets, free of all Encumbrances;
 - b. sealing and designating as confidential, on terms, certain commercially sensitive information;
 - c. authorizing TBS Canada to change its corporate name and, correspondingly, the title of proceedings in this *CCA* proceeding;
 - d. conveying to the Purchaser the rights and obligations of TBS Canada under certain Material Agreements;
 - e. authorizing the Monitor to exercise any powers properly exercised by the Board of Directors of TBS Canada;
 - f. declaring that pursuant to sections 5(1)(b)(iv) and 5(5) of the *Wage Earner Protection Program Act (WEPPA)*, TBS Canada meets the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 (the *WEPP Regulations*);
 - g. extending the stay of proceedings from December 13, 2024 two and including March 31, 2025; and
 - h. granting a release to and including TBS Canada, the Monitor, the UK Purchaser and their respective directors, officers and employees and representatives in respect of any alleged failure of TBS Canada, the Monitor or the UK Purchaser to provide SPE, the Purchaser and their respective directors, officers and shareholders, as applicable, with any disclosure that may be required pursuant to section 5 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, or any similar laws of any jurisdiction in Canada, solely in connection with the execution of the Master Franchise Agreement and ancillary agreements by the Purchaser.

- [2] Defined terms in this Endorsement have the meaning given to them in prior Endorsements made in this *CCAA* Proceeding, the motion materials filed in respect of this motion, and/or the Second Report of the Monitor dated December 10, 2024 or the Supplement thereto dated December 12, 2024, unless otherwise stated.
- [3] The Service List has received the motion materials. To the extent not already on the Service List, TBS Canada has provided notice of this motion to all parties who hold a security registration or a Court-ordered charge against the assets of the Company, to landlords in respect of leased locations, material contract counterparties, and other identified affected parties.
- [4] The relief sought today is unopposed. It is supported by the UK Purchaser, the proposed Purchaser of TBS Canada and the represented employees of TBS Canada. It is strongly recommended by the Court-appointed Monitor. The *WEPPA* relief is not opposed by the Attorney General of Canada represented by the Department of Justice, provided that certain amendments to the draft order were made, and those amendments were agreeable to all parties and in particular, TBS Canada and the employees.
- [5] The background and context for these motions is fully set out in earlier Endorsements, and in the Reports of the Monitor.
- [6] TBS Canada is a wholly owned subsidiary of TBSI Realizations Limited, the UK Parent (formerly called The Body Shop International Limited). TBS Canada has historically relied on the UK Parent for accounting and cash management services.
- [7] TBS Canada has now entered into a definitive agreement with 1001072685 Ontario Inc. (685), the proposed Purchaser, pursuant to which, if approved, the Purchaser would acquire substantially all of the assets of TBS Canada as a going concern.
- [8] At the conclusion of the hearing of these motions, I granted the relief sought, as amended, with reasons to follow. These are those reasons.

Approval of the APA Transaction and Related Relief

- [9] In the main, the proposed APA Transaction offers various benefits to the Company and its stakeholders, including but not limited to the continuation of a significant number of the retail stores of TBS Canada as operating locations and the continued employment of at least 400 of the Company's employees and approximately 100 of its seasonal employees, the preservation of relationships with landlords, and the continuation of "The Body Shop" business in Canada as a going concern.
- [10] I previously approved the Sale Process in this proceeding. That Sale Process was complicated by the fact that TBS Canada did not own "The Body Shop" trademark or associated intellectual property, but rather had a licence to sell trademarked products through a distribution and franchise agreement with the UK Parent. That was in turn complicated by the fact that a separate process was ongoing in the UK to find potential buyers for the UK Parent's business or assets.
- [11] Once the UK Sale Process was completed and the UK Purchaser had closed its transaction for the UK Parent, the UK Purchaser advised that it intended to transition the Canadian business into a franchise. The Monitor in this proceeding therefore advised interested parties of the deadline for submitting offers.

- [12] The Monitor and TBS Canada engaged with over 55 parties to solicit interests, 21 of which executed a non-disclosure agreement and received certain diligence materials. The Monitor and TBS Canada also engaged with the franchise team of the UK Parent and the UK Purchaser, with respect to the terms of a potential franchise arrangement.
- [13] As noted, the UK factors complicated this Sale Process given the issues of intellectual property rights, inventory, pricing, the unsettled terms of a necessary franchise agreement and the provision of shared services to Canada by the UK Purchaser principally related to accounting and IT services.
- [14] Ultimately, the Monitor received four bids, two of which were deemed to be Qualified Bids. Thereafter, the proposed Purchaser settled franchise terms with the UK Purchaser and was prepared to enter into a Master Franchise Agreement and other related or ancillary agreements, and the proposed Purchaser (through an affiliate) finalized a term sheet with TBS Canada.
- [15] A final complication has related to franchise law obligations in Canada such that the parties have been unable to enter into the proposed Franchise Agreement due to the need to satisfy certain disclosure requirements which is not possible within the required time frame for the Transaction to proceed. TBS Canada cannot defer the closing of the Transaction without significantly (and negatively) impacting recoveries for creditors.
- [16] For all of these reasons, the parties agreed to finalize the Asset Purchase Agreement (APA) and the Franchise Agreement on the understanding that TBS Canada would bring a motion for approval of the APA and related agreements, and a separate motion seeking relief in respect of the franchise disclosure issues, all of which are returnable before me today. On that basis, TBS Canada entered into the APA with the Purchaser on December 6, 2024.
- [17] The APA Transaction is scheduled to close on December 16, 2024. The Purchaser will acquire substantially all of the assets of TBS Canada on an “as is, where is” basis, including a significant number of leases for TBS Canada retail locations, the inventory at Purchased Locations and the inventory at stores that are not Purchased Locations. The Purchaser is not acquiring Excluded Assets such as claims against the UK Parent, and the leases to Excluded Locations.
- [18] The APA contemplates that TBS Canada will liquidate the inventory at Excluded Locations and the proceeds will be payable to the Purchaser. TBS Canada and the Purchaser will provide certain transition services to one another, to assist with the transition of The Body Shop business, the liquidation of inventory at Excluded Locations, and the administration of these *CCAA* proceedings.
- [19] Consideration for the purchase price payable under the APA is comprised of cash and the assumption of certain liabilities.
- [20] The Purchaser will offer employment on December 11, 2024 to those employees it has identified and who accept the Purchaser’s offer of employment, on terms and conditions similar to those in effect immediately prior to the Closing Date, including the recognition of accumulated service. The Purchaser will assume all liabilities of TBS Canada relating to those Transferred Employees arising after the Closing Date.
- [21] The granting of the contemporaneously sought declaratory relief in respect of the franchise disclosure obligations is a key closing condition for the APA Transaction. That declaratory relief is discussed further below.

- [22] The Transaction provides a very favourable outcome for stakeholders of TBS Canada, some of which are highlighted above. It will preserve at least 400 store level and head office jobs and an additional 100 seasonal jobs, and ensure the continued operation of a significant number of Purchased Locations, with the minimization of business disruption.
- [23] This Court has the jurisdiction to approve the sale of assets outside the ordinary course of business pursuant to section 36 of the *CCAA*. Section 36(3) sets out the relevant factors to be considered, which are to be evaluated alongside the *Soundair Principles*. The section 36(3) factors are neither exhaustive nor mandatory: *Target Canada Co. (Re)*, 2015 ONSC 2066 [Commercial List] at .
- [24] I am satisfied that all relevant factors have been satisfied here. The Sale Process was reasonable. The market was thoroughly canvassed in a fair, transparent manner that optimized the chances of securing the best price for the assets. There was integrity throughout the process.

Assignment Order

- [25] The corollary assignment order is appropriate in order that certain leases associated with the Purchase Locations and related material agreements can be assigned to the Purchaser. A number of those agreements require consents to assignment from the respective counterparties. If third-party consents cannot be obtained, it is a closing condition of the APA that TBS Canada obtain an order pursuant to section 11.3 of the *CCAA* assigning the relevant leases and contracts to the Purchaser.
- [26] TBS Canada has been working, and continues to work, with the relevant counterparties of the Material Agreements to obtain any required third-party consents. However, due to timing constraints, TBS Canada seeks to minimize the risk that the APA Transaction cannot close on time by seeking the proposed Assignment Order that would apply to all Material Agreements.
- [27] I am satisfied that that relief is appropriate.
- [28] Section 11.3 of the *CCAA* provides this Court with the authority to make an order assigning the rights or obligations of a debtor company under an agreement. Section 11.3(3) sets out the non-exhaustive list of factors for the Court to consider when determining whether it is appropriate to grant such relief. I am satisfied that those factors are met here. The Monitor supports this relief: s. 11.3(3)(a).
- [29] In addition, section 11.3(4) of the *CCAA* provides that the Court may not make an assignment order unless it is satisfied that all monetary defaults in relation to the agreement to be assigned, other than those arising by reason only of the debtor company's insolvency, the commencement of *CCAA* proceedings, or the debtor company's failure to perform a nonmonetary obligation, will be remedied. That requirement, also, is satisfied here.
- [30] Pursuant to the APA, TBS Canada has agreed to pay all monetary defaults in relation to Material Agreements that are leases for the Purchased Locations, and the Purchaser has agreed to pay the monetary defaults under the balance of the Material Agreements other than those arising by reason of the insolvency of TBS Canada, the commencement of this *CCAA* Proceeding, or the failure by TBS Canada to perform a non-monetary obligation.

Corporate Name Change and Amendment to the Title of Proceedings

- [31] The AVO will authorize TBS Canada to change its legal corporate name in order to avoid confusion with the “The Body Shop” brand that will continue to be operated by the Purchaser following the closing of the Transaction. This is appropriate and practical. TBS Canada will change its name to “OLD TBS Canada Limited”.
- [32] That corporate name change is approved. In corresponding fashion, it is appropriate to amend the title of proceedings in this *CCAA* proceeding to reflect that name change, and the title of proceedings in this Application is accordingly amended.

Sealing Order

- [33] TBS Canada seeks sealing relief in respect of the unredacted copy of the APA, a summary of the bids received in the Sale Process, and the liquidation analysis prepared by the Monitor which provides a comparative analysis of recoveries if the Transaction proceeds and in the alternative scenario of a likely bankruptcy and liquidation.
- [34] The proposed sealing relief is limited, both temporally (to be in effect only until the closing of the APA Transaction or further order of this Court), and in scope (it is limited to the materials identified above). In particular, all salient terms of the proposed APA Transaction, including which locations will be assumed and which will not, and the nature and terms of the proposed Transaction generally, are all public in order that affected parties and stakeholders can understand the key scope and terms of the proposed transaction.
- [35] In the circumstances, I am satisfied that the proposed sealing relief is appropriate. The salutary effects of the proposed sealing order outweigh any deleterious effects that may exist in the circumstances. In particular, and if the Transaction does not close, and the assets and/or business of TBS Canada need to be re-marketed and sold, the disclosure of the information sought to be sealed at this time will have a serious and negative impact on the integrity and outcome of any future sales process and a correspondingly negative impact on recovery for stakeholders, and the outcome for other affected parties, including but not limited to employees.
- [36] For all of those reasons, I am satisfied that the factors articulated by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* have been satisfied here, with the result that the sealing orders are approved pursuant to section 137(2) of the *Courts of Justice Act*.

Expansion of Monitor’s Powers and WEPPA Eligibility and Associated Relief

- [37] The proposed Ancillary Order will expand the powers of the Monitor, enable former employees of TBS Canada to access benefits under *WEPPA*, and extend the stay of proceedings to and including March 31, 2025. I am also satisfied that this relief is appropriate. Jurisdiction to grant the relief flows from sections 11 and 23(1)(k) of the *CCAA*.
- [38] With respect to the expansion of the powers of the Monitor, upon the resignation of the directors and officers of TBS Canada immediately following the closing of the Transaction, TBS Canada will no longer have directors or officers to make decisions in respect of the Applicants, including those relative to winding down these *CCAA* Proceedings. The proposed relief would grant the Monitor the necessary powers to facilitate the effective and efficient administration of TBS Canada as necessary to complete these *CCAA* Proceedings and wind down TBS Canada. The Monitor supports this relief and is prepared to exercise the powers associated with such an expanded role.

- [39] With respect to the *WEPPA* relief, TBS Canada terminated approximately 220 employees shortly after it commenced the NOI Proceeding. In connection with the closing of the Transaction, TBS Canada will terminate the remaining employees, with many being offered employment by the Purchaser. As a result, there are two categories of terminations: the first includes employees offered employment by the Purchaser; and the second includes employees not offered employment but retained by TBS Canada to liquidate Excluded Locations.
- [40] TBS Canada therefore seeks a declaration that the Company meets the criteria prescribed by section 3.2 of the *WEPP Regulations* enabling its eligible former employees to receive benefits such as wages, termination and severance pay to which they may be entitled under *WEPPA* following the termination of their employment.
- [41] The Monitor supports this request. I am satisfied that it is appropriate. In particular, I am satisfied that TBS Canada is a “former employer, all of whose employees in Canada have been terminated” for the purposes of section 3.2 of the *WEPP Regulations*.
- [42] The Attorney General of Canada, representing Service Canada and the Wage Earner Protection Program, does not oppose the relief sought, provided that the Applicant agrees not to seek additional relief originally sought in respect of a declaration and order to the effect that the former employees of the Applicant are eligible to receive payments in accordance with *WEPPA*. The parties, and including in particular, the Applicant, the represented employees and the Purchaser are in agreement that this relief ought not to be sought, and the Monitor supports that position.
- [43] I agree. Pursuant to *WEPPA*, the Minister of Labour is designated to be responsible for determining whether an individual is eligible for a *WEPP* payment, and also the amount that employee may be eligible to receive (see ss. 9 and 10). It is appropriate that the Minister can determine if an applicant under *WEPPA* is eligible to receive a payment: *Attorney General of Canada c. Former Gestion Inc.*, 2024 QCCA 1441 (CanLII), at para. 16.

Extension of Stay of Proceedings

- [44] With respect to the proposed stay of proceedings, the current stay expired on December 13, 2024. I am satisfied that the stay of proceedings should be extended through to and including March 31, 2025. That additional time is necessary to allow the Monitor on behalf of TBS Canada to perform all post-closing obligations under the APA, and advance the necessary matters towards a termination of the *CCAA* Proceeding and a wind down of the Company.
- [45] I am satisfied that TBS Canada has acted, and continues to act, in good faith and with due diligence in these *CCAA* Proceedings and has given notice to its stakeholders, including landlords, employees, vendors and counterparties to Material Agreements.
- [46] The Monitor and the Purchaser support the proposed stay extension. The cash flow forecast appended to the Second Report of the Monitor reflects that TBS Canada anticipates that the Proceeds from the Transaction will provide sufficient liquidity through the extended stay period.
- [47] The stay extension is approved pursuant to section 11.02(2) of the *CCAA*.

Declaratory Relief - Franchise Disclosure

- [48] As described above, 685, an affiliate of Serruya Private Equity, is the Purchaser under the proposed APA Transaction, having been identified as the successful bidder through the Sale Process. The principal of the Purchaser is Michael Serruya (Serruya). He has been involved in many franchise arrangements in his career, including Yogen Früz, Cold Stone Creamery and Pinkberry, among others.
- [49] As part of the Sale Process, the Purchaser led by Serruya and supported by legal and financial advisors, conducted extensive due diligence on the business of TBS Canada. The Purchaser was advised and clearly understood that to operate “The Body Shop” business in Canada or sell any branded inventory, any purchaser of the assets and business of TBS Canada would need to settle the terms of a franchise or other agreement with the UK Purchaser who owns the intellectual property and who would be the source of inventory for the Canadian operations.
- [50] Accordingly, the Purchaser received a significant amount of information regarding the proposed franchise or other arrangement. In particular, the Purchaser:
- a. was provided with a template master franchise agreement and the business planning model from the UK Purchaser;
 - b. regularly engaged with the franchise team of the UK Purchaser to conduct business and financial diligence and discuss a Canadian franchise agreement; and
 - c. discussed with the UK Purchaser various matters including licensing, intellectual property, pricing and payment terms for branded inventory, and the establishment of operational and merchandising guidelines.
- [51] The Purchaser settled franchise terms with the UK Purchaser on November 25, 2024 and was therefore prepared to enter into the Franchise Agreement to allow “The Body Shop” business to continue to operate in Canada.
- [52] The complicating factor is that under franchise laws in six Canadian provinces in which retail stores of TBS Canada are located, a franchisor (i.e., the UK Purchaser) must provide to a franchisee (i.e., the Purchaser), a franchise disclosure document at least 14 days *before* the earlier of the franchise agreement being signed, and the payment of any consideration to the franchise or relating to the franchise.
- [53] The franchise disclosure document must include all material facts, financial statements and copies of proposed franchise agreements, all for the purpose of assisting a franchisee make an informed decision about whether or not to invest in a franchise.
- [54] The challenge here is that the UK Purchaser is unable to provide the required franchise disclosure document in advance of the required closing date of the APA Transaction, given the limited time available. The evidence in the record is to the effect that the financial disclosure document would take several weeks or months to prepare and deliver here.
- [55] To require the UK Purchaser to prepare and deliver the franchise disclosure document would delay the closing of the Transaction by at least several months, and perhaps indefinitely, if TBS Canada cannot maintain operation of the Canadian business in the interim.

- [56] Absent an exemption from application of the governing statute, or an exemption from the requirement to deliver the franchise disclosure document, if the UK Purchaser fails to provide the franchise disclosure document or provides a franchise disclosure document that is deficient, the Purchaser may have the right to rescind the Franchise Agreement and claim damages: in this case against the UK Purchaser, TBS Canada and the Monitor.
- [57] For these reasons, and given the associated potential exposure, the parties have not yet executed the Franchise Agreement, notwithstanding that it is a condition to the closing of the Transaction.
- [58] The Purchaser has confirmed in an affidavit sworn by Michael Serruya and filed in the record, that it has all of the important and material facts and documents needed to make an informed investment decision, that it does not require any additional disclosure in the form of a franchise disclosure statement or otherwise, and that such will not improve its understanding of TBS Canada or affect its decision to proceed with the Transaction or sign the Franchise Agreement.
- [59] The Purchaser intends to enter into the Franchise Agreement with the UK Purchaser prior to the closing of the Transaction to satisfy the closing condition. The Purchaser does not intend to exercise any potential right it may have to rescind the Franchise Agreement as a result of the inability of the UK Purchaser to deliver a financial disclosure document.
- [60] Moreover, the Purchaser is agreeable, as a condition precedent to the Transaction closing, to provide TBS Canada, the Monitor and the UK Purchaser, with a release from any known claims that may be available to the Purchaser under Canadian franchise law arising from the failure of the UK Purchaser to provide Serruya Private Equity and the Purchaser with a franchise disclosure document in connection with the execution of the Franchise Agreement by the Purchaser. The Purchaser has received independent legal advice with respect to the release and particularly with respect to the relief requested on this motion.
- [61] In all of these circumstances, which are somewhat unusual, I am satisfied that the requested relief should be granted. It is consistent with the purpose of the requirement for franchise disclosure and with the legislative intent behind the relevant statutory provisions. That intent is directed towards protecting franchisees and addressing what is a typical power imbalance as between a sophisticated franchisor on the one hand, and a proposed franchisee on the other hand, all with a view to ensuring there is sufficient disclosure such that a franchisee can make a properly informed decision about whether or not to invest in a franchise.
- [62] In this case, the Purchaser is the affiliate of a highly sophisticated commercial party, and one with particular and extensive experience with franchises, including as a franchisor. The Purchaser has specifically confirmed that it is equipped and able to make an informed investment decision, and that it does not require further disclosure. It has gone even further and agreed to provide a release with respect to any possible claims related to deficient franchise disclosure. No stakeholder will suffer prejudice as a result of the requested relief, which is supported by the Purchaser, the UK Purchaser and recommended by the Court-appointed Monitor.
- [63] The declaratory relief sought is a condition precedent to the proposed APA Transaction. Without it, the transaction will not close, at least in the foreseeable future, with the result that over 400 full-time jobs and 100 seasonal jobs, as well as numerous commercial leases with landlord counterparties, will be put in immediate jeopardy. Recoveries for stakeholders of TBS Canada will be negatively affected, and TBS Canada may be required to commence a liquidation process.

- [64] The proposed closing date for the Transaction of December 16, 2024 cannot be deferred without significantly impacting the economics of the Transaction. One of the relevant factors here is that the highest revenues for the Company are generated during the holiday season, and there will be significant difficulty in identifying a going concern transaction in the new year.
- [65] Moreover, a number of the Company's leases expire at the end of 2024 and in the first quarter of 2025, and there is a risk that landlords may look to replace the Company as the tenant at those locations. In addition, the Company will lose access to certain of the shared services historically provided by the UK Parent, including IT services and point-of-sale systems, after December 31, 2024.
- [66] Finally, the Company does not have sufficient inventory for the 2025 calendar year, without which it will be unable to operate, and that in turn requires new inventory and the negotiation of new agreements with the UK Purchaser.
- [67] For all of these reasons, I am satisfied that it is not a realistic option to defer the Closing Date of the Transaction to permit the UK Purchaser to comply with the requirement to deliver a franchise disclosure statement. Most fundamentally, all of the parties who are affected by this particular head of relief sought, and in particular, the Purchaser whose ability to make claims related to any alleged non-disclosure would be affected by the relief, have specifically and expressly consented, all with the benefit of independent legal advice.
- [68] I am satisfied that this Court has the jurisdiction to grant the requested relief pursuant to section 11 of the *CCAA*. While, in my view, it follows that I do not need to resort to the doctrine of paramountcy, application of the doctrine would, in the particular circumstances of this case, support the exercise of the discretion granted to this Court under the *CCAA* over the *Arthur Wishart Act (Franchise Disclosure) 2000*, in any event.

Result and Disposition

- [69] For all of these reasons, the motions are granted.
- [70] The orders signed by me are effective immediately and without the necessity of issuing and entering.

Olson, J.