CITATION: Riocan Real Estate Investment Trust v. 2455034 Ontario Limited Partnership, 2026 ONSC 733
COURT FILE NO.: CV-25-00744295-00CL
DATE: 20260209

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: RIOCAN REAL ESTATE INVESTMENT TRUST, RIOCAN HOLDINGS INC., RIOCAN HOLDINGS (OAKVILLE PLACE) INC., RIOCAN PROPERTY SERVICES TRUST, RC HOLDINGS II LP, RC NA GP 2 TRUST and RIOCAN FINANCIAL SERVICES LIMITED

Applicants

AND:

2455034 ONTARIO LIMITED PARTNERSHIP, 2455034 ONTARIO INC., 2491815 ONTARIO LIMITED PARTNERSHIP, 2491815 ONTARIO INC., 2491816 ONTARIO LIMITED PARTNERSHIP, 2491816 ONTARIO INC., 2681842 ONTARIO LIMITED PARTNERSHIP, 2681845 ONTARIO INC., and 2681842 ONTARIO INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, and SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

BEFORE: KIMMEL J.

COUNSEL: *Orestes Pasparakis, James Renihan, Nadine Tawdy & Evan Cobb*, for the Receiver FTI Consulting Canada Inc.

Robert J. Chadwick, Julie Rosenthal & Andrew Harmes, for the RioCan Applicants

Michael Shakra & *Preet Gill,* for the HBC CCAA Monitor

Michael Schacter, for Fairweather Limited

D.J. Miller, Deborah E. Palter & Andrew Nesbitt, for Oxford Properties Group, OMERS Realty Management Corporation, Yorkdale Shopping Centre Holdings Inc., Scarborough Town Centre Holdings Inc., Montez Hillcrest Inc., Hillcrest Holdings Inc., Kingsway Garden Holdings Inc., Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc., OMERS Realty Corporation, Oxford Properties Retail Limited Partnership, CPPIB Upper Canada Mall Inc., CPP Investment Board Read Estate Holdings Inc. (the "Oxford Parties")

HEARD: January 14, 2026

ENDORSEMENT
(RECEIVER'S MOTION FOR APPROVAL OF SUBLEASE AT YORKDALE)

The Motion

[1] FTI Consulting Canada Inc. ("FTI"), as court-appointed receiver and manager (in such capacity, the "Receiver") of the assets, undertakings and properties of, among others, 2491815 Ontario Limited Partnership ("YSS 1") and 2491815 Ontario Inc., brings this motion for:

a. Approval of the Sublease Agreement, dated August 12, 2025 (the "New Sublease") between the Receiver and Fairweather Ltd. ("Fairweather" or the "Fairweather Parent") for the premises located at Yorkdale Mall in Toronto, ("Yorkdale") formerly occupied by Hudson's Bay Company ULC ("HBC") pursuant to a sublease between HBC and YSS 1 (the "HBC Sublease"); and

b. Certain ancillary relief from the exercise of remedies by Yorkdale Shopping Centre Holdings Inc. (together with its affiliates, the Oxford Parties or "Oxford"), as landlord, pursuant to its Lease Agreement with YSS 1, as tenant, dated September 26, 2002 (the "Head Lease"), as a result of any defaults arising from the appointment of the Receiver, the insolvency proceedings of HBC, or stemming from these receivership proceedings involving YSS 1.

[2] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Fifth Report of the Receiver dated October 11, 2025 (the "Fifth Report") filed in support of this motion. The Receiver's motion is fully supported by the RioCan Applicants ("RioCan").

The Yorkdale Head Lease and HBC Sublease

[3] YSS 1 leases space at Yorkdale from Oxford pursuant to the Head Lease that it was assigned in 2015 (as detailed below). The Head Lease is for a lengthy term: the initial five-year term was from 2002 to 2007, but the Head Lease allows for extensions over twenty-seven consecutive five-year terms at the option of YSS 1, as the tenant, to the year 2142. It is generally agreed that the rent payable under the Head Lease is favourable compared to the current market rent for these premises.

[4] YSS 1 owns the building which houses the former HBC Yorkdale premises. However, upon expiry (or earlier termination) of the Head Lease, the Head Lease provides that the building is automatically conveyed to Oxford for no further consideration. YSS 1 values the building at $178 million.[1]

[1] The court has not made any findings on this motion about this particular provision of the Head Lease. The motion proceeded on the assumption that this is what will happen.

[5] The Head Lease contains various restrictions on Oxford (for example with respect to other development within "no-build" restricted areas, and parking requirements) that it would be free of if the Head Lease is disclaimed or terminated.

[6] The Head Lease requires the tenant to "continuously operate" as a "single integrated traditional retail department store". If the tenant ceases operating in the premises for six months, Oxford can then provide notice to terminate the Head Lease six months thereafter unless the tenant resumes operation in that time. This means Oxford can terminate the Head Lease as early as twelve months after the tenant ceases operating, which the parties typically refer to as the "go dark" date. HBC ceased operating from, and left, the HBC premises at Yorkdale on June 16, 2025.

[7] The Receiver and RioCan have been working to secure a new tenant to commence operations at the premises prior to June 2026. After the Receiver brought this motion, Oxford agreed that it would not terminate the Head Lease pursuant to the "go dark" provisions until at least August 31, 2026, if the Receiver is successful on this motion. Oxford has not indicated what its position will be if the Receiver is not successful.

[8] In 2015, HBC and RioCan Real Estate Investment Trust formed a joint venture (the "JV"). In conjunction with the formation of the JV, the Headlease was assigned to YSS 1 and HBC continued to operate from the Yorkdale premises under the HBC Sublease. The JV's assets include the beneficial interest in the Head Lease held by HBC under the HBC Sublease. In January 2024, the Royal Bank of Canada ("RBC") provided YSS 1 with a credit facility of approximately $75 million, secured against YSS 1's leasehold interest in the HBC Yorkdale premises (the "RBC Credit Facility"). RioCan guaranteed YSS 1's obligations under the Credit Agreement.

[9] HBC's rent obligations under the HBC Sublease exceeded the rent obligations under the Head Lease. The difference between the HBC Sublease payments received by YSS 1 and the Head Lease payments by YSS 1 to Oxford resulted in a margin available to YSS 1 to satisfy its own obligations, including servicing its debt service, and to generate returns.

The YSS 1 Receivership

[10] HBC filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), on March 7, 2025. The proceedings quickly became a forced liquidation of HBC's inventory over a period of approximately three months.

[11] Efforts to monetize HBC's assets in the CCAA proceedings did not result in any bids for HBC's interest in the JV or any transactions in respect of the Head Lease, the HBC Sublease or any other JV assets. RioCan applied and was granted an order on June 3, 2025 to appoint the Receiver over the assets of YSS 1 (and other JV entities), including any value that it associated with its leasehold interests at Yorkdale.

[12] HBC ceased paying rent to the JV under the HBC Sublease when it ceased conducting operating at Yorkdale in June of 2025. Since then, RioCan has provided the funds necessary for YSS 1 to pay all amounts due under the Head Lease.

[13] RioCan recently acquired the $75 million loan under the RBC Facility (that was fully drawn as of October 11, 2025) and the related security held against YSS 1's leasehold interests at Yorkdale, such that RioCan is now YSS 1's primary creditor and priority secured creditor.

[14] If sufficient value is realized in this receivership to repay the amounts owing under the RBC Facility (now owing to RioCan), any excess value will flow to YSS 1's other remaining secured creditors, a number of whom were identified in the court's June 3, 2025 endorsement appointing the Receiver, including the Bank of Montreal. No other creditors appeared or took any position on this motion.

The Receiver's Efforts to Market the Yorkdale Premises and the New Sublease

[15] It was established early on that Oxford was not prepared to voluntarily pay for the surrender of the Head Lease. The Receiver considers the surrender or "hold up" value of the leasehold interests for the HBC Yorkdale premises to be in the hundreds of millions of dollars.

[16] The Head Lease was marketed pursuant to a Lease Monetization Process Order in the HBC CCAA proceedings. Building on the prior efforts of HBC to market the Head Lease before and during the CCAA proceedings, the Receiver adopted a targeted marketing approach for re-letting the former HBC Yorkdale premises after it was appointed. An affiliate of RioCan was contracted to assist in these efforts under a management services agreement, the terms of which have not been fully disclosed. Approximately twelve potential occupants were contacted, including Fairweather.

[17] Locating a replacement tenant in a timely manner proved to be challenging given HBC's insolvency, the use requirements under the Head Lease, and the prevailing market conditions. There are few traditional department stores still operating in Canada after several notable insolvencies, including Sears, Eaton's, Target, Nordstrom and now HBC.

[18] It had been contemplated that disclaimers would be issued by July 15, 2025 for all leases not subject to a Successful Bid under the Lease Monetization Process Order. No bids were received in respect of the former HBC Yorkdale premises. The HBC Sublease for the Yorkdale premises has not been disclaimed. As noted earlier in this endorsement, HBC ceased operating from the Yorkdale premises in June 2025, making it important to secure a new tenant to operate at the premises prior to the June 2026 "go dark" date under the Head Lease. This left the Receiver with a limited and finite period of time to identify a replacement tenant for the former HBC Yorkdale premises.

[19] The Receiver concluded that Fairweather's proposal was the highest and best alternative for a successful transaction. It commenced negotiations with Fairweather, leading to the execution of the New Sublease on August 13, 2025. The New Sublease provides for a fixturing period of up to six months from the delivery of vacant possession, during which Fairweather can prepare the former HBC Yorkdale premises for opening. All of this needs to happen before the extended go dark date in August 2026, hence the timing of this motion.

[20] The Receiver has summarized the terms of the New Sublease with Fairweather as follows:

a. Fairweather must comply with all provisions of the Head Lease, save for modifications to the rent it is required to pay. Until May 31, 2029, Fairweather will

pay an annual gross rent equal to the greater of $1,000,000 or 12% of its gross receipts at Yorkdale. After May 31, 2029, Fairweather will be required to pay all amounts due under the Head Lease.

b. The Sublease has an initial term of twenty-five years with extensions of up to twenty-five additional years. However, the Receiver may terminate the New Sublease at any time on nine months' notice in favour of an "Alternative Transaction", meaning an assignment, sale, transfer or similar transaction involving the Head Lease. This allows the Receiver to continue looking for a tenant to take over the Head Lease or any other transaction that is more beneficial than the Sublease.

c. Fairweather may terminate the New Sublease at any time after May 31, 2029. If it does, YSS 1 can rescind that termination, but Fairweather will then pay rent equal to the greater of $1,000,000 or 12% of its gross receipts at Yorkdale, rather than all amounts due under the Head Lease.

[21] Under the New Sublease, Fairweather's rent obligations will be less than the rental obligations under the Head Lease. Oxford will retain its contractual rights and continue to collect all rent under the Head Lease. YSS 1 (or its Receiver) will remain responsible for the tenant's obligations under the Head Lease. Fairweather has not signed or offered to sign any agreement directly with Oxford.

[22] Oxford has appended a detailed Schedule D to its factum that contains a non-exhaustive list of the covenants, obligations and agreements of the Tenant under the Head Lease that Fairweather has not agreed to assume and perform. One of the examples of a general discrepancy noted is that the New Sublease does not include "net lease" provisions, whereas the Head Lease is a net lease. Not all of the identified discrepancies relate to rent obligations.

[23] According to RioCan, it has committed to ensuring that rent continues to be paid under the Head Lease for *so long as it has a material economic interest in preserving the Head Lease*, which is the sole collateral for the $75 million leasehold mortgage loan advanced by RBC to YSS 1 that RioCan guaranteed (and has now acquired from RBC). RioCan says that it will (at least for the time being) bear the responsibility for funding the rent differential between the payments received by YSS 1 (or its Receiver) from Fairweather under the New Sublease and amounts owing to Oxford under the Head Lease to preserve the Yorkdale Head Lease. RioCan's additional financial support will be provided through its position as a lender in the receivership.

[24] There is no documentation evidencing any commitment or agreement between or among the Receiver, RioCan, or Fairweather to provide support for the financial obligations under the Head Lease. RioCan has made no direct commitment to Oxford.

[25] The Receiver considers the New Sublease to be the best way to preserve the potential (as of yet unlocked) value of the Head Lease for YSS 1's stakeholders. Oxford considers the New Sublease to involve contractual, financial and reputational risk for its premier shopping mall in Canada.

Fairweather's Intentions and Oxford's Refusal to Consent

[26] Fairweather intends to operate a "Les Ailes de la Mode" ("Ailes") retail department store at the HBC Yorkdale premises. Ailes department stores offer merchandise in a range of departments: men's apparel, women's apparel, children's apparel, footwear, housewares, home décor, accessories and confectionary. It is a Fairweather-owned banner positioned at a higher price point compared to Fairweather's other banners. The products are expected to be in the mid- to high-end range of the market. Brands that have committed to supply the Ailes stores include Reebok, Chaps, Steve Madden, DKNY, Tahari, Billabong, French Connection, Laura Ashley, Geoffrey Beene and Perry Ellis, many of which are the same as, or similar to, brands previously offered by HBC. The Ailes store will offer a mix of half branded and half private label products. That compares with Simons, which is reported to carry 70% private label products.

[27] After the Receiver notified Oxford about the New Sublease on September 3, 2025, Oxford responded with a list of requests about Fairweather, including Fairweather's corporate profile, articles of incorporation, business description, audited financial statements, and details regarding Fairweather's experience as a department store operator and its operational plans for the former HBC Yorkdale premises. Since much of this was information that the Receiver understood Oxford already had because of its long-time dealings with Fairweather as a tenant in many of its other malls in Canada (including three current tenancies at Oxford properties), this response from Oxford was treated by the Receiver as a refusal by Oxford to consent to the New Sublease. After confirming its understanding that Oxford was not consenting to the New Sublease, the Receiver initiated this motion. Oxford has re-confirmed in its response to this motion that it is not consenting to the New Sublease with Fairweather.

The Issue to be Decided and Summary of Outcome

[28] The court must decide whether to approve the New Sublease that the Receiver has entered into with Fairweather, without Oxford's consent and over its objection, and if approved, whether to grant various requested ancillary relief from the consequences of any default under the Head Lease caused by the appointment of the Receiver or by HBC's insolvency.

[29] The Receiver presented this as a matter of first instance for the court to consider and determine how, in the context of an ongoing insolvency proceeding, to assess a proposed New "placeholder" Sublease entered into with a view to preserving the debtors' existing leasehold interests for a prospective value accretive transaction that may later arise.

[30] The analysis requires consideration of the applicable contractual terms under the Head Lease and rights and obligations of the landlord and tenant under the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7. This also requires a broader consideration of the court's specific and general authority and jurisdiction under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), and in the insolvency context, to approve a receiver's contractual dealings involving assets and liabilities in the receivership.

[31] For the reasons that follow, the Receiver's motion is dismissed.

Analysis

The Contractual Regime: The Head Lease and the HBC Sublease

[32] For reasons that will be elaborated upon later in this endorsement, because YSS 1 is in receivership and HBC is under CCAA protection, the decision about whether to approve the New Sublease is not necessarily or entirely dependent upon the interpretation and application of the relevant contractual provisions under the existing Head Lease and HBC Sublease. While Oxford's consent, and whether or not it was, and is, being unreasonably withheld is not determinative of the analysis under the insolvency regime, it is a relevant consideration under the contract (Head Lease). The contractual framework provides important context. It requires consideration of whether Oxford has unreasonably withheld its consent to the New Sublease and, even if so, whether it is entitled to do so.

[33] Each case is fact specific. The contract (in this case the Head Lease) informs what requirements the parties have identified to be important to the evaluation of the appropriateness of a prospective new subtenant. The Head Lease contains express provisions that restrict any transfer (whether by assignment or sublease) affecting the tenant, the lease, or the department store operating at the HBC Yorkdale premises.

[34] Section 21.00 of the Head Lease precludes any such transfer (sublease) of the HBC Yorkdale premises without Oxford's written consent. However, Oxford may not unreasonably withhold its consent if the proposed transferee is: (i) creditworthy; (ii) a suitable replacement tenant; and (iii) sufficiently experienced and competent in operating a business of the type required to be operated in the premises, namely a "single integrated traditional retail department store".

[35] Conversely, by virtue of subsection 21.02 of the Head Lease, the Landlord will be deemed not to be unreasonably withholding, and may arbitrarily withhold, consent to a sublease if the proposed subtenant has not agreed in writing directly with Oxford to assume and perform all of the covenants, obligations and agreements of the Tenant under the Head Lease, and if the three specified section 21.00 requirements have not been satisfied.

[36] Oxford's urges the court to read section 21.02 as identifying two independent disjunctive grounds that give it the contractual right to be unreasonable and arbitrarily withhold its consent to the Sublease. In other words, even if Fairweather is an otherwise creditworthy, suitable, and sufficiently experienced and competent subtenant (which Oxford says it is not), Oxford may still unreasonably and arbitrarily withhold its consent to the New Sublease (and will be deemed not to be doing so) because Fairweather has not agreed in writing with Oxford about anything and the terms of the New Sublease do not provide for Fairweather to assume and perform all (without exception) of the covenants, obligations and agreements of the Tenant under the Head Lease.

[37] As noted earlier in this endorsement, under the New Sublease Fairweather has not agreed to pay the full amount of rent payable under either the HBC Sublease or the Head Lease. Oxford points out that Fairweather has also not agreed to assume any obligations for base building replacement for HVAC, elevators and related items. Oxford argues that a subtenant contracting directly with it would have to agree to comply with these and other obligations of the tenant under the Head Lease. Oxford maintains that this discrepancy between the terms of the New Sublease

and the terms of the Head Lease and the absence of any direct commitment from Fairweather to abide by all of the terms of the Head Lease contractually entitles it to unreasonably and arbitrarily withhold its consent to the New Sublease.

[38] Oxford also argues that the three section 21.00 Head Lease requirements are not met, which would mean that even if the paths to unreasonable and arbitrary withholding of consent are conjunctive and both are required, it is contractually entitled to unreasonably and arbitrarily withhold its consent to the New Sublease.

[39] Reading subsections 21.00 and 21.02 of the Head Lease together, and giving the "plain meaning" to the word "and" in section 21.02, I find that Oxford's contractual right to unreasonably and arbitrarily withhold its consent to the New Sublease requires both a failure to meet one or more of the three section 21.00 requirements *and* the absence of direct written commitment from the proposed subtenant to assume and perform all of the covenants, obligations and agreements of the Tenant under the Head Lease. Given that Fairweather has clearly not provided a written agreement to assume and perform all of the covenants, obligations and agreements of the Tenant under the Head Lease or to enter into a direct agreement with Oxford, the focus here is on the three section 21.00 requirements.

[40] The Receiver (standing in the place of YSS 1) has the onus to show its proposed subtenant, Fairweather, meets these three requirements. Oxford contends that it is fatal to the Receiver's position that there is no direct evidence from Fairweather about its creditworthiness, its suitability as a tenant, and its experience and competency in operating a business of the type required to be operated in the premises, namely a "single integrated traditional department store". In *In Re Hudson's Bay Company*, 2025 ONSC 5998, at para. 43 (the "*HBC Lease Decision*"), the court held that to properly assess the reasonableness of a proposed lease assignment, 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.

[41] I agree that the Receiver has the onus to satisfy, with evidence, the three section 21.00 requirements, but I do not agree that it is fatal to the Receiver's position that there is no direct evidence from Fairweather on each of these points. In this case, there is evidence (from RioCan and Oxford) that Fairweather is a known retail operator and existing tenant of Oxford and of RioCan in many retail malls across the country. There is also evidence from both RioCan and Oxford regarding Fairweather's historic performance of its lease obligations in other malls[2], and evidence of Fairweather having been accepted as a suitable tenant in other Oxford-owned retail

[2] The only examples of non-payment of rent by Fairweather at other premises owned by both RioCan and Oxford over many years of tenancies were at certain RioCan shopping malls in the aftermath of the COVID-19 pandemic. In these instances, the documents indicate that arrangements were made by RioCan to reduce (abate) rent amounts otherwise payable and documented in two letters dated October 29, 2020 and October 26, 2021, that Oxford tries now to characterize as defaults. However, on their face these appear to be documenting agreed upon rent deferrals/forgiveness and Oxford did not ask RioCan's witness about this.

malls, including at Yorkdale itself. I am satisfied that the Receiver has met its evidentiary onus to show that Fairweather is a creditworthy and suitable tenant to operate at Yorkdale.

[42] However, the third section 21.00 requirement, that Fairweather be shown to have the necessary experience and competence to operate a "single integrated traditional retail department store" requires a deeper dive into the evidence. Fairweather is admittedly a new entry into the retail department store market, with a limited track record for its Ailes stores in Quebec, all of which operate out of significantly smaller premises than the HBC Yorkdale premises.

[43] The evidence on this point primarily comes from the two experts who provided opinion evidence on this motion. They each take a different approach to the question of Fairweather's experience and competence to operate a "single integrated traditional retail department store" at the former HBC Yorkdale premises.

[44] Oxford focusses on the need for an anchor tenant of a certain quality and caliber at Yorkdale. Its expert, Mr. Scott Lee, opines that an unsuitable anchor tenant "can deter prospective tenants and diminish the overall performance and value of the shopping centre", and that "the substitution of an anchor tenant is one of the most consequential decisions a landlord can face." Oxford's witness, Ms. Nadia Corrado, Vice-President, Asset Management for Oxford, affirms that Fairweather does not meet Oxford's standard for an anchor tenant.

[45] According to Ms. Corrado, the presence of an anchor tenant whose operations materially downgrade the quality of the retail offerings at Yorkdale would have an immediate and negative impact on Yorkdale. Yorkdale's market strength depends on its reputation as a consistent and cohesive luxury retail destination. The introduction of retailers inconsistent with this strategy would risk diluting Yorkdale's brand, diminishing its attractiveness to luxury tenants, and reducing customer traffic across the shopping centre. Oxford's witness surmises about the prospect of hundreds of millions of dollars in damages from having a sub-quality anchor tenant in the HBC premises at Yorkdale, which is home to many high-end retail tenants.

[46] Oxford's evidence and position is that it is better off with the former HBC Yorkdale premises empty than with Fairweather as a tenant in those premises. Oxford argues that this is the case even if it receives the full rent under the HBC Sublease and all other covenants and obligations of the Tenant under the Head Lease are performed (by RioCan where they extend beyond what Fairweather has agreed to).

[47] From a contractual perspective, the "quality" of the proposed subtenant should be informed by the section 21.00 requirements. The fact that Yorkdale has, since the Head Lease was entered into, expanded to include some higher end retailers, does not alter the benchmark for acceptable tenants under the Head Lease with HBC or its assigns. This is the approach adopted by the Mr. Tate, the expert that the Receiver relies upon in support of its motion, who focusses on how the words of the Head Lease would be understood from an industry perspective.

[48] Mr. Tate, explains that, while there is no commonly understood meaning of what might constitute a "single integrated traditional retail department store", s. 6.00 of the Head Lease identified the Bay and other stores such as Sears, Bloomingdale's, Macy's or Nordstrom's as examples of such. From an industry perspective, these would be considered to be "Department

Stores" under the North American Industry Classification System ("NAICS"). Mr. Tate notes that this section of the Head Lease goes on to say that the parties "…acknowledge the fluid and dynamic nature of a department store operation and agree that the departments and types of merchandise and services typically featured in such an operation are subject to changes over time to better accommodate the operator's perception of its target market."

[49] The reality of the marketplace today is that none of the former banners of single integrated traditional retail department stores cited as examples in the Head Lease still exist in Canada (or in the case of Macy's and Bloomingdale's, ever existed in Canada). Eaton's, Sears, Nordstrom and now the Bay (and Sacks') have exited the market. Even lower-end department stores such as Zellers and Target have struggled to succeed in the Canadian marketplace.

[50] Mr. Tate opines that Nordstrom (one of the examples of a single integrated retail department store cited in the Head Lease) is recognized as a "Family Clothing Retailer", as are both Holt Renfrew & Co. and Simons, two of the current anchor tenants at Yorkdale. In his opinion, Simons qualifies as a department store under the current, expanded, meaning of the term and the Ailes stores equally qualify under that definition. Mr. Tate opines that Fairweather's banner department store, Ailes, is one of the few existing Canadian operations that would also fit the current NAICS definition of "Department Store". As an example, he notes that it is expected that the Ailes store will carry specific brands that are of a quality and sell at price points that are comparable to the quality and price points of merchandise offered in the Simons store at Yorkdale and at many other stores at Yorkdale, as well as previously offered at HBC.

[51] I accept Mr. Tate's opinion evidence over the evidence of Mr. Lee. Mr. Tate's evidence is more directly relevant to the question that must be determined under section 21.00 of the Head Lease of whether Fairweather Ailes banner store is a single integrated retail department store within the meaning of that term under the Head Lease. Considering his opinion, the evidence and the contractual provisions, I find that it is. While it is true that Ailes has no experience operating out of premises as large as the HBC premises at Yorkdale (a point that I will come back to later), it has demonstrated experience and competency in operating a department store out of smaller premises in Quebec. The size of the premises is not a specific aspect of the section 21.00 Head Lease Requirements.

[52] Here, the Receiver has demonstrated Fairweather to have a proven track record of creditworthiness and suitability to operate in Oxford shopping malls, including Yorkdale, and that it has experience and competency in operating, under its Ailes banner, retail department stores elsewhere. That is sufficient to satisfy the requirements of section 21.00 of the Head Lease. As a result, having regard to the relevant contractual provisions, I find that Oxford is not contractually entitled to unreasonably and arbitrarily withhold its consent to the proposed New Sublease.

[53] This leads to the next question, of whether Oxford's refusal to consent to the proposed Sublease in the circumstances of this case is unreasonable. Again, while not determinative, the question of whether Oxford's withholding of consent was reasonable is part of the foundation upon which the later analysis will be undertaken under the insolvency lens.

Is Oxford's Refusal to Consent to the Proposed Sublease Unreasonable?

[54] Section 23(1) of the *Commercial Tenancies Act* provides that consent to a sublease may not be unreasonably withheld unless the lease contains "an express provision to the contrary." This is an express statutory recognition that sophisticated parties have the right to agree that they can be unreasonable and arbitrary, as they agreed under the Head Lease. However, for reasons outlined in the previous section of this endorsement, I have found that Oxford's right to be unreasonable and arbitrary has not been triggered in the circumstances of this case. So the question of whether Oxford is unreasonably withholding its consent to the New Sublease must still be determined to complete the contractual analysis.

[55] Oxford raised a preliminary point that it was never actually asked in writing for its consent to the New Sublease. Oxford's request for certain financial and other information about Fairweather was interpreted by the Receiver as a refusal by Oxford to consent, and this motion was brought. Oxford acknowledges that the motion is now being decided on the basis that it is not consenting to the New Sublease. The stated grounds for Oxford's withholding of consent can be inferred from the exchanges of correspondence between the parties about the New Sublease in September and October of 2025, just as the request for Oxford's consent can also be inferred from this correspondence.

[56] Absent the express contractual provision to the contrary, if a landlord refuses to consent, the court may determine whether the refusal is unreasonable and grant an order permitting the assignment if it is: ss. 23(1) and (2) of the *Commercial Tenancies Act*. In this context, a sublease that is for some or all of premises under an existing lease is considered to be an "assignment". That is the appropriate analytical framework within which to evaluate whether Oxford is unreasonably withholding its consent to the New Sublease.

[57] These sections of the *Commercial Tenancies Act* and the determination of whether a refusal to consent to an assignment of a lease is unreasonable correspond with the common law duty of good faith that requires a party whose consent is sought for an assignment of a contract to act reasonably: see *Quickie Convenience Stores Corp. v. Parkland Fuel Corporation*, 2020 ONCA 453, 151 O.R. (3d) 778, at para. 40.

[58] The leading case on a landlord's duty to act reasonably in considering an assignment request is *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 33 B.L.R. (3d) 163 (Ont. S.C.), at para 9. It establishes the following principles:

a. The tenant has the burden of showing the landlord has acted unreasonably.

b. In determining whether the landlord acted reasonably, the court considers only the information available to, and the reasons given by, the landlord at the time of refusal, not any additional, or different, facts subsequently provided to the Court.

c. A refusal will be deemed unreasonable if it is designed to achieve a collateral purpose or benefit to the landlord, wholly unconnected to the bargain between the landlord and the tenant reflected in the terms of the lease, but the landlord may, as a general rule, withhold consent if the assignment will diminish the value of its rights under it, or of its reversion.

d. A probability that the proposed assignee will default may be a reasonable ground for withholding consent.

e. The financial position of the assignee may be a relevant consideration.

f. Reasonableness is essentially a question of fact, determined with reference to the commercial realities of the marketplace and economic impact on the landlord.

[59] The court in *Welbow* explains that the question of whether a landlord is unreasonably withholding consent must be considered in light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the tenant to assign and that of the landlord to withhold consent. These same principles were also more recently summarized in *Rabin v. 2490918 Ontario Inc.*, 2023 ONCA 49, 165 O.R. (3d) 498, at para. 35.

[60] The section 21.00 requirements in the Head Lease (discussed in the previous section of this endorsement in which it was established by the Receiver that Fairweather has a proven track record of creditworthiness and suitability to operate in Oxford shopping malls, including Yorkdale, and that it has experience and competency in operating retail department stores under its Ailes banner), not surprisingly, correspond with some of the above-referenced principles. For purposes of the first part of this analysis, it will be assumed that concerns about the differential between Fairweather's financial obligations under the New Sublease and the tenant's obligations under the Head Lease can be satisfied by RioCan's commitment to make up any deficiencies. I will return to this later in the analysis.

[61] In this case, Oxford's inquiries indicate a concern from the outset when it was first approached about Fairweather as a subtenant about Fairweather's ability to operate in the 300,000 square foot former HBC Yorkdale premises. This concern would subsist even if any other express concerns at that time about Fairweather's creditworthiness were found to be disingenuous (given Oxford's prior history with Fairweather as a reliable, paying tenant) and even if Fairweather had already been determined to be a suitable tenant at Yorkdale with sufficient experience and competency to operate a single integrated traditional department store.

[62] The size of the HBC premises at Yorkdale was not directly factored into the section 21.00 requirements but it is a relevant consideration in the broader reasonableness analysis. In my view, the lack of any evidence about how Fairweather plans to operate out of the former HBC Yorkdale premises, with significantly more retail space than any store that Fairweather has ever operated, is problematic in terms of the Receiver's onus to demonstrate that Oxford's refusal to consent is unreasonable.

[63] The Receiver seeks to negate Oxford's argument that the Receiver has not met its onus to put forward direct evidence from Fairweather about how it plans to utilize this much greater space with its own argument that Oxford was required to raise the concerns about the ability of Fairweather to operate a 300,000 square foot premise when it originally objected to the New Sublease, and should therefore be precluded from raising that ground now to support its assertion that its refusal to consent is reasonable.

[64] The Receiver contends that Oxford was previously focused on the lack of "evidence" of Fairweather's creditworthiness and the fact that it was "down-scale" compared to other stores in

Yorkdale. The Receiver has already satisfied the court regarding these two issues, for the reasons outlined above. The Receiver says the concern about the planned use of the larger retail space is an afterthought. Based on the exchange of correspondence, however, it was not an afterthought.

[65] Oxford did, as soon as it was made aware of the proposed New Sublease with Fairweather, raise questions about this in its lawyers' letter dated September 4, 2025. Not only did Oxford inquire about Fairweather's creditworthiness, financial position, management, and past experience and competency, but also asked for detailed information about Ailes' proposed operations within the former HBC Yorkdale premises. This included requests for floor plans and design drawings, renderings and applicable design standards sales projections, key milestone dates for opening, and business and marketing plans (the "Ailes Operating Information"), which was not provided.

[66] In the same exchange of correspondence between counsel for the Receiver and Oxford it was confirmed that Oxford was not consenting to the New Sublease. Thus, the failure to provide Ailes Operating Information was among the reasons that had been provided at the time of Oxford's confirmation of its refusal to consent to the New Sublease and is not something that has just been raised subsequently in response to this motion.

[67] The Receiver and RioCan argue that Oxford's information requests about Fairweather, taken together, were not genuine and were perceived, and treated, as litigation posturing. That could be said of both sides in the lead up to this motion, but that does not change the fact that the Ailes Operating Information was requested and was not provided at the time, nor in response to this motion once it was brought.

[68] This takes the analysis back to the original point, that the Receiver has not provided any concrete evidence of how Fairweather plans to utilize the 300,000 square feet of prime anchor retail space at Yorkdale in response to Oxford's request for the Ailes Operating Information. In the circumstances of this proposed subtenant with no proven track record in operating out of premises anywhere close to the size of the former HBC Yorkdale premises, the Ailes Operating Information was not an unreasonable thing for Oxford to ask for. It is the absence of this information, not the quality of the answer, which is relevant to the analysis of whether Oxford's refusal to consent is unreasonable.

[69] Turning to another of the *indicia* of "unreasonableness" from *Welbow*, the Receiver contends that Oxford's response to Fairweather as a proposed subtenant of the former HBC Yorkdale premises was designed to achieve a collateral purpose or benefit unconnected to the Head Lease or HBC Sublease, rendering its withholding of consent to be unreasonable. The Receiver's argument is that Oxford refused to consent in order to take advantage of the HBC and YSS 1 insolvencies to get out of the long term Head Lease with below market rent and unfavourable restrictions on development, among other things.

[70] Oxford denies that its refusal to consent to the proposed Sublease was or is opportunistic. Oxford points to the reasons it has outlined, including the lack of the requested Ailes Operating Information regarding how Ailes intends to configure, stock and operate a department store that is many times bigger than any other store it (or Fairweather) has ever operated. Oxford also has provided direct evidence confirming that the only redevelopment that Oxford is exploring at Yorkdale within the next 3-5 years involves one block in the master plan near the Yorkdale subway

station where it may be possible to connect to existing sanitary services. This area is not subject to any redevelopment restrictions or similar rights in favour of the tenant under the Head Lease.

[71] In these circumstances, the Receiver has not met its onus to demonstrate that Oxford withheld its consent to the New Sublease for a collateral purpose. Even if the prospect of being free of the below market rent and re-development restrictions under the Head Lease are advantages that Oxford might enjoy if the New Sublease is not approved, they are very much connected to the Head Lease. Just because the HBC insolvency may create a collateral benefit for this landlord based on the contractual terms of the Head Lease that it bargained for does not mean that Oxford's refusal to consent was designed to achieve a collateral purpose or benefit.

[72] On balance, I am not persuaded that the Oxford's request for the Ailes Operating Information was unreasonable, or that its unwillingness to consent to the New Sublease without this information was unreasonable. This is a fact driven analysis. In these circumstances, the Receiver has not met its onus to show, on a balance of probabilities, that Oxford was unreasonable in withholding its consent to the New Sublease.

[73] Earlier in this endorsement it was noted that, for purposes of the first part of the analysis, it would be assumed that concerns about the differential between Fairweather's financial obligations under the New Sublease and the tenant's obligations under the Head Lease could be satisfied by RioCan's commitment to make up any deficiencies. Since I have found for other reasons that Oxford's withholding of its consent to the New Sublease was not unreasonable, the analysis does not depend on any further findings about these unusual financial arrangements. However, I observe that these arrangements do present a further difficulty for the Receiver. Oxford is being asked to consent to a New Sublease that does not mirror the tenant's obligations under either the HBC Sublease or the Head Lease, and includes a non-contractual commitment from RioCan as secured creditor to cover the difference in rent paid by Fairweather to the JV (which in turn would pay Oxford as landlord) for an indeterminate period of time.

[74] The Receiver and Riocan argue that Oxford retains all of its rights and remedies under the Head Lease in the event of any default by YSS 1. They say that is precisely the incentive for RioCan to continue to backstop the Tenant's obligations, failing which Oxford may take enforcement action and ultimately terminate the Head Lease. However, the absence of any direct commitment from RioCan, and the dependence upon RioCan continuing to have *"a material economic interest in preserving the Head Lease"*, provides limited comfort to the landlord in this case.

[75] For all of the forgoing reasons, the Receiver has not met its onus to establish that the withholding of consent to the New Sublease by Oxford was unreasonable. If the question of whether to approve the New Sublease were to be determined strictly under the *Commercial Tenancies Act*, I would have declined to do so.

Are There Other Considerations in the Insolvency Context?

[76] The Receiver submits that the court has the power, under s. 243(1) of the BIA and s. 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"), or using its inherent jurisdiction, to override the landlord, Oxford, and its objections to the New Sublease.

[77] Section 243 of the BIA confers broad authority on a supervising court in relation to a receivership authorizing a court to appoint a receiver and, "if it considers it just and convenient to do so", to direct the receiver to "take any other action that the court considers advisable".

[78] The Receiver argues that, even if the contractual and statutory analysis leads to the conclusion that Oxford is either not being unreasonable in withholding its consent to the New Sublease (having regard to the Head Lease criteria and the statutory and common law factors) or if it had led to the conclusion that Oxford was entitled to be unreasonable and arbitrary in doing so (e.g., if on a narrower construction of section 21.02 of the Head Lease, it had been found to be entitled to do so because Fairweather has not entered into an agreement with it directly or undertaken responsibility for all of the tenants covenants under the Head Lease), the court should take a broader view in the insolvency context and consider the relative importance of the proposed transaction to the receivership. For this argument, the Receiver relies upon the principles held to apply in the *HBC Lease Decision*, at paras. 32, 34, 39 and 43(n)(iv), although it propounds their application to achieve a different outcome in this case.

[79] The *HBC Lease Decision* was about the assignment of leases that the court was being asked to approve under the CCAA. The court concluded that when considering whether to order the assignment of a lease, it was not constrained by whether or not the landlord's refusal to consent was reasonable. Such an approach was found to be unduly restrictive: see *HBC Lease Decision* at paras. 36-42, 43(i). The court held that it must consider, among other factors, the reasonableness of the proposed transaction, taking into account the interests of all affected stakeholders, which may be "very different from what is reasonable from the perspective only of one particular landlord in the context of its lease": *HBC Lease Decision*, at para. 39.

[80] This court held in *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920, 86 C.B.R. (6th) 125, at paras. 29-31 that s. 243 of the BIA combined with s. 100 of the CJA provide the necessary authority for the court to order the assignment of a contract in a receivership, drawing on principles developed under the CCAA. As was stated in *Urbancorp* (at para. 35) and confirmed in the *HBC Lease Decision* (at paras. 40 and 43), the same principles may be considered in respect of contested lease assignments under both s. 11.3 of the CCAA and s. 84.1 (4) of the BIA.

[81] The court in the *HBC Lease Decision* observed (at para. 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.

[82] According the Supreme Court of Canada, "the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with

greater judicial discretion, making it more responsive to complex reorganizations": see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 14. The Supreme court emphasized the need to align the relief sought with the policy objectives and remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company (*Century Services*, at para. 70).

[83] The policy objectives of the BIA are narrower than under the CCAA. The CCAA allows for liquidation and has the policy objectives of value maximization and fair treatment of stakeholders, but also has historically been focused on restructuring alternatives that keep businesses going and preserve employment and other contracts needed for the continuation of the business. The primary task of a receiver appointed under the BIA is to "ensure that the highest value is received for the assets so as to maximize the return to the creditors": *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 73, citing *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77. This can involve both the preservation and realization of assets for the benefit of creditors.

[84] I agree with the Receiver and RioCan that the court has the jurisdiction to approve the New Sublease entered into between the Receiver and Fairweather, notwithstanding Oxford's refusal to consent, if doing so aligns with the policy objectives and remedial purpose of the BIA. Within the parameters of the BIA's objectives, the court has exercised its jurisdiction and power to authorize and approve a court-appointed receiver's contractual dealings with third parties in other circumstances, such as to:

a. disclaim contracts: e.g., *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205, at para. 25, citing *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, 2020 BCSC 1013, 80 C.B.R. (6th) 118, at para. 25;

b. enter into agreements to sell assets: e.g., *Third Eye Capital*, at para. 85;

c. enter into management or construction contracts to facilitate the receivership: e.g., *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*, 2024 ONSC 1678, at para. 20; *KingSett*, at paras. 33-37*;*

d. assign leases that were otherwise compliance with s. 84.1 of the BIA: e.g., *Urbancorp.*

[85] The Receiver contends that the court can and should approve the New Sublease based on principles that have developed in the insolvency context, even if it is a much longer term agreement than the contracts being assigned in the above examples and even though it is not a true sale or assignment, nor compliant with the contractual requirements for a sublease. The Receiver states in its factum that: "While a sublease is not identical to a sale or an assignment, it serves the same purpose of maximizing value for creditors and is readily analogous to a sale or assignment". However, the Receiver suggests that, by analogy, the principles applicable to both a sale (having regard to the well-known and established *Soundair* factors) and an assignment (having regard to

the factors in the *HBC Lease Decision*, at para. 43) should be applied, all of which it argues support approval of the Sublease.

[86] As a starting point, I agree that the question of whether to approve the New Sublease in the context of a receivership does engage a broader perspective under the insolvency lens. However, where, as in the case of the BIA, there are specific statutory provisions that also address this general question, they must be factored into the analysis as well.

Is the New Sublease an Assignment of Rights Under s. 84.1 of the BIA

[87] Even taking the broader view under the insolvency lens, the court is still constrained by the specific provisions of the BIA that apply to leases when considering the Receiver's request for approval of the proposed Sublease.

[88] Section 146 of the BIA provides that, subject to three specific exceptions (s. 84.1 of the BIA being one of those exceptions and the only one raised for consideration in this case), the rights of landlords are determined in accordance with the laws of the Province in which the property is situated. In Ontario, that would be the *Commercial Tenancies Act*, the analysis of which has already been undertaken in an earlier section of this endorsement and, under which I have already determined I would not have approved the New Sublease.

[89] Under s. 84.1 of the BIA, as long as the court is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court (per s. 84.1(5)), the court can make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment. In making that order, the court is to consider, under s. 84.1(4) of the BIA, among other things:

> (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
>
> (b) whether it is appropriate to assign the rights and obligations to that person.

[90] The Receiver acknowledges that the New Sublease is neither a sale of an asset or an assignment of a contract (whether that be the Head Lease or the HBC Sublease) and that s. 84.1 does not directly apply.

[91] The Receiver relies on *Urbancorp*, which held that the court had the authority to approve the assignment of a lease under s. 84.1 of the BIA. Even though s. 84.1 only refers to trustees and not to receivers, the combined effect of s. 243.1(c) of the BIA and s. 100 of the *Courts of Justice Act* can be relied upon. This was held, at para. 29, to be "preferable…to insist on a purposive approach to accomplish the objectives of Canadian insolvency laws", consistent with the goal of value maximization. However, the court in *Urbancorp* (at para. 27) was addressing a gap in the BIA that was silent (not prohibitive) and made an order that achieved a result that could have been achieved through a more cumbersome, timely and costly process of first assigning the debtor into bankruptcy, so that there would be a trustee in place to make the ss. 84.1 assignment.

[92] The analogy and "gap filling" analysis does not easily fit with the present situation because there is no assignment or assumption of obligations to begin with. This is not a technical matter of whether a receiver or a trustee is making the assignment, as was the case in *Urbancorp*. Rather, it would entail applying the s. 84.1 criteria to a different legal construct, and to a sublease that does not mirror the terms of the HBC Sublease or the Head Lease. As noted earlier in this endorsement, the New Sublease contemplates having a subtenant in the Yorkdale premises paying even less than the below market rent under the Head Lease for a shorter (albeit lengthy, up to 50 years) lease term and without having, in fact, agreed to fulfill all of the tenant's other obligations under the Head lease. While the New Sublease states that the tenant is doing so, that statement is qualified by stated exceptions.

[93] The s. 84.1 BIA exception to s. 146 of the BIA does not apply, even by analogy, to the circumstances of this case. The statutory test is s. 146 of the BIA directs the determination of the rights of landlords in Ontario under the *Commercial Tenancies Act* in Ontario in the absence of any of the specified exceptions (which do not apply in this case). That may be the complete answer here.

Soundair and Other Balancing of Stakeholder Interests Under the Court's Inherent Jurisdiction

[94] The Receiver urges the court to adopt the approach of the court in the *HBC Lease Decision* that was decided under the s. 11.3 of the CCAA. That entails consideration of the reasonableness of the transaction proposed by the Receiver, taking into account the interests of all affected stakeholders, which may be "very different from what is reasonable from the perspective only of one particular landlord in the context of its lease": see *HBC Lease Decision*, at para. 39.

[95] Section 11.3 of the CCAA contemplates similar factors as those prescribed for consideration under s. 84.1 of the BIA, which I have found not to be engaged in the circumstances of this case. The court's general discretion under s. 243 of the BIA to make any order it considers to be just or convenient is often considered to correspond with the court's broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[96] While the general discretion is similar under the BIA and the CCAA, I am mindful of a distinction in this case because of the apparent direct application of s. 146 of the BIA to the situation at hand (discussed in the previous section of this endorsement). I do note, however, that s. 146 of the BIA appears to be more focused on the landlord's rights and interests and does not expressly account for the interests of other interested stakeholders.

[97] If the court is to engage in a broader balancing of stakeholder interests in considering a proposed transaction, Oxford accepts that the test from *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.), for the approval of a sales process, could be applied to this situation by analogy, and would require the court to consider:

> (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the efficacy and integrity of the process;
>
> (c) whether there has been unfairness in the working out of the process; and

(d) the interests of all parties.

Oxford contends that the Receiver has not satisfied any element of the *Soundair* test.

[98] The *Soundair* test is a useful tool for judges to verify the fairness and commercial reasonableness of a receiver's attempts to generate value for the creditors—whether through a traditional sale of assets or ancillary means. Consistent with this, the *Soundair* test has been applied to the court's consideration of whether to approve a settlement by receiver: see *1117387 Ontario Inc.*, at para. 46; *IWHL Inc. (Re)*, 2011 ONSC 5672, 84 C.B.R. (5th) 223, at paras. 4-6. This suggests a somewhat flexible approach to the *Soundair* test, indicating that its application may extend beyond the conventional sale of assets through a receiver to other activities of the receiver said to be in furtherance of the maximization of value, where the providence of the receiver's actions is at issue.

[99] Oxford contends that the New Sublease, premised entirely on the possibility of a hypothetical "Alternative Transaction" for the Head Lease manifesting itself (while the New Sublease keeps that prospect open, as a placeholder), is not commercially reasonable. Oxford argues that if the proposed New Sublease is approved by the court, the Receiver will be stuck with these obligations, having affirmed the Head Lease through this process, and will no longer be able to disclaim the Head Lease and back out of this arrangement. In other words, it will have committed YSS 1 to the Head Lease for at least as long as the potential 50-year term of the New Sublease (if not the entire 100-year term of the Head Lease) without any (disclosed) contractual commitment from RioCan to satisfy the tenant's obligations under the Head Lease where they are not satisfied by Fairweather under the New Sublease.

[100] I agree that there is an apparent lack of commercial soundness to this arrangement that, at the very least, makes it difficult for the court to afford deference to the Receiver's recommendation that the court approve the New Sublease. The Receiver and RioCan have not adequately countered with any rational independent explanation for doing this, other than to preserve the "hold up value" of the HBC Sublease.

[101] The "hold up value" is essentially the value of a potential Alternative Transaction either involving a buy-out by Oxford of the remaining term of the Head Lease (which Oxford has already said it is not prepared to do) or involving another new tenant in the HBC Yorkdale premises willing to pay something to YSS 1. With this in mind, the New Sublease with Ailes is just a placeholder to give the Receiver and RioCan more time than they would otherwise have under the Head Lease to find a new tenant before the Head Lease "goes dark".

[102] This "hold up" strategy is an attempt to preserve value that exists only in the leverage that is created by the court's intervention, not because there is any value in the New Sublease itself, which will cost RioCan money going forward. I do appreciate that the Receiver and RioCan have been upfront that their immediate short term goal is to preserve the prospect of the option for value maximization through an Alternative Transaction, if one materializes. This prospect of an Alternative Transaction will disappear in August 2026 if there is no tenant occupying and operating out of the HBC Yorkdale premises as a single independent integrated retail department store. That is a potential prejudice to the stakeholders in the YSS 1 receivership if the New Sublease is not approved.

[103] To soften the prejudice that the Receiver contends, Oxford indicated in oral argument that just because the Head Lease can be terminated after the prescribed period of non-operation from the HBC Yorkdale premises (as extended by agreement of the parties), that does not mean it will be. Oxford suggested that any steps that it might take in this regard could be subject to the stay of proceedings and, if so, would require leave of the court to be pursued; nor is it a forgone conclusion that leave will be granted: see e.g. *Village Green Lifestyle Community Corporation (Re)* (2007), 27 C.B.R. (5th) 199, at para. 13. Whether the "go dark" date under the Head Lease could be informally, or formally, extended by the court is not before the court on this motion.

[104] The potential prejudice to the stakeholders of YSS 1 exists because of the nature and terms of the Head Lease and the market and is not solved by the New Sublease. To be clear, the New Sublease is not resulting in any liquid value to the YSS 1 estate. If approved, it will continue to cost YSS 1 money that it does not have. The New Sublease simply creates the opportunity for the prejudice to be addressed through other means (e.g., the Alternative Transaction) in the future.

[105] Having considered the arguments on both sides, I might have been persuaded that the first two *Soundair* factors have been satisfied (that the Receiver has made a sufficient effort to get the best price and has not acted improvidently – at least for as long as RioCan remains willing to back stop the tenant's obligations under the Head Lease - and has proceeded efficaciously and with integrity in its efforts to identify potential tenants for the former HBC Yorkdale premises), but I am not persuaded that the last two *Soundair* factors have been.

[106] Specifically, there was an unfairness in the working out of the process of looking for a subtenant for this prime retail space in the top shopping mall in Canada without involving Oxford (the landlord) or giving it the direct access to information from the proposed subtenant. At the very least, it was unfair to withhold the Ailes Requested Information (among other things) and not to properly take into account Oxford's interest in understanding how any prospective new subtenant was planning to open and operate a department store of the size and importance of the former HBC Yorkdale premises.

[107] The prior attempt to monetize the HBC Sublease in the HBC CCAA proceedings failed. There was an expectation, based on the Lease Monetization Process Order in the HBC CCAA proceedings, that after the attempts to find new tenants for the various HBC premises failed, there would be lease disclaimers and the HBC operations would be wound down. Oxford only found out about the New Sublease after it had been signed by the Receiver. In the meantime, an affiliate of RioCan's (one of Oxford's main competitors in the Canadian retail mall market) had been directly and intimately involved with the arrangements concerning the New Sublease. Oxford criticizes the fairness of the Receiver's process for allowing RioCan to insinuate itself into it.

[108] In the insolvency context, when the court is being asked to approve a contract such as the New Sublease, the court's general jurisdiction is expanded to consider the interests of other stakeholders "which may be very different from what is reasonable from the perspective only of one particular landlord in the context of its lease": *HBC Lease Decision*, at para. 39. However, that general jurisdiction does not entirely ignore the landlord's perspective. Oxford's interests as the counterparty to the Head Lease and the landlord of the HBC Yorkdale premises have to be considered as well.

[109] Ultimately, the court's general jurisdiction is exercised through a balancing of stakeholder interests. Dunphy J. observed in *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678, 61 C.B.R. (6th) 68, at paras. 28-29:

> Of course, insolvency is not always a catastrophe for such counterparties. Sometimes it is a godsend. Assets locked into long-term contracts at advantageous prices may be freed up to allow the counterparty to re-price to current market. In such cases, the creditors are at risk of seeing the debtor lose critical assets while the counterparty receives an unexpected windfall ...
>
> Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.

[110] Oxford disputes the contention that it will obtain a windfall if the New Sublease is not approved and the Head Lease is terminated or disclaimed. Oxford is obtaining precisely what it bargained for, including for having received below market rent under the Head Lease for a number of years. The alleged windfall if the Head Lease is disclaimed in the receivership, or is terminated by virtue of non-occupancy pursuant to the lease terms, has to be evaluated in the context of the contractual terms – it is not a windfall if Oxford bargained for this under the terms of the Head Lease: see *HBC Lease Decision*, at paras. 174-77.

[111] Having considered the detailed written and oral submissions on both sides, and in balancing the competing interests:

a. The claimed prejudice to Oxford having a new subtenant, in prime retail anchor space in the Yorkdale shopping mall, which has:

    i. no proven experience operating a department store anywhere close to the size of these former HBC Yorkdale premises and has not provided a plan for how it intends to use, and operate in, this exceptionally large premium retail space; and

ii. is not prepared to assume all of the obligations under the Head Lease, leaving Oxford with recourse and remedies against an insolvent tenant under the Head Lease and/or insolvent subtenant under the HBC Sublease, on the strength of a non-contractual commitment by a competitor of Oxford, RioCan, to fund the deficiencies that Fairweather does not satisfy for as long as it considers itself to have an economic interest to do so;

with

b. The potential loss of what the Receiver and RioCan assert is the primary asset of any value of YSS 1, which are the HBC Sublease and the building that is on those premises that have been valued (for mortgage lending and other purposes) at in excess of $175 million, if the prospect of an Alternative Transaction or buy out is not preserved through the approval of the New Sublease.

[112] I conclude that the balance in this case favours Oxford and I am not prepared to exercise my discretion or the general jurisdiction of the court to approve the New Sublease.

[113] The Receiver is asking the court to grant relief that would represent an exercise of the discretion of the court to affect rights of a third party over a potentially very lengthy time, utilizing its discretionary power under s. 243 of the BIA. I do not consider it to be just or convenient to do so in these circumstances.

Final Disposition

[114] The court takes the recommendations of its court officers seriously. This Receiver has gone to great and creative lengths to try to preserve and maximize any value that may exist in the leasehold interests associated with the former HBC Yorkdale premises for the creditors of YSS 1. That is the Receiver's role. The role of the court is to evaluate the Receiver's recommendations among the other relevant factors and, having done so, I have decided not to accept the Receiver's recommendation in this situation.

[115] For the foregoing reasons, the Receiver's motion for approval of the New Sublease is dismissed. By way of general summary, without limiting any of the prior analysis:

a. Under the terms of the Head Lease, Oxford was not entitled to unreasonably or arbitrarily withhold its consent to the New Sublease, but it did not do so.

b. Since Oxford did not unreasonably refuse to consent to the New Sublease, the court's authority to grant an order under s. 21 of the *Commercial Tenancies Act* to approve the New Sublease was not invoked.

c. Section 84.1 of the BIA does not apply directly or by analogy, and without that exception, s. 146 of the BIA directs that the rights of the landlord are to be determined under Ontario law, which would in turn involve a consideration of the questions answered by (a) and (b) above.

d. Even when considered in the context of the court's jurisdiction and general discretion under s. 243 of the BIA, it would not be just or convenient to approve the New Sublease in the circumstances of this case.

[116] There is no need to address the ancillary relief sought by the Receiver.

[117] The parties agreed at the conclusion of the hearing that they would exchange cost outlines by January 16, 2026, which I assume they have done. Now that the outcome of the motion is known the participating parties are encouraged to try to reach an agreement on costs. If they are unable to do so, a case conference may be scheduled before me for further directions regarding the determination of the costs of this motion.

Kimmel J.

Date: February 9, 2026