

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-11-051625-164

No. 500-11-051624-167

DATE: November 11, 2016

PRESIDING : M^{TRÉ} JULIE BÉGIN, REGISTRAR

IN THE MATTERS OF THE NOTICE OF INTENTION OF:

AMERICAN APPAREL CANADA WHOLESALE INC.
AMERICAN APPAREL CANADA RETAIL INC.

Debtors/Petitioners

-and-

KPMG INC.

Trustee

**ORDER APPOINTING AN INTERIM RECEIVER
AND CREATING INTERIM CHARGES**
(Sections 47.1; 64.1 and 64.2 of the *Bankruptcy and Insolvency Act*)

- [1] **ON READING** the Petitioners' *Motion for the Issuance of an Order Appointing an Interim Receiver* (the "**Motion**") pursuant to section 47.1 of the *Bankruptcy and Insolvency Act* (the "**BIA**"), the affidavit of Mr. Bennett Nussbaum sworn November 11, 2016 and the exhibits in support thereof;
- [2] **CONSIDERING** the submissions of Petitioners' attorneys and the submissions of the Trustee, KPMG Inc.;

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- [3] **CONSIDERING** the consent of KPMG Inc. to act as interim receiver;
- [4] **CONSIDERING** the circumstances as set forth in the Motion, which warrant the appointment of an interim receiver with powers akin to a receiver;
- [5] **CONSIDERING** that it is appropriate to appoint an interim receiver of the Debtors' Property (as defined below);

WHEREFORE THE COURT:

- [6] **GRANTS** the Motion;

SERVICE

- [7] **ORDERS** that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof;

APPOINTMENT

- [8] **APPOINTS** KPMG Inc., trustee, to act as interim receiver of the Debtors' Property pursuant to section 47.1 of the BIA (the "**Interim Receiver**") until the issuance of any order by the Court terminating the mandate of the Interim Receiver, subject to section 47.1 (1.1) BIA;

PROCEDURAL CONSOLIDATION

- [9] **ORDERS** the consolidation of matters bearing docket no. 500-11-051625-164 and docket no. 500-11-051624-167 and **DECLARES** that the consolidation of said files shall be for administrative purposes only and shall not effect nor be construed as a consolidation of the assets and property of each of the respective Debtors for the purposes of any proposal or proposals that may be hereafter filed;

INTERIM RECEIVER'S POWERS

- [10] **AUTHORIZES** the Interim Receiver to exercise the following powers:

10.1 Powers related to the possession of the Property

AUTHORIZES the Interim Receiver to take possession of all the Debtors' property (the "**Property**") and to exercise the following powers listed hereinafter in the place and stead of the Debtors in respect of the Property, of every nature and kind whatsoever, wherever situated, and regardless of whose possession it may be in;

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10.2 Powers related to the preservation of the Property

- (a) all the powers necessary to receive, preserve, protect or maintain the Property or any part thereof;
- (b) all the powers necessary to control the Property or any part thereof, the place of business and the premises occupied by the Debtors;
- (c) all the powers necessary to grant the Interim Receiver access, at all times, to the place of business and to the premises of the Debtors, to the Property, and to change the locks and security codes granting access to such premises and places of business of the Debtors;
- (d) all the powers necessary to grant the Interim Receiver access to all the accounting records of the Debtors, as well as to any document, contract, register of any nature or kind whatsoever, wherever they may be situated and regardless of the medium on which they may be recorded (the "**Records**"), as well as the powers necessary to make copies of all the Records necessary or useful to the execution of the Interim Receiver's functions;
- (e) all the powers necessary to undertake an analysis of the Debtors' Records;
- (f) all the powers reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

10.3 Powers related to the Debtors' operations

- (g) carry on, all or any part of the Debtors' operations, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, cease to perform or disclaim any contracts of any Debtor;
- (h) all the powers necessary to control the Debtors' receipts and disbursements;
- (i) all the powers necessary to collect all the accounts receivable and all the other claims of the Debtors and to transact in respect of same, as well as to sign any document for this purpose;
- (j) all the powers necessary to open any required bank account, pursuant to the terms and conditions the Interim Receiver may determine, with any chartered Canadian bank, or any other financial institution, the whole, in order to cash any item payable to the Debtors, and to issue any payment

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which, in the opinion of the Interim Receiver, is necessary or useful to the Debtors' operations;

- (k) All the powers necessary to disclaim on behalf of the Debtors any lease to which the Debtors may be party;

10.4 Powers related to the disposition or sale of the Property

- (l) all the powers necessary to carry out the sale or the disposition of the Property in the ordinary course of business of the Debtors, to transact in that regard, and to sign any document or any contract required or useful for these purposes or meant to give effect to any such sale or disposition;
- (m) all the powers necessary to seek interest in or solicit one or several potential buyers of all or any part of the Property, including, without limitation, the right to carry out a public call for tenders or private solicitations in order to dispose of the Property;

[11] AUTHORIZES the Interim Receiver to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

- (a) without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$1,000,000; and
- (b) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

[12] GRANTS the Interim Receiver all the powers necessary to initiate, prosecute and continue the prosecution of any and all proceedings it considers appropriate, including for the purpose of section 34 BIA, within the performance of its duties regarding the Property;

[13] AUTHORIZES the Interim Receiver to retain the services of any lawyer, or of any person or business in order to appropriately fulfil its functions, *inter alia*, consultants, appraisers, agents, experts, auditors, accountants, managers and such other advisors or professionals from time to time and on whatever basis, including on a temporary basis;

[14] DECLARES that the Interim Receiver may provide creditors and other relevant stakeholders with information in response to requests made by them in writing. A copy of such requests must be sent to the Petitioners' attorney. Where the Interim Receiver has been advised by the Petitioners that information is confidential, proprietary or competitive, the Interim Receiver shall not provide

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such information to any person without the consent of the Petitioners unless otherwise directed by this Court;

- [15] **DECLARES** that, notwithstanding the powers granted to the Interim Receiver herein, and unless all of the Directors of the Debtors will have resigned without being replaced, the Debtors will retain all control in respect of the current proposal proceedings to which the Debtors are subject. Either of the Debtors or the Interim Receiver may seek the advice and direction of this Court in the event of a dispute, or to seek clarity regarding the scope of the powers granted by Paragraphs 9 through 13 hereof and the powers retained by the Debtors pursuant to this Paragraph [15];
- [16] **GRANTS** the Interim Receiver, only in the event that all of the directors of the applicable Debtors have resigned without being replaced, all the powers necessary to (i) make an assignment of any Debtors' property for the general benefit of the applicable Debtors' creditors pursuant to section 42(1)(a) BIA; (ii) file a proposal pursuant to sections 50 and 50.4, BIA; and/or (iii) seek the continuance of the present proceedings pursuant to the *Companies' Creditors Arrangement Act*;

CASH MANAGEMENT SYSTEM

- [17] **ORDERS** that, without limiting the generality of subparagraph 10.3(j), above, the Interim Receiver shall be entitled to continue to utilize the Debtors' central cash management system currently in place with Bank of Montreal and with any other financial institution, without any disruption whatsoever, as described in the Debtors' motion for the issuance of this Order, or replace it with another substantially similar central cash management system (the "**Cash Management System**");
- [18] **ORDERS** that Bank of Montreal or any future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Interim Receiver of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any person other than the Interim Receiver, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Debtors' proposal with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System;
- [19] **ORDERS** that the Interim Receiver shall, in accordance with the Cash Management System, have control over the proceeds from the Debtors' stores

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deposited on the Debtors' account with the Bank of Montreal and any other bank in Canada, wherever situated;

- [20] **ORDERS** that, without limiting the generality of subparagraph 10.3(j), above, the Interim Receiver shall be entitled to continue to utilize, without any disruption whatsoever, the payment processing services, arrangements and solutions currently provided by or concluded with Global Payments Canada GP (for the payments processed via credit cards (e.g.: Visa and MasterCard) and debit cards), and with American Express, and any other credit card provider in place, or to replace those payment processing services, as well as any agreements pertaining thereto, with other substantially similar arrangements or agreements;
- [21] **ORDERS** that the Interim Receiver be and hereby is an authorized signatory for all cheques, bank drafts, account transfers and other financial documents and instruments connected to the Cash Management System, for and on behalf of the Petitioners, and is hereby authorized to execute any such documents or instruments for and on behalf of the Petitioners without further authorization from the Petitioners, their directors or representatives, and any third party recipient of such document or instrument shall be entitled to rely on the signature of the Interim Receiver;

DEBTORS' DUTIES

- [22] **ORDERS** the Debtors, its directors, officers, employees, agents and representatives to forthwith provide the Interim Receiver with access to the Property, to the places of business and to the premises of the Debtors, as well as to the Records;
- [23] **ORDERS** the Debtors, its current and former directors, officers, employees, shareholders, agents and representatives to cooperate with the Interim Receiver in the exercise of the powers that are granted pursuant to the terms of this Order;
- [24] **ORDERS** the Debtors not to dispose, alienate, encumber or otherwise transact in any manner whatsoever, with regard to the Property, other than in the ordinary course of business or, otherwise, with the authorization of the Interim Receiver;

EMPLOYEES

- [25] **AUTHORIZES** the Interim Receiver to engage the services of the Debtors' employees until the Interim Receiver, acting for and on behalf of the Debtors, terminates the employment of such employees. The Interim Receiver shall not be liable for any employee- or wage-related liabilities, including any successor-employer liabilities as provided for in section 14.06(1.2) of the *BIA* other than such amounts as the Interim Receiver may specifically agree in writing to pay, or



in respect of its obligations under sections 81.4(5) and 81.6(3) of the *BIA* or under the *Wage Earner Protection Program Act*;

PROTECTION OF PERSONAL INFORMATION

[26] **DECLARES** that pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Interim Receiver shall disclose personal information on identifiable individuals, which information it has in its possession or under its responsibility, to interested parties or to investors, financiers, prospective purchasers or potential strategic partners, as well as to their advisors, but only to the extent desirable or required, and only upon condition that the persons to whom such personal information is disclosed shall undertake to maintain and protect the privacy of such information and limit the use of such information pursuant to confidentiality agreements entered into with the Interim Receiver;

LIMITATION OF LIABILITY

[27] **DECLARES** that subject to the powers granted to the Interim Receiver pursuant to the terms of paragraph [10] of this Order, nothing herein contained shall require the Interim Receiver to occupy or to take control, or to otherwise manage all or any part of the Property. The Interim Receiver shall not, as a result of this Order, be deemed to be in possession of any of the Property within the meaning of environmental legislation, the whole pursuant to the terms of the *BIA*;

[28] **DECLARES** that the powers of the Interim Receiver shall be exercised pursuant to its sole discretion and judgment;

[29] **DECLARES** that sections 14.06 and 215 of the *BIA* apply *mutatis mutandis* to the present Order, and hence that no action lies against the Interim Receiver by reason of its appointment, by the execution of the powers granted by the Court or by the exercise of its discretion, except by leave of the Court. The entities related to the Interim Receiver or belonging to the same group as the Interim Receiver shall benefit from the protection arising under the present paragraph, the aforementioned provisions of the *BIA* and any other applicable legislation;

FEES

[30] **DECLARES** that as security for the professional fees and disbursements incurred in relation to these proceedings, both before and after the date of this Order, a charge and security over the Property is hereby constituted in favour of the Interim Receiver, the Interim Receiver's attorneys, the Petitioners' attorneys and their respective advisors, to the extent of the aggregate amount of \$750,000 (the "**Administration Charge**");



[31] **AUTHORIZES** the Interim Receiver to collect the payment of its fees and disbursements and those of its attorneys, with the consent of the Petitioners, the whole subject to taxation in conformity with the BIA, if applicable;

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

[32] **ORDERS** that the Petitioners shall indemnify its directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the Petitioners after the filing of the Debtors' notices of intention to file a proposal, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct or gross or intentional fault;

[33] **ORDERS** that the directors of the Petitioners shall be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of \$950,000 (the "**Directors' Charge**"), as security for the indemnity provided in paragraph [32] of this Order as it relates to obligations and liabilities that the directors may incur in such capacity after the filing of the Debtors' notices of intention to file a proposal. The Directors' Charge shall have the priority set out in paragraph [35] of this Order.

[34] **ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the directors are entitled to be indemnified in accordance with paragraph [32] of this Order.

PRIORITIES AND GENERAL PROVISIONS RELATING TO INTERIM CHARGES

[35] **DECLARES** that the priorities of the Administration Charge and the Directors' Charge (collectively, the "**Interim Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

First, the Administration Charge (to a maximum of \$750,000);

Second, the Directors' Charge (to a maximum of \$950,000).

[36] **DECLARES** that each of the Interim Charges shall constitute a charge on the Property subordinate to all other security interests, hypothecs, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**"), which are properly perfected security interests as of the date of this Order in favour of any other Person and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA, if any. Nothing in this Paragraph shall

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prevent the Petitioners or the Interim Receiver from bringing a motion on notice to affected parties to seek to elevate the priority of the Interim Charges;

- [37] **ORDERS** that, except as otherwise expressly provided for herein, the Debtors shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the Interim Charges unless the applicable Debtor obtains the prior approval of the Court;
- [38] **DECLARES** that each of the Interim Charges shall attach, as of the Effective Time, to all present and future Property of the Debtors, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.
- [39] **DECLARES** that the Interim Charges are effective and shall charge, as of 12:01 a.m. (Montreal time) the day of this Order (the "**Effective Time**"), all the Debtors' Property present and future;
- [40] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any assignment in bankruptcy made or deemed to be made in respect of the Debtors and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Interim Receiver pursuant to the Order and the granting of the Interim Charges do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting a recourse for abuse under an applicable law, and shall be valid and enforceable as against any person, including any trustee in bankruptcy;

NO INTERFERENCE WITH THE INTERIM RECEIVER

- [41] **DECLARES** that no person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Interim Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an "eligible financial contract" (as defined in section 11.1(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36) with the Debtors from terminating such contract or exercising any rights of set-off, in accordance with its terms.

CONTINUATION OF SERVICES

- [42] **DECLARES** that all persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further



Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Interim Receiver, and that the Interim Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, Internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Interim Receiver on behalf of the Debtors in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Interim Receiver, or as may be ordered by this Court.

GENERAL

- [43] **DECLARES** that, subject to section 69 BIA, no Proceeding against or in respect of the Debtors or their Property shall be commenced or continued except with the written consent of the Interim Receiver or with leave of this Court and any and all proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court;
- [44] **DECLARES** that the Order, the Motion and the affidavit do not, in and of themselves, constitute a default or failure to comply by the Debtors under any statute, regulation, license, permit, contract, permission, covenant, agreement, undertaking or any other written document or requirement;
- [45] **DECLARES** that the Interim Receiver is at liberty to serve any notice, circular or any other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to persons or other appropriate parties at their respective given address as last shown in the Records; the documents served in this manner shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three (3) business days after mailing if delivered by ordinary mail;
- [46] **DECLARES** that the Interim Receiver may serve any court materials in these proceedings on all represented parties, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Interim Receiver shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter;
- [47] **DECLARES** that any party interested in these proceedings may serve any court material in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that such party shall deliver a "hard copy" on paper of such PDF or electronic materials to the Debtors' and the Interim Receiver's counsel and to any other party who may request such delivery;

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- [48] **DECLARES** that, unless otherwise provided herein, ordered by this Court, or provided by the *B/A*, no document, order or other material need be served on any person in respect of these proceedings, unless such person has served a notice of appearance on the solicitors for the Debtors and the Interim Receiver and has filed such notice with the Court;
- [49] **ORDERS** that the Debtors and the Interim Receiver are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the creditors of the Debtors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS)
- [50] **DECLARES** that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon five (5) days' notice to the Interim Receiver, the Debtors and any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order;
- [51] **DECLARES** that the present Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada;
- [52] **DECLARES** that the Interim Receiver shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement the Order and any subsequent orders of this Court and, without limitation to the foregoing, an order under Chapter 15 of the *U.S. Bankruptcy Code*, for which the Interim Receiver shall be the foreign representative of the Debtors. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Interim Receiver as may be deemed necessary or appropriate for that purpose;
- [53] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order;

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[54] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever;

A handwritten signature in blue ink, appearing to be 'P. Y.', is written over a horizontal line.

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COPIE CERTIFIÉE CONFORME
AU DOCUMENT DÉTENU PAR LA COUR
Arsenir Osierne
Personne désignée par le greffier (Art. 44 C.p.o.)