

Court File No. CV-23-00694493-00CL

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

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF BBB CANADA LTD.

APPLICANT

FACTUM OF THE APPLICANT

July 4, 2023

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TO: SERVICE LIST

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PART I - NATURE OF THIS MOTION

1. On February 10, 2023, BBB Canada Ltd. (the “**Applicant**”), along with Bed Bath & Beyond Canada L.P. (“**BBB LP**”, and together with the Applicant, “**BBB Canada**”), was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the “**CCAA**”) pursuant to an Initial Order (the “**Initial Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this CCAA proceeding (the “**Monitor**”). On February 21, 2023, the Court further granted an Amended and Restated Initial Order (the “**ARIO**”) and a sale approval order (the “**Sale Approval Order**”).

2. Since the granting of the ARIO, BBB Canada has been focused on implementing an orderly wind down of its Canadian operations for the benefit of all stakeholders. On June 22, 2023, the Court Granted an Order extending the stay of proceedings to August 22, 2023, in order to allow BBB Canada to take certain steps necessary to complete the wind down, and with the expectation

that BBB Canada would in the near future return to the Court to establish a limited claims process in relation to the Directors and Officers of BBB Canada.

3. The orderly wind down of BBB Canada's retail business has been largely completed:

- (a) pursuant to the terms of the ARIO, BBB Canada and its listing agent have facilitated the sale or assignment of the majority of BBB's leases across Canada. All leases previously held by BBB Canada have now been assigned, surrendered, or disclaimed;
- (b) pursuant to the terms of the Sale Approval Order, BBB Canada has liquidated all merchandise, and owned furnishings, trade fixtures, equipment and improvements to real property located in BBB Canada's retail stores, and has finalized the reconciliation of the proceeds therefrom; and
- (c) all of BBB Canada's stores have been closed, and substantially all of BBB Canada's employees have been terminated.

4. In light of this substantial progress, and with a view to completing the winddown of its business and operations in the near term and concluding these CCAA proceedings, BBB Canada has determined, in consultation with the Monitor, to initiate a claims process with respect to BBB Canada's Directors and Officers. The funds available to the estates of the Applicant and BBB LP will be insufficient to satisfy the claims of BBB Canada's secured creditors, and distributions will therefore not be available or made to any of BBB Canada's unsecured creditors. As a result, the claims process will be limited to claims against the Directors and Officers of BBB Canada, and no direct claims against BBB Canada will be solicited.

5. The Applicant therefore seeks an order (the “**D&O Claims Procedure Order**”) approving a procedure for the solicitation, determination, and resolution of D&O Claims against the current and former Directors and Officers of BBB Canada (the “**D&O Claims Process**”). The D&O Claims Process was designed in consultation with the Monitor and represents an important and necessary step in finalizing the wind down of the estates of the Applicant and BBB LP.

6. This relief is within the Court’s jurisdiction and discretion to grant under the CCAA and is consistent with the objectives of the CCAA. BBB Canada has been proceeding in good faith and with due diligence in pursuit of the efficient wind-down of their operations for the benefit of all stakeholders. The D&O Claims Process will provide BBB Canada with important information necessary to finalize BBB Canada’s orderly wind-down by allowing for the timely resolution of D&O Claims, which will in turn allow for the Directors’ Charge to be discharged with a view to permitting distributions to BBB Canada’s senior secured creditors. BBB Canada therefore submit that the D&O Claims Procedure Order should be granted.

PART II - SUMMARY OF THE FACTS

7. The facts underlying this motion are more fully set out in the Affidavit of Wade Haddad.¹ Facts relevant to the requested relief are highlighted in the relevant sections below.

A. The Wind Down of BBB Canada’s Retail Operations is Largely Complete

8. On February 10, 2023, BBB Canada was granted protection under the CCAA pursuant to the Initial Order. The Initial Order, among other things: (a) appointed the Monitor in the CCAA Proceeding; (b) granted a stay of proceedings in favour of the Applicant until and including

¹ Affidavit of Wade Haddad, sworn June 29, 2023 [Haddad Affidavit]. Unless otherwise specified, capitalized terms in this factum have the same meaning as in the Haddad Affidavit.

February 21, 2023 (the “**Stay Period**”); and (c) granted the Directors’ Charge in favour of the directors and officers of BBB Canada (the “**Directors’ Charge**”).²

9. On February 21, 2023, the Court further granted an Amended and Restated Initial Order (the “**ARIO**”) which, amongst other things, extended the Stay Period to May 1, 2023 and increased the quantum of the Directors’ Charge. On the same day, the court granted the Sale Approval Order, which approved BBB Canada entering into a consulting agreement to complete the liquidation of all merchandise, and owned furnishings, trade fixtures, equipment and improvements to real property located in BBB Canada’s retail stores, warehouse, and corporate office in Mississauga (the “**Liquidation Sale**”).³

10. The ARIO authorized BBB Canada to dispose of redundant or non-material assets on certain terms to permit BBB Canada to proceed with an orderly wind-down of its business and to retain consultants, among others, as it deems reasonably necessary or desirable in the ordinary course of business or to carry out the terms of the ARIO. BBB Canada accordingly retained Retail Ventures CND Inc. (“**RVC**”) as its exclusive listing agent to market BBB Canada’s leases. This marketing process was highly successful, resulting in a number of transactions in relation to the leases. Each of these transactions have since closed, and all leases previously held by BBB Canada have been assigned, surrendered, or disclaimed.⁴

11. BBB Canada has also completed the Liquidation Sale and finalized the final reconciliation of all funds realized thereby, has terminated substantially all of BBB Canada’s employees, and has

² Haddad Affidavit, at para. 4.

³ Haddad Affidavit, at para. 5.

⁴ Haddad Affidavit, at paras. 7-9.

closed all of its stores. The wind down of BBB Canada's retail operations is therefore substantially complete.⁵

B. The D&O Claims Process

12. BBB Canada has developed, in consultation with the Monitor, the proposed D&O Claims Process. The D&O Claims Process is designed to facilitate the continued wind down of BBB Canada's operations by allowing for the the potential universe of claims against BBB Canada's Directors and Officers to be ascertained, determined, and addressed within a structured process. This process is intended to avoid any requirement for BBB Canada to maintain a reserve for potential claims going forward, and allow for the Directors' Charge to be discharged with a view to permitting distributions to BBB Canada's senior secured creditors.⁶

13. Details of the D&O Claims Process are set out in the D&O Claims Procedure Order and in the Haddad Affidavit. Certain aspects of the D&O Claims Process are summarized below:

- (a) BBB Canada will solicit any D&O Claim of any person that may be asserted or made against one or more Directors or Officers of the Applicant or BBB LP, that either: (i) relates to a claim for which the Directors or Officers are by law liable in their capacity as Directors or Officers; or (ii) is in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, which, in either case, is based

⁵ Haddad Affidavit, at para. 9.

⁶ Haddad Affidavit, at paras. 12-13.

in whole or in part on facts existing prior to the Claims Bar Date (as defined below) or that relates to a period of time prior to the Claims Bar Date.⁷

- (b) The D&O Claims Process does not apply to claims that cannot be compromised pursuant to subsections 5.1(2) or 19(2) of the CCAA, and will not solicit direct claims against the Applicant or BBB LP.⁸
- (c) Notice will be provided to all potential claimants as soon as practicable after the date of the D&O Claims Procedure Order, in the following manner: (i) by serving on the Service List copies of the D&O Claims Procedure Order, the Notice to Claimants, and the Proof of Claim; (ii) by posting the same documents on the Monitor's website; and (iii) publishing the Notice to Claimants in the National Edition of the Globe and Mail.⁹
- (d) The claims bar date for any person asserting a D&O Claim is on or before 5:00 p.m. on August 7, 2023 (the "**Claims Bar Date**"). Any person who does not deliver a Proof of Claim by the Claims Bar Date will be forever barred from asserting any D&O Claim which they may hold. Where a D&O Claim is filed in accordance with the D&O Claims Process, a corresponding D&O Indemnity Claim will be deemed to have been filed.¹⁰

⁷ Haddad Affidavit, at para. 14.

⁸ Haddad Affidavit, at paras. 14-15.

⁹ Haddad Affidavit, at para. 16.

¹⁰ Haddad Affidavit, at paras. 18, 20-21.

- (e) All compliant Proofs of Claim will be reviewed by BBB Canada, in consultation with the Monitor and any applicable Directors and Officers, who will either accept, revise, or reject each D&O Claim. BBB Canada and the Monitor are authorized to enter into settlement negotiations and agreements with any claimant and are authorized to use reasonable discretion regarding the compliance of any D&O Claim with the D&O Claims Process.¹¹
- (f) Claimants whose Claims are revised or rejected will be sent a Notice of Revision or Disallowance. A claimant that wishes to dispute a Notice of Revision or Disallowance must: (i) deliver a Notice of Dispute so as to be received by the Monitor no later than 5:00 p.m. on the day that is fifteen days after the date that the claimant is deemed to have received the Notice of Revision or Disallowance; and (ii) within ten days of the delivery of the Notice of Dispute, file a motion with the Court seeking determination of the D&O Claim in question. Any claimant who fails to do so will be deemed to have accepted the amount of its D&O Claim as set out in the applicable Notice of Revision or Disallowance.¹²

PART III - ISSUES AND THE LAW

14. The sole issue on this motion is whether this Court should approve the proposed D&O Claims Process.

A. The D&O Claims Process Should be Approved

¹¹ Haddad Affidavit, at paras. 22, 24-25.

¹² Haddad Affidavit, at para. 22.

(a) Authority to Approve a Claims Process

15. Section 11 of the CCAA gives the Court the power to make any order it considers appropriate in the circumstances, which includes the ability to approve a process for filing and determining claims against a debtor company and/or the directors and officers of the company.¹³

16. The general practice in CCAA proceedings is for debtors to apply to the Court for approval of a process to solicit claims against the debtor company and its directors and officers and to establish a deadline for filing claims. This Court routinely approves claims processes in CCAA proceedings, which has become a “well accepted practice.”¹⁴ Even where there is no plan contemplated, as here, a claims procedure order (and in particular, a claims bar date) assists the debtor in determining the universe of claims against itself or against its directors and officers.¹⁵

17. Claims procedure orders should be both flexible and expeditious, in order to achieve the remedial objectives of the CCAA and ensure that stakeholders are treated as advantageously and fairly as the circumstances permit.¹⁶ The order should be drafted carefully to ensure that it is fair and reasonable to all affected stakeholders.¹⁷ Whether these criteria are satisfied depends on all of the circumstances.

¹³ *Re Toys “R” Us (Canada) Ltd.*, [2018 ONSC 609](#) [Commercial List] at para. 8 [“Toys “R” Us”]; *Re Timminco Ltd.*, [2014 ONSC 3393](#) at para. 40 [“Timminco”].

¹⁴ *Re ScoZinc Ltd.*, [2009 NSSC 136](#) at para. 23 [“ScoZinc”]; see also *Toys “R” Us*, at para. 8; see also *Re U.S. Steel Canada Inc.*, [2017 ONSC 1967](#) [*U.S. Steel*] at paras. 5-6

¹⁵ See, for example, *Re Aralez Pharmaceuticals*, (October 10, 2018), Ont. S.C.J. [Commercial List], Court File No. CV-18-603054-00CL ([Claims Procedure Order](#)), and *Re Timminco*, (June 15, 2012), Ont. S.C.J. [Commercial List], Court File No. CV-12-9539-00CL ([Claims Procedure Order](#)).

¹⁶ *ScoZinc, Ltd.*, at para. 23; *Re Laurentian University of Sudbury*, [2021 ONSC 3885](#) [“Laurentian”] at para. 30.

¹⁷ *Laurentian* at para. 32.

18. The proposed D&O Claims Process satisfies all of these requirements and should be approved. The D&O Claims Process was developed following extensive consultation with the Monitor, and the Monitor supports the establishment of the D&O Claims Process in the form contained in the proposed D&O Claims Procedure Order.¹⁸

19. Further, the proposed D&O Claims Process is in the interests of all stakeholders. Commencing the D&O Claims Process at this time will facilitate the continued wind down of BBB Canada's operations by allowing BBB Canada, the Monitor, and the applicable Directors and Officers, to assess the nature, quantum, and priority of any potential D&O Claims efficiently and effectively. This will in turn address any requirement to maintain reserve funds moving forward and permit the release of the Directors' Charge, such that distributions to BBB Canada's senior secured creditors can be made and the CCAA proceedings concluded (which relief will be sought on a further motion by BBB Canada to this Court at a later date).¹⁹

20. In addition to facilitating the continued wind down of BBB Canada's operations, the Proposed D&O Claims Process also provides a fair and reasonable process which incorporates steps to ensure that potential claimants are informed of the process and have the opportunity to assert their claims:

- (a) materials related to the D&O Claims Process will be publicly available in a national newspaper, on the Monitor's website and served on the Service List;²⁰

¹⁸ Haddad Affidavit, at paras. 13, 26.

¹⁹ Haddad Affidavit, at para. 13.

²⁰ Haddad Affidavit, at para. 16.

- (b) if BBB Canada or the Monitor becomes aware of any person having a D&O Claim, the Monitor will direct such claimant to the Monitors' Website;²¹
- (c) where a potential claimant requests further documents or information, the Monitor will provide the claimant with such documents or information, or otherwise respond to the request as the Monitor considers appropriate;²² and
- (d) Claimants whose D&O Claims are revised or disallowed will be informed of this decision and will be afforded ample time to file a Notice of Dispute.²³

21. The Claims Bar Date is also fair and reasonable in the circumstances. The Claims Bar Date was selected by BBB Canada in consultation with the Monitor. BBB Canada and the Monitor believe that the Claims Bar Date is reasonable and provides sufficient time for potential Claimants to evaluate and submit a Proof of Claim or Notice of Dispute, while simultaneously recognizing the limited scope of the potential D&O Claims and the limited number of potential claimants.²⁴ In doing so, it satisfies the purpose of claims processes, which is “to streamline the resolution of claims against an insolvent debtor in the most time sensitive and cost efficient manner.”²⁵

22. The proposed D&O Claims Process will determine the nature, quantum, and validity of the D&O Claims in order to facilitate these final stages of the orderly and efficient wind-down of BBB Canada's business. This purpose is consistent with the recognition of one objective of the CCAA

²¹ Haddad Affidavit, at para. 17.

²² Haddad Affidavit, at para. 17.

²³ Haddad Affidavit, at para. 22.

²⁴ Haddad Affidavit, at para. 19.

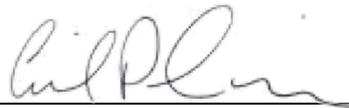
²⁵ *Re Canwest Global Communications Corp.*, [2011 ONSC 2215](#) [Commercial List] at para. 40.

– the orderly wind-down of a business. The proposed D&O Claims Procedure Order is fair, reasonable and within this Court’s jurisdiction to grant under the broad authority conferred under section 11 of the CCAA. BBB Canada submits that the D&O Claims Process should therefore be approved, and the D&O Claims Procedure Order granted.

PART IV - NATURE OF THE ORDER SOUGHT

23. The Applicant therefore requests an order substantially in the form attached at Tab 3 to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of July, 2023.



Per Marc Wasserman / Shawn Irving / Dave
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SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *Re Aralez Pharmaceuticals*, (October 10, 2018), Ont. S.C.J. [Commercial List], Court File No. CV-18-603054-00CL ([Claims Procedure Order](#))
2. *Re Canwest Global Communications Corp.*, [2011 ONSC 2215](#) [Commercial List]
3. *Re Laurentian University of Sudbury*, [2021 ONSC 3885](#)
4. *Re ScoZinc Ltd.*, [2009 NSSC 136](#)
5. *Re Timminco Ltd.*, [2014 ONSC 3393](#)
6. *Re Timminco*, (June 15, 2012), Ont. S.C.J. [Commercial List], Court File No. CV-12-9539-00CL ([Claims Procedure Order](#)).
7. *Re Toys “R” Us (Canada) Ltd.*, [2018 ONSC 609](#) [Commercial List]
8. *Re U.S. Steel Canada Inc.*, [2017 ONSC 1967](#)

SCHEDULE “B”: TEXT OF STATUTES, REGULATIONS & BY-LAWS

COMPANIES’ CREDITORS ARRANGEMENT ACT

R.S.C., 1985, c. C-36, as amended

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[...]

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[...]

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

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