

**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**

November 15, 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, as amended (the “**CCAA**” and the within proceedings, the “**CCAA Proceedings**”) 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 these CCAA Proceedings (the “**Monitor**”).

2. The CCAA Proceedings are nearing completion. All lease assignment transactions entered into by BBB Canada and approved by this Court have now closed, together with four additional transactions that did not require court approval. The Liquidation Sale (as defined below) is now complete, and BBB Canada has completed the wind down of its retail operations across Canada. Following the granting of a D&O Claims Procedure Order (the “**D&O Claims Procedure Order**”), one Proof of Claim was submitted, by His Majesty the King in right of the Province of

British Columbia against the previous directors of BBB LP for alleged outstanding provincial sales tax owing by BBB LP. This claim has since been accepted by BBB Canada and paid in full.

3. In or about August 2023, BBB Canada became aware that the Canada Revenue Agency (“**CRA**”) had commenced an audit of BBB Canada’s GST/HST returns for the period from March 1, 2021 to February 28, 2023 (the “**CRA Audit**”). BBB Inc. retained Deloitte to assist BBB Canada in responding to the CRA Audit. Deloitte concluded, and delivered a submission to the CRA, that no additional amounts were owing by BBB Canada. The CRA did not accept Deloitte’s submissions, and instead informed BBB Canada on November 1, 2023, that the CRA Audit was now complete and that BBB Canada owed \$2,084,044.28 on account of GST/HST. BBB Canada intends to appeal the CRA assessment (in such case, the “**CRA Audit Appeal**”).

4. BBB Canada seeks to extend the Stay Period until May 22, 2024 to allow it to pursue the CRA Audit Appeal. A further motion for termination of the CCAA Proceedings and discharge of the Monitor will be brought by BBB Canada as soon as it is in a position to do so.

## **PART II - SUMMARY OF THE FACTS**

### **A. Background and Update on the CCAA Proceeding**

5. 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 Proceedings; and (b) granted a stay of proceedings in favour of the Applicant until and including February 21, 2023, or such later date as the Court may order (the “**Stay Period**”).<sup>1</sup>

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<sup>1</sup> Affidavit of Michael Goldberg, sworn November 13, 2023, at paras. 4-5 [“**Goldberg Affidavit**”].

6. On February 21, 2023, the Court granted an Amended and Restated Initial Order (the “**ARIO**”) which, among other things, extended the Stay Period, approved a key employee retention plan, and granted a charge to secure the amounts expected to be paid thereunder. On the same day, the court granted a Sale Approval Order, which approved BBB Canada entering into a consulting agreement with the Consultant 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**”).<sup>2</sup>

7. Following the completion of the Liquidation Sale and the closing of the various lease assignment transactions, on July 6, 2023, BBB Canada sought, and the Court granted, the D&O Claims Procedure Order establishing a process for ascertaining, determining and addressing the universe of claims against BBB Canada’s Directors and Officers. The D&O Claims Procedure Order established a claims bar date of August 7, 2023 (the “**Claims Bar Date**”).<sup>3</sup>

8. One Proof of Claim was received by BBB Canada on or before the Claims Bar Date. Specifically, His Majesty the King in right of the Province of British Columbia filed a Proof of Claim against the previous directors of BBB LP in the amount of \$489,528.95 for outstanding provincial sales tax owing by BBB LP for the period ending December 31, 2022 (the “**BC Tax Claim**”). BBB Canada has since confirmed that the BC Tax Claim was valid and paid the claim in full.<sup>4</sup>

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<sup>2</sup> Goldberg Affidavit at para. 6.

<sup>3</sup> Goldberg Affidavit at para. 8.

<sup>4</sup> Goldberg Affidavit at paras. 9-10.

## **B. CRA Audit**

9. In addition to the BC Tax Claim, in or about August 2023, BBB Canada became aware that the CRA had commenced an audit of BBB Canada's GST/HST returns for the period from March 1, 2021 to February 28, 2023. BBB Inc. retained Deloitte to assist BBB Canada in responding to the audit. Deloitte reviewed BBB Canada's records for the 2021 and 2022 taxation years and performed a reconciliation of all reported GST/HST with that accrued and paid by BBB Canada. On the basis of that review, Deloitte delivered a submission to the CRA on October 11, 2023, asserting that in its view no additional amounts were owing in respect of the 2021 and 2022 taxation years.<sup>5</sup>

10. The CRA did not accept Deloitte's submissions, and on November 1, 2023, BBB Canada received a letter from the CRA, advising that the CRA Audit was complete, and that the CRA had concluded that BBB Canada owed \$2,084,044.28 on account of GST/HST (the "**CRA Assessment**").<sup>6</sup>

11. Based on the advice of Deloitte, BBB Canada intends to file the CRA Audit Appeal.<sup>7</sup>

## **C. Distribution of BBB Canada Cash**

12. Since late March 2023, BBB Canada has been maintaining a minimum balance of \$6 million (the "**Minimum Balance**") in its bank accounts in accordance with the ARIO.<sup>8</sup>

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<sup>5</sup> Goldberg Affidavit at paras. 11-12.

<sup>6</sup> Goldberg Affidavit at para. 13.

<sup>7</sup> Goldberg Affidavit at para. 14.

<sup>8</sup> Goldberg Affidavit at para. 15.

13. In late September, BBB Inc.'s financial advisor (the "**Financial Advisor**") reached out to BBB Canada and the Monitor to advise that, as a result of the impending implementation of the Chapter 11 Plan, all of the remaining employees of BBB Inc. would be terminated or deemed terminated as of the Plan Implementation Date, including those employees who had been administering BBB Inc.'s cash management system (which included the Canadian bank accounts of BBB Canada) and indicated that the individuals who were in the process of being retained by the Plan Administrator to wind-down the Chapter 11 estate (all of whom would reside in the United States) were not comfortable being named as signatories of bank accounts located in Canada. As a result, all of BBB Canada's remaining cash in the Canadian accounts (the "**BBB Canada Cash**") was to be transferred to the U.S. accounts.<sup>9</sup>

14. The Monitor expressly advised the Financial Advisor that the BBB Canada Cash must be held in a segregated bank account in light of these CCAA Proceedings and the terms of the ARIO, including, among others, the requirement to maintain the Minimum Balance and the encumbrances created by the Charges (as defined in the ARIO). Despite this, substantially all of the BBB Canada Cash (totally approximately \$6.1 million) was inadvertently transferred to a US concentration account, where it was comingled with other funds, and then distributed to the Lenders in accordance with the Chapter 11 Plan. As a result, BBB Canada no longer holds cash in an amount equal to the Minimum Balance.<sup>10</sup>

15. Upon learning of this distribution, meetings were held between BBB Canada, the Monitor, and the Lenders, among others, to explore options to remedy the situation. The Lenders advised

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<sup>9</sup> Goldberg Affidavit at para. 16.

<sup>10</sup> Goldberg Affidavit at para. 17.

BBB Canada that they could not promptly return the BBB Canada Cash to BBB Canada. Accordingly, the U.S. Plan Administrator has agreed, with the Lenders' consent, to segregate and hold in trust for the benefit of BBB Canada CAD \$3 million from the cash that is expected to be received by the Plan Administrator through the wind-down of the Chapter 11 estates, which cash would otherwise be distributed to the Lenders (the "**Segregated Amount**"). A Reimbursement Agreement is currently being drafted with the involvement of the Monitor and is expected to be in place prior to the hearing of this motion. The Reimbursement Agreement is forecast to provide sufficient liquidity for any potential priority payables.<sup>11</sup>

### **PART III - ISSUES AND THE LAW**

16. This factum addresses the following issue:

(a) This Court should extend the Stay Period to May 22, 2024.

#### **A. Extension of Stay Period**

17. Section 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court that: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted, and is acting, in good faith and with due diligence.

18. The current Stay Period expires on November 22, 2023. The Applicant is seeking to extend the Stay Period to May 22, 2024. The extension of the Stay Period is necessary and appropriate in the circumstances to maintain continued stability for BBB Canada while it works diligently, in

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<sup>11</sup> Goldberg Affidavit at paras. 19-21; Eighth Report of the Monitor at para. 5.5.

good faith and in consultation with the Monitor and Deloitte, to address the CRA Audit and the CRA Audit Appeal.<sup>12</sup>

19. The costs of these CCAA Proceedings on a go forward basis are expected to be minimal given that BBB Canada has ceased operations, sold or disclaimed all assets and property, and terminated all employees. Almost all matters to be attended to in connection with the CCAA Proceeding have been completed, except for the CRA Audit Appeal. Anticipated costs through the extended Stay Period will be funded by retainers provided by BBB Canada to its counsel prior to the Filing Date, and by the limited cash remaining in BBB Canada's bank accounts for the professional fees of the Monitor and its counsel incurred in connection with these CCAA Proceedings.<sup>13</sup> Therefore, subject to the finalization of the Reimbursement Agreement, BBB Canada is forecast to have sufficient liquidity to fund the CCAA Proceedings through the proposed extension of the Stay Period.<sup>14</sup>

20. BBB Canada has acted, and continues to act, in good faith and with due diligence in these CCAA Proceedings. The proposed extension of the Stay Period is appropriate and necessary in the circumstances.<sup>15</sup>

21. The Monitor supports the requested extension to the Stay Period, which it views as reasonable and appropriate in the circumstances.<sup>16</sup>

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<sup>12</sup> Goldberg Affidavit at para. 22.

<sup>13</sup> Goldberg Affidavit at para. 23.

<sup>14</sup> Eighth Report of the Monitor at para. 5.5.

<sup>15</sup> Goldberg Affidavit at para. 24.

<sup>16</sup> Goldberg Affidavit at para. 24; Eighth Report of the Monitor at para. 8.1.

**PART IV - NATURE OF THE ORDER SOUGHT**

22. The Applicant therefore requests an Order substantially in the form attached at **Tab 3** to the Motion Record extending the Stay Period to May 22, 2024.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15<sup>th</sup> day of November, 2023.



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**SCHEDULE "A": LIST OF AUTHORITIES**

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

### *COMPANIES’ CREDITORS ARRANGEMENT ACT*

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

#### **Stays, etc. — initial application**

**11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Stays, etc. — other than initial application**

**(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

#### **Burden of proof on application**

**(3)** The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

**(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Restriction**

**(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

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LTD.**

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

Applicant

*Ontario*  
**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at: TORONTO

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