

**SUPERIOR COURT OF JUSTICE - ONTARIO**

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

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

**BEFORE:**    Chief Justice Geoffrey B. Morawetz

**COUNSEL:**   *Shawn Irving and David Rosenblat*, for BBB Canada Ltd. and Bed Bath & Beyond  
Inc.

*Wael Rostom*, for Sixth Street Specialty Lending, Inc.

*Mike Shakra and Joshua Foster*, for the Monitor Alvarez & Marsal Canada Inc.

**HEARD and**

**DETERMINED:**    December 1, 2023

**REASONS:**        January 19, 2024

**ENDORSEMENT**

[1]    In a motion returnable November 17, 2023, BBB Canada Ltd. (the "BBB Canada" or the "Applicant") sought an extension of the Stay Period to May 22, 2024. The Monitor supported the position of the Applicant and there was no opposition to the requested relief.

[2]    At the hearing, I expressed a degree of concern which is reflected in paras. [3]-[6] of the endorsement issued that day.

[3]    Having reviewed the record, there is one issue which, in my view, requires clarification. It concerns the role of the Financial Advisor to BBB Inc., in connection with the transfer of approximately \$6.1 million from BBB Canada to a US concentration account, where it was co-mingled with other funds, and then distributed to the Lenders in accordance with the Chapter 11 Plan. The point that requires clarification is that at the time of the transfer, the terms of the Amended and Restated Initial Order ("ARIO") required BBB Canada to maintain a minimum balance of \$6 million in its bank account, subject to the consent of the Monitor to a consensual reduction.

[4]    The parties involved in the transfer of funds are directed to provide clarification of events relating to this transfer.

[5] With respect to the request to extend the Stay Period, I am satisfied that the Applicant has acted and continues to act in good faith and with due diligence in these proceedings. The Record establishes that steps have been taken to enter into a Reimbursement Agreement in the amount of US \$3 million, so as to ensure that the Applicant is able to pay any potential priority obligations, including those subject to the Charges (as defined in the ARIO) – which rank in priority to claims of the Lenders.

[6] Accordingly, I am prepared to extend the Stay Period up to December 1, 2023. A hearing is now scheduled for that day so that affected parties have the opportunity to clarify issues surrounding the transfer of funds from BBB Canada to the US concentration account. In arriving at this conclusion, I am satisfied that the Record establishes that the Applicant will have sufficient financial resources to conduct operations during the extension of the Stay Period.

[3] The Stay Period was extended to December 1, 2023. A hearing was scheduled for that day so that affected parties would have an opportunity to clarify issues surrounding the transfer of funds.

[4] On December 1, 2023 I granted the Stay Extension motion with reasons to follow. These are the reasons.

[5] On November 17, 2023, the evidence consisted of the Affidavit of Michael Goldberg, sworn November 13, 2023, the Eighth Report of the Monitor and the Affidavit of Joshua Foster, sworn November 16, 2023.

[6] For the December 1, 2023 hearing, additional evidence was filed, namely the Supplementary Affidavit of Mr. Goldberg sworn November 30, 2023, the Affidavit of Kent Percy, sworn November 29, 2023 and the Supplement to the Eighth Report of the Monitor, Alvarez & Marsal Canada Inc. (the “Monitor”).

[7] BBB Canada received an assessment from Canada Revenue Agency on November 1, 2023 in the amount of \$2,084,044.28 for unpaid GST/HST. BBB Canada seeks to extend the Stay Period to May 22, 2024 (the “Extended Stay Period”) in order to maintain continued stability for BBB Canada while it addresses the CRA Audit, including potentially pursuing an appeal of the CRA assessment.

[8] The evidence establishes that the Applicant will have sufficient resources to sustain its operations during the Extended Stay Period.

[9] The outstanding issue to address is the transfer of \$6.1 million from BBB Canada to the U.S. concentration account. This transfer contravened the provisions of the ARIO which, as noted, requires BBB Canada to maintain a minimum balance of \$6 million (the “Minimum Balance”) in its bank account, subject to the consent of the Monitor to a consensual reduction. No such consent had been provided by the Monitor.

[10] In his November 13, 2023 affidavit, Mr. Goldberg acknowledges the requirement to maintain the Minimum Balance.



[11] Mr. Goldberg then explains that in late September, 2023, BBB Inc.'s financial advisor, AlixPartners (the "Financial Advisor") advised that the remaining employees of BBB Inc. would be 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). The Financial Advisor indicated that the employees who were in the process of being retained by Mr. Goldberg, in his capacity as Plan Administrator, to wind-down the estate were not comfortable being named signatories of bank accounts located in Canada and as a result, all of BBB Canada's remaining cash in the Canadian accounts (the "BBB Canada Cash") was to be transferred to U.S. accounts.

[12] Mr. Goldberg further states that he was advised by counsel to the Applicant that the Monitor expressly advised the Financial Advisor that BBB Canada Cash must be held in a segregated bank account in light of the CCAA proceedings and the terms of the ARIO. However, subsequent to his appointment as Financial Advisor, Mr. Goldberg learned that this did not occur. The funds had been transferred to a U.S. concentration account, where they were co-mingled with other funds, and then subsequently distributed to the lenders (the "Lenders") in accordance with the Chapter 11 Plan.

[13] Subsequently, the Lenders advised BBB Canada and the Monitor that they were not able to promptly return the BBB Canada Cash to BBB Canada.

[14] The Eighth Report of the Monitor references that the BBB Canada cash was inadvertently transferred to one of BBBI's U.S. concentration accounts. The factum submitted by Applicant's counsel also references the transfer as being inadvertent. The affidavit of Mr. Goldberg makes no mention of the transfer having been made through inadvertence.

[15] It was anticipated that the Chapter 11 Debtors would receive at least USD \$3 million in connection with continuing realization efforts in the Chapter 11 Proceedings. In order to ensure that BBB Canada had sufficient cash to satisfy any potential priority obligations, the Plan Administrator agreed, with the Lenders' consent, to segregate Cdn. \$3 million from the available cash that would otherwise be distributed to the Lenders (the "Segregated Amount"), for the benefit of BBB Canada. To that end, BBB Canada and the Plan Administrator, with the support of the Monitor, embarked upon the process of drafting an agreement (the "Reimbursement Agreement") the terms of which will provide that the Plan Administrator will hold the Segregated Amount in his possession in trust for the benefit of BBB Canada.

[16] Mr. Percy, a partner and Managing Director of AlixPartners, states that Holly Etlin, also of AlixPartners served as Chief Restructuring Officer and Chief Financial Officer to Bed Bath & Beyond Inc. ("BBBI") and its various U.S. and Canadian subsidiaries, including the Applicant. His affidavit states in part:

10. The Monitor responded to me later that day (September 26, 2023) seeking confirmation that the U.S. concentration account would remain under the control of the Plan Administrator (following the Plan Implementation Date) and that the BBB Canada Cash would be subject to the Minimum Balance. On September 29, 2023, my colleague, Hart Ku, informed the Monitor that the funds were not transferred to a segregated account. In response, the Monitor inquired whether



AlixPartners had included instructions with the funds transfer explaining that the BBB Canada Cash was not to be released to any of the Chapter 11 Debtors or secured creditors unless the Monitor provided its consent....

11. At various points in September and October 2023, AlixPartners provided the Plan Administrator and certain consultants engaged by the Plan Administrator with a transition report which included a note that the "CCAA has defined the Minimum Cash Balance of CAN \$6 million".... I do not recall having any further discussions with Mr. Goldberg about the Minimum Balance or the requirement to maintain same. I did not in any way intend to contravene the terms of the ARIO or the direction of the Monitor.

[17] Mr. Goldberg, in his Supplementary Affidavit, states the following:

[4] I have read the Affidavit of Mr. Kent Percy of AlixPartners sworn November 29, 2023. I can confirm that while I did receive a copy of the transition report which is referenced in para 11 of Mr. Percy's affidavit, I did not have any discussions or other communication with Mr. Percy or anyone else about the BBB Canada Cash or any requirement by the CCAA Court to maintain the Minimum Balance, and since my appointment, the account balance of the Chapter 11 Debtors' wind down estate has never gone below USD \$6 million.

[5] At my direction, a USD \$10 million distribution was made to the Lenders on October 20, 2023 from the U.S. concentration account. The funds in the U.S. concentration account included the BBB Canada Cash that was transferred from BBB Canada's Canadian accounts on September 27, 2023 (prior to my appointment as Plan Administrator). In directing the distribution, there was (and is) no intention on the part of the Plan Administrator to contravene the ARIO or any direction of the CCAA Court.

[6] Attached as Exhibit "A" to the affidavit of Joshua Foster, sworn November 16, 2023, is a copy of the Reimbursement Agreement entered into between the Plan Administrator and the Monitor, ... to address the distribution of the Minimum Balance in a manner satisfactory to BBB Canada and the Monitor. I can confirm that I have now segregated with the Lenders' consent CAD \$2.9 million for the benefit of BBB Canada.

[18] Based on the foregoing, I find that the Monitor was aware of the requirements of the ARIO and brought this to the attention of the Financial Advisor.

[19] Further, the evidence establishes that there was no intention to contravene the ARIO or any direction from this Court.

[20] I am satisfied that, with the execution of the Reimbursement Agreement, it appears that no creditor of the Applicant will be prejudiced by the inappropriate transfer of funds to the U.S. concentration account.


[21] I am satisfied that the Applicant has been and continues to act in good faith and with due diligence such that the request to extend the Stay Period to May 22, 2024 is reasonable in the circumstances. As noted, the evidence establishes that the Applicant expects to have sufficient financial resources to sustain itself during this Extended Stay Period.

[22] However, it is important to emphasize that there was a breach of a provision of the ARIO.

[23] Although I accept that there was no intention to breach the specific term of the ARIO, I can only conclude that the breach occurred as a result of miscommunication as between representatives of the Financial Advisor and the Plan Administrator and/or a lack of oversight of the individuals who had signing authority over the accounts in question. In addition, I note that the distribution was made on October 20, 2023. The issue only came to the Court's attention when the materials for the November 17, 2023 motion were filed. At a minimum, when the parties became aware of the transfer, immediate steps should have been taken to bring this matter to the attention of the Court. I acknowledge that steps were taken to remedy the situation through the Reimbursement Agreement, but that does not excuse the fact that disclosure to the Court should have been made at the first opportunity.

[24] The parties involved must take the necessary steps to ensure that their internal processes are reviewed so as to avoid a recurrence or repetition of events that led to the failure to adhere to an order of this Court.

[25] In the result, the Stay Period is extended until May 22, 2024.



Chief Justice Geoffrey B. Morawetz

**Date:** January 19, 2024