

**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**

June 18, 2023

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**TO: SERVICE LIST**

## 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 the CCAA Proceedings (the “**Monitor**”).

2. The CCAA Proceedings are nearly complete. 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) has been completed, 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, which had since been paid in full. On November 1, 2023, the Canada Revenue Agency (the “**CRA**”) delivered a notice of assessment (the “**CRA Assessment**”) to BBB Canada, which has also been paid in full.

3. Following payment to the CRA, all matters to be attended to in connection with the CCAA Proceedings have been completed. The Applicants therefore seek an order (the “**CCAA Termination Order**”) terminating the CCAA Proceedings, discharging the Monitor, and providing other related relief. The CCAA Termination Order should be granted so these CCAA Proceedings can be brought to an orderly close, providing certainty and finality for all parties.

## PART II - SUMMARY OF THE FACTS

4. The facts are more fully set out in the Affidavit of Michael Goldberg.<sup>1</sup>

### 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>2</sup>

6. On February 21, 2023, the Court granted an Amended and Restated Initial Order (the “**ARIO**”) which, among other things, extended the Stay Period. 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>3</sup>

7. On April 11, April 28 and May 15, 2023, the Court granted four Assignment, Approval and Vesting Orders (collectively, the “**Assignment, Approval and Vesting Orders**”), which, among other things, approved a number of transactions entered into as part of the Liquidation Sale. The transactions subject to the Assignment, Approval, and Vesting Orders have since closed, along

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<sup>1</sup> Affidavit of Michael Goldberg, sworn June 13, 2024 [Goldberg Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the Goldberg Affidavit.

<sup>2</sup> Goldberg Affidavit, at paras. 5-6.

<sup>3</sup> Goldberg Affidavit at para. 7.

with four other transactions which did not require court approval. The Liquidation Sale is therefore complete, and the reconciliation of all funds realized thereby has been finalized.<sup>4</sup>

8. Following the completion of the Liquidation Sale, the Court granted the D&O Claims Procedure Order, which established a process for ascertaining, determining and addressing the universe of claims against BBB Canada's Directors and Officers.<sup>5</sup> Only one Proof of Claim was received by BBB Canada on or before the Claims Bar Date, from His Majesty the King in right of the Province of British Columbia in the amount of \$489,528.95 for outstanding provincial sales tax owing by BBB LP (the "**BC Tax Claim**"). The BC Tax Claim has been paid in full.<sup>6</sup>

9. Throughout this process, the Stay Period has been extended on numerous occasions, most recently to June 21, 2024.<sup>7</sup>

## **B. Resolution of the CRA Audit**

10. On November 1, 2023, the CRA delivered CRA Assessment which, among other things, informed BBB Canada that the CRA had concluded that BBB Canada owed \$2,084,044.28. After reviewing the matter, BBB Canada filed a notice of objection to the CRA Assessment in late March 2024. Subsequently, BBB Canada and the senior lenders under the Amended Credit Agreement (the "**Lenders**") were advised by BBB Canada's tax advisor, Deloitte LLP, that the CRA typically takes approximately one year to assign an appeal to an agent and start the review process. Based on this information, the Lenders (who solely stood to benefit if the CRA Appeal was granted) and

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<sup>4</sup> Goldberg Affidavit at paras. 9-11.

<sup>5</sup> Goldberg Affidavit at para. 8.

<sup>6</sup> Goldberg Affidavit at paras. 12-13.

<sup>7</sup> Goldberg Affidavit at para. 8.

BBB Canada decided to pay the GST/HST amounts owing to the CRA as per the CRA Assessment, and on June 13, BBB Canada made a payment to the CRA in the amount of \$522,009.07 on account of the GST/HST owing (the “**CRA Payment**”).<sup>8</sup>

**C. BC Employer Health Tax Claim**

11. On or around March 24, 2024, BBB Canada received a statement of account from the British Columbia Employer Health Tax Collection Department, claiming that BBB Canada owed \$204,496.64 with respect to that tax with the year ended December 31, 2022 (the “**BC Employer Health Tax Claim**”). As this is a pre-filing claim that is not secured by any charge, BBB Canada does not intend to pay the BC Employer Health Tax Claim.<sup>9</sup>

**D. Update on the BBB Canada Cash**

12. On November 16, 2023, BBB Canada and the Plan Administrator entered into the “**Reimbursement Agreement**,” whereby the Plan Administrator agreed to segregate and hold in trust CAD \$3 million from the available cash that would otherwise be distributed to the Lenders for the benefit of BBB Canada (the “**BBB Canada Trust Monies**”).<sup>10</sup>

13. Since that time, BBB Canada and the Plan Administrator have taken all steps required to ensure that they remain in compliance with the Reimbursement Agreement and the Orders of this Court. Since the date of the Reimbursement Agreement, the Plan Administrator has made the CRA

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<sup>8</sup> Goldberg Affidavit at paras. 14-15.

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

<sup>10</sup> Goldberg Affidavit at para. 19. Further details regarding the establishment of the Reimbursement Agreement are set out in the Goldberg Affidavit at paras. 17-20, and the Affidavits of Michael Goldberg sworn November 13, 2023 and November 29, 2023.

Payment and has disbursed approximately CAD \$150,000 to the Monitor and to BBB Canada's counsel in respect of professional fees incurred in the course of the CCAA Proceedings. Approximately USD \$1.8 million of the BBB Canada Trust Monies remains segregated and held in trust.<sup>11</sup>

14. It is anticipated that the Reimbursement Agreement will be terminated following the payment of all amounts secured by the Administration Charge and the granting of the proposed CCAA Termination Order.<sup>12</sup>

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

15. This factum addresses the following issue:

- (a) This CCAA Proceedings should be terminated;
- (b) This Court should grant the Releases; and
- (c) This Court should extend the Stay Period to June 21, 2024.

#### **A. The CCAA Proceedings Should be Terminated**

16. With the remittance of the CRA Payment, all matters to be attended to in connection with these CCAA Proceedings are now complete. BBB Canada has completed the wind-down of its retail operations in Canada, terminated all of its employees, closed all of its stores, and disclaimed all leases not previously assigned or surrendered.<sup>13</sup> The Claims Procedure has been completed, and

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<sup>11</sup> Goldberg Affidavit at para. 21.

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

<sup>13</sup> Goldberg Affidavit at para. 11.

all claims received have been resolved. All amounts due under the KERP and secured by the KERP Charge have been paid.<sup>14</sup>

17. The Applicants are accordingly seeking an Order terminating the CCAA Proceedings, discharging the Monitor from all further duties, and, subject to the payment in full of all amounts owing to the beneficiaries of the Administration Charge, terminating, releasing, and discharging all of the Charges (as defined in the ARIO).<sup>15</sup>

18. It is well established that this Court may grant an order terminating proceedings under the CCAA on terms similar to those sought in the proposed CCAA Termination Order.<sup>16</sup> Such orders have frequently included provisions explicitly:

- (a) terminating the CCAA proceedings upon the issuance of the termination order;<sup>17</sup>

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<sup>14</sup> Tenth Report of the Monitor, dated June 18, 2024, at para. 4.2(e) [Tenth Report].

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

<sup>16</sup> See, e.g., *Re Cline Mining Corporation et al.*, (July 30, 2015), Ont. S.C.J. [Commercial List], CV-14-10781-00CL ([CCAA Termination Order](#)) [*Cline Mining Termination Order*]; *Re David's Bridal et al.*, (September 29, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698107-00CL ([Termination of CCAA Proceedings Order](#)) [*David's Bridal Termination Order*]; *Re Express Fashion Apparel Canada Inc. et al.*, (December 8, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11785-00CL ([Stay Extension & Discharge & Termination Order](#)) [*Express Termination Order*]; *Re Forever XXI ULC*, (September 28, 2022), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([CCAA Termination Order](#)) [*Forever XXI Termination Order*]; *Re Golf Town et al.*, (March 29, 2018), Ont. S.C.J. [Commercial List], Court File No. CV-16-11527-00CL ([CCAA Termination Order](#)) [*Golf Town Termination Order*]; *Re Harte Gold Corp. et al.*, (February 15, 2021), Ont. S.C.J. [Commercial List], Court File No. CV-21-00673304-00CL ([CCAA Distribution and Termination Order](#)) [*Harte Gold Termination Order*]; *Re McEwan Enterprises Inc.*, (December 21, 2021), Ont. S.C.J. [Commercial List], Court File No. CV-21-00669445-00CL ([CCAA Termination Order](#)) [*McEwan Termination Order*]; *Re Sears Canada Inc. et al.*, (October 25, 2021), Ont. S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([CCAA Termination Order](#)) [*Sears Termination Order*]; *Re Target Canada Co. et al.*, (October 18, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-15-10832-00CL ([Discharge Order](#)) [*Target Termination Order*].

<sup>17</sup> See, i.e., *Cline Mining Termination Order* at para. 2; *Target Termination Order* at para. 4.

- (b) discharging the monitor from all further duties, obligations, and responsibilities as monitor, while authorizing the monitor, notwithstanding its discharge, to address any matters that are ancillary or incidental to the CCAA proceedings;<sup>18</sup> and
- (c) terminating, releasing and discharging any charges connected to the CCAA proceeding.<sup>19</sup>

19. The proposed CCAA Termination Order is appropriate in the circumstances and provides for an effective and appropriate process whereby the CCAA Proceedings may be terminated.

#### **B. The Releases Should be Granted**

20. The proposed CCAA Termination Order provides for a release of all claims against the Monitor, counsel to the Monitor, and counsel to BBB Canada (the “**Released Parties**”). This Court has the jurisdiction to render orders approving releases, and equivalent releases are commonly found in orders terminating proceedings under the CCAA.<sup>20</sup>

21. The Released Parties have significantly contributed to the CCAA Proceedings, including by conducting and overseeing the Liquidation Sale and the various lease assignment transactions. Further, the proposed releases are appropriately limited in scope, and do not apply in respect of

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<sup>18</sup> See, i.e., *Cline Mining Termination Order* at para. 13; *Golf Town Termination Order* at para. 12; *Harte Gold Termination Order* at para. 15; *McEwan Termination Order* at para. 14

<sup>19</sup> See, i.e., *Cline Mining Termination Order* at para. 3; *David's Bridal Termination Order* at para. 6; *Harte Gold Termination Order* at para. 14; *McEwan Termination Order* at para. 12; *Sears Termination Order* at para. 4; *Target Termination Order* at para. 12.

<sup>20</sup> See, i.e., *Express Termination Order* at para. 7, *Forever XXI Termination Order* at para. 15; *Golf Town Termination Order* at para. 14.



any claim or liability arising out of gross negligence or willful misconduct on the part of the Released Parties.<sup>21</sup>

22. Granting the releases will provide certainty and finality, and in the interest of all parties. The Monitor supports granting the proposed releases.<sup>22</sup>

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

23. The Applicant therefore requests the CCAA Termination Order substantially in the form attached at **Tab 3** to the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 18<sup>th</sup> day of June, 2024.



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<sup>21</sup> Goldberg Affidavit at paras. 25-26.

<sup>22</sup> Goldberg Affidavit at para. 27; Tenth Report at paras. 4.2(g)-(h).

## SCHEDULE “A”: LIST OF AUTHORITIES

1. *Re Cline Mining Corporation et al.*, (July 30, 2015), Ont. S.C.J. [Commercial List], CV-14-10781-00CL ([CCAA Termination Order](#))
2. *Re David's Bridal et al.*, (September 29, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698107-00CL ([Termination of CCAA Proceedings Order](#)).
3. *Re Express Fashion Apparel Canada Inc. et al.*, (December 8, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11785-00CL ([Stay Extension & Discharge & Termination Order](#)).
4. *Re Forever XXI ULC*, (September 28, 2022), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([CCAA Termination Order](#)).
5. *Re Golf Town et al.*, (March 29, 2018), Ont. S.C.J. [Commercial List], Court File No. CV-16-11527-00CL ([CCAA Termination Order](#)).
6. *Re Harte Gold Corp. et al.*, (February 15, 2021), Ont. S.C.J. [Commercial List], Court File No. CV-21-00673304-00CL ([CCAA Distribution and Termination Order](#)).
7. *Re McEwan Enterprises Inc.*, (December 21, 2021), Ont. S.C.J. [Commercial List], Court File No. CV-21-00669445-00CL ([CCAA Termination Order](#)).
8. *Re Sears Canada Inc. et al.*, (October 25, 2021), Ont. S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([CCAA Termination Order](#)).
9. *Re Target Canada Co. et al.*, (October 18, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-15-10832-00CL ([Discharge Order](#)).

**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.**

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

Applicant

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

Proceeding commenced at: TORONTO

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