

**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

May 17, 2024

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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 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, which had since been paid in full.

3. In or about spring 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**”). On November 1, 2023, the CRA informed BBB Canada the CRA Audit was now complete, and that BBB Canada owed \$2,084,044.28 (the “**CRA Assessment**”). After evaluating the CRA Assessment and obtaining data in support of its position, BBB Canada filed a Notice of Objection to the CRA Assessment on or about March 25, 2024 (the “**CRA Appeal**”). Following further consideration, and particularly in light of the extensive amount of time that will likely be needed to resolve the CRA Appeal, the Lenders (as defined in the

Goldberg Affidavit) and BBB Canada have decided to abandon the CRA Appeal, and to pay the aggregate amounts owing to the CRA.

4. Following payment to the CRA, little remains to be done in the CCAA proceedings, and a further motion for termination of the CCAA Proceedings and discharge of the Monitor, and other related relief, will be brought by BBB Canada within the next several weeks. The Applicants therefore seek to extend the Stay Period (as defined below) until June 21, 2024, in order to permit BBB Canada the time needed to continue working diligently and with good faith towards the final resolution of all necessary remaining issues.

PART II - SUMMARY OF THE FACTS

5. The facts are more fully set out in the Affidavit of Michael Goldberg.¹

A. Background and Update on the CCAA Proceeding

6. 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**”).²

7. 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,

¹ Affidavit of Michael Goldberg, sworn May 15, 2024 [Goldberg Affidavit]. Capitalized terms not otherwise defined have the same meaning as in the Goldberg Affidavit.

² Goldberg Affidavit, at paras. 5-6.

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**").³

8. 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 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.⁴

9. 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.⁵ 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.⁶

³ Goldberg Affidavit at para. 7.

⁴ Goldberg Affidavit at paras. 9-11.

⁵ Goldberg Affidavit at para. 8.

⁶ Goldberg Affidavit at paras. 12-13.

10. Throughout this process, the Stay Period has been extended on numerous occasions, most recently through the granting of a Stay Extension Order on December 1, 2023 (the “**Stay Extension Order**”). The Stay Extension Order extended the Stay Period to May 22, 2024.⁷

B. Update on the CRA Audit

11. In or about spring 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 (the “**Audit Period**”). While the CRA was initially potentially assessing that BBB Canada owed up \$6 million, this was subsequently reduced to approximately \$4.5 million.⁸

12. BBB Inc. retained Deloitte LLP (“**Deloitte**”) to assist BBB Canada in responding to the CRA 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. Through these efforts and discussions with the CRA, BBB Canada and Deloitte were able to significantly reduce the amounts claimed by the CRA, and on November 1, 2023, BBB Canada received the CRA Assessment, which, among other things, informed BBB Canada that the CRA had concluded that BBB Canada owed \$2,084,044.28.⁹ Following the granting of the Stay Extension Order, BBB Canada, through the services of the Plan Administrator’s staff and in consultation with Deloitte, worked diligently to better understand and establish its position with

⁷ Goldberg Affidavit at para. 8.

⁸ Goldberg Affidavit at para. 14.

⁹ Goldberg Affidavit at paras. 15-16.

respect to the CRA Assessment and consider a possible appeal (as defined above, the “**CRA Appeal**”).

13. On March 25, 2024, BBB Canada delivered its Notice of Objection to the CRA Assessment. The Notice of Objection was accompanied by a letter to the Chief of Appeals requesting that the Minister extend the time for filing the Notice of Objection pursuant to section 303 of the *Excise Tax Act*, on the basis that BBB Canada and Deloitte were unable to gather sufficient supporting data to pursue the CRA Appeal by the original Notice of Objection deadline of February 5, 2024. In the Notice of Objection, BBB Canada took the position that the CRA had miscalculated the total BBB Canada revenues during the Audit Period for GST/HST calculation purposes.¹⁰

14. Following receipt of the CRA Assessment and submission of the Notice of Objection, Deloitte advised the Team Lead that the CRA typically takes approximately one year to assign an appeal to an agent and start the review process. This is consistent with information provided on the CRA website, which states that the review process for an appeal of an assessment of medium to high complexity would likely take between 277 and 500 days to resolve. Based on this information, the Lenders (who solely stand to benefit if the CRA Appeal is granted) and BBB Canada have decided to abandon the CRA Appeal and pay the amounts owing to the CRA. After accounting for prior overpayments made to the CRA by or on behalf of BBB Canada, the total amount owing by BBB Canada to the CRA is \$527,029.27, subject to any adjustments since November.¹¹

¹⁰ Goldberg Affidavit at paras. 19-20

¹¹ Goldberg Affidavit at paras. 21-23.

C. BC Employer Health Tax Claim

15. 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**”). BBB Canada is currently analyzing the claim and considering potential responses.¹²

D. Update on the BBB Canada Cash

16. 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**”).¹³

17. 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 had 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 \$2.2 million of the BBB Canada Trust Monies remains segregated and held in trust.¹⁴

¹² Goldberg Affidavit at para. 25.

¹³ Further details regarding the establishment of the Reimbursement Agreement are set out in the Goldberg Affidavit at paras. 28-29, and the Affidavits of Michael Goldberg sworn November 13, 2023 and November 29, 2023.

¹⁴ Goldberg Affidavit at para. 30.

PART III - ISSUES AND THE LAW

18. This factum addresses the following issue:

(a) This Court should extend the Stay Period to June 21, 2024.

A. Extension of Stay Period

19. 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.

20. The current Stay Period expires on May 22, 2024. The Applicant is seeking to extend the Stay Period to June 21, 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 and in good faith towards resolving all necessary remaining issues, including remitting final payment to the CRA and considering the BC Employer Health Tax Claim, and bringing a motion in the coming weeks to terminate the CCAA Proceedings, together with certain additional related relief.¹⁵

21. The remaining costs of the CCAA Proceedings are expected to be minimal, as BBB Canada has ceased operations, sold or disclaimed all assets and property, and terminated all employees. Anticipated costs through the extended Stay Period, which are expected to consist primarily of professional fees of counsel to BBB Canada, the Monitor and its counsel, will be funded by the

¹⁵ Goldberg Affidavit at para. 31.

remaining BBB Canada Trust Monies.¹⁶ BBB Canada is forecast to have sufficient liquidity to fund the CCAA Proceedings through the proposed extension of the Stay Period.¹⁷

22. BBB Canada has acted, and continues to act, in good faith and with due diligence in the CCAA Proceedings. The proposed extension of the Stay Period is appropriate and necessary in the circumstances and is supported by the Monitor.¹⁸

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 extending the Stay Period to June 21, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of May, 2024.



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¹⁶ Goldberg Affidavit at para. 32

¹⁷ Ninth Report of the Monitor dated May 17, 2024, at para. 4.3 [Ninth Report].

¹⁸ Goldberg Affidavit at para. 33; Ninth Report at para. 5.2.

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.

EXCISE TAX ACT

R.S.C., 1985, c. E-15, as amended

Extension of time by Minister

303 (1) Where no objection to an assessment is filed under section 301, or no request has been made under subsection 274(6), within the time limit otherwise provided, a person may make an application to the Minister to extend the time for filing a notice of objection or a request and the Minister may grant the application.

Contents of application

(2) An application made under subsection (1) shall set out the reasons why the notice of objection or the request was not filed within the time otherwise limited by this Part for doing so.

How application made

(3) An application under subsection (1) shall be made by delivering or mailing to the Chief of Appeals in a District Office or Taxation Centre of the Canada Revenue Agency the application accompanied by a copy of the notice of objection or a copy of the request, as the case may be.

Exception

(4) The Minister may accept an application under this section notwithstanding that it was not delivered or mailed to the person or place specified in subsection (3).

Duties of Minister

(5) On receipt of an application made under subsection (1), the Minister shall, with all due dispatch, consider the application and grant or refuse it, and shall thereupon notify the person of the decision by registered or certified mail.

Date of objection if application granted

(6) Where an application made under subsection (1) is granted, the notice of objection or the request shall be considered to have been filed on the day the decision of the Minister is mailed to the person.

When order to be made

(7) No application shall be granted under this section unless

(a) the application is made within one year after the expiration of the time otherwise limited by this Part for objecting or making a request under subsection 274(6), as the case may be; and

(b) the person demonstrates that

(i) within the time otherwise limited by this Part for objecting,

(A) the person was unable to act or to give a mandate to act in the person's name, or

(B) the person had a bona fide intention to object to the assessment or make the request,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and

(iii) the application was made as soon as circumstances permitted it to be made.

**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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