

Court File No.

**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**

February 10, 2023

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**TO: SERVICE LIST**

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**PART I - NATURE OF THIS APPLICATION**

1. This factum is filed in support of an application by BBB Canada Ltd. (the “**Applicant**”) for an Initial Order and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). While Bed Bath & Beyond Canada L.P. (“**BBB LP**” and together with the Applicant, “**BBB Canada**”) is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other benefits of the Initial Order under the CCAA extended to BBB LP, as it is related to and carries on operations that are integral to the business of the Applicant. The Applicant also seeks a temporary stay of any proceeding against its parent company Bed Bath & Beyond Inc. (“**BBBI**” and together with its various U.S. subsidiaries and BBB Canada, the “**Bed Bath & Beyond Group**”) arising out of any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant.

2. The Bed Bath & Beyond Group has been in financial difficulty for the past several years, suffering significant net losses since 2018. Over this period, BBB Canada itself has seen dramatic declines in revenues.

3. In an effort to improve the Bed Bath & Beyond Group's financial performance, former management embarked on a series of initiatives designed to transform the business. Unfortunately, the COVID-19 pandemic and the broader economic downturn significantly disrupted the Bed Bath & Beyond Group's operations, putting further financial strain on the entire enterprise, including BBB Canada, and hindering the transformational efforts of management.

4. The Bed Bath & Beyond Group's situation significantly worsened throughout 2022, with declining year-over-year sales in both the United States and Canada, multiple credit rating downgrades, cash flow constraints, and significant inventory reductions. Cash constraints caused delays and stoppages of merchandise shipments to BBB Canada's stores, causing inventory levels to decrease dramatically.

5. In June 2022, certain management of BBBI was replaced, and the new, current management embarked on an aggressive campaign to preserve cash, reduce costs and strengthen the balance sheet. By August 2022, the Bed Bath & Beyond Group believed it was well-positioned for success. However, less than one week after announcing its strategic and business update, BBBI's Chief Financial Officer passed suddenly and tragically. The CFO's death left the Bed Bath & Beyond Group with a significant leadership gap at a critical juncture in its restructuring efforts.

6. The process of remedying the Bed Bath & Beyond Group's business and financial decline continued to be challenging through the Fall of 2022. The Bed Bath & Beyond Group announced that during the third quarter holiday period, it suffered from a lower in stock position of approximately 70%.

7. The situation continued to decline in January 2023. On January 5, 2023, in its notice of late filing with respect to its Form 10-Q for the three months ended November 26, 2022, the Bed Bath

& Beyond Group disclosed that there was substantial doubt about its ability to continue as a going concern. Shortly thereafter, the ABL Agent (as defined below) declared events of default and delivered notices of acceleration under both the ABL Facility and BBBI's then US \$375 million FILO Facility (of which BBB LP is also a borrower and the Applicant is a guarantor), thereby causing the principal amount of such facilities, together with all accrued interest thereon and other fees and obligations, to become immediately due and payable. The ABL Agent also declared cash dominion, which restricted the entire Bed Bath & Beyond Group, including BBB Canada, from spending any cash on hand.

8. During this time, the Bed Bath & Beyond Group continued to pursue actions and take steps to improve its cash position and mitigate liquidity shortfalls, and to consider and pursue all strategic alternatives, including restructuring or refinancing its debt, seeking additional debt or capital, reducing or delaying the company's business activities and strategic initiatives, selling assets—including a sale of some or all of the Canadian business—and other strategic measures, including the possibility of obtaining relief under the U.S. Bankruptcy Code. Lazard Frères & Co. LLC ("**Lazard**"), an investment bank retained by the Bed Bath & Beyond Group, undertook a marketing process to identify an executable transaction, including a sale of some or all of the Canadian business.

9. As a result of these efforts, earlier this week, BBBI announced a proposed underwritten public offering of shares (the "**Offering**"), together with amendments to its Credit Facilities, which, if all of the conditions are met, will provide BBBI with additional time to continue its turnaround efforts for Bed Bath & Beyond Group's business in the United States outside of a bankruptcy filing. The Offering is subject to certain conditions which, if not fully satisfied, could result in less than full proceeds received from the Offering. The Bed Bath & Beyond Group expects

that a failure to receive the full amount of proceeds of the Offering would likely force a bankruptcy filing by BBBI and its U.S. subsidiaries under the United States Bankruptcy Code.

10. Unfortunately, Lazard's efforts to identify a going concern solution for Canada were not successful. Multiple outreaches to third parties have not resulted in an executable transaction.

11. Faced with extremely limited funding and significant constraints upon its use of cash, the Bed Bath & Beyond Group has reluctantly concluded that there is not enough capital available (even with the lifeline provided by the Offering) to restructure both its business in the United States and properly resuscitate the Canadian business to achieve profitability.

12. BBB Canada is not profitable on a standalone basis. BBB Canada has realized significant net losses for the 9 months ending November 26, 2022. Moreover, BBB Canada contributes negative EBITDA margin to the Bed Bath & Beyond Group's consolidated business. While consideration was given to closing a smaller subset of poorly performing stores, and continuing operations in Canada with a reduced footprint of stronger performing locations, the Bed Bath & Beyond Group has concluded that the economics of doing so are not justifiable. Without an operation of scale, the costs of accessing inventory, securing necessary transportation arrangements, and maintaining operational infrastructure would significantly impact the profitability (if any) of these remaining Canadian locations.

13. Further, a significant amount of capital is required to replenish the inventory in Canada, satisfy accounts payable, and rebuild vendor relationships. Inventory levels at the Canadian stores are at historic lows, due to the financial challenges faced by the enterprise, tightened or unavailable trade credit, and/or the unwillingness of suppliers to ship merchandise.

14. In addition, BBB Canada is dependent on BBBI to provide critical Shared Services (as defined below). BBBI is not prepared to continue offering those Shared Services or continuing to allow the use of the “Bed Bath & Beyond” and “buybuy BABY” marks (which are not owned by BBB Canada), in light of its current financial circumstances.

15. Finally, continuation of Canadian operations does not have support from BBB Canada’s lenders under the Approved Budget (defined below), which is one of the conditions to the amendment and deceleration that made the Offering possible. Notwithstanding the recent amendments to the Amended Credit Agreement, the Bed Bath & Beyond Group, including BBB Canada, remain under cash dominion. The Approved Budget (as defined below) contemplated by the recently announced Amended Credit Agreement (as defined below) (against which variances may constitute an event of default) does not provide for any further funding of the Canadian operations. BBB Canada does not have capacity or ability to independently effect a recapitalization or restructuring of the Canadian operations without access to cash and the support of BBBI and its lenders.

16. Accordingly, after consideration of all strategic alternatives, including an unsuccessful attempt to achieve a going concern solution for the Canadian business, and without any ability to access further funding under the Approved Budget, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada. BBB Canada is insolvent. Without the support of BBBI, it will be unable to satisfy its obligations as they come due. BBB Canada is required to wind down its business in Canada. It has commenced these proceedings to obtain the flexibility and breathing space afforded by the CCAA to effect an orderly liquidation of its remaining inventory with assistance from a third-party professional liquidator and vacate its leased retail stores and premises.

## PART II - SUMMARY OF FACTS

17. The facts regarding this Application are fully set out in the Affidavit of Holly Etlin.<sup>1</sup>

### A. Corporate Structure

18. The Applicant is a federal corporation incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c C-44 and has a registered office in Toronto, Ontario. The Applicant is a wholly-owned subsidiary of BBBI, a corporation incorporated pursuant to the laws of the State of New York with a head office in Union, New Jersey. BBBI is the ultimate parent corporation of the entire Bed Bath & Beyond Group. BBBI's shares are listed on the NASDAQ exchange.<sup>2</sup>

19. BBB LP is a limited partnership formed under the laws of the Province of Ontario with its principal place of business in Richmond Hill, Ontario. The Applicant is the general partner and 99% unitholder of BBB LP. While BBB LP is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP. BBB LP is the operating entity in Canada which conducts substantially all of Bed Bath & Beyond's retail operations and is party to all commercial real property leases throughout Canada.<sup>3</sup>

### B. The Business of the Bed Bath & Beyond Group

#### (a) The Bed Bath & Beyond Group's Retail Business

20. The Bed Bath & Beyond Group is an omni-channel retailer that sells a wide assortment of merchandise in the home, baby, beauty and wellness markets using multiple end-user customer platforms consisting of websites, applications, and physical retail stores. Within Canada, BBB

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<sup>1</sup> Affidavit of Holly Etlin, sworn February 9, 2023 [Etlin Affidavit]. Capitalized terms not otherwise defined have the same meanings as in the Etlin Affidavit. All references to monetary amounts are in Canadian dollars unless otherwise noted.

<sup>2</sup> Etlin Affidavit, para. 25.

<sup>3</sup> Etlin Affidavit, para. 27. A corporate chart detailing the structure of the Bed Bath & Beyond Group as of January 2023 is attached as Exhibit "A" to the Etlin Affidavit.



Canada operates 54 Bed Bath & Beyond stores and 11 buybuy BABY stores. As of January 31, 2023, BBB LP employed approximately 387 full-time employees and 1,038 part-time employees in connection with its retail operations across Canada.<sup>4</sup>

**(b) Leases and Retail Stores**

21. Each BBB Canada retail store is located in premises leased by BBB LP. The vast majority of the retail leases to which BBB LP is party are indemnified by BBBI.<sup>5</sup>

22. Certain of the Bed Bath & Beyond and buybuy BABY store leases in Canada are held or managed by large national retail landlords, while others are held or managed by non-national retail landlords. Certain of these large national retail landlords lease multiple locations to BBB LP.<sup>6</sup>

23. Under the majority of store leases, BBB Canada's filing for protection under the CCAA constitutes an "Event of Default" entitling the applicable landlord to exercise certain remedies against BBB LP, including termination of the lease, acceleration of rent and other charges under the lease, and repossession of the premises.<sup>7</sup>

**(c) Support Services provided by BBBI**

24. BBB Canada relies on BBBI for certain administrative and business support services (the “**Shared Services**”) that are integral to BBB Canada’s operations. In addition, all procurement of merchandise for BBB Canada is completed by Liberty Procurement Co., Inc., a wholly-owned subsidiary of BBBI.<sup>8</sup>

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<sup>4</sup> Etlin Affidavit, paras. 30-31 & 62.

<sup>5</sup> Etlin Affidavit, paras. 36-37.

<sup>6</sup> Etlin Affidavit, para. 38.

<sup>7</sup> Etlin Affidavit, para. 41.

<sup>8</sup> Etlin Affidavit, paras. 45 & 75. The Shared Services include executive, legal, accounting, finance, treasury, tax, insurance/risk management, real estate, human resources and information technology support services, among other things.

25. BBB Canada cannot operate or function without the provision of the Shared Services from BBBI as it does not have any head office or management employees in Canada who complete these services for BBB Canada.<sup>9</sup>

### **C. The Financial Position of the Applicant**

#### **(a) Assets and Liabilities**

26. As at November 26, 2022, the Bed Bath & Beyond banner in Canada had total assets of approximately \$427.4 million, and total liabilities of approximately \$342.8 million. The buybuy BABY banner in Canada had total assets of approximately \$52.7 million and total liabilities of approximately \$86.9 million.<sup>10</sup>

#### **(b) Secured Debt of BBB Canada**

27. BBBI, certain of its U.S. and Canadian subsidiaries (including BBB LP), JPMorgan Chase Bank, N.A., as administrative agent and collateral agent (in such capacity, the “**ABL Agent**”), Sixth Street Specialty Lending, Inc. as the “first-in, last-out” agent (“**Sixth Street**”), and certain lenders, are parties to an Amended Credit Agreement.<sup>11</sup>

28. As a result of recent amendments entered into in connection with the Offering, the Amended Credit Agreement provides for aggregate revolving commitments of US \$565 million (the “**ABL Facility**”) and a “first-in, last-out” term loan facility of US \$475 million (the “**FILO Facility**”) and together with the ABL Facility, the “**Credit Facilities**”). Prior to the Second

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<sup>9</sup> Etlin Affidavit, para. 75.

<sup>10</sup> Etlin Affidavit, paras. 87-93. As a publicly traded company, BBBI files consolidated financial statements with the U.S. Securities and Exchange Commission. These financial statements include the consolidated results of both the U.S. and Canadian operations. BBB Canada prepares, but does not separately audit or release, stand-alone balance sheets and profit & loss statements for the Canadian operations. Even though the Bed Bath & Beyond banner and the buybuy BABY banner are both operated in Canada by BBB Canada, BBBI tracks the operations of each banner in Canada separately

<sup>11</sup> Etlin Affidavit, para. 97.

Amendment to the Amended Credit Agreement, dated as of February 7, 2023 (the “**Second Amendment**”), the aggregate revolving commitments under the ABL Facility were US \$1.13 billion and the FILO Facility was US \$375 million. With respect to BBB LP in particular, borrowing availability under the ABL Facility is determined based on certain eligible assets and subject to a US \$75 million sublimit (US \$150 million prior to the Second Amendment).<sup>12</sup>

29. In Canada, the Credit Facilities are secured against all present and after-acquired personal property of BBB LP and the Applicant.<sup>13</sup>

#### **D. Events Leading to the CCAA Filing**

##### **(a) Bed Bath & Beyond’s Efforts to Restructure the Business**

30. The North American retail industry has experienced a period of rapid change and shifting consumer demands over the past number of years. Even prior to the COVID-19 pandemic, retailers like the Bed Bath & Beyond Group faced dramatic declines in retail foot traffic as consumers shifted their spending to online platforms like Amazon and Wayfair. The rapid changes resulted in a surge of retail bankruptcy filings.<sup>14</sup>

31. The Bed Bath & Beyond Group was not immune to the foregoing challenges. By 2018, its revenues were declining and it was reporting significant net losses. Recognizing the need to quickly adapt, the Bed Bath & Beyond Group’s former management developed a comprehensive plan to transform its business and position itself for long-term success.<sup>15</sup>

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<sup>12</sup> Etlin Affidavit, para. 98.

<sup>13</sup> Etlin Affidavit, para. 100.

<sup>14</sup> Etlin Affidavit, para. 109.

<sup>15</sup> Etlin Affidavit, para. 110.

32. Unfortunately, the Bed Bath & Beyond Group's efforts to restructure its operations was interrupted in its early stages by the global COVID-19 pandemic in March 2020. The impact of the COVID-19 pandemic extended beyond the immediate effect of store closures and resulted in global supply chain disruptions and persistent inflation. Ultimately, the Bed Bath & Beyond Group's liquidity constraints resulted in a significant number of key suppliers either tightening or revoking the ability of the Bed Bath & Beyond Group to access inventory on credit.<sup>16</sup>

33. In 2022, the Bed Bath & Beyond Group announced that it had taken steps to address its liquidity constraints and improve its balance sheet and cash flows. The process of remedying the Bed Bath & Beyond Group's business and financial decline, however, continued to be complex and challenging throughout the Fall of 2022. While the Bed Bath & Beyond Group successfully reduced its accounts payable, raised gross proceeds of approximately US \$75 million through an at-the-market offering program, and cleared out a significant portion of its excess private-label goods, inventory issues continued to plague the Bed Bath & Beyond Group through the 2022 holiday season.<sup>17</sup>

**(b) The Bed Bath & Beyond Group defaults under the Credit Facilities**

34. On or around January 13, 2023, certain events of default were triggered under the Amended Credit Agreements (collectively, the "**Events of Default**") as a result of BBBI's failure to prepay an over-advance and satisfy a financial covenant, among other things. The Bed Bath & Beyond

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<sup>16</sup> Etlin Affidavit, paras. 112-120.

<sup>17</sup> Etlin Affidavit, paras. 117-119.

Group and its advisors engaged in discussions with the ABL Agent and Sixth Street regarding a forbearance agreement, but after multiple rounds of negotiations, no agreement was reached.<sup>18</sup>

35. On January 23, 2023, the ABL Agent informed the Bed Bath & Beyond Group that, as a result of the ongoing Events of Default, a cash dominion period (the “**Cash Dominion Period**”) had occurred and the ABL Agent had delivered the applicable dominion notices. Such significant restrictions on the Bed Bath & Beyond Group’s cash use severely hampered its ability to continue operating both in Canada and the United States.<sup>19</sup>

36. On January 25, 2023, the ABL Agent sent a notice of acceleration and default interest (the “**Acceleration Notice**”) to the Bed Bath & Beyond Group (including BBB Canada) as a result of the ongoing Events of Default. The Acceleration Notice notified the Bed Bath & Beyond Group that the principal amount of the Credit Facilities, together with accrued interest thereon and other fees and obligations, were due and payable immediately.<sup>20</sup>

**(c) Bed Bath & Beyond explores Strategic Alternatives**

37. In light of the Bed Bath & Beyond Group’s rapidly declining financial results, the Bed Bath & Beyond Group undertook a further in-depth review of all strategic alternatives. To assist in these efforts, the Bed Bath & Beyond Group retained various advisors, including Lazard.<sup>21</sup>

38. Among the various strategic alternatives pursued, Lazard commenced a marketing process for certain of the Bed Bath & Beyond Group's assets, including some or all of the Canadian business. Lazard contacted a multitude of strategic partners, including two with respect to the

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<sup>18</sup> Etlin Affidavit, para. 123.

<sup>19</sup> Etlin Affidavit, para. 124.

<sup>20</sup> Etlin Affidavit, para. 125.

<sup>21</sup> Etlin Affidavit, para. 127.

Canada-only operations. One additional third party independently contacted Lazard about the Canadian business.<sup>22</sup>

39. As a result of Lazard's efforts, on February 6, 2023, BBBI announced the Offering which is expected to raise US \$225 million together with an additional approximately US \$800 million through the issuance of securities requiring the holder to exercise warrants in future installments, assuming certain conditions are met. There is no assurance that the company will receive any or all of the future installments. A failure to receive the full amount of gross proceeds will likely force the Bed Bath & Beyond Group to file for bankruptcy protection in the United States.<sup>23</sup>

40. Concurrently with the closing of the Offering, the Second Amendment to the Amended Credit Agreement was entered into to among other things: (i) waive any outstanding defaults or events of default under the existing Credit Facilities; (ii) rescind the acceleration notices issued under the existing Credit Facilities; and (iii) decrease the ABL Facility from US \$1.13 billion to US \$565 million and increase the FILO Facility by US \$100 million. However, notwithstanding the Second Amendment, the Bed Bath & Beyond Group, including BBB Canada, will remain under cash dominion until all obligations under the Credit Facilities are repaid.<sup>24</sup>

41. In its public disclosure announcing the Offering, BBBI confirmed that unless the Offering closes in accordance with its terms, BBBI will not have the financial resources to satisfy its payment obligations under the Credit Facilities or the Senior Notes and would likely be required to file for bankruptcy protection in the United States.<sup>25</sup>

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<sup>22</sup> Etlin Affidavit, para. 128.

<sup>23</sup> Etlin Affidavit, para. 129.

<sup>24</sup> Etlin Affidavit, paras. 102-103, 130-131.

<sup>25</sup> Etlin Affidavit, para. 132.

42. Notwithstanding the best efforts of the Bed Bath & Beyond Group and its advisors including Lazard, and after active engagement with a number of third parties, no acceptable bids were received for any executable transaction involving the Canada-only business.<sup>26</sup>

43. Following announcement of the Offering on February 6, 2023, Lazard re-initiated discussions with one potential acquiror who had expressed interest in the Canadian-owned inventory and certain other assets to canvass the potential for an increased bid amount. While further discussions were undertaken and information exchanged, no bids have been received that would provide value in excess of the estimated liquidation value of BBB Canada's inventory.<sup>27</sup>

#### **E. The Urgent Need for Relief under the CCAA**

44. BBB Canada is in urgent need of protection under the CCAA. Facing extremely limited funding and significant constraints on its use of cash, the Bed Bath & Beyond Group has reluctantly concluded that there is not enough capital available - even with the lifeline provided by the Offering - to restructure both its business in the United States and properly resuscitate the Canadian business to achieve profitability.<sup>28</sup>

45. BBB Canada is not profitable on a standalone basis. In 2021, both the Applicant and BBB LP reported net losses on their respective annual tax filings with the CRA. For the nine-month period ending November 26, 2022, both the Bed Bath & Beyond and buybuy BABY banners in Canada reported significant net losses and negative EBITDA.<sup>29</sup>

46. Even prior to 2022, BBB Canada contributed negative EBITDA margin to the Bed Bath & Beyond Group's consolidated business. While certain Canadian stores were EBITDA positive

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<sup>26</sup> Etlin Affidavit, para. 133.

<sup>27</sup> Etlin Affidavit, para. 134.

<sup>28</sup> Etlin Affidavit, para. 135.

<sup>29</sup> Etlin Affidavit, para. 136.

during the 2021 fiscal year, the economics of keeping those limited retail locations open on a standalone basis are not justifiable. Without a larger operation, the costs of accessing inventory, securing necessary transportation arrangements, and maintaining operational infrastructure would significantly impact the profitability (if any) of these remaining Canadian locations.<sup>30</sup>

47. Further, a significant amount of capital is required to replenish store inventories in Canada, satisfy accounts payable, and rebuild vendor relationships. Inventory levels at Canadian retail locations are at historic lows, due to the financial challenges faced by the enterprise, tightened or unavailable trade credit, and/or the unwillingness of suppliers to ship merchandise.<sup>31</sup>

48. BBB Canada is wholly dependent on BBBI to provide critical Shared Services, including executive, legal, accounting, finance, treasury, tax, human resources and information technology and inventory procurement. BBBI is not prepared to continue offering those Shared Services (which have not historically been cash settled) or allowing BBB Canada to use of the “Bed Bath & Beyond” and “buybuy BABY” marks (which are not owned by BBB Canada) in light of current financial circumstances.<sup>32</sup>

49. Finally, notwithstanding the Second Amendment, the Bed Bath & Beyond Group, including BBB Canada, remain under cash dominion. The Approved Budget (as defined in the Second Amendment) contemplated by the Amended Credit Agreement (against which variances may constitute an event of default) does not provide for any further funding of the Canadian operations. BBB Canada does not have the capacity or ability to independently effect a

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<sup>30</sup> Etlin Affidavit, para. 137.

<sup>31</sup> Etlin Affidavit, para. 138.

<sup>32</sup> Etlin Affidavit, para. 139.



recapitalization or restructuring of the Canadian operations without the support of BBBI. BBB Canada is insolvent from a balance sheet and cash flow perspective.<sup>33</sup>

50. Accordingly, after consideration by BBB Canada of all strategic alternatives, including an unsuccessful attempt to achieve a going concern solution for the Canadian business, and without any ability to access further funding under the Approved Budget, on February 9, 2023, BBBI resolved to file the Applicant for creditor protection under the CCAA. The Bed Bath & Beyond Group believes that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down in the interests of all stakeholders.<sup>34</sup>

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

51. This factum addresses the following issues:

- (a) The Applicant is entitled to seek protection under the CCAA:
  - (i) The Applicant is insolvent and has obligations exceeding \$5 million;
  - (ii) The Applicant's chief place of business is Ontario; and
  - (iii) The CCAA can be used to effect an orderly wind-down of the Applicant's business.
- (b) The Applicants are entitled to a broad stay of proceedings:
  - (i) The stay should be extended to BBB LP; and
  - (ii) The stay should be extended to BBBI in relation to claims that are derivative of claims against BBB Canada.
- (c) This Court has the jurisdiction to authorize paying pre-filing claims to critical suppliers.
- (d) This Court should approve the Court-ordered charges:

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<sup>33</sup> Etlin Affidavit, para. 140.

<sup>34</sup> Etlin Affidavit, para. 141.

- (i) The Administration Charge (defined below) will ensure the continued engagement of the advisors needed to achieve the orderly wind-down; and
- (ii) The Directors' Charge (defined below) will ensure continued services of the director and officers throughout the wind-down period.

**A. The Applicant is Entitled to Seek Protection Under the CCAA**

**(a) The Applicant is Insolvent and Claims Exceed \$5 Million**

52. The CCAA applies to a “debtor company” where the total of claims against the debtor exceeds \$5 million.<sup>35</sup> The total claims against the Applicant are far in excess of this amount.<sup>36</sup>

53. Pursuant to section 2 of the CCAA, a “debtor company” means, *inter alia*, a company that is insolvent. Whether a company is insolvent for these purposes evaluated by reference to the definition of “insolvent person” in the *Bankruptcy and Insolvency Act*<sup>37</sup> and to the expanded concept of insolvency accepted by this Court in *Stelco*.<sup>38</sup>

54. In order to give effect to the CCAA objectives of allowing the debtor company breathing room to restructure, a debtor is insolvent under *Stelco* if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.<sup>39</sup>

55. The Applicant meets both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition, as a result of the following:

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<sup>35</sup> CCAA, s. 3(1).

<sup>36</sup> Etlin Affidavit, paras. 92-93.

<sup>37</sup> R.S.C. 1985, c. B-3, as amended [BIA]; See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008 CanLII 21724](#) (S.C.J.), para. 30.

<sup>38</sup> [2004 CanLII 24933](#) (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused [2004 CarswellOnt 2936](#), leave to appeal to S.C.C. refused [2004 CarswellOnt 5200](#) [*Stelco (Re)*].

<sup>39</sup> *Stelco (Re)*, above note 38 at para. 26. *Stelco* has been followed by this Court in a number of cases, including in *Target Canada Co. (Re)*, [2015 ONSC 303](#) at paras. 26–27 [*Target*] in which Morawetz J. (as he then was) concluded that the debtor company was insolvent either under the BIA test or the expanded *Stelco* test, and most recently, in *Laurentian University of Sudbury*, [2021 ONSC 659](#) [*Laurentian University*] at paras. 30-33.

- (a) BBB Canada is not profitable on a standalone basis. For the nine-month period ending November 26, 2022, the Bed Bath & Beyond banner in Canada reported a net loss of \$87.6 million and its EBITDA was negative \$81.8 million. For the same period, the buybuy BABY banner in Canada reported a net loss of \$11.9 million and its EBITDA was negative \$10.4 million.<sup>40</sup>
- (b) BBB Canada remains under cash dominion, and the Approved Budget contemplated by the Amended Credit Agreement does not provide for any further funding of the Canadian operations.<sup>41</sup>
- (c) The Applicant does not have the capacity or ability to independently effect a recapitalization or restructuring of the Canadian operations without the support of BBBI. The Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada.<sup>42</sup>

**(b) Ontario Court Has Jurisdiction Over the Proceeding**

56. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.<sup>43</sup>

57. The chief place of business of the Applicant is Ontario. The Applicant's registered office is in Toronto, Ontario, and BBB LP is formed pursuant to the laws of Ontario. The corporate office for the BBB Canada's operations is located in Mississauga, Ontario. 22 of Bed Bath & Beyond's

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<sup>40</sup> Etlin Affidavit, paras. 12, 20, 96 & 136.

<sup>41</sup> Etlin Affidavit, paras. 23, 103 & 140.

<sup>42</sup> Etlin Affidavit, paras. 24 & 141.

<sup>43</sup> *Target*, above note 39, para. 29.

54 Canadian retail stores and 5 of buybuy BABY's 11 Canadian retail stores are located in Ontario. In addition, almost 50% of BBB Canada's employees are located in Ontario.<sup>44</sup>

**(c) Use of the CCAA to Effect an Orderly Wind-Down of the Business**

58. The Applicant urgently requires a stay of proceedings and other protections provided by the CCAA so that it will have the breathing room to develop and conduct a controlled and orderly wind down of operations in Canada for the benefit of all stakeholders.<sup>45</sup>

59. The CCAA case law is now replete with examples of CCAA proceedings that have either been commenced for the purpose of winding down a business, or that have adopted this purpose after it became apparent that a going-concern solution was not achievable. Examples include: *Target Canada Co.*,<sup>46</sup> *Express Fashion Apparel Canada Inc.*,<sup>47</sup> and *Forever XXI ULC*.<sup>48</sup>

60. It is entirely appropriate for the orderly wind-down of the Applicant's business to be carried out with the benefit of the protections and flexibility afforded by the CCAA. The "skeletal" nature of the CCAA is ideally suited to overseeing the process through which BBB Canada conducts a controlled and orderly wind down of operations in Canada for the benefit of all stakeholders.

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<sup>44</sup> Etlin Affidavit, para. 29.

<sup>45</sup> Etlin Affidavit, para. 142.

<sup>46</sup> *Target*, above note 39, para. 31.

<sup>47</sup> *Express Fashion Apparel Canada Inc. and Express Canada GC GP, Inc. (Re)*, (May 4, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11785-00CL ([Initial Order](#)) at para. 10; see also *First Leaside Wealth Management Inc. (Re)*, [2012 ONSC 1299](#) at para. 32.

<sup>48</sup> *Forever XXI ULC (Re)*, (September 29, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Initial Order](#)) at para. 10; *Forever XXI ULC (Re)*, (September 29, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Endorsement](#)).

**B. Stay of Proceedings**

**(a) Requested Stay and Related Relief Limited During Initial Stay Period**

61. Section 11.02(1) permits this Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith.<sup>49</sup> Under new section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under section 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."<sup>50</sup>

62. In *Lydian*,<sup>51</sup> one of the first cases to interpret this provision, Morawetz C.J. stated that, "absent exceptional circumstances", the relief granted during the Initial Stay Period should be limited and where possible, the *status quo* should be maintained during that period.<sup>52</sup> The Initial Stay Period allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.<sup>53</sup>

63. Whether particular relief is necessary to stabilize a debtor company's operations during the Initial Stay Period is an inherently factual determination, based on all of the circumstances of the particular debtor.<sup>54</sup> There are no "hard and fast" rules. Consistent with the objectives of the CCAA and its flexibility, it remains open to this Court, where circumstances dictate it, to grant relief during the Initial Stay Period in one CCAA restructuring that may not be appropriate in another.

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<sup>49</sup> CCAA, s. 11.02(3)(a-b).

<sup>50</sup> CCAA, s. 11.001.

<sup>51</sup> *Re Lydian International Limited*, [2019 ONSC 7473](#) [Commercial List] [*Lydian*].

<sup>52</sup> *Lydian*, above note 51, para. 26.

<sup>53</sup> *Lydian*, above note 51, para. 30.

<sup>54</sup> See for example, *Laurentian University*, above note 39, in which the CCAA Court granted a variety of relief during the Initial Stay Period that was particular to the debtor company's factual circumstances.

64. Each aspect of the relief sought in the Initial Stay Period is interdependent with other aspects, and is critical to respond to the extraordinary circumstances in which the Applicant finds itself, the unique urgency created by those circumstances and the fundamentally interconnected nature of the Applicants' business. In this sense, all of the requested relief – as submitted further below – consists of exactly the type of essential “keep the lights on” measures that are contemplated by section 11.001 of the CCAA.

**(b) The Stay should be extended to BBB LP**

65. The CCAA expressly applies, by its terms, to debtor companies, but not partnerships.<sup>55</sup> Where the operations of partnerships are integral and closely related to the operations of the Applicant, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted on multiple occasions.<sup>56</sup>

66. While BBB LP is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP, as it is related, carries on operations that are integral to the business of the Applicant, is party to all Canadian retail leases, and is a guarantor under the Credit Facilities.<sup>57</sup>

**(c) Stay of Certain Derivative Claims against BBBI**

67. Most of the retail leases to which BBB LP is a party in Canada are subject to an indemnity provided by BBBI in favour of the landlord. Although BBBI is not an applicant in this proceeding,

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<sup>55</sup> CCAA, s. 2, “debtor company”.

<sup>56</sup> See, for example, *Target*, above note 39, paras. 42-43; also *4519922 Canada Inc. (Re)*, [2015 ONSC 124](#), para. 37.

<sup>57</sup> Etlin Affidavit, para. 143. Note that under the majority of store leases, BBB Canada's filing for protection under the CCAA is an event of default entitling the applicable landlord to exercise certain remedies against BBB LP, including termination of the lease, acceleration of rent and other charges under the lease, and repossession of the premises. As such, BBB Canada's urgent need for the protections afforded by the CCAA is accelerated: Etlin Affidavit, para. 41.

the proposed Initial Order includes a temporary stay of any proceeding against or in respect of BBBI arising out of or in connection with any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant. The proposed Initial Order also provides that any landlord claim pursuant to a guarantee in relation to either BBB LP or the Applicant shall be unaffected and shall not be released or affected in any way in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the BIA.<sup>58</sup>

68. A CCAA Court has jurisdiction under section 11 to grant a third party stay, and has done so in respect of guarantors of a CCAA debtor in many instances, including: *Target Canada Co.*,<sup>59</sup> *McEwan Enterprises Inc.*,<sup>60</sup> *Laurentian University of Sudbury*,<sup>61</sup> *SinoForest Corp.*,<sup>62</sup> and *Lydian International Limited*.<sup>63</sup> Indeed, the fact that a non-debtor is a related company that has guaranteed the obligations of the debtor company has been included in the list of factors militating *in favour* of extending the stay to a third party.<sup>64</sup>

69. The Applicant submits that section 11.04 of the CCAA does not prevent this court from granting such a remedy in its discretion, for reasons as set out below:

70. First, section 11.04 is inapplicable, as the indemnities at issue here are not guarantees. For the purposes of section 11.04, the key features of a “guarantee” have been held to include that “there is primary and secondary liability, and only after the primary debtor defaults on some covenant or obligation is the secured party entitled to turn to the guarantor to make good on the

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<sup>58</sup> Etlin Affidavit, para. 145.

<sup>59</sup> *Target*, above note 39, para. 50.

<sup>60</sup> *McEwan Enterprises Inc.*, [2021 ONSC 6453](#), para. 45.

<sup>61</sup> *Laurentian University*, above note 39, para. 47.

<sup>62</sup> *Sino-Forest Corp (Re)*, [2012 ONSC 2063](#), paras. 26-29.

<sup>63</sup> *Lydian*, above note 51, para. 39.

<sup>64</sup> *Laurentian University*, above note 39, paras. 39-40.

guarantee.”<sup>65</sup> In this instance, all of the indemnities make BBBI the primary obligor, and there is no condition which has to occur before BBBI’s obligation can be invoked. Therefore, the indemnities are not guarantees for the purposes of section 11.04, and it has no application.

71. Secondly, even if the indemnities are “guarantees” for the purpose of section 11.04 (which is denied), section 11.04 should be read narrowly, consistent with its express wording and with the objectives of the CCAA. Crucially, the opening words of section 11.04 are “[n]o order made under section 11.02...”. This wording precludes a stay **against the debtor** under section 11.02 from affecting a guarantee. However, it does not preclude the CCAA Court, in its discretion, from granting a third party stay in favour of a guarantor under section 11 of the CCAA. Section 11 gives this Court the discretion to grant any order it thinks fit, and has been used on many occasions in support of the jurisdiction of the CCAA Court to grant a third party stay.<sup>66</sup> This Court thus has the ability to extend a stay of proceedings to guarantors under section 11 in appropriate circumstances such as these.

72. To the extent that the Alberta Court of Queen’s Bench in *Northern Transportation* takes a contrary view, seemingly concluding that Section 11.04 generally prohibits a CCAA court from extending third party stays to guarantors,<sup>67</sup> the Applicant submits respectfully that this reasoning should not be followed by this Court. In particular, the court in *Northern Transportation* appears to have relied on a mistaken impression that in *Target*, Morawetz J. (as he then was) had not intended the stay to apply to an enforceable guarantee, and that section 11.04 had not been raised

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<sup>65</sup> *Northern Transportation Company Limited (Re)*, [2016 ABQB 522](#) [*Northern Transportation*], para. 69.

<sup>66</sup> For example, see *Pacific Exploration & Production Corporation (Re)*, [2016 ONSC 5429](#), para. 26; *JTI-Macdonald Corp. (Re)*, [2019 ONSC 1625](#), para. 14. Further, in *9354-9186 Québec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#), the Supreme Court of Canada recently indicated that section 11 of the CCAA should be the provision of first resort in anchoring jurisdiction and should be relied upon unless there is another CCAA provision that confers more specific jurisdiction.

<sup>67</sup> *Northern Transportation*, above note 65, para. 92.



in that instance.<sup>68</sup> To the contrary, the application of section 11.04 was expressly addressed before Morawetz J. in seeking the initial order in *Target*. A time-limited stay of proceedings was extended to the Target parent company in relation to the lease guarantees, with the benefit of detailed legal submissions.

73. Finally, in *Northern Transportation*, Dario J. stated that she did not intend to foreclose the possibility that a CCAA Court could exercise its inherent jurisdiction to grant a third party stay to a guarantor “in exceptional cases to ensure that the intent and purpose of the CCAA proceedings are not frustrated”.<sup>69</sup> The Applicant submits that this is such a case.

74. Importantly, the landlords at issue will not suffer any prejudice from such relief because of the assurance that any Landlord claim pursuant to a guarantee in relation to any BBB Entity shall be unaffected and shall not be released or affected in any way in any Plan filed by the Applicant under the CCAA, or any proposal filed by the BBB Entities under the BIA. As a result, the stay will only defer their claims.

75. Further, a third party stay in favour of BBBI is demonstrably necessary to allow BBB Canada to have sufficient “breathing space” under the CCAA to focus their resources on a fair and orderly wind down process. Any derivative litigation against BBBI relating to a lease of BBB LP would necessarily require the participation of BBB Canada and would result in a significant distraction of remaining senior management from the goals of this proceeding, namely an orderly wind down of the Canadian operations. It is crucial that BBBI’s resources be focused on providing the Shared Services and other support to wind-down process over the next several months in

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<sup>68</sup> *Northern Transportation*, above note 65, paras. 90-91.

<sup>69</sup> *Northern Transportation*, above note 65, para. 101.

Canada. Such resources are already significantly taxed addressing the financial distress of the broader Bed Bath & Beyond Group and efforts to right size U.S. operations and implement its restructuring initiatives. It is imperative that BBBI not be distracted by derivative litigation at this time.<sup>70</sup>

76. The potential disruption of landlords seeking to commence proceedings during the Initial Stay Period is material enough that the Applicant requires this relief on Day 1. The Applicant cannot risk waiting until the comeback hearing to obtain this relief, as landlords may take advantage of the lack of a stay to advance their claims, distracting the management of BBB Canada and disrupting BBBI from supporting the orderly wind-down process of BBB Canada and focusing on its restructuring efforts in the United States. On this basis, granting the third party stay during the Initial Stay Period is entirely consistent with section 11.001 of the CCAA.

### **C. Authority to Permit Pre-Filing Payments to Critical Suppliers**

77. BBB Canada is proposing in the Initial Order that it be authorized, but not required, and in all cases with the consent of the Monitor, to make payments for goods or services actually supplied to BBB Canada prior to the date of the Initial Order by third-party suppliers or service providers up to a maximum aggregate amount of \$500,000 if, in the opinion of BBB Canada, the supplier or service provider is critical to the orderly wind-down of BBB Canada's business.<sup>71</sup>

78. Section 11.4 of the CCAA gives the Court the specific authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing for services provided after the filing. However, section 11.4 of the CCAA does not oust the court's

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<sup>70</sup> Etlin Affidavit, para. 146.

<sup>71</sup> Etlin Affidavit, para. 151.

inherent jurisdiction to make provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor, even where the debtor does not propose to secure payment of post-filing supplies with a critical supplier charge.<sup>72</sup> Case law demonstrates that this Court has jurisdiction to include such a provision in the Initial Order.<sup>73</sup>

**D. Other Court-Ordered Charges**

**(a) Administration Charge**

79. The Applicant proposes that the Monitor, its counsel, and counsel to BBB Canada be granted a Court-ordered charge as security for their respective fees and disbursements relating to services rendered in respect of BBB Canada (the “**Administration Charge**”). With the concurrence of the proposed Monitor, the Applicant is proposing that the Administration Charge for the first ten days be limited to \$0.55 million and will be seeking to increase the charge at the comeback hearing. The Administration Charge is proposed to have first priority over all other charges and was developed in consultation with the proposed Monitor.<sup>74</sup>

80. Section 11.52 of the CCAA gives this Court the jurisdiction to grant an administration charge in circumstances such as these.<sup>75</sup> In this case, it is vital that the wind-down of the Canadian business take place in an orderly fashion, in order to minimize prejudice to stakeholders and maximize value. Professional advisors are essential for this wind-down to occur in a responsible, controlled and orderly manner.

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<sup>72</sup> *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, [2010 ONSC 222](#) [*Canwest Publishing*], para. 50.

<sup>73</sup> *Target*, above note 39, paras. 64-65.

<sup>74</sup> Etlin Affidavit, para. 158.

<sup>75</sup> *Canwest Publishing*, above note 72, para. 54; *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114](#) [*Canwest Global*], paras. 37-40.

81. The amount of the proposed Administration Charge is commensurate with the nature of the Applicant's business and the tasks required to effect a responsible and controlled wind-down of the Bed Bath & Beyond Group's Canadian retail operations. The Proposed Monitor thus supports the Administration Charge sought by the Applicant.

**(b) D&O Charge**

82. An orderly wind down of BBB Canada will only be possible with the continued participation of the BBB Canada's directors, officers, management and employees who are essential to the viability of the orderly wind down of BBB Canada's business.<sup>76</sup>

83. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.<sup>77</sup> Directors of Canadian companies can be held liable for certain obligations of a company owing to employees and government entities. BBB Canada estimates, with the assistance of A&M in its capacity as proposed Monitor, that these obligations may amount to as much as approximately \$7.8 million during the initial 10-day stay period, increasing to \$9.4 million by the comeback hearing.<sup>78</sup>

84. BBB Canada's present and former directors, and officers who are or were employed by the Applicant or BBB LP, are among the potential beneficiaries under a liability insurance policy that covers the entire Bed Bath & Beyond Group business. These insurance policies contain various exceptions, exclusions and carve-outs, thus may not provide sufficient coverage against the

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<sup>76</sup> Etlin Affidavit, para. 159.

<sup>77</sup> *Canwest Global*, above note 75, para. 48.

<sup>78</sup> Etlin Affidavit, para. 160.

potential liability that the directors and officers could incur in relation to these CCAA proceedings.<sup>79</sup>

85. In light of the complexity and scope of BBB Canada's operations and potential liabilities and the uncertainty surrounding available indemnities and insurance, the directors and officers have indicated to the Applicant that their continued service to BBB Canada and involvement in this proceeding is conditional upon the granting of an order under the CCAA that grants a charge in favour of the directors and officers of BBB Canada (the "**D&O Charge**"). With the concurrence of the proposed Monitor, BBB Canada is proposing that the D&O Charge for the first ten days be limited to \$7.5 million and will be seeking to increase the charge at the comeback hearing. The quantum of the D&O Charge was developed in consultation with the Monitor.<sup>80</sup>

86. The D&O Charge is proposed to be subordinate to the Administration Charge. The D&O Charge is necessary so that BBB Canada may benefit from its directors' and officers' experience with BBB Canada's business and industry, and so that its directors and officers can guide BBB Canada's wind down.<sup>81</sup>

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

87. The Applicant therefore requests an Order substantially in the form of the draft Initial Order attached as Schedule "A" to the Notice of Application.

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<sup>79</sup> Etlin Affidavit, para. 161.

<sup>80</sup> Etlin Affidavit, para. 162.

<sup>81</sup> Etlin Affidavit, para. 163.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10th day of February, 2023.

*Shawn Irving*

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per Marc Wasserman / Shawn Irving / Dave  
Rosenblat / Emily Paplawski

## SCHEDULE “A”: LIST OF AUTHORITIES

### *Cases*

1. *4519922 Canada Inc. (Re)*, [2015 ONSC 124](#)
2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, [2020 SCC 10](#)
3. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008 CanLII 21724](#) (S.C.J.)
4. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114](#)
5. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, [2010 ONSC 222](#)
6. *Express Fashion Apparel Canada Inc. and Express Canada GC GP, Inc. (Re)*, (May 4, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11785-00CL ([Initial Order](#))
7. *First Leaside Wealth Management Inc. (Re)*, [2012 ONSC 1299](#)
8. *Forever XXI ULC (Re)*, (September 29, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Endorsement](#))
9. *Forever XXI ULC (Re)*, (September 29, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Initial Order](#))
10. *JTI-Macdonald Corp. (Re)*, [2019 ONSC 1625](#)
11. *Laurentian University of Sudbury*, [2021 ONSC 659](#)
12. *Lydian International Limited (Re)*, [2019 ONSC 7473](#) [Commercial List]
13. *McEwan Enterprises Inc.*, [2021 ONSC 6453](#)
14. *Northern Transportation Company Limited (Re)*, [2016 ABQB 522](#)
15. *Pacific Exploration & Production Corporation (Re)*, [2016 ONSC 5429](#)
16. *Sino-Forest Corp (Re)*, [2012 ONSC 2063](#)
17. *Stelco Inc. (Re)*, [2004 CanLII 24933](#) (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused [2004 CarswellOnt 2936](#), leave to appeal to S.C.C. refused [2004 CarswellOnt 5200](#)
18. *Target Canada Co. (Re)*, [2015 ONSC 303](#)

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

### *BANKRUPTCY AND INSOLVENCY ACT*

R.S.C., 1985, c. B-3, as amended

#### 2. [...]

***insolvent person*** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

### *COMPANIES’ CREDITORS ARRANGEMENT ACT*

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

#### 2. (1) [...]

***debtor company*** means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (*compagnie débitrice*)



[...]

### Application

**3** (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

### Jurisdiction of court to receive applications

**9** (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

[...]

### 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.

[...]

### Relief reasonably necessary

**11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

### Rights of suppliers

**11.01** No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

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 30 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.

[...]

Burden of proof on application

**11.02** (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.

[...]

Persons obligated under letter of credit or guarantee

**11.04** No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

[...]

Critical supplier

**11.4** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier

of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

#### Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

#### Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

#### Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[...]

#### Security or charge relating to director's indemnification

**11.51** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

#### Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

#### Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

### Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

### Court may order security or charge to cover certain costs

**11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

### Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

Court File No:

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

Applicant

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

Proceeding commenced at: TORONTO

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