

**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 11, 2023

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TO: SERVICE LIST

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PART I - NATURE OF THIS MOTION

1. On February 10, 2023, BBB Canada Ltd. (the “**Applicant**”), along with Bed Bath & Beyond Canada L.P. (“**BBB LP**”, and together with the Applicant, “**BBB Canada**”), was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the “**CCAA**”) 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 this CCAA proceeding (the “**Monitor**”). On February 21, 2023, the Court further granted an Amended and Restated Initial Order (the “**ARIO**”) and a sale approval order.

2. Pursuant to the powers granted to it by the terms of the ARIO, BBB Canada retained Retail Ventures CND Inc. (“**RVC**”) as its exclusive listing agent for the purpose of facilitating the sale of leases and other property rights for some or all of BBB Canada’s retail stores across Canada (the “**Leases**”). RVC commenced a marketing process seeking to monetize the Leases for the benefit of BBB Canada’s stakeholders. This marketing process was ultimately successful, generating significant interest in the Leases.

3. A number of the transactions were entered into as part of this marketing process and have already been approved by this Court. This factum is filed in support of a motion by BBB Canada with respect to the final two transactions entered into as part of the marketing process. The Applicant seeks an order:

- (a) assigning the Ottawa Trainyards Lease (as defined below) to Winners Merchants International L.P. (**“Winners LP”**) in accordance with the Assignment and Assumption of Lease Agreement, dated May 5, 2023 (the **“Winners Ottawa Agreement”**), and pursuant to section 11.3 of the CCAA; and
- (b) approving the transactions contemplated by the Winners Ottawa Agreement and the Assignment and Assumption of Lease Agreement, dated May 1, 2023 (the **“Giant Tiger Agreement”**) among BBB LP, BBBI and Giant Tiger Stores Limited (**“Giant Tiger”**), and vesting BBB LP’s right, title and interest in and to the Ottawa Trainyards Lease and the other purchased assets described in the Winners Ottawa Agreement and the Colossus Lease (as defined below) and the other purchased assets described in the Giant Tiger Agreement, free and clear of all Encumbrances other than permitted encumbrances identified in, or pursuant to, the Winners Ottawa Agreement or the Giant Tiger Agreement (as applicable).

4. The Applicant submits that the assignment of the Ottawa Trainyards Lease fulfils the requirements set out in in section 11.3 of the CCAA and should be assigned to Winners LP. The requested assignment order is a condition to the closing of the Winners Ottawa Agreement and is an essential step in the realization by BBB Canada of the value of the Ottawa Trainyards Lease. Winners LP is a sophisticated commercial entity which holds 554 retail leases across Canada, had

net sales in the 2023 fiscal year of approximately \$6.45 billion and has confirmed its financial ability to close the transaction and assume all obligations under the Ottawa Trainyards Lease.

5. BBB Canada and Winners LP have made repeated, good faith efforts to contact the landlord of the Ottawa Trainyards Lease and obtain its consent to the proposed assignment. The only reason BBB Canada is required to seek an order under section 11.3 is because of the landlord's ongoing failure to respond in any manner to correspondence from the landlord's own counsel, BBB Canada or Winners LP.

6. The Applicant further submits that the requested approvals with respect to the Winners Ottawa Agreement and the Giant Tiger Agreement (which approval and vesting has been specifically requested by Giant Tiger) should be granted. Both agreements are the result of a robust marketing process which this Court previously found was "comprehensive and garnered significant interest from third parties."¹ The criteria set out in section 36(3) of the CCAA for approval of a transaction outside the normal course of business are satisfied. The consideration paid by Winners LP for the Ottawa Trainyards Lease, and by Giant Tiger for the Colossus Lease, was fair and reasonable in the circumstances and represented the highest, non-overlapping executable offer received within the marketing process.

PART II - SUMMARY OF THE FACTS

A. BBB Canada's Marketing of the Leases

7. Under the terms of the ARIO, BBB Canada is authorized to dispose of redundant or non-material assets not exceeding \$500,000 in any one transaction or \$2.5 million in the aggregate and

¹ *BBB Canada Inc. (Re)*, 2023 ONSC 2308 at para. 12 [*BBB Canada*].

to apply to the Court for such approval, vesting or other Orders as may be necessary to consummate sale transactions for all or any part of the Property (as defined in the ARIO), for the purpose of effecting the orderly wind-down of BBB Canada's business. The ARIO further authorizes and empowers BBB Canada to retain, among other persons, contractors, consultants, agents or advisors as it deems reasonably necessary or desirable in the ordinary course of business or to carry out the terms of the ARIO.²

8. Following the granting of the ARIO, BBB Canada entered into an Exclusive Listing Agreement with RVC to market and facilitate the sale of the Leases. Between February 28 and March 24, 2023, 58 parties were contacted by, or reached out directly to, RVC to discuss the process for bidding on one or more of the Leases. Of these 58 parties, 44 executed non-disclosure agreements, and BBB Canada ultimately received 19 separate expressions of interests for a transaction involving one or more of the leases. BBB Canada, with the assistance of RVC and in consultation with the Monitor, undertook extensive negotiations with these bidders, which resulted in a number of executable transactions.³

9. A number of the transactions entered into as part of the marketing process conducted by RVC were approved by this Court on April 11 and 28, 2023. The Winners Ottawa Agreement and the Giant Tiger Agreement are the final two assignment and assumption agreements resulting from the marketing process.⁴

² Affidavit of Wade Haddad, sworn April 5, 2023 at para. 9 [April 5 Haddad Affidavit].

³ Affidavit of Wade Haddad, sworn May 5, 2023 at para. 6 [Haddad Affidavit].

⁴ Haddad Affidavit, at para. 6.

B. The Ottawa Trainyards Lease

10. BBB LP and Winners LP are party to the Winners Ottawa Agreement with respect to premises located in the Ottawa Trainyards Shopping Center at 500 Terminal Avenue, Ottawa, Ontario (the “**Ottawa Trainyards Lease**”). Under the terms of the Winners Ottawa Agreement, BBB LP agrees to assign and transfer, and Winners LP agrees to assume, all of BBB LP’s right, title and interest in and to the Ottawa Trainyards Lease, the premises described in the Ottawa Trainyards Lease, and all personal property, FF&E and Trade Fixtures left in the premises on the closing date, in each case on an “as is, where is” basis. In exchange, Winners LP agrees to pay to the Monitor, in trust, cash consideration of \$300,000.⁵

11. BBB Canada understands that the principal of the landlord under the Ottawa Trainyards Lease is an elderly individual who singularly manages her family’s real estate portfolio. Until recently, BBB Canada was in advanced discussions with counsel to the landlord (“**Landlord’s Counsel**”) regarding the terms of a contractual landlord consent to the assignment. BBB Canada has been advised by Landlord’s Counsel that in his last discussion with the principal of the landlord, she was generally supportive of the assignment of the Ottawa Trainyards Lease to Winners LP. At no point has either the landlord or Landlord’s Counsel expressed opposition to the assignment.⁶

12. However, over the past number of weeks, the landlord has been unresponsive to communications from both Landlord’s Counsel and from Winners LP.⁷ BBB Canada’s counsel,

⁵ Haddad Affidavit, at para. 8.

⁶ Haddad Affidavit, at paras. 10-11.

⁷ Haddad Affidavit, at para. 10.

Osler Hoskin & Harcourt LLP (“**Osler**”) has been in regular contact with Landlord’s Counsel since March 27, 2023, including at least 17 emails and numerous telephone conversations. A final draft of a proposed landlord waiver and amendment agreement (drafted with the participation of Landlord’s Counsel) was circulated to Landlord’s Counsel on April 14, 2023. Osler followed up with Landlord’s Counsel on six separate occasions, most recently on May 5, 2023, but was advised that Landlord’s Counsel had not received a response from the landlord and, accordingly, did not have instructions on the proposal final form of landlord consent.⁸

13. Further, BBB Canada has been advised that representatives of Winners LP also attempted to reach the landlord directly by phone on April 6, 17, 24, and 27, 2023; however, no voicemails were returned.⁹

C. The Giant Tiger Agreement

14. BBB LP and Giant Tiger are party to the Giant Tiger Agreement with respect to the premises located at 67 Colossus Drive, Unit D10, Vaughan, Ontario (the “**Colossus Lease**”). Under the terms of the Giant Tiger Agreement, BBB LP agreed to assign and transfer, and Giant Tiger agreed to assume, all of BBB LP’s right, title and interest in and to the Colossus Lease, the premises described in the Colossus Lease, and all personal property, FF&E and Trade Fixtures left

⁸ Haddad Affidavit, at para. 12-13.

⁹ Haddad Affidavit, at para. 14.

in the premises on the closing date, on an “as is, where is” basis. In exchange, Giant Tiger agreed to pay to the Monitor, in trust, cash consideration of \$268,663.73.¹⁰

15. Simultaneous with execution of the Giant Tiger Agreement, BBB LP, BBBI, Giant Tiger and the landlord under the Colossus Lease executed a Landlord Waiver and Amendment of Lease Agreement pursuant to which, among other things, the landlord agreed to certain waivers and amendments to the Colossus Lease and Giant Tiger agreed to pay cure costs of \$1,336.23.¹¹ The transactions under the Giant Tiger Agreement closed on May 1, 2023, however Giant Tiger has since requested that the Applicant seek the requested approval and vesting language in the proposed order.¹²

PART III - ISSUES AND THE LAW

16. This factum addresses the following issues:

- (a) This Court should assign the Ottawa Trainyards Lease to Winners LP pursuant to section 11.3 of the CCAA; and
- (b) This Court should approve the Winners Ottawa Agreement and the Giant Tiger Agreement, and vest BBB LP’s right, title and interest in and to the Ottawa Trainyards Lease, the Colossus Lease and the other purchased assets to Winners LP and Giant Tiger, as appropriate, free and clear of all Encumbrances other than

¹⁰ Haddad Affidavit, at para. 25.

¹¹ Haddad Affidavit, at para. 27.

¹² Haddad Affidavit, at para. 28.

permitted encumbrances identified in, or pursuant to, the Winners Ottawa Agreement or the Giant Tiger Agreement, as appropriate.

A. Assignment of the Ottawa Trainyards Lease

17. Section 11.3 of the CCAA gives this Court the jurisdiction and the discretion to make an order assigning the rights and obligations of the debtor company under an agreement to a third party who agrees to the assignment. Section 11.3 sets out requirements that must be satisfied for the Court to grant such an assignment, which include:

- (a) *Notice*: a motion for an assignment order must be “on notice to every party to an agreement and the monitor...”¹³ That notice has been given.¹⁴ Although it is not required to, BBB Canada has made repeated good faith attempts to contact and obtain the consent of the landlord. Further, the Landlord’s Counsel has been given notice of BBB Canada’s intent to seek the assignment and has been served with the relevant motion materials, and a separate copy of the motion record was mailed to the landlord at the address for notice listed in the Ottawa Trainyards Lease.
- (b) *No Exception Applies*: no assignment order can be granted in respect of (1) obligations that are not assignable by reason of their nature; (2) an agreement entered into on or after the filing date; (3) an eligible financial contract; or (4) a collective agreement.¹⁵ No such exception applies.

¹³ CCAA, s. 11.3(1).

¹⁴ Haddad Affidavit, at para. 17.

¹⁵ CCAA, s. 11.3(2).

- (c) *Assignment is Appropriate*: the court must consider, among other things, (1) whether the Monitor approved the proposed assignment; (2) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and (3) whether it would be appropriate to assign the rights and obligations to that person.¹⁶ The Monitor has advised that it approves the proposed assignment.¹⁷ Winners LP is a sophisticated commercial entity which holds leases for 554 retail stores across Canada, had net sales of approximately \$6.45 billion during fiscal year 2023, and has confirmed that it has the financial ability to close the transactions, to make all payments covenanted to be made under the Ottawa Trainyards Lease, and to other assume, observe, perform, and be liable for the performance of the Ottawa Trainyards Lease.¹⁸ The Applicant therefore submits that it is appropriate to assign the rights and obligations to Winners LP.
- (d) *Monetary Defaults Cured*: the Court must be satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company’s insolvency, the commencement of proceedings under the CCAA or the company’s failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.¹⁹ BBB LP has agreed to be responsible for all monetary defaults existing as of the closing date which relate solely to the period prior to the closing date; however, if any monetary defaults exceed \$150,000, BBB LP will

¹⁶ CCAA, s. 11.3(3).

¹⁷ Haddad Affidavit, at para. 24.

¹⁸ Haddad Affidavit, at paras. 21-23.

¹⁹ CCAA, s. 11.3(4).

have the option to terminate the Winners Ottawa Agreement on or before May 18, 2023.²⁰

18. Section 11.3 on its face does not require that a landlord's consent be sought or obtained prior to an assignment. It applies notwithstanding the terms of a contract and regardless of whether the counterparty has been asked for consent, or whether the counterparty's failure to consent is reasonable or unreasonable. Even before the enactment of Section 11.3, this Court held that it had the jurisdiction to order an assignment of the debtor company's rights and obligations under contract to a third party, despite the lack of counterparty consent. The Court's exercise of this jurisdiction was based on evidence that the proposed assignment was necessary or important to facilitate the reorganization process, did not unduly prejudice the rights of the third party, and was consistent with the objectives of the CCAA.²¹ Courts have held that the principles applicable under Section 11.3 of the CCAA have essentially codified and clarified this prior law.²²

19. These criteria are satisfied. The relief sought by the Applicant under s. 11.3 is a condition to the closing of the Winners Ottawa Agreement and is essential to the ability of BBB Canada to realize the value of the Ottawa Trainyards Lease for the benefit of stakeholders.²³ Further, there can be no suggestion that the landlord is being treated unfairly. BBB Canada and Winners LP have made repeated, good faith efforts to contact the landlord and obtain its consent to the proposed assignment. The only reason BBB Canada is required to seek an order under section 11.3 of the

²⁰ Haddad Affidavit, at para. 8.

²¹ *Playdium Entertainment Corp (Re)*, [2001 CanLII 28282 \(ON SC\)](#) at para. 38-39, 42; *Hayes Forest Service Ltd (Re)*, [2009 BCSC 1169](#) at para. 28. See also *Nexient Learning Inc (Re)*, [2009 CanLII 72037 \(ON SC\)](#) at para 54.

²² See for example *Veris Gold Corp (Re)*, [2015 BCSC 1204](#) at paras 56-58.

²³ Haddad Affidavit, at paras. 17, 19, 23.

CCAA is because of the landlord's ongoing failure to respond in any manner to correspondence from Landlord's Counsel, BBB Canada or Winners LP. No amendments to the permitted use restrictions, go dark rights, or other provisions are being sought by BBB Canada or Winners LP that would prejudice the landlord's rights under the Ottawa Trainyards Lease.²⁴

20. The failure of the landlord to respond to repeated communications should not be permitted to prevent the sales process from moving forward and the Ottawa Trainyards Lease from being assigned. Indeed, the landlord's unresponsiveness has already caused three instances of significant loss to BBB Canada and its stakeholders:

- (a) A separate lease in the same development and involving the same landlord was intended to be assigned by BBB Canadas to Canadian Tire; however, because of the landlord's unresponsiveness, Canadian Tire elected to exclude the lease from the Canadian Tire Agreement, as it had the right to do, causing BBB Canada to lose \$140,000 of value that would otherwise have been payable by Canadian Tire.
- (b) With respect to the Winners Ottawa Agreement, Winners LP has already reduced the consideration which it was originally proposing to pay to account for the cost increases caused by the failure of the transaction to close on May 1, 2023.
- (c) BBB Canada commenced discussions with Landlord's Counsel on March 27, with a view to assigning the Ottawa Trainyards Lease to Winners LP on or before May 1, 2023, in order to avoid paying additional rent after the liquidation sale was

²⁴ Haddad Affidavit, at para. 22.

concluded. The landlord's unresponsiveness delayed the closing and has caused BBB Canada to incur additional rent since May 1st.²⁵

21. These losses should not be permitted to continue. The Ottawa Trainyards Lease is a valuable asset for the estate, which BBB Canada seeks to realize on for the benefit of its creditors. Delaying this realization – and in the process requiring BBB Canada to continue to make future lease payments – would be detrimental to the interest of BBB Canada's stakeholders, and inconsistent with the objectives of the CCAA.

22. Given the above, and BBB Canada's satisfaction of all requirements under section 11.3 of the CCAA, the Applicant submits that this Court should assign the rights and obligations under the Ottawa Trainyard Lease to Winners LP.

B. Approval of the Winners Ottawa Agreement and the Giant Tiger Agreement

23. Section 36 of the CCAA sets out the legal test for obtaining court approval where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

Section 36 provides:

36(1) Restriction on disposition of business assets - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3) Factors to be considered - In deciding whether to grant the authorization, the court is to consider, among other things,

²⁵ Haddad Affidavit, at paras. 15-16.

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

...

36(6) Assets may be disposed of free and clear - The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7) Restriction — employers - The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

24. In discussing section 36 of the CCAA, which was added to the CCAA as part of the 2009 amendments, this Court has stated:²⁶

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."

25. It is well-established that the factors listed in section 36(3) are, on their face, not intended to be exhaustive. Nor are they intended to be a formulaic checklist that must be followed in every

²⁶ *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368 \(ON SC\)](#) at para. 32.

sale transaction under the CCAA.²⁷ These factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law.²⁸

26. At the request of Giant Tiger, the Applicant is seeking the requested relief in relation to the Giant Tiger Agreement, notwithstanding the fact that the transaction closed on May 1, 2023 and proceeds have been received by the Monitor. The Giant Tiger Agreement does not require approval by the Court, as consideration payable by Giant Tiger is below the threshold set out in the ARIO; however, the Applicant has agreed to facilitate Giant Tiger's request.

27. The Applicant submits that, taking into account the factors listed in Section 36(3) of the CCAA and with regard to the general interpretative principles underlying the CCAA, this Court should grant the proposed approval and vesting language in the proposed Order. In the absence of any indication that the Applicant has acted improvidently, the informed business judgment of BBB Canada and RVC, as listing agent, that the Winners Ottawa Agreement and the Giant Tiger Agreement are in the best interests of BBB Canada and its stakeholders is entitled to deference by this Court.²⁹ The Monitor supports approval of the Winners Ottawa Agreement, the Giant Tiger Agreement, and the transactions contemplated therein.

²⁷ See for example, *White Birch Paper Holding Co. (Re)*, [2010 QCCS 4915](#) [*White Birch*] at para. 48, leave to appeal refused [2010 QCCA 1950](#); *Target Canada Co. (Re)*, [2015 ONSC 2066](#) [*Target*] at para. 15.

²⁸ *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, [2010 ONSC 2870](#) at para. 13, citing *Royal Bank v. Soundair Corp.*, [\[1991\] O.J. No. 1137](#) (C.A.) [*Soundair*] at para. 16. Under the *Soundair* test, it was necessary to consider (1) whether sufficient efforts had been made to obtain the best price and that the debtor had not acted improvidently; (2) whether the interests of all parties had been considered; (3) the integrity and efficacy of the process for obtaining offers; and (4) whether there was any unfairness in working out the process. See also *Target*, at para. 15.

²⁹ *AbitibiBowater Inc. (Re)*, [2010 QCCS 1742](#) at paras. 70-72. See also *Sanjel Co. (Re)*, [2016 ABQB 257](#) [*Sanjel*] at para. 57; *Target Canada Co. (Re)*, [2015 ONSC 1487](#) at para. 18.

(a) Process was Reasonable

28. Whether the process for achieving a sale transaction under the CCAA is fair and reasonable must be examined contextually, in light of the particular circumstances existing at the time.³⁰ Assessing the reasonableness of a sale process does not require the Court to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer.³¹ The Court must be satisfied overall that the debtor has not acted improvidently. As the Courts have held, by reference to the principles in *Soundair*, the decision to accept a particular offer is a matter of business judgment on the part of the debtor that should not lightly be interfered with in the absence of evidence of imprudence or unfairness.³²

29. Here, BBB Canada, with the assistance of RVC and in consultation with and with the support of the Monitor,³³ undertook a marketing process which this Court previously determined was “comprehensive and garnered significant interest from third parties.”³⁴ The Winners Ottawa Agreement and the Giant Tiger Agreement resulted from this “comprehensive” marketing process.

(b) Monitor Concurs

³⁰ See *White Birch*, at para. 49: “The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.” See also *Sanjel*, at paras. 77 & 80.

³¹ *Soundair*, at paras. 48-49.

³² *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247](#) at paras. 45 & 51-52 [*Terrace Bay*], citing *Soundair*, at paras. 21 & 30-31; see also *Sanjel*, at para. 99.

³³ April 5 Haddad Affidavit, at para. 10.

³⁴ *BBB Canada*, at para 12.

30. As required by section 36 of the CCAA, the Monitor has been involved at virtually every stage of the marketing process. The Monitor approved of and monitored the marketing process, was kept apprised of the status and details of the marketing process and was provided with copies of all EOIs received in the marketing process.³⁵

31. The Monitor, having been involved at every step of the process, has advised that it supports the relief the Applicant seeks on this motion.³⁶

(c) Purchase price is fair and reasonable

32. BBB Canada and RVC are each of the view that the consideration to be received by BBB Canada under the Winners Ottawa Agreement and received under the Giant Tiger Agreement is fair and reasonable.³⁷

33. CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion.³⁸ The debtor must demonstrate that sufficient effort has been made to obtain the best price and that it has not acted improvidently. This requirement is evaluated based on the information available at the time the offer is accepted. It requires deference to the debtor's business judgment (which is supported by the Monitor) in order to avoid turning the process into an auction conducted by the Court.³⁹

³⁵ See April 5 Haddad Affidavit, at paras. 18-19, 21-22.

³⁶ Haddad Affidavit, at para. 29; Fourth Report of the Monitor, at para. 6.1.

³⁷ Haddad Affidavit, at para. 29; Fourth Report of the Monitor, at para. 6.1.

³⁸ See for example *Terrace Bay*, at paras. 50-55; *Sanjel*, at para. 56; and *Grafton-Fraser Inc. v. Cadillac-Fairview Corp.*, [2017 ONSC 2496](#) at para. 19.

³⁹ *Terrace Bay*, at para. 51, citing *Soundair*. See also *Sanjel*, at para. 80.

34. Case law interpreting section 36 of the CCAA does not mandate that the purchase price for a debtor company's assets must be established following any specific type of process - such as an "auction" - before the Court can determine that the consideration offered is fair and reasonable.⁴⁰ As long as the process is fair and reasonable in the circumstances, it may not be impugned.

35. As described above, BBB Canada and RVC undertook a comprehensive marketing process for the sale of the Leases. There is ample evidence that the market has been thoroughly tested in order to obtain the best price. The price that was obtained pursuant to the Winners Ottawa Agreement represented the highest, non-overlapping, executable offer received within the marketing process for the Ottawa Trainyards Lease.⁴¹ Similarly, the consideration that was paid pursuant to the Giant Tiger Agreement represented the highest, non-overlapping, executable offer received within the marketing process for the Colossus Lease and other purchased assets under the Giant Tiger Agreement.⁴²

(d) Transaction in Best Interests of Stakeholders

36. In addition to the purchase prices obtained under the Winners Ottawa Agreement and the Giant Tiger Agreement, there are certain other benefits that support the reasonable, informed business judgment of BBB Canada, supported by RVC and the Monitor, that both agreements are in the best interests of BBB Canada and their stakeholders. These include:

⁴⁰ As noted above, *Soundair* itself was a case in which the Court held that a reasonable process did not necessarily require an auction.

⁴¹ Haddad Affidavit, at para. 23.

⁴² Haddad Affidavit, at para. 29.

- (a) *Certainty*: Both the Winners Ottawa Agreement and the Giant Tiger Agreement were concluded on an “as-is, where is” basis.⁴³ Moreover, **[neither agreement is]** subject to any unusual or onerous conditions that could affect the ability of the parties to close the transaction.
- (b) *Assumption of Costs*: Giant Tiger agreed to be responsible for all cure costs under the Colossus Lease incurred or due and owing for the period between January 1, 2023 and the closing date by means of a deduction from the purchase price.⁴⁴ As above, under the Winners Ottawa Agreement, BBB LP has agreed to be responsible for all monetary defaults existing as of the closing date which relate solely to the period prior to the closing date; however, if any monetary defaults exceed \$150,000, BBB LP will have the option to terminate the Winners Ottawa Agreement on or before May 18, 2023.
- (e) **Compliance with additional requirements under section 36**

37. The Applicant submits that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied:

- (a) All parties who have registered security interests against BBB Canada’s interest in the properties to be transferred under the Winners Ottawa Agreement and the Giant

⁴³ Haddad Affidavit, at paras. 8, 25.

⁴⁴ Haddad Affidavit, at para 25.

Tiger Agreement and who might be affected by the relief requested in this motion have been notified.⁴⁵

- (b) Pursuant to section 36(4) of the CCAA, certain mandatory criteria must be met for court approval of a sale or disposition to a related party. Neither the Applicant and Winners LP nor the Applicant and Giant Tiger are related parties, and these criteria are therefore not relevant for the purposes of this motion.
- (c) Section 36(6) of the CCAA permits this court to authorize a sale or disposition free and clear of any security, charge or other restriction.
- (d) Section 36(7) of the CCAA provides that relief under section 36 cannot be granted unless the Court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement. The amounts referred to under these subsections are amounts owing by a debtor company to its employees and former employees for unpaid wages that these employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to the debtor company. Given that the Applicant has been paying employees for all post-filing services, the requirements of section 36(7) of the CCAA are satisfied in this motion.

⁴⁵ CCAA, s. 36(2).

PART IV - NATURE OF THE ORDER SOUGHT

38. The Applicant therefore requests an order substantially in the form attached at Tab 3 to the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of May, 2023.



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

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SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *AbitibiBowater Inc. (Re)*, [2010 QCCS 1742](#)
2. *BBB Canada Inc. (Re)*, [2023 ONSC 2308](#)
3. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368 \(ON SC\)](#)
4. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, [2010 ONSC 2870](#)
5. *Hayes Forest Service Ltd (Re)*, [2009 BCSC 1169](#)
6. *Nexient Learning Inc (Re)*, [2009 CanLII 72037 \(ON SC\)](#)
7. *Royal Bank v. Soundair Corp.*, [\[1991\] O.J. No. 1137](#) (C.A.)
8. *Playdium Entertainment Corp (Re)*, [2001 CanLII 28282 \(ON SC\)](#)
9. *Sanjel Co. (Re)*, [2016 ABQB 257](#)
10. *Target Canada Co. (Re)*, [2015 ONSC 1487](#)
11. *Target Canada Co. (Re)*, [2015 ONSC 2066](#)
12. *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247](#)
13. *Veris Gold Corp (Re)*, [2015 BCSC 1204](#)
14. *White Birch Paper Holding Co. (Re)*, [2010 QCCS 4915](#)

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

COMPANIES’ CREDITORS ARRANGEMENT ACT

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

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the

agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

[...]

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a)** an agreement entered into on or after the day on which proceedings commence under this Act;
- (b)** an eligible financial contract; or
- (c)** a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a)** whether the monitor approved the proposed assignment;
- (b)** whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c)** whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

- (5) The applicant is to send a copy of the order to every party to the agreement.

**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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