

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

April 7, 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. This factum is filed in support of an application by BBB Canada for an order approving the Omnibus Assignment and Assumption of Leases, FF&E and Trade Fixtures Agreement, dated March 28, 2023 (the “**DKB Capital Agreement**”) between BBB LP, Bed Bath & Beyond Inc. (“**BBBI**”) and 11607987 Canada Inc., dba DKB Capital (“**DKB Capital**”), entered into as part of this marketing process. Under the terms of the ARIO, the approval of this Court is required for the DKB Capital Agreement.

4. The Applicant accordingly seeks the following orders:

- (a) an order approving the DKB Capital Agreement;
- (b) an order assigning certain Leases to DKB Capital pursuant to section 11.3 of the CCAA on an unopposed basis;
- (c) an order vesting BBB LP’s right, title and interest in and to certain Leases and other purchased assets in DKB Capital free and clear of all Encumbrances other than permitted encumbrances identified in, or pursuant to, the DKB Capital Agreement; and
- (d) an order directing that the unredacted copy of the DKB Capital Agreement be treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this Honourable Court.

5. The Applicant submits that the DKB Capital Agreement is the culmination of a robust and highly successful marketing process and should be approved on the basis that the criteria set out

in section 36(3) of the CCAA are clearly satisfied. The marketing process, which was designed to be an inherently flexible process and involved a broad canvassing of the market, was implemented with the objective of securing the highest value for BBB Canada's leases.

6. The consideration paid by DKB Capital for the applicable Leases is fair and reasonable in the circumstances. It represents the highest, non-overlapping executable offer received within the marketing process for the 29 Leases.

7. Of the 29 Leases, eight of the Leases do not require landlord consent prior to assignment, while for six others, required landlord consents have been obtained. Further, BBB anticipates that landlords in respect of eight leases for which consents have not been obtained will not oppose an assignment of such leases to DKB Capital by the court. BBB Canada will continue to work with all landlords to obtain the necessary consents and releases for the remaining seven leases subject to the DKB Capital Agreement. If consents/waivers are not finalized by April 11, 2023, BBB Canada may seek an Order assigning BBB Canada's rights, title and obligations under the Unassigned Leases to DKB Capital.

PART II - SUMMARY OF THE FACTS

8. The facts regarding this motion are fully set out in the affidavit of Wade Haddad.¹

¹ See Affidavit of Wade Haddad, sworn April 5, 2023 [Haddad Affidavit]. Capitalized terms not otherwise defined have the same meanings as in the Haddad Affidavit. All references to monetary amounts are in Canadian dollars unless otherwise noted.

A. BBB Canada's Marketing of the Leases

(a) Retention of RVC as Listing Agent

9. 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 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

10. Following the granting of the ARIO, BBB Canada sought and obtained proposals from three potential listing agents (the "**Prospective Listing Agents**") to market the Leases, with a view to maximizing the value of the Leases for the benefit of BBB Canada's creditors. After reviewing each of the proposals, BBB LP, in consultation with and with the support of the Monitor, entered into an Exclusive Listing Agreement with RVC on February 27, 2023, to market the Leases as exclusive agent for and on behalf of BBB LP for the period of February 21, 2023 through April 21, 2023 (the "**Exclusive Listing Agreement**"). As confirmed by the Monitor, RVC had the lowest and most competitive fee structure among the Prospective Listing Agents.³ RVC is a retail tenant focused brokerage and consulting company based in Toronto. RVC was selected as listing agent

² Haddad Affidavit, at para. 9

³ Second Report of the Monitor, at para. 3.5.

on the basis of, among other things, its extensive local experience and expertise, as well as its existing knowledge of BBB Canada's real estate portfolio.⁴

11. In order to complete the marketing process in a cost effective and proportionate manner based on unknown recoveries, BBB Canada determined, in consultation with the Monitor, that the marketing process should be undertaken in accordance with the authority granted to BBB Canada in the ARIO, as opposed to seeking advance court approval. The marketing process was by necessity undertaken in an abridged, although no less comprehensive, manner owing to the expected conclusion of BBB Canada's liquidation sale on April 30, 2023, and the need for BBB Canada to disclaim its interest in any Leases not subject to a sale transaction as soon as reasonably practicable to avoid paying additional rent.⁵

(b) Conduct of the Marketing Process

12. Upon execution of the Exclusive Listing Agreement, RVC commenced the process of marketing the Leases to, among others, commercial real estate brokerages, retail organizations operating in Canada, investment and private equity firms, and various other companies/organizations with potential interest in one or more of the Leases. In addition to this direct outreach, the opportunity to potentially acquire one or more of the Leases was published in various retail industry news publications. These marketing efforts were successful, and between

⁴ Haddad Affidavit, at paras. 10-13.

⁵ Haddad Affidavit, at paras. 16, 19.

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.⁶

13. Of these 58 parties, 44 executed non-disclosure agreements with BBB LP and the Monitor and were granted access to a confidential data site containing relevant documentation related to the Leases. Each of these 44 parties was further informed that time was of the essence due to the ongoing CCAA proceedings and anticipated conclusion of the liquidation sale and were therefore asked to confirm their interest by no later than 5:00 p.m. on March 24, 2023 (the “**EOI Deadline**”). In the period leading up to the EOI Deadline, RVC and BBB Canada, in consultation with the Monitor, engaged with, assisted, and responded to inquiries from interested parties.⁷

14. As a result of the comprehensive marketing process, interest in the Leases was significant. By the EOI Deadline, BBB Canada received 19 separate EOIs from third parties, which were comprised of: (a) offers by landlords for the surrender of specific Leases; and (b) offers by third party retailers for the assignment and assumption of certain Leases. As there was significant overlap between the various EOIs, RVC, in consultation with BBB Canada and the Monitor, undertook extensive negotiations with applicable bidders to either narrow the scope of the Leases included in their bids to reduce overlap or, in the alternative, increase the consideration provided thereunder.⁸

15. Following the EOI Deadline, RVC, BBB Canada’s counsel, the Monitor and the Monitor’s counsel reviewed all of the EOIs received by the EOI Deadline. As set out in the Monitor’s Second

⁶ Haddad Affidavit, at paras. 14-15.

⁷ Haddad Affidavit, at paras. 17-18.

⁸ Haddad Affidavit, at paras. 20-21.

Report, the Monitor's review in this regard focused on confirming that the highest and best possible aggregate recovery on the Leases was obtained.

16. The marketing process, and the subsequent negotiations led by RVC, ultimately resulted in the execution of, among other transactions, the DKB Capital Agreement.

B. DKB Capital Agreement

17. On March 28, 2023, BBB LP, BBBI, and DKB Capital entered into the DKB Capital Agreement relating to 29 Leases.⁹ Under the terms of the DKB Capital Agreement, BBB LP agrees to assign and transfer, and DKB agrees to assume, all of BBB LP's right, title and interest in and to: (1) each assigned Lease and the premises demised pursuant to the same on an "as is, where is" basis; and (2) various FF&E and Trade Fixtures, as specified in the DKB Capital Agreement. In exchange, DKB Capital agrees to pay to the Monitor, in trust, cash consideration of \$1,772,264.34. Of this amount, \$1,100,000 is allocated between the 29 Leases, and 662,264.34 is allocated between the FF&E and Trade Fixtures subject to the DKB Capital Agreement.¹⁰

18. The application of the DKB Capital Agreement to a specific Lease is dependent on first obtaining any required consents and releases from the relevant landlord. The DKB Capital Agreement contemplates that only "Assigned Leases" will ultimately be assigned to DKB Capital. Assigned Leases are defined as either: (1) Leases which do not require the consent of the landlord to the assignment and do not require prior notice to the landlord of the assignment, or that require prior notice but do not provide the landlord with any termination right or entitlement to a longer

⁹ See Haddad Affidavit, at para 29, for a full list of the Leases subject to the DKB Capital Agreement.

¹⁰ Second Report of the Monitor, at p. 16; Haddad Affidavit, at para. 31(a), (c). See Haddad Affidavit, at para. 31, for a detailed discussion of the terms of the DKB Capital Agreement.

notice period than was actually provided to the landlord in respect of the assignment (collectively, the “**No-Consent Leases**”); or (2) Leases which do require consent for the assignment and such consent has been obtained by April 11, 2023. In the event that any of the 29 Leases are not Assigned Leases as of April 11, 2023, BBB Canada may elect to exclude such Leases from the scope of the DKB Capital Agreement, and all cash consideration allocated to them will be returned to DKB Capital.¹¹

19. The DKB Capital Agreement, in respect of each Assigned Lease, is also conditional upon each landlord providing a release (in a form acceptable to BBB LP and BBBI) on or before April 11, 2023, releasing BBB LP and BBBI of all obligations under the Lease and the associated BBBI Indemnity. Should such a release not be obtained, BBB LP may elect to remove the relevant Lease from the Assigned Leases, or DKB Capital may provide an indemnity to BBB LP from an affiliate of DKB Capital acceptable to BBB LP indemnifying and saving BBB LP harmless from any and all claims arising from, among other things, non-payment of rents and other amounts due and owing under the Lease or the non-observance or non-performance of any terms, obligations or covenants under the Lease, in each case during the period following the closing date.¹²

20. As of the date of the swearing of the Haddad Affidavit, of the 29 Leases subject to the DKB Capital Agreement: (1) eight are No-Consent Leases; (2) six are leases for which landlords have provided the require consents and releases; and (3) eight are leases for which BBB Canada anticipates the relevant landlords will not oppose an assignment of the lease to DKB Capital

¹¹ Haddad Affidavit, at para. 31(b)-(d).

¹² Haddad Affidavit, at para. 31(e).

pursuant to an Order under section 11.3 of the CCAA. BBB Canada intends to continue to work with all landlords to obtain the necessary consents and releases for the remaining seven Leases.¹³

PART III - ISSUES AND THE LAW

21. This factum addresses the following issues:

- (a) This Court should approve the DKB Capital Agreement and grant the proposed Assignment, Approval and Vesting Order;
- (b) This court should assign certain Leases to DKB Capital pursuant to section 11.3 of the CCAA on an unopposed basis; and
- (c) This court should grant an order directing that the unredacted DKB Capital Agreement be treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this Honourable Court.

A. Approval of Proposed Transaction

22. Section 36 of the CCAA sets out the legal test for obtaining court approval that applies 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.

¹³ Haddad Affidavit, at paras. 33-34.

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,

- (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.

23. In discussing section 36 of the CCAA, which was added to the CCAA as part of the 2009 amendments, this Court has stated:¹⁴

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

¹⁴ *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368 \(ON SC\)](#) at para. 32.

company with greater flexibility in dealing with its property while limiting the possibility of abuse."

24. 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 sale transaction under the CCAA.¹⁵ These factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law.¹⁶

25. 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 approve the DKB Capital Agreement and grant the proposed Assignment, Approval and Vesting 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 DKB Capital Agreement is in the best interests of BBB Canada and their stakeholders is entitled to deference by this Court.¹⁷ The Monitor supports approval of the DKB Capital Agreement and the transactions contemplated therein.

¹⁵ 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.

¹⁶ *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.

¹⁷ *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

26. 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.¹⁸ 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.¹⁹ 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.²⁰

27. Here BBB Canada, in consultation with and with the support of the Monitor,²¹ chose a reputable listing agent, and the process followed by the listing agent was comprehensive and garnered significant interest from third parties.²² The fact that court approval of the process was not sought beforehand should not weigh against its reasonableness, as the decision to undertake the marketing process in accordance with the terms of the ARIO was made in consultation with the Monitor, on the basis that BBB Canada did not have the time or resources to seek court approval under such an expediated timeline. Moreover, the potential value of the leases was not

¹⁸ 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.

¹⁹ *Soundair*, at paras. 48-49.

²⁰ *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.

²¹ Haddad Affidavit, at para. 10.

²² Haddad Affidavit, at paras. 20-21.

known to BBB Canada until after the sale process began.²³ There are many examples where a sale was approved by the court, even though the process did not receive prior approval.²⁴

(b) Monitor Concurs

28. 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 and was kept apprised of the status and details of the negotiations which led to the DKB Capital Agreement. The Monitor was provided with copies of all EOIs received in the marketing process.²⁵

29. The Monitor, having been involved at every step of the process, supports the relief the Applicant seeks on this motion.²⁶ The Monitor's views are entitled to considerable deference from this Court.²⁷

(c) Purchase price is fair and reasonable

30. BBB Canada, RSV, and the Monitor are each of the view that the consideration to be received by BBB Canada under the DKB Capital Agreement is fair and reasonable.²⁸

²³ Haddad Affidavit, at para. 16.

²⁴ See e.g., *Sanjel*, where the SISP had been run before an initial order was sought under the CCAA. Also see *Soundair*, where a sale of an airline by a receiver was approved after the receiver had been given significant discretion to run the sales process as best it saw fit.

²⁵ See Haddad Affidavit, at paras. 18-19, 21-22.

²⁶ Haddad Affidavit, at para. 39.

²⁷ J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013) at p. 573.

²⁸ Haddad Affidavit, at para. 38

31. CCAA case law both prior to and subsequent to the enactment of section 36 has applied the test from *Soundair* in evaluating this criterion.²⁹ 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.³⁰

32. Case law interpreting section 36 of the CCAA does not mandate that the purchase price of 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.³¹ As long as the process is fair and reasonable in the circumstances, it cannot be impugned.

33. As described above, BBB Canada and the listing agent undertook a comprehensive sales and 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 obtained pursuant to the DKB Capital Agreement represents the highest, non-overlapping, executable offer received within the marketing process for the relevant Leases.³²

²⁹ 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.

³⁰ *Terrace Bay*, at para. 51, citing *Soundair*. See also *Sanjel*, at para. 80.

³¹ As noted above, *Soundair* itself was a case in which the Court held that a reasonable process did not necessarily require an auction.

³² Haddad Affidavit, at para. 38.

(d) Transaction in Best Interests of Stakeholders

34. In addition to the significant benefits represented by the purchase price obtained under the DKB Capital Agreement, there are certain other benefits that support the reasonable, informed business judgment of BBB Canada, supported by RVC and the Monitor, that the DKB Capital Agreement is in the best interests of BBB Canada and their stakeholders. These include:

- (a) *Certainty*: The DKB Capital Agreement is being concluded on an “as-is, where is” basis.³³ Moreover, the DKB Capital Agreement is not subject to any unusual or onerous conditions that could affect the ability of the parties to close the transaction. Finally, there is a mechanism for removing leases from the transaction and reducing the purchase price in order to facilitate closing of the DKB Capital Agreement where landlord consents to particular lease assignments or lease amendments are not forthcoming.³⁴
- (b) *Assumption of Costs*: DKB Capital has agreed to be responsible for all “Cure Costs” (as defined in the DKB Capital Agreement) which have or will arise as a result of non-monetary defaults under the assigned Leases.³⁵ Further, DKB Capital has confirmed and covenanted that it has the financial ability to make all payments covenanted to be made under the Leases, and to other assume, observe, perform, and be liable for the performance of the Leases.³⁶

³³ Haddad Affidavit, at para. 31(a).

³⁴ Haddad Affidavit, at para. 31(e).

³⁵ Haddad Affidavit, at para 30(f).

³⁶ Haddad Affidavit, at para. 35.

35. The Applicant therefore submits that the DKB Capital Agreement is beneficial overall to the creditors and other stakeholders of the Applicant.

(e) Compliance with additional requirements under section 36

36. 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 the Applicant's interest in the properties to be transferred under the DKB Capital Agreement and who might be affected by the relief requested in this motion have been notified.³⁷
- (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. The Applicant and DKB Capital are not 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

³⁷ CCAA, s. 36(2).

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.

B. Assignment of Contracts

37. As discussed above, certain of the Leases which are subject to the DKB Capital Agreement will be assigned in accordance with section 11.3 of the CCAA on an unopposed basis.

38. 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 this 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...”³⁸ That notice has been given.
- (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.³⁹ No such exception applies.

³⁸ CCAA, s. 11.3(1).

³⁹ 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.⁴⁰ The Monitor has approved the proposed assignments,⁴¹ and DKB Capital has confirmed and covenanted that it has the financial ability to close the transactions, to make all payments covenanted to be made under the Leases, and to other assume, observe, perform, and be liable for the performance of the Leases.⁴² The Applicant therefore submits that it is appropriate to assign the rights and obligations to DKB Capital.
- (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.⁴³ DKB Capital has confirmed that any applicable cure costs will be paid (or addressed in a manner satisfactory to the applicable counterparty) in relation to any Leases that are assigned by the Court.⁴⁴

⁴⁰ CCAA, s. 11.3(3).

⁴¹ Haddad Affidavit, at para. 39.

⁴² Haddad Affidavit, at para. 35.

⁴³ CCAA, s. 11.3(4).

⁴⁴ Haddad Affidavit, at para. 31(f).

39. 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 the 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.⁴⁵ Courts have held that the principles applicable under Section 11.3 of the CCAA have essentially codified and clarified this prior law.⁴⁶

40. Each of these criteria is satisfied. The requested assignments are critical to closing the transactions contemplated in the DKB Capital Agreement and are essential to the ability of the Applicant to realize upon the value of these transactions for the benefit of all stakeholders.⁴⁷ Further, there can be no suggestion that counterparties are being treated unfairly, as each of the requested assignments are proceeding on an unopposed basis.

41. Given the above, the Applicant submits that this Court should assign the rights and obligations under the Leases to the DKB Capital.

C. Temporary Sealing Order

42. Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, the Applicant requests that the unredacted copy of the DKB Capital Agreement be temporarily treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB

⁴⁵ *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.

⁴⁶ See for example *Veris Gold Corp (Re)*, [2015 BCSC 1204](#) at paras 56-58.

Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this Honourable Court..

43. The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measure will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁴⁸

44. Each of these considerations supports the proposed sealing order:

- (a) *Public Interest*: The maximization of recovery in insolvency has been found to constitute an important public interest for the purpose of obtaining a sealing order,⁴⁹ and CCAA courts have approved sealing orders where they are required to protect commercially sensitive information disclosed in the course of negotiations.⁵⁰ The unredacted DKB Capital Agreement contains commercially sensitive information regarding the allocation of the purchase price to each individual Lease and associated FF&E and Trade Fixtures. Publication or dissemination of such

⁴⁸ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para. 38.

⁴⁹ *Danier Leather Inc., Re*, [2016 ONSC 1044](#) at para. 84.

⁵⁰ *Guardian Financial Corp (Re)*, (June 30 2021), Ont. S.C.J. [Commercial List], Court File No. CV-20-00646507-00CL ([Endorsement of Justice Dietrich](#)).

information would pose a serious risk to the commercial interests of BBB Canada and its stakeholders should the DKB Capital Agreement fail to close, and the Leases are required to be re-offered to parties which had previously submitted an EOI.⁵¹

- (b) *Lack of a Reasonable Alternative*: CCAA courts have found that no reasonable alternative to a sealing order exists where declining to grant the proposed order would materially impair the maximization of asset value for the benefit of stakeholders.⁵² In the present case, there are no reasonable alternatives to a sealing order which would prevent the risks to BBB Canada's stakeholders outlined above.
- (c) *Proportionality*: CCAA courts have approved sealing orders where the information over which confidentiality is sought to be maintained is "discrete, proportional, and limited."⁵³ The proposed sealing order seeks to keep confidential only limited information in respect of the consideration payable by DKB Capital, as necessary to protect the interests of BBB Canada's Stakeholders. Further, the proposed sealing order is explicitly temporary in nature.

45. Finally, the proposed sealing order is supported and recommended by the Monitor. CCAA courts have referred to the support of the monitor as a relevant factor in determining whether the *Sherman Estate* test is met.⁵⁴

⁵¹ Haddad Affidavit, at para. 30.

⁵² *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#)), at para. 60 [*Original Traders*].

⁵³ *Original Traders*, at para. 63.

⁵⁴ *Original Traders*, at paras. 60, 64.

PART IV - NATURE OF THE ORDER SOUGHT

46. 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 7th day of April, 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. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 63368 \(ON SC\)](#)
3. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, [2010 ONSC 2870](#)
4. *Danier Leather Inc., Re*, [2016 ONSC 1044](#)
5. *Grafton-Fraser Inc. v. Cadillac-Fairview Corp.*, [2017 ONSC 2496](#)
6. *Guardian Financial Corp (Re)*, (June 30 2021), Ont. S.C.J. [Commercial List], Court File No. CV-20-00646507-00CL ([Endorsement of Justice Dietrich](#))
7. *Hayes Forest Service Ltd (Re)*, [2009 BCSC 1169](#)
8. *Nexient Learning Inc (Re)*, [2009 CanLII 72037 \(ON SC\)](#)
9. *Royal Bank v. Soundair Corp.*, [\[1991\] O.J. No. 1137](#) (C.A.)
10. *Original Traders Energy Ltd. (Re)*, (January 30 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00693758-00CL ([Endorsement of Justice Osborne](#))
11. *Playdium Entertainment Corp (Re)*, [2001 CanLII 28282 \(ON SC\)](#)
12. *Sanjel Co. (Re)*, [2016 ABQB 257](#)
13. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
14. *Target Canada Co. (Re)*, [2015 ONSC 1487](#)
15. *Target Canada Co. (Re)*, [2015 ONSC 2066](#)
16. *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247](#)
17. *Veris Gold Corp (Re)*, [2015 BCSC 1204](#)
18. *White Birch Paper Holding Co. (Re)*, [2010 QCCS 4915](#)

Secondary Sources

19. J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013)

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.

COURTS OF JUSTICE ACT

R.S.O. 1990, c. C.43, as amended

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**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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