

**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 17, 2023

OSLER, HOSKIN & HARCOURT LLP
100 King Street West, 1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Shawn Irving (LSO# 50035U)
Dave Rosenblat (LSO# 64586K)
Emily Paplawski (LSA# 17693)

Tel: (416) 362-2111
Fax: (416) 862-6666

Counsel for the Applicant

TO: SERVICE LIST

**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

PART I - NATURE OF THIS MOTION

1. On February 10, 2023, BBB Canada Ltd. (the “**Applicant**”) 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**”). The relief requested by the Applicant was supported by the Affidavit of Holly Etlin.¹

2. The Initial Order, among other things: (i) appointed Alvarez & Marsal Canada Inc. as monitor within these CCAA proceedings (the “**Monitor**”); (ii) granted a stay of proceedings in favour of the Applicant until and including February 21, 2023, or such later date as the Court may order (the “**Stay Period**”); (iii) extended the stay of proceedings and other benefits and requirements of the Initial Order and the CCAA to Bed Bath & Beyond Canada L.P. (“**BBB LP**” and together with the Applicant, “**BBB Canada**”); (iv) granted a stay of any proceeding against

¹ Affidavit of Holly Etlin, sworn February 9, 2023 [Initial Order Affidavit].

Bed Bath & Beyond Inc. (“**BBBI**”), the ultimate parent corporation of BBB Canada,² 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 “**BBBI Indemnities**”) until and including February 21, 2023; (v) granted a charge as security for the respective fees and disbursements of counsel to BBB Canada, the Monitor and Monitor’s counsel relating to services rendered in respect of BBB Canada (the “**Administration Charge**”); and (vi) granted a charge in favour of the directors and officers of BBB Canada (the “**D&O Charge**”).

3. In this motion, the Applicant now also seeks an order (the “**Sale Approval Order**”), among other things, approving the Consulting Agreement and the Sale Guidelines (each as defined below) and authorizing BBB LP, with the assistance of the Consultant (as defined below), to undertake a liquidation process in accordance with the terms of the Sale Approval Order, the Consulting Agreement and the Sale Guidelines.

4. The Applicant also seeks an Amended and Restated Initial Order (the “**ARIO**”), among other things, extending the Stay Period to May 1, 2023, extending the stay against BBBI in respect of the BBBI Indemnities until May 1, 2023, increasing the Administration Charge and the D&O Charge, approving a key employee retention plan for three non-store employees (the “**KERP**”) and granting a Court-ordered charge (the “**KERP Charge**”) as security for payments under the KERP.

² BBBI and its various U.S. and Canadian subsidiaries are collectively referred to in this factum as the “**Bed Bath & Beyond Group**”.

PART II - SUMMARY OF THE FACTS

5. The facts regarding this motion are fully set out in the Second Affidavit of Holly Etlin.³

A. Sale Approval Order

6. As foreshadowed, BBB Canada intends to wind-down the Canadian business in a fair and orderly manner. In order to maximize the value of its merchandise (“**Merchandise**”) and owned furnishings, trade fixtures, equipment and improvements to real property (“**FF&E**”) for the benefit of its creditors, BBB Canada is seeking the Court's approval of:

- (a) a Consulting Agreement with a contractual joint venture comprised of Hilco Merchant Retail Solutions ULC, Gordon Brothers Canada ULC, Tiger Asset Solutions Canada, ULC, and B. Riley Retail Canada ULC (collectively, the “**Consultant**”) dated February 15, 2023 (the “**Consulting Agreement**”) regarding the liquidation of the Merchandise and FE&E that are located in the Canadian retail stores, the warehouse, and the corporate office in Mississauga; and
- (b) the proposed sale guidelines for the orderly liquidation of the Merchandise and FF&E in Canada (the “**Sale Guidelines**).⁴

7. The joint venture comprising the Consultant is led by Hilco Merchant Retail Solutions ULC, an affiliate of Hilco Merchant Resources, LLC (“**Hilco**”). Over the past two years, Hilco has been engaged, and is currently engaged, by BBBI and Buy Buy Baby Inc. to facilitate numerous store closures in the United States including, most recently, the closure of approximately 150 Bed

³ Affidavit of Holly Etlin, sworn February 15, 2023 [Second Etlin Affidavit]. Capitalized terms not otherwise defined have the same meanings as in the Second Etlin Affidavit. All references to monetary amounts are in Canadian dollars unless otherwise noted.

⁴ Second Etlin Affidavit at para. 13.

Bath & Beyond banner stores announced in August 2022. More generally, Hilco has extensive experience conducting retail liquidations in Canada, including *Target Canada*, *Sears Canada*, *American Apparel Canada*, *BCBG Canada*, *Express Fashion Apparel*, *Danier Leather*, and *Forever 21*.⁵

8. The proposed liquidation of BBB Canada's Merchandise and FF&E is currently contemplated to run for ten weeks (until April 30, 2023), which date can be extended or abridged by BBB Canada and the Consultant, in consultation with the Monitor.⁶

9. The Consulting Agreement is expressly subject to, among other things, approval of this Court. The Bed Bath & Beyond Group, in consultation with Hilco and AlixPartners, currently estimates that the aggregate net proceeds from the liquidation of the Merchandise and FF&E will be approximately \$32.7 million in Canada.⁷

10. The Consulting Agreement requires that the liquidation sale be commenced on the first business day following the granting of the Sale Approval Order (the "**Sale Commencement Date**") but, in any event, no later than February 24, 2023.⁸

11. Although the Applicant is seeking the Sale Approval Order at this time, it remains in discussions with one or more third parties and has received a revised going concern proposal for a subset of BBB Canada's business. BBB Canada will update this Honourable Court if and to the extent discussions progress.⁹

⁵ Second Etlin Affidavit at para. 14.

⁶ Second Etlin Affidavit at para. 16.

⁷ Second Etlin Affidavit at paras. 19-20.

⁸ Second Etlin Affidavit at para. 16(b).

⁹ First Report of the Monitor Alvarez & Marsal Canada Inc. (February 17, 2023) [Monitor's First Report] at para. 3.2

B. Amended and Restated Initial Order

(a) KERP

12. The proposed KERP will provide three key employees with retention payments as an incentive to continue their employment, as required, through these CCAA proceedings. Thus, any payments under the KERP are conditional upon the employee continuing to provide services to BBB Canada until such time as they are advised that they are no longer required to assist in the wind down, sale, or other matters in these CCAA proceedings.¹⁰

13. Assuming BBB Canada is able to retain all three key employees, the total amount payable under the KERP will be a maximum of approximately \$161,000. The Applicant is seeking the KERP Charge to secure the amounts payable under the KERP.¹¹

(b) Increase to the Administration Charge

14. The Initial Order approved the Administration Charge in the amount of \$0.55 million, which was initially sized only to reflect fees and disbursements expected to be incurred by BBB Canada's counsel, the Monitor and the Monitor's counsel during the initial 10-day Stay Period. With the concurrence of the Monitor, BBB Canada is now seeking to increase the Administration Charge to \$1.25 million to account for the additional professional expenses that will be incurred after the initial 10-day Stay Period.¹²

(c) Increase to the D&O Charge

15. The Initial Order approved the D&O Charge for the initial 10-day Stay Period in the amount of \$7.5 million. With the concurrence of the Monitor, BBB Canada is now seeking to

¹⁰ Second Etlin Affidavit at paras. 30-31.

¹¹ Second Etlin Affidavit at para. 32.

¹² Second Etlin Affidavit at para. 34.

increase the D&O Charge to \$8.25 million to account for the additional potential liabilities facing the directors and officers of BBB Canada after the initial 10-day Stay Period.¹³

(d) Extension of the Stay of Proceedings in Respect of Landlord Claims

16. As noted above, in the Initial Order, this Court granted a stay of any proceedings, until and including February 21, 2023, against or in respect of BBBI arising out of or in connection with the BBBI Indemnities (the “**Third Party Stay**”).

17. Promptly after obtaining the Initial Order, BBB Canada’s Canadian counsel, Osler, Hoskin & Harcourt LLP (“**Osler**”) sent letters to all of BBB Canada’s landlords on February 10 and 13, 2023, advising that BBB Canada had applied for and been granted an Initial Order under the CCAA and requesting the contact information for each landlord’s counsel. As of February 15, 2023, Osler had received responses from 11 landlords providing counsel information and has commenced discussions regarding these CCAA proceedings, the relief being sought in the proposed ARIO, the Sale Guidelines, and the proposed liquidation and has had constructive discussions with counsel to certain of these landlords.¹⁴

18. BBB Canada seeks an extension of the Third Party Stay to May 1, 2023. Such extension of the Third Party Stay is necessary to allow BBB Canada the breathing space and time necessary to complete an orderly liquidation while engaging in good faith discussions with landlords with respect to the BBBI Indemnities.¹⁵

PART III - ISSUES AND THE LAW

19. This factum addresses the following issues:

¹³ Second Etlin Affidavit at para. 35.

¹⁴ Second Etlin Affidavit at para. 39.

¹⁵ Second Etlin Affidavit at para. 40.

- (a) This Court should grant the Sale Approval Order.
- (b) This Court should grant a declaration that former employees of BBB Canada are eligible to receive payments under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 (“WEPPA”) following termination of their employment.
- (c) This Court should approve the KERP and grant the KERP Charge.
- (d) This Court should extend the Third Party Stay to May 1, 2023.
- (e) This Court should extend the Stay Period to May 1, 2023.

A. Liquidation Process

20. It is well recognized that a CCAA court has jurisdiction to approve a sale process in relation to a CCAA debtor’s business and assets, prior to the development (or even in the absence) of a plan of compromise and arrangement.¹⁶ This Court in *Nortel* identified a number of factors that should be considered in determining whether to authorize a sale process. These include:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole economic community?
- (c) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?¹⁷

¹⁶ *Nortel Networks Corp. (Re)*, [2009 CarswellOnt 4467](#) (S.C.J. [Commercial List]) [*Nortel*] at para. 48.

¹⁷ *Nortel*, above note 16 at para. 49.

21. Although the above *Nortel* criteria were formulated under the CCAA prior to the 2009 amendments, the Court in *Brainhunter* confirmed that the same criteria apply under the amended CCAA.¹⁸

22. In addition, the Court in *Brainhunter* noted that s. 36 of the CCAA directly applies only in the context of the approval of a sale, not of a sales process. However, the *Nortel* criteria for approving a sales process should be evaluated in light of the considerations that may ultimately apply when seeking approval for a concluded sale under s. 36.¹⁹ These considerations are enumerated in s. 36(3) of the CCAA and include:

- (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

¹⁸ *Brainhunter Inc. (Re)*, [2009 CarswellOnt 8207](#) (S.C.J. [Commercial List]) [*Brainhunter*] at paras. 15-17.

¹⁹ *Brainhunter*, above note 18 at para. 17.

- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²⁰

23. Although *Nortel* and *Brainhunter* both involved stalking horse sales procedures for certain assets of the debtor companies, subsequent case law has confirmed that the same considerations apply when approving inventory liquidation sales of retailers.²¹ In particular, this Court has focused on the reasonableness of the process used to solicit potential liquidators and the reasonableness of the sale guidelines themselves as key factors in determining whether it should approve a proposed liquidation sale.²²

24. The Applicant requests this Court grant the Sale Approval Order, among other things, approving the Consulting Agreement and the Sale Guidelines and authorizing BBB LP, with the assistance of the Consultant, to undertake a liquidation process in accordance with the terms of the Sale Approval Order, the Consulting Agreement and the Sale Guidelines. The Applicant submits that the Sale Approval Order satisfies the *Nortel* criteria and, to the extent that it is necessary to do so, the criteria for the sale of assets outside the ordinary course of business set out in s. 36 of the CCAA. Both the Monitor and the Lenders support the proposed Consulting Agreement, the Sale Guidelines, including the proposed timeline, and BBB Canada's request for the Sale Approval Order, absent an acceptable and implementable Going Concern Proposal.²³

25. The sale of the Merchandise and FF&E is warranted at this time as it is an integral part of the orderly wind-down of BBB Canada's business. Notwithstanding the best efforts of the Bed

²⁰ *Brainhunter*, above note 18 at para. 17.

²¹ *Target Canada Co. (Re)*, [2015 ONSC 846](#) [Commercial List] [*Target - Agency Agreement Endorsement*] at paras. 2-5; *Sears Canada Inc. (Re)*, [2017 ONSC 6235](#) [Commercial List] [*Sears*] at paras. 6-8.

²² *Target - Agency Agreement Endorsement* above note 21 at paras. 2-5; *Sears*, above note 21 at paras. 6-8.

²³ Second Etlin Affidavit at para. 22. Monitor's First Report at para. 11.

Bath & Beyond Group and its advisors, attempts to identify a going concern solution for BBB Canada (including on a standalone basis) have not resulted in an executable proposal to date.²⁴ Therefore, the wind-down process must be commenced as soon as possible to maximize recoveries and limit operating costs, ensuring that BBB Canada can exit from all retail stores as soon as practicable and avoid further rent, employee costs, critical supplier/service provider fees, bank fees, and other ongoing amounts. Inventory levels in Canadian stores are currently at historic lows and will continue to further deplete.²⁵ In the circumstances, any delay in commencing the wind-down process could compromise the net recoveries generated from the sale of BBB Canada's Merchandise and FF&E.²⁶

26. The liquidation process set out in the Consulting Agreement and the Sale Guidelines was designed by BBB Canada and the Consultant in consultation with the Monitor in order to maximize the value realized from the sale of BBB Canada's Merchandise and FF&E for the benefit of BBB Canada's creditors.²⁷

27. The Consultant has in-depth expertise and knowledge of the Bed Bath & Beyond Group's business, merchandise, and store operations, and its extensive experience conducting retail liquidations in Canada. The Consultant has been assisting BBBI over the past several years in connection with the closure of stores throughout the United States. Therefore, it is the opinion of BBB Canada, with the concurrence of the Monitor, that the Consultant's services are necessary for a seamless and efficient large-scale store closing process and that engaging the Consultant to assist

²⁴ Initial Order Affidavit at paras. 17, 24, 133 & 141.

²⁵ Initial Order Affidavit at paras. 21 & 138.

²⁶ Second Etlin Affidavit at para. 20.

²⁷ Second Etlin Affidavit at para. 19.

with the sale of the Merchandise and FF&E will produce better results than attempting to liquidate without professional assistance.²⁸

28. Further, the Consulting Agreement and Sale Guidelines contain terms that are similar to and typical of agreements and orders for inventory liquidation sales that have been negotiated and approved in other retail insolvencies. Similar orders appointing a professional liquidator and authorizing a coordinated process for the sale of inventory have been granted in a number of proceedings, including *Sears*,²⁹ *Target*,³⁰ and *Forever 21*,³¹ although each agreement and order invariably contain differences to reflect the circumstances of the particular case.

29. The manner in which the sale of the Inventory and FF&E will be conducted under the Consulting Agreement and the Sale Guidelines is fair and reasonable. In particular:³²

- (a) the Consultant is appointed as exclusive consultant for purposes of conducting a sale of BBB Canada's Merchandise and FF&E through a "Store Closing", "Everything Must Go", "Everything on Sale" or similar themed sale;
- (b) loyalty points, gift cards, gift certificates and similar items and programs issued by BBB Canada prior to the Sale Commencement Date will be honoured by BBB Canada until and including March 9, 2023;

²⁸ Second Etlin Affidavit at paras. 15 & 19.

²⁹ *Sears Canada Inc.(Re)*, (July 18, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([Liquidation Sale Approval Order](#)).

³⁰ *Target Canada Co. (Re)*, (February 4, 2015), Ont. S.C.J. [Commercial List], Court File No. CV-15-10832-00CL ([Approval Order – Agency Agreement](#)) [*Target – Agency Agreement Order*].

³¹ *Forever XXI ULC (Re)*, (October 7, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Sale Approval Order](#)).

³² Second Etlin Affidavit at para. 16.

- (c) during the sale, rent will be paid by BBB Canada to landlords in accordance with the Initial Order (i.e., twice monthly in equal payments on the first and fifteenth day or each month, in advance, but not in arrears);
- (d) all sales during the liquidation will be final with no returns accepted or allowed unless otherwise directed by BBB Canada;
- (e) as consideration for its services in accordance with the Consulting Agreement, the Consultant is entitled to payment of a base fee equal to 1.5% of the gross proceeds (net only of sales taxes) of Merchandise sold in the stores and 12.5% of the gross proceeds (net only of sales taxes) of FF&E. The Consultant is also entitled to payment of an incentive fee not to exceed \$1.5 million in the aggregate in the event net recoveries from the sale of Merchandise exceed certain net recovery thresholds;
- (f) BBB Canada is responsible for all expenses of the sale, including (without limitation) all store level operating expenses, all costs and expenses related to BBB Canada's other retail store operations, and all of the Consultant's documented out of pocket expenses; and
- (g) the Consultant has the right to supplement the Merchandise in the retail stores with additional goods procured by the Consultant that are of like kind, and no lesser quality to the Merchandise in the stores. This will contribute to the success of the proposed liquidation sale by encouraging increased foot traffic and ensuring that

consumers find the mix and quality of goods they expect,³³ and has been done before in other retail liquidations such as *Target*.³⁴

B. WEPPA Declaration

30. The WEPPA permits eligible former employees to collect certain eligible wages, including termination and severance pay, owed to such former employees where the former employer is the subject of CCAA proceedings and a court determines that the criteria prescribed by regulation are met. The *Wage Earner Protection Program Regulations*, SOR/2008-222 (the “**WEPP Regulation**”) requires that the Court determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

31. As part of the liquidation and wind-down of the Bed Bath & Beyond Group’s Canadian operations, BBB Canada intends to provide all, or substantially all, of its Canadian employees with notice of termination of their employment with BBB Canada by no later than February 24, 2023.³⁵

32. More specifically, it is expected that all employees who are required to assist in the wind-down of the Canadian operations, including the completion of the proposed liquidation sales, will be provided with working notice of termination ranging between 8 to 12 weeks. It is expected that a limited number of BBB Canada’s employees who are not required for the liquidation and wind-down of the Canadian business will be given notice of termination, effective immediately upon the granting of the Sale Approval Order.³⁶

³³ Second Etlin Affidavit at paras. 17-18.

³⁴ *Target – Agency Agreement Order*, above note 30, Schedule “B” at s. 13

³⁵ Second Etlin Affidavit at para. 24.

³⁶ Second Etlin Affidavit at para. 25.

33. Prior to recent amendments to the WEPP Regulations, WEPP payments were only available where an employer had entered into bankruptcy or become subject to a receivership. This led to delays in accessing WEPP payments when an employer engaged in a liquidating CCAA before filing for bankruptcy or receivership. For example, Sears Canada began liquidating restructuring proceedings under the CCAA in June 2017, closed remaining Canadian stores in January 2018, but did not become subject to receivership until January 2019. It was only when that receivership occurred that former employees became eligible for the WEPP, even though many ended their employment months earlier.³⁷

34. The WEPP Regulations have now been amended specifically to enable earlier WEPP payments when an employer engages in liquidating restructuring proceedings, including liquidating CCAA proceedings, and particular criteria set out in the WEPP Regulations are met (essentially termination of all employees and a wind-down of operations).

35. Given the above, in order to assist eligible terminated employees of BBB Canada to access payments in respect of eligible wages under WEPPA in a timely manner following their termination, BBB Canada is seeking a declaration in the ARIO that pursuant to subsections 5(1)(b)(iv) and 5(5) of WEPPA, the Applicant and BBB LP meet the criteria prescribed by section 3.2 of the WEPP Regulations and their former employees are eligible to receive payments under and in accordance with WEPPA following the termination of their employment.

36. BBB Canada submits that the requested declaration is entirely appropriate and consistent with the recent amendments to the WEPP Regulations. Similar relief has been recently granted in

³⁷ See Canada Gazette, Part II, Volume 155, Number 18, [SOR/2021-196](#).

the *FIGR Brands*³⁸ and *Inscape*³⁹ CCAA proceedings. In addition, the Monitor supports the requested relief.⁴⁰

C. KERP Should be Approved

37. The Applicant seeks approval of the KERP for three non-store employees and the granting of the KERP Charge up to a maximum aggregate amount of \$161,000 as security for payments under the KERP. The KERP Charge is proposed to rank behind the Administration Charge and the D&O Charge, but in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise.⁴¹

38. The approval of a KERP and related KERP Charge is in the discretion of the CCAA court. The authority to grant such a charge derives from the Court's general jurisdiction to make any order that the CCAA Court thinks appropriate.⁴² KERPs have been approved in numerous CCAA proceedings.⁴³

39. As the Court held in *Walter Energy*, the factors to be considered by the Court in granting a KERP vary from case to case. However, some factors are generally present.⁴⁴

³⁸ *FIGR Brands, Inc. (Re)*, (February 2, 2022), Ont. S.C.J. [Commercial List], Court File No. CV-21-00655373-00CL ([WEPPA Order](#)) at para. 4.

³⁹ *Inscape Corporation (Re)*, (January 20, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00692784-00CL ([ARIO](#)) at para. 41.

⁴⁰ Second Etlin Affidavit at para. 27.

⁴¹ Second Etlin Affidavit at paras. 28 & 32.

⁴² See *Mountain Equipment Co-operative (Re)*, [2020 BCSC 1586](#) [MEC] at para. 66, citing *US Steel Canada Inc. (Re)*, [2014 ONSC 6145](#) [*US Steel*] at para. 27.

⁴³ See, for example, *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#) [Commercial List] [*Aralez*] at para. 57; *Target Canada Co. (Re)*, [2015 ONSC 303](#), at para. 59 [*Target*]; *U.S. Steel*, above note 42 at paras. 28-33; *Nortel Networks Corp. (Re)*, [2009 CarswellOnt 1330](#) (S.C.J. [Commercial List]) at para. 4; *MEC* above note 42 at para. 71.

⁴⁴ *Walter Energy Canada Holdings Inc. (Re)*, [2016 BCSC 107](#) [*Walter*] at para. 58, citing *Grant Forest Products (Re)*, [2009 CanLII 42046](#) (Ont. S.C.J. [Commercial List]) [*Grant Forest*].

40. Factors supporting a KERP and a related KERP charge have been held to include (a) the approval of the Monitor; (b) whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved; (c) whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company; (d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and (e) the business judgement of the board of directors of the debtor.⁴⁵

41. As Dunphy J. held in *Aralez*, three criteria underlie the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (a) arm's length safeguards; (b) necessity; and (c) reasonableness of design.⁴⁶ Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact dependent, based on the needs of the particular CCAA debtor and the role of the beneficiaries in the business and the restructuring.

42. In evaluating the criteria suggested by Dunphy J. in *Aralez*, the Court should defer to the business judgment of the debtor regarding the scope and quantum of the KERP where the process for designing the KERP has been fair and objectively reasonable and where the end result is also objectively reasonable.⁴⁷ The oversight of the Monitor in relation to the KERP design is of considerable importance. Also relevant is the support (or lack of objection) of secured creditors who are affected by the granting of a court-ordered KERP charge.⁴⁸

43. In this case, the KERP was developed by BBB Canada, in consultation with the Monitor, to facilitate the continued participation of three key employees of BBB Canada who each

⁴⁵ *Grant Forest*, above note 44 at para. 19. See also *Walter*, above note 44 at para. 59; *MEC*, above note 42 at para. 68.

⁴⁶ *Aralez*, above note 43 at para. 30.

⁴⁷ *Aralez*, above note 43 at paras. 27, 30 & 36.

⁴⁸ *Aralez*, above note 43 at para. 35.

respectively have in-depth knowledge of BBB Canada's business including, in particular, its payroll, operations and facilities and whose continued employment is integral to the success of the liquidation process. These employees have significant experience and specialized expertise that cannot be easily replicated or replaced. Each of these employees is required to guide the business through the contemplated orderly wind down process in order to preserve value for BBB Canada's stakeholders.⁴⁹

44. The Applicant submits that the process for developing the KERP was objectively reasonable, and is the product of consultation with the Monitor and the Lenders. The total quantum of the KERP payment is modest and the KERP is structured in a way that reasonably incentivizes retention. Specifically, 70% of the compensation provided to the KERP Participants is to be provided following the earlier of: (a) four months of service (to coincide with the conclusion of the liquidation process); or (b) the date on which the KERP Participants' services are no longer required.

45. In the business judgment of the Applicant, the KERP is both objectively reasonable in scope and quantum and is necessary to facilitate the restructuring. As such, it should be approved.⁵⁰

D. Extension of Third Party Stay

46. BBB Canada seeks an extension of the Third Party Stay to May 1, 2023. An extension of the Third Party Stay is necessary to provide BBB Canada with the breathing space and time necessary to engage in good faith with landlords to canvass resolutions of the BBBI Indemnities and to complete the liquidation. It is also necessary to avoid collaterally imperilling the precarious

⁴⁹ Second Etlin Affidavit at para. 29.

⁵⁰ Second Etlin Affidavit at paras. 29-31.

and uncertain restructuring of BBBI in the United States.⁵¹ BBB Canada remains in discussions with certain of the landlords regarding a mutually acceptable resolution of the Third Party Stay and will update this Honourable Court regarding the outcome of such discussions at the comeback hearing.⁵²

47. The Applicant reiterates the submissions it made in its factum dated February 9, 2023 filed in support of the motion seeking the Initial Order.

48. By way of summary, the Applicant submits that this Court has jurisdiction under section 11 of the CCAA to grant a third party stay, and has done so in respect of guarantors of a CCAA debtor in many instances.⁵³ Further, section 11.04 of the CCAA does not prevent this court from granting such a remedy in its discretion. First, section 11.04 is inapplicable, as the indemnities at issue here are not guarantees. Second, 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.

49. To the extent that the Alberta Court of Queen’s Bench in *Northern Transportation*⁵⁴ takes a contrary view, seemingly concluding that Section 11.04 generally prohibits a CCAA court from extending third party stays to guarantors, the Applicant submits respectfully that this reasoning should not be followed by this Court, for the reasons articulated previously.

⁵¹ Second Etlin Affidavit at para. 40.

⁵² Second Etlin Affidavit at para 39; Monitor’s First Report at para 4.18.

⁵³ *Target*, above note 43, para. 50; *McEwan Enterprises Inc.*, [2021 ONSC 6453](#), para. 45; *Laurentian University of Sudbury*, [2021 ONSC 659](#) [*Laurentian University*] at para. 47; *Sino-Forest Corp (Re)*, [2012 ONSC 2063](#) [*Sino-Forest*] at paras. 26-29; *Lydian International Limited (Re)*, [2019 ONSC 7473](#) [Commercial List] [*Lydian*].

⁵⁴ *Northern Transportation Company Limited (Re)*, [2016 ABQB 522](#) [*Northern Transportation*].

50. This court in *Cannapiece* recently held that it did not have the jurisdiction to grant a stay to a director of a CCAA debtor company in respect of a personal guarantee given in relation to the debtor company's obligations.⁵⁵ However, this decision can be distinguished on at least two grounds.

51. First, the obligations at issue in *Cannapiece* were explicitly characterized by the court as "guarantees". By contrast and as submitted above, the indemnities at issue here are not guarantees, as 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.

52. Second, since *Cannapiece* involved guarantees *granted by directors*, it necessarily required analysis of section 11.03 of the CCAA, which is structured much differently than section 11.04. The Court's holdings in respect of section 11.03 should not be unquestionably applied to section 11.04, a provision that has not prevented this Court from granting third party stays to guarantors of a CCAA debtor many times in the recent past.⁵⁶

53. Even if the reasoning of *Northern Transportation* and *Cannapiece* were to be accepted, it is important to note that in both instances, the courts recognized that they still needed to maintain some residual discretion to craft an appropriate remedy in circumstances where a third-party guarantor needed protection. In *Cannapiece*, where the directors were already facing an action on

⁵⁵ *Cannapiece Group Inc v. Marzili*, [2022 ONSC 6379](#) [Commercial List] [*Cannapiece*] at paras. 32-36. Note that, in *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, [2015 QCCS 4716](#), the Quebec Superior Court (Commercial Division) held that the CCAA Court retains the jurisdiction under section 11 to extend a third party stay to a director in relation to a personal guarantee. This decision was cited by Penny J. in *Cannapiece*, but he did not expressly indicate why he declined to follow its reasoning.

⁵⁶ *Target*, above note 43; *Laurentian University*, above note 53; *Sino-Forest*, above note 53; *Lydian*, above note 53.

their guarantees, this took the form of a procedural order extending the time the directors had to deliver their statements of defence to one week after the forecasted close of the sales process.⁵⁷

54. Meanwhile, 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”.⁵⁸ The Applicant submits that this is such a case.

55. No landlord will be significantly prejudiced by the requested extension to the temporary stay of proceedings, as all rent payments to landlords in Canada are paid current and will be made on an ongoing basis throughout these CCAA proceedings in accordance with the Initial Order until the applicable lease is disclaimed and the premises vacated by BBB Canada which, is expected to occur at the end of April – immediately prior to the expiration of the proposed extended Stay Period on May 1, 2023.⁵⁹

56. The proposed ARIIO provides that any Landlord claim pursuant to a guarantee or indemnity 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. The landlords' rights under the indemnities are not being extinguished; they are merely being deferred for a brief period.

57. Further, such extension will provide the necessary time and space for constructive, good faith discussions to be undertaken by BBB Canada and the landlords regarding treatment and

⁵⁷ *Cannapiece*, above note 55 at para. 37.

⁵⁸ *Northern Transportation*, above note 54 at para. 101.

⁵⁹ Second Etlin Affidavit at para. 41.

resolution of the BBBI Indemnities. Any derivative litigation against BBBI relating to a lease of BBB LP would result in a significant distraction of remaining senior management of BBB Canada from the goals of this proceeding, namely an orderly wind down of the Canadian operations. Moreover, it would also distract the senior management of BBBI. It is crucial that BBBI's resources be focused on providing the Shared Services and other wind-down support to BBB Canada over the next several months. 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.⁶⁰

58. Finally, BBBI is currently in an extremely precarious financial position and, as outlined in the Initial Order Affidavit, is desperately attempting to save its business, made possible only through a last minute, yet highly conditional, underwritten public offering of shares (the “**Offering**”). The filing of a deluge of claims now by landlords under the BBBI Indemnities could have a collateral impact on these efforts, jeopardizing the Offering and the restructuring of the US business more generally.⁶¹

E. Extension of Stay Period

59. On an application other than an initial application, s. 11.02(2) of the CCAA provides that the Court may make a stay order for any period that the court considers necessary, if the applicant satisfies the Court (a) the circumstances exist that make the order appropriate, and (b) that the applicant has acted, and is acting, in good faith and with due diligence.

⁶⁰ Initial Order Affidavit at para. 146; Second Etlin Affidavit at para. 41.

⁶¹ Initial Order Affidavit at paras. 15-16, 129 & 132.

60. The Applicant is seeking to extend the Stay Period up to and including May 1, 2023. The extension of the Stay Period is necessary and appropriate in the circumstances to allow for the proposed liquidation process to be undertaken and for BBB Canada to focus on the orderly wind down of the Canadian business. As noted above, the targeted completion date for the liquidation process is April 30, 2023.⁶²

61. BBB Canada has acted, and continues to act, in good faith and with due diligence in pursuing the orderly wind down of its business. BBB Canada has given notice of these CCAA proceedings to stakeholders including, most significantly, its landlords, secured creditors, and employees. In consultation with the Monitor, BBB Canada has engaged, and will continue engaging, in discussions with its stakeholders as these CCAA proceedings progress.⁶³

PART IV - NATURE OF THE ORDER SOUGHT

62. The Applicant therefore requests Orders substantially in the form of the ARIO included at Tab 3 of the Motion Record and the Sale Approval Order included at Tab 5 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of February, 2023.



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

OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto ON M5X 1B8

Lawyers for the Applicant

⁶² Second Etlin Affidavit at para. 42.

⁶³ Second Etlin Affidavit at para. 43.

SCHEDULE “A”: LIST OF AUTHORITIES

Cases

1. *Aralez Pharmaceuticals Inc. (Re)*, [2018 ONSC 6980](#) [Commercial List]
2. *Brainhunter Inc. (Re)*, [2009 CarswellOnt 8207](#) (S.C.J. [Commercial List])
3. *Cannapiece Group Inc v. Marzili*, [2022 ONSC 6379](#) [Commercial List]
4. *FIGR Brands, Inc. (Re)*, (February 2, 2022), Ont. S.C.J. [Commercial List], Court File No. CV-21-00655373-00CL ([WEPPA Order](#))
5. *Forever XXI ULC (Re)*, (October 7, 2019), Ont. S.C.J. [Commercial List], Court File No. CV-19-00628233-00CL ([Sale Approval Order](#)).
6. *Grant Forest Products (Re)*, [2009 CanLII 42046](#) (Ont. S.C.J. [Commercial List])
7. *Inscape Corporation (Re)*, (January 20, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00692784-00CL ([ARIO](#))
8. *Laurentian University of Sudbury*, [2021 ONSC 659](#)
9. *Lydian International Limited (Re)*, [2019 ONSC 7473](#)
10. *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, [2015 QCCS 4716](#)
11. *McEwan Enterprises Inc.*, [2021 ONSC 6453](#)
12. *Mountain Equipment Co-operative (Re)*, [2020 BCSC 1586](#)
13. *Nortel Networks Corp. (Re)*, [2009 CarswellOnt 1330](#) (S.C.J. [Commercial List])
14. *Nortel Networks Corp. (Re)*, [2009 CarswellOnt 4467](#) (S.C.J. [Commercial List])
15. *Northern Transportation Company Limited (Re)*, [2016 ABQB 522](#)
16. *Sears Canada Inc. (Re)*, 2017 ONSC 6235
17. *Sears Canada Inc. (Re)*, (July 18, 2017), Ont. S.C.J. [Commercial List], Court File No. CV-17-11846-00CL ([Liquidation Sale Approval Order](#)).
18. *Sino-Forest Corp (Re)*, [2012 ONSC 2063](#)
19. *Target Canada Co. (Re)*, [2015 ONSC 303](#)
20. *Target Canada Co. (Re)*, [2015 ONSC 846](#)

21. *Target Canada Co. (Re)*, (February 4, 2015), Ont. S.C.J. [Commercial List], Court File No. CV-15-10832-00CL ([Approval Order – Agency Agreement](#)).
22. *US Steel Canada Inc. (Re)*, [2014 ONSC 6145](#)
23. *Walter Energy Canada Holdings Inc. (Re)*, [2016 BCSC 107](#)

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

COMPANIES’ CREDITORS ARRANGEMENT ACT

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

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.

[...]

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.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[...]

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

[...]

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.

[...]

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.

WAGE EARNER PROTECTION PROGRAM ACT

S.C., 2005, c. 47, s. 1, as amended

Eligibility for Payments

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

[...]

Prescribed criteria — other proceedings

5 (5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

WAGE EARNER PROTECTION PROGRAM REGULATIONS

SOR/2008-222, as amended

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

**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

FACTUM OF THE APPLICANT

OSLER, HOSKIN & HARCOURT LLP
100 King Street West, 1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Shawn Irving (LSO# 50035U)
Dave Rosenblat (LSO# 64586K)
Emily Paplawski (LSA# 17693)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicant