

SUPERIOR COURT
(COMMERCIAL DIVISION)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
NO: 500-11-058763-208

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT* OF:

GROUPE DYNAMITE INC.
GRG USA HOLDINGS INC.
GRG USA LLC

Debtors

-and-

DELOITTE RESTRUCTURING INC.

Monitor

**APPLICATION TO AMEND THE AMENDED AND RESTATED
INITIAL ORDER WITH RESPECT TO SALES TAXES**
(*Companies' Creditors Arrangement Act* (the "CCAA"), s 11)

**TO THE HONOURABLE PETER KALICHMAN, JUSTICE OF THE SUPERIOR COURT,
SITTING IN THE COMMERCIAL DIVISION FOR THE DISTRICT OF MONTRÉAL, THE
DEBTORS RESPECTFULLY SUBMIT:**

I. INTRODUCTION

1. By the present application (the "**Application**"), Groupe Dynamite Inc. ("**Groupe Dynamite**"), GRG USA Holdings Inc. and GRG USA LLC (collectively, the "**Debtors**") seek the issuance of a Re-Amended and Restated Initial Order, substantially in the form of the draft *Re-Amended and Restated Initial Order* (the "**Draft Order**") communicated herewith as **Exhibit P-1**, in order to amend subparagraph 22(b) of the Initial Order (the "**Sales Tax Provision**") rendered in these proceedings (the "**CCAA Proceedings**") on September 8, 2020 (as amended and restated, the "**Initial Order**"), which shall provide that the Debtors are only required to remit, in accordance with legal requirements, sales taxes accrued or collected after September 8, 2020 (the "**Proposed Amendment**"). All capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Initial Order.

2. The Proposed Amendment is sought following various requests directed to the Monitor by the Ministry of Justice and Attorney General (British Columbia) (the “**BC Tax Authority**”) in connection with its claim for the immediate payment of alleged arrears in Sales Taxes that were accrued or collected by Groupe Dynamite prior to the commencement of the CCAA Proceedings (the “**BC Tax Claim**”).
3. The application in this case of the Sales Tax Provision, as currently drafted, would serve to confer an undue priority on the BC Tax Authority and other potential Sales Tax claimants for significant pre-filing debts, which are inconsistent with various CCAA principles. Moreover, this is an outcome that was not intended or contemplated at the time the Initial Order was sought.

II. BACKGROUND

A. The Sales Tax Provision

4. On September 8, 2020, this Court rendered the Initial Order and the Monitor was appointed monitor of Groupe Dynamite and the other Debtors. The Initial Order was thereafter amended and restated on September 18, 2020.
5. The Sales Tax Provision included in the Initial Order reads as follows:

[22] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay: [...]

 - (b) all goods and services, harmonized sales or other applicable sales taxes (collectively, “Sales Taxes”) required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.
6. An examination of the Sales Tax Provision, *in fine*, reveals that the Debtors are required to remit or pay, in accordance with legal requirements:
 - a) Sales Taxes accrued or collected after the date of the Initial Order (“**Post-filing Sales Taxes**”); and
 - b) Sales Taxes accrued or collected prior to the date of the Initial Order but only required to be remitted on or after the date of that order (“**Straddle Period Sales Taxes**”).
7. The Sales Tax Provision was inspired by paragraph 8 (b) of the Ontario Superior Court of Justice, Commercial List Form CCAA Initial Order, a copy of which is communicated herewith as **Exhibit P-2**.
8. Language similar to the Sales Tax Provision is also included in the model CCAA Initial Orders used in various other common law provinces.

9. Such language is not, however, included in the Bar of Montréal's model CCAA Initial Order used in Québec and communicated herewith as **Exhibit P-3**. In fact, the Québec model order (Exhibit P-3) does not provide for any special treatment for claims related to the remittance of Sale Taxes.
10. The CCAA does not confer any priority to Sales Tax; to the contrary, its paragraph 37(1) even renders inapplicable "any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty". As such, all claims for Sales Tax rank *pari passu* with all of the other unsecured claims of Groupe Dynamite.

B. The Sales Taxes owed to the BC Tax Authority

11. Between March 1st and October 3rd, 2020, Groupe Dynamite collected an aggregate amount of \$1,183,315.74 in British Columbia provincial Sales Taxes ("**BC Sales Taxes**") over the following periods:

Start of period	End of period	Description of period	Remittance date (without applying the Stabilization Act)	Total amount of BC Sales Taxes collected (\$)
March 1 st , 2020	April 4, 2020	March 2020	April 20, 2020	110,467.97
April 5, 2020	May 2 nd , 2020	April 2020	May 20, 2020	64,278.98
May 3 rd , 2020	May 30, 2020	May 2020	June 20, 2020	133,590.60
May 31, 2020	July 4, 2020	June 2020	July 20, 2020	230,329.97
July 3, 2020	August 1 st , 2020	July 2020	August 20, 2020	185,588.13
August 2, 2020	August 29, 2020	August 2020	Sept. 20, 2020	187,906.20
August 30, 2020	October 3 rd , 2020	Sept. 2020	October 20, 2020	271,153.89
			Total:	1,183,315.74

12. Pursuant to the *Provincial Sales Tax Act*, SBC 2012, c 35, BC Sales Taxes collected by Groupe Dynamite shall be remitted to the Government of British Columbia on specific dates determined according to the date of collection. The remittance dates for each period of collection are specified in the table above.
13. All amounts of BC Sales Taxes collected on or after September 8, 2020, which constitute Post-filing Sales Taxes, have been remitted to the BC Tax Authority. In particular, amounts of BC Sales Taxes totalling \$189,771.62 collected from September 8, 2020 to October 3rd, 2020, within the September 2020 remittance period, have been remitted to the BC Tax Authority.
14. The BC Sales Taxes accrued or collected prior to the Initial Order, being arrears for pre-filing Sales Taxes, have not been remitted by Groupe Dynamite and amount to \$993,544.12.

C. Extension granted by the BC Government

15. On or about August 14, 2020, the British Columbia Legislature enacted the *Economic Stabilization (COVID-19) Act*, SBC 2020 c 19 (the “**Stabilization Act**”), which implemented several measures in an attempt to mitigate the difficult economic context caused by the COVID-19 pandemic (the “**Pandemic**”), the whole as appears from a copy of the Stabilization Act, communicated herewith as **Exhibit P-4**.
16. The Stabilization Act granted, among other things, a deferral of the remittance deadlines until September 30, 2021 for all BC Sales Taxes that were required to be remitted within the period from March 24, 2020 to September 29, 2020.
17. Paragraphs 1 and 4(3)(b) of the Stabilization Act provide as follows:
 1. In this Part:

“**new due date**” means the later of

 - (a) September 30, 2020, and
 - (b) the date prescribed, if any;

“**relevant period**” means the period beginning March 24, 2020 and ending on the day before the new due date. [...]
 4. (3) A person who is required, under any of the following provisions of the *Provincial Sales Tax Regulation, B.C. Reg. 96/2013*, to file a return, or remit or pay to the government any tax or other amount, on a date that is within the relevant period may, despite the regulation, file the return, or remit or pay the tax or other amount, on or before the new due date: [...]
 - (b) section 72 [*prescribed date for remitting tax*];
18. Pursuant to these provisions, the required remittance of BC Sales Taxes was voluntarily deferred by the Government of British Columbia to September 30, 2020, namely after the date of the Initial Order.
19. The unusual consequence of the extensions granted under the Stabilization Act is to render all pre-filing arrears in Sales Taxes owed by Groupe Dynamite immediately payable as Straddle Period Sales Taxes.

III. THE BC TAX CLAIM

20. On February 9, 2021, the BC Tax Authority wrote to the Monitor reasserting the BC Tax Claim and requesting certain information and reporting from the Monitor in connection therewith, the whole as appears from a letter from M^{re} Tiger, communicated herewith as **Exhibit P-5**.
21. In the week that followed, various incidental correspondence was exchanged between counsel for the BC Tax Authority, the Debtors and the Monitor, all of which are communicated herewith *en liasse* as **Exhibit P-6**.

22. On February 18, 2021, the BC Tax Authority again wrote to the Monitor indicating that it required the latter's position on the BC Tax Claim no later than February 26, 2021, failing which it would institute the necessary proceedings, as appears from a Letter from M^{re} Tiger, communicated herewith as **Exhibit P-7**.
23. As further appears from said letter (Exhibit P-7), the BC Tax Authority suggested that the BC Tax claim was for Post-filing Sales Taxes, a position reiterated by counsel for the BC Tax Authority at the hearing before the Court on February 19, 2021.
24. On March 1st, 2021, after having consulted with the Debtors, the Monitor wrote to the BC Tax Authority indicating, *inter alia*, its position that the BC Tax Claim was not a post-filing claim and expressing certain concerns regarding the interpretation and application of the Sales Tax Provision in the CCAA Proceedings, the whole as appears from a copy a letter from M^{re} Zucker, communicated herewith as **Exhibit P-8**.
25. As further appears from said letter (Exhibit P-8), the Monitor indicated that the Debtors intended to seek an amendment to the Initial Order in order to address the BC Tax Claim.
26. Notwithstanding the BC Tax Authority's suggestions to the contrary, the BC Tax Claim is a claim "that relate to debts or liabilities, present or future, to which the company is subject on [...] the day on which proceedings commenced under [the CCAA]" (CCAA, s 19(1)(a)(i)). The obligation to remit the Straddle Period Sales Taxes to the BC Tax Authority arose upon the collection of those Sales Taxes by Groupe Dynamite, when it made sales prior to September 8, 2020.
27. The scope of provable claims is to be interpreted broadly to facilitate the CCAA's remedial objective of rehabilitating debtor companies and to ensure fairness between creditors. Moreover, the fact that a claim may crystalize or become exigible after the commencement of an insolvency proceedings does not change its characterization as a pre-filing, provable claim.
28. The occurrence of an applicable remittance date following the date of the Initial Order does not serve to transform the BC Tax Claim into a post-filing claim. In fact, the only basis for rendering any pre-filing Sales Taxes payable during the pendency of the CCAA Proceedings appears to be the final clause of the Sales Tax Provision, applicable to Straddle Period Sales Taxes.
29. As a general rule, pre-filing debts are to be dealt with as provable claims through the Restructuring and any payments to creditors on account of such claims are exceptional and should be necessary further the remedial objectives of the CCAA. By way of illustration, the Initial Order allows for limited payments of pre-filing debts to suppliers considered critical to the Restructuring with the consent of the Monitor.
30. Bearing in mind the foregoing, the position adopted by the BC Tax Authority on the basis of the Sales Tax Provision cannot be retained since, among other things:
 - a) Claims for arrears in Sales Taxes rank as unsecured claims under the CCAA and rendering the BC Tax Claim immediately payable would serve to grant an undue priority to the BC Tax Authority.
 - b) The BC Tax Authority would receive a significant immediate payment of a pre-filing

debt, while the claims of other creditors are stayed, notwithstanding that it provides no post-filing services to the Debtors that further the objectives of the Restructuring.

- c) Other claims for pre-filing arrears in Sales Taxes are contemplated for an aggregate amount of approximately \$3.5 million, which, if paid immediately and in full, would impact the Debtors' cash flows and potentially the progress of the Restructuring.
- d) The Pandemic and relief measures like those provided for under the Stabilization Act have importantly expanded the scope of Straddle Period Sales Taxes beyond what was reasonably contemplated and what would occur in normal circumstances.

IV. THE PROPOSED AMENDMENT

- 31. The Proposed Amendment would remove the portion of the Sales Tax Provision dealing with Straddle Period Sales Taxes, such that only Post-filing Sales Taxes would be immediately due and payable by the Debtors, in accordance with legal requirements, during the CCAA Proceedings:

[22] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay: [...]

- (b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, but only where such Sales Taxes are accrued or collected after the date of this Order, ~~or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.~~
- 32. Such an amendment would be reasonable in the circumstances, promote fairer treatment of the Debtors' creditors and serve to advance the Debtors' objective of presenting and implementing a viable plan of compromise or arrangement.
 - 33. The Debtors never anticipated, at the time the CCAA Proceedings were commenced, the effects that could result from the inclusion of the Sales Tax Provision in the Initial Order, particularly given the impact of the Sales Taxes remittance deferrals granted in the exceptional circumstances of the Pandemic.
 - 34. It is respectfully submitted that the CCAA is sufficiently flexible to allow the Proposed Amendment, *a fortiori*, as no tax authority has acted in reliance on the Sales Tax Provision. Indeed the BC Tax Authority, having been paid all Post-filing Sales Taxes has suffered no prejudice by the passage of time and can advance the same arguments against the Proposed Amendment in response to this Application as it could have had similar language been sought at the outset of the CCAA Proceedings.
 - 35. In such circumstances, the Proposed Amendment should be authorized in order to limit the application of the Sales Tax Provision to Post-filing Sales Taxes.

V. CONCLUSIONS

- 36. The Debtors are acting, and have acted, in good faith and with due diligence in connection with the issues raised in this Application.

37. The Monitor recommends that the Proposed Amendment be authorized. National Bank of Canada, the agent for the Debtors' lending syndicate, which holds first ranking security on the Property, also supports this Application.
38. Given the need to advance the Restructuring and that it would be preferable to determine the issues raised in this Application in advance of the deployment of a claims process in the CCAA Proceedings, it is respectfully requested that this Court order the provisional execution of the relief sought, notwithstanding any appeal.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present *Application to Amend the Amended and Restated Initial Order with respect to the British Columbia Provincial Sales Tax*;

AUTHORIZE the following amendment to paragraph 22 (b) of the Initial Order dated September 8, 2020 (as amended and restated on September 18, 2020):

[22] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay:

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, but only where such Sales Taxes are accrued or collected after the date of this Order.

RENDER a *Re-Amended and Restated Initial Order* on terms substantially similar to draft order filed in support of the Application as **Exhibit P-1**.

THE WHOLE, WITHOUT COSTS, except in the event of contestation.

Montreal, March 26, 2021

McCarthy Tétrault sncrl srl

McCarthy Tétrault LLP

Lawyers for the Debtors

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Debtors
-and-

Deloitte Restructuring Inc.

Monitor

Affidavit

I, the undersigned, Guy Vallières, Vice-President, Finance and Administration, domiciled for the purpose hereof at 5592 Ferrier Street, Mount-Royal, Québec, Canada, solemnly affirm that all the facts alleged in the present *Application to Amend the Amended and Restated Initial Order with respect to the British Columbia Provincial Sales Tax* are true.

AND I HAVE SIGNED,



Guy Vallières

SOLEMNLY AFFIRMED TO BEFORE ME AT
MONTREAL, this 26th day of March, 2021
Sainte-Marthe, by virtual means

C. Bergeron 86,149

COMMISSIONER OF OATHS
FOR THE PROVINCE OF QUÉBEC

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Notice of Presentation

TO:

Service List

TAKE NOTICE that the present *Application to Amend the Amended and Restated Initial Order with respect to the British Columbia Provincial Sales Tax* will be presented for adjudication before the Superior Court of Québec, sitting in the Commercial Division for the district of Montréal, on a date to be determined, at the Montreal Courthouse located at 1 Notre-Dame Street East, Montréal, in a room to be determined or by videoconference.

Montreal, March 26, 2021

McCarthy Tétrault senecl srl

McCarthy Tétrault LLP
Lawyers for the Debtors

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-and-

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Monitor

List of Exhibits

- Exhibit P-1:** Draft Re-Amended and Restated Initial Order
- Exhibit P-2:** Ontario Superior Court of Justice, Commercial List Form CCAA Initial Order
- Exhibit P-3:** Bar of Montréal's model CCAA Initial Order
- Exhibit P-4:** Copy of the *Economic Stabilization (COVID-19) Act*, SBC 2020 c 19
- Exhibit P-5:** Copy of the BC Government's letter dated February 9, 2021
- Exhibit P-6:** Copy of various incidental correspondence was exchanged between counsel for the BC Tax Authority, the Debtors and the Monitor
- Exhibit P-7:** Copy of the BC Government's letter dated February 18, 2021
- Exhibit P-8:** Monitor's letter to the BC Government dated March 1, 2021

Montreal, March 26, 2021

McCarthy Tétrault sncrl srl

McCarthy Tétrault LLP
Lawyers for the Debtors

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