

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 **TARGET CANADA CO., TARGET
CANADA HEALTH CO., TARGET CANADA MOBILE GP
CO., TARGET CANADA PHARMACY (BC) CORP.,
TARGET CANADA PHARMACY (ONTARIO) CORP.,
TARGET CANADA PHARMACY CORP., TARGET
CANADA PHARMACY (SK) CORP., and TARGET
CANADA PROPERTY LLC**

APPLICANTS

REPLY FACTUM OF THE APPLICANTS

**(Motion for Approval of Agency Agreement and Inventory Liquidation Process,
Approval of Real Property Portfolio Sales Process and Stay Extension)**

February 3, 2015

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1. This reply factum of the Applicants responds to the Responding Factum of The Cadillac Fairview Corporation Limited and its Affiliates (“Cadillac Fairview”), served on February 3, 2015 (the “CF Factum”) in opposition to (i) the approval of certain provisions of the Real Property Portfolio Sales Process and the Inventory Liquidation Process, and (ii) an extension of the Stay, sought by the Target Canada Entities.¹

No Unilateral Variation of Contracts

2. Cadillac Fairview submits that it does not object in theory to the approval of either a real property sales process or an inventory liquidation process, but argues that the Target Canada

¹ Capitalized terms in this Reply Factum have the same meaning as in the Factum of the Applicants dated January 30, 2015.

Entities have designed the two specific Sales Processes in a way that does “material harm” to Cadillac Fairview’s interests as landlord. In scrutinizing the CF Factum, it appears that Cadillac Fairview’s complaints relate only to the Inventory Liquidation Process and not the Real Property Portfolio Sales Process. Even Cadillac Fairview’s complaints about the Inventory Liquidation Process are vague and ill-defined, based on unsupported assertions and unfounded extrapolation.

3. Cadillac Fairview in particular states that the Agency Agreement and Inventory Liquidation Process contemplates “an unlawful, unilateral amendment of the terms of the Cadillac Fairview Leases...on a go-forward basis...as opposed to merely staying defaults or breaches” of those Leases. Cadillac Fairview then submits that this Court has no jurisdiction to approve unilateral contract amendments, or even if it does, this Court should decline to exercise that authority.² However, Cadillac Fairview fails to identify any specific provision of the Agency Agreement or Inventory Liquidation Process that actually constitutes a unilateral amendment of any specific Cadillac Fairview Lease. Cadillac Fairview does not identify any aspect of the Inventory Liquidation Process that breaches, let alone alters, a provision of a Cadillac Fairview Lease in any way whatsoever. Furthermore, paragraph 8 of the proposed Order approving the Agency Agreement provides that nothing in the Order “shall amend or vary, or be deemed to amend or vary the terms of the leases for Target Canada’s leased locations”.

4. Instead, Cadillac Fairview baldly states that “Target Canada is seeking to maintain its contracts rather than disclaiming them, but to have the Court approve sweeping unilateral changes that amount to a re-writing of the contracts”. Cadillac Fairview uses a number of variations on this rhetoric, stating that the Target Canada Entities seek to “confiscate” its rights,³ or to pick

² CF Factum, para. 2(b).

³ CF Factum, para. 26.

and choose provisions of the Leases that they wish to honour, again without identifying which rights are being confiscated or cherry picked.

5. The Applicants submit that if Cadillac Fairview has any *bona fide* complaints that the Inventory Liquidation Process violates the specific provisions of a Cadillac Fairview Lease, it is incumbent upon Cadillac Fairview to identify such provision with specificity. This is particularly true given that Cadillac Fairview purports to rely on the “material harm” to its interests caused by the Inventory Liquidation Process as a basis for this Court to decline to exercise its jurisdiction to approve the Inventory Liquidation Process and to extend the Stay to allow the process to be conducted in a timely manner at a time of heightened consumer interest. Given that Cadillac Fairview seeks to impede the Inventory Liquidation Process to the detriment of the general body of the Target Canada Entities’ stakeholders, Cadillac Fairview must at least identify some specific basis on which its interests should take precedence over those of stakeholders as a whole, whose interests lie in ensuring a prompt, efficient and successful Inventory Liquidation Process in order to maximize recoveries for all creditors.

6. In any event, even if the Inventory Liquidation Process fails to comply with the Cadillac Fairview Leases (which is denied), there is no sense in which the Inventory Liquidation Process will alter the terms of any Lease. Certain rights of the landlords may be stayed in the same manner as any contractual counterparty. However, the Lease terms will remain as they are.

No Prejudice from Augmentation

7. Cadillac Fairview states that the augmentation of inventory under the Inventory Liquidation Process should not be permitted in order to prevent undue prejudice to Cadillac

Fairview and its tenants.⁴ However, the nature or scope of any prejudice to Cadillac Fairview or anyone else is not explained or demonstrated. The Applicants submit that the augmentation provision contributes to the success of the Sale by ensuring that consumers find the mix and quality of goods that they expect, benefitting stakeholders as a whole by assisting in maximizing recoveries. In addition, augmentation will enhance recoveries for the estate of the Target Canada Entities since the Agent will pay the Company a fee equal to 5% of the gross proceeds of such goods. Moreover, the Target Canada Entities and the Monitor met with Cadillac Fairview and numerous other landlords to address these concerns and the compromise reached is reflected in the Sales Guidelines as filed.

8. Cadillac Fairview fails to demonstrate any prejudice at all either to Cadillac Fairview itself, or to its tenants, from the augmentation provision in the Agency Agreement. Nonetheless, Cadillac Fairview asserts that this unspecified prejudice makes it necessary for any augmentation rights to be “limited”.

9. The Applicants submit that the augmentation rights under the Agency Agreement are limited and fairly balance the interests of the landlords. They are capped at 5% of the aggregate Cost Value of the Merchandise as of the Sale Commencement Date and any augmented goods must be of like kind and no lesser value than those already sold by the Target Canada Entities. These limits are entirely reasonable. Moreover, since augmented goods will be effectively indistinguishable from the wide range of and varied types of goods already sold by the Target Canada Entities, there is no prejudice whatsoever to Cadillac Fairview or anyone else from this provision.

⁴ CF Factum, paras. 37 to 39.

10. Nor does Cadillac Fairview identify any provision in a Cadillac Fairview Lease that would impose legal limits on the ability of the Liquidators to augment the Sale in this fashion. Cadillac Fairview's reference to principles of agency law preventing an agent from acquiring higher rights than those possessed by its principal⁵ are of no assistance in the absence of any provision in a Cadillac Fairview Lease that imposes limits on the rights of the Target Canada Entities. Cadillac Fairview simply asserts that "the authority of the Target Canada liquidation agents is circumscribed by the terms of the existing Cadillac Fairview Leases to which Target Canada is a party..." This bare assertion is meaningless without specific reference to the particular terms of the Leases that are implicated. Since Cadillac Fairview references no such terms, the logical inference is that there are none.

No Extraordinary Relief Requested

11. Cadillac Fairview submits in the alternative that the Court should not grant "extraordinary relief" that is not required, and that the Court should not exercise its discretion to grant "extraordinary relief" in the context of this liquidating CCAA. However, it is not clear from these statements exactly what extraordinary relief is allegedly being referred to. There is no amendment of any Lease at issue here. Cadillac Fairview does not point to any facts to support this claim.

12. Cadillac Fairview then makes vague references to the ability of the parties to reach a negotiated solution without Court intervention. These submissions seem to amount to an assertion that an inventory liquidation process could be conducted by the Target Canada Entities without any specific court order approving the process. However, this approach is fundamentally

⁵ CF Factum, paras. 40 to 43.

flawed. Among other things, it would not create the certainty and stability required for the Target Canada Entities to carry out the liquidation of their inventory and FF&E in an organized, coordinated fashion over a finite and relatively short period of time in a manner that is designed to maximize recoveries for all stakeholders. Moreover, it does not authorize the Target Canada Entities to compensate the Agent for its fees, and completely ignores the fact that similar inventory liquidation orders have previously been granted in many other retail insolvencies.⁶

Discretion Can Be Exercised in the Applicants' Favour

13. Cadillac Fairview states that the Court, in deciding whether to exercise discretion to grant extraordinary relief ought not to be swayed by the wishes of a “defunct company” like Target Canada.⁷ Here again, there is no extraordinary relief being requested. Nor is Target Canada a “defunct company”. Instead, it is a company that is in the process of carrying out an orderly wind-down of its affairs, supported by a significant body of case law supporting its legal entitlement to benefit from the CCAA in these circumstances. As this Court stated in the Initial Endorsement:

[31] ...I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured “going concern” solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, [2010] SCC 50 (“*Century Services*”) that “courts frequently observe that the CCAA is skeletal in nature”, and does not “contain a comprehensive code that lays out all that is permitted or barred”. The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more “rules-based” approach of the BIA.

[...]

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are

⁶ See Applicants Factum, para. 35.

⁷ CF Factum, para. 53.

affected are, in my view, suited to the flexible framework and scope for innovation offered by this “skeletal” legislation.⁸

14. Moreover, there is no basis whatsoever in CCAA case law for asserting that a debtor company that is carrying out a liquidation under the CCAA is not entitled to the benefit of the flexibility, the broad jurisdiction and the discretion of the CCAA court in doing so. To the contrary, the case law relied upon by the Applicants to support the use of the CCAA for an orderly wind-down or liquidation in appropriate circumstances demonstrates exactly the opposite.⁹

15. Finally, there is no basis for the assertion that Target Canada has no “legitimate interest” in the conduct of its liquidation. The Target Canada Entities are debtors-in-possession (unlike a trustee in bankruptcy) with control over the orderly wind-down of their business, under the oversight of the Court and the Monitor, in the interests of maximizing recoveries for all of their stakeholders. While the landlords represent an important segment of those stakeholders, there are other significant stakeholders whose interests are affected and equally entitled to protection under the CCAA. The Target Canada Entities have an interest in the fair treatment of their stakeholders as a whole.

16. Cadillac Fairview points to no evidence whatsoever that the Target Canada Entities are improperly motivated by the interests of any particularly stakeholder group in this process, including Target Corporation (although Target Corporation has legitimate interests in this proceeding, in its capacity as both DIP Lender and as creditor) or the general body of creditors as a whole. In any event, all of Cadillac Fairview’s arguments on this point are predicated on the entirely incorrect premise that the relief sought involves the unilateral amendment or variation of

⁸ Initial Endorsement of Morawetz J., *Target Canada Co (Re)*, 2015 ONSC 303 at paras 31 and 34.

⁹ Applicants’s Factum (Initial Order) dated January 15, 2015, paras. 52-60.

unspecified provisions of the Cadillac Fairview Leases.¹⁰ To the contrary, and as stated above, the Target Canada Entities and the Monitor met with Cadillac Fairview and numerous other landlords in an attempt to address their concerns.

Stay Extension Should Be Granted

17. Finally, Cadillac Fairview submits that the extension of the Stay should not be granted on the basis that it is premature. This request ignores the fact that the extension of the Stay is crucial in providing the certainty and stability required to conduct the two Sales Processes (which Cadillac Fairview does not oppose), and that it would be illogical to approve these two Processes without at the same time extending the Stay.

18. The Applicants recognize that the Stay extension will, if approved, precede the comeback hearing (currently scheduled to be heard on February 11, 2015). However, the Applicants have expressly assured their stakeholders that the extension of the Stay, if granted, is entirely without prejudice to the ability of any stakeholder to make full argument regarding the terms of the Initial Order at the comeback hearing. Cadillac Fairview makes no reference to this assurance, and fails to demonstrate why its rights are not adequately protected by it.

19. In any event, even Cadillac Fairview acknowledges that a liquidation process is necessary, whether under the CCAA or a bankruptcy. As a result, there is no prejudice to Cadillac Fairview or anyone else from granting both the approval of the Sales Processes and the extension of the Stay at this stage, without foreclosing the ability of Cadillac Fairview or anyone else to make arguments at the comeback hearing.

¹⁰ CF Factum, para. 60.

20. Moreover, there is no basis to suggest that it is premature to determine whether the Applicants have acted in good faith and with due diligence. To the contrary, all of the evidence filed to date, including the Monitor in its First Report, supports the fact that the Applicants have satisfied the test for the extension of the Stay, as already submitted.

21. The Applicants therefore submit that there is no factual or legal foundation to the objections raised by Cadillac Fairview. The relief requested by Cadillac Fairview either cannot or should not be granted.¹¹ This Court cannot strike the provisions of the Process Approval Order or Stay Extension Order that purport to unilaterally amend the Cadillac Fairview Leases, since no such provisions have been identified by Cadillac Fairview. This Court should not refuse to extend the Stay as the Applicants clearly satisfy the test for the extension, there is no prejudice to Cadillac Fairview from doing so, and it is in the interests of the stakeholders as a whole.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

¹¹ CF Factum, para. 71.

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