

Court File No.

**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

FACTUM OF THE APPLICANTS

January 15, 2015

OSLER, HOSKIN & HARCOURT LLP

Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
Shawn Irving (LSUC #: 50035U)
Robert Carson (LSUC #: 57364H)

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

Lawyers for the Applicants

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 **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

FACTUM OF THE APPLICANTS

PART I – NATURE OF THIS APPLICATION

1. Target Canada Co. (“**TCC**”) and the other applicants listed above (the “**Applicants**”) seek relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). While the limited partnerships listed in Schedule A to this factum (the “**Partnerships**”) are not Applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an Initial Order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2. TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, which is one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC’s

Canadian retail business (such as the Canadian pharmacy operations) or to finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants therefore do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred to in this factum as the “**Target Canada Entities.**”

3. Target Corporation determined in early 2011 to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of the date of this hearing, TCC operates 133 stores, with at least one store in every province of Canada.

4. Due to a number of factors, the expansion into Canada has proved to be substantially less successful than expected and Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate that there is little or no prospect that further investment in the Canadian business will generate profits within a reasonable time or at a reasonable level. After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation has concluded that, in the interests of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

5. Without ongoing substantial investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the sheer magnitude and complexity of the operations of the Target Canada Entities, including the number of stakeholders affected, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The

Target Canada Entities intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the 17,600 employees of the Target Canada Entities.

6. An orderly wind-down under court supervision, with the benefit of the inherent flexibility of the CCAA and the oversight of the proposed Monitor, provides a framework in which the Target Canada Entities can, among other things:

- (a) pursue initiatives such as the sale of real estate portfolios and the sale of inventory under court-approved processes, thereby creating opportunities to materially enhance recoveries for affected stakeholders and/or to reduce claims in the estates of the Target Canada Entities;
- (b) develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the “**Employee Trust**”) funded by Target Corporation, which is designed to soften the impact of the wind-down on the employees of the TCC; (ii) an Employee Representative Counsel to safeguard employee interests arising in the proceeding; and (iii) a key employee retention plan (“**KERP**”) to compensate essential employees who agree to continue their employment and contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
- (c) create a level playing field to ensure that all affected stakeholders of the Target Canada Entities can be treated as fairly and equitably as the circumstances allow;
and

- (d) avoid the significant manoeuvring among creditors and other stakeholders (and the resulting chaos) that would inevitably occur, to the detriment of all stakeholders, in the absence of a court-supervised proceeding.

7. All of these factors are entirely consistent with the well-established purpose of a CCAA stay to give a debtor company the “breathing room” required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going-concern or on an orderly liquidation or wind-down basis. Similarly, the relief requested makes appropriate use of the flexibility and innovation afforded by the CCAA to ensure that the Target Canada Entities can take all necessary and appropriate steps to wind down their businesses in a responsible manner, while preventing aggressive tactics by creditors seeking to get a “leg up” over other creditors.

8. The Applicants are seeking an initial stay of proceedings.

PART II – FACTS

9. The facts with respect to this Application are more fully set out in the Affidavit of Mark J. Wong.¹ Capitalized terms in this Factum not otherwise defined have the same meanings as in the Wong Affidavit.

Target’s Decision to Expand Retail Operations into Canada

10. Target Corporation is one of the largest retailers in the United States. It operates approximately 1,800 US stores, and employs more than 350,000 people. It is a public company and its common stock is listed on the New York Stock Exchange.²

¹ Affidavit of Mark J. Wong, sworn January 14, 2015 [Wong Affidavit].

² Wong Affidavit, para. 5.

11. In early 2011, Target Corporation decided for the first time to expand its retail operations outside the United States. At the time, Target Corporation's leadership viewed an expansion into Canada as an opportunity to extend the Target shopping experience to a broader group of people and thereby expand its revenues and profits. They also believed that there were significant opportunities in the Canadian market that made their strategies well-positioned to succeed in the Canadian market.³

12. TCC entered the Canadian market in 2011 by purchasing a portfolio of leasehold interests from Zellers Inc. ("Zellers") for a net purchase price of approximately USD \$1.6 billion.⁴ The Zellers leases gave TCC immediate access to key locations in communities across Canada. TCC saw this as a way to establish operations at an efficient scale more quickly than would be possible with a typical greenfield expansion. After renovations and leasehold completions were completed, TCC opened many of the former Zellers locations under the Target banner. The first stores opened in March 2013.⁵

Structure of the Canadian Business

13. TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company.⁶ It is directly owned by Nicollet Enterprise 1 S.à r.l.

³ Wong Affidavit, paras. 8 and 10.

⁴ Wong Affidavit, paras. 8 and 44. The price paid to Zellers was approximately USD \$1.861 billion, which was subsequently offset by the sale to third parties of the right to acquire leasehold interests in 54 former Zellers sites. TCC has since entered into four additional leases that are unrelated to the leases acquired from Zellers.

⁵ Wong Affidavit, para. 9.

⁶ Wong Affidavit, para. 24. An organization chart showing the organizational structure of the Target Canada Entities forms Exhibit A to the Wong Affidavit.

(“NE1”), an entity organized under the laws of Luxembourg.⁷ Target Corporation (which is incorporated under the laws of Minnesota) owns NE1 through several other entities.⁸

14. TCC operates from a corporate headquarters in Mississauga.⁹ As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada.¹⁰ TCC’s employees are not represented by a union, and there is no registered pension plan for employees.¹¹

15. The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.¹² They are:

- (a) *Target Canada Pharmacy Franchising LP* (“**TCC Pharmacy**”): an Ontario limited partnership that acts as franchisor for TCC’s franchised pharmacies. It consists of TCC as limited partner and Target Canada Health Co. (“**TCC Health**”) as general partner. TCC Health is a wholly-owned direct subsidiary of TCC which is incorporated as a Nova Scotia unlimited liability company.¹³
- (b) *Pharmacy Corporations*: TCC owns all of the issued and outstanding shares of four pharmacy corporations (the “**Pharmacy Corporations**”): (i) Target Canada Pharmacy (Ontario) Corp. (“**TCC Pharmacy Ontario**”); (ii) Target Canada

⁷ Wong Affidavit, para. 26.

⁸ Wong Affidavit, para. 27.

⁹ Wong Affidavit, para. 4.

¹⁰ Wong Affidavit, para. 6.

¹¹ Wong Affidavit, para. 111 and 112.

¹² Wong Affidavit, para. 24. See also Exhibit A to the Wong Affidavit.

¹³ Wong Affidavit, paras. 30 and 31.

Pharmacy (BC) Corp.; (iii) Target Canada Pharmacy (SK) Corp.; and (iv) Target Canada Pharmacy Corp. TCC Pharmacy Ontario operates three TCC-owned in-store pharmacies in Ontario; the other three Pharmacy Corporations are not active.¹⁴

- (c) *Target Canada Mobile LP* (“**TCC Mobile**”): an Ontario limited partnership that acts as franchisor in relation to Target-branded kiosks for the sale of mobile phones operated in TCC stores under licence to Glentel Inc. (“**Glentel**”). TCC Mobile consists of TCC as limited partner and Target Canada Mobile GP Co. (“**TCC Mobile GP**”) as general partner. TCC Mobile GP is a wholly-owned direct subsidiary of TCC which is incorporated as a Nova Scotia unlimited liability company.¹⁵
- (d) *Target Canada Property LLC* (“**TCC Propco**”): a limited liability company organized under the laws of Minnesota. It is wholly owned by Nicollet Enterprise 3 S.à r.l. (“**NE3**”), an entity organized under the laws of Luxembourg. Target Corporation indirectly owns NE3 through several other entities. TCC Propco is a sub-lessee/sub-lessor in the sub-subleaseback arrangements implemented to finance leasehold improvements for the leased TCC stores.¹⁶
- (e) *Target Canada Property LP* (“**TCC Property LP**”): an Ontario limited partnership that formerly acted as sub-lessee/sub-lessor in the sub-subleaseback arrangements described above before the rights and obligations were assigned to

¹⁴ Wong Affidavit, paras. 32 and 33.

¹⁵ Wong Affidavit, para. 34 and 35.

¹⁶ Wong Affidavit, para. 36 and 37. See also Exhibit A to the Wong Affidavit.

and assumed by TCC Propco in January 2014. TCC Property LP no longer carries on business.¹⁷

Overview of the Canadian Retail Business

16. Retail operations in Canada are carried out by the Target Canada Entities, each of which performs specific functions within the Canadian retail business.

(a) Retail Store Operations

17. TCC operates 133 retail stores across Canada, with at least one store in each Canadian province. All but three of these stores are leased. In addition, TCC has seven “unopened” stores across Canada, all of which are leased.¹⁸ Three of TCC’s open stores (one in each of Barrie, Ontario, Candiac, Quebec and Winnipeg, Manitoba) are owned by TCC.¹⁹

18. Many of TCC’s store leases are held or managed by large retail landlords who lease several store locations to TCC. The lease terms generally range from 5 to 10 years, with renewal options in some cases.²⁰ Many of its leases are subject to a parent guarantee or indemnity provided to the particular landlords by Target Corporation.²¹

19. A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant in the mall or shopping centre. Each TCC store typically contains an in-store Target-brand

¹⁷ Wong Affidavit, para. 37.

¹⁸ Wong Affidavit, para. 43 and accompanying chart showing number of stores per province.

¹⁹ Wong Affidavit, para. 54.

²⁰ Wong Affidavit, para. 46.

²¹ Wong Affidavit, para. 50.

pharmacy, Target Mobile kiosk and a Starbucks cafe.²² The store typically employs approximately 100 to 150 people, described as “team members” and “team leaders”, with a total of approximately 16,700 people employed at the “store level” of TCC’s retail operations.²³

20. Target stores typically carry a wide range of merchandise, including: (a) clothing and apparel; (b) electronics; (c) household essentials such as beauty, pharmaceutical, personal care and cleaning products; (d) food and pet supplies; and (e) home furnishings and décor.²⁴ The vast majority of merchandise sold in TCC stores is sourced from vendors located in Canada and the United States. Many of the vendors supply merchandise to both TCC’s Canadian stores and Target Corporation’s US stores. Some of the merchandise is supplied by Canadian-based vendors who do not also supply Target Corporation’s stores in the US.²⁵ In addition, merchandise is acquired from overseas vendors through a Target Corporation affiliate.²⁶

21. TCC owns three distribution centres (two in Ontario and one in Calgary) to support its retail operations through receipt and inspection of in-bound shipments, inventory management and preparation of outbound shipments to TCC stores. These centres are operated by a third party, Eleven Points Logistics Inc.²⁷ Most products sold in most of TCC’s stores are

²² Wong Affidavit, para. 42.

²³ Wong Affidavit, para. 111.

²⁴ Wong Affidavit, para. 41.

²⁵ Wong Affidavit, para. 57.

²⁶ Wong Affidavit, paras. 59 and 60.

²⁷ Wong Affidavit, paras. 55 and 63.

replenished through the distribution centres.²⁸ TCC also leases a variety of warehouse and office space.²⁹

(b) In-Store Pharmacies

22. TCC Pharmacy Ontario operates three in-store pharmacies in Ontario.³⁰ Apart from these three stores, TCC's branded in-store pharmacies are operated under a franchised model. Outside Quebec, 93 of TCC's in-store pharmacies are operated by franchisees under agreements with TCC Pharmacy as franchisor. Pursuant to these agreements, the franchisees have a specific license to operate a Target-branded pharmacy within a TCC store. The franchisees are typically corporations that are wholly-owned by individual pharmacists. Each franchisee has its own employees – typically, one additional pharmacist and up to two pharmacy technicians in addition to an individual franchisee pharmacist.³¹

23. In Quebec, the 14 in-store pharmacies are co-branded with the Target and “Brunet” brands. This relationship is governed by an agreement (the “**McMahon Agreement**”) among TCC, TCC Pharmacy, McMahon Distributeur Pharmaceutique Inc. (“**McMahon**”) and McMahon's ultimate parent, Metro Inc. McMahon subleases space in the TCC stores operating in Quebec for these purposes. Pursuant to the McMahon Agreement, McMahon has entered into franchise and further sublease agreements with the third party franchisees who operate the individual in-store pharmacies in Quebec.³²

²⁸ Wong Affidavit, para. 62.

²⁹ Wong Affidavit, para. 56(c).

³⁰ Wong Affidavit, para. 33 and 78.

³¹ Wong Affidavit, paras. 72 and 74.

³² Wong Affidavit, paras. 83 and 84.

(c) In-Store Mobile Kiosks

24. Most TCC stores have a “Target Mobile” branded display kiosk that sells mobile phones and accessories. These kiosks are operated by Glentel pursuant to an agreement between TCC Mobile and Glentel. Glentel has a temporary licence to use space within TCC stores, as well as a specific licence to use the “Target Mobile” trade-mark in connection with the sale of products by Glentel in the TCC stores.³³

(d) Starbucks Cafes

25. Most TCC stores have a Starbucks cafe which is operated under a master licensing agreement between TCC and Starbucks Coffee Canada Inc. (“**Starbucks**”). Under this agreement, Starbucks granted TCC a non-exclusive licence to use the Starbucks trade-marks and system to construct and operate a Starbucks cafe within TCC stores.³⁴

TCC Encounters Significant Problems in Achieving Profitability

26. When it entered the Canadian market, Target Corporation expected that the path to achieving financial returns for Canadian stores would be in line with the historic experience for US store openings. This typically means that, when a new store opens, the store will experience losses until the end of the first full year of operations and profits thereafter.³⁵

27. However, this US pattern has not been replicated in Canada. Despite significant commitment and effort by Target Corporation and the Target Canada Entities, Canadian consumers did not embrace the Target shopping experience in Canada to the same extent as consumers in the United States. In every quarter since TCC opened its first store, TCC has faced

³³ Wong Affidavit, paras. 86 to 88.

³⁴ Wong Affidavit, para. 90.

³⁵ Wong Affidavit, para. 10.

lower-than-expected sales and greater-than-expected losses. Sales for the 2013 fiscal year and the year-to-date 2014 fiscal year significantly missed expectations. As reported in Target Corporation's consolidated financial statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.³⁶

28. TCC is completely operationally funded by its parent, Target Corporation and related entities. TCC has put significant financial pressure on Target Corporation and continues to consume significant cash. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market until the end of the 2014 fiscal year (ending January 31, 2015) will be more than CAD \$2.5 billion. This is more than triple the loss originally expected for this period. If TCC's operations are not wound down, it is projected that TCC's operations would remain unprofitable for at least five years and would require significant and continued funding from Target Corporation during that period.³⁷

29. TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian on-line retail presence.³⁸

Attempts to Develop Solutions Are Unsuccessful

30. Despite significant efforts to identify ways for TCC to succeed in Canada, recent results continue to fall below expectations. Beginning in Spring 2014, TCC has added internal resources and consulted extensively with financial, strategic and operational advisors in an attempt to improve TCC's operations and identify strategies that could make the Canadian

³⁶ Wong Affidavit, para. 10. A chart showing the magnitude of these losses on a per-quarter basis is found at para. 10 of the Wong Affidavit.

³⁷ Wong Affidavit, para. 11.

³⁸ A more detailed explanation of these issues is found in the Wong Affidavit, para. 12.

operations viable in the long term. These efforts included visits and assessments of each and every operating TCC retail store to evaluate its attributes, its performance and other relevant factors. Despite these efforts, forecasted financial improvements during the 2014 holiday season did not materialize.³⁹

31. A wide range of potential options to improve TCC's performance were assessed. These include (singly or in combination): (a) closing underperforming stores; (b) selling specific assets, such as a portfolio of leases outside an insolvency proceeding; (c) improving logistics; (d) consolidating distribution operations; and a wide variety of other options. At best, even under the most optimistic scenarios, TCC and Target Corporation could not identify an option that would result in TCC breaking even in the next five years.⁴⁰

32. Following this thorough review of TCC's operations, the board of directors of Target Corporation has recently decided, in its business judgment, that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.⁴¹

Financial Position of the Canadian Business

(a) TCC

33. Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidate the financial results of TCC and its subsidiaries), TCC had total assets of approximately CAD \$5.408 billion and total liabilities of approximately CAD \$5.118

³⁹ Wong Affidavit, para. 13.

⁴⁰ Wong Affidavit, para. 14.

⁴¹ Wong Affidavit, para. 15.

billion. This does not reflect a significant impairment charge that will likely be incurred at year end due to TCC's financial situation.⁴²

34. All of TCC's operational funding is provided exclusively by Target Corporation. In particular, as of November 1, 2014, NE1 (TCC's direct parent), had provided equity capital to TCC in the amount of approximately CAD \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of CAD \$62 million since November 1, 2014.⁴³

35. NE1 has also lent funds to TCC⁴⁴ under a loan facility with a maximum amount of CAD \$4 billion. TCC owed NE1 approximately CAD \$3.1 billion under this facility, as of January 2, 2015. This loan facility is unsecured, and as of September 1, 2014, interest no longer accrues on the outstanding balance.⁴⁵ On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this loan facility to the payment in full of proven claims against TCC.⁴⁶

(b) TCC Propco

36. As at November 1, 2014, TCC Propco had total assets of approximately CAD \$1.632 billion and total liabilities of approximately CAD \$1.643 billion. This does not reflect a

⁴² Wong Affidavit, paras. 127 and 134.

⁴³ Wong Affidavit, para. 153.

⁴⁴ Wong Affidavit, para. 151.

⁴⁵ Wong Affidavit, para. 151.

⁴⁶ Wong Affidavit, para. 152.

significant impairment charge that will likely be incurred at year end due to TCC Propco's financial situation.⁴⁷

37. At the same time that TCC Property LP assigned certain subleases and sub-subleases in connection with the sub-sub-leaseback arrangements to TCC Propco, TCC Property LP made available to TCC Propco a loan facility with a maximum amount of approximately CAD \$2 billion, of which TCC Propco has borrowed approximately CAD \$1.5 billion.⁴⁸ TCC Propco also owes USD \$89 million to Target Corporation under a demand promissory note.⁴⁹

38. TCC has subleased almost all the retail store leases to TCC Propco, which then made the real estate improvements, including capital investment in fixtures, and sub-subleased the properties back to TCC. Under this arrangement, upon termination of any of these subleases, a "make-whole" payment becomes owing from TCC to TCC Propco.⁵⁰

Urgent Need for Relief

39. Without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they come due, including TCC's next payroll (due on January 16, 2015). They are therefore insolvent.⁵¹

40. Given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their

⁴⁷ Wong Affidavit, paras. 139 and 144.

⁴⁸ Wong Affidavit, para. 154

⁴⁹ Wong Affidavit, para. 155

⁵⁰ Wong Affidavit, para. 157.

⁵¹ Wong Affidavit, para. 15.

operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed Monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. As submitted further below, TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.⁵²

PART III – ISSUES AND THE LAW

41. This Application addresses the following issues:
- (a) The Applicants are entitled to seek protection under the CCAA:
 - (i) The Applicants are insolvent;
 - (ii) The Applicants' chief place of business is Ontario;
 - (iii) The CCAA can be used to effect an orderly wind-down of the Applicants' businesses;
 - (b) The Applicants are entitled to a broad stay of proceedings:
 - (i) The stay should be extended to the Partnerships;
 - (ii) The stay should extend to "co-tenancy" rights of third party tenants;
 - (iii) The stay should extend to Target Corporation in relation to claims that are derivative of claims against the Target Canada Entities;

⁵² Wong Affidavit, para. 16.

- (c) This Court should approve protections for employees:
 - (i) The Employee Trust mitigates financial hardship to employees;
 - (ii) The KERP secures continued service of key employees, as required, throughout the orderly wind-down period;
 - (iii) The Employee Representative Counsel will benefit employees by representing employee interests in the CCAA proceeding;
- (d) This Court has the jurisdiction to authorize pre-filing claims to “critical” suppliers;
- (e) This Court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and should approve the financial advisor and real estate advisor engagements;
- (f) This Court should exercise its discretion to approve the Court-ordered charges:
 - (i) The DIP Facility and the DIP Lender’s Charge will provide essential liquidity during the orderly-wind down period;
 - (ii) The Administration Charge and Financial Advisor Subordinated Charge will ensure the continued engagement of the advisors needed to achieve the orderly wind-down; and
 - (iii) The Directors Charge will ensure the continued services of the directors and officers throughout the wind-down period.

The Applicants are Entitled to Seek Protection Under the CCAA

(a) The Applicants Are Insolvent

42. The CCAA applies to a “debtor company” or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars. Pursuant to section 2 of the CCAA, a “debtor company” means, *inter alia*, a company that is insolvent.⁵³

43. Whether a company is insolvent for the purposes of this definition is evaluated by reference to the definition of “insolvent person” in the *Bankruptcy and Insolvency Act* (“BIA”).

The definition of “insolvent person” in the BIA is as follows:

s.2(1)

... “insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

44. In *Stelco*,⁵⁴ Farley J. held that the test for “insolvency” under the CCAA should be given an expanded meaning in order to give effect to the objectives of the CCAA of allowing the debtor company to obtain some breathing room in order to restructure. Under the *Stelco* approach, a Court will determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the applicant running out of

⁵³ CCAA, sections 2 and 3(1).

⁵⁴ (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.).

money to pay its debts as they generally become due in the future without the benefit of a stay of proceedings. As Farley J. wrote:

It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.⁵⁵ [Emphasis added.]

45. The Applicants are all affiliated debtor companies with total claims against them that far exceed \$5 million.⁵⁶ TCC Propco is a “company” for the purposes of s. 2 of the CCAA because it has assets in Canada.⁵⁷

46. Moreover, the Applicants are insolvent. When CCAA applicants form part of a significantly intertwined group of affiliated debtor companies, it may not be legally necessary to find that each and every applicant is insolvent on a stand-alone basis.⁵⁸ In any event, the Applicants in these proceedings are either currently insolvent under the BIA test for solvency, or facing the kind of imminent liquidity crisis that clearly satisfies the expanded *Stelco* test.

47. The Target Canada Entities are entirely dependent operationally on the continued financial support of Target Corporation.⁵⁹ Since TCC commenced retail operations in Canada, TCC and TCC Propco have consistently operated at a significant loss and have only been able to maintain going concern operations as a result of the equity capital invested by Target Corporation or its affiliates and the loan facilities provided by Target Corporation or its

⁵⁵ *Re Stelco*, above at note 54 at para. 26.

⁵⁶ An organization chart showing the corporate relationships between the Target Canada Entities is attached as Exhibit A to the Wong Affidavit.

⁵⁷ Wong Affidavit para. 38.

⁵⁸ *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299 (S.C.J.) [*Re First Leaside*] at paras. 28 to 30.

⁵⁹ Wong Affidavit, para. 15.

affiliates.⁶⁰ Target Corporation has advised that it will not continue to provide the financial support that has been sustaining the Target Canada Entities' operations.⁶¹

48. Without further financial support from Target Corporation, TCC's liquidity continues to deteriorate. In fact, without immediate funding, TCC does not have sufficient liquidity to meet its next payroll (due on January 16, 2015) and other obligations as they come due.⁶² In addition, the value of TCC's and TCC Propco's assets as set out in the most recent financial statements prepared for the Canadian operations do not reflect the significant impairment charge that both entities will likely incur at year end due to their financial situation.⁶³

49. The Applicants are therefore all insolvent and are debtor companies to which the CCAA applies under either the BIA or the *Stelco* test.⁶⁴ Without the continued financial support of Target Corporation, the Target Canada Entities believe that there are too many legal and business impediments and too much uncertainty for the Target Canada Entities to wind-down their operations without the "breathing space" afforded by a stay of proceedings and other available relief under the CCAA.⁶⁵

(b) Ontario Court Has Jurisdiction Over the Proceeding

50. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in (a) the province

⁶⁰ Wong Affidavit, paras. 10 and 150.

⁶¹ Wong Affidavit, para. 15.

⁶² Wong Affidavit, para. 18.

⁶³ Wong Affidavit, paras. 133 and 143.

⁶⁴ Wong Affidavit, para. 181.

⁶⁵ Wong Affidavit, para. 16.

in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.⁶⁶

51. These criteria are satisfied on the basis that the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. Four of TCC's eleven other office locations are in Ontario. Fifty-five of the TCC retail stores operate in Ontario – the largest number of any province in which TCC operates. Two of TCC's three primary distribution centres are located in Ontario. Almost half of the employees that support TCC's operations work in Ontario.⁶⁷

(c) Use of CCAA to Effect an Orderly Wind-Down of the Business

52. The purpose for seeking the proposed Initial Order in these proceedings is to effect a fair, controlled and orderly wind-down of the Canadian retail business of the Target Canada Entities with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings.⁶⁸ Although there is no prospect that a restructured “going-concern” solution involving the Target Canada Entities will result, the Applicants submit that the use of the protections and the flexibility afforded by the CCAA is entirely appropriate in the circumstances.

⁶⁶ CCAA, s. 9(1).

⁶⁷ Wong Affidavit, paras. 36, 37 and 39. Note that the three non-Ontario Pharmacy Corporation Applicants are inactive: Wong Affidavit, para. 33.

⁶⁸ Wong Affidavit, para. 17.

53. It is well-established that the CCAA is a flexible instrument and that a debtor company is entitled to seek its protection in the context of a very wide range of restructuring options. As Topolniski J. of the Alberta Queen’s Bench has stated, “... reorganization of a company’s affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organization and management restructuring, downsizing, refinancing, or debt to equity conversion – the solutions are generally limited only by the creativity of those structuring the plan of arrangement.”⁶⁹

54. The Supreme Court of Canada expressly noted in *Century Services* that “[c]ourts frequently observe that ‘[t]he CCAA is skeletal in nature’ and does not ‘contain a comprehensive code that lays out all that is permitted or barred.’”⁷⁰ 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.⁷¹

55. Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, a debtor company is entitled to seek the protection of the CCAA where the outcome will not be a going-concern restructuring, but instead, a “liquidation” or wind-down of the debtor company’s assets or business. Thus, Farley J. stated in *Lehndorff* that a restructuring under the CCAA “may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best

⁶⁹ *Re 843504 Alberta Ltd.*, 2003 ABQB 1015 at para. 14

⁷⁰ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para. 57, citing *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 44.

⁷¹ *Century Services*, above note 70 at para. 61.

interests of the creditors generally.”⁷² The Court similarly recognized as appropriate the use of the CCAA to wind down or liquidate a business in both *Olympia & York*,⁷³ and in *Anvil Range*.⁷⁴

56. The 2009 amendments did not expressly address whether the CCAA could be used generally to wind down the business of a debtor company. However, the enactment of s. 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle by means of which a debtor company’s business is down-sized or wound-down.⁷⁵

57. The CCAA case law is replete with examples of CCAA proceedings that have either been commenced for the purpose of winding down a business, or that have adopted this purpose after it became apparent that a going-concern solution was not achievable. Key examples of such recent proceedings include:

- (a) *Nortel Networks*: Nortel sought CCAA protection in January 2009 with a view to restructuring its business, but by June 2009 it was clear that the CCAA would be used to “liquidate” its assets. As Newbould J. recently noted, “[i]t is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a

⁷² *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) [*Lehndorff*] at para. 7.

⁷³ The “CCAA need not be employed to revitalize a corporation but can also involve a liquidation scenario”: *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at para 18.

⁷⁴ “While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company — or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances.”: *Re Anvil Range Mining Corp.*, 2001 CarswellOnt 1325 (S.C.J.), aff’d 2002 CarswellOnt 2254 (C.A.).

⁷⁵ CCAA, s. 36.

distribution of proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.”⁷⁶

- (b) *Grant Forest Products Inc.*: GFPI commenced CCAA proceedings for the purpose of winding down its business. In this context, Campbell J. recognized that “[w]hat has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating CCAA of which both *Indalex Ltd.*, *Re* and GFPI are leading examples.”⁷⁷
- (c) *Indalex Ltd.*: Indalex sought protection under the CCAA for the purpose of winding down its business and was a “liquidating” CCAA proceeding “from the outset.”⁷⁸
- (d) *First Leaside Wealth Management*: the Court expressly recognized that “the reality is that ‘reorganizations of differing complexity require different legal mechanisms.’ That reality has led courts to recognize that the CCAA may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership, or to wind-up or liquidate it.”⁷⁹

58. It is entirely appropriate in the circumstances of this case for the proposed orderly wind-down of the Target Canada Entities’ businesses to be carried out with the benefit of the protections and flexibility afforded by the CCAA. The sheer magnitude and complexity of the Target Canada Entities’ business, including the number of stakeholders whose interests are

⁷⁶ *Re Nortel Networks Corp.*, 2014 ONSC 5274 at para. 23.

⁷⁷ *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933 at para. 44.

⁷⁸ *Re Indalex Ltd.*, 2011 ONCA 265 at para. 180, rev’d on other grounds 2013 SCC 6, [2013] 1 S.C.R. 271.

⁷⁹ *Re First Leaside* above note 58, at para. 32.

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

59. The controlled wind-down of the Target Canada Entities’ businesses is much more than a simple liquidation. In particular, the Applicants will benefit from the CCAA’s flexibility, under the supervision of the Court and with the assistance of the Monitor, in implementing measures that have the objective of: (a) mitigating the financial hardship that will be faced by TCC employees; (b) maximizing recoveries for all stakeholders; and (c) fairly and equitably reducing claims in the Target Canada Entities’ estates or otherwise addressing stakeholder interests as they arise, while respecting the “level playing field” created by the CCAA stay.

60. The Applicants therefore submit that the proposed Initial Order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA to the Target Canada Entities should be granted.

The Applicants Are Entitled to a Broad Stay of Proceedings

(a) Stay Should Be Extended to the Partnerships

61. The CCAA expressly applies, by its terms, to debtor companies, but not partnerships.⁸⁰ Where the operations of partnerships are integral and closely related to the operations of the Applicants, it is well-established that the CCAA Court has the jurisdiction to

⁸⁰ CCAA, s. 2, “debtor company”.

extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved.⁸¹

62. Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the Partnerships. The corporate partners are Applicants in these proceedings, as is TCC as the sole limited partner. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each of the Partnerships performs key functions in relation to the Target Canada Entities' businesses. In particular:

- (a) TCC Pharmacy acts as franchisor in relation to each of the franchised in-store pharmacies that operate in TCC stores outside Quebec, and as licensor in the co-branded pharmacy relationship with McMahon in Quebec; and
- (b) TCC Mobile LP is the counterparty under the agreement with Glentel pursuant to which Glentel operates the Target Mobile in-store kiosks located in TCC stores throughout Canada.⁸²

63. The Applicants also seek to extend the stay to Target Canada Property LP. Although it does not currently carry on business, Target Canada Property LP was formerly the sublessee/sub-sublessor under the sub-subleaseback arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The rights and obligations under this

⁸¹ See *Lehndorff* above note 72 para. 21; *Re Smurfit-Stone Container Canada Inc.*, 2009 CarswellOnt 391 (S.C.J.) at para. 19 [*Smurfit-Stone*]. *Re Prizm Income Fund*, 2011 ONSC 2061 [*Prizm*] at paras. 26 and 27; *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 222 [*Canwest Publishing* (Initial Order)] at paras. 33 and 34; *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 [*Canwest Global* (Initial Order)] at paras. 28 and 29.

⁸² Wong Affidavit, para. 35.

arrangement were assigned to TCC Propco.⁸³ The extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

(b) Landlord Protection in Relation to Third Party Tenants

64. Many retail leases of non-anchor tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations.⁸⁴ In order to alleviate the prejudice to TCC's landlords if any such non-anchor tenants attempt to exercise these rights, the Applicants request that, during the Stay Period, the Court extend the stay of proceedings (the "**Co-tenancy Stay**") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order. The proposed Co-tenancy Stay includes, but is not limited to, rights to terminate the leases or rights to a reduction or abatement of rent.⁸⁵

65. This Court's authority to grant the Co-tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose."⁸⁶ A stay of proceedings of the same nature as the Co-tenancy Stay was granted by the Court in the Eaton's second CCAA proceeding. In upholding the jurisdiction of the Court to grant the stay in the face of an objection by an affected tenant, this Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay period, the

⁸³ Wong Affidavit, para. 37.

⁸⁴ Wong Affidavit, para. 51.

⁸⁵ Wong Affidavit, para. 51; Draft Initial Order, para. 18.

⁸⁶ CCAA, s. 11.02(1). See also CCAA, s. 11.

claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.⁸⁷

66. In *Eaton's*, on a motion brought by certain non-anchor tenants, the Court rejected the affected tenant's objection that the Court did not have jurisdiction to grant the "co-tenancy" stay because the affected tenant was not a creditor of the debtor company. In reaching this conclusion, the Court invoked the broad jurisdiction of the CCAA Court to make orders against third party non-creditors, where their actions would potentially jeopardize the success of a plan.⁸⁸

67. The Court in *Eaton's* also rejected the affected tenant's objection that the prejudice experienced by the tenant far outweighed the benefits of the co-tenancy stay. The Court was persuaded by the submissions of the landlords to the effect that the affected tenant's allegation of prejudice was premature, given the considerable uncertainty regarding the outcome of the proceeding and its effect on particular leases. It was not yet clear whether there would be a plan and how the plan would address stakeholder claims. If Eaton's could not achieve its restructuring with the landlords, the economic harm could be far-reaching and devastating. Furthermore, an exodus of tenants from the affected malls could have significant ripple effects in the local economics, thereby causing further job loss. Finally, a bankruptcy of Eaton's would have had an even more devastating impact on all stakeholders.⁸⁹

68. Although some of the case law relied upon by the Court in *Eaton's* for the ability of a Court to affect third party contractual rights contains language that focuses on the objectives

⁸⁷ *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) [*Eaton's*] at para. 4, citing *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 1988 CarswellAlta 318 (QB); *Lehndorff*, above note 72.

⁸⁸ *Eaton's*, above note 87 at para. 6, citing *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 1988 CarswellAlta 318 (QB); *Lehndorff*, above note 72.

⁸⁹ *Eaton's*, above note 87 at para. 7.

of the CCAA of assisting with a going-concern restructuring, there is no reason in principle why the Court's jurisdiction should be any different in circumstances where the CCAA restructuring takes the form of an orderly wind-down of the debtor company's operations with a view to maximizing recoveries for the general body of stakeholders. In fact, the very reason for granting the co-tenancy stay in the Eaton's proceeding was the fact that the restructuring had the potential to (and in fact, did) involve the closure of a significant number of stores.

69. In these proceedings, as submitted further below, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to developing a sales process for some or all of the TCC lease portfolio. It is premature to determine whether this process will be successful, whether (for example) any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. While this process is being resolved and the orderly wind-down of the Target Canada Entities' businesses is underway, the Co-tenancy Stay postpones the contractual rights of these tenants for a finite period. Any prejudice to those tenants is therefore significantly outweighed by the benefits of the Co-tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

70. The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

(c) Target Corporation Protected Against Derivative Claims

71. The Applicants request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the Cash Management System) to Target Corporation and its US subsidiaries in relation to claims against these entities that are derivative of the

primary liability of the Target Canada Entities.⁹⁰ This extension of the stay of proceedings to Target Corporation and its US subsidiaries has the effect of postponing (but not resolving or otherwise impairing) certain types of claims that could potentially be asserted against Target Corporation or its US subsidiaries that depend or derive from acts, omissions, liabilities or obligations of the Target Canada Entities. Such claims may arise under contract, including under a guarantee, under statute or by any other means.

72. The Applicants request that the stay of proceedings be extended to derivative claims against Target Corporation and its US subsidiaries in order to allow the Target Canada Entities sufficient “breathing space” to focus their resources on the fair and orderly wind-down process. Any derivative litigation against Target Corporation or its US subsidiaries would necessarily require the participation of key personnel of the Target Canada Entities – for example, to provide evidentiary support for the claim through witnesses or documents. The need to provide such support could be a very significant distraction for the members of senior management who remain employed by TCC during the wind-down period and would materially detract from the paramount goal of achieving the fair and orderly wind-down of the business.⁹¹ Given the number of provincial jurisdictions in which the Target Canada Entities operate and the number of affected stakeholders, the risk that multiple derivative proceedings could be asserted against Target Corporation and/or its US subsidiaries, with the inevitable disruptions to the orderly wind-down of the business, could be significant.

73. A well-recognized purpose of the stay of proceedings under the CCAA is to prevent the debtor company from having to devote time and scarce resources to addressing

⁹⁰ Draft Initial Order, para. 19; Wong Affidavit, para. 229.

⁹¹ Wong Affidavit, para. 230.

litigation against it. Thus, for example, in upholding a stay of proceedings in favour of the directors and officers of Nortel, the Court expressly noted that the purpose of the stay of proceedings is to provide the debtor company's management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy defending legal actions.⁹²

74. The stay of derivative claims against Target Corporation and its subsidiaries will apply, among other things, to guarantees given by Target Corporation in favour of creditors such as landlords or other vendors. Section 11.04 of the CCAA states that “no order made under section 11.02 has effect 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 or credit or guarantee in relation to the company.”⁹³ Although this section was renumbered in the course of the 2009 amendments to the CCAA, a provision with similar wording was also found in the pre-2009 amendment statute.⁹⁴

75. The Applicants submit that this exception does not apply in this case. It is well-established that provisions of the CCAA that constitute exceptions to the operation of the broad stay of proceedings must be construed narrowly.⁹⁵ This approach is consistent with general principles of statutory interpretation which dictate that statutory exceptions must be interpreted in light of their underlying rationale and should not be used to undermine the broad purpose of

⁹² *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 (S.C.J.) [*Nortel Networks* (ERISA Litigation)] at paras. 20, 27 and 36.

⁹³ CCAA, s. 11.04

⁹⁴ The section was formerly numbered as s. 11.2 of the CCAA and was essentially identical in wording: SO 1997, c. 12, s. 124.

⁹⁵ *Re Nortel Networks Corp.*, 2009 ONCA 833 [*Nortel Networks* (Post-Filing Employee Claims Appeal)] at para. 17, referring to former section 11.3 of the CCAA (now section 11.01 of the CCAA).

the legislation.⁹⁶ In the context of the broad remedial objectives of the CCAA stay of proceedings, it is particularly important to interpret any exceptions to the stay in a manner that is consistent with and that does not undermine these objectives.

76. A recent Quebec decision has clearly indicated that this provision must be read restrictively in order to avoid undermining the purpose of the stay. Section 11.04 of the CCAA states that the stay of proceedings cannot affect a proceeding against a person obligated under a “letter of credit or guarantee”. The Quebec Court held that this limitation is intended to apply narrowly to formal security instruments such as “letters of credit” or “letters of guarantee”, but not to a contractual relationship of guarantee or suretyship that is derivative of the obligations of the debtor company.⁹⁷

77. Both a letter of credit and a letter of guarantee generally represent “stand-alone” obligations that are subject to being drawn in accordance with their terms, without proof of the primary liability or any defences that might be raised to that liability.⁹⁸ The Applicants submit that in order to reconcile the language of section 11.04 of the CCAA with the purpose of the CCAA of ensuring that claims affecting the property are addressed within the CCAA proceedings and that resources of the debtor company are devoted to its restructuring, the proper narrow interpretation of section 11.04 is that it is intended to prevent the stay of proceedings from affecting actions, suits or proceedings in relation to stand-alone financial obligations. However, it is not intended to preclude a stay of proceedings from postponing the claims of

⁹⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th Ed. (Markham: LexisNexis, 2008) at p. 484, citing *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161.

⁹⁷ *Re Charles Morissette Inc.*, 2014 QCCS 385 (unofficial translation).

⁹⁸ Lazar Sarna, *Letters of Credit: The Law and Current Practice*, 3rd ed., loose-leaf (Toronto: Carswell, 2014), ch. 2 at 19: “The same principles apply to an instrument described as a ‘letter of guarantee’ as to a standby letter of credit. Since the issuer is not a guarantor, the circumstances under which a guarantor’s obligations might be discharged are not available to it.”

creditors against a third party that are derivative of the debtor company's liability and dependent on the resources of the debtor company to resolve.

78. In any event, by its plain wording, section 11.04 of the CCAA prevents a stay of proceedings granted under sections 11.02 of the CCAA from affecting a proceeding in relation to a letter of credit or guarantee. It does not prevent the CCAA Court from exercising its inherent jurisdiction, in appropriate circumstances, to extend the stay of proceedings to third party non-applicants. A CCAA stay of proceedings has frequently been extended to non-applicants where such an order furthers the purpose of the CCAA stay.⁹⁹

79. In fact, a number of cases have imposed a stay of proceedings affecting the rights of creditors to recover against a non-applicant that acts as guarantor for obligations of a CCAA debtor. For example, in *Tamerlane Ventures*, the applicants requested that the CCAA stay of proceedings be extended to two non-applicant parties on the basis that the operations of the applicants and the non-applicants were intertwined and that the stay was necessary to maintain stability and value in the CCAA process. The non-applicant parties included a US subsidiary of the applicants that had guaranteed the applicants' secured loans.¹⁰⁰

80. The "balancing of prejudices" favours this relief in the circumstances of this case. As a general matter, CCAA courts have held that subjecting plaintiffs to a temporal stay of their rights to bring legal actions causes no prejudice to such plaintiffs because their actions are not

⁹⁹ Such non-applicants include partnerships such as the Partnerships. See above.

¹⁰⁰ *Re Tamerlane Ventures Inc.*, 2013 ONSC 5461 (S.C.J.) at para. 21. See also *Re Cinram International Inc.*, 2012 ONSC 3767 at paras. 61 to 65 (stay extended to a number of non-applicant entities, including subsidiaries of the debtor company that were parties to an agreement with an applicant as surety, guarantor or otherwise); *Re Sino-Forest Corp.*, 2012 ONSC 2063 at paras. 26-29 (stay extended to a number of non-applicant subsidiaries that acted as guarantor for the obligations of the applicant).

being precluded, but simply postponed.¹⁰¹ Claims against Target Corporation and its subsidiaries are being postponed, but not otherwise impaired by the proposed extension of the stay to claims against them that are derivative of the liability of the Target Canada Entities.

81. Moreover, until the orderly wind-down occurs and a claims procedure is developed, the amounts of any derivative claims against Target Corporation cannot be known. Such claims would therefore be premature, and if such claims were to proceed, there is a clear risk of inconsistent results.¹⁰² A stay of proceedings against a co-defendant to the debtor has been granted in order to ensure that inter-related proceedings were resolved consistently. The extension of the stay to the co-defendant prevented the proceeding against the non-applicant from being detrimentally impacted by the obstacles to participation by the debtor company.¹⁰³

82. Any prejudice associated with the extension of the stay to Target Corporation in relation to derivative claims is far outweighed by the benefits to the Applicants' stakeholders as a whole. The Monitor supports the Applicants' request for this stay of proceedings and the views of the Monitor should not lightly be disregarded.¹⁰⁴ The Applicants therefore submit that it is appropriate to extend the stay of proceedings in favour of Target Corporation in this manner.

¹⁰¹ *Nortel Networks (ERISA Litigation)*, above note 92 at para. 36, citing *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at para. 24.

¹⁰² Wong Affidavit, paras. 230-231.

¹⁰³ *Re Grace Canada Inc.*, 2005 CarswellOnt 6648 (S.C.J.) at para. 12.

¹⁰⁴ See for example, *Re Grant Forest Products Inc.* 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]) [*Grant Forest Products*] at para. 19, citing *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). Monitor's Pre-Filing Report, para. 7.2.

Protections for Employees

(a) Approval of the Employee Trust

83. TCC employs approximately 17,600 people.¹⁰⁵ As of January 12, 2015, these included:

(a) *16,700 “store level” employees:* Most store-level employees are paid hourly rates and, subject to eligibility, are entitled to company-paid benefits packages. Approximately 700 employees are paid through base salary and company benefits.¹⁰⁶ These store-level employees are referred to by TCC and Target Corporation as “team members” (approximately 14,500) or “team leaders” (approximately 1,500).¹⁰⁷

(b) *Management and other salaried employees:* Approximately 127 employees work in group and district offices for TCC. Approximately 763 employees work at TCC’s Mississauga headquarters. All of these employees are compensated through base salary and company-paid benefits. Some of these employees are entitled to performance bonuses or other incentives.¹⁰⁸

84. TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada

¹⁰⁵ Wong Affidavit, para. 110. A chart showing the breakdown of TCC employees by province can be found at para. 116 of the Wong Affidavit. Approximately 70 employees have been seconded to work with TCC under a secondment agreement between Target Corporation and other US-based entities and TCC. In addition, approximately 600 non-TCC employees are based in the US and approximately 200 non-TCC employees are based in Indian but provide dedicated services to TCC: Wong Affidavit, paras. 114 and 115.

¹⁰⁶ Wong Affidavit, para. 111.

¹⁰⁷ Wong Affidavit, para. 111.

¹⁰⁸ Wong Affidavit, para. 112.

Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated at the end of their statutory or contractual notice period.¹⁰⁹

85. In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC's employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum amount of CAD \$70 million. The Applicants are seeking this Court's approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination.¹¹⁰ The Employee Trust was developed in consultation with the proposed Monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel (described further below).¹¹¹ If approved, the Employee Trust will provide funding for payment to employees of at least their full statutory or contractual termination entitlements, even if they are not required to work for their entire notice period.¹¹²

86. The Employee Trust is an innovative support mechanism that is proposed to be established and implemented under the flexible jurisdiction and scope for innovation that is afforded by the CCAA. Claims by employees for termination and severance pay under employment standards legislation would ordinarily be treated as unsecured claims in the estates of the Target Canada Entities. They are subject to the stay of proceedings and are subject to compromise under a plan of compromise or arrangement. This means, generally, that the

¹⁰⁹ Wong Affidavit, para. 200.

¹¹⁰ Wong Affidavit, para. 19 and 200; Draft Initial Order, paras. 26 to 30. The details regarding the beneficiaries of the Employee Trust and the distributions to which those beneficiaries may be entitled are set out at para. 204 of the Wong Affidavit.

¹¹¹ Wong Affidavit, para. 202.

¹¹² Wong Affidavit, para. 200.

employee would not recover the full amount of the claim. The case law attests to the fact that this result creates significant hardships for employees whose employment is terminated by an insolvent employer.¹¹³

87. Approval of the Employee Trust is entirely in keeping with the flexible nature of the CCAA and the jurisdiction of the CCAA Court to grant orders that further the objectives of the CCAA, including the objective of treating stakeholders as fairly and equitably as possible.¹¹⁴ In seeking to alleviate the potentially harsh impact of an insolvency on vulnerable employees, this Court has previously exercised its CCAA jurisdiction to direct a debtor company to take steps to address employee financial hardship, including by providing for partial early recoveries from the debtor's estate for employees, albeit at a compromised amount.¹¹⁵ The Employee Trust goes significantly further than these prior measures by permitting Eligible Employee Claims (as defined in the Employee Trust) to be recovered at their face amount from funds that do not deplete the debtor company's estate.

88. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of the Target Canada Entities. Target Corporation has agreed not seek to recover from the Target Canada Entities' estates any amounts paid out to employee beneficiaries under the Employee Trust.¹¹⁶ The Employee Trust will pre-fund distributions for payment to beneficiaries

¹¹³ *Re Nortel Networks Corp.*, 2009 CarswellOnt 3583 (S.C.J.) [*Nortel Networks* (Post-Filing Claims)] at para. 60, aff'd by *Nortel Networks* (Post-Filing Employee Claims Appeal), above note 95; see also *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4471 (S.C.J.) at paras. 35 to 36, 51; *Re Canwest Global Communications Corp.*, 2010 ONSC 1746 at paras. 30 to 34.

¹¹⁴ It is well-established that "equitable" treatment is an underlying principle and objective of the CCAA, and that "equitable" does not necessarily mean "equal": see *Re Air Canada*, 2003 CarswellOnt 5296 (S.C.J.) at para. 7, citing *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at p. 173.

¹¹⁵ *Nortel Networks* (Post-Filing Claims), above note 113 at paras. 87 and 88.

¹¹⁶ Wong Affidavit, paras. 19 and 201.

by TCC or its third party payroll provider. The distributions will be based on estimates developed by TCC and the Monitor on a per-pay-period basis, with a final reconciliation and “true-up” on or after the final distribution.¹¹⁷

89. The Employee Trust not only benefits the employees themselves, but creates added benefits for the general body of stakeholders in the Target Canada Entities’ estates. Where there is a very large workforce and most of that workforce is receiving notices of termination contemporaneously with the granting of the Initial Order, claims by terminated employees whose service is not required for the full duration of their statutory notice periods could be significant. Upon receipt of distributions for Eligible Employee Claims, the beneficiaries of the Employee Trust will be deemed to have released TCC, Target Corporation and other Releasees (as defined in the Employee Trust) in respect of the Claim, to the extent of the distribution received.¹¹⁸ Subject to the resolution of any dispute,¹¹⁹ these beneficiaries will therefore no longer be entitled to assert these claims in the Target Canada Entities’ estates. The resolution of these claims outside a claims process will therefore benefit the other stakeholders of the Target Canada Entities. It is anticipated that the Employee Trust will cover approximately \$60 million of Eligible Employee Claims, and will reduce the cost to the estate of the KERP (described below).¹²⁰

90. It is submitted that the Employee Trust should be approved on the basis that it is a product of the flexibility allowed to debtor companies under the CCAA to take measures that, within the framework of the CCAA stay, have the beneficial effect of furthering the objectives of

¹¹⁷ Wong Affidavit, para. 203(c).

¹¹⁸ Wong Affidavit, para. 203(d).

¹¹⁹ Wong Affidavit, para. 206.

¹²⁰ Wong Affidavit, paras. 206 and 208(d).

the CCAA while protecting a vulnerable stakeholder group. The Employee Trust is funded entirely by Target Corporation, in circumstances where Target Corporation has no legal obligation to provide such funding. The Employee Trust provides a cushion for employees, as one of the largest and most vulnerable groups of stakeholders, against the financial impact of the orderly wind-down of the Target Canada Entities' businesses.

(b) Approval of the KERP

91. The Applicants seek the approval of a key employee retention plan (“KERP”) and the granting of a Court-ordered charge up to the aggregate amount of CAD \$6.5 million as security for payments under the KERP.¹²¹ The KERP Charge will rank after the Administration Charge but before the Directors' Charge, the Financial Advisor Subordinated Charge and the DIP Charge.

92. The approval of a KERP and related KERP Charge is in the discretion of the CCAA court. KERPs have been approved in numerous CCAA proceedings,¹²² including recently in the Nortel Networks, the Grant Forest Products and the US Steel proceedings. In *Nortel Networks*, this Court approved the proposed KERP on the basis that the commitment and retention of key employees was “essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement.”¹²³ In *US Steel*, this Court very recently approved the KERP for employees whose continued services were critical for the stability of the business and

¹²¹ Wong Affidavit, para. 194; Draft Initial Order, paras. 24 and 25.

¹²² See, for example: *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks* (KERP)]; *Grant Forest Products*, above note 104.

¹²³ *Nortel Networks Corp.* (KERP), above note 122 at para 4.

for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its US parent.¹²⁴

93. In *Grant Forest Products*, Justice Newbould upheld the provisions of an Initial Order granting a KERP and related KERP Charge, taking into account, among other things (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;¹²⁵ (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 company.¹²⁶

94. The KERP was developed by the Target Canada Entities in consultation with the proposed Monitor.¹²⁷ The proposed KERP and KERP Charge for the Target Canada Entities benefits between 21 to 26 key management employees and approximately 520 store level management employees.¹²⁸

95. The management employee participants perform services such as human resources, legal support, distribution and merchandising support and property development that

¹²⁴ *Re US Steel Canada Inc.*, 2014 ONSC 6145 [*US Steel*] at paras. 28 to 33.

¹²⁵ In *Re Nortel Networks Corp.*, 2009 CarswellOnt 1519 (S.C.J.) [*Nortel Networks (KEIP)*], a companion decision to the *Nortel Networks (KERP)* decision, Morawetz J. approved a key executive incentive plan arrangement (“KEIP”) in circumstances in which there was a “potential” loss of management at the time who were sought after by competitors.

¹²⁶ *Grant Forest Products*, above note 104. Note that in *Grant Forest*, the Monitor’s view that the KERP was necessary to retain the key employee in question and appropriate in quantum was given considerable weight: see para. 19.

¹²⁷ Wong Affidavit, para. 195.

¹²⁸ The terms of the KERP, the employees covered and the manner in which the quantum of the KERP was established is described in greater detail in para. 196 of the Wong Affidavit.

will be critical throughout the contemplated inventory liquidation process and thereafter.¹²⁹ At the store level, participants include the store team leader, who runs the store.¹³⁰ Additional store-level KERP participants at each store include one human resources professional to assist with scheduling, payroll and employee communications; one key logistics employee to coordinate the store's receipt of inventory and placement of inventory in the store; and one facilities technician responsible for building operations and maintenance.¹³¹

96. The number of store level employees who are protected by the KERP reflects the structure of TCC's Canadian retail operations. Each store essentially runs as a stand-alone operation, with its own management and workforce. Each store will require four key employees to remain in their positions during the proposed liquidation of the inventory in order to ensure that this process operates as smoothly and efficiently as possible.¹³²

97. All of the employees who are protected by the KERP are those whose continued service throughout the orderly wind-down of the Target Canada Entities' businesses is essential to the stability of operations during this period and to the ability of the Target Canada Entities to complete the wind-down in a controlled and responsible fashion. These employees have significant experience and specialized expertise that cannot be easily replicated or replaced.¹³³ The Applicants submit that the KERP is particularly important in light of the fact that the Target Canada Entities are winding down their operations, which would otherwise create strong incentives for key employees to seek and take advantage of alternate opportunities for

¹²⁹ Wong Affidavit, para. 196(a).

¹³⁰ Wong Affidavit, para. 196(b)(i).

¹³¹ Wong Affidavit, paras. 196(b)(ii), (iii) and (iv). The KERP entitlements for these employees are explained in detail in these paragraphs.

¹³² Wong Affidavit, para. 196(b).

¹³³ Wong Affidavit, para. 195.

employment during the course of the CCAA proceeding, before the orderly wind-down process is complete.

98. The Applicants further submit that the size of the KERP is reasonable relative to the total TCC workforce of approximately 17,600 employees. In total, the KERP covers approximately 3 percent of these employees. Moreover, TCC operates 133 stores. The KERP benefits approximately 520 store-level employees – 4 key employees per store location.¹³⁴ The quantum of the KERP is also consistent with the relative size of KERPs granted in complex restructurings.¹³⁵

99. The proposed Monitor supports the KERP and is of the view that it is reasonable and appropriate in the circumstances.¹³⁶ The Applicants therefore submit that the KERP and the KERP Charge should be granted.

(c) Appointment of Representative Counsel

100. The Applicants ask the Court to appoint Koskie Minsky LLP as employee representative counsel (the “**Employee Representative Counsel**”), with Susan Philpott acting as senior counsel, to represent all of TCC’s employees, except directors and officers, in relation to any issues affecting the employees in the CCAA proceedings.¹³⁷ The Employee Representative

¹³⁴ Wong Affidavit, para. 196. The KERP does not apply to 11 store team leaders who are international assignees: para. 197(b)(i).

¹³⁵ *Nortel Networks* (KERP), above note 122 at para. 8; *Nortel Networks* (KEIP), above note 125 at para. 6 (two plans benefitted 5% of Nortel’s global workforce, and covered 300 employees of the Canadian debtors; the Canadian component of these two plans was valued at approximately \$13 million, with the KERP component representing approximately \$6.2 million); see also *Canwest Global* (Initial Order) above note 81 at paras. 5 and 49 (the applicants employed approximately 1,700 people. Of these, 20 were KERP participants. The value of the KERP charge was \$5.9 million).

¹³⁶ Monitor’s Pre-Filing Report, para. 13.5.

¹³⁷ Draft Initial Order, paras. 31 to 37; Wong Affidavit, para. 209.

Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. At this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between the interests of individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.¹³⁸

101. Section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the Court to appoint representative counsel for vulnerable stakeholder groups such as employees or investors.¹³⁹ The Court has expressly recognized that employees of an insolvent debtor are vulnerable without representation.¹⁴⁰ The Court's jurisdiction to appoint representative counsel for a vulnerable group is appropriately exercised where the group is not otherwise represented and requires and deserves assistance in the restructuring process.¹⁴¹

102. There is no established list of criteria that must be satisfied in determining whether to appoint representative counsel. Some of the factors have been considered in determining whether to appoint particular representative counsel include the breadth of proposed representation, legal expertise, jurisdiction of practice, the need for facility in both official languages and estimated costs.¹⁴²

103. Additional factors that may be taken into consideration include (i) the vulnerability and resources of the group sought to be represented; (ii) any benefit to the

¹³⁸ Wong Affidavit, para. 212, 213(c). See also *US Steel*, above note 124 at para. 39.

¹³⁹ *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) [*Nortel Networks (Representative Counsel)*] at paras. 10 to 12.

¹⁴⁰ *US Steel*, above note 124 at para. 37.

¹⁴¹ See, for example, *Re Fraser Papers Inc.*, 2009 CarswellOnt 6169 (S.C.J.) [*Fraser Papers*] at para. 7; *US Steel*, above note 124 at para. 37.

¹⁴² *Fraser Papers*, above note 141 at para. 12.

companies under CCAA protection; (iii) any social benefit to be derived from the representation of the group; (iv) the facilitation of the administration of the proceedings and efficiency; (v) the avoidance of multiplicity of legal retainers; (vi) the balance of convenience and whether it is fair and just including to creditors of the estate; and (vii) the position of other stakeholders and the Monitor.¹⁴³ It is appropriate for a CCAA debtor's estate to provide funding for representative counsel where such counsel is not otherwise funded from other sources, such as a union.¹⁴⁴

104. It is clearly beneficial to both the employees and the estates of the Target Canada Entities to appoint the Employee Representative Counsel in the context of this proposed CCAA proceeding. TCC has a large workforce that is not unionized and not otherwise represented. The vast majority of these employees are “store level” workers who are paid an hourly wage. All of these employees will lose their jobs as part of this orderly wind-down.

105. The assistance of the Employee Representative Counsel will be invaluable in assisting these vulnerable stakeholders to speak with “one voice”, in ensuring that their interests are represented throughout the proceeding, and in assisting the Monitor in administering the Employee Trust – a mechanism specifically designed to mitigate the financial hardship caused to these stakeholders and to reduce their claims in the estates of the Target Canada Entities. The Employee Representative Counsel has been consulted regarding the Employee Trust and supports the approval of the Employee Trust.¹⁴⁵ At the same time, the Employee Representative Counsel will materially contribute to the efficiency of these proceedings and reduce the risks of

¹⁴³ *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 1328 [*Canwest Publishing* (Representative Counsel)] at para. 21.

¹⁴⁴ *Fraser Papers*, above note 141 at para. 18; *Canwest Publishing* (Representative Counsel), above note 143 at para. 27.

¹⁴⁵ Wong Affidavit, para. 211.

multiple claims, multiple legal retainers and the associated disruption to the orderly wind-down of the Target Canada Entities' business.¹⁴⁶

106. The proposed Employee Representative Counsel has been selected based on the significant depth of its experience in representing employees in complex restructurings such as Air Canada, Nortel, Hollinger Canadian Publishing Holdings and Eaton's.¹⁴⁷ It is proposed that the Employee Representative Counsel be appointed immediately, before the appointment of employee representatives in order to establish the Employee Trust at the earliest possible time for the benefit of the employees, the estate and other stakeholders.¹⁴⁸ If the Initial Order is granted, it is anticipated that prompt steps will be taken by the Employee Representative Counsel to nominate no more than seven employee representatives to ensure employee representation from each of the three geographic regions of Canada in which TCC operates.¹⁴⁹

107. The Applicants submit that this Court has the jurisdiction to appoint the Employee Representative Counsel and that it is in the best interests of the employees and of the estates of the Target Canada Entities to do so.

Authority to Permit Pre-Filing Payments to "Critical" Suppliers

108. In the draft Initial Order the Applicants also seek authorization, if necessary and with the consent of the Monitor, to make payments for pre-filing amounts owing in arrears to

¹⁴⁶ Wong Affidavit, paras. 214 to 216.

¹⁴⁷ Wong Affidavit, para. 210.

¹⁴⁸ Wong Affidavit, para. 213(a).

¹⁴⁹ Wong Affidavit, para. 213(b).

certain critical third parties that provide services that are integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.¹⁵⁰

109. Ample authority decided prior to the 2009 amendments to the CCAA supports the Court's general jurisdiction to permit the payment of pre-filing obligations to persons whose services are deemed "critical" to the ongoing operations of the debtor.¹⁵¹ Although the aim of the CCAA is to maintain the *status quo* while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the *status quo* does not necessarily entail the preservation of the relative pre-stay debt status of each creditor:

The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.¹⁵²

110. Section 11.4 of the CCAA, which was enacted as part of the 2009 amendments to the CCAA, gives the Court the specific authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing to that supplier for services provided after the filing. However, section 11.4 of the amended CCAA does not oust the court's inherent jurisdiction to make provision for the payment of pre-filing amounts to suppliers whose

¹⁵⁰ Wong Affidavit, para. 223. See also Draft Initial Order, para. 8(e).

¹⁵¹ See for example *Smurfit-Stone*, above, note 81 at para. 21.

¹⁵² *Alberta-Pacific Terminals Ltd*, (1991), 8 C.B.R. (3d) 99 (B.C.S.C.), at para. 23.

services are viewed as critical to the post-filing operations of the debtor, even where the debtor does not propose to secure payment of post-filing supplies with a critical supplier charge.¹⁵³

111. As noted by Pepall J. in *Canwest Global*, the 2009 amendments, including under s. 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.¹⁵⁴ The Supreme Court of Canada has also affirmed in *Century Services* that: "[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders."¹⁵⁵

112. Case law under both section 11.4 of the CCAA and under the inherent jurisdiction of the CCAA to authorize payment of pre-filing amounts demonstrates that a supplier is viewed as "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services and/or difficult to secure an alternate supplier.¹⁵⁶

113. The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

¹⁵³ *Canwest Publishing (Initial Order)*, above note 81 at para. 50.

¹⁵⁴ *Canwest Global (Initial Order)*, above note 81 at para. 24.

¹⁵⁵ *Century Services*, above note 70 at para. 70.

¹⁵⁶ See, for example, *Priszm*, above note 81. In *Priszm*, the suppliers who were declared to be "critical" to the debtor's operations were suppliers of food and other consumables that were necessary to the continued operation of the debtors' restaurant business, as well as utility service providers, suppliers of waste disposal services, providers of appliance repair and information technology services. Similarly, in *Canwest Global (Initial Order)*, above note 81 at para. 43, this Court recognized certain suppliers as critical to the debtor companies' operations for the purposes of paying pre-filing amounts, including television programming suppliers, newsprint suppliers, as well as the American Express Corporate Card Program and Central Billed Accounts that enabled the debtors' employees to perform their job functions.

- (a) Logistics and supply chain providers, including customs brokers and freight forwarders and security and armoured truck carriers;
- (b) Providers of credit, debit and gift card processing related services; and
- (c) Other suppliers up to a maximum aggregate amount of \$10 million, if in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of their business.¹⁵⁷

114. The first two categories of suppliers are fundamental to the Applicants' supply and distribution chain and to their in-store operations.¹⁵⁸ The Applicants submit that this Court has jurisdiction to authorize the Target Canada Entities, where necessary and appropriate and with the consent of the Monitor, to pay pre-filing amounts owing to certain suppliers who are determined to be critical to post-filing operations.

Maximizing Recoveries for Stakeholders

115. In order to maximize recoveries for all stakeholders, TCC intends to liquidate its inventory and attempt to sell the real estate portfolio, either *en bloc*, in groups, or on an individual property basis. The Applicants are therefore seeking authorization in the draft Initial Order to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities' inventory in a liquidation process.¹⁵⁹

116. The Applicants also seek the approval of this Court of the engagement of Lazard as TCC's financial advisor and Northwest as TCC's real estate advisor to develop and assist with

¹⁵⁷ Draft Initial Order, para. 8(e); Wong Affidavit, para. 223.

¹⁵⁸ Wong Affidavit, paras. 67 and 68.

¹⁵⁹ Draft Initial Order, para. 12(d); Wong Affidavit, paras. 17 and 224.

a sales process for TCC's real estate portfolio.¹⁶⁰ It is anticipated that if these engagements are approved, the sales process will be developed by TCC, Lazard and Northwest, in consultation with the Monitor and that the Applicants will return to court for approval of the process.

117. Upon filing, the Applicants intend to engage in dialogue with their landlords in relation to both of these processes.

DIP Financing and Charges

(a) Jurisdiction to Approve DIP Financing and Related Charge

118. TCC's liquidity position continues to deteriorate and TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015.¹⁶¹ Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "**DIP Lender**") has agreed to provide TCC and its subsidiaries (collectively, the "**Borrower**") with an interim financing facility (the "**DIP Facility**") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount of up to approximately USD \$175 million. No fees are payable under the DIP Facility and interest is to be charged at the favourable rate of 5%.¹⁶² It is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.¹⁶³

¹⁶⁰ Wong Affidavit, paras. 17, 225 to 226.

¹⁶¹ Wong Affidavit, para. 18.

¹⁶² Wong Affidavit, paras. 18, 183 and 185. Note that the 5% interest rate increases automatically to 7% upon the occurrence of an event of default that is continuing: Wong Affidavit, para. 185.

¹⁶³ Wong Affidavit, para. 184.

119. The entire amount of the DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a Court-ordered charge on the Borrower's property to secure the amount actually borrowed under the DIP Facility (the "**DIP Lender's Charge**"). The DIP Lender's Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge, as well as any purchase money security interests.¹⁶⁴

120. Section 11.2 of the CCAA gives the Court the statutory authority to grant a debtor-in-possession ("DIP") financing charge:

11.2(1) Interim Financing – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) Priority – Secured Creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

...

121. Section 11.2(4) of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) Factors to be considered – In deciding whether to make an order, the court is to consider, among other things:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

¹⁶⁴ Wong Affidavit, para. 187. Draft Initial Order, paras. 61- 63.

- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

122. Before the above sections of the CCAA were enacted in 2009, it was well established that courts could exercise their broad and flexible powers under the CCAA to approve DIP financing and provide that it be secured by a charge on the debtor company's assets.¹⁶⁵ The 2009 amendments to the CCAA codify and clarify earlier practice but do not limit the court's broad discretion to grant orders that further a debtor's overall restructuring objectives, including in respect of DIP financing. As stated by Pepall J:

In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.¹⁶⁶

123. The Target Canada Entities did not seek alternative DIP financing proposals based on their belief that the DIP Facility is being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders.¹⁶⁷

¹⁶⁵ See for example, *Re Temple City Housing Inc.* (2007), 42 C.B.R. (5th) 274, 2007 CarswellAlta 1806 (Alta. Q.B.) at para. 14, leave to appeal to C.A. refused 2008 CarswellAlta 2 (Alta. C.A.).

¹⁶⁶ *Canwest Global* (Initial Order), above note 81 at para. 24.

¹⁶⁷ Wong Affidavit, para. 189.

124. Recently, in *US Steel*, this Court approved a DIP facility for the Canadian debtor company that was provided by its US parent through an indirect subsidiary. In granting this approval, the Court noted with approval that the US parent, as the debtor's largest creditor, was providing the facility and that the operating relationships with the parent would continue throughout the restructuring.¹⁶⁸ Target Corporation has agreed to continue certain shared services arrangements with TCC during the CCAA period.¹⁶⁹ The Court in *US Steel* also recognized that, without the DIP lender's charge and the priority accorded to that charge, it was not realistic to expect the DIP lender to proceed with the DIP facility.¹⁷⁰

125. The following factors also support the approval of the DIP Facility and the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in s. 11.2(4) above:

- (a) in compliance with s. 11.2(1) of the CCAA, the DIP Lender's Charge will not secure any pre-filing obligations;¹⁷¹
- (b) TCC has an immediate need for funding to meet payroll and other pending obligations;¹⁷²
- (c) the DIP Facility will provide the Borrower with the liquidity necessary to continue to operate during the orderly wind-down process in a controlled and equitable fashion that maximizes recoveries for stakeholders;¹⁷³

¹⁶⁸ *US Steel*, above note 124 at paras. 4 to 10.

¹⁶⁹ Wong Affidavit, paras. 159 and 160.

¹⁷⁰ *US Steel*, above note 124 at para. 18.

¹⁷¹ Draft Initial Order, para. 58.

¹⁷² Wong Affidavit, para. 183.

- (d) the DIP Lender's Charge does not affect the security interests of any existing secured creditors as it ranks behind the other Court-ordered charges in this proceeding and all other Encumbrances (as defined in the draft Initial Order);¹⁷⁴ and
- (e) the proposed Monitor recommends that the Court approve the DIP Facility and the DIP Lender's Charge.¹⁷⁵

126. Accordingly, the Applicants submit that this Honourable Court ought to grant the DIP Lender's Charge in the amount of up to USD \$175 million and approve the DIP Facility.

(b) Administration Charge

127. Under the draft Initial Order, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, the proposed financial advisor (Lazard, with respect to its Monthly Fee set out in the Financial Advisor Agreement) and the proposed real estate advisor (Northwest) to the Target Canada Entities be protected by a Court-ordered charge on all of the property of the Target Canada Entities up to a maximum amount of CAD \$6.75 million as security for their respective fees and disbursements (the "**Administration Charge**").¹⁷⁶ In addition, it is proposed that the fees of the proposed financial advisor other than its Monthly Fee

¹⁷³ Wong Affidavit, para. 189.

¹⁷⁴ Draft Initial Order, paras. 58, 61 and 63.

¹⁷⁵ Monitor's Pre-Filing Report, para. 16.3.

¹⁷⁶ Draft Initial Order, para. 53. Wong Affidavit, para. 217.

under the Financial Advisor Agreement be secured by the Financial Advisor Subordinated Charge up to a maximum amount of CAD\$3 million.¹⁷⁷

128. The Administration Charge will have first priority over all other court-ordered charges and over all other Encumbrances (as defined in the Initial Order) except persons who are “secured creditors” as defined in the CCAA. The Financial Advisor Subordinated Charge is subordinate to all of the other Court-ordered Charges except the DIP Charge.¹⁷⁸

129. Prior to the 2009 amendment to the CCAA, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides that the Court has jurisdiction to grant an administration charge:

11.52(1) Court may order security or charge to cover certain costs – 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.

11.52(2) Priority – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

130. This section is permissive, and does not contain any specific criteria for a court to consider in granting such a charge.

¹⁷⁷ Wong Affidavit, para. 227.

¹⁷⁸ Draft Initial Order, paras. 61-63; Wong Affidavit, para. 217.

131. In *Canwest Global* and *Canwest Publishing*, administration charges were granted pursuant to s. 11.52(1). In *Canwest Publishing*, Pepall J. provided a non-exhaustive list of factors to be considered in approving an administration charge, including: (a) the size and complexity of the businesses being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the Monitor.¹⁷⁹

132. In this case, it is vital that the wind-down of the Canadian business take place in an orderly fashion, in order to minimize prejudice to stakeholders and maximize value. The sheer magnitude of the Canadian business and the number of affected stakeholders means that the restructuring will be complex and will require the robust involvement of a number of professional advisors.

133. The Applicants submit that the amounts of the proposed Administration Charge and Financial Advisor Subordinated Charge are commensurate with the complexity of the Applicants' businesses and the tasks required to effect a fair and controlled wind-down of the Canadian retail operations. The magnitude of the proposed Charges are also consistent with similar charges granted in other large or complex CCAA proceedings.¹⁸⁰

134. The proposed Monitor is of the view that the Administration Charge and the Financial Advisor Subordinated Charge are reasonable and appropriate in the circumstances,

¹⁷⁹ *Re Canwest Publishing*, above note 81 at para. 54.

¹⁸⁰ *Canwest Global* (Initial Order), above note 81 at para. 39 (charge of up to \$15 million to cover usual advisors and a number of financial advisors); *Canwest Publishing* (Initial Order), above note 81 at para. 52 (charge of up to \$3 million for the usual advisors, as well as \$10 million for the financial advisor that provided investment banking services to the debtor companies); *US Steel*, above note 124 at para. 19 (charge of up to \$13 million).

having regard to the scale and complexity of the proceedings and potential work involved at peak times.¹⁸¹

(c) **Directors' Charge**

135. The Applicants seek a directors' and officers' charge (the "**Directors' Charge**") in an amount of up to CAD \$64 million. The Directors' Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the Financial Advisor Subordinate Charge and the DIP Lender's Charge.¹⁸²

136. Pursuant to s. 11.51 of the CCAA, the Court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain statutory obligations.

11.51(1) Security or charge relating to director's indemnification – 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.

11.51(2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) Restriction – indemnification insurance – 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.

11.51(4) Negligence, misconduct or fault – 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.

¹⁸¹ Monitor's Pre-filing Report, para. 16.9.

¹⁸² Draft Initial Order, paras. 40 and 63.

137. In *Canwest Global*, Pepall J. set out some of the factors to be considered by the court when applying s. 11.51. In approving the requested directors' charge, Pepall J. stated:

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: *Re General Publishing Co.* [(2003), 39 C.B.R. (4th) 216]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.¹⁸³

138. With the assistance of the Monitor, the Target Canada Entities have estimated the potential exposure of the TCC present and former directors and officers for unpaid statutory amounts, including unpaid accrued wages, unpaid accrued vacation pay and unpaid sales and services taxes at approximately CAD \$64 million. The proposed amount of the Directors Charge is based on this estimate.¹⁸⁴

139. TCC's present and former directors are among the potential beneficiaries of directors' and officers' liability insurance policy with an aggregate annual limit of USD \$25 million. This amount likely will not provide sufficient coverage for the potential liability that the directors and officers could incur in relation to this proceeding.¹⁸⁵ Certain of TCC's directors and officers who are employed by Target Corporation or its subsidiaries may also be covered under a separate liability policy in the amount of approximately USD \$450 million. However, there is concern that this policy would not fully insulate these directors and officers from Canadian statutory liabilities in their roles as directors and officers of a Canadian corporation. In addition

¹⁸³ *Canwest Global* (Initial Order), above note 81 at para. 48.

¹⁸⁴ Wong Affidavit, para. 222.

¹⁸⁵ Wong Affidavit, para. 220.

and in any event, there may be competing claims against the US policy, which covers many other individuals in many other circumstances.¹⁸⁶

140. TCC's directors and officers have indicated that, due to the potential for significant personal liability associated with the CCAA proceeding, they cannot continue their service and involvement during the stay period unless the Initial Order includes the Directors' Charge. The Directors' Charge is therefore necessary to secure the indemnification obligations owed by the Applicants to the directors and officers of the Target Canada Entities.¹⁸⁷ The Directors Charge is both necessary and appropriate since the ability of the Target Canada Entities to carry out the orderly wind-down of their businesses depends on the continued participation of their respective boards of directors and key management and employees.¹⁸⁸

141. The requested Directors' Charge is reasonable given the nature of the Target Canada Entities' retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. The magnitude of the Directors Charge is consistent with the directors' charges granted other large and/or complex CCAA proceedings.¹⁸⁹

PART IV – NATURE OF THE ORDER SOUGHT

142. The Applicants therefore request an Order substantially in the form of the draft Order attached as Schedule "A" to the Notice of Application.

¹⁸⁶ Wong Affidavit, para. 221.

¹⁸⁷ Wong Affidavit, para. 222.

¹⁸⁸ Wong Affidavit, para. 219.

¹⁸⁹ *Canwest Publishing* (Initial Order), above note 81 at para. 56 (\$35 million); *Canwest Global* (Initial Order), above note 81 at para. 44 (\$20 million); Nortel Networks -- \$90 million; *US Steel*, above note 124 at para. 19 (\$39 million).

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

“Jeremy Dacks”

Jeremy Dacks

“Tracy Sandler”

Tracy Sandler

Schedule "A"

LIST OF AUTHORITIES

Case Law

1. *843504 Alberta Ltd. (Re)*, 2003 ABQB 1015
2. *Air Canada (Re)*, 2003 CarswellOnt 5296 (S.C.J.)
3. *Alberta-Pacific Terminals Ltd (Re)*, (1991), 8 C.B.R. (3d) 99 (B.C.S.C.)
4. *Anvil Range Mining Corp. (Re)*, 2001 CarswellOnt 1325 (S.C.J.), aff'd 2002 CarswellOnt 2254 (C.A.)
5. *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 (S.C.J.)
6. *Canwest Global Communications Corp. (Re)*, 2010 ONSC 1746
7. *Canwest Publishing Inc. et al. (Re)*, 2010 ONSC 222 (S.C.J.)
8. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 1328
9. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
10. *Charles Morissette Inc. (Re)*, 2014 QCCS 385
11. *Cinram International Inc. (Re)*, 2012 ONSC 3767
12. *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (S.C.J.)
13. *Fraser Papers Inc. (Re)*, 2009 CarswellOnt 6169 (S.C.J.)
14. *Grace Canada Inc.(Re)*, 2005 CarswellOnt 6648 (S.C.J.)
15. *Grant Forest Products Inc. (Re)* 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])
16. *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933
17. *Indalex Ltd. (Re)*, 2011 ONCA 265, rev'd on other grounds 2013 SCC 6, [2013] 1 S.C.R. 271.
18. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.)
19. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 1330 (S.C.J.)
20. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 1519 (S.C.J.)

21. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3028 (S.C.J.)
22. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3583 (S.C.J.), aff'd 2009 ONCA 833.
23. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 4806 (S.C.J.)
24. *Nortel Networks Corp. (Re)*, 2014 ONSC 5274
25. *Olympia & York Developments Ltd. (Re)* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.)
26. *Priszm Income Fund (Re)*, 2011 ONSC 2061
27. *Sino-Forest Corp. (Re)*, 2012 ONSC 2063
28. *Smurfit-Stone Container Canada Inc. (Re)*, 2009 CarswellOnt 391 (S.C.J.)
29. *Stelco (Re)* (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]), leave to appeal to C.A. refused 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200 (S.C.C.)
30. *T. Eaton Co. (Re)*, 1997 CarswellOnt 1914 (Gen. Div.)
31. *Tamerlane Ventures Inc. (Re)*, 2013 ONSC 5461 (S.C.J.)
32. *Temple City Housing Inc. (Re)* (2007), 42 C.B.R. (5th) 274, 2007 CarswellAlta 1806 (Alta. Q.B.), leave to appeal to C.A. refused 2008 CarswellAlta 2 (Alta. C.A.)
33. *US Steel Canada Inc. (Re)*, 2014 ONSC 6145
34. *Windsor Machine & Stamping Ltd. (Re)*, 2009 CarswellOnt 4471 (S.C.J.)

Secondary Sources

35. Lazar Sarna, *Letters of Credit: The Law and Current Practice*, 3rd ed., loose-leaf (Toronto: Carswell, 2014)
36. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th Ed. (Markham: LexisNexis, 2008)

Schedule “B”

BANKRUPTCY AND INSOLVENCY ACT

R.S.C. 1985, c. B-3, as amended

2. [...]

“insolvent person”
« *personne insolvable* »

“insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

COMPANIES’ CREDITORS ARRANGEMENT ACT

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

2.(1) [...]

“debtor company”
« *compagnie débitrice* »

“debtor company” means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

[...]

Application

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

[...]

Jurisdiction of court to receive applications

9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

R.S., c. C-25, s. 9.

[...]

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

[...]

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

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.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

[...]

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has effect 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.

2005, c. 47, s. 128.

[...]

Interim financing

11.2 (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, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[...]

Critical supplier

11.4 (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 a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

[...]

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.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

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.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

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(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

**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., et al.**

Applicants

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANTS

OSLER, HOSKIN & HARCOURT LLP

Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)

Jeremy Dacks (LSUC #: 41851R)

Shawn Irving (LSUC #: 50035U)

Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111

Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785