

**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 (the "Applicants")**

**FACTUM OF THE MOVING PARTY**

(Motion for Appointment of Employee Representatives, returnable February 11, 2015)

**PART I - OVERVIEW**

1. This is a motion made by Frederick Payette, Sylvie Gautier, Jennifer Lindsay, Catherine Bédard, Michael O'Neil, Alyssa Morin and Joshua Gordon (collectively, the "**Representatives**") on behalf of employees, other than directors and officers, of the Applicants as at January 15, 2015 or any person claiming an interest under or on behalf of such employee, or group or class of them (collectively the "**Target Employees**") in the Insolvency Proceedings (as defined in the order of Morawetz RSJ, dated January 15, 2015, the "**Initial Order**"). (All capitalized terms not defined herein have the meaning ascribed to them in the Initial Order.)

2. The Representatives seek an Order to represent all Target Employees (excluding Op-Out Individuals, if any, as defined below) in respect of all claims in the Insolvency Proceedings with respect to any issues affecting the Target Employees in the Insolvency Proceedings, including, without limitation, with respect to the Employee Trust, and for the purpose of settling or compromising claims of the Target Employees in the Insolvency Proceedings.

## **PART II - THE FACTS**

### **THE APPLICANTS' CCAA FILING**

3. On January 15, 2015, the Applicants applied for and were granted the Initial Order by the Morawetz RSJ for protection from its creditors pursuant to the *Companies' Creditors Arrangement Act* (Canada) (CCAA), which stayed all proceedings and claims against the company in Canada.

Initial Order at paragraph 20.

### **TARGET EMPLOYEES' INTERESTS IN THE CCAA PROCEEDINGS**

4. Over 16,700 Target Employees have an interest in the Insolvency Proceeding in respect of their wages, notice of termination, pay in lieu of notice of their termination, benefit and incentive plans, retirement allowances and other retirement and benefit programs and amounts owed in accordance with applicable common law, contractual obligations and employment standards legislation. Many of these Target Employees are or will be unsecured creditors of the Applicants.

Affidavit of Natercia McLellan sworn February 9, 2015 ("McLellan Affidavit"), paragraphs 23, 28-29.

5. In cooperation with the Monitor and the Applicants, Target Corporation (the Applicants' parent corporation based in the U.S.) has established the Employee Trust for the benefit of certain Target Employees that facilitates the payment of certain amounts arising from the notice of termination of employment of Target Employees. Target Employees have a beneficial interest in the Employee Trust.

Initial Order at paragraph 28.

6. In co-operation with the Monitor and the Applicants, as an incentive to retain certain key Target Employees during the Insolvency Proceedings, the Applicants have established a key employee retention program to provide certain payments to Target Employees who are

essential to the wind-down and are required to continue to work through the Insolvency Proceedings.

Initial Order at paragraph 28.

7. The Applicants have or are expected during the Insolvency Proceedings to cease making payments under certain obligations or programs which affect Target Employees. Target Employees may have claims for certain employment-related matters and other unsecured claims against Target Canada.

McLellan Affidavit at paragraph 23.

8. The Initial Order appointed Representative Counsel (Koskie Minsky LLP) to represent all Target Employees as at January 15 except individual employees who elect to opt out of representation.

Initial Order at paragraphs 32-33.

## **THE REPRESENTATIVES**

9. The Initial Order required that Representative Counsel commence a process of identifying “no more than 7 Employees to be nominated as Court-appointed representatives ... as soon as practicable”.

Initial Order at paragraphs 32-33.

10. The proposed Representatives are a volunteer group of employees identified and selected to represent the Target Employees in the Insolvency Proceedings, including, without limitation, for the purpose of settling or compromising claims of the Target Employees in the Insolvency Proceedings.

11. Representative Counsel identified and confirmed seven Target Employees who wish to serve as Representatives. These employees are:

(a) **Frederick Payette** is a Store Facilities Technician at the store in Edmonton, Alberta. He is an hourly-paid employee who commenced employment with the Applicants in December, 2013.

(b) **Sylvie Gauthier** is a Price Accuracy Team Leader at the Candiac store near Montreal, Quebec. She is an hourly-paid employee who commenced employment with the Applicants in November, 2013.

(c) **Jennifer Lindsay** is a Guest Service Team Leader at the Cloverdale Mall store in Etobicoke, Ontario. She is an hourly-paid employee who commenced employment with the Applicants in December, 2012.

(d) **Catherine Bédard** is an Operations Manager at The Applicants' Head Office in Mississauga, Ontario. She is a salaried employee who commenced employment with the Applicants in January, 2013.

(e) **Michael O'Neil** is an Executive Team Leader at the Dartmouth, Nova Scotia store. He is a salaried employee who commenced employment with the Applicants in February, 2013.

(f) **Alyssa Morin** is a Human Resources Team Member at the Maple Ridge store in Maple Ridge, British Columbia. She is an hourly-paid employee who commenced employment with the Applicants in August, 2013.

(g) **Joshua Gordon** is an Executive Team Leader - Human Resources at the Centrepont store in Toronto, Ontario. He is a salaried employee who commenced employment with the Applicants in September, 2012.

McLellan Affidavit at paragraphs 16-22.

12. The Applicants have obligations to employees in respect of their notice of termination or severance entitlements under employment standards legislation and contracts of

employment. The proposed Representatives include Target Employees who have entitlements under employment standards legislation and under contracts of employment.

McLellan Affidavit at paragraph 23.

13. The Applicants have 133 stores located throughout Canada and operate within an internal structure composed of the Western Region (British Columbia, Alberta, Saskatchewan and Manitoba), Central Region (Ontario) and Eastern Region (Quebec and Atlantic Provinces). Target Canada has approximately 5,500 employees in the Western Region, over 8,000 employees in Ontario, 3,000 employees in Quebec and 1,000 employees in the Atlantic Provinces. The proposed Representatives include three representatives from Ontario (including Target Canada's head office), two representatives from the Western Region (British Columbia and Alberta), and one representative from each of Quebec and the Atlantic Provinces (Nova Scotia).

McLellan Affidavit at paragraphs 24-25.

14. The Applicants' compensation programs, including fringe benefits, differ between hourly and salaried employees. The proposed Representatives include both hourly and salaried employees.

McLellan Affidavit at paragraph 26.

15. The Applicants' labour force is composed of a group of about 800 head office employees and employees who work in the stores. Within stores, it is composed of a series of "shop floor" employee positions and "executive team leader" or management functions. The proposed Representatives include individuals employed on the store floor, and individuals employed in store management. There is also one head-office employee.

McLellan Affidavit at paragraph 27.

16. The Applicants have implemented the Employee Trust and KERP. Among the proposed Representatives are individuals who participate in or are beneficiaries of both the Employee Trust and the KERP.

McLellan Affidavit at paragraph 28.

17. Each of these individuals has consented to being appointed to the role of Representative.

McLellan Affidavit at paragraph 29.

### **PART III - ISSUES AND THE LAW**

**ISSUE 1: Should the Court appoint Representatives?**

**ISSUE 2: Should the Court appoint Frederick Payette, Sylvie Gautier, Jennifer Lindsay, Catherine Bédard, Michael O'Neil, Alyssa Morin and Joshua Gordon as the Representatives?**

**ISSUE 1: REPRESENTATION ORDERS**

18. This Court has already appointed Representative Counsel in the Insolvency Proceedings. The Initial Order contemplated the appointment of Representatives to represent the Target Employees and provide instructions to Representative Counsel. It is appropriate to appoint Representatives in this proceeding.

Initial Order at paragraph 32.

19. The Court has wide discretion pursuant to Section 11 of the *CCAA* to appoint Representatives on behalf of a group of employees in *CCAA* proceedings and to order legal and other professional expenses of such Representatives to be paid from the estate of the company. Section 11 of the *CCAA* provides as follows:

“Powers of court

11. (1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.”

*CCAA*, s. 11(1).

20. In *Nortel Networks Corporation (Re)*, Mr. Justice Morawetz (as he then was) confirmed that the court has authority to appoint representative counsel in *CCAA* proceedings under Rules 10.01 and 12.07 of the *Rules of Civil Procedure*, as well as section 11 of the *CCAA*. Mr. Justice Morawetz held that representative counsel should be appointed to allow vulnerable stakeholders (in that case, employees and retirees) to participate in the *CCAA* proceedings:

[13] [I]t is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex *CCAA* proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel’s insolvency

[14] I am in agreement with these general submissions.

*Nortel Networks Corporation (Re)* (2009), 2009 Carswell ON 3028 (Ont. S.C.) (“*Nortel*”) at paragraphs 13-14.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 10.01 and 12.07.

21. In *Canwest Publishing Inc.*, Madam Justice Pepall (as she then was) summarized the factors considered by Canadian courts when issuing representative counsel orders in insolvency proceedings (the “**Canwest Factors**”):

- a) the vulnerability and resources of the group sought to be represented;
- b) any benefit to the companies under CCAA protection;
- c) any social benefit to be derived from representation of the group;
- d) the facilitation of the administration of the proceedings and efficiency;
- e) the avoidance of a multiplicity of legal retainers;
- f) the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- h) the position of other stakeholders and the Monitor.

*CanWest Publishing Inc. (Re)*, [2010] 2010 CarswellOnt 1344 (S.C.) (“*CanWest*”).

22. In *Canwest*, Justice Pepall held that it is preferable to grant a representation order early in a CCAA proceeding, both for the parties to be represented and for the CCAA Applicants, and despite the possibility “that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them.”

*CanWest*, *supra* at paragraph 24.

23. In *Dugal v. Research In Motion*, Justice Campbell decided that a Representation Order was appropriate, particularly given the opt out provision that was included in the Order. In his analysis, Justice Campbell refers to *Police Retirees of Ontario v. Ontario Municipal Employees' Retirement Board*, a leading case on Representation Orders as follows:

“...the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and



individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience test, I must consider the inconvenience that would be experienced by each party of the representation order were or were not granted.”

*Dugal v. Research in Motion, supra* at paragraph 21.

*Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.) at paragraph 18.

### **Vulnerable Group**

24. Employees are a vulnerable group of creditors in an insolvency because they have minimal and disparate means to pursue a claim in complex *CCAA* proceedings or other related insolvency proceedings. The vulnerability of employees who are terminated in connection with an insolvency has been articulated as follows:

“Employees comprise the largest segment of those creditors of business organizations who have little capacity to protect themselves from the effects of their debtors. This is due in large part to the fact that the circumstances surrounding the formation of employment contracts do not facilitate the use of protective measures. A prospective employee rarely has the bargaining power to demand some form of security interests in the property of a prospective employer to protect against the possibility that amounts owing under an employment contract are not paid...Further, employees do not have the capacity to spread the loss resulting from non-payment over a large number of transactions. Nor can an employee “write-off” a loss from non-payment of wages against other income.”

R.C.C. Cuming, *Enhanced Enforcement of Wage Claims under Canadian Bankruptcy and Receivership Law*, prepared for the Corporate Law Policy Directorate of Industry Canada by Robert C.C. Cuming, College of Law – University of Saskatchewan, April 1998, p. 1.

25. This reasoning extends to the Target Employees. The Target Employees have little means to pursue their claims in respect of termination, severance, retirement savings

payments and other benefits claims in the Insolvency Proceedings and will benefit from an Order appointing Representatives in these proceedings.

### **Benefit to the Applicants**

26. A Representation Order provides a benefit to the Applicants by streamlining the Insolvency Proceedings process by being the single point of contact for thousands of Target Employees, and as such can provide consistent representation for a variety of employee entitlements and claims in the Insolvency Proceedings, including in a claims process, promote finality and thereby provide an overall benefit to the Applicants.

### **Social Benefit**

27. Granting a Representation Order will provide a social benefit by assisting Target Employees, the vast majority of whom would otherwise have no means to advance their claims. The Representatives can advocate on behalf of Target Employees in the negotiation of any potential Plan of Arrangement, provide instruction to Representative Counsel, and can address with the Court issues that may affect their interests.

### **Streamlined Process and Avoidance of a Multiplicity of Retainers**

28. Appointing Representatives benefits all parties as it creates a unified voice for Target Employees and streamlines the process for all parties involved in the Insolvency Proceedings. It assists in preventing Target Employees from filing inconsistent claims and ensures that claims are advanced by Target Employees in a timely and efficient manner.

### **The balance of convenience favours representative counsel**

29. The “balance of convenience test” as outlined in *Dugal v. Research in Motion* has been met in the case at bar. By appointing Representatives the Court will create a greater benefit for all and therefore it is appropriate to ask the Court to exercise its discretion pursuant to section 11 of the *CCAA* to make a Rule 10 Representation Order.

**No Representatives have already been appointed and the Monitor supports the appointment of the Representatives**

30. No other representation order, (other than the appointment of Representative Counsel) has been made in these proceedings.

31. The Monitor and Applicants support the requested relief and no other party has indicated that they oppose the appointment of Representatives.

## **ISSUE 2: THE APPROPRIATE REPRESENTATIVES**

32. The proposed Representatives who are granted representative status on behalf of Target Employees will be well-equipped to deal with all issues and interests of Target Employees. In co-operation with the Monitor, Representative Counsel developed criteria for the identification and selection of Representatives in order to ensure adequate and efficient representation of Target Employee interests.

33. The proposed Representatives are aware that Target Employees are located across the country. The proposed Representatives are drawn from Western Canada, Eastern Canada, Quebec and Ontario.

34. The proposed Representatives include individuals employed on the store floor, and individuals employed in store management. There is also one head-office employee.

35. The Applicants' compensation programs, including fringe benefits, differ between hourly and salaried employees. The proposed Representatives include both hourly and salaried employees and individuals who participate in or are beneficiaries of both the Employee Trust and the KERP.

36. The Representatives are well-suited to represent all Target Employees in the Proceedings in respect of all of their interests and thus, the Court should use its discretion pursuant to Section 11 to grant a Representation Order in favour of the Representatives.

37. For the reasons listed above, it is in the best interests of Target Employees that the Representation Order be granted in favour of the Representatives.

#### **PART IV - ORDER REQUESTED**

38. The Representatives respectfully request an Order:

(a) Appointing the Representatives to represent the Target Employees (excluding Opt-Out Individuals, if any) in the Insolvency Proceedings with respect to any issues affecting the Target Employees in the Insolvency Proceedings, including, without limitation, with respect to the Employee Trust and for the purpose of settling or compromising claims of the Target Employees in the Insolvency Proceedings, and the Target Employees shall be bound by the actions of the Representatives and Representative Counsel in the Proceedings;

(b) Declaring that the Representatives or Representative Counsel (as defined in the Initial Order), are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto;

(c) Requiring that notice of the granting of this Order, substantially in the form attached to the Order as **Schedule "A"** (the "Notice") shall be:

- (i) published by Representative Counsel on its website within 2 calendar days of the date of this Order;
- (ii) published by the Applicants, with the assistance of the Monitor, in the *Globe and Mail*, within 7 calendar days of the date of this Order, and in the same time period, a French translation of the Notice will be published in *La Presse*;

- (iii) posted by the Applicants, with the assistance of the Monitor in each of the Applicants' stores, and within 2 calendar days of the date of this Order;

(d) Declaring that any individual Target Employee who does not wish to be represented by the Representatives and Representative Counsel in the Insolvency Proceedings shall, within 30 days of the publication in the *Globe and Mail* and *La Presse* of the notice referred to in paragraph 4, notify the Monitor, the Applicants, and Representative Counsel in writing that he or she is opting out of representation by the Representatives and Representative Counsel (an "**Opt-Out Notice**"), and shall thereafter not be bound by the actions of the Representatives or Representative Counsel and shall represent himself or herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in the Insolvency Proceedings (any such persons who deliver an Opt-Out Notice in compliance with these conditions being an "**Opt-Out Individual**");

(e) Declaring that the Representatives and Representative Counsel have no obligation to represent the Opt-Out Individuals;


(f) Declaring that the Representatives shall have no liability as a result of their respective appointment or the fulfilment of their duties in carrying out the provisions of this Order save and except for any gross negligence or unlawful misconduct on their part; and

(g) Declaring that the Representatives shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of their powers and duties.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of February, 2015.

  
\_\_\_\_\_  
SUSAN PHILPOTT

  
\_\_\_\_\_  
SIMON ARCHER

  
\_\_\_\_\_  
CLIO GODKEWITSCH

  
\_\_\_\_\_  
JAMES HARNUM

**Lawyers for the Target Employees**

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Nortel Networks Corporation (Re)* (2009), 2009 Carswell Ont 3028 (Ont. S.C.).
2. *CanWest Publishing Inc. (Re)*, 2010 CarswellOnt 1344 (S.C.).
3. *Dugal v. Research In Motion Ltd.* (2007), 87 O.R. (3d) 721 (S.C.J. – Commercial List).
4. *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.).
5. R.C.C. Cuming, *Enhanced Enforcement of Wage Claims under Canadian Bankruptcy and Receivership Law*, prepared for the Corporate Law Policy Directorate of Industry Canada by Robert C.C. Cuming, College of Law – University of Saskatchewan, April 1998.

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**1. ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990,  
REGULATION 194**

**Representation of an interested person who cannot be ascertained**

***Proceedings in which Order may be Made***

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the *Variation of Trusts Act*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

**2. ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990,  
REGULATION 194**

**PROCEEDING AGAINST REPRESENTATIVE DEFENDANT**

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so. O. Reg. 465/93, s. 2 (3).

**3. *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36)**

**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.

**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**

Court File No: CV-15-10832-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE-  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM  
(RETURNABLE FEBRUARY 11, 2015)**

**KOSKIE MINSKY LLP**  
20 Queen Street West, Suite 900, Box 52  
Toronto, Ontario  
M5H 3R3

**Susan Philpott LSUC#: 31371C**  
Email: [sphilpott@kmlaw.ca](mailto:sphilpott@kmlaw.ca)  
Tel: 416-595-2104

**Simon Archer LSUC#: 46263D**  
Email: [srcher@kmlaw.ca](mailto:srcher@kmlaw.ca)  
Tel: 416-595-2267

**Clio Godkewitsch LSUC#: 45412G**  
Email: [cgodkewitsch@kmlaw.ca](mailto:cgodkewitsch@kmlaw.ca)  
Tel: 416-595-2120

**James Harnum LSUC#: 60459F**  
Email: [jharnum@kmlaw.ca](mailto:jharnum@kmlaw.ca)  
Tel: 416-595-6285

**Fax: 416-204-2819**

**Lawyers for Target Employees**