

**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 PHARMACY FRANCHISEE ASSOCIATION OF CANADA
(motion returnable Wednesday, February 11, 2015)**

February 5, 2015

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TO: SERVICE LIST

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PART I – NATURE OF MOTION

1. The motion is for an order:
 - (a) appointing Pharmacy Franchisee Association of Canada (“PFAC”) as the representative of the Pharmacists and Franchisees (collectively “Pharmacists”) under the Pharmacy Franchise Agreements (“Franchise Agreements”);
 - (b) appointing Sutts, Strosberg LLP as Pharmacist Representative Counsel;
 - (c) appointing BDO Canada as Pharmacist Financial Adviser;
 - (d) directing that the Pharmacists’ reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charge to secure payment;
 - (e) directing, pursuant to section 32(2) of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (“CCAA”), that the “Disclaimer of Franchise Agreements” dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP (“Target Pharmacy”) of the Franchise Agreements be set aside;
 - (f) declaring the Franchise Agreements and/or related agreements may not be disclaimed without Court order; and
 - (g) directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist’s operations without Pharmacist’s consent or Court order.

2. On January 26, 2015, Target Pharmacy delivered disclaimers of the Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec) seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

3. The Pharmacists are “dependent” contractors, totally reliant upon Target Pharmacy and its Affiliates to operate their pharmacies. The Pharmacists ask this Court to deny Target Pharmacy’s disclaimer of their Franchise Agreements because (i) the disclaimers will not enhance the prospects of a viable arrangement being made, and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy the fate for many of them.

4. The interests of this vulnerable group of stakeholders has been ignored or disregarded by the Target Canada Entities. Under the proposed wind-down, Target Pharmacy accepts no responsibility for pharmacy shutdown costs and has left the Pharmacists responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors, (ii) the relocation costs of their pharmacies, and (iii) the continuation of services to their patients in accordance with professional standards. Target Pharmacy has also left them without the means to fulfill these responsibilities.

5. No reasons have been provided to date by either Target Pharmacy or the Monitor for the disclaimer of these contracts.

6. The Pharmacists face many impediments and much uncertainty in the wind-down or relocation of their operations. They require the “breathing space” that may be afforded to them by an order that the Franchise Agreements are not to be

disclaimed at this time. They ask the Court to direct Target Pharmacy and its Affiliates not to deny them access to their licensed space or otherwise interfere with the Pharmacists' operations without their consent or on terms directed by the Court.

7. While the closure of Target stores will have generally the same effect on Pharmacists as the termination of employment for Target Canada Entities' direct employees, there is no offer of financial assistance or security to diminish the financial hardship they will suffer. All of the reasons that support the assistance and security provided to Target employees -- such as the creation of a trust and funded legal advice -- apply in equal measure to the Pharmacists who face the same hardship.

8. The Pharmacists require the time, representation and funded expert advice to reorder their own affairs, maximize value of assets, relocate their pharmacies, and continue to meet the obligations they owe to their employees and contractors, their patients and the public in accordance with the standards of their profession.

9. In facing the numerous challenges created by the Target Canada store closures, and in relocating, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as notice of pharmacy closure, notice of intention to open a new pharmacy, the safeguarding of confidential personal health records, providing notice to patients respecting their personal health information, and safeguarding and disposition of

narcotics and controlled substances. The challenges are made all the more difficult by the ongoing obligation to continue to serve the needs of their patients in the public interest. The Pharmacists ask this Court to provide them with the assistance they require to meet these challenges.

PART II – FACTS

10. Under the Target Canada Entities' wind-down as proposed and implemented to date, Target Pharmacy:

- (a) will not accept responsibility for pharmacy shut-down costs;
- (b) will not continue to pay amounts owing to Pharmacists under their Franchise Agreements following their disclaimer, notice of which was delivered on January 26, 2015;
- (c) has not offered to buy-back the pharmacies or the assets thereof or provide any financial relief to the Pharmacists;
- (d) has advised the Pharmacists that they alone are responsible for the closing and/or relocating of their pharmacies;
- (e) has created uncertainty about supplies to meet the continuing needs of their patients;
- (f) while acknowledging that patient files belong to the Pharmacists, has created uncertainty concerning the safeguarding of patient confidentiality and the custody of patient records;
- (g) will not accept any responsibility for pharmacy employees or contractors, advising that the Pharmacists are “solely responsible for all salaries, fees, benefits, notice of termination, pay in lieu of notice, severance pay, and any other obligation under contract, statute, common law or otherwise”; and
- (h) has ceased communicating with the Pharmacists, with Target Pharmacy advising that effective 11:59 pm Eastern Time on Friday, January 23,

2015 the targetcanada@target.com mailbox will no longer respond to emails and Target Pharmacy representatives will no longer respond to voicemail or text messages from the Pharmacists.¹

11. Many Pharmacists have made significant investments in the pharmacies operated within Target-branded retail stores. Many Pharmacists also have required financial assistance by Target Pharmacy in welfare programs, which assistance has been discontinued. They are a vulnerable group and are presently in dire financial circumstances.²

12. Pharmacists are health professionals who have ongoing public responsibilities to serve their patients. Absent representation in these CCAA proceedings, funded by the Target Canada Entities, the Pharmacists believe that their interests and those of the public they serve will not be adequately protected. The opportunities of many Pharmacists to continue to carry on business to serve their patients will be seriously compromised or lost.³

13. The Target Canada Entities have consistently directed the Pharmacists to obtain independent legal advice, to consult their respective regulatory authorities about matters such as protecting patient confidentiality, storing drugs and re-locating their

¹ Affidavit of Stavros Gavrilidis, also known as Steve Gavrilidis sworn February 3, 2015 [“Gavrilis Affidavit”], para. 5, Motion Record, pp. 29-30.

² Gavrilidis Affidavit, para. 6, Motion Record, p. 30.

³ Gavrilidis Affidavit, para.7, Motion Record, p.30.

pharmacies in accordance with applicable regulations. But they have left the Pharmacists without the means to do so.⁴

THE PHARMACY FRANCHISE ARRANGEMENTS

14. For the Target-branded pharmacies in Canada outside of Quebec, the disclaimer of their Franchise Agreements without prior consultation or financial support has destabilized their businesses. The Pharmacists believe the disclaimer leaves them with inadequate time to relocate and devalues the value of their prescription and patient files.⁵

15. There are 96 Target-branded pharmacies operating in retail stores in Canada outside of Quebec, 93 of which are operated by Franchisees pursuant to the standard form Franchise Agreement, with the remaining 3 corporate pharmacies operated by TCC Pharmacy Ontario. Most Franchisees are independent corporations which are wholly owned by licensed Pharmacists. A licensed Pharmacist is a party to each Franchise Agreement and a pharmacist must be present on the premises to operate the pharmacies.⁶

16. The principal terms of the Franchise Agreement are:

⁴ Gavrilidis Affidavit, para.8, Motion Record, pp. 30-31.

⁵ The post-Initial Order dealings with the Pharmacists are described under the heading “Efforts to Date to Stabilize Business” subheading “B. Pharmacists” paragraphs 11 to 15 of Mark J. Wong’s January 29, 2015 affidavit.

⁶ Gavrilidis Affidavit, para. 15, Motion Record, pp. 32-33; Excerpt from Affidavit of Mark J. Wong dated January 14, 2015, paras. 71-80, Exhibit “B” to Gavrilidis Affidavit, Tab 2B, Motion Record, pp. 61-64.

- (a) Target Pharmacy licenses the Franchisees the right to operate the pharmacies within Target stores across Canada, except Quebec;
- (b) no landlord and tenant relationship exists between Target Pharmacy and any Franchisee;
- (c) the Franchisees have a temporary licence to use designated space within Target Canada stores for the operation of the pharmacies for an initial term of five (5) years from the date the pharmacy opens;
- (d) Target Pharmacy may terminate the Franchise Agreement under various circumstances (there is no cause for termination asserted by Target Pharmacy);
- (e) each Franchisee operates an independent business;
- (f) each Franchisee has the sole responsibility for all aspects of the employment relationship with its own employees;
- (g) the Franchisee must purchase and sell products that have been approved by Target Pharmacy from Target Pharmacy-approved suppliers. McKesson Canada Corporation is the primary supplier of pharmaceutical, health and beauty products;
- (h) Franchisees make monthly payments to Target Pharmacy, including a franchise fee, an operations fee for the Computer System and other services, a licensed space fee and an advertising fee;
- (i) the inventory for prescription drugs is owned by the Franchisees and most of the other inventory in the Pharmacy such as over-the-counter drugs is owned by Target Pharmacy; and
- (j) all patient data is owned by the Target Pharmacy and must be safeguarded by the Franchisee.⁷

⁷ Gavrilidis Affidavit, para. 16, Motion Record, pp. 33-34; Pharmacy Franchise Agreement, Exhibit "C" to Gavrilidis Affidavit, Motion Record, Tab 2C, pp. 66-108.

PHARMACY FRANCHISEE ASSOCIATION OF CANADA (“PFAC”)

17. The proposed Pharmacist representative, PFAC, was originally formed to provide a collective voice for the Pharmacists. Many Pharmacists operating in Target-branded retail stores wished to effect fundamental and necessary changes to the onerous terms and conditions of the Franchise Agreement in order to represent a more independent pharmacy franchise model.⁸

18. Since January 15, 2015, PFAC has taken a proactive role to advance the interests of the Pharmacists including the following steps:

- (a) retaining Sutts, Strosberg LLP to represent PFAC in these CCAA proceedings;
- (b) seeking and obtaining the authorization from at least 75 Pharmacists to be represented by PFAC and Sutts, Strosberg LLP in these CCAA proceedings, including the initial steps of seeking a representation order, an order for funding of legal and other expenses, and the other orders now sought;
- (c) obtaining preliminary legal advice on the CCAA process;
- (d) creating a Facebook page to keep PFAC members apprised of current events;
- (e) creating a media strategy and political strategy to lobby on behalf of PFAC and the Pharmacists;
- (f) obtaining BDO Canada Limited’s (“BDO”) consent to be appointed as the financial adviser to the Pharmacists regarding the wind-down of the pharmacies; and

⁸ Gavrilidis Affidavit, para. 21, Motion Record, pp. 34-35.

- (g) through Sutts, Strosberg LLP, securing other advisers relating to compliance with professional and regulatory obligations for pharmacists across Canada.⁹

19. The Target Canada Entities and Monitor have provided no meaningful guidance or assistance to the Pharmacists in this process. There has been no communication with the Pharmacists concerning the wind-down plan. The announcement of the CCAA filing and discontinuance of the Target Canada operations came as a surprise and shock to the Pharmacists.¹⁰

20. Under the terms of the Franchise Agreement and in the operations of the pharmacies, the Pharmacists are dependent on the Target Canada Entities. As stated above, the Pharmacists are obligated to purchase inventory, supplies, systems and equipment “exclusively from the Franchisor or from its preferred suppliers” and to order generic prescription drug products from the Franchisor’s preferred suppliers.¹¹

DISCLAIMER OF FRANCHISE AGREEMENTS

21. On January 26, 2015, the Pharmacists received the notice of “Disclaimer of Franchise Agreements”.¹²

⁹ Gavrilidis Affidavit, para. 23, Motion Record, pp. 35-36; Official PFAC List of Members, Exhibit “D” to Gavrilidis Affidavit, Motion Record, Tab 2E, p. 114.

¹⁰ Gavrilidis Affidavit, para. 27, Motion Record, p. 37.

¹¹ Gavrilidis Affidavit, para. 28, Motion Record, p. 37.

¹² Gavrilidis Affidavit, para. 38, Motion Record, p. 41; January 26, 2015 Disclaimer of Franchise Agreements, Exhibit “L” to Gavrilidis Affidavit, Motion Record, Tab 2L, pp. 137-140.

22. In the Pharmacists' opinion, no orderly wind-down of the pharmacies is possible within the proposed 30 day time frame. Nor can the Pharmacists reasonably dispose of their patient lists or other assets except at distress prices without the time and assistance to arrange for their orderly disposition.¹³

23. The Target Canada Entities have provided no assistance in the timely transition of patients' files since the Initial Order.¹⁴ There has been no real communication regarding the steps that Pharmacists are required to take to comply with regulatory and professional requirements for the safeguarding of patient files, communication with patients, and the ongoing sale and relocation of scheduled drug inventory. Target Canada Entities discontinued all communication whatsoever with the Pharmacists three days prior to delivery of the disclaimer of the Franchise Agreements.¹⁵

24. Target Pharmacy's demands for the immediate closure of the pharmacies present legal, financial and regulatory problems for all Pharmacists.¹⁶ They seek the appointment of Sutts, Strosberg LLP as representative counsel to:

- (a) inform them in these proceedings and provide advice needed with respect to their effective participation in these proceedings;
- (b) represent their interests on issues that affect their rights in the course of these CCAA proceedings;
- (c) assist in evaluating their provable claims as required; and

¹³ Gavrilidis Affidavit, para. 50, Motion Record, p. 45.

¹⁴ Gavrilidis Affidavit, para. 52, Motion Record, p. 46.

¹⁵ Gavrilidis Affidavit, para. 53, Motion Record, p. 46.

¹⁶ Gavrilidis Affidavit, para. 54, Motion Record, p. 46.

- (d) contribute to a streamlining of the process by being the single point of contact for the Pharmacists, providing consistent representation for a variety of claims and entitlements in the CCAA proceedings.¹⁷

PART III – ISSUES AND SUBMISSIONS

25. The issues for determination on this motion are:
- (a) Should the Court provide representation for the Pharmacists by appointing PFAC as their representative in these CCAA proceedings?
 - (b) Should the Court approve legal representation for the Pharmacists by appointing Sutts, Strosberg LLP as representative counsel?
 - (c) Should the Court approve financial advice for the Pharmacists by appointing BDO Canada as financial adviser?
 - (d) Should the Court direct the Target Canada Entities to pay the reasonable fees and expenses of the representative counsel and the financial adviser?
 - (e) Should the Court exercise its discretion to approve a court-ordered charge to secure such payment?
 - (f) Is the disclaimer of the Franchise Agreements required to enhance the prospects of a Target Canada Entities' compromise or arrangement?
 - (g) Will the disclaimer of the Franchise Agreements likely cause significant financial hardship to the Pharmacists?
 - (h) Having considered all the circumstances, should the Court direct that the Franchise Agreements are not to be disclaimed?
 - (i) Should the Court direct that Target Pharmacy and its Affiliates cannot deny access to licensed space, discontinue supplies or otherwise interfere with the operations of any pharmacy without the consent of the Pharmacists or further order of the Court?

¹⁷ Gavrilidis Affidavit, para. 70, Motion Record, pp. 51-52.

FRANCHISEES ARE A VULNERABLE GROUP

26. The *Arthur Wishart Act*¹⁸ is special legislation addressing the vulnerability of franchisees, such as the Pharmacists. A sampling of the numerous decisions that deal with the protection of this vulnerable group follows.

27. G.R. Strathy J. (as he then was) in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,¹⁹ states:

[2] The motion is all the more interesting because it involves the intersection of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (the “A.W.A.”) and the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the “C.P.A.”). The A.W.A. is intended, among other things, to “level the playing field” between franchisors and franchisees, while the C.P.A. was designed to provide access to justice to those who lack the capacity to effectively and economically assert their legal rights. Both statutes have, as one of their purposes, the protection of the vulnerable.

[3] This could be regarded as a contest between two extreme positions. On the one hand, one could say that it would be over-zealous paternalism to deprive competent adults of their right to freely negotiate a conclusion to their relationship. On the other hand, one could argue that the class members in question are the most vulnerable of an already vulnerable group, and they require the court’s protection from a franchisor who is able to extract concessions from them because of their difficult individual circumstances.

[...]

[19] The inherent vulnerability of franchisees due to the power imbalance between the parties was one of the principal reasons for the enactment of the A.W.A. and it has been noted in several decisions of this court: see *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (2002), 2002 CanLII 6199 (ON SC), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.) at para. 42, aff’d (2004), 2004 CanLII 16620 (ON SCDC), 70 O.R. (3d) 182, [2004] O.J. No. 865 (Div. Ct.); *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533, [2003] O.J. No. 1919 (C.A.) at paras. 58 and 63. The experiences of the franchisees who are being offered Buyback Transactions illustrate that many of them are, in fact, a vulnerable group in the middle of a vulnerable group – they want to get out, cannot find a buyer, and their only hope is a Buyback Transaction.

¹⁸ *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3.

¹⁹ *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3871 (CanLII) at paras. 2-3 and 19.

28. In *Fairview Donut Inc. v. The TDL Group Corp.*²⁰ J.R. Strathy J. states:

[205] The intersection of the *C.P.A.* and the *Arthur Wishart Act* has provided a fertile ground for the growth of franchise class actions. As I noted in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300 (CanLII), [2011] O.J. No. 889 at paras. 46-59, there have been a number of class actions in Ontario in the past fifteen years involving claims by franchisees against franchisors. The existence of a group of franchisees, operating under a standard contract, can give rise to common issues of fact or law that are capable of resolution on a class-wide basis. The *C.P.A.* has proven to be an effective procedural tool to address concerns that individual franchisees are powerless, vulnerable and lack an effective voice.

29. Winkler J. (as he then was) in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*²¹ states:

[41] Further, these are exactly the type of plaintiffs that may be required to prosecute a class action lawsuit in the context of a franchise relationship, with the inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee. This aspect of the commercial realities of franchise arrangements has been commented upon in the context of class proceedings. In recognizing that access to justice is a major impediment for franchisees, the Ontario Law Reform Commission, Report on Class Actions, Vol. 1 (Toronto: Ministry of the Attorney General, 1982) states at p. 128:

Even small businesses may be reluctant to sue more powerful companies where, for example, in a franchisor-franchisee situation, they must deal continuously with such companies on a basis of dependence.

[42] Similarly, Samuel Grange Q.C. in the report to the Ontario Government of the committee entitled Report of the Minister's Committee on Franchising (Toronto: Department of Financial and Commercial Affairs, 1971) stated at p. 40:

. . . the franchisee is constantly plagued with the threat of termination of the franchise. Almost all franchise contracts give to the franchisor either an unfettered right to terminate or a right to terminate upon breach of the agreement, and it is all too easy for the franchisee to be in such breach. . . . the franchisee has invariably invested time and money, and he knows that he will lose it all if the franchise comes to an end. Naturally, he is prepared to be servile, and if not, he is generally not long for the franchise family.

²⁰ *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (CanLII) at para. 205.

²¹ *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*, 2002 CanLII 6199 (ON SC) at paras. 41 and 42.

REPRESENTATIVE ORDERS

30. Representation, properly funded, is required to permit this vulnerable group of franchisees to assert their legal rights effectively and economically in these CCAA proceedings.

31. The court has a broad discretion under s. 11 of the CCAA and the *Rules* to appoint representatives on behalf of vulnerable stakeholder groups in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.²²

32. The factors that courts have considered in granting representative orders include:

- (a) The vulnerability and resources of the group sought to be represented;
- (b) Any benefit to the company(ies) 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;

²² *Re Target Canada Co.*, 2015 ONSC 303 (S.C.J.) at para. 61; *Re Nortel Networks Corp.*, 2009 CanLII 26603 (S.C.J.) at paras. 10-12; *Re Fraser Papers Inc.*, [2009] O.J. No. 4287 (S.C.J.) at para. 7; S. 11 of the CCAA; See also Rules 10.01, 12.07 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

- (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.²³

33. Consideration must be given to the “commonality of interest” among the group seeking representation and any conflicts that could arise. The following principles are applicable to assessing commonality of interest:

- a) Commonality of interest should be viewed based on the non-fragmentation test not on an identity of interest test;
- b) The interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;
- c) The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible;
- d) In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans;
- e) Absent bad faith, the motivations of creditors to approve or disapprove a plan are irrelevant;
- f) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.²⁴

²³ *Re Target Canada Co.*, 2015 ONSC 303 (S.C.J.) at paras. 60-61; *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145 (S.C.J.) at paras. 36-42; *Re TBS Acquireco Inc.*, [2013] O.J. No. 3211 (S.C.J.) at paras. 34-35; *Re Canwest Publishing Inc.*, 2010 ONSC 1328 (S.C.J.) at paras. 20-21; S. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

²⁴ *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145 (S.C.J.) at paras. 39; *Re Nortel Networks Corp.*, 2009 CanLII 26603 (S.C.J.) at para. 62; See also *Re Stelco Inc.*, 15 C.B.R. 5th 307 (Ont. C.A.) at paras 21-23 and *Re Canadian Airlines Corp.* (2000) 19 C.B.R. 4th 12 Alta. Q.B. at para 31.

34. As the Target Canada Entities have already advised the Court in these CCAA proceedings, 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.

35. There is no established list of criteria that must be satisfied in determining whether to appoint representative counsel. Some of the factors that have been considered include the breadth of the proposed representation, legal expertise, jurisdiction of practice and estimated costs. 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.²⁵

36. It is clearly beneficial to the Pharmacists to appoint Sutts, Strosberg LLP as representative counsel. Representative counsel will assist these vulnerable stakeholders to speak with one voice, will ensure that their interests are represented throughout the CCAA proceedings, and will assist with their provable claims. Representative counsel will also materially contribute to the efficiency of these proceedings and reduce the risk of multiple claims, multiple legal retainers and the associated disruption in the orderly wind-down of the Target Canada Entities. Respectfully, it is in the best interests of the Pharmacists and the Target Canada Entities

²⁵ *Re U.S. Steel Canada Inc.*, 2014 ONSC 6145 (S.C.J.) at para. 37; *Re Canwest Publishing Inc.*, 2010 ONSC 1328 (S.C.J.) at para. 27; *Re Fraser Papers Inc.*, [2009] O.J. No. 4287 (S.C.J.) at paras. 7, 12 and 18.

that Sutts, Strosberg LLP be appointed as representative counsel to PFAC and the Pharmacists.

REPRESENTATIVE FUNDING AND ADMINISTRATIVE CHARGE

37. PFAC asks that its proposed representative counsel (Sutts, Strosberg LLP), proposed financial adviser (BDO Canada) and proposed pharmaceutical regulatory adviser (Gardiner Roberts LLP) be paid for by the Target Canada Entities and protected by a court-ordered charge on the property of the Target Canada Entities as security for their respective fees and disbursements (the “Administrative Charge”). PFAC asks that the Administrative Charge have equal priority to the Administrative Charge for the legal advisers under the Initial Order.

38. Section 11.52 of the CCAA states:

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 [...]

(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.

39. This section is permissive and does not contain any specific criteria for a court to consider in granting such a charge. Following is a non-exhaustive list of factors to be considered in approving an Administration Charge:

- (a) The size and complexity of the business 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.²⁶

40. There has been no representation of the interests of the Pharmacists, their employees and/or contractors in the CCAA proceedings to date. The closure of the Target stores in Canada necessarily dictates the involuntary closure of each of the pharmacies with financial hardship for those affected. Justice dictates that they be provided with meaningful representation in the process.

SECTION 32 OF THE CCAA AND ECONOMIC HARDSHIP

41. Section 32(4) of the CCAA stipulates the following non-exhaustive list of factors that the court is to consider in the exercise of its discretion to determine whether

²⁶ *Re Target Canada Co.*, 2015 ONSC 303 (S.C.J.) at paras. 73-74; *Re Canwest Publishing Inc.*, 2010 ONSC 222 (S.C.J.) at para. 54.

a contract may be terminated:

- (a) whether the monitor approved the proposed disclaimer;
- (b) whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer would likely cause significant financial hardship to a party to the agreement.

42. With respect to subsection 32(4)(a), the Monitor approved the disclaimer of the Franchise Agreements delivered on January 26, 2015. But there is no reference in the Monitor's Pre-Filing Report or its First Report of the Monitor's reason or reasons for approving the disclaimers. The Monitor has provided no response to the request by Sutts, Strosberg LLP that the Monitor advise of any investigations or studies that were conducted of the consequences of the disclaimers prior to giving its approval²⁷. The Monitor appears to take the position that section 32(8) of the CCAA provides that only the debtor company is required to provide written reasons for a disclaimer on request.

43. The Monitor has not contacted the Pharmacists or any representative of the Pharmacists to determine whether the disclaimer of the Franchise Agreements would cause them significant financial hardship or the extent of that hardship.²⁸ Respectfully, little weight should be given to the Monitor's approval of a disclaimer in circumstances

²⁷ Exhibit "O" to Gavrilidis Affidavit, January 29, 2015 letter from Sutts, Strosberg LLP to Monitor, Motion Record, Tab O, pp. 152-153.

²⁸ Gavrilidis Affidavit, para. 25, Motion Record, Tab 2, p. 36.

where the Monitor has failed to consult with the counterparties to the agreement or conducted any investigation into the consequences of the disclaimer.

44. With respect to subsection 32(4)(b), the disclaimers do not enhance a compromise or arrangement because none is being proposed in these CCAA proceedings.

45. The Target Canada Entities have stated that the purpose for seeking the Initial Order is to effect a fair, controlled and orderly wind-down of their Canadian retail business. There is no prospect of any arrangement that will permit the continuation of the pharmacies at their present locations.

46. The effect of the orderly wind-down of the Target Canada retail business is to eliminate entirely the “licensed space” and all supplies and services provided by the Target Pharmacy and its Affiliates for the operation of the pharmacies.²⁹

47. Subsection 32(4)(c) identifies the likelihood of causing significant financial hardship to a party to an agreement as a factor in deciding whether the agreement should be disclaimed. It is the most significant factor in this case.

48. The disclaimer of the Franchise Agreements will likely cause significant financial hardship to the Pharmacists – likely financial ruin for many of them. It could

²⁹ *Re Target Canada Co.*, 2015 ONSC 303 at paras. 31-34.

not do otherwise. In considering what is fair, reasonable and equitable for the stakeholders, as stated above, it bears repeating that the Franchise Agreements are being disclaimed under conditions that Target Pharmacy:³⁰

- (a) will not accept responsibility for pharmacy shut-down costs;
- (b) will not continue to pay amounts payable under a number of arrangements with Pharmacists following disclaimer;
- (c) has not offered to buy-back the pharmacies or the assets thereof or provide any financial relief to the Pharmacists to date;
- (d) Pharmacists are alone responsible for the closing and/or relocating of their pharmacies; and
- (e) will not accept any responsibility for pharmacy employees or contractors, advising that the Pharmacists are “solely responsible for all salaries, fees, benefits, notice of termination, pay in lieu of notice, severance pay, and any other obligation under contract, statute, common law or otherwise”.

49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreements are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if there are funds available in the Target Pharmacy estate.

50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer of contracts is insufficient.³¹ Setting aside the disclaimers

³⁰ Gavrilidis Affidavit, paras. 4-7, Motion Record, Tab 2, pp. 29-30.

³¹ *Re Doman Industries Limited*, (2004), 2004 CarswellBC 1262, 1 C.B.R. (5th) 7 (B.C. S.C.); leave to appeal refused (2004), 2004 CarswellBC 1545, 2 C.B.R. (5th) 141 (B.C. C.A. [In Chambers]); *Re Dylex*

in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damage to themselves and those who depend on them.

51. It was held in *Re Timminco Ltd.*³² that the test of whether a disclaimer of an agreement will cause significant hardship to the counterparty depends on an examination of the individual characteristics and circumstances of such counterparty.

52. There is no more vulnerable group in these CCAA proceedings than the Pharmacists. There is no evidence of any examination of the circumstances of any of the Pharmacists prior to the delivery of the disclaimers.

53. Respectfully, such disclaimer should not be permitted until the Court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable.

54. In the exercise of this extraordinary power granted under CCAA section 32, a court must determine whether the termination is fair, reasonable and equitable in all the circumstances.

Ltd. (1995), 1995 CarswellOnt 54, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]).

³² *Re Timminco Ltd.*, 2012 ONSC 4471 (S.C.J.) at para. 60.

55. In no respect is the 30 day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

56. Each of the Pharmacists is a small business operator whose business will be destroyed should the disclaimer be permitted to stand, leading to significant financial hardship if not financial ruin.

57. Notwithstanding Target Pharmacy's intention to disclaim the Franchise Agreements, the Target Canada Entities sought and obtained an order that, among others, those providing pharmaceutical services are restrained from discontinuing, altering, interfering with or terminating these services. On January 23, 2015, Target Pharmacy advised that it would not authorize a reduction in the required hours of operation at the pharmacies because it did not want patient care compromised during the wind-down.³³

58. This "business as usual" directive is commonplace in CCAA proceedings and generally necessary to provide stability in an orderly wind-down. It also has the effect in this case of limiting the ability of the Pharmacists to fully explore any options

³³ Gavrilidis Affidavit, paras. 36-37, Motion Record, pp. 40-41, January 23, 2015 e-mail, Exhibit "J" to Gavrilidis Affidavit, Tab 2J, p. 128 and January 23, 2015 Target Press Release, Exhibit "K" to Gavrilidis Affidavit, Tab 2K, pp. 130-135.

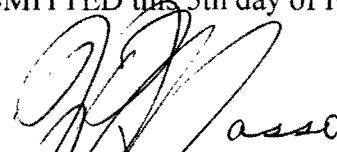
that may be available to them. They require breathing space and advice to make informed business decisions concerning the sale of assets and/or the relocation of their pharmacies in order to continue to serve their patients.

59. Respectfully, it will not interfere with Target Canada Entities' wind-down to provide the Pharmacists with the opportunity to remain in their premises during the period of the Court-approved Target Canada liquidation sale.

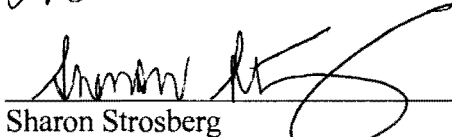
PART IV – RELIEF SOUGHT

60. PFAC, on its own behalf, and on behalf of the Pharmacists, for the grounds and reasons stated above requests the orders set out in their notice of motion.

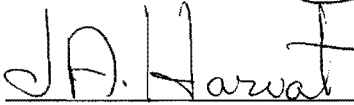
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2015.



William V. Sasso



Sharon Strosberg



Jacqueline A. Horvat

SCHEDULE "A" – AUTHORITIES

Tab	
1	<i>1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.</i> , 2002 CanLII 6199 (ON SC)
2	<i>1250264 Ontario Inc. v. Pet Valu Canada Inc.</i> , 2011 ONSC 3871 (CanLII)
3	<i>Fairview Donut Inc. v. The TDL Group Corp.</i> , 2012 ONSC 1252 (CanLII)
4	<i>Re Canadian Airlines Corp.</i> (2000) 19 C.B.R. 4th 12 Alta. Q.B.
5	<i>Re Canwest Publishing Inc.</i> , 2010 ONSC 1328 (S.C.J.)
6	<i>Re Canwest Publishing Inc.</i> , 2010 ONSC 222 (S.C.J.)
7	<i>Re Doman Industries Limited</i> , (2004), 2004 CarswellBC 1262, 1 C.B.R. (5 th) 7 (B.C. S.C.); leave to appeal refused (2004), 2004 CarswellBC 1545, 2 C.B.R. (5 th) 141 (B.C. C.A. [In Chambers])
8	<i>Re Dylex Ltd.</i> (1995), 1995 CarswellOnt 54, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])
9	<i>Re Fraser Papers Inc.</i> , [2009] O.J. No. 4287 (S.C.J.)
10	<i>Re Nortel Networks Corp.</i> , 2009 CanLII 26603 (S.C.J.)
11	<i>Re Stelco Inc.</i> , 15 C.B.R. 5 th 307 (Ont. C.A.)
12	<i>Re Target Canada Co.</i> , 2015 ONSC 303 (S.C.J.)
13	<i>Re TBS Acquireco Inc.</i> , [2013] O.J. No. 3211 (S.C.J.)
14	<i>Re Timminco Ltd.</i> , 2012 ONSC 4471 (S.C.J.)
15	<i>Re U.S. Steel Canada Inc.</i> , 2014 ONSC 6145 (S.C.J.)

SCHEDULE "B" STATUTES

Rules of Civil Procedure, R.R.O. 1990, REG. 194

RULE 10 REPRESENTATION ORDER

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).

Order Binds Represented Persons

- (2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

- (3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,
- (a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or
 - (b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

- (4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

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).

Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Multiplicity of proceedings

138. As far as possible, multiplicity of legal proceedings shall be avoided. R.S.O. 1990, c. C.43, s. 138.

Companies' Creditors Arrangement Act, RSC 1985, c C-36

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.

Disclaimer or rescission of agreements

- **32. (1)** Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or rescind any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or rescission.

- **Court may prohibit disclaimer or resiliation**

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

- **Court-ordered disclaimer or resiliation**

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

- **Factors to be considered**

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

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

- **Date of disclaimer or resiliation**

(5) An agreement is disclaimed or resiliated

- (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
- (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
- (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

- **Intellectual property**

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

- **Loss related to disclaimer or resiliation**

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

- **Reasons for disclaimer or resiliation**

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

- **Exceptions**

(9) This section does not apply in respect of

- (a) an eligible financial contract;
- (b) a collective agreement;
- (c) a financing agreement if the company is the borrower; or
- (d) a lease of real property or of an immovable if the company is the lessor.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF
PHARMACY FRANCHISEE ASSOCIATION OF
CANADA**

(motion returnable Wednesday, February 11, 2015 at 10:00 a.m.)

SUTTS, STROSBURG LLP

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