

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, C.C-3, 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

MOVING PARTY'S FACTUM (ISSI INC.)

February 18, 2015

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Service List of February 18, 2015

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Applicants

MOVING PARTY'S FACTUM

PART I - INTRODUCTION

1. This is a Motion seeking information with regard to 2,000 suppliers of Target Canada Co., the Canadian satellite business of Target Corporation (USA) ("TCC"), which Canadian operation is now within CCAA protection.
2. On the Motion without notice, the Canadian company sought an Order for CCAA protection. The Affidavit of Mark J. Wong sworn January 14 2015 ("WA") in support, although indicated in the index as January 15, 2015 was sworn on January 14, 2015.
3. It is submitted that the CCAA material and agreements were being prepared before January 2, 2015, the date when the definition of default was amended (see page 344 WA). The searches attached to the affidavit were carried out on January 7, 2015 (WA page 138-164).

4. The extent of the documentation and the scope and content of the WA and agreements prepared and attached to the WA suggests that the preparation of material took some time involving a number of people. The decision to go CCAA was made before that work was done.

The Material Evidence About Inventory

5. The WA sets out that the majority of the assets are inventory supplied by suppliers to TCC.

WA, para. 129

6. However, the only material information that was provided with regard to inventory on the motion without notice was the following:

- (a) *Paragraph 64--- As of January 3, 2015, there was merchandise with a retail value of approximately CAD \$202 million in the distribution centres.*
- (b) *Paragraph 68 – TCC also must pay customs brokers, clearing houses, freight forwarders and other supply chain providers for costs incurred in transporting products from their source outside of Canada to the distribution centres and ultimately to the stores. As of January 3, 2015, TCC estimates that merchandise at cost of approximately CAD \$66 million was in transit to Canada or from Canadian ports to the distribution centres. TCC is seeking authority (but not the requirement) to pay, with the consent of the Monitor, transportation and logistics providers, custom brokers and other supply chain providers for amounts incurred before the commencement of these proceedings, if required, to ensure the continued flow of inventory through its supply chain during the contemplated wind down*

process and to maximize recoveries to the estate from the inventory liquidation process.

(c) *Paragraph 127---As at November 1, 2014, TCC's current assets consisted of the following:*

(a)---Inventory: approximately CAD \$683,555,000

(d) *Paragraph 129 – It is estimated that, as of the filing of this Affidavit on January 15, 2015, TCC will have cash on hand of approximately CAD 1 million. As set out above, inventory comprises the vast majority of TCC's current assets. TCC and its affiliates routinely enter into arrangements with vendors – for example, with respect to greeting cards – whereby TCC does not purchase or pay for merchandise until the merchandise is sold. This merchandise is not included in inventory because of TCC's virtually simultaneous purchase and sale of this merchandise.*

ISIS Inc. and 30 Day Goods

7. There are two corporations that are run by the principals of ISSI Inc. One is Elfe and the other is ISSI Inc.

8. Elfe and ISSI both supply product to TCC. They supply product under the same supplier agreement provided by TCC. Those agreements provide that TCC may cancel an order at any time.

9. The total sales in 2014 by ISSI Inc. to TCC were approximately \$1.2million. The total sales in 2014 by Elfe to TCC were approximately \$1.7million. The total for both companies is approximately \$2.9million.

**Supplementary Motion Record of ISSI Inc., Affidavit of Shell Bern sworn February 17, 2015
("Bern Affidavit") para. 41, Exhibit B**

10. Based on the purchase orders received, the required delivery dates and the rate of sale, the estimated inventory for ISIS Inc. at the end of January, 2015 would have ballooned to over \$1.2million. This would mean that TCC would have had on hand by the end of January, 2015 more than 100% as much inventory than it sold in 2014.

Bern Affidavit, para. 42

11. Furthermore, based on the inventory received, the required delivery dates, and the rate of sale, the estimated inventory for Elfe at the end of January, 2015 would have ballooned to over \$1million.

Bern Affidavit, para. 43

12. As a result, TCC would have had in its stores and distribution centres goods totalling approximately \$2,240,000.00 which is an amount far in excess of anything TCC could reasonably have anticipated selling within the six month period (the first half of 2015), and certainly not in the quarter commencing in January, 2015.

Bern Affidavit, para. 45

13. TCC did have the ability at any time to cancel any purchase orders already issued, or send ISSI Inc. and Elfe revised forecasts. It did not do so. In the retail industry, this is common practice

because of inventory adjustment requirements. TCC did the exact opposite during this time period.

Bern Affidavit, para. 46

14. Furthermore, there were also, for the first time, significant penalties imposed by TCC (Notice given November 19, 2014) if orders were delivered late. For example, on the order for \$759,404.10 of product (see paragraph 12 of the Bern Affidavit), if it was eight days late, the penalty would have been in excess of \$50,000.00.

Bern Affidavit, para. 26, Exhibit I

15. It is submitted that TCC wanted to ensure that product was delivered promptly during this anticipated CCAA time period.

16. The 30 day goods of ISSI Inc. totalled \$150,934.84 (Bern Affidavit, para. 32), and of Elfe \$118,475.17 (Bern Affidavit, para. 33) for a total of approximately \$270,000.00.

17. Furthermore, counsel on behalf of ISSI Inc. has requested information related to the timing of the CCAA program, including when Oslers was consulted and when Oslers was retained. That information has not been provided.

Supplementary Motion Record of ISSI Inc., Affidavit of Lana Kirsch sworn February 18, 2015, Exhibit "A"

18. If suppliers were not advised after it was determined that CCAA proceedings would take place, it is submitted that the representations made by TCC to suppliers during this timeframe would not comply with the obligation of honest performance recently set out by the Supreme Court of Canada. As TCC had the ability to cancel orders at any time without penalty under its agreements with suppliers, such as Elfe and ISSI Inc., it is submitted that the failure to do so in

these circumstances and, in fact, the representations made that things were going great, for example: on December 12, 2014 suggests conduct that was not consistent with honest performance.

Bern Affidavit, para. 44, Exhibit W

Bhasin v. Hrynew, 2014 SCC 71

19. Furthermore, what is also missing from the WA is how, when and by whom the decision was made to file the application for CCAA protection. The only reference that appears to be in the Affidavit is set out in paragraph 15 of WA, wherein Mr. Wong states:

"I am informed by senior management of Target Corporation that the board of directors of Target Corporation has determined that, in its business judgement, it is in the best interest of its business and its shareholders to discontinue operations in Canada and focus on driving growth and building further momentum in its omni channel U.S. business."

20. This information has been not yet been forthcoming although requested. This evidence as tendered was inadmissible as being hearsay in support of an application, without the named source of the information and as well, double hearsay.

Bern Affidavit, para. 51, Exhibit X

Rules 4.06(2), 39.01(4) and 39.01(5) of the *Rules of Civil Procedure*

Information

21. The Affidavit of Shell Bern demonstrates that the information related to inventory is available with regard to the amount of inventory delivered and the point of sales information at each of the TCC stores, with respect to each product. This information is electronic data available from TCC for each supplier at any point in time. The supplier can then know how much inventory

is still in inventory with TCC at any time by deducting from the total inventory delivered, the point of sale information.

Bern Affidavit, paras. 9-40

22. TCC therefore has the ability to obtain this information as well at any time.

23. The suggestion that TCC needs some extra time in order to obtain the inventory figures on December 15 and January 15 appears to be subject to serious question.

24. Not only should the inventory figures and the 30 day goods amounts have been provided to His Honour on the Motion without notice as it is material information, it was also available to advise His Honour in short order, in light of the computer system in place. Management of inventory is one of the foundations of the business of TCC and Target USA.

25. The compilation of the affidavit evidence of Wong probably involved at least two or more weeks and, as a result, there was sufficient time to obtain the most up to date accurate inventory figures and provide them to the Court prior to obtaining the Order.

26. It is submitted that there are two potential issues that are before the Court and they support why the following information is material.

- (a) When it was known to TCC that the CCAA proceedings were going to be instituted. Orders should have been cancelled and suppliers should have been told not to ship product.

- (b) Whether the suppliers of the 30 day goods should have been protected under the Order based on the intent of s. 81.1 of the BIA and the fact the Order of January 15, 2015 was intended to carry out a liquidation of the assets of TCC.

27. Furthermore, liquidation under a CCAA proceeding should not be a means of avoiding the 30 day good provisions of Section 81.1 of the *BIA*.

Bruce Agra Foods Inc. v. Proposal; of Everfresh Beverages Inc. (Receiver of) (1996) (Ont.C.A.), para. 6

In the Matter of Agro Pacific Industries (2000) BCSC 837, p. 20

28. It should not be, that suppliers' inventory should indirectly finance a CCAA proceeding, to the financial detriment of those suppliers.

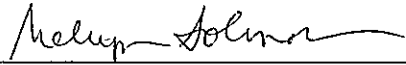
29. There may be less incentive for some suppliers to come forward and provide the information. This is especially so if these suppliers, who are major ones, such as Warner Bros., Sony and others, already have significant financial arrangements with Target Corporation (USA) and would not want, in any way, to jeopardize their business relationships.

30. It is the smaller Canadian suppliers who do not carry on business with Target (USA) that will suffer financial prejudice.

31. In any event it is only TCC that has all of this information concerning suppliers, which information is readily available.

32. It is in such circumstances that the Court should order that all relevant information be obtained and provided forthwith to suppliers, so that the Court may then entertain a motion to determine what would be a fair and equitable variation of the CCAA Order in order to ensure that all TTC suppliers are not unfairly and, perhaps, dishonestly taken advantage of.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of February, 2015.

A handwritten signature in cursive script, appearing to read "Melvyn L. Solmon", is positioned above a horizontal line.

Melvyn L. Solmon

SOLMON ROTHBART GOODMAN LLP
Barristers

Lawyers for ISSI Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Bhasin v. Hrynew*, 2014 SCC 71
2. *Bruce Agra Foods Inc. v. Proposal; of Everfresh Beverages Inc. (Receiver of)* (1996) (Ont.C.A.), para. 6
3. *In the Matter of Agro Pacific Industries* (2000) BCSC 837, p. 20

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rule 4.06(2) of the *Rules of Civil Procedure*

Format

Contents

(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 4.06 (2).

Rules 39.01(4) and 39.01(5) of the *Rules of Civil Procedure*

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent’s information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent’s information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Section 81.1 of the *Bankruptcy and Insolvency Act*

Right of unpaid supplier to repossess goods

81.1 (1) Subject to this section, if a person (in this section referred to as the “supplier”) has sold to another person (in this section referred to as the “purchaser”) goods for use in relation to the purchaser’s business and delivered the goods to the purchaser or to the purchaser’s agent or mandatary, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier’s own expense, and the purchaser, trustee or receiver, or the purchaser’s agent or mandatary, as the case may be, shall release the goods, if

(a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in the prescribed form and containing the details of the transaction, within a period of 15 days after the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(b) the goods were delivered within 30 days before the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(c) at the time when the demand referred to in paragraph (a) is presented, the goods

(i) are in the possession of the purchaser, trustee or receiver,

(ii) are identifiable as the goods delivered by the supplier and not fully paid for,

(iii) are in the same state as they were on delivery,

(iv) have not been resold at arms' length, and

(v) are not subject to any agreement for sale at arms' length; and

(d) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.

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

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PROCEEDING COMMENCED AT TORONTO

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