

**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**

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**OUTLINE OF SUBMISSIONS OF  
RIOCAN MANAGEMENT INC. AND CERTAIN OF ITS AFFILIATES AND  
KINGSETT CAPITAL INC. AND CERTAIN OF ITS AFFILIATES  
(Motion for Process Approval and Stay Extension Orders)  
(Returnable on February 4, 2015)**

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and certain of its affiliates and (ii) Kingsett  
Capital Inc. and certain of its affiliates

## PART I - BACKGROUND

1. These submissions are jointly filed by (i) RioCan Management Inc. and certain of its affiliates (collectively, "**RioCan**") and (ii) Kingsett Capital Inc. and certain of its affiliates (collectively, "**Kingsett**"). RioCan and Kingsett are each landlords of Target Canada (defined below), and each obtained a guarantee or indemnity from the U.S. parent corporation, Target Corp. ("**Target U.S.**"), in respect of some or all of its leases. RioCan is Target Canada's single largest landlord with 26 leased properties. Kingsett is the landlord for 5 of Target Canada's leased premises, one of which is a joint venture with RioCan.
2. Approximately two years ago, Target U.S., a major U.S. retailer came into Canada and, through a Canadian start-up subsidiary, opened for business by taking over a large number of properties with existing leases. Two years later, it has failed and declared its intention to liquidate and vacate Canada.
3. Rather than turning over the business and assets to a Trustee in Bankruptcy for realization and distribution, Target U.S. has instead asked the Court (defined below) to allow it, through its almost-defunct Canadian start-up, to control its own liquidation and, in the process, to tie up all of the assets and rights of the suppliers and landlords, and even to attempt to alter and override their rights in certain important respects.
4. On January 15, 2015, Target Canada Co. and certain of its affiliates (collectively, "**Target Canada**") sought and obtained an *ex parte* Initial Order from the Ontario Superior Court of Justice (Commercial List) (the "**Court**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended, the "**CCAA**"). The Initial Order, among other things: (i) granted a stay of proceedings in respect of Target Canada; (ii) granted a stay of proceedings in respect of Target U.S. and its direct and indirect subsidiaries (other than Target Canada) (the "**Parent Stay**"); and (iii) scheduled a full "comeback hearing" for February 11, 2015. In connection with the granting of the Initial Order, Regional Senior Justice Morawetz made an Endorsement dated January 16, 2015, providing, among other things, that "[t]he comeback hearing is to be a 'true' comeback hearing."

5. By notice of motion served after 10:00 p.m. on January 29, 2015, Target Canada has brought a motion returnable February 4, 2015, a week in advance of the comeback hearing, for an order, among other things:

- (a) approving an Agency Agreement, Inventory Liquidation Process and Real Property Portfolio Sales Process (each as defined in the Affidavit of Mark J. Wong, sworn January 29, 2015); and
- (b) granting an extension of the Stay of Proceedings (as defined in the Initial Order), which is currently set to expire on February 13, 2015, to May 15, 2015.

6. On February 2, 2015, counsel to various of Target Canada's landlords met with counsel to Target Canada, the Monitor, the Monitor's counsel and counsel to Target U.S. The purpose of the meeting was to discuss the landlords' issues and concerns with respect to the various orders being sought by Target Canada, including the terms of the Initial Order.

7. At that meeting, counsel for RioCan and Kingsett provided the other parties present with a mark-up (the "**RPPSP Mark-up**") to the Real Property Portfolio Sales Process (the "**RPPSP**") that had been included in Target Canada's January 29 motion record. The RPPSP Mark-up had been previously circulated to counsel for the various other landlords in attendance (in person or phone) at the meeting, and each had expressed support for the changes being sought.

## **PART II - ARGUMENT**

### ***A. General Concerns Regarding the CCAA Proceeding and the Parent Stay***

8. As a preliminary matter, it is important to note that this proceeding is not in any way a restructuring or reorganization as is contemplated by the CCAA. It is a liquidation or de facto bankruptcy situation. In fact, the Affidavit of Mark J. Wong sworn January 15, 2015 in support of the Initial Order (the "**Initial Affidavit**") explicitly states that "TCC and Target Corporation intend to wind down Canadian operations in a responsible and controlled manner...". While this Court has permitted the CCAA to be used for liquidations in certain instances, those liquidations generally result from a failed (but attempted) restructuring under the CCAA, or are otherwise

justified due to the complexity of the situation. It is submitted that neither is the case with respect to Target Canada.

9. Although Target Canada has attempted to frame this proceeding as unique and in need of special treatment under the CCAA, it strains credulity to suggest that something as clear as this liquidation – a liquidation of a company that has been operating for approximately two years – cannot be conducted under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as amended, the "BIA") more efficiently and effectively. However, in respect of this liquidation, tens of millions of dollars will be expended in fees and costs (the 13-week cash flow filed in support of the extension of the Stay Period estimates that approximately \$28 million of professional fees will be incurred by Target Canada in the first 4 months of the CCAA proceeding), there are or will be court-ordered secured charges, stays of proceedings for non-CCAA applicants, a manufactured (and likely to be disputed) claims process (notwithstanding that one already exists under the BIA) and, ultimately, either a distribution under a statute which has no distribution provisions (or conversion to a BIA proceeding at the appropriate time) or a Plan of Arrangement (including all the cost that entails).

10. The liquidation (or wind down of operations in a responsible and controlled manner) of the Target Entities is precisely the type of situation envisaged by the BIA and for which it has been used for over a century. Target Canada is insolvent and is ceasing its operations permanently. It is therefore Target Canada's creditors that have the primary interest in maximizing value for Target Canada's assets in order to obtain a distribution of the proceeds, if any. Target Canada itself no longer has any independent interest; in fact, it will very likely cease to exist in the very near future. Accordingly, there is no compelling reason why Target Canada should remain in charge of its liquidation process, and not a Trustee in Bankruptcy under the BIA. Canadian insolvency law allows for debtor-in-possession restructurings under the CCAA and the proposal provisions under the BIA, but liquidations that are intended as such from the outset are to be administered by officers of the Court that have a fiduciary duty to maximize value for the benefit of creditors. There is nothing unique about the current situation facing Target Canada. It is a classic bankruptcy circumstance.

11. The Initial Order provides for the Parent Stay, which is a stay in favour of a non-CCAA applicant. The appropriateness of the Parent Stay is an issue for the "comeback hearing", and not for this motion, but it need be said that this is a significant issue for RioCan and Kingsett. Those issues will no doubt be addressed at the comeback hearing on February 11, but RioCan and Kingsett consider it important to outline their concerns at this time to better explain the issues that arise now in respect of the RPPSP. RioCan and Kingsett submit that Target Canada's liquidation should have proceeded by way of a bankruptcy under the well-established regime of the BIA. To the extent that Target Canada and the Court believe it is appropriate for the liquidation to be conducted under the CCAA as Target Canada has proposed, RioCan and Kingsett submit that this proceeding should be a CCAA that is effectively an analog to a bankruptcy under the BIA in all respects and that there should be a clear pronouncement by the Court to that effect to avoid further misunderstanding and to provide the type of certainty and expectation that the BIA provides.

12. It is submitted that the Court must be particularly careful and circumspect when allowing a clear and straightforward liquidation to proceed as a CCAA proceeding because of the prejudice that can be suffered down the line and because there is already a statute to deal with such situations, without extra cost, extra orders and processes that need to be manufactured and extra uncertainty. It is further submitted that those issues must be dealt with up front, before matters progress too far and the legitimate rights of parties are trampled by the inertia of the CCAA proceedings.

***B. Issues Regarding Real Property Portfolio Sales Process***

13. Most of the proposed changes sought in the RPPSP Mark-up fall into one or more of the following categories: (i) the RPPSP should be run by the Monitor, not Target Canada; (ii) the time limits proposed by Target Canada (in consultation with its advisors) and supported by the Monitor should be strictly adhered to; and (iii) no landlord rights should be affected in any respect by the RPPSP.

**(i) The RPPSP should be run by the Monitor, not Target Canada**

14. As noted, Target Canada is proposing to liquidate and no longer has any independent or real interest to speak of. Its assets are being sold by professional advisors, and the legal entities comprising Target Canada will likely cease to exist in legal or practical terms shortly after the completion of the liquidation processes.

15. The parties that have an economic interest in the RPPSP are Target Canada's landlords and other creditors. They are the ones that will benefit from a successful process by way of increased recoveries.

16. It is submitted that the fact that the debtor has no independent interest in the liquidation process is precisely the reason liquidations under the BIA are conducted by a Trustee in Bankruptcy, and not the debtor. The Trustee in Bankruptcy is an officer of the Court and has a fiduciary duty to the creditors. The role of the Trustee in Bankruptcy is to maximize value for creditors generally and not to advance interests of one creditor or stakeholder group over the interests of another. The Trustee in Bankruptcy is answerable to the creditors and is directed by the Inspectors (who are elected by the creditors), as opposed to having the process run by the almost-defunct debtor. Creditors can take some degree of comfort knowing that they will be treated fairly and in accordance with the priority regime in the BIA.

17. In this case, Target Canada, an insolvent enterprise that will cease to exist in the near term, is proposing that it conduct the liquidation process and, among other things, determine which offer is the "most favourable". The term "most favourable" is difficult to define in any event, but it seems very problematic in the context of Target Canada. What is most favourable from the perspective of an insolvent company that is about to cease to exist, and why is that perspective relevant?

18. RioCan and Kingsett submit that the liquidation process should be run by the Monitor, an officer of the Court with a duty to all stakeholders. That is consistent with how the process would be run if this were a bankruptcy under the BIA. In addition, if the proceeding is converted into a bankruptcy, the transition of the RPPSP from the Monitor to the Trustee in Bankruptcy

would be much more seamless. It is therefore most appropriate that the Monitor run the process, which the Monitor has not objected to doing.

**(ii) The time limits proposed by Target Canada (in consultation with its advisors) and supported by the Monitor should be strictly adhered to**

19. Under the BIA, there is a finite period within which leases are to be dealt with. In Ontario, the rights of the Trustee In Bankruptcy include: (i) the ability to retain the leased premises for a period of 3 months following the date of bankruptcy; (ii) the ability to elect to retain the leased premises for the whole or any portion of the unexpired term of a lease and any renewal thereof; (iii) the ability to assign the lease with rights of renewal, if any, to a third party even if the lease prohibits assignment; and (iv) the ability to disclaim or surrender the lease within 3 months of the date of bankruptcy. Accordingly, under the BIA, a lease will generally be dealt with one way or another within 3 months of the date of bankruptcy.

20. Under the proposed RPPSP, Target Canada originally proposed to give itself to May 15, 2015 to complete the sale process, a period of 4 months from the date of the Initial Order. In its revised draft, it has actually given itself until June 30, 2015 just to enter into a definitive agreement (as opposed to closing the transaction(s)). In addition, the proposed sales process contemplates the possibility of endless extensions to virtually each stage of the process.

21. Even the proposed "Outside Date" of June 30, 2015, which RioCan and Kingsett submit is far too long a time period, does not result in finality to the process. Target Canada proposes that if a definitive agreement is not entered into with respect to a particular lease by June 30, 2015, upon a request by the relevant landlord, Target Canada will bring a motion for advice and directions. If this were a bankruptcy, the landlords would have certainty and finality within 3 months from the date of bankruptcy (certainly not more than 5 months after the date of filing).

22. RioCan and Kingsett submit that the liquidation process should have definitive deadlines, subject of course to the Monitor's ability to return to Court to seek an extension for very good reasons to any timeline on notice to the Service List. The timeline was created by Target Canada with the assistance of two professional advisors with extensive experience in liquidation processes and the leasing market, respectively, and was supported by the Monitor. It also

contemplates that leases may not be dealt with until 4 months (and now 5.5 months with the proposed changes by Target Canada) after the Initial Order was granted. It is submitted that the Court should not permit the Monitor and/or Target Canada to extend the timelines at their discretion and without hearing the objections of others, including landlords. This process must yield certainty for the landlords and other stakeholders within a reasonable time period.

23. In that vein, the RPPSP Mark-up contains provisions that provide in essence that if there is no interest with respect to a particular lease after the lease has been sufficiently marketed, upon a request by the applicable landlord to be released from any stay of proceedings with respect to such lease, Target Canada will forthwith disclaim such lease, provided that the merchandise liquidation process has been completed at the applicable premises. This proposed change is to provide greater certainty for the landlords that this process will not keep them in a process for a longer period of time than is required.

**(iii) No landlord rights should be affected by the sales process**

24. With respect to this issue, RioCan and Kingsett adopt paragraphs 12 – 64 of the Responding Factum of The Cadillac Fairview Corporation Limited and its affiliates.

*Other Issues*

25. With respect to other issues not specifically dealt with in this Outline of Submissions, RioCan and Kingsett adopt the submissions in the Responding Factum of The Cadillac Fairview Corporation Limited and its affiliates.

**(i) Stay extension**

26. With respect to Target Canada's proposed extension of the Stay Period, RioCan and Kingsett submit that the extension of the stay should be considered at the comeback hearing on February 11 as was originally intended and adopt the submissions in the Responding Factum of The Cadillac Fairview Corporation Limited and its affiliates. In any event, if the Court determines that it is appropriate to grant the extension at this time, RioCan and Kingsett submit that paragraph 5 of the draft order approving the extension be deleted and replaced with the following:



THIS COURT ORDERS that nothing in this Order, including the extension of the Stay Period set out herein, shall (i) in any way affect the "comeback rights" of any interested party, including as set out in paragraph 77 of the Initial Order and in the Endorsement of Morawetz R.S.J. dated January 16, 2015, (ii) in any way preclude or prejudice any argument that any interested party may make with respect to the Initial Order, including any challenges to any stay of proceedings contained therein, (iii) in any way preclude or prejudice any argument that any interested party may make that the within proceedings be terminated and the liquidation of Target Canada be continued pursuant to bankruptcy proceedings under the *Bankruptcy and Insolvency Act*.

27. RioCan and Kingsett do not anticipate that Target Canada or the Monitor will have any objection to that proposed language given that both have indicated through counsel that any extension of the Stay Period is truly without prejudice to all rights and arguments.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February, 2015.

Bennett Jones LLP  
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