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

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

OUTLINE OF SUBMISSIONS OF RIOCAN AND KINGSETT

(Motion Returnable February 11, 2015)

PART I – DETAILED OVERVIEW

Introduction

1. The following is an outline of the submissions of RioCan Management Inc. and certain of its affiliates ("**RioCan**") and KingSett Capital Inc., certain funds under its management and certain of its and their affiliates (collectively, "**KingSett**", and together with RioCan, these "**Responding Parties**"), in respect of: (i) the motion returnable February 11, 2015 concerning the Initial Order in this proceeding; and (ii) the motion originally returnable February 4, 2015, and adjourned to February 11, 2015, regarding the Real Property Portfolio Sales Process (the "**RPPSP**").

2. Following lengthy negotiations with counsel for Target Canada Co. and certain of its affiliates (the "**Applicants**" or "**Target Canada**"), Target Corp. ("**Target U.S.**"), the Monitor, and other landlords, these Responding Parties have reached a resolution (the "**Resolution**") under which certain amendments are being made to the Initial Order and the RPPSP. While supportive of these amendments being made pursuant to the Resolution, that support should not be construed as support of an undefined and open-ended CCAA process to run this liquidation, nor as consent (as opposed to non-opposition) to the other terms of the Amended and Restated Initial Order or the RPPSP. As well, for greater certainty, the Responding Parties are not opposing the requested extension of the stay of proceedings (provided that the amendments contemplated by the Resolution are approved by the Court).

3. However, for the reasons described below, these Responding Parties have significant concerns about the nature of this CCAA proceeding, which they are obliged to highlight for the Court notwithstanding the Resolution.

Background

4. These Responding Parties are collectively landlords of Target Canada in respect of 31[1] properties (the "**Properties**"), and each of these Responding Parties holds guarantees and/or indemnities (collectively, the "**Indemnities**") from the U.S. parent corporation, Target U.S., in respect of some of such leases.

5. On January 15, 2015, Target Canada sought and obtained an 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

[1] This includes the Bayshore Shopping Centre. KingSett is the landlord of the Bayshore Shopping Centre and it is represented by Fasken Martineau DuMoulin LLP in relation to that property in this proceeding.

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 "comeback hearing" for February 11, 2015.

These Responding Parties' Serious Concerns about this Proceeding and the Initial Order

6. Prior to the Resolution, these Responding Parties had made clear their intention to bring a motion at this comeback hearing to either: (i) amend the Initial Order and the proposed RPPSP to closely mirror the balancing of interests reflected in the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**"), including as between landlords (and their other tenants) and the debtor/tenant; or (ii) alternatively, lift the stay of proceedings for the purpose of petitioning Target Canada Co. into bankruptcy under the BIA.

7. These Responding Parties' disclosed intentions were motivated by a very serious concern that Target U.S. and the Applicants might attempt to use the "flexibility" of a CCAA proceeding, notwithstanding that this is a pure liquidation, to, among other things: (a) advance an agenda and plan of arrangement or compromise to eliminate or to circumscribe significantly Target U.S.'s liabilities under the Indemnities, and/or (b) conduct a drawn-out and extendible marketing process for the leases (without a definitive and reasonable end date) that could constitute a significant impairment of value for the landlords, and their other tenants, and which would run counter to the balancing of interests inherently recognized by the BIA.

8. While the Resolution has addressed a number of those concerns as to possible misuse or abuse of CCAA proceedings, especially in a clear liquidation such as this, many significant concerns regarding this choice of proceeding remain, including the potential for a flexible and open-ended CCAA proceeding to be used to attempt to shift the balance dictated by the

principles and provisions of the BIA away from protecting landlords and other creditors and in favour of a liquidating debtor and its U.S. parent.

The Use of Insolvency Statutes in a Pure Liquidation

9. Simply put, in this pure liquidation, Target Canada has no real interest to serve or protect in these proceedings. It is soon to be wound-down and there is acknowledged to be no prospect or even intention of solvency or restructuring. The purpose of the CCAA is not to have the defaulting debtor appointed as the guardian of the interests of the creditors. It is to allow a debtor breathing space in order to propose a restructuring, while the oversight of the Court serves to help protect the interests of the creditors and to balance all of the interests as dictated by Parliament. This case does not fit that purpose.

10. In a pure liquidation from the outset such as this case, the bright lines are clearly defined, since there is no restructuring contemplated and no possible basis for allowing the debtor to claim that it is championing the interests of its creditors. Parliament under the BIA has rightly given that role to an independent Trustee, who is guided by a committee of creditors, and not by the debtor or its parent. The BIA process is clearly defined, more efficient, less costly and less time-consuming. It is therefore submitted that, going forward in these proceedings, extra care must be taken to have close regard to the principles of the BIA, and to avoid skewing the process to the detriment of the landlords and other creditors, all on the basis of a singular devotion to the principle of increasing recoveries for creditors.

11. Creditor recoveries are certainly very important, but the BIA (which is the only expression of Parliament's will with respect to such liquidations) clearly sets out a balancing of that principle against the rights of various parties to a liquidation, including landlords, through its

time limits and its rules. It creates a level of certainty that is necessary to respect that balancing and those rights.

12. The CCAA, on the other hand, with its flexibility and dearth of comprehensive rules, especially in the case of a liquidation, allows for a very unlevel playing field, one on which the debtor often is able to set the agenda and push the envelope, forcing the other parties to respond to such attempts on tight timelines and very often at considerable cost. Indeed, the debtor in such circumstances is able to use the process, and the funds that otherwise would go to creditors, to advance its agenda. That is a particular concern where the debtor has a non-insolvent parent or affiliate which owes obligations to some of the same creditors.

13. However much the flexible process of the CCAA may make sense in a restructuring, it is very difficult indeed to justify giving to a debtor that will not survive and which chose the timing of the proceedings, the ability to write its own rules and to dictate the agenda for something as clear and straightforward as liquidating its assets, especially where there is already a time-tested and Parliament-approved structure for doing so in the form of the BIA.

14. The events of the past few weeks are a prime example of the way in which the CCAA process can potentially become skewed. In arriving at the Resolution, a great deal of time and cost was incurred by many landlords (and funds that otherwise would have been available to creditors were expended by the debtor and the Monitor) simply to achieve a result that more fairly conforms to the principles referred to above. If this liquidation had been undertaken under the BIA, it would have seen only a portion of these key issues subject to disagreement and potential litigation, because there are clear rules. Instead, proceeding under the CCAA in this case may unfairly allow the insolvent and liquidating debtor to remain in control, to incur

significant additional cost, to overreach in terms of its desired flexibility and interference with the rights of landlords and others (e.g. the full-force Parent Stay in the Initial Order), and to use creditor funds (while all others must fund their own costs of resisting these attempts) to fight the very creditors, including landlords, whose interests should be one of the primary focuses of protection in a liquidation.

Going Forward

15. The Resolution has addressed some of the important concerns that arose at this stage, but the potential for further prejudice to landlords and other creditors remains. These Responding Parties submit that the Court should ensure as this liquidation proceeds that the debtor is to be guided by the principles and general timelines of the BIA in pursuing the current process.

16. These Responding Parties have prepared these submissions and filed them because ongoing fairness in this (or a substitute) proceeding depends on consistency of treatment of various parties and principles over the course of the proceeding. These Responding Parties and others have expressed serious concerns as to the potential for unfairness or an un-levelling of the playing field. It is only fair and appropriate that the Court and the Monitor, in supervising these proceedings, and in having been made aware of these concerns, approach future decisions with this context and with these concerns made clear from the outset and carried forward. These Responding Parties and others can and have anticipated a number of such potential situations and are specifically asking the Court and the Monitor to understand these concerns now and going forward, rather than these Responding Parties being accused at some future point of having been silently acquiescent.

PART II – ARGUMENT AND SPECIFIC CONCERNS GOING FORWARD

These Responding Parties' Rights as Landlords are Important

17. The Properties are important and valuable assets generally and in these Responding Parties' respective real estate portfolios.

18. The Target Canada stores are important to these properties for a number of reasons. For example, the stores are mostly very large tenancies in retail shopping centres, with many being what is referred to in the industry as an "anchor" tenancy. Such very large tenants of Canadian shopping centres play a critical role in the financial viability of those centres for both landlords and other tenants alike as they provide a significant draw of customers to the shopping centre. Indeed, lease rates for other tenants are often determined based upon the existence and operation of such large tenants. Without the proper major tenants needed to draw consumers to retail premises, other tenants may suffer immediate and adverse effects.

19. In short, every day that the shopping centres in question are missing their large tenants and/or face the uncertainty of not knowing if they will have a large tenant and who it might be, has very real and material financial consequences for the landlord.

Target Canada's Liquidation is Not a Restructuring

20. Although Target Canada has tried to frame this proceeding as unique and in need of special treatment under the CCAA, there is no reason that something as straightforward as this liquidation – a liquidation of a company that is only a few years old – could not have been conducted under the BIA more efficiently and effectively.

21. Under the BIA, the statutory regime specifically designed to address these kinds of liquidations, there is an attempt to balance the relevant interests, including a defined and restricted period within which leases are to be dealt with (being a period of significant uncertainty for landlords and their other tenants), after which landlords regain the necessary commercial certainty of being able to deal with their leases, to the extent that such leases have been disclaimed. In Ontario, a Trustee in Bankruptcy has three months in which to elect to retain the leased premises, assign the lease (subject to court approval) or disclaim or surrender the lease.[2] Accordingly, under the BIA, the time during which a landlord and its other tenants will be subject to uncertainty with respect to a lease is limited to three months from the date of bankruptcy.

22. Thus, Parliament has struck a balance in the provisions of the BIA, one that is time-tested and time-honoured, between attempting to increase recoveries for unsecured creditors in a liquidation and the rights of landlords and other third party tenants for whom commercial leases are very significant agreements. Essentially, those purporting to act for the benefit of the creditors (in the case of a proceeding in Ontario under the BIA, the Trustee in Bankruptcy) have a three-month period within which to determine the value of the lease, if any, and to decide whether or not to continue with the lease. Three months is the period that the legislators have chosen in the striking of this balance.

23. This balance is all the more critical on the present facts given that Target Canada stores are generally "anchor tenants", as the implications of these proceedings extend not only to the directly involved suppliers, employees and landlords, but also to many of the other thousands of

[2] BIA, s. 146; *Commercial Tenancies Act*, R.S.O. 1990, c.L.7, s. 38(2).

retail tenants of these shopping centres who are seeing their businesses affected both during these proceedings and afterward.

24. While increasing recoveries for unsecured creditors in a liquidation is certainly an important goal, it is not the overriding principle which trumps the rule of law and the balancing of interests inherent in the BIA (the only statute through which Parliament has spoken on this issue), the need for commercial certainty, and the reputation of the Canadian system for the fair treatment of all parties. Nowhere in the BIA or the CCAA does Parliament state that the overriding principle is "more value for creditors at all costs, including at the expense of commercial certainty, fairness and equitable treatment of certain creditors". If it had, the treatment of leases and many other types of assets under the BIA would be very different and subject to different time limits. As this is a pure liquidation, the debtor will not emerge and no jobs will be saved by a plan of arrangement under the CCAA. Extra cost and delay could, however, be very significant to those parties affected by this insolvency, who will survive and continue to conduct commerce and employ people following the completion of this insolvency.

Certain Specific Concerns of these Responding Parties Going Forward

1. When Leases are to be Disclaimed

25. These Responding Parties would have preferred that Target Canada be obliged to disclaim those leases for which there is no material bidder interest within the RPPSP process, if requested by the landlord after that point in time. Although that request was not incorporated into the Resolution, both Target Canada and the Monitor have indicated to counsel for these Responding Parties that Target Canada is not likely to continue to keep leased premises in the process (with the concomitant requirement to pay rent using creditor funds) without a good reason to do so. It

is only logical that the basis or justification for doing so declines as the RPPSP progresses and no tangible interest is expressed in a particular property, including no qualified bid. The Court should be aware of this going forward.

2. No Assignment Without Complying With All Lease Terms

26. These Responding Parties are particularly concerned about Target Canada's future intentions in connection with attempting to force assignments of leases where the proposed assignee does not intend or expect to comply with *all* of the terms of the applicable lease or where a proposed assignee is not a fit tenant. Obviously, that is an issue that will only become relevant if such prospective tenants emerge as winning bidders pursuant to the RPPSP. These Responding Parties fully expect that, as a matter of law, absent the consent of the relevant landlord, all lease terms will be complied with and that no assignment will be permitted otherwise. The CCAA cannot be used to amend lease provisions.

27. If, later in this proceeding, Target Canada (with or without the support of the Monitor) seeks Court approval of an assignment of a lease of one of these Responding Parties to an assignee that does not comply with the foregoing, and is otherwise not acceptable to the landlord, the relevant Responding Party will forcefully oppose that. Although this is clearly an issue for another day, these Responding Parties believe that it was the mutual understanding and agreement of all parties to the Resolution that neither the Amended and Restated Initial Order nor the amended RPPSP would create any presumption or reliance argument to the contrary.

3. Time Certainty of RPPSP Deadline

28. Paragraph 50 of the amended RPPSP provides that if a transaction with respect to a particular lease has not been completed on or before June 30, 2015 (or such later date as may be ordered by the Court), any such lease that is the subject of such transaction shall be released from the stay of proceedings and shall be disclaimed in accordance with the CCAA and the Initial Order on the later of (i) June 30, 2015, and (ii) such later date as may be ordered by the Court, as applicable.

29. These Responding Parties would like it to be clearly understood that such wording was agreed upon by all parties to the Resolution so as not to create any presumption in favour of Target Canada or the Monitor if an extension to a later date is sought from the Court. The various landlords (including these Responding Parties), Target Canada and the Monitor have agreed that the sales process is intended and expected to be completed by no later than June 30, 2015.

4. Interpretation of Paragraphs 19 and 19A of the Amended and Restated Initial Order

30. The Moving Parties wish to make clear to the Court that, as agreed with Target Canada, Target US and the Monitor, the word "landlord" in paragraphs 19 and 19A of the Amended and Restated Initial Order is not intended to be read restrictively. Accordingly, to the extent that the party attempting to pursue or enforce its rights pursuant to or in accordance with paragraph 19 or 19A is not the same legal entity as the actual landlord on the lease agreement, such party will not be denied the benefits afforded landlords by those paragraphs for that reason. All parties to the Resolution agreed with this interpretation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 10th DAY OF FEBRUARY, 2015

BENNETT JONES LLP

Lawyers for RioCan and KingSett

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Proceeding commenced at Toronto

OUTLINE OF SUBMISSIONS OF RIOCAN AND KINGSETT

BENNETT JONES LLP
Suite 3400, One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

S. R. Orzy (LSUC #23181I)
Tel: (416) 777-5737
R. Swan (LSUC #32076A)
Tel: (416) 777-7479
S. Zweig (LSUC#57307I)
Tel: (416) 777-6254

Fax: (416) 863-1716

Lawyers for RioCan and KingSett