

**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**

**RESPONDING FACTUM OF
THE CADILLAC FAIRVIEW CORPORATION LIMITED
AND ITS AFFILIATES
(Motion for Process Approval and Stay Extension Orders)
(Returnable on February 4, 2015)**

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PART I – OVERVIEW

1. This factum is filed by The Cadillac Fairview Corporation Limited and its affiliates (collectively, “Cadillac Fairview”) in response to the motion of Target Canada Co. and certain of its affiliates¹ (collectively, “Target Canada”) for orders, among other things: (a) approving the 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 below) to May 15, 2015 (the “Process Approval and Stay Extension Orders”).

2. Cadillac Fairview’s position is as follows:

¹ Target Canada Co.’s affiliates include 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.

- (a) Cadillac Fairview does not object to the approval of an inventory liquidation process and a real property sale process; however, Target Canada has elected to design such processes in a way that does material harm to Cadillac Fairview's interests as a landlord.
- (b) The approval of the Agency Agreement and the Inventory Liquidation Process in the form sought by Target Canada contemplates an unlawful, unilateral amendment of the terms of the Cadillac Fairview Leases (as defined below) on a go-forward basis (i.e. as opposed to merely staying defaults or breaches as at the date of the commencement of the within proceedings). The Court is being asked, inappropriately, to rewrite a contract between parties and to bind Cadillac Fairview against its wishes to this new economic bargain going forward. This Court does not have the requisite authority to approve such unilateral contract amendments. Moreover, in the event that this Court does have the requisite authority, this Court should decline to exercise such authority in the present case. An appropriate liquidation process that achieves the legitimate objectives of Target Canada may be approved by this Court without the necessity for the extraordinary relief sought by Target Canada.
- (c) Target Canada has not met its burden under the test for an extension of the Stay of Proceedings and, in any event, it is premature to extend the Stay of Proceedings prior to the Comeback Hearing that has been scheduled for February 11, 2015.

PART II - FACTS

Initial Order, Comeback Hearing and Process Approval and Stay Extension Orders

3. On January 15, 2014, Target Canada sought and obtained from the Ontario Superior Court of Justice an Initial Order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") that, among other things, granted a stay of proceedings in respect of Target Canada (the "Stay of Proceedings") and scheduled a Comeback Hearing on February 11, 2015. In connection therewith, Regional Senior

Justice Morawetz made an endorsement on January 16, 2015, providing that “[t]he comeback hearing is to be a ‘true’ comeback hearing.”²

4. Target Canada is, by its own admission, a defunct company. It is in liquidation, and there is no going concern value. There will be no continuing business, no continued employment for its employees. It is a *de facto* bankrupt company in all but name only.

5. As a defunct company, Target Canada has no interest in the outcome of the liquidation of its assets. Conversely, Target Canada’s landlords collectively have the largest prospective economic interest in the cessation of Target Canada.

6. Despite being defunct and having no interest in the outcome of its liquidation, Target Canada is attempting to direct its own liquidation contrary to the expressed wishes of, and in a manner that is material prejudicial to, its principal economic stakeholders.

7. On January 29, 2015, Target Canada served a motion record in connection with its motion for the Process Approval and Stay Extension Orders to be heard on February 4, 2015, which date is prior to the Comeback Hearing.

8. Cadillac Fairview intends to file additional materials in connection with, and appear at, the Comeback Hearing. Arguments made herein are without prejudice to any arguments that Cadillac Fairview may make at the Comeback Hearing.

Cadillac Fairview Leases

9. Target Canada leases certain retail space from Cadillac Fairview pursuant to certain lease agreements (the “Cadillac Fairview Leases”). The Cadillac Fairview Leases relate to the following properties:

- i) Chinook Centre;
- ii) Les Promenades Saint-Bruno;
- iii) Les Galeries D’Anjou (co-owned with Ivanhoe Cambridge and managed by Cadillac Fairview);

² *Re Target Canada Co.*, CV-15-10832-00CL, Endorsement of Morawetz RSJ, January 16, 2015, at para. 82, Cadillac Fairview’s Brief of Authorities, at Tab 1.

- iv) Market Mall (co-owned with Ivanhoe Cambridge and managed by Cadillac Fairview); and
- v) Masonville Place.

10. The approval of the Agency Agreement and the Inventory Liquidation Process in the form sought by Target Canada would result in the unilateral amendment the Cadillac Fairview Leases, to the detriment of Cadillac Fairview.

PART III – ISSUES

11. The following issues are before this Court and addressed below:
- A. Does this Court have the requisite authority to unilaterally amend the terms of the Cadillac Fairview Leases and bind Cadillac Fairview to such unilaterally amended leases on a go-forward basis; that is, to excuse going forward the non-performance of Target Canada or its agents of those obligations that it does not wish to be bound by under the Cadillac Fairview Leases while simultaneously ordering Cadillac Fairview to continue to perform its obligations under the Cadillac Fairview Leases?
 - B. In the event that this Court has the requisite authority to unilaterally amend the terms of the Cadillac Fairview Leases, should this Court exercise such authority in the present case and what is the test that the Court is to employ in making that determination?
 - C. Should this Court extend the Stay of Proceedings at this time ahead of the comeback hearing?

PART IV – LAW AND ARGUMENT

Issue A: This Court does not have the authority to approve unilateral contractual changes that bind parties against their wishes going forward

12. Cadillac Fairview submits that, as a matter of, *inter alia*:
- (a) contract law;
 - (b) insolvency law; and
 - (c) agency law,

this Court does not have the requisite authority to unilaterally amend the terms of the Cadillac Fairview Leases in the manner sought by Target Canada.

(a) Contract Law

13. It is a well-established principle of contract law that a Court cannot - and will not - rewrite the terms of a bargain between two parties. This principle has been consistently enunciated in legal texts and in case law.

14. Geoff R. Hall, in *Canadian Contractual Interpretation, 2nd Edition*, in the course of considering a more limited power to imply terms in an existing contract, emphasizes that this power is limited and must be used cautiously, and says that:

this power cannot be used either to rewrite the parties' contract or to contradict the express wording they have chosen. ... The prohibition against rewriting the parties' contract is very consistent with the overarching approach to the interpretation of contracts in Canada.³

15. In other words, the bargain made between contractual parties can be interpreted by a Court (and a Court may even go so far in some circumstances as to imply terms), but the express terms of a contract cannot be rewritten or created other than by the contracting parties themselves. There is a clear limit to the Court's authority in this regard.

16. This principle has consistently been supported by Canadian courts. In the case of *G. Ford Homes Ltd. v. Draft Masonry (York) Co.*, the Ontario Court of Appeal held that courts must be cognizant of the "time-honoured caution" that, "[c]ertainly a court will not rewrite a contract for the parties."⁴

17. The principle that a contract must be agreed upon by the contracting parties as a matter of contract law, and the Court does not have the ability to step in and rewrite contractual terms, has also been enunciated by the Supreme Court of Canada. In the case of *Pacific National Investments Ltd. v. Victoria (City)*, a real estate developer purchased land that the City of Victoria wished to develop. The parties entered into an agreement for certain infrastructure to be built with zoning changes being a condition precedent. When the City "down-zoned" the lots

³ Hall, Geoff R. *Canadian Contractual Interpretation Law, 2nd Ed.* (Markham: LexisNexis Canada, 2012), at pp. 155-156, Cadillac Fairview's Brief of Authorities, at Tab 2.

⁴ [1983] O.J. No. 3181, 43 O.R. (2d) 401 at para. 403 (Ont. C.A.), Cadillac Fairview's Brief of Authorities, at Tab 3.

such that much of the agreed development could not be built, the developer commenced an action against the City for breach of contract. In considering the contractual issues, the Supreme Court commented on the Court's role in reviewing contracts in general. Justice Binnie held that:

[t]he general rule, of course, is that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract.⁵

18. This case has been cited in numerous other cases, including by the Supreme Court of Canada in *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*.⁶ In that case, three investors entered into a joint venture agreement to purchase, develop and sell property. When the investors became unable to meet their payment obligations and the property was foreclosed upon, one investor, the Appellant, commenced an action against the other two investors for breach of the joint venture agreement. In concluding that the Appellant was not entitled to a return of the initial investment, the Supreme Court found that the parties had contracted voluntarily to invest the money and never provided for a right to have the money repaid. Chief Justice McLachlin cited the case of *Pacific National*, holding once again that, "it is not the function of the court to rewrite a contract for the parties."⁷

19. In the present case, Target Canada is asking this Court to do what it is expressly, as a matter of contract law, not permitted to do. Target Canada is seeking to maintain its contracts rather than disclaiming them, but to have the Court approve sweeping unilateral changes that amount to a re-writing of the contracts. Target Canada wishes to have the benefit of an economic arrangement with its landlords that it did not bargain for, and to achieve this unilaterally through having this Court force that bargain on landlords such as Cadillac Fairview. Such an approval would undermine commercial efficacy and the negotiation process for such contracts, as well as well-established principles of contract law, to the detriment of Cadillac Fairview.

⁵ *Pacific National Investment Ltd. v. Victoria (City)* 2004 SCC 75, 2004 CSC 75, at para. 31, Cadillac Fairview's Brief of Authorities, at Tab 4.

⁶ 2007 SCC 55, at para. 34, Cadillac Fairview's Brief of Authorities, at Tab 5.

⁷ *Ibid.*, at para. 34.

(b) Insolvency Law

I. Unilateral Amendments of Leases

20. There is no basis in insolvency law for disregarding the principles enumerated above, and there is no statutory or inherent jurisdiction to depart from these principles. On the contrary, these principles have been repeatedly tested and upheld.

21. Within the context of the CCAA, the principle that a court should not rewrite contractual terms takes on enhanced significance because CCAA debtor companies are already provided with special powers in respect of their contractual obligations. Parliament turned its mind to the question of the rights to be given to a debtor in CCAA with respect to contracts. If a debtor finds a contract to be onerous, it is provided with an extraordinary remedy not available outside of the insolvency process whereby it is permitted to disclaim most contracts so that they have no requirement to perform on a go-forward basis. However, what the CCAA does *not* permit is the unilateral modification of contractual terms going forward when a debtor opts not to disclaim; the debtor is not permitted both to maintain a contract and to amend the contract's terms to be more favourable to the debtor. Put colloquially, a debtor may not pick and choose in its discretion the parts of a contract that it is prepared to honour going forward and to use the Court as a means to bind the counterparty to perform its obligations unamended. The debtor's statutory remedy is disclaimer, and not unilateral contract modification going forward. This is visible in case law dealing with the CCAA process.

22. The case of *Re Allarco Entertainment Inc.* involved an initial order that varied the terms of a contract by establishing a different payment structure than that negotiated between the parties. In examining whether this variance was correct, the Alberta Court of Queen's Bench held that:

at the stage of the initial order, it would be inappropriate for a court to attempt to draw up a contract for the parties. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the service provided.⁸

23. The Court held that, on a go-forward basis, the contract must be performed according to its terms if not repudiated. Commenting specifically on the CCAA, the Court further held that:

⁸ *Re Allarco Entertainment Inc.* 2009 ABQB 503, at para. 46, Cadillac Fairview's Brief of Authorities, at Tab 6.

[g]iven the respect for contracts in the common law, explicit statutory provisions are required to give courts the jurisdiction to impose unilateral variations in contracts. Such explicit authority is not given to courts in the CCAA at the initial order stage.⁹

24. The case of *Allarco* was followed by the Quebec Superior Court in *Re AbitibiBowater Inc.*¹⁰ In that case, Justice Gascon considered whether a trust agreement could be amended by a CCAA debtor company. In refusing to approve the amendment, the Court held that:

Under these circumstances, the Court considers that the Trust Agreement entered into between BCFPI and RTC cannot be amended and that BCFPI cannot ask the Court to modify it. This negotiation belongs to the parties themselves. It is not for the Court to substitute itself to this process.

It is inappropriate for a Court to attempt to draw up a contract for the parties when these parties do not agree to modify its contractual terms. Contracts represent a law which private parties have agreed applies to them and they normally cannot be varied by the Courts. This remains true as well in the context of a CCAA restructuring.¹¹

25. In the case of *Re Canadian Airlines Corp.*,¹² the Alberta Court of Queen's Bench, in considering classification schemes (not unilateral amendments of contracts), commented broadly on the CCAA and Court's place in changing the relative legal positions of parties within a restructuring. The Court held that, "while the CCAA grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur."¹³ This case underscores that: (a) express statutory authority is required to alter the rights of parties; and (b) no alteration of rights is permitted where it amounts to a confiscation of rights or causes an injustice.

26. In the present case, the rights of Cadillac Fairview - contractually bargained for between sophisticated parties - would be confiscated if the unilateral amendment of the Contracts were approved as requested, since there would be no opportunity for the parties to settle on terms that

⁹ *Ibid.*, at para. 54.

¹⁰ 2010 QCCS 4218, Cadillac Fairview's Brief of Authorities, at Tab 7.

¹¹ *Ibid.*, at paras. 109-110.

¹² [2000] A.J. No. 1693, 19 C.B.R. (4th) 12, Cadillac Fairview's Brief of Authorities, at Tab 8.

¹³ *Ibid.*, at para. 22.

are mutually acceptable. Simply put, Target Canada proposes that the Court be used to take from Cadillac Fairview various rights that it has under the Cadillac Fairview Leases.

27. Within the context of insolvency law, then, a Court does not have the power to approve unilateral contractual changes by the debtor going forward. Such a power would be severely prejudicial to the other contracting party, who would be forced to accept and perform going forward a contract on different (i.e. materially less favourable) terms than it bargained for. A CCAA debtor is already given an extraordinary remedy – that of repudiation – and this is the remedy that is to be used if a debtor wants to be freed from its contractual obligations.

28. In the present case, Target Canada is asking that this principle be ignored. The Court does not have the authority as a matter of insolvency law to approve the requested changes to the Contracts.

29. In *Richter & Partners Inc. v. Westwood Mall (Mississauga) Ltd.*¹⁴, the Court refused to grant an assignment of leases sought by a trustee in bankruptcy pursuant to the *Commercial Tenancies Act* (Ontario) because the assignment contemplated a change of use from that set out in the lease. The Court held that it could only override the lease provisions to the extent explicitly granted such authority by statute. Although there was statutory authority to override a consent requirement for assignment of the leases, there was no express statutory authority to override other terms of the lease, including restrictions on use. As such, the assignment was not lawful and was refused by the Court.

30. It should be noted that Cadillac Fairview is not objecting to the *quid pro quo* that is statutorily established by the CCAA (i.e. a contractual counterparty is stayed with respect to defaults existing at the time of the CCAA filing, but that going forward a debtor must fully perform a contract that it wishes to continue, failing which it may repudiate such contract).

31. That is, Cadillac Fairview fully accepts that it is stayed from acting on any existing defaults, monetary or otherwise, existing as at the date of the commencement of the within CCAA proceedings. This is statutorily provided by the CCAA. The CCAA also expressly deals with certain other contractual issues, such as negating the effect of a contractual *ipso facto* clause. Again, this is statutorily provided and is directed at the fundamental goal underlying the

¹⁴ [2001] O.J. No. 5021 (Ont. S.C.J. [Commercial List]), Cadillac Fairview's Brief of Authorities, at Tab 9.

CCAA of temporarily maintaining a status quo so as to allow a debtor company to reorganize (albeit not to allow a *de facto* bankrupt debtor to liquidate under the CCAA).

32. Importantly, Target Canada is not seeking relief consistent with the temporary maintenance of a status quo (to which the CCAA's provisions re: contracts are directed); on the contrary, Target Canada is seeking to fundamentally alter the status quo going forward by re-writing its contracts and selectively seeking permission to ignore those portions of its leases not to its liking.

33. The importance of maintaining the status quo has been emphasized in legal commentary and case law. Houlden and Morawetz, in their analysis of the CCAA, say that, "The fundamental purpose of the CCAA [is] to preserve the *status quo* while the debtor prepares a plan."¹⁵ This point has been supported overwhelmingly by Canadian courts. In the case of *Re Forest & Marine Financial Corp.*, the British Columbia Court of Appeal held that preserving the status quo is the "fundamental purpose" of the CCAA.¹⁶

34. In the case of *Century Services Inc. v. Canada (A.G.)*, the Supreme Court of Canada considered judicial decision making under the CCAA. Justice Deschamps held that, within a CCAA case, "A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo."¹⁷ She further held that, "The CCAA creates conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all."¹⁸

35. A primary purpose of the CCAA would be frustrated if Target Canada were permitted to make unilateral changes to its contracts. Justice Farley of the Ontario Superior Court held in the case of *Re JTI-Macdonald Corp.* that, "a CCAA stay order...is to be used as a shield, not a sword."¹⁹ In other words, the CCAA stay is to be used to preserve the status quo, and not to

¹⁵ Houlden, L.W. and Geoffrey B. Morawetz. *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, available on Westlaw, at N§63, Cadillac Fairview's Brief of Authorities, at Tab 10.

¹⁶ 2009 BCCA 319, at para. 26, Cadillac Fairview's Brief of Authorities, at Tab 11.

¹⁷ [2010] 3 S.C.R. 379, at para. 60, Cadillac Fairview's Brief of Authorities, at Tab 12.

¹⁸ *Ibid.*, at para. 77.

¹⁹ 2005 CarswellOnt 1201, at para. 6, Cadillac Fairview's Brief of Authorities, at Tab 13. See also *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, at para. 33, Cadillac Fairview's Brief of Authorities, at Tab 14.

permit the debtor to change the status quo in its favour at the expense of the stayed parties, which is what Target Canada is seeking to do.

36. As discussed below, the relief sought by Target Canada is inconsistent with the objects of the Act. Accordingly, this Court cannot have a discretion in such circumstances; there is no jurisdiction - statutory, inherent or otherwise - to order an outcome that is so fundamentally at odds with the objects of the CCAA.

II. Augmentation of Inventory

37. On the specific issue of augmentation, it is the position of Cadillac Fairview that the augmentation of Target Canada merchandise that is to be sold in premises leased from Cadillac Fairview pursuant to the Agency Agreement with other non-Target Canada merchandise should not be permitted. To the extent that there is to be any augmentation, it should be limited in scope to the delivery of outstanding Target Canada orders from Target Canada's suppliers and any augmentation should be further limited in scale in order to prevent undue prejudice to Cadillac Fairview and its tenants that would otherwise result.

38. This Court has previously recognized that it is necessary to limit the scope and scale of augmentation in the restructuring or liquidation of retail companies.²⁰ In *Re T. Eaton Co.*, Justice Farley restricted the liquidation of augmented merchandise from leased premises as follows:

While it would include merchandise which has been purchased, it would not include merchandise which has not in fact been ordered. Even where there is a binding agreement between Eaton's and the supplier, the question would appear to be whether Eaton's could reasonably extricate itself from the obligation. However, augmentation merchandise would appear to include goods which have been effectively paid for, although not directly so — e.g. where Eaton's has provided a letter of credit from a financial institution to the supplier. It would also appear that where the supplier has labeled or otherwise fairly indelibly identified Eaton's on or with the goods to the objective observer, then these would be appropriate augmentation goods. In this analysis what we are looking at are goods which are Eaton's in the sense of beneficial title having passed even if the goods have not been paid for.

²⁰ *Re T. Eaton Co.*, [1999] O.J. No. 3277 at paras. 9-11 (Ont. S.C.J. [Commercial List]), Cadillac Fairview's Brief of Authorities, at Tab 15.

Eaton's would be contractually obligated to pay for such goods (subject of course to any mitigation). Thus while these goods would not be in Eaton's direct hands in the sense of their being in its stores or warehouses, these goods would be Eaton's responsibility.²¹

39. Likewise, in order to prevent undue prejudice to Cadillac Fairview and its tenants in the present case, it is necessary for the augmentation of merchandise to be limited. Subject to the foregoing and in keeping with its desire to be a constructive participant in Target Canada's CCAA case, Cadillac Fairview is prepared to work with Target Canada in order to arrive at a consensual arrangement in this respect.

(c) Agency Law

40. In addition to asking this Court to ignore clear contract and insolvency law, Target Canada is likewise asking this Court to ignore established agency law.

41. Target Canada is seeking to have this Court impose an outcome that is fundamentally inconsistent with agency law, one in which Target Canada's agents will have greater rights and powers that Target Canada itself has, as principal. Such a result would undermine the very foundations of agency law by permitting the agent to achieve results that are incapable of being achieved by the principal, as can be seen with reference to the Supreme Court of Canada's definition of agency in *R. v. Kelly*²²:

[28] In *The Law of Agency*, 5th ed. (London: Butterworths, 1983), Fridman suggests at p. 9 the following definition of agency:

Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [emphasis in original]

[29] The principal must be able to place trust and confidence in the agent since the agent has the authority to affect the legal position of the principal. This is perhaps the focus of the relationship. **In essence the agent acts to achieve the same results that would have been obtained if the principal had**

²¹ *Ibid.*, at para. 10.

²² [1992] 2 S.C.R. 170, Cadillac Fairview's Brief of Authorities, at Tab 16.

acted on his or her own account. The influence the agent can have on the affairs of the principal and the power to take action on behalf of the principal are significant. They are of such great significance that it follows as the night the day that the agent must always act in the best interests of the principal.²³ [emphasis added]

42. As a matter of Canadian agency law, it is a fundamental maxim that an agent can have no greater powers than those of the principal. The agency relationship only invests the agent with “a facsimile of the principal’s own power”.²⁴ Accordingly, permitting Target Canada’s agents to have greater rights and powers than Target Canada itself has, as principal, would be inconsistent with the Supreme Court of Canada’s definition of agency.

43. The authority of Target Canada’ liquidation agents is circumscribed by the terms of the existing Cadillac Fairview Leases to which Target Canada is a party, as the rights that are capable of being granted by Target Canada to the liquidation agent cannot be greater than the rights of Target Canada pursuant to the Cadillac Fairview Leases.

Issue B: In the event that this Court has the requisite authority to unilaterally amend the terms of the Cadillac Fairview Leases, this Court should decline to exercise such authority in the present case

44. Cadillac Fairview submits that this Court does not have the authority to approve unilateral changes to the Cadillac Fairview Leases. If this is to be found to be in error, it is necessary for Target Canada to:

- i) identify with specificity the basis of the Court’s authority; that is, the Court cannot have ambiguous statutory or inherent or “gap filling” jurisdiction in the face of such clear insolvency, contract and agency law, and Target Canada must identify the Court’s clear and unambiguous authority to depart from such clearly established law; and
- ii) identify both: (a) the relevant test that this Court is to consider in determining whether it is appropriate to exercise its jurisdiction to unilaterally amend the Cadillac Fairview Leases; and (b) the source of such test (i.e. rather than baldly

²³ *Ibid.*, at paras. 28-29.

²⁴ Fridman, Gerald. *Canadian Agency Law*, 2d ed. (Markham: LexisNexis Canada, 2012), at p. 13, Cadillac Fairview’s Brief of Authorities, at Tab 17.

asserting that a particular test ought to be applied, there must be some principled basis employed in identifying that test as being the relevant and appropriate test).

45. Even if this Court does have authority to do as requested by Target Canada, and irrespective of whatever test for the exercise of such discretion proposed by Target Canada, this Court should not exercise its discretion in this case for the following reasons:

- (a) extraordinary relief should only be granted where truly necessary, and there is no necessity in the present case;
- (b) as a defunct company, Target Canada's wishes should not be determinative; and
- (c) there is no evidence lead by Target Canada to support a finding that any reasonable test for the exercise of discretion has been met.

(a) The extraordinary relief sought by Target Canada is unnecessary

46. Where a Court is asked to do something extraordinary (including something fundamentally at odds with existing case law and for which there is no express statutory authority), it ought to be satisfied that there is a compelling case for such relief, not only as a matter of law but as a matter of practically. A Court ought not grant extraordinary relief that is not required.

47. This Court has overseen firsthand over a dozen retail liquidation proceedings under the CCAA in recent years (and there have been many other such cases before other courts across Canada). This Court has seen, time and time again, that:

- i) robust liquidations that benefit creditors may be carried out - and have been carried out - without the necessity of unilaterally rewriting and overriding leases, there being no precedent in these previous cases where such extraordinary relief was needed or granted;
- ii) the absence of this extraordinary relief in past cases has never led to chaos or curtailed the conduct of a successful liquidation process;
- iii) landlords have consistently behaved in a reasonable manner, consensually negotiating reasonable parameters on liquidation sales with debtors and liquidators, without the need for the courts to intervene; and

iv) a consensual, negotiated solution has in every case to date proven attainable.

In short, this Court has considerable reason to be confident based on prior similar cases that the relief sought by Target Canada is unnecessary, and that denying the relief sought will not adversely affect the liquidation process.

48. There are numerous protections and safeguards already in place in the within CCAA proceedings to ensure that a proper liquidation process may unfold, including without undue interference or distraction.

49. Most importantly, the Initial Order contains a broad stay of proceedings in favour of Target Canada. If, in the course of conducting a liquidation process, Target Canada or its agents breach any of its real property leases, the affected landlord is stayed from exercising any “self-help” remedies. Such affected landlord would: (a) engage in reasonable discussion with Target Canada, the Monitor and/or the liquidators, with a view to resolving the issue; and (b) failing such resolution, return to Court.

50. Importantly, if the terms of any of Target Canada’s leases prove to be at issue, and such issue cannot be resolved, the Court can be confident that the parties will return to the Court and that it, at that time - when these issues are ripe - may then decide what relief to grant, if any (including whether to refuse to lift the stay or to otherwise deny such landlord relief).

51. As this Court is well aware, in the many prior retail liquidation CCAA cases heard by this Court, the debtors, liquidators and landlords were consistently able to resolve their issues without a return to Court.

52. The existing stay of proceedings in favour of Target Canada is sufficiently broad so as to make the relief sought by Target Canada presently (i.e. a unilateral amendment of leases going forward) unnecessary. Accordingly, it would be improper for the Court to exercise its jurisdiction to grant unnecessary extraordinary relief.

(b) Discretion ought not be exercised at the behest of a defunct company

53. Cadillac Fairview submits that a Court, in deciding whether to exercise discretion to grant extraordinary relief, ought not to be swayed by the wishes of a defunct company such as Target Canada.

54. Though it is well-known that the CCAA affords courts broad discretionary powers, such powers, must, and do, have their limits. The Supreme Court of Canada in *Century Services*²⁵ expressed such limits as follows:

The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself. (citations omitted)²⁶

55. The Supreme Court of Canada also anchored the exercise of judicial authority under the CCAA to the remedial purposes of the Act:

The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.²⁷

56. In these proceedings, the purpose of permitting the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets²⁸ is

²⁵ *Supra.*, at note 17.

²⁶ *Ibid.*, at para. 64.

²⁷ *Ibid.*, at para 70.

²⁸ *Ibid.*, at para. 15.

spent: the debtor is not carrying on business and will never carry on business again with the resulting social and economic costs of liquidating its assets already being felt.

57. As a result, it would be inappropriate for the CCAA court to grant the relief sought by Target Canada on the basis of a purported discretion that cannot be reconciled to these purposes and underlying objects of the CCAA in the exercise of its statutory or inherent jurisdiction.

58. Furthermore, it is clear that Target Canada, as a defunct entity, has no legitimate interests in the conduct of its liquidation. If the within proceedings were a bankruptcy under the *Bankruptcy and Insolvency Act* rather than a disguised bankruptcy under the CCAA, there would be no doubt that Target Canada, as a bankrupt, had no personal interest in the outcome of the liquidation of its estate and would lack power or standing to direct or influence this process.

59. At best, and since it has no *bona fide* personal interest in this liquidation, Target Canada may purport to want the extraordinary relief that it is seeking because it will benefit: (a) Target U.S., its parent company; (b) the liquidators; or (c) other non-landlord creditors of Target Canada.

60. It is inappropriate for Target Canada to advocate a position on behalf of these other persons, and the Court ought not decide to exercise its discretion based on such position taken by Target Canada:

- i) **Target U.S.** Target U.S. is independently represented in these proceedings and its interests ought not be pursued by Target Canada. In any event, the interests of Target U.S. (including in respect of guarantees that it has given to many landlords) ought not to determine this issue and the exercise of the Court's discretion.
- ii) **Liquidators.** Undeniably, the liquidators stand to make greater profit from the demise of Target Canada should they be able to circumvent Target Canada's leases. The Court ought not to be swayed in granting the extraordinary relief sought by Target Canada by the desire for greater profits by liquidators, and the interests of the liquidators in making money in no circumstances should be given priority over the interests of one of the largest - if not the largest - creditor groups, being the landlords of Target Canada.

- iii) **Non-Landlord Creditors.** A significant number of non-landlord creditors of Target Canada are represented in these proceedings. As of the writing of this Factum, not one such creditor has advocated on the record in favour of unilateral amendments to the leases as benefitting such person. If any non-landlord creditor believes that its interests would be best served by unilateral amendments to the leases, it is incumbent that they come forward and advocate in favour of this position. It is not appropriate that Target Canada, a defunct company, purport to advocate for extraordinary relief on their behalf. A bankrupt company would have no such standing to influence the exercise of the Court's discretion. If there is to be any "weighing of interests" applied in the Court's consideration of a possible exercise of its discretion, the interests to be weighed are those of the landlords and the other creditors. Target Canada has no interests to be weighed.

(c) Even if there were a test, there is no evidence to support a finding that any reasonable test has been met

61. Because the approval of unilateral contractual amendments is unprecedented, the Court would be required to articulate the basis for its authority to approve the amendments, the test that must be met, and the evidence supporting the conclusion that the test has been satisfied. Because of the dearth of evidence on these points, the present case does not lend itself to the enunciation of a precedential test.

62. It is not clear what test Target Canada is advocating be applied by this Court in determining whether to exercise its discretion (e.g. a balancing of interest? some fairness and/or reasonability test? etc.). Regardless, whatever test is appropriate, Target Canada has failed to meet such test and to provide the Court with sufficient evidence as to its meeting the test.

63. At a minimum, whatever test is applied, the Court ought not to exercise its discretion in a manner that is inconsistent with the objects and policies underlying the CCAA. A disguised bankruptcy conducted under the CCAA is already fundamentally inconsistent with the objects of the Act. Further, as noted above, another fundamental object of the Act is to preserve the status quo for a temporary period of time. Given how inconsistent the relief sought by Target Canada is with the objects of the Act, there is no basis on which the Court ought to find it appropriate to exercise its discretion in favour of Target Canada.

64. Whichever test is used, there is no reasonable basis on which to conclude that the approval should be granted. Liquidations have been conducted for the benefit of bankrupt and liquidating estates for many years without any demonstrated need for the unilateral amendment of contractual terms. The basis on which such relief is being sought in the present case is that it would yield a more valuable contract for the debtor, which has never been a permitted justification for this type of relief before. The unilateral amendment of the Cadillac Fairview Leases in the manner sought by Target Canada would be unprecedented and, even if this Court has the authority to approve such amendment, the Court should not exercise its discretion in this case.

Issue C: The Stay of Proceedings should not be extended at this time

65. Target Canada has not met its burden under the test for an extension of the Stay of Proceedings and, in any event, it is premature to extend the Stay of Proceedings at this time. The Stay of Proceedings provided for in the Initial Order is set to expire on February 13, 2015. The Initial Order also provided for a Comeback Hearing to be held on February 11, 2015. Target Canada now seeks to pre-empt this Court-ordered schedule of events by moving on February 4, 2015, for an extension of the Stay of Proceedings to May 15, 2015.

66. Pursuant to Section 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company or debtor companies where:

- (a) circumstances exist that make the order appropriate; and
- (b) the applicant has acted and is acting in good faith and with due diligence.²⁹

(a) The circumstances do not warrant an extension of the Stay of Proceedings

67. The circumstances do not exist to warrant the extension of the Stay of Proceedings in the present case at the present time. There is a Comeback Hearing scheduled for February 11, 2015, that is meant to be a “true” Comeback Hearing in accordance with the Endorsement. It would be fundamentally unfair to approve a lengthy extension of the Stay of Proceedings before the date of the Comeback Hearing if it is to be a true Comeback Hearing.

²⁹ CCAA, section 11.02.

68. In addition, there is no prejudice to Target Canada in waiting until the Comeback Hearing on February 11, 2015, particularly given that the hearing is already scheduled and no additional cost would be incurred. The Stay of Proceedings is a live issue that will be discussed during the hearing on February 11, 2015, and the Comeback Hearing would be undermined if an extension were granted at this time. In addition, an extension of the stay at the present time presupposes that a CCAA case is appropriate in the present case and would have the result of pre-determining any applications that are to be brought at the Comeback Hearing to move this case to a bankruptcy prior to parties having the opportunity to tender evidence on this point. This is a matter better left to the Comeback Hearing.

69. The granting of an approval for the liquidation of Target Canada's estate does not necessitate or make appropriate the granting of a corresponding extension of the CCAA stay. Should the CCAA stay ultimately not be extended and a bankruptcy ensue, that same liquidation process would presumably be conducted in the bankruptcy process. The Court may commit to a liquidation process at this time without also committing to a continuation of the CCAA process.

(b) It is premature to determine whether or not Target Canada has acted and is acting in good faith and with due diligence

70. It is premature at this time to determine whether or not the applicant has acted and is acting in good faith and with due diligence. Such a determination requires an analysis of Target Canada's conduct to date. Since only a short time has elapsed since the Initial Order was granted, this analysis would be better left to the Comeback Hearing when this Court will have the benefit of additional evidence in this regard. The basis for such a determination would only be strengthened by following the existing Court-ordered schedule of events and waiting until February 4, 2015, to make such a determination, as there will be a more complete record before this Court at that time, including, among other things, potential evidence with respect to the appropriateness of Target Canada's liquidation proceeding as a bankruptcy as opposed to a CCAA case and greater visibility of the positions of other parties in interest with respect to the myriad issues engaged by the Initial Order.

PART V – RELIEF REQUESTED

71. For the reasons set forth herein, Cadillac Fairview respectfully requests that this Court:

- (a) strike the provisions of the Process Approval and Stay Extension Orders that purport to unilaterally amend the terms of the Cadillac Fairview Leases; and
- (b) decline to extend the Stay of Proceedings at the present time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2015.



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Limited and its affiliates

**SCHEDULE “A”
LIST OF AUTHORITIES**

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Re Target Canada Co., CV-15-10832-00CL, Endorsement of Morawetz RSJ, January 16, 2015.

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SCHEDULE “B” RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

RESPONDING FACTUM OF
THE CADILLAC FAIRVIEW CORPORATION
LIMITED AND ITS AFFILIATES
(Motion for Process Approval and
Stay Extension Orders)
(Returnable on February 4, 2015)

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