

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**

APPLICANTS

FACTUM OF THE APPLICANTS

**(Motion to Accept Filing of the Amended Plan
and Authorize Creditors' Meeting)**

April 8, 2016

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PART I - NATURE OF THIS MOTION

1. Target Canada Co. ("TCC") and the other applicants listed above (the "**Applicants**") and certain Partnerships (collectively, the "**Target Canada Entities**") obtained relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by an Initial Order dated January 15, 2015, as amended (the "**Initial Order**"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this CCAA proceeding. The Initial Order granted a stay of proceedings until February 13, 2015. The Stay Period, as defined in the Initial Order, was later extended seven times, most recently on March 14, 2016 to April 15, 2016.

2. This factum is filed in support of the Applicants' motion to file their Amended and Restated Joint Plan of Compromise and Arrangement dated April 6, 2016 (the "**Amended Plan**") and to obtain an order of this Court (the "**Meeting Order**") authorizing the Applicants to hold a meeting of their Affected Creditors.

3. If approved by the requisite majority of Affected Creditors at the proposed Creditors' Meeting and sanctioned by this Court, the Amended Plan will complete the orderly wind down of the businesses of the Target Canada Entities in a timely manner, without costly and lengthy litigation. In addition, it will effect a compromise, settlement and payment of all Proven Claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

4. Target Corporation is the Plan Sponsor of the Amended Plan, as it was of the Joint Plan of Compromise and Arrangement dated November 27, 2015 (the "**Original Plan**") that the Target Canada Entities sought to file with the Court in late 2015. The Amended Plan preserves Target Corporation's agreement to subordinate billions in Intercompany Claims to the claims of other Affected Creditors.

5. If the Amended Plan is implemented, and as a direct result of the very significant economic contributions that Target Corporation has made as Plan Sponsor, the Applicants expect that all Persons with an economic interest in the Target Canada Entities will derive a greater benefit from the Amended Plan than would result from a bankruptcy. Based on the Monitor's updated preliminary analysis, and subject to certain important limitations and caveats set out in the Meeting Order Affidavit and prior Monitor's reports, the Target Canada Entities expect that all Affected Creditors (other than Convenience Class Creditors, Landlord Guarantee Creditors and Landlord Non-Guarantee Creditors) will receive approximately **68% to 78%** of their Proven Claims under the Amended Plan.

6. The Amended Plan is materially different in certain key respects from the Original Plan. In particular, through extensive negotiation, the Landlord Guarantee Creditors and Target Corporation, with the assistance of the Target Canada Entities and the Monitor, have reached a comprehensive agreement to resolve all Landlord Guarantee Claims, conditional, among other things, upon approval and implementation of the Amended Plan. This agreement, which is outside the Amended Plan, will contractually release Target Corporation and others from the Landlord Guarantee Claims.

7. Therefore, although the Amended Plan contains a release of Target Corporation as part of the global resolution of all matters related to the Target Canada Entities, this release does not cover Landlord Guarantee Claims, which are addressed by separate contract. The implementation of the Amended Plan, if approved, will comply with paragraph 19A of the Initial Order and this Court will not be asked to amend or vary paragraph 19A.

8. This Court has the jurisdiction to grant the Meeting Order and should exercise its discretion to do so. The Applicants clearly satisfy the legal requirements to permit them to hold the Creditors' Meeting and to seek the Affected Creditors' approval of the Amended Plan. The Target Canada Entities should be entitled to place the Amended Plan before the Affected Creditors and allow them to exercise their business judgment in determining whether to support it.

9. Based on these considerations, and the submissions below, as well as the Monitor's recommendation, the Applicants submit that the proposed Meeting Order, in the form set out in the Applicants' Motion Record, should be granted.

PART II - FACTS

10. The facts with respect to this motion are more fully set out in the Meeting Order Affidavit of Mark J. Wong.¹ Capitalized terms in this Factum not otherwise defined have the same meanings as in the Meeting Order Affidavit.

The Original Plan

11. On November 27, 2015, the Target Canada Entities brought a motion seeking, *inter alia*, to file the Original Plan and authorizing the Target Canada Entities to call and hold a creditors' meeting to vote on it.² The motion was heard on December 21 and 22, 2015. Representatives of the Objecting Landlords, who were principally Landlord Guarantee Creditors, opposed the motion.³

12. This Court dismissed the motion on January 13, 2016, and released an Endorsement on January 15, 2016. Among other things, this Court held that filing the Original Plan would violate paragraph 19A of the Initial Order by seeking to compromise the Landlord Guarantee Claims without the consent of such affected Landlords.⁴

Development of the Amended Plan

13. Immediately after the January 15 Endorsement was issued, the Target Canada Entities continued their discussions with the Landlords in an effort to develop a framework for a consensual resolution that would preserve Target Corporation's agreement to maintain the

¹ Affidavit of Mark J. Wong, sworn April 6, 2016 [Meeting Order Affidavit].

² The details of the process by which the Original Plan was developed and the events leading up to the filing of the Original Plan on November 27, 2015 are set out in the Affidavit of Mark J. Wong, sworn on November 27, 2015.

³ Meeting Order Affidavit, para. 18.

⁴ Meeting Order Affidavit, para. 19.

subordination contained in the Original Plan, while at the same time addressing the Objecting Landlords' concerns and complying with the January 15 Endorsement.⁵

14. At a case conference on February 1, 2016, the Target Canada Entities proposed a timetable for achieving a consensual global resolution with the Landlords and, if successful, for obtaining approval of an amended and restated plan. The timetable contemplated that unless the Target Canada Entities had executed the necessary agreements with each of the Landlords by March 4, 2016, the Target Canada Entities would transition to an alternative bankruptcy process.⁶

15. Over the course of late January and early February, 2016, the Target Canada Entities developed a non-binding, confidential Term Sheet setting out their proposed framework for a global consensual resolution of these CCAA proceedings. Throughout February, the Target Canada Entities then sought input on the Term Sheet from the Monitor, Landlord Guarantee Creditors, Landlord Non-Guarantee Creditors, Target Corporation and the Consultative Committee.⁷

16. On March 4, 2016, following weeks of extensive discussion and negotiation with the assistance of the Monitor, TCC announced that agreements had been entered into with all of the Landlord Guarantee Creditors and all of the Landlord Non-Guarantee Creditors. TCC also announced that the Monitor and the Consultative Committee Members support the filing of the Amended Plan.⁸

⁵ Meeting Order Affidavit, para. 20.

⁶ Meeting Order Affidavit, para. 22.

⁷ Meeting Order Affidavit, paras. 23 and 24. The Amended Plan has been refined to incorporate changes of a technical nature since the date of the Term Sheet (with the result that the Term Sheet has been superseded and is reflected in the terms of the Amended Plan), but these changes are not material.

⁸ Meeting Order Affidavit, paras. 26 and 54.

Overview of the Amended Plan

17. The primary features of the Amended Plan are summarized in the Meeting Order Affidavit.⁹ Some of the more significant features include:

- (a) A single class of Affected Creditors will consider and vote on the Amended Plan.¹⁰
- (b) As with the Original Plan, the Amended Plan has been designed to isolate and address Claims against Propco and Property LP, on one hand, and TCC and the remaining Target Canada Entities on a consolidated basis, on the other.¹¹
- (c) Affected Creditors with Proven Claims that are less than or equal to \$25,000 (“**Convenience Class Creditors**”) will be paid the full amount of their Proven Claims. Affected Creditors with Proven Claims in excess of \$25,000 can elect to be treated for all purposes as Convenience Class Creditors.¹²
- (d) Landlord Guarantee Creditors will be paid 100% of their Proven Claims by TCC. In addition, Landlord Guarantee Creditors will be paid a Landlord Guarantee Enhancement Amount, as provided for in the Landlord Guarantee Creditor Settlement Agreement, described below.¹³
- (e) Landlord Non-Guarantee Creditors will be paid, in addition to their Pro Rata Share of their Proven Claims, a Landlord Non-Guarantee Creditor Equalization Amount.

⁹ Meeting Order Affidavit, paras. 55-67.

¹⁰ Meeting Order Affidavit, para. 4.

¹¹ Meeting Order Affidavit, paras. 46 and 56(a).

¹² Meeting Order Affidavit, paras. 56(d) and 60.

¹³ Meeting Order Affidavit, para. 62. Landlord Guarantee Claims are Unaffected Claims under the Amended Plan: Meeting Order Affidavit, para. 43.

This payment is intended to provide Landlord Non-Guarantee Creditors with equivalent economic treatment to the treatment they received under the Original Plan. The Landlord Non-Guarantee Creditor Equalization Cash Pool is funded by Target Corporation and will not dilute recoveries for other Affected Creditors.¹⁴

- (f) As consideration for Target Corporation's significant economic contributions throughout these CCAA proceedings and under the Amended Plan, Target Corporation, the HBC Entities and other third parties will also be released and discharged from all Claims, except for the Landlord Guarantee Claims.¹⁵

18. The Amended Plan has several significant changes from the Original Plan.¹⁶ Most notably, in order to comply with the Court's January 15 Endorsement, the Landlord Guarantee Creditors and Target Corporation have reached a comprehensive agreement outside of the Amended Plan that will resolve all Landlord Guarantee Claims and contractually release Target Corporation and others from the Landlord Guarantee Claims. As a result of this agreement, Target Corporation will not receive a release under the Amended Plan in respect of the Landlord Guarantee Claims. The settlement of the Landlord Guarantee Claims is conditional on the approval and implementation of the Amended Plan.¹⁷

19. In the Original Plan, subject to the assumptions and qualifications set out in the Monitor's Twenty-Third Report, the Monitor estimated a range of recovery of approximately

¹⁴ Meeting Order Affidavit, paras. 25(e), 49 and 61.

¹⁵ Meeting Order Affidavit, para. 56(h).

¹⁶ For a detailed discussion of the changes between the Original Plan and the Amended Plan, see Meeting Order Affidavit, paras. 41-54.

¹⁷ Meeting Order Affidavit, paras. 10-11.

75.3% to 85.3% for Affected Creditors with Proven Claims. As set out above, the Monitor's updated illustrative range of recovery is approximately **68% to 78%**, resulting in an estimated reduction of approximately **7%** from the Original Plan, subject to the important assumptions and qualifications set out in certain of the prior Monitor's reports, including the Monitor's Twenty-Third Report. The reduction is primarily as a result of the enhancement to Landlord Guarantee Creditors borne by the Affected Creditors (through the re-contribution by Plan Sponsor of \$34.081 million to the Landlord Guarantee Enhancement Cash Pool) required to reach consensual resolution with the Landlord Guarantee Creditors and comply with paragraph 19A of the Initial Order and the January 15 Endorsement.¹⁸

Comprehensive Settlement Agreements to Resolve Landlord Claims

20. The global resolution negotiated with the Landlord Guarantee Creditors and the Landlord Non-Guarantee Creditors of the Target Canada Entities involved tough, complex negotiations and the execution of dozens of agreements with 33 different landlord groups in respect of 89 leases in a very short time span.¹⁹ The key agreements are described below.

i. The Landlord Guarantee Creditor Settlement Agreement

21. The Landlord Guarantee Creditor Settlement Agreement, executed as of March 4, 2016, is an agreement among Target Corporation and each of the Landlord Guarantee Creditors that settles the Landlord Guarantee Claims outside of the Amended Plan in accordance with paragraph 19A of the Initial Order. The settlement applies to 37 disclaimed leases that were guaranteed directly or indirectly by Target Corporation. TCC is not a party to the agreement.²⁰

¹⁸ Meeting Order Affidavit, para. 25(f).

¹⁹ Meeting Order Affidavit, para. 27.

²⁰ Meeting Order Affidavit, para. 28. A redacted copy of the Landlord Guarantee Creditor Settlement Agreement, without schedules, is attached as Exhibit "E" to the Meeting Order Affidavit.

However, the Target Canada Entities, together with the Monitor, organized and facilitated the process by which 10 different sets of landlord counsel, representing landlords holding these 37 disclaimed leases, executed the Landlord Guarantee Creditor Settlement Agreement with Target Corporation.²¹

22. Under the Landlord Guarantee Creditor Settlement Agreement, Landlord Guarantee Creditors will receive payments from two cash pools, in full settlement of their Landlord Guarantee Claims and Affected Claims. This represents enhanced recovery relative to the recoveries available to Landlord Guarantee Creditors under the Original Plan.²²

23. Landlord Guarantee Creditors will receive their Landlord Guarantee Creditor Base Claim Amounts from the Landlord Guarantee Creditor Base Claim Cash Pool, which will be established on the Plan Implementation Date from TCC's Cash.²³ They will receive their Landlord Guarantee Enhancement Amounts from the Landlord Guarantee Enhancement Cash Pool, payment of which will be facilitated through the Amended Plan with funds contributed by Target Corporation, as Plan Sponsor.²⁴

²¹ Monitor's Twenty-Sixth Report, para. 3.3.

²² Monitor's Twenty-Sixth Report, para. 3.5.

²³ Meeting Order Affidavit, paras. 29 and 45. See also Monitor's Twenty-Sixth Report, para. 4.6.

²⁴ Meeting Order Affidavit, paras. 29 and 47-48. The entire \$59.532 million is funded or contributed by the Plan Sponsor as follows: (1) before the Plan Implementation Date, the Plan Sponsor will contribute \$25.451 million in cash to be deposited into the Landlord Guarantee Enhancement Cash Pool; and (2) the Plan Sponsor will direct TCC to deposit \$34.081 million into the Landlord Guarantee Enhancement Cash Pool from amounts payable to the Plan Sponsor in respect of Intercompany Claims. Under the Original Plan, this \$34.081 million would have been paid into the TCC Cash Pool for the benefit of all Affected Creditors.

24. Each Landlord Guarantee Creditor agrees to vote all of its Claims in favour of the Amended Plan and to consent to the motions by the Target Canada Entities seeking the Meeting Order and Sanction and Vesting Order.²⁵

25. Each Landlord Guarantee Creditor will execute and deliver to TCC an Acknowledgement and Direction that consensually resolves its Proven Claims in the CCAA proceedings in accordance with the Claims Procedure Order.²⁶

26. The Landlord Guarantee Creditor Settlement Agreement provides for a full and final contractual release in favour of Target Corporation and all predecessors in interest to the Target Canada Entities, including the HBC Entities, from the Landlord Guarantee Claims.²⁷

ii. The Landlord Non-Guarantee Creditor Consent and Support Agreements

27. TCC executed 31 individual and identical Landlord Non-Guarantee Creditor Consent and Support Agreements each dated March 4, 2016 with 22 different landlord groups in respect of 52 leases that were disclaimed during this CCAA proceeding and were not guaranteed by Target Corporation. These leases include 38 store leases and 14 office and warehouse leases.²⁸

28. Each Landlord Non-Guarantee Creditor Consent and Support Agreement provides for settlement of the Landlord's Proven Claims in accordance with the Claims Procedure Order.²⁹

²⁵ Meeting Order Affidavit, para. 30.

²⁶ Meeting Order Affidavit, para. 31.

²⁷ Meeting Order Affidavit, para. 30(d).

²⁸ Meeting Order Affidavit, para. 34. A redacted copy of a Landlord Non-Guarantee Creditor Consent and Support Agreement, without schedules, is attached as Exhibit "F" to the Meeting Order Affidavit.

²⁹ Meeting Order Affidavit, para. 35(a). The Landlord Formula Amount that was the basis for valuing Landlord Restructuring Period Claims under the Original Plan is no longer used, as the value of the Landlord Restructuring Period Claims, together with the value of all Landlords' Pre-Filing Claims have been consensually resolved, with the assistance of the Monitor, in accordance with the Claims Procedure Order: Meeting Order Affidavit, para. 42.

The agreement also provides for the payment of the Landlord Non-Guarantee Creditor Equalization Amount on the Initial Distribution Date, which is intended to provide equivalent economic treatment to Landlord Non-Guarantee Creditors to the treatment they would have received under the Original Plan.³⁰

29. Each Landlord agrees to vote all of its Claims in favour of the Amended Plan and to consent to the motions by the Target Canada Entities seeking the Meeting Order and Sanction and Vesting Order.³¹

30. The Landlord Guarantee Creditor Settlement Agreement and the Landlord Non-Guarantee Creditor Consent and Support Agreements are conditional upon (*inter alia*) the Amended Plan's approval by the Affected Creditors, sanction by the Court, and implementation by certain deadlines.³²

iii. The Plan Sponsor Agreement

31. The Plan Sponsor Agreement between Target Corporation and TCC has been executed and contains Target Corporation's commitment to fund various contributions into the Amended Plan, including funding for the Landlord Guarantee Enhancement Cash Pool and the Landlord Non-Guarantee Creditor Equalization Cash Pool.³³

³⁰ Meeting Order Affidavit, para. 35(b).

³¹ Meeting Order Affidavit, para. 35.

³² Meeting Order Affidavit, para. 37.

³³ Meeting Order Affidavit, para. 38. A copy of the Plan Sponsor Agreement is attached as Exhibit "G" to the Meeting Order Affidavit.

Material Contributions of Target Corporation as Plan Sponsor

32. An essential part of the Amended Plan is the involvement of Target Corporation as Plan Sponsor. Target Corporation is by far the largest single creditor of the Target Canada Entities and Target Corporation's involvement as Plan Sponsor will result in significantly higher recoveries to Affected Creditors than they would receive in bankruptcy proceedings. Target Corporation has made it clear that Target Corporation would not agree to the subordination of its material Intercompany Claims in bankruptcy proceedings.³⁴

33. In particular, in addition to the subordination of the \$3.1 billion NE1 Intercompany Claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, Target Corporation will, on the Plan Implementation Date, permit the subordination of the Propco Intercompany Claim and certain other Intercompany Claims. Target Corporation will contribute the funds necessary to pay the Landlord Guarantee Enhancement Amounts and Landlord Non-Guarantee Creditor Equalization Amounts.³⁵

34. Target Corporation has made other important contributions to the success of this CCAA proceeding, including: (a) making available DIP financing to TCC to meet payroll and other obligations; (b) funding the Employee Trust in the amount of \$95 million (effectively removing employee termination claims from the estate); and (c) providing ongoing shared services to facilitate the orderly wind down.³⁶

³⁴ Meeting Order Affidavit, para. 14.

³⁵ Meeting Order Affidavit, paras. 13 and 56. See also Monitor's Twenty-Sixth Report, paras. 3.5, 4.2 and 4.7 for further details regarding the subordination of Intercompany Claims and the quantum of Target Corporation's economic contribution to fund the Landlord Guarantee Enhancement Amount and the Landlord Non-Guarantee Creditor Equalization Amount.

³⁶ Meeting Order Affidavit, para. 12.

35. Based on these very significant contributions that will result in materially higher economic recoveries for Affected Creditors, the Amended Plan provides that Target Corporation will receive a full and final release of all matters relating to the Target Canada Entities, except for the Landlord Guarantee Claims (which are being addressed outside of the Amended Plan, in accordance with the January 15 Endorsement).³⁷

Projected Plan Recoveries

36. Based on the updated information from the Monitor (and subject to certain important limitations and caveats set out in the Meeting Order Affidavit and certain of the prior Monitor's reports), the Target Canada Entities expect that Affected Creditors will be paid approximately **68% to 78%** in respect of their Proven Claims.³⁸ Notable exceptions include:

- (a) Convenience Class Creditors, who will be paid the lesser of: (a) 100% of their Proven Claims; and (b) \$25,000, on the Initial Distribution Date.³⁹
- (b) Landlord Guarantee Creditors, who will be paid 100% of their Proven Claims on the Initial Distribution Date, as well as receiving the Landlord Guarantee Enhancement Amounts pursuant to the Landlord Guarantee Creditor Settlement Agreement.⁴⁰

³⁷ Meeting Order Affidavit, para. 12.

³⁸ Meeting Order Affidavit, para. 7. See also Monitor's Twenty-Sixth Report, paras. 3.6 and 6.2.

³⁹ Monitor's Twenty-Sixth Report, para. 4.6.

⁴⁰ Meeting Order Affidavit, footnote 2.

- (c) Landlord Non-Guarantee Creditors, who are expected to receive a slightly higher percentage of their Proven Claims than other Affected Creditors as a result of receiving their Landlord Non-Guarantee Creditor Equalization Amounts.⁴¹

Proposed Creditors' Meeting

37. The Meeting Order authorizes the Target Canada Entities to convene a meeting of a single class of all Affected Creditors to consider and vote on the Amended Plan.⁴²

38. The Meeting Order provides for comprehensive notification of the Creditors' Meeting to the Affected Creditors, as set out more fully in the Meeting Order Affidavit.⁴³ The Target Canada Entities also intend to send a "Letter to Creditors" to the Affected Creditors that provides an overview of the Amended Plan and its mechanics, to help them understand it.⁴⁴

39. Voting will be in accordance with the procedures set out in the Meeting Order, as summarized in the Meeting Order Affidavit.⁴⁵ Notably:

- (a) Affected Creditors with a Voting Claim will be entitled to one vote at the dollar value of their Voting Claim.

⁴¹ Meeting Order Affidavit, footnote 3. Landlord Non-Guarantee Creditors are expected to receive a slightly higher percentage recovery on their Affected Claims – likely in the range of 72% to 82% of their Affected Claims based on the updated information from the Monitor – as a result of receiving their respective Landlord Non-Guarantee Creditor Equalization Amounts. The Landlord Non-Guarantee Creditor Equalization Amounts are provided by Target Corporation and would not dilute recoveries of other Affected Creditors: see Monitor's Twenty-Sixth Report, para. 3.7.

⁴² Meeting Order Affidavit, para. 70.

⁴³ Meeting Order Affidavit, para. 71. See also Monitor's Twenty-Sixth Report, paras. 7.3 to 7.6.

⁴⁴ Meeting Order Affidavit, para. 9.

⁴⁵ Meeting Order Affidavit, paras. 74(a)-(h).

- (b) Affected Creditors holding Disputed Claims will be entitled to one vote at the dollar value set out in the Notice of Revision and Disallowance issued by the Monitor to the Affected Creditor. The Monitor will tabulate these votes separately for the purpose of reporting to the Court at the Plan Sanction Hearing.
- (c) Each Convenience Class Creditor is deemed to have voted in favour of the Amended Plan.
- (d) Canada Revenue Agency, which filed “marker claims” for unliquidated or unknown amounts, will have one vote in respect of Disputed Claims, the dollar value of which shall be equal to \$1.
- (e) Certain Persons, including Persons holding Unaffected Claims or Intercompany Claims, are not entitled to vote on the Amended Plan. Target Corporation is not entitled to vote in respect of its Plan Sponsor Subrogated Claims, any Cash Management Lender Claim held by it, or any amounts to be contributed to the Landlord Guarantee Enhancement Cash Pool and to the Landlord Non-Guarantee Creditor Equalization Cash Pool under the Amended Plan.

PART III - ISSUES AND THE LAW

40. The issue on this motion is:

- (a) Should this Honourable Court grant the requested Meeting Order?

This Court Has Jurisdiction to Grant the Meeting Order

41. Section 4 of the CCAA expressly contemplates the calling of a meeting of the unsecured creditors of a company to consider and vote on a plan proposing a compromise of the claims of those creditors:

Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders or the company to be summoned in such manner as the court directs.⁴⁶

42. The threshold to be satisfied in order to file a plan and call a meeting of creditors is low. As the Ontario Court of Appeal held in *Nova Metal Products*, the feasibility of a plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors. However, the Court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset.⁴⁷

43. The Court is not required to address the fairness and reasonableness of the Amended Plan at this stage. Unless it is obvious that a plan would not be approved by the affected creditors, a debtor company should be authorized to present its plan to its creditors at a meeting.⁴⁸

44. This Court's decision not to order a meeting of the creditors to consider the Original Plan was based primarily on the finding that the Original Plan violated paragraph 19A of the Initial Order by seeking to compromise the Landlord Guarantee Claims without the consent of such affected Landlords. In the January 15 Endorsement, this Court stated:

Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.⁴⁹

⁴⁶ CCAA, s. 4.

⁴⁷ *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (W.L. Can.) (C.A.) at para. 90.

⁴⁸ *Re ScoZinc*, 2009 NSSC 163 at para. 7.

⁴⁹ *Re Target Canada Co.*, 2016 ONSC 316 at para. 76.

45. The Amended Plan complies with the January 15 Endorsement (and paragraph 19A of the Initial Order) by fully settling the Landlord Guarantee Claims outside the Amended Plan. In addition, the Amended Plan and related settlement agreements make certain other changes relative to the Original Plan that are designed to balance stakeholder interests.

46. As submitted above, the CCAA Court has the jurisdiction to grant the Meeting Order. The primary obstacle to granting the proposed Meeting Order that was the basis for the January 15 Endorsement no longer exists. Furthermore, the Target Canada Entities submit that, not only is there is no basis for concluding that the Amended Plan has no hope of success (the low threshold established in the meeting order jurisprudence), there is a reasonable basis for believing that the Amended Plan can achieve the approval of the requisite majority of Affected Creditors and if such approval is obtained, the sanction of this Court.

47. The Monitor recommends that the Court grant the proposed Meeting Order.⁵⁰ Every Landlord Guarantee Creditor and every Landlord Non-Guarantee Creditor has agreed to vote for the Amended Plan. The Consultative Committee supports the filing of the Amended Plan. The Applicants submit that this Court should exercise its discretion to grant the proposed Meeting Order.

The Affected Creditors Are Appropriately Classified for Voting Purposes

48. If the Meeting Order is granted, all of the Affected Creditors will vote in the Unsecured Creditors' Class at the Creditors' Meeting. All of the Affected Creditors under the Amended Plan have unsecured claims against the Target Canada Entities.

⁵⁰ Monitor's Twenty-Sixth Report, para. 11.1.

49. Section 22(1) of the CCAA provides that:

A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to a company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.⁵¹

50. Section 22(2) of the CCAA sets out the factors that are to be taken into account in placing creditors in the same class. Creditors may be included in the same class if their interests are sufficiently similar to give them a commonality of interest, taking into account (*inter alia*) the nature of the debts, liabilities or obligations giving rise to their claims, as well as the remedies available to those creditors in the absence of the compromise or arrangement being sanctioned and the extent to which those creditors would recover their claims by exercising those remedies.⁵²

51. These criteria, which were added as part of the 2009 amendments to the CCAA, codify factors considered in case law pre-dating these amendments.⁵³ Under this case law, it is well-established that the starting point when considering classification of creditors must be the objectives of the CCAA and its purpose of facilitating the restructuring of debtor companies. This purpose must be considered at every stage of the proceeding, including classification.⁵⁴

52. In *Canadian Airlines*, Paperny J., as she then was, summarized the principles applicable to the classification of creditors as follows:

In summary, the cases establish the following principles applicable to assessing commonality of interest:

⁵¹ CCAA, s. 22(1).

⁵² CCAA, s. 22(2).

⁵³ Houlden & Morawetz, *The 2015-2016 Annotated Bankruptcy and Insolvency Act*, N§149.

⁵⁴ *Re SemCanada Crude Co.*, 2009 CarswellAlta 1269 (Q.B.) [*SemCanada Crude*] at para. 16, citing *Re Canadian Airlines Corp.*, (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.) [*Canadian Airlines*] at para. 14.

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests the creditor holds *qua* creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.⁵⁵

53. Classification is a fact-specific determination that must be evaluated in the unique circumstances of every case. The exercise must be approached with the flexible and remedial jurisdiction of the CCAA in mind.⁵⁶

54. “Commonality of interest” does not mean “identity of interest”.⁵⁷ “Commonality of interest” is based on the principle that a class consists of those persons whose interests are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.⁵⁸ It is a non-fragmentation test designed to facilitate, rather than hinder, the restructuring.

⁵⁵ *Canadian Airlines*, para. 31.

⁵⁶ *Canadian Airlines*, para. 18.

⁵⁷ *Canadian Airlines*, para. 20, citing *Re Norcen Energy Resources Ltd.* (1988), 72 C.B.R. (N.S.) 20 (W.L. Can.) (Alta. Q.B.) at paras. 46 and 49.

⁵⁸ *Canadian Airlines*, para. 17, citing *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.) at p. 583.

55. Creditors with different legal rights can be included within the same class, as long as their interests are not so dissimilar that they cannot vote with a common interest.⁵⁹

56. Presumptively, the fact that all of the Affected Creditors under the Amended Plan have unsecured claims against the Target Canada Entities favours the placement of such creditors in the Unsecured Creditors' Class. As Farley J. noted in *Stelco*:

...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.⁶⁰

57. There is ample precedent for including landlords in the same class as ordinary unsecured creditors and all landlords with disclaimed leases have agreed to this treatment.⁶¹ Moreover, creditors within the same class may receive a higher share of distributions than other creditors in the same class without affecting commonality of interest and requiring separate classification.⁶² Thus, the fact that Landlord Guarantee Creditors will be paid 100% of their Proven Claims and receive enhanced recoveries under the Landlord Guarantee Creditor Settlement Agreement does not require them to be placed in a separate class.

58. Nor does the entitlement of the Landlord Non-Guarantee Creditors to the Landlord Non-Guarantee Equalization Amounts affect classification. The Landlord Non-Guarantee Equalization Amounts are funded by Target Corporation, as Plan Sponsor, not the Target Canada

⁵⁹ *Canadian Airlines*, para. 25, citing *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.). See also *Canadian Airlines*, para. 31.

⁶⁰ *SemCanada Crude*, citing *Re Stelco Inc.*, 2005 CarswellOnt 6483 at para. 13, aff'd 2005 CarswellOnt 6818 (C.A.).

⁶¹ See, for example, *Re San Francisco Gifts*, 2004 ABQB 705 at para. 16, citing *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, 1991 CarswellOnt 220 (Gen. Div.) and *Re Armbrö Enterprises Inc.*, 1993 CarswellOnt 241 (Gen. Div.).

⁶² *SemCanada Crude*, para. 26.

Entities.⁶³ In all respects, their legal interests in relation to the Target Canada Entities are sufficiently similar to those of the other Affected Creditors that they should be placed in the same class with all other Affected Creditors.

59. The Target Canada Entities therefore submit that this Court should approve the voting of Affected Creditors in a single unsecured Class.

Establishing a Convenience Class of Creditors is Appropriate

60. The Amended Plan establishes a “Convenience Class” of creditors who will receive 100% recovery of their Proven Claims and be deemed to vote in favour of the Amended Plan.⁶⁴

61. A convenience class of creditors, which consists of a subset of creditors who will be paid in full, is a typical mechanism used in CCAA plans to assist small creditors. At the same time, it improves efficiencies by immediately addressing and resolving claims that have little relative importance in the overall restructuring of the debtor company. There are numerous examples in the CCAA case law in which this Court has sanctioned a CCAA plan that provides for a convenience class.⁶⁵

⁶³ Meeting Order Affidavit, para. 56(b). Similarly, the Landlord Guarantee Enhancement Amounts (which are being paid pursuant to the Landlord Guarantee Creditor Settlement Agreement, not the Amended Plan) are also funded by Target Corporation.

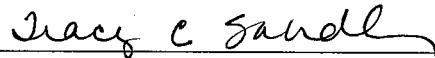
⁶⁴ Meeting Order Affidavit, paras. 56(d), 60 and 74(f).

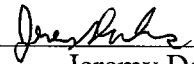
⁶⁵ See, for example, *Re Nelson Financial Group Ltd.*, 2011 ONSC 2750 at para. 14; *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 2010 ONSC 4209. The full text of the Consolidated Plan of Compromise, Arrangement and Reorganization of Canwest Global Communications Corp. is found at I.I.C. Ct. Filing 376509950013. Note that the convenience class in this plan was also deemed to vote in favour of the plan: see section 3.6 of the plan.

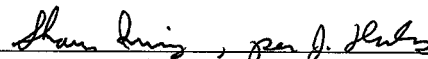
PART IV - NATURE OF THE ORDER SOUGHT

62. For all of the reasons above, the Applicants submit that this Honourable Court should grant the requested Meeting Order and related relief requested by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:


Tracy Sandler


Jeremy Dacks


Shawn Irving

SCHEDULE “A”
LIST OF AUTHORITIES

Case Law

1. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (W.L. Can.) (C.A.)
2. *Re Armbro Enterprises Inc.*, 1993 CarswellOnt 241 (Gen. Div.)
3. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.)
4. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209
5. *Re Nelson Financial Group Ltd.*, 2011 ONSC 2750
6. *Re Norcen Energy Resources Ltd.* (1988), 72 C.B.R. (N.S.) 20 (W.L. Can.) (Alta. Q.B.)
7. *Re San Francisco Gifts*, 2004 ABQB 705
8. *Re ScoZinc*, 2009 NSSC 163
9. *Re SemCanada Crude Co.*, 2009 CarswellAlta 1269 (Q.B.)
10. *Re Stelco Inc.*, 2005 CarswellOnt 6483, aff'd 2005 CarswellOnt 6818 (C.A.)
11. *Re Target Canada Co.*, 2016 ONSC 316
12. *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.)
13. *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, 1991 CarswellOnt 220 (Gen. Div.)
14. *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.)

Secondary Source

15. L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Carswell, 2009)

SCHEDULE "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36, as amended

Compromise with unsecured creditors

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

Company may establish classes

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

Class - creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

**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., *et al.***

Applicants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANTS

**(Motion to Accept Filing of the Amended Plan
and Authorize Creditors' Meeting)**

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