

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

(Plan Sanction Hearing)

May 27, 2016

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TO: SERVICE LIST

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(Motion to Sanction a Plan of Compromise and Arrangement)

PART I - NATURE OF THIS MOTION

1. Target Canada Co. (“TCC”), the other applicants listed above, and certain related 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 (in this capacity, the “**Monitor**”). The Initial Order granted a stay of proceedings until February 13, 2015. The Stay Period, as defined in the Initial Order, was later extended eight times, most recently on April 15, 2016 to June 6, 2016.

2. This factum is filed in support of the Applicants' motion for this Court's sanction of their Second Amended and Restated Joint Plan of Compromise and Arrangement dated May 19, 2016 (the "**Amended Plan**") and to obtain an order of this Court extending the Stay Period until September 23, 2016 to allow for the implementation of the Amended Plan and the continuation of the Claims Process for the benefit of all stakeholders.

3. The Amended Plan represents the culmination of the orderly wind down of the businesses of the Target Canada Entities. It achieves a global resolution of these CCAA proceedings and is the product of lengthy negotiations and extensive consultation among key stakeholders. It has the support of the Monitor, the Landlords and the Consultative Committee of creditors. If sanctioned by this Court and implemented, it will maximize distributions to creditors in a timely manner, without costly and lengthy litigation.

4. At the Creditors' Meeting held on May 25, 2016, Affected Creditors of the Target Canada Entities that were present in person or by proxy unanimously voted in favour of the Amended Plan. 100% in number representing 100% in value of Affected Creditors holding Proven Claims that were present in person or by proxy voted to approve the Resolution in favour of the Amended Plan. This approval level far exceeds the "double majority" of creditor votes required for this Court's approval. The extent of the Affected Creditors' support is also a very strong indicator that the Amended Plan is fair and reasonable and that the Affected Creditors, in their business judgment, believe that it fairly addresses their interests.

5. The Target Canada Entities submit that the Amended Plan meets the test for sanction by this Court. The Applicants have complied with the CCAA, nothing has been done that is not authorized under the CCAA, and the Amended Plan represents a fair and reasonable balancing of stakeholder interests.

6. Based on the Monitor's updated analysis as of May 6, 2016 (and subject to the caveats and qualifications set out in the Monitor's Reports), the Amended Plan is projected to result in recoveries for Affected Creditors (other than Convenience Class Creditors, Landlord Guarantee Creditors and Landlord Non-Guarantee Creditors) in the range of 71% to 80% of their Proven Claims. This recovery compares very favourably to the significantly lower recovery of approximately 30% for claims against TCC that, according to the Monitor's projections, would have been obtained in a bankruptcy.

7. These very favourable recoveries for Affected Creditors have been achieved, in large measure, because of Target Corporation's agreement to subordinate the majority of its very significant Intercompany Claims against TCC to the claims of other Affected Creditors. In recognition of this material contribution to the success of the Amended Plan – among its many other contributions to the orderly wind down and the Amended Plan – Target Corporation is among those parties that are released from all claims arising out of the business of the Target Canada Entities and of this proceeding (except for the Landlord Guarantee Claims, which are the subject of a negotiated resolution that is outside of the Amended Plan). The Applicants submit that the release of Target Corporation provided in the Amended Plan falls squarely within the well-established test for third party releases in CCAA jurisprudence.

8. Based on these considerations, and the submissions below, as well as the Monitor's recommendation, the Applicants submit that the Amended Plan should be sanctioned by this Court as fair and reasonable.

PART II - FACTS

9. The facts with respect to this motion are more fully set out in the Sanction Affidavit of Mark J. Wong.¹ Additional facts, including the background to, and mechanics of, the Amended Plan are described in the Meeting Order Affidavit of Mark J. Wong.² Capitalized terms in this Factum not otherwise defined have the same meanings as in the Sanction Affidavit and the Meeting Order Affidavit.

The Amended Plan is a Product of Negotiation and Consultation

10. Consistent with the objectives of the CCAA to achieve a fair balance of the interests of all Affected Creditors, the Amended Plan is the product of extensive negotiations and consultations with key stakeholders, including Landlord Guarantee Creditors, Landlord Non-Guarantee Creditors, Target Corporation and the Consultative Committee, all with the assistance of the Monitor. All of these key stakeholders were consulted and/or provided input into the Term Sheet that formed the basis for the Amended Plan.³

11. Each of the Monitor, the Landlords and the Consultative Committee of creditors supports the Amended Plan.⁴

¹ Affidavit of Mark J. Wong sworn May 26, 2016 [Sanction Affidavit].

² Affidavit of Mark J. Wong, sworn April 6, 2016 [Meeting Order Affidavit], attached as Exhibit B to the Sanction Affidavit.

³ Meeting Order Affidavit, para. 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. Additional revisions of a technical nature were made on May 19, 2016. These changes were made with the consent of the Monitor and the Plan Sponsor, and in consultation with the Consultative Committee, and were posted to the Monitor's website on May 19, 2016 and the Service List was notified: see Sanction Affidavit, para. 12 and Exhibit "C" to the Sanction Affidavit.

⁴ Sanction Affidavit, para. 34. Twenty-Seventh Report of the Monitor, dated May 11, 2016 [Monitor's Twenty-Seventh Report] at paras. 9.3 and 9.4.

12. 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.⁵ The Amended Plan provides for the consolidation for Plan purposes of the Target Canada Entities other than Propco and Property LP.⁶ The Monitor has commented on the impact of the substantive consolidation of the estates of the Target Canada Entities for the purposes of this proceeding.⁷

13. The primary features of the Amended Plan are summarized in the Meeting Order Affidavit, the Sanction Affidavit and the Monitor's Report.⁸ Some of the more significant features include:

- (a) Affected Creditors voted on the Amended Plan as a single class.⁹
- (b) 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 had the option to elect to be treated for all purposes as Convenience Class Creditors.¹⁰

⁵ Meeting Order Affidavit, para. 46. A detailed description of the distribution mechanics under the Amended Plan is set out in this paragraph. See also Monitor's Twenty-Seventh Report, para. 3.9.

⁶ Meeting Order Affidavit, para. 56(a).

⁷ Monitor's Twenty-Seventh Report, paras. 4.1 to 4.5.

⁸ Meeting Order Affidavit, paras. 55-67. See also Sanction Affidavit, para. 10; Monitor's Twenty-Seventh Report, Section 3.

⁹ Meeting Order Affidavit, para. 4.

¹⁰ Meeting Order Affidavit, paras. 56(d) and 60. See also Monitor's Twenty-Seventh Report, para. 3.11 (vi) and paras. 4.6 to 4.9.

- (c) Landlord Guarantee Creditors will be paid the full amount of their Proven Claims on the Initial Distribution Date.¹¹ In addition, the Landlord Guarantee Creditors will be paid a Landlord Guarantee Enhancement Amount, as provided for in the Landlord Guarantee Creditor Settlement Agreement, described briefly below.¹²
- (d) 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 on the Initial Distribution Date. The Landlord Non-Guarantee Creditor Equalization Cash Pool is funded by Target Corporation and will not dilute recoveries for other Affected Creditors.¹³
- (e) Other Affected Creditors with Proven Claims will receive their Pro Rata Share of the remaining TCC Cash Pool.¹⁴
- (f) As consideration for Target Corporation's significant economic contributions throughout these CCAA proceedings and under the Amended Plan – including Target Corporation's agreement to subordinate the vast majority of its Intercompany Claims – Target Corporation is among those third parties that will be released and discharged from all Claims, except for the Landlord Guarantee Claims,

¹¹ Meeting Order Affidavit, para. 62(a). Landlord Guarantee Claims are Unaffected Claims under the Amended Plan: Meeting Order Affidavit, para. 43. Monitor's Twenty-Seventh Report, para. 3.11(v)

¹² Meeting Order Affidavit, para. 62(b). The Landlord Guarantee Creditors will be paid out of two cash pools: see Monitor's Twenty-Seventh Report, para. 3.14(vii).

¹³ Meeting Order Affidavit, para. 49. See also Monitor's Twenty-Seventh Report, para. 3.14(viii).

¹⁴ Monitor's Twenty-Seventh Report, para. 3.14(ix).

which are addressed outside the Amended Plan under the Landlord Guarantee Creditor Settlement Agreement.¹⁵

(g) Certain reserves for Disputed Claims and Administrative Reserve Costs will be established in accordance with the Plan.

(h) Upon Plan Implementation:

(i) All CCAA Charges will be discharged, except for the Directors' Charge and the Administration Charge.¹⁶

(ii) The Target Canada Entities will transfer their remaining IP assets to Target Corporation's designees and the Pharmacy Shares to the Pharmacy Purchaser.¹⁷

(iii) The Employee Trust will be terminated in accordance with the Amended Plan and any surplus funds returned to Target Corporation.¹⁸

14. If this Court sanctions the Amended Plan, the Plan Implementation Date will be the date on which all conditions precedent are satisfied, or if permitted, waived.¹⁹ The Target Canada Entities are currently working towards June 28, 2016 as the Plan Implementation Date and July 6, 2016 as the Initial Distribution Date.²⁰ The timing and mechanics for distributions under the Amended Plan are set out in detail in the Meeting Order Affidavit and the Sanction Affidavit.²¹

¹⁵ Sanction Affidavit, paras. 10(b) and 22 to 24; Meeting Order Affidavit, para. 56(h).

¹⁶ Sanction Affidavit, para. 10(e).

¹⁷ Sanction Affidavit, para. 10(f).

¹⁸ Sanction Affidavit, para. 10(g).

¹⁹ The conditions precedent for implementation of the Amended Plan are set out at para. 25 of the Sanction Affidavit. See also Monitor's Twenty-Seventh Report, para. 4.19.

²⁰ Sanction Affidavit, para. 11.

²¹ Meeting Order Affidavit, paras. 57 to 67; Sanction Affidavit, paras. 14 to 17.

Consensual Resolution of Landlord Restructuring Period and Pre-Filing Claims

15. On November 27, 2015, the Target Canada Entities brought a motion seeking, *inter alia*, to file their original Plan of Compromise and Arrangement (the “**Original Plan**”) and an Order authorizing the Target Canada Entities to call and hold a creditors' meeting to vote on it.²² This Court dismissed the motion on January 13, 2016, and released an Endorsement on January 15, 2016 (the “**January 15 Endorsement**”). 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.²³

16. After the January 15 Endorsement was issued, the Target Canada Entities continued their negotiations with the Landlords to develop a framework for a consensual resolution that would preserve Target Corporation's agreement to maintain the subordination contained in the Original Plan, while at the same time addressing certain Landlords' concerns and complying with the January 15 Endorsement.²⁴

17. On March 4, 2016, following weeks of extensive discussion and negotiation, the Target Canada Entities announced that agreements had been entered into with all of the Landlord Guarantee Creditors and all of the Landlord Non-Guarantee Creditors.²⁵ These agreements include:

²² The details of the process by which the Original Plan was developed and the events leading up to motion seeking to file the Original Plan on November 27, 2015 are set out in the Affidavit of Mark J. Wong, sworn on November 27, 2015.

²³ Meeting Order Affidavit, para. 19.

²⁴ Meeting Order Affidavit, para. 20.

²⁵ Meeting Order Affidavit, para. 26. At the same time, the Plan Sponsor Agreement was executed between Target Corporation and TCC (as contemplated by section 2.5 of the Amended Plan) to embody Target Corporation's commitment to fund various contributions into the Amended Plan, including funding for the Landlord Guarantee

- (a) The Landlord Guarantee Creditor Settlement Agreement – an agreement among Target Corporation, as guarantor, 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.²⁶ Key terms include the following:
- (i) payment of the Landlord Guarantee Creditor Base Claim Amounts in respect of disclaimed leases from the Landlord Guarantee Creditor Base Claim Cash Pool, which will be established on the Plan Implementation Date from TCC's Cash. The Landlord Guarantee Creditor Base Claim Amounts were consensually resolved with the Landlords pursuant to the Claims Procedure Order;²⁷
 - (ii) payment of the Landlord Guarantee Enhancement Amounts from the Landlord Guarantee Enhancement Cash Pool by means of the distribution mechanism under the Amended Plan but entirely with funds contributed or re-contributed by Target Corporation, as Plan Sponsor (not from the TCC Cash Pool);²⁸ and
 - (iii) agreement by each Landlord Guarantee Creditor to vote all Proven Claims in favour of the Amended Plan and to consent to the motion by the Target Canada Entities seeking the Meeting Order and Sanction and Vesting Order.²⁹
- (b) Landlord Non-Guarantee Creditor Consent and Support Agreements – TCC executed 31 individual and identical agreements with 22 different landlord groups

Enhancement Cash Pool and the Landlord Non-Guarantee Creditor Equalization Cash Pool: Meeting Order Affidavit, paras. 38 to 39.

²⁶ Meeting Order Affidavit, para. 28. A redacted copy of the Landlord Guarantee Creditor Settlement Agreement, without its schedules, is attached as Exhibit "E" to the Meeting Order Affidavit.

²⁷ Meeting Order Affidavit, paras. 29, 31 and 45. See also Monitor's Twenty-Sixth Report, para. 4.6.

²⁸ Meeting Order Affidavit, paras. 29, 47 and 48. This includes a re-contribution of \$34.081 million from distributions (that would otherwise be paid to the Plan Sponsor out of the Propco Cash Pool). Under the Original Plan, those amounts would have been paid into the TCC Cash Pool.

²⁹ Meeting Order Affidavit, para. 30.

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.³⁰ Key terms include the following:

- (i) settlement of the Landlord Restructuring Period Claims and Pre-Filing Claims on a consensual basis, in accordance with the Claims Procedure Order;³¹
- (ii) in order to provide Landlord Non-Guarantee Creditors with equivalent economic treatment to the treatment they would have received under the Original Plan, payment of the Landlord Non-Guarantee Creditor Equalization Amount on the Initial Distribution Date;³² and
- (iii) agreement by each Landlord 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.³³

18. The terms of these Agreements were disclosed and explained to Affected Creditors and to this Court prior to the Creditors' Meeting. A description of the terms of these Agreements was provided in the Meeting Order Affidavit and the Monitor's Report.

19. The Landlord Guarantee Creditor Settlement Agreement and the Landlord Non-Guarantee Creditor Consent and Support Agreements are conditional upon, *inter alia*, (a) the Amended Plan's approval by the Affected Creditors (which was unanimously granted at the Creditors' Meeting, as set out below); (b) sanction by this Court; and (c) Plan Implementation.³⁴

³⁰ Meeting Order Affidavit, para. 34. A redacted copy of a Landlord Non-Guarantee Creditor Consent and Support Agreement, without its schedules, is attached as Exhibit "F" to the Meeting Order Affidavit.

³¹ 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.

³² Meeting Order Affidavit, paras. 35(b), 49 and 61.

³³ Meeting Order Affidavit, para. 35.

³⁴ Meeting Order Affidavit, para. 37.

Creditors Unanimously Approve the Amended Plan

20. On April 13, 2016, this Court granted an order permitting the Applicants to put the Amended Plan before the Affected Creditors for approval at the Creditors' Meeting.³⁵

21. On April 14, 2016, the Monitor published the Meeting Materials on the Monitor's website, including a copy of the Amended Plan. The Meeting Materials were sent to Affected Creditors by first class mail on April 19, 2016. In addition, notices of the Creditors' Meeting were published in major national and U.S. newspapers at the end of April.³⁶

22. The Meeting Materials included Target Canada's letter to creditors, which provided Affected Creditors with an overview of the terms of the Amended Plan. In addition, Affected Creditors received a letter from the Consultative Committee, indicating the Consultative Committee's support for the Amended Plan and its recommendation that creditors vote in favour of the Amended Plan.³⁷

23. The Creditors' Meeting was held on May 25, 2016. The required quorum was present and the meeting was properly constituted.³⁸

24. According to the Monitor's tabulation, 100% in number representing 100% in value of the Affected Creditors holding Proven Claims that were present in person or by proxy and voting at the Creditors' Meeting voted (or were deemed to vote) to approve the Resolution in favour of the Amended Plan.³⁹ According to the Monitor's tabulation, 1246 Affected Creditors representing

³⁵ Monitor's Twenty-Seventh Report, para. 3.2.

³⁶ Sanction Affidavit, para. 27. Monitor's Twenty-Seventh Report, para. 7.1.

³⁷ Sanction Affidavit, paras. 28 and 29, Exhibits "D" and "E". Monitor's Twenty-Seventh Report, para. 7.2.

³⁸ Sanction Affidavit, paras. 4, 30 and 31.

³⁹ Sanction Affidavit, para. 4.

approximately \$554 million in value voted (or were deemed to vote pursuant to the Meeting Order) at the Creditors' Meeting.⁴⁰

Projected Plan Recoveries

25. Based on the most up-to-date information from the Monitor (and subject to certain important limitations and caveats set out in the Monitor's reports), the Target Canada Entities expect that, subject to certain exceptions, Affected Creditors will be paid 71% to 80% of their Proven Claims. This is an increase of approximately 2% to 3% since the Meeting Order was granted, primarily due to the resolution of several large Claims.⁴¹

26. 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.⁴²
- (b) Landlord Guarantee Creditors, who will be paid 100% of their Proven Claims (settled on a consensual basis pursuant to the Claims Procedure Order) on the Initial Distribution Date, as well as receiving the Landlord Guarantee Enhancement Amounts pursuant to the Landlord Guarantee Creditor Settlement Agreement.⁴³
- (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 (funded

⁴⁰ Sanction Affidavit, para. 32.

⁴¹ Sanction Affidavit, para. 5. Monitor's Twenty-Seventh Report, para. 3.11(viii), paras. 6.1 and 6.2.

⁴² Monitor's Twenty-Seventh Report, para. 3.14(vi).

⁴³ Meeting Order Affidavit, footnote 2.

solely by Target Corporation with no dilution to the distributions to other Affected Creditors).⁴⁴

27. Since the date of the Meeting Order, the Monitor, in consultation with the Target Canada Entities, has successfully resolved many significant Claims filed in the Claims Process. The resolution of these Claims has enhanced the expected recoveries of Affected Creditors in respect of their Proven Claims under the Amended Plan relative to the expected recoveries projected as of the date of the Meeting Order.⁴⁵

28. The Monitor, in consultation with the Target Canada Entities, continues to work on the resolution of all outstanding Disputed Claims.

PART III - ISSUES AND THE LAW

29. The issue on this motion is:

- (a) Should this Honourable Court approve the Amended Plan as fair and reasonable?

Test for Sanctioning a Plan

30. Section 6(1) of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite “double majority” vote. The effect of the Court’s approval is to bind the company and its creditors:

6(1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or

⁴⁴ Meeting Order Affidavit, footnote 3. However, the Landlord Non-Guarantee Creditor Equalization Amounts are funded entirely by Target Corporation and do not dilute recoveries of other Affected Creditors: see Monitor’s Twenty-Sixth Report, para. 3.7.

⁴⁵ Sanction Order Affidavit, paras. 5 and 8.

arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

31. The criteria that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.⁴⁶

Compliance with all Statutory Requirements

32. Under this first branch of the test for sanctioning a CCAA plan, the Court typically considers factors such as whether: (a) the applicant comes within the definition of "debtor company" under section 2 of the CCAA; (b) the applicant or affiliated debtor companies have total claims in excess of \$5 million; (c) the notice of meeting was sent in accordance with the Court's Order; (d) the creditors were properly classified; (e) the creditors' meeting was properly

⁴⁶ *Re Canadian Airlines Corp.*, 2000 ABQB 442 [*Canadian Airlines*] at para. 60, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.) [*Sammi Atlas*], at para. 2; *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 [*Canwest Global*] at para. 14. See also *Re Skylink Aviation*, 2013 ONSC 2519 [*Skylink*] at para. 26.

constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.⁴⁷

33. In this case, the Target Canada Entities submit that they have satisfied all of these requirements. In particular,

- (a) in granting the Initial Order, this Honourable Court determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that the Applicants were insolvent;⁴⁸
- (b) Affected Creditors were classified for the purposes of voting and receiving distributions under the Amended Plan and they voted on the Amended Plan as a single class. This Honourable Court approved the classification of Affected Creditors in granting the Meeting Order. The classification of Affected Creditors was not opposed at that time, nor was the Meeting Order appealed;
- (c) in accordance with the Meeting Order, the Monitor provided copies of the Meeting Materials to Affected Creditors, and an electronic copy of the Meeting Materials was posted on the Monitor's website maintained for this CCAA proceeding. In addition, the Monitor published notice of the Creditors' Meeting in *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal*;⁴⁹
- (d) Affected Creditors were provided with Target Canada's letter to creditors containing an overview of the terms of the Amended Plan, as well as a letter from

⁴⁷ *Canadian Airlines*, above, at para. 62. See also *Canwest Global*, above, at para. 15.

⁴⁸ *Re Target Canada Co.*, 2015 ONSC 303 at para. 27.

⁴⁹ Sanction Affidavit, para. 27; Monitor's Twenty-Seventh Report, para. 7.1.

the Consultative Committee of creditors communicating the Consultative Committee's support of the Amended Plan and recommendation that Affected Creditors vote in favour of the Amended Plan;⁵⁰

- (e) the Creditors' Meeting was properly constituted and the voting was carried out in accordance with the Meeting Order;⁵¹ and
- (f) 100% in number representing 100% in value of the Affected Creditors that were present and voting in person or by proxy at the Creditors' Meeting voted in favour of the Plan⁵² – such unanimous approval of the Amended Plan far exceeds the required statutory “double” majority under section 6(1) of the CCAA.

34. Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. All of these requirements are satisfied:

- (a) Source Deductions (section 6(3) of the CCAA): all such amounts were remitted in the ordinary course and, to the best of the Target Canada Entities' knowledge, no such amounts are outstanding.
- (b) Wages/Employee Amounts (section 6(5) of the CCAA): the Employee Trust, which was funded by Target Corporation (the Plan Sponsor) satisfied all outstanding wage

⁵⁰ Sanction Affidavit, paras. 28 and 29, Exhibits “D” and “E”.

⁵¹ Sanction Affidavit, para. 31.

⁵² Sanction Affidavit, para. 4.

claims. In accordance with the Amended Plan, the Employee Trust will be discharged and any surplus funds returned to Target Corporation.⁵³

- (c) Pension Amounts (section 6(6) of the CCAA): the Target Canada Entities do not participate in a prescribed pension plan.

35. The claims of Affected Creditors are not being paid in full. In compliance with section 6(8) of the CCAA, the Amended Plan does not provide for any recovery for equity holders.⁵⁴ In addition, as set out further below, Target Corporation, the indirect shareholder of TCC and the largest single creditor of TCC, has agreed to subordinate the majority of its Intercompany Claims.

36. The Monitor is of the view that the Amended Plan complies with the requirements of the CCAA, including the requirements under section 6 of the CCAA.⁵⁵

37. Accordingly, the Target Canada Entities submit that the statutory prerequisites to the sanction of the Amended Plan have been satisfied.

⁵³ Sanction Affidavit, para. 10(g).

⁵⁴ Section 6(8) of the CCAA provides that “No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.”

⁵⁵ Monitor’s Twenty-Seventh Report, para. 9.1.

No Unauthorized Steps taken by the Target Canada Entities

38. In making a determination as to whether anything has been done – or is purported to have been done – that is not authorized by the CCAA, the Court should rely on the parties and their stakeholders and the reports of the Monitor.⁵⁶

39. The Target Canada Entities submit that no unauthorized steps have been taken in this CCAA proceeding and that this Honourable Court has been kept apprised of all of the key issues facing the Target Canada Entities throughout the restructuring. In particular:

- (a) The Monitor has issued twenty-eight reports in this proceeding, three supplemental reports, as well as its Pre-Filing Report; and
- (b) This Court has issued numerous Orders throughout this proceeding.

40. The Amended Plan complies with the January 15 Endorsement as the Landlord Guarantee Claims have been resolved outside the Amended Plan, by means of the Landlord Guarantee Creditor Settlement Agreement. The Amended Plan therefore complies with paragraph 19A of the Initial Order⁵⁷ and this Court is not being asked to vary this provision.

41. The Amended Plan treats creditors with Proven Claims enumerated in sections 5.1(2) and 19(2) of the CCAA as “Unaffected Creditors.”⁵⁸

⁵⁶ *Canadian Airlines*, above, at para. 64, citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182 (Gen. Div.) [*Olympia & York*] and *Canwest Global*, above, at para. 17.

⁵⁷ Meeting Order Endorsement dated April 13, 2016.

⁵⁸ Monitor’s Twenty-Seventh Report, para. 3.14(v).

42. The Target Canada Entities have acted in good faith and with due diligence in complying with all Court Orders and ensuring that no unauthorized steps have been taken under the CCAA. This Court therefore has the jurisdiction to approve the Amended Plan.

The Amended Plan is Fair and Reasonable

43. The Applicants further submit that this Court should exercise its discretion to sanction the Amended Plan as fair and reasonable.

44. Canadian courts have repeatedly emphasized that when considering whether a plan is fair and reasonable, the court will consider the relative degrees of prejudice that would flow from granting or refusing to grant relief sought under the CCAA and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.⁵⁹ The meaning of “fairness” and “reasonableness” are “necessarily shaped by the unique circumstances of each case, within the context of the CCAA ...”.⁶⁰

45. Generally speaking, a plan will be approved where it provides “equitable” treatment to creditors, viewed as a whole, and where it balances interests in a manner that represents an equitable sharing of the pain of the insolvency. Where creditors have signalled their support of a plan by means of the vote, the court will be very reluctant to second-guess the business decisions made by the stakeholders as a body.⁶¹ This principle should have even greater weight in this case where creditors *unanimously* voted to approve the Amended Plan.

⁵⁹ *Canadian Airlines*, above, at para. 3; *Canwest Global*, above, at para. 19; *Re AbitibiBowater Inc.*, 2010 QCCS 4450 at paras. 29 to 43.

⁶⁰ *Canadian Airlines*, above, at para. 94.

⁶¹ *Sammi Atlas*, above, at paras. 4 and 5, citing *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Canadian Airlines*, above, at para. 97, citing *Olympia & York*.

46. In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:

- (a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;
- (b) what creditors would receive on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) the public interest.⁶²

47. Each of these factors strongly supports approval of the Amended Plan by this Court:

- (a) Classification and Creditor Approval: As noted above, Affected Creditors voted as a single class on the basis of commonality of interest vis-à-vis the debtor company – namely, that all such creditors have unsecured Claims against the Target Canada Entities.⁶³ The Amended Plan received unanimous approval from Affected Creditors voting at the Creditors' Meeting. As Paperny J. noted in *Canadian Airlines*, creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably

⁶² *Canwest Global*, above, at para. 21. See also *Re Sino-Forest Corp.*, 2012 ONSC 7050 [*Sino-Forest*] at para. 60.

⁶³ *Sino-Forest*, above, at paras. 55 to 58.

under the plan.⁶⁴ The unanimous approval of the Amended Plan reflects the fact that it is a product of dialogue, negotiation and communication among stakeholders and therefore a true compromise.⁶⁵

- (b) Recovery on Bankruptcy: The Monitor has expressed the view that recoveries under the Amended Plan are well in excess of those that would have been received on a bankruptcy of the Target Canada Entities. Recoveries against TCC in a bankruptcy would be approximately 30%, as compared to the expected 71% to 80% to Affected Creditors under the Amended Plan. This material improvement in creditor recovery under the Amended Plan is primarily due to the very significant contribution of the Plan Sponsor in agreeing to subordinate the majority of its Intercompany Claims filed against the Target Canada Entities.⁶⁶
- (c) Alternatives to the Amended Plan: When this CCAA proceeding was commenced, there was no prospect for the future business of the Target Canada Entities. The Amended Plan is the only alternative to a bankruptcy. It is the product of hard-fought negotiations following the January 15 Endorsement. As the Consultative Committee of creditors noted in its letter to Affected Creditors, the Amended Plan represents the “best alternative for creditors in light of all relevant circumstances.”⁶⁷
- (d) No Oppression of Creditors: The pre-insolvency rights and priorities of Affected Creditors are respected under the Amended Plan and there is no oppression of any

⁶⁴ *Canadian Airlines*, above, at para. 97.

⁶⁵ Meeting Order Affidavit, paras. 20-21. See, for example, *Skylink*, above, at para. 29.

⁶⁶ Monitor’s Twenty-Seventh Report, para. 4.25, para. 9.2.

⁶⁷ Sanction Affidavit, Exhibit “E”.

creditor rights. Case law makes it clear that a plan can be fair and reasonable even if it does not provide exactly the same recoveries for all creditors, as long as there is a sufficient rationale for any differences in recovery for particular creditors or classes of creditors.⁶⁸ In addition to the consensual resolution of the Landlord Guarantee Claims outside of the Amended Plan, the Landlord Guarantee Creditors will receive enhanced recoveries as part of the consensual resolution leading to the Amended Plan. This differential treatment reflects the guarantees held by the Landlord Guarantee Creditors and was necessary to maintain the subordination in the Amended Plan. These arrangements were clearly disclosed to Affected Creditors and to this Court when the Meeting Order was granted.⁶⁹

- (e) No Unfairness to Shareholders: Given that Affected Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recoveries under the Amended Plan.
- (f) Public Interest: The Amended Plan resolves the Proven Claims against the Target Canada Entities in a manner that is efficient and timely, and that avoids costly litigation.⁷⁰ Moreover, the recoveries provided under the Amended Plan attest to the flexibility of the CCAA and its ability to generate greater economic benefits for

⁶⁸ See, for example, *Sino-Forest*, above, at para. 65; *Canwest Global*, above, at paras. 22 to 24, citing *Re Armbro Enterprises Inc.*, 1993 CarswellOnt 241 (Gen. Div.) and *Re Uniforêt Inc.*, 2003 CarswellQue 3404 (CS). In *Canwest Global*, as in the case at bar, the fact that the Noteholders held guarantees from other CMI Entities supported the higher recoveries provided for these creditors under the Canwest plan.

⁶⁹ See, for example, Meeting Order Affidavit, paras. 25(c), 26, 44, 45 and 62; Monitor's Twenty-Sixth Report, para. 3.2 to 3.6, 4.6. The Landlord Non-Guarantee Creditors receive enhanced recoveries by means of the Landlord Non-Guarantee Creditor Equalization Amount paid on the Initial Distribution Date. These recoveries are funded entirely by Target Corporation and do not dilute recoveries for Affected Creditors under the Amended Plan: see Monitor's Twenty-Sixth Report, para. 3.7.

⁷⁰ Meeting Order Affidavit, para. 5.

Affected Creditors than would be achieved in a bankruptcy. It is therefore in the public interest to approve the Amended Plan to allow Affected Creditors to benefit from the results of this process.

The Releases are Fair and Reasonable

48. Article 7.1 of the Amended Plan provides for full and final releases (the “Releases”) in favour of:

- (a) The Target Canada Released Parties (the Target Canada Entities, NE1 and their respective Directors, Officers, employees, legal counsel, agents and advisors);
- (b) The Third Party Released Parties (the Monitor, A&M and its affiliates, their respective directors, officers, employees, legal counsel, agents and advisors, as well as Pharmacists’ Representative Counsel and members of the Consultative Committee and their advisors);
- (c) The Plan Sponsor Released Parties (Target Corporation, its subsidiaries other than the Target Canada Entities and NE1, the HBC Entities and their respective directors, officers, employees, legal counsel, agents and advisors), except in respect of Landlord Guarantee Claims: and
- (d) The Employee Trust Released Parties (the Employee Trust Administrator and its respective directors and officers, the Employee Trust Trustee, Employee Representative Counsel, Employee Representatives and all of their respective counsel and advisors.)⁷¹

⁷¹ Sanction Affidavit, paras. 20 to 22. Monitor’s Twenty-Seventh Report, para. 3.15.

49. It is now well-accepted that Canadian courts have jurisdiction to sanction plans containing releases in favour of third parties. In *Metcalfe*, the Ontario Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third party as part of the “compromise” or “arrangement” that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.⁷²

50. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.⁷³

51. In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:

- (a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- (b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- (c) Whether the plan could succeed without the releases;
- (d) Whether the parties being released were contributing to the plan;
- (e) Whether the release benefitted the debtors as well as the creditors generally;

⁷² *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) [*Metcalfe*] at para. 61.

⁷³ *Metcalfe*, above, at para 70.

(f) Whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and

(g) Whether the releases were fair and reasonable and not overly broad.⁷⁴

52. In determining whether to approve a third party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA.⁷⁵ No single factor set out above will be determinative.⁷⁶

53. Courts have approved releases that benefit affiliates of the debtor company where the *Metcalf* criteria are satisfied. In *Sino-Forest*, for example, the subsidiaries of the debtor company were entitled to benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors.⁷⁷ It is also common for CCAA courts to approve third party releases in favour of persons, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company.⁷⁸

54. Each of the Released Parties has been essential and has contributed in tangible and material ways to the orderly wind down of the Target Canada Entities' businesses. Without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Amended Plan. The Releases are a significant part of the various compromises that were required

⁷⁴ *Metcalf*, above, at para 71. See also *Re Cline Mining Corp.*, 2015 ONSC 622 at paras. 22 to 28; *Re Kitchener Frame Ltd.*, 2012 ONSC 234 [*Kitchener Frame*] at para. 80.

⁷⁵ *Skylink*, above, at para. 30.

⁷⁶ *Kitchener Frame*, above, at para. 82.

⁷⁷ *Sino-Forest*, above, at paras. 72 and 73. See also *Skylink*, above, at para. 21; *Kitchener Frame*, above, at paras. 83 to 85.

⁷⁸ See, for example, *Skylink*, above, at para. 33; *Cline Mining*, above, at para. 26.

to achieve the Amended Plan. They are a necessary element of the global, consensual resolution of this CCAA proceeding.⁷⁹

55. In particular, the economic contributions by Target Corporation as Plan Sponsor have demonstrably increased the available recoveries for Affected Creditors, as attested by the Monitor.⁸⁰ Target Corporation's material direct and indirect economic contributions as Plan Sponsor include:

- (a) subordinating (or permitting the subordination of), inter alia, the following Intercompany Claims against TCC
 - (i) the NE1 Intercompany Claim which was filed against TCC in an amount of **\$3,068,729,438** (and not adjusted by the Monitor in the Intercompany Claims Report);
 - (ii) the Propco Intercompany Claim which was filed against TCC in an amount of **\$1,911,494,242** (and proposed to be adjusted downwards by the Monitor in the Intercompany Claims Report to an amount of **\$1,356,756,051**)
 - (iii) the Propco (Pre-filing TCC) Intercompany Claim which was filed against TCC in a net⁸¹ amount of **\$27,254,109** (and proposed to be adjusted upwards by the Monitor in the Intercompany Claims Report to a net amount of **\$34,232,528**); and
 - (iv) the Propco (Post-filing TCC) Intercompany Claim which was filed against TCC in a net⁸² amount of **\$37,347,552** (and proposed to be adjusted downwards by the Monitor in the Intercompany Claims Report to a net amount of **\$36,559,823**);
- (b) partially subordinating (or permitting the subordination of) various other Intercompany Claims in accordance with the Amended Plan;

⁷⁹ Sanction Affidavit, para. 19.

⁸⁰ Monitor's Twenty-Seventh Report, para. 4.25.

⁸¹ I.e., after netting the TCC (Pre-filing Propco) Intercompany Claim.

⁸² I.e., after netting the TCC (Post-filing Propco) Intercompany Claim.

- (c) a cash contribution of approximately **\$25.451 million** towards the aggregate Landlord Guarantee Enhancement Amount and foregone recovery on any subrogated claim in respect of such amount;
- (d) a net cash contribution of approximately **\$4.1 million** to fund the Landlord Non-Guarantee Creditor Equalization Amount;
- (e) a cash contribution of **\$700,000** towards costs of certain Landlord Guarantee Creditors;
- (f) funding the Employee Trust in the amount of **\$95 million**;
- (g) making available DIP financing to TCC to allow TCC to meet payroll and other obligations; and
- (h) providing ongoing shared services to facilitate the orderly wind down for which Target Corporation will not be fully compensated.⁸³

56. The Releases are appropriately narrow and rationally connected to the overall purposes of the Amended Plan. The Plan Sponsor Released Parties are not released from the Landlord Guarantee Claims, which are separately resolved in the Landlord Guarantee Creditor

⁸³ Sanction Affidavit, para. 23; Monitor's Twenty-Seventh Report, para. 3.11 and 3.12.

Settlement Agreement.⁸⁴ Nor will Target Corporation be released under the Amended Plan from any indemnity or guarantee in favour of any Director, Officer or employee.⁸⁵

57. The Releases apply to the extent permitted by law and expressly do not apply to liability for criminal, fraudulent or other wilful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA, particularly claims under section 5.1(2) of the CCAA.⁸⁶

58. Full disclosure of the Releases was made to Affected Creditors in the Meeting Order Affidavit, in the Amended Plan and in the Letter to Creditors. The terms of the Releases (apart from the carve-out in the Amended Plan for Landlord Guarantee Claims) were also disclosed to creditors in the Original Plan. No party has objected to the scope of the Releases contained in the Amended Plan.⁸⁷

59. The Monitor is of the view that the Amended Plan as a whole is fair and reasonable.⁸⁸ Accordingly, the Target Canada Entities submit that this Court should sanction the clear decision of the Affected Creditors that the Amended Plan represents an equitable balancing of their interests and approve the Amended Plan.

⁸⁴ The HBC Entities benefit from the Releases as Plan Sponsor Released Parties, except in relation to the Landlord Guarantee Claims. As described in the Fourteenth Report of the Monitor, Target Corporation guaranteed to Zellers and HBC the timely payment and performance by TCC of certain obligations and liabilities in connection with TCC's acquisition of leases from Zellers. For some of these leases, Zellers may have a claim over against Target Corporation, which would, in turn, have a subrogated claim against TCC. It is therefore necessary to obtain the third party release of the HBC Entities to avoid any such subrogated claims against TCC, as such claims, if proven, would dilute the recovery available for Affected Creditors.

⁸⁵ Sanction Affidavit, para. 22.

⁸⁶ Monitor's Twenty-Seventh Report, para. 3.14(v).

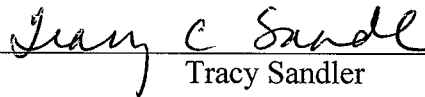
⁸⁷ See *Cline Mining*, above, at para. 25.


⁸⁸ Monitor's Twenty-Seventh Report, para. 9.3.

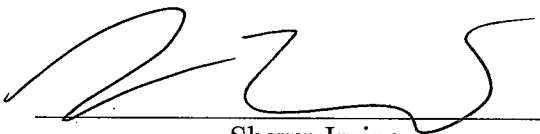
PART IV - NATURE OF THE ORDER SOUGHT

60. 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. *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182 (Gen. Div.)
2. *Re AbitibiBowater Inc.*, 2010 QCCS 4450
3. *Re Armbro Enterprises Inc.*, 1993 CarswellOnt 241 (Gen. Div.)
4. *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.)
5. *Re Canadian Airlines Corp.*, 2000 ABQB 442
6. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209
7. *Re Cline Mining Corp.*, 2015 ONSC 622
8. *Re Kitchener Frame Ltd.*, 2012 ONSC 234
9. *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.)
10. *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.)
11. *Re Sino-Forest Corp.*, 2012 ONSC 7050
12. *Re Skylink Aviation*, 2013 ONSC 2519
13. *Re Target Canada Co.*, 2015 ONSC 303
14. *Re Uniforêt Inc.*, 2003 CarswellQue 3404 (CS)

SCHEDULE "B"

COMPANIES' CREDITORS ARRANGEMENT ACT

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

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or

meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

- (a) subsection 224(1.2) of the Income Tax Act;
- (b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
- (c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
 - (ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

**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

(Plan Sanction Hearing)

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