

Tab 6

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.) THURSDAY, THE
JUSTICE CAMPBELL)
) 10th DAY OF DECEMBER, 2009



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 IN THE MATTER OF HOLLINGER CANADIAN
PUBLISHING HOLDINGS CO.

APPLICATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

INITIAL ORDER

THIS APPLICATION, made by Hollinger Canadian Publishing Holdings Co. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Thomas L. Kram, sworn December 8, 2009 (the "**Kram Affidavit**"), and the Exhibits thereto, the consent of Ernst & Young Inc. to act as the Monitor (the "**Monitor**"), the consent of Dennis Byrd to act as chief restructuring officer, the consent of Koskie Minsky LLP to act as representative counsel and on hearing the submissions of counsel for the Applicant,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") in accordance with the CCAA.

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Applicant shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the engagement of Marianne Desaulniers, Fey Kakaroukas and Bina Benoit by the Applicant as Assistants in accordance with the retention agreements entered into between such persons and the Applicant, as may be modified or amended between the Applicant and such Assistants in consultation with the Monitor (as defined below), is hereby authorized and approved.

6. **THIS COURT ORDERS** that, subject to paragraphs 46 and 47, the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee and retiree medical, dental, disability, life insurance and similar benefit plans or arrangements, employee assistance programs, other retirement benefits and employee and employer current service, special and other contributions and payments in respect of pensions), vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and
- (b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Applicant following the date of this Order.

8. **THIS COURT ORDERS** that the Applicant shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be

deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances

upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that the Applicant shall, subject to such requirements as are imposed by the CCAA, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding \$250,000 in any one transaction or \$1,000,000 in the aggregate;
- (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and
- (c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. **THIS COURT ORDERS** that the Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the

CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including January 8, 2010, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of

the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence, sub-licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

18. **THIS COURT ORDERS** that as and from the date of this Order, neither Chicago Newspaper Liquidation Corp. (formerly Sun-Times Media Group, Inc.) ("STMG") nor any of

the other shareholders of the Applicant, nor any of the officers, directors or employees of STMG or of any such other shareholders shall have any authority or responsibility for any action or decision taken by or in respect of the Applicant, its Business or its Property.

19. **THIS COURT ORDERS** that the Applicant is hereby authorized and directed to enter into a transition services agreement substantially in the form attached as Exhibit P to the Kram Affidavit (the "TSA") and that the TSA and the actions required of the Applicant thereunder are hereby authorized and approved.

NON-DEROGATION OF RIGHTS

20. **THIS COURT ORDERS** that, notwithstanding anything else contained herein, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant, including any person who manages or supervises the management of the business or affairs of the Applicant or is deemed by law to be a director or officer of the Applicant (referred to collectively as the "**directors and/or officers**") with respect to any claim against the directors and/or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors and/or officers are alleged under any law to be liable in their capacity as directors and/or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

APPOINTMENT OF MONITOR

22. **THIS COURT ORDERS** that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

23. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicant's receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Applicant, to the extent required by the Applicant, in connection with the Pension and Benefits Plans (as defined below) and the Pension and Benefits Payments and Contributions (as defined below);
- (d) advise the Applicant in its development of the Plan and any amendments to the Plan;
- (e) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;

- (g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (h) assist the Applicant in pursuing offers for material parts of the Business or Property, in whole or in part, as contemplated in paragraph 11 of this Order; and
- (i) perform such other duties as are required by this Order or by this Court from time to time.

24. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof, and nothing in this Order shall cause the Monitor to be deemed to be an employer of any of the Applicant's employees or an employer in respect of any of the Pension and Benefit Plans.

25. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

26. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

27. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a weekly (or such other interval as may be mutually agreed) basis and, in addition, the Applicant is hereby authorized to pay retainers to the Monitor, counsel to the Monitor, and counsel to the Applicant, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

29. **THIS COURT ORDERS** that the Monitor and its legal counsel may, and at the request of the Applicant shall, pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

30. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, the Applicant's counsel and Representative Counsel (as defined below) shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$750,000, as security for their professional fees and

disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 39 and 41 hereof. The priority of the Administration Charge and the provisions of this Order relating thereto shall survive any bankruptcy of the Applicant and shall be binding upon any trustee in bankruptcy, receiver or like person appointed in respect of any of the Applicant or the Property.

APPOINTMENT OF CHIEF RESTRUCTURING OFFICER

31. **THIS COURT ORDERS** that the agreement (the "**CRO Agreement**"), substantially in the form attached as Exhibit "O" to the Kram Affidavit, to engage Dennis Byrd ("**Byrd**") as the chief restructuring officer ("**CRO**") of the Applicant and the engagement of Byrd as the CRO in accordance with the CRO Agreement are hereby authorized and approved, effective immediately upon the making of this Order.

32. **THIS COURT ORDERS** that, in addition to the powers, duties and responsibilities set out in the CRO Agreement, the CRO shall, subject in all cases to prior approval of the Monitor or order of this Court, have and exercise the following powers, duties and responsibilities, together with such additional or other powers, responsibilities and duties as hereafter may be approved by the Monitor, or as may be ordered by this Court:

- (a) to assist the Monitor as requested from time to time in connection with its duties and responsibilities, including without limitation, (i) in securing the books and records of the Applicant, (ii) by providing to the Monitor information and copies of documents (if in the possession or control of the Applicant) relating to the Applicant, including without limitation, relating to its operations, its former employees, its retirees, its pension and benefit plans, and its assets and liabilities, and (iii) in responding to enquiries from creditors, former employees, retirees and other persons in relation to the Applicant;
- (b) to, on behalf of the Applicant, retain and terminate such Assistants as it considers necessary and appropriate to assist the Applicant or the CRO in the performance of its duties, on such terms as may be approved by the Monitor or this Court, and

may provide instructions and directions to any and all Assistants, counsel and advisors retained by the Applicant;

- (c) to provide such assistance to the Applicant in the administration of the Pension and Benefits Payments and Contributions (as defined below) as is consistent with the manner in which such Pension and Benefits Payments and Contributions were administered prior to the date of this Order, but as modified or amended pursuant to this Order or as may be modified by further Order of this Court;
- (d) to assist the Applicant in the administration of the Applicant's Business, including causing the Applicant to pay accounts for goods or services rendered to the Applicant from and after the date of this Order and approved by the Monitor or this Court;
- (e) to approve and execute any and all agreements, documents, instruments, cheques, wire payments and transactions and to take such actions and steps on behalf of the Applicant to cause the Applicant to do all things authorized and directed by this Order or as may be approved by the Monitor or further Order of this Court;
- (f) to file, on behalf of the Applicant, one or more Plans, for approval by one or more classes of the Applicant's creditors; and
- (g) to seek the direction of this Court at any time and from time to time with respect to any matter relating to its duties and responsibilities and the exercise of its powers or otherwise in relation to the Applicant.

33. **THIS COURT ORDERS** that the CRO shall be paid by the Applicant for all services rendered pursuant to the CRO Agreement and this Order in accordance with the terms of the CRO Agreement.

CRO INDEMNITY AND CHARGE

34. **THIS COURT ORDERS AND DIRECTS** that the CRO shall not incur any liability or obligation as a result of the performance of his duties or his engagement as contemplated hereunder, save and except for any liability or obligation found by this Court to have arisen

from gross negligence or wilful misconduct on his part, and that no action or proceedings may be commenced against the CRO, except with the prior leave of this Court obtained on at least twenty-one (21) days' notice to the Applicant, the CRO and the Monitor.

35. **THIS COURT ORDERS** that, without diminishing any rights of the CRO to indemnification or insurance under any insurance policy, by-law, resolution, agreement or otherwise at law, the Applicant shall indemnify the CRO from any and all claims, losses, damages, costs, charges and expenses which the CRO sustains or incurs by reason of or relating to the exercise of any power or authority or in the performance of any responsibility, duty or obligation in his capacity as CRO, save and except to the extent of any loss found by the Court to have been caused by any gross negligence or wilful misconduct on his part (the "**CRO Indemnity**").

36. **THIS COURT ORDERS** that the CRO shall be entitled to the benefit of and is hereby granted a charge (the "**CRO Charge**") on the Property as security for (i) the CRO's fees and disbursements incurred in accordance with the terms of the CRO Agreement and (ii) the CRO Indemnity. The CRO Charge shall have the priority set out in paragraphs 39 and 41 of this Order. The CRO Indemnity and CRO Charge shall be in addition to any coverage available to the CRO and the Applicant under any insurance policy and nothing in this Order shall absolve, reduce or diminish the obligation of any insurer to provide any payment or coverage under any insurance policy.

37. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, no insurer shall be entitled to be subrogated to or claim the benefit of the CRO Charge.

38. **THIS COURT ORDERS** that the CRO Indemnity and CRO Charge and the provisions of this Order relating thereto shall survive any bankruptcy of the Applicant and shall be binding upon any trustee in bankruptcy, receiver or like person appointed in respect of any of the Applicant or the Property.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

39. **THIS COURT ORDERS** that the priorities of the Administration Charge and the CRO Charge (collectively, the “**Charges**”) as among them, shall be as follows:

First, the Administration Charge, to the maximum amount of \$750,000; and

Second, the CRO Charge.

40. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

41. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, “**Encumbrances**”) in favour of any Person.

42. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, either of the Charges, unless the Applicant also obtains the prior written consent of the Monitor and the beneficiaries of the Charges, or further Order of this Court.

43. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the “**Chargees**”) shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by the creation of the Charges; and
- (c) the payments made by the Applicant pursuant to this Order and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable, voidable or reviewable transactions under any applicable law.

44. **THIS COURT ORDERS** that any Charge created by this Order over leases or real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

INTERIM ADMINISTRATION OF THE PENSION AND BENEFIT PLANS

45. **THIS COURT ORDERS** that the Applicant shall continue to act as the administrator of all of its pension and benefits plans (the "**Pension and Benefits Plans**"), subject to the supervision and overview of the CRO and the Monitor and subject to this and any further Orders of this Court from and after the date hereof.

46. **THIS COURT ORDERS** that any persons or entities performing administrative or payment functions in respect of the Pension and Benefits Plans ("**Administrative Entities**") are authorized and directed to continue acting in their current capacity and to continue performing such administrative and payment functions, provided that from and after the date of this Order (i) reports of all contributions and payments made in respect of each of the Pension and Benefits Plans shall be provided to the Applicant and the Monitor on the same

periodic basis as such reports are currently generated; (ii) all contributions and payments in respect of the Applicant's non-registered Pension and Benefits Plans shall require the prior approval of the Monitor; (iii) all contributions by the Applicant in respect of the Thomson Plan, the Sterling Plan, the Hollinger Sterling Plan and the Journal Plan (all as defined in the Kram Affidavit) shall require the prior approval of the Monitor.

47. **THIS COURT ORDERS** that until further order of this Court, the Applicant, together with any Administrative Entities on the Applicant's behalf, shall continue to make payments to the members or beneficiaries of the Pension and Benefits Plans and contributions to the Pension and Benefits Plans, as the case may be, as prescribed by the terms of the Pension and Benefits Plans, applicable legislation and as amended or modified by this Order or any subsequent orders of this Court (the "**Pension and Benefits Payments and Contributions**").

48. **THIS COURT ORDERS AND DECLARES** that any and all Pension and Benefits Payments and Contributions made from and after the date of this Order in respect of any non-registered Pension and Benefits Plans shall (unless otherwise provided for in the Plan or further Order of this Court) be credited against the ultimate entitlements of each member or beneficiary under such Pension and Benefits Plans pursuant to any final resolution or restructuring approved by this Court or in any bankruptcy of the Applicant.

49. **THIS COURT ORDERS AND DECLARES** that any and all Pension and Benefits Payments and Contributions made by the Applicant or an Administrative Entity in accordance with this Order do not and will not constitute fraudulent preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable, voidable or reviewable transactions under any applicable law.

PENSION AND BENEFIT PLANS - REPRESENTATIVE COUNSEL

50. **THIS COURT ORDERS** that Koskie Minsky LLP ("**Representative Counsel**") is hereby appointed as counsel for all members and beneficiaries of the OPEB Plans (as defined in the Kram Affidavit) in these proceedings for or in respect of any issues affecting the members and/or beneficiaries of the OPEB Plans in these proceedings.

51. **THIS COURT ORDERS** that the Applicant shall provide to Representative Counsel, without charge:

- (a) the names, last known addresses and last known e-mail addresses (if any) of all of the members of the OPEB Plans, as well as applicable data regarding their entitlements, only to be used for the purposes of these proceedings and subject to confidentiality arrangements satisfactory to the Applicant and Monitor and applicable privacy laws; and
- (b) upon request of Representative Counsel, such documents and data as may be relevant to matters relating to the issues in these proceedings including documents and data pertaining to the OPEB Plans, including available financial and actuarial information regarding the funding and investments of the OPEB Plans.

52. **THIS COURT ORDERS** that Representative Counsel may, with prior approval of the Monitor and the Applicant or further order of this Court, retain such actuarial and other advisors and assistants as may be necessary in connection with its duties as Representative Counsel.

53. **THIS COURT ORDERS** that all reasonable professional fees and disbursements that may be incurred by Representative Counsel and in respect of its advisors and assistants retained pursuant to paragraph 52 above shall be paid by the Applicant on a monthly basis, forthwith upon the rendering of accounts to the Applicant. In the event of any disagreement regarding such fees and disbursements, such disagreement may be remitted to this Court for determination.

54. **THIS COURT ORDERS** that Representative Counsel is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

55. **THIS COURT ORDERS** that any individual member of the OPEB Plans who does not wish to be represented by Representative Counsel in these proceedings shall, within 30 days of publication of notice of the appointment of Representative Counsel pursuant to

paragraph 59(b) below, notify the Monitor and Representative Counsel, in writing, by delivering an executed copy of the opt-out form attached to the Plan Members Notice (as defined below) by facsimile or registered mail (the “**Opt-Out Notice**”), and shall thereafter not be bound by the actions of Representative Counsel and shall represent themselves or be represented by any counsel that they may retain exclusively at their own expense.

56. **THIS COURT ORDERS** that, with the exception of persons who have delivered the Opt-Out Notice to the Monitor and Representative Counsel in accordance with paragraph 55 above, Representative Counsel shall represent and act for all individual members and beneficiaries of the OPEB Plans in these proceedings and such individual members and beneficiaries and any person who may be entitled to claim payments, benefits or reimbursements under any OPEB Plans through such individual members or beneficiaries or because such individuals are members or beneficiaries of any OPEB Plan shall be bound by the actions of Representative Counsel in these proceedings.

57. **THIS COURT ORDERS** that Representative Counsel shall have no liability as a result of their appointment or the fulfilment of their duties in carrying out the provisions of this Order and any subsequent Orders in these proceedings, save and except for any gross negligence or wilful misconduct on their part and that no action or proceedings may be commenced against the Representative Counsel, except with the prior leave of this Court obtained on at least twenty-one (21) days' notice to the Applicant, the Representative Counsel the CRO and the Monitor.

58. **THIS COURT ORDERS** that Representative Counsel shall be at liberty and are authorized at any time to apply to this Court, on proper notice to the Monitor and the Applicant, for advice and directions in the performance or variation of their powers and duties.

SERVICE AND NOTICE

59. **THIS COURT ORDERS** that the Monitor shall:

- (a) without delay, publish in the national edition of The Globe and Mail a notice:
 - (i) containing the information prescribed under the CCAA; and

- (ii) of the appointment of Representative Counsel pursuant to this Order, in a form to be agreed upon by Representative Counsel, the Applicant and the Monitor or, failing such agreement, approved by further order of this Court;
- (b) within ten days after the date of this Order:
 - (i) send notice of the making of this Order and the appointment of Representative Counsel pursuant to this Order, substantially in the form attached as Schedule "A" to this Order, to the members of the Pension and Benefits Plans (the "**Plan Members**") by ordinary mail at the address of each such Plan Member as shown on the books and records of the Applicant (the "**Plan Member Notice**");
 - (ii) post this Order and the Plan Member Notice on the Website (as defined below); and
 - (iii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than \$1000, other than the Plan Members, and prepare a list showing the names and addresses of such creditors (which, for greater certainty, shall not include the Plan Members) and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

60. **THIS COURT ORDERS** that the Applicant and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

61. **THIS COURT ORDERS** that the Applicant, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website (<http://documentcentre.eycan.com>) (the "Website").

GENERAL

62. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

63. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

64. **THIS COURT ORDERS** that this Order and any other Order in these proceedings shall have full force and effect in all provinces and territories in Canada, in the same manner in all respects as if the Order had been made by the court enforcing it, and shall have full force and effect outside Canada.

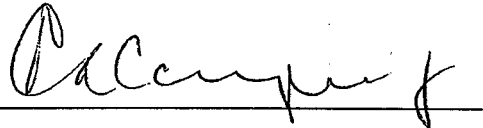
65. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

66. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or

administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

67. **THIS COURT ORDERS** that any interested party (including the Applicant, the Monitor and the Representative Counsel) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

68. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

DEC 10 2009

PER / PAR: TV

SCHEDULE "A"

December •, 2009

VIA FIRST CLASS MAIL

Dear Sir/Madam:

Re: Hollinger Canadian Publishing Holdings Co. – CCAA Proceedings and Appointment of Representative Counsel

On December •, 2009, Hollinger Canadian Publishing Holdings Co. (formerly •) (“**HCPH**”) commenced court-supervised restructuring proceedings under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”). Ernst & Young Inc. has been appointed by the court as Monitor in HCPH’s CCAA proceedings pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on December •, 2009 (the “**Initial Order**”).

Several years ago, HCPH sold its various newspaper businesses and, for some period of time, it has had no ongoing business activity. However, it continues to administer post-employment benefits, post-retirement benefits and pension plans for in excess of 3,000 former employees of what once was the Southam newspaper chain. HCPH has commenced CCAA proceedings with a view to implementing arrangements to deal with its remaining assets and liabilities in a fair and orderly manner that takes into account the best interests of all stakeholders.

In its CCAA proceedings, HCPH has sought and obtained permission from the court to continue to provide, on an interim basis, all existing benefits to beneficiaries of its pension and benefit plans (the “**Plan Members**”), thereby avoiding any sudden interruption in benefits that could otherwise potentially affect former employees, retirees and others receiving them.

In addition, as part of the Initial Order HCPH has sought and obtained an order of the court (the “**Representation Order**”), appointing the law firm Koskie Minsky LLP as representative counsel (“**Representative Counsel**”) to act on behalf of all Plan Members in respect of issues arising from HCPH’s CCAA proceedings that affect the post-employment and post-retirement benefits, other than registered pension plan benefits, of Plan Members (“**OPEB Benefits**”). Under the terms of Initial Order, Koskie Minsky LLP is not appointed to represent individuals with respect to any registered pension plan matters at this time.

As the Representation Order requires HCPH to pay all reasonable professional fees and expenses of Representative Counsel you will not be required to pay legal fees for Koskie Minsky LLP’s role as your Representative Counsel in HCPH’s CCAA proceedings.

HCPH will be providing Representative Counsel with individual contact information for all Plan Members. Individuals that have received this letter directly from the Monitor do not need to forward their contact information to Koskie Minsky LLP. If you need to for any reason, you can contact Representative Counsel at:

Koskie Minsky LLP
Suite 900, Box 52
20 Queen Street West
Toronto, ON M5H 3R3

Email: hcp@kmlaw.ca

Tel: •

Website: www.kmlaw.ca

If you do not wish to be bound by the Representation Order, you must submit an opt-out letter to the Monitor and the Representative Counsel on or before •, 2009. A form of opt-out letter is attached to this letter for your convenience. Individuals who opt-out and wish to appear in HCPH's CCAA proceedings must obtain independent legal representation or represent themselves before the court, all at their own expense.

For the time-being, your payments under HCPH's pension and benefits plans will continue and **you are not required to take any action**. However, OPEB Benefits are not insured or pre-funded. They are paid from the available assets of HCPH, which may not be sufficient to fully fund all OPEB Benefits over the long-term. As a result, it is possible that your OPEB Benefits may be altered in the future. For this reason, Representative Counsel has been appointed to represent the interests of Plan Members who do not opt-out, in respect of issues arising from HCPH's CCAA proceedings that affect OPEB Benefits.

At this time, Plan Members are not required to file a proof of claim in respect of their OPEB Benefits (or any pension or other claims). A special process may be established for claims, and Plan Members will be notified of such a process if and when it occurs.

Individuals can obtain more information about HCPH's ongoing CCAA proceedings and can view the Initial Order and other public court documents at the Monitor's website. In that regard, as required by the CCAA, the Monitor has prepared and filed with the Court a report on the cash-flow statement filed by HCPH in connection with the Initial Order. That report is available on the Monitor's website. Contact information for the Monitor is as follows:

Ernst & Young Inc.
Court-appointed Monitor of Hollinger Canadian Publishing Holdings Co.
222 Bay Street
P.O. Box 251
Toronto, ON M5K 1J7

Tel: 1-888-274-4344

Website: www.ey.com/ca/HCPH

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 IN THE MATTER OF HOLLINGER CANADIAN
PUBLISHING HOLDINGS CO.

APPLICATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

OPT-OUT NOTICE

Ernst & Young Inc.
Court-appointed Monitor of Hollinger Canadian Publishing Holdings Co.
Ernst & Young Tower
222 Bay Street
P.O. Box 251
Toronto, Ontario M5K 1J7
Attention: •
Tel: •
Fax: •

I, _____, am a former employee of Hollinger Canadian Publishing Holdings Co. ("HCPH"), and am a member or beneficiary of one or more OPEB Plans (as defined in the Order of Justice • dated •, 2009) (the "**Initial Order**").

Under Paragraph [55] of that Order, former employees who do not wish Koskie Minsky LLP (the "**Representative Counsel**") to act as their representative counsel may opt out.

I hereby notify the Monitor that I do not wish to be represented by or bound by the actions of Representative Counsel in these proceedings and will be represented as an independent individual party to the extent I wish to appear in these proceedings. This Notice shall be binding upon me and any person to whom I am related or who may otherwise be entitled to claim payments, benefits or reimbursement under an OPEB Plan under or through me or because I am a member or beneficiary under such OPEB Plan.

Date

Signature

IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER
OF HOLLINGER CANADIAN PUBLISHING HOLDINGS CO.

Court File No. 09-8503-00LL

<p><i>ONTARIO</i></p> <p>SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)</p> <p>Proceedings commenced in Toronto</p>	
<p>INITIAL ORDER</p>	<p>BENNETT JONES LLP One First Canadian Place Suite 3400, P.O. Box 130 Toronto, Ontario M5X 1A4</p> <p>Derek Bell (LSUC #43420J) Raj Sahni (LSUC #42942U)</p> <p>Tel: 416-863-1200 Fax: 416-863-1716</p> <p>Lawyers for the Applicant</p>

IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND
IN THE MATTER OF HOLLINGER CANADIAN PUBLISHING HOLDINGS CO.

DEC. 10/05.

Court File No.

This is an Application for an Initial Order under the CCAA in respect of the circumstances. At one level the situation of the Applicant is complicated being part of the former Hollinger empire. At the most basic level however matters are much simpler. The assets essentially represent cash or cash equivalents ~~at~~ of approximately \$33 million. The creditors are members of ~~the~~ funded ~~and~~ unfunded pension plans of the Applicant. The beneficiaries being former retired employees. In addition some employees are due to be beneficiaries of other benefits. The Applicant is a subsidiary of the former Sun Times media group. It was the US & now in liquidation. It had been managed by Sun Times which is no longer in a position to do so. (over)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

APPLICATION RECORD

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

Derek Bell (LSUC #43420J)
Raj Sahni (LSUC #42942U)
Mark Smyth (LSUC #47278L)
Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for the Applicant

-2-
I am satisfied that in the circumstances that this is an appropriate Application of the CCAA powers. The Company is insolvent with debts in excess of \$5 million. I am satisfied that the aims of the restructuring which is essentially to preserve persons & other retirement benefits for former employees. All of the proposals are consistent with that goal & the scheme of administration is intended to provide secure low cost reliable continuance of services & benefit.

I am satisfied that the proposed plan including the financial arrangements are appropriate in the circumstances. The proposed representative counsel & monitors appointment will assure performance. The draft initial order filed which I have signed will I am satisfied provide the necessary protection to all parties including potential claimants.

Ch. Campbell J.

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

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES

(Motion for appointment of Representative Counsel
to terminated employees, returnable May 18, 2016)

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
(t) 416-595-2083
(f) 416-204-2872
(e) ahatnay@kmlaw.ca

James Harnum (LSUC# 60459F)
(t) 416-542-6285
(f) 16-204-2819
(e) jharnum@kmlaw.ca

Proposed Representative Counsel to the
terminated employees of Danier Leather Inc.

Tab 7

CITATION: MF Global Canada Co. (Re), 2011 ONSC 7100

COURT FILE NO.: 31-OR-207854-T

Date: 20111130

**SUPERIOR COURT OF JUSTICE
ONTARIO
(In Bankruptcy and Insolvency)**

**IN THE MATTER OF THE BANKRUPTCY OF MF GLOBAL CANADA CO.,
OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO**

HEARD: November 14 and 24, 2011

BEFORE: C. Campbell J.

COUNSEL: *Craig J. Hill* for KPMG Inc., Trustee in Bankruptcy of MF Global Canada Inc.
Fred Myers, Brian Empey for Canadian Investor Protection Fund
E.A. Sellers, Tracy Sandler for RBC Dominion Securities
Derrick Tay for CDCC
Harry Underwood for Friedberg Mercantile
Ashley Taylor, proposed Representative Counsel to the Customers
Jeff Carhart for XL Foods Inc.

ENDORSEMENT

[1] Three motions were brought by the MF Global Trustee; two were heard on November 14, 2011 and one on November 24, 2011. The first was for the appointment of Customer Representative Counsel in the bankruptcy of MF Global Canada Co., which was unopposed and which will permit assistance to the Court in respect of the interest of customers of the bankrupt.

[2] The second and third motions sought orders permitting transfer of customer accounts to Royal Bank of Canada Dominion Securities (RBCDS) pursuant to and as contemplated in the Account Transfer and Support Agreement between RBCDS and the Trustee, and repayment of certain amounts that were characterized as a liquidity advance.

[3] The second motion became moot in the intervening time between submissions on the second and third motions, since there was no need to order a liquidity advance, but the basis for which the Order was made is relevant for context.

[4] The third motion, heard on November 24, also sought confirmation of an agreement between the Trustee and the Canadian Investor Protection Fund ("CIPF") by which payments to which CIPF might otherwise be obligated assuming final confirmation of claims, would be estimated and any over-estimated payment would be reimbursed ahead of the "general fund" as referred to below.

[5] The proposed Orders represent the culmination of intense activity on the part of the Trustee and others to permit customers of the bankrupt to have access to their accounts for liquidation and trading purposes. All of those who were involved have performed diligently and effectively to this end and are to be congratulated for their efforts.

[6] The contested area of the relief sought arises from the position of the CIPF, which urges that it be entitled to be repaid from assets in the customer pool of funds following the allocation made pursuant to paragraphs 262(1)(a) and (b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA.") The section reads in part:

262. (1) Cash and securities in the customer pool fund shall be allocated in the following priority:

- (a) for costs of administration referred to in paragraph 136(1)(b), to the extent that sufficient funds are not available in the general fund to pay such costs;
- (b) to customers, other than deferred customers, in proportion to their net equity;
- and
- (c) to the general fund.

[7] More explicitly, CIPF asserted in the second motion that should it make liquidity advances or payments to the Trustee to facilitate transfer of customer accounts for which it is obligated to protect that recovery, CIPF should be permitted over and above any amount that it is obligated to reimburse customers any additional liquidity amounts advanced before any further allocation pursuant to section 262(1)(c).

[8] Mr. Taylor on behalf of the customers submits that the scheme of distribution as set out in s. 262 should be strictly construed and so read would not permit any payment out except to customers, which would include both insured and uninsured customers. In that event, CIPF would only be able to recover advances from the general fund referred in 262(1)(c).

[9] Despite the able argument of Mr. Taylor, I was not persuaded that the liquidity charge that was sought here violates s. 262. The scheme of part XII. of the BIA is to permit, among other things, the transfer to and access by customers of their accounts when a security firm is in bankruptcy.

[10] What was sought in the liquidity advance was not in my view a priority to another creditor to the disadvantage of a customer, but rather the cost of administration of advances in respect of estimated obligations for transfer to the customer pool.

[11] I remain of the view that the liquidity Order sought represents an agreement among CIPF, the Trustee and other parties, and it would not in my view be in the interests of any of the customers to see the agreement by which their accounts would be transferred expeditiously put in jeopardy. This would be the case if the agreement between CIPF and the Trustee were rejected.

[12] I concluded that it was in the interests of both the insured and uninsured customers that the transfers take place in an expedited fashion as soon as possible and so approved the Order in the form signed.

[13] The third motion was in effect a variation of the second. Instead of waiting to pay out its obligations in the finalization of a proof of claim process to those customers to which it would be obligated, CIPF agreed to pre-pay its estimated obligation to facilitate early payments to all customers, not just those to whom CIPF would be responsible and to permit the Trustee to minimize the time and cost that would otherwise be incurred in a full claims process.

[14] The scheme of Part XII of the BIA does not explicitly deal with this situation. While some analogy may be made to a Debtor In Possession (DIP) financing, that analogy does not adequately reflect this situation. The pre-payment by CIPF of estimated obligations is voluntary. It did not have to be paid and CIPF is not being reimbursed as would a lender entitled to interest.

[15] The effect of the Agreement with the Trustee is such that CIPF will make a payment of an estimated amount that it otherwise has no obligation but for the Agreement to make at this time. In return for pre-payment of an estimated amount, it seeks to recover any over-payment of the obligated amount ahead of uninsured customers or the general fund.

[16] In my view, the estimated amount does not give rise to a potential priority to CIPF but rather significantly saves the time and cost of administration that would otherwise be incurred if a full claims process were required.

[17] For the above reasons, the relief sought on behalf of uninsured customers is denied and the administration sought by the Trustee is approved in terms of the Order signed.

C. CAMPBELL J.

Released:

Tab 8

Indexed as:
**Police Retirees of Ontario Inc. v. Ontario Municipal
Employees' Retirement Board**

Between
Police Retirees of Ontario Incorporated, plaintiff, and
The Ontario Municipal Employees' Retirement Board, The
Waterloo Regional Police Services Board, The Waterloo
Regional Police Association, and The Waterloo Regional
Police Senior Officers' Association, defendants

[1997] O.J. No. 3086

35 O.R. (3d) 177

41 O.T.C. 120

17 C.C.P.B. 49

72 A.C.W.S. (3d) 989

Court File No. 1443/96

Ontario Court of Justice (General Division)
Toronto, Ontario

Kiteley J.

Heard: March 20, 1997.

Judgment: July 23, 1997.

(16 pp.)

Practice -- Parties -- Representation orders -- When available.

This was an application to issue a representation order. A multi-employer defined benefit pension plan for employees of local governments in Ontario was created under the Ontario Municipal Employees Retirement System Act. The plan offered two types of benefits to employees of basic

and supplementary benefits. The Waterloo Regional Police Services Board entered into a supplementary benefit agreement with the Ontario Municipal Employees Retirement System Board under which employee police officers could receive a full unreduced pension after 30 years of service once within ten years of retirement age. In 1991 the supplementary benefit became part of the basic benefit package offered. The money remaining in the fund was declared superfluous by the OMERS Board. The OMERS Board wrote to contributing employers under the supplementary agreement and offered five options for the use of the excess funds. The Police Board and Police Association elected to leave a sum in the account in anticipation of supplementary benefits not yet introduced and to use the balance to offset the basic plan contributions by the employer to create an employer contribution holiday. When the provincial government enacted the social contract legislation the Police Services Board and the Police Association agreed to access the excess funds available because of the employer contribution holiday to fund the social contract targets. Representatives of the local retirees' association were not included in the negotiations and only active members of the force were allowed to vote on the use of the funds. The plaintiff brought an action claiming entitlement to a share in the excess funds. At issue here was whether a representation order was to be issued under Rule 10.01(1)(f) of the Ontario Rules of Civil Procedure to authorize the plaintiff, the Police Retirees of Ontario Inc., to represent police retirees in the action.

HELD: The application was allowed. The balance of convenience favoured the issuance of the representation order over individual service and participation. It was within the interests of justice to make the order. The Police Retirees of Ontario Inc. was an appropriate representative. It was an established and important organization dedicated to the concerns of its members and the litigation was consistent with its mandate.

Statutes, Regulations and Rules Cited:

Ontario Municipal Employees Retirement System Act Ontario Rules of Civil Procedure, Rule 10.01(1)(f).

Counsel:

Donna E. Campbell, for the plaintiff.

David Stamp, for OMERS.

Steven L. Moate, for the Waterloo Regional Police Services Board.

Martin Doane, for the Waterloo Regional Police Association and Waterloo Regional Senior Officers' Association.

1 KITELEY J.:-- The issue in this motion is the circumstances in which a representation order

should be issued pursuant to Rule 10.01(1)(f) of the Rules of Civil Procedure.

FACTUAL BACKGROUND

2 The Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O. 29 (the "OMERS Act") creates a multi-employer defined benefit pension plan for employees of local governments in Ontario. Participation in and contribution to the pension plan is obligatory on the part of the employee and the employer. Members of the Waterloo Regional Police Force participate in, contribute to and benefit from the OMERS pension plan which is subject to the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "Pension Benefits Act"), and is administered by the OMERS Board, a corporation created by the OMERS Act. OMERS offers two categories of pension benefits to employees: (a) basic benefits, which are specified in the OMERS Regulations; and (b) supplementary benefits, which employees may receive if their employers enter into supplementary agreements with OMERS as provided under the OMERS Regulations.

3 In 1973 the Waterloo Regional Police Services Board (the "Police Board") entered into a supplementary benefit agreement with OMERS (the "supplementary agreement") to provide a permanent partial disability supplementary benefit to its employee police officers. The supplementary agreement was amended on January 13, 1977, to provide an additional supplementary benefit which enabled police officers who were within ten years of normal retirement age to retire on a full unreduced pension after 30 years of service. The amendment made that benefit effective January 1, 1976. Although that benefit was initially paid for by contributions from both the Police Board and the police officers, an amendment to Regulation 724, R.S.O. 1980, effective January 1, 1983, eliminated direct contributions from employees who were covered by that benefit. Direct contributions that had been made by police officers from January 1, 1976, to December 31, 1982, were, on an optional basis, transferred to the contributor's R.R.S.P.'s or used to provide additional retirement benefits for the police officers who made such contributions. Employers continued to contribute. The amending regulation also provided that any supplementary agreement in force as of December 31, 1982, was deemed to be amended as of January 1, 1983, until it was amended in fact to accord with the form and content of any agreement as determined by the Board. In November 1983, the OMERS Board approved the form and content of a supplementary agreement to reflect the amendment. Although the agreement was approved, the Police Board and the OMERS Board never executed it.

4 In December 1991, the events began which led to this lawsuit. The supplementary benefit became part of the basic benefit package offered by OMERS, and was funded through employer contributions to the basic plan. All members became eligible to retire on an unreduced pension within 10 years of normal retirement date, after 30 years of qualifying service. This change to the OMERS basic plan removed the need to provide the supplementary benefit, funded by the supplementary pension plan. The money remaining in the fund, which had a value of \$5,722,742.05 as of December 31, 1991, was declared "largely superfluous" by the OMERS Board. The funds required for the early retirement of those who retired after January 1, 1976, and before December

31, 1991, were transferred to the basic plan upon retirement of the member and are not reflected in the surplus fund.

5 In April 1992 the OMERS Board wrote to the contributing employers who had entered into a supplementary agreement and offered five options for use of the funds remaining in the supplementary benefit fund. It took the position that a clause which appears in the 1983 agreement, which characterized such monies as "excess funds on account", permitted the use of the funds in a manner to be agreed upon by the OMERS Board and the employer. The Police Board and the Police Associations elected to leave \$2,000,000 in the account in anticipation of supplementary benefits yet to be introduced and to use the balance to offset the Police Board's basic plan contributions (ie employer contribution holidays).

6 Contrary to the plaintiff's initial understanding which is reflected in the Statement of Claim, the funds were not disbursed directly into the OMERS fund. Rather, the funds were applied to pay the employer's contribution to the basic pension plan. Although there was no direct payment out of the funds, the contribution holiday freed up monies which the Police Board had set aside for payment to the basic pension plan, and it is these funds to which the retired members claim a proportional entitlement. The employer contribution holiday ended in September 1995.

7 Around the time of the discussions concerning the surplus funds, the provincial government enacted legislation that required a social contract agreement to be entered into between the Police Board and the Police Associations to minimize the effect of an expenditure reduction programme. The Police Services Board and the Associations agreed to access the funds held by OMERS with respect to the members covered by the social contract agreement. It was agreed that \$4,065,000 (the amount available because of the employer contribution holiday) would be used to fund, among other things, early retirement incentive payments and sick leave gratuities, and would also be allocated to achieve the social contract targets for the Board and the Associations. No representative of the local retirees' association or of the plaintiff was present during the negotiations between the Police Board and the Police Associations. None of the retired members who contributed to the fund were consulted either before or at the time the social contract agreement was negotiated and signed. Only active members of the force were permitted to vote on the use of the funds. On August 6, 1993, the date the social contract agreement was signed, the funds were valued at \$6,343,628.97 (the "Excess Funds").

THE ISSUE

8 The issue in this action is whether the police retirees are entitled to a share in the Excess Funds. If the Court should determine that the police retirees are entitled to a share, the question then becomes the amount to which they are entitled.

9 The issue for determination on this motion is whether a representation order should be issued pursuant to Rule 10.01(1)(f) authorizing the Police Retirees of Ontario Incorporated ("P.R.O.") to represent the police retirees in their action claiming an entitlement to the Excess Funds.

ANALYSIS

10 Rule 10.01 (1) and (2) are as follows:

Proceedings in which Order May be Made

10.01(1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the Variation of Trusts Act;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule, a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding who cannot be readily ascertained, found or served.

Order Binds Represented Persons

- (2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

(1) Definition of the sub-classes within the class: the threshold issue

11 In paragraph 15 of her factum, counsel for the plaintiff identified five possible sub-classes within the class of retirees. Suffice it to say that not all those sub-classes will be represented. For purposes of the motion for a representative order, I accepted the position advanced by counsel for the plaintiff, supported by counsel for OMERS, namely that the liability issue, that is, the entitlement of retired members to share in the monies, is a threshold issue. The order I make on the representative issue is for purposes only of progressing to and through the threshold issue.

12 As indicated below, counsel for the Police Associations raise the conflict between and among the sub-classes. I agree with the plaintiff and OMERS that the issue of conflict between and among the sub-classes does not need to be addressed at this time. Should the court find that no entitlement exists for any retired member, the possibility of conflicting entitlements of the sub-classes need not

be considered. If the court does find entitlement, the potential for conflict between the sub-classes will need to be addressed.

(2) Definition of "person" in s. 10 of the Rules of Civil Procedure:

13 Counsel for the Waterloo Regional Police Association and the Waterloo Regional Police Senior Officers' Association, submitted that the motion should fail on the basis that P.R.O. is a corporation rather than a natural person and thus may not represent the police retirees.

14 The Rules of Civil Procedure do not provide a definition of the word "person." However, s. 29(1) of the Interpretation Act R.S.O. 1990, c. I.11, contains the following definition: "person includes a corporation and the heirs, executors, administrators, or other legal representatives of a person to whom the context can apply according to law." That definition applies to Rule 10.01. In *Toronto Fire Department Pensioners' Assn. v. Fitzsimmons* 40 C.P.C. (3d) 298 at 301 (O.C.G.D.), Pitt J. held in an application pursuant to Rule 10 that he was not prepared to find, nor did he think it necessary to find, that "no corporation could be a person" contemplated by the rule". Accordingly, I find that there is no compelling reason why a corporation cannot be granted a representation order.

(3) The standard which the plaintiff must meet in order to be granted a representation order

15 The onus is on the plaintiff to satisfy the Court that this is a proper case for a representation order: see *Hardy v. Clancy* [1993] O.J. No. 1737 (O.C.G.D.) per McNeely J.

16 The wording of R. 10.01(1)(f) indicates that a representation order will be granted where the group of persons affected by the order may not be "readily ascertained, found, or served". OMERS can create a list of all retirees potentially affected by this action. The respondents (other than OMERS) therefore suggest that since the proposed class constitutes a group which can be readily ascertained, found or served, the representation order ought not to be made. However, an analysis of the cases in which the wording of this provision has been considered suggests that a liberal interpretation of this requirement has been employed by the courts. In two recent decisions in which representation orders were made pursuant to s. 10.01(1)(f), the group of persons could be readily ascertained and/or found, but the court determined that it would be inconvenient for each member of the group to be individually served. In *Bathgate v. N.H.L. Pension Society*, (26 June 1991), Toronto RE 785/91, Potts J. granted a representation order to seven retired hockey players as representatives of the player participants in a pension plan. Potts J. mandated that a copy of the notice indicating that a representation order had been granted be sent by regular mail to all of the player participants as well as to the beneficiaries of deceased player participants under the plan. A representation order was made although the group of persons could be readily ascertained, found and served.

17 Similarly, in *Qit-Fer et Titane Inc. v. Dorr-Oliver Canada Ltd*, (9 January 1997), Toronto B177/96, Cameron J. granted a motion for a representation order to four natural persons to represent members of a pension plan for employees of Dorr Canada. As was the case in *Bathgate*, supra, the

individuals on whose behalf the representation order was made could be ascertained and found.

18 These cases suggest that the test to be applied in considering a request for a representation order is not whether the individual members of the group can be found or ascertained, but rather whether the balance of convenience favours the granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience which would be experienced by each party if the representation order were or were not granted. There is no evidence of the financial resources of the members of P.R.O. But, by definition, retirees live on income less than previous wages. I assume that the individual police retirees are of modest means. To require that an individual police retiree assume financial responsibility for the representation of all of the police retirees for the purpose of resolving the threshold issue would impose an undue burden. It would be prohibitive. OMERS is in favour of the granting of a representation order, and, in fact, suggests that it would be "practical" to do so. Mr. Stamp has indicated that the issue is an important one which OMERS wishes to have determined as quickly and efficiently as possible. There are several other supplementary agreements being negotiated and progress will be hampered until this action is resolved. That resolution is likely to be more expeditious if a representation order is made. There is no evidence to suggest that individual members of the respondent Waterloo Regional Police Services Board, the Waterloo Regional Police Association, or the Waterloo Regional Police Senior Officers' Association would experience inconvenience in the event that a representation order is granted. As a result, I find that the balance of convenience favours the issuance of a representation order. Furthermore, as advocated by OMERS, it is in the interests of justice to make the order.

(4) Definition of the "class of persons" in s. 10.01(f) of the Rules of Civil Procedure

19 In order to obtain a representation order under Rule 10.01 of the Rules of Civil Procedure, the proposed plaintiff must provide a certain amount of information in regard to the essential characteristics of the group. In *Township of Bruce v. Thornburn*, 57 O.R. (2d) 77 (Div. Ct.), Southey J., writing for the Court, overturned a representation order which had been made in regard to subscribers of the Bruce Municipal Telephone System. Southey J. determined that the class of persons which the "Bryce group" had been appointed to represent was not an appropriate one for a representation order under rule 10.01 since no attempt had been made to describe the essential characteristics of the members of the "Bryce group" which would give them the claim to subscriber status which they asserted, nor was any attempt made to limit the class being represented to persons having the same characteristics.

20 Similarly, in *Toronto Fire Department Pensioners' Association v. Fitzsimmons*, 40 C.P.C. (3d) 298 (O.C.G.D.), an application was made to appoint a corporation without share capital to represent all retired members of a fire department. The applicant had been incorporated by six retired

firefighters for the purpose of "promoting and protecting the best interest of the Toronto Fire Department pensioners and their families." Nothing more of substance was known of the corporation. Pitt J. held that the applicant was not the appropriate representative for the purpose of this proceeding. At p. 301, he observed that it should not be difficult to find a small group of persons who could obtain leave of the court to institute representative proceedings after providing satisfactory evidence of their representative nature, their commonality of interest and their ability to satisfy costs awards or to provide a satisfactory mechanism for satisfying such awards.

(5) P.R.O. is the appropriate representative:

21 In contrast to the proposed representative plaintiffs in Township of Bruce, supra, and Toronto Fire Department Pensioners' Association, supra, substantial information exists in regard to the essential characteristics of the members of P.R.O.. P.R.O. was incorporated on December 30, 1992. It is administered by an elected Board of Directors consisting of retired police personnel. Sydney Brown is the President and was one of the founding members. As of October 1996, P.R.O. had over 6000 members. Membership is restricted to retired police officers and spouses, retired police civilian employees and spouses, and the widows and widowers of both active and retired personnel. Police officers are automatically enrolled in the organization upon their retirement from the police force. Individuals pay annual dues of \$5.00 while local retirees' associations pay fees of \$25.00. A failure to pay dues does not result in removal from the membership list, but a written request for removal will. In other words membership is based on status, not on the member taking initiative to join. Mr. Doane and Mr. Moate describe the membership as "illusory". While it would be more comforting if membership were actively pursued rather than passively bestowed, the method of ascribing membership status does not mean that it is any the less representative.

22 P.R.O. is the only provincial organization which is primarily concerned with the advancement and protection of retired police personnel including assisting members in dealing with government boards and agencies. It has a written constitution and by-laws. It circulates a newsletter. It has a permanent office in Kitchener, Ontario. Members from the Waterloo Regional Police Force form part of the organization. The most recent address list compiled by P.R.O. of retired members in the Waterloo Regional Police Force lists approximately 176 retired police officers and/or their surviving spouses.

23 P.R.O. is recognized by OMERS. In his capacity as President of P.R.O., Sydney Brown has been invited by OMERS to attend consultation meetings held by the OMERS Board. Since September 1995, the OMERS Board has held four such consultation meetings, the purpose of which is to discuss with member representatives proposed changes to OMERS affecting the governance of that organization. As it is not possible to invite all members, the plaintiff asserts that the OMERS Board focuses on who they perceive to be representatives of those members, as a way of obtaining effective input. OMERS did not take issue with that assertion. Mr. Brown has attended each meeting and has been the only representative of the police retirees present. At the most recent meeting, two groups of retirees were represented: the Municipal Retirees of Ontario and P.R.O. No

one from the Waterloo Regional Police Association or the Waterloo Regional Senior Officers Association attended.

24 Based on the foregoing, I find that P.R.O. is an established and important organization dedicated to the concerns of its members. This litigation is consistent with its mandate. It is respected and consulted by OMERS.

25 The defendants have suggested that the plaintiff does not have the requisite solvency for the purpose of this representative action. During the year ending December 31, 1995, P.R.O. generated \$1,771,104 in revenues as a result of ticket sales for the Garden Bros. Circus which it sponsors. Most of those funds are expended on the circus. The modest profit and very minor membership fees are used for administration expenses which for that year, totalled \$162,173. P.R.O.'s net income on December 31, 1995, was \$58,415. I conclude that P.R.O.'s financial statements as of December 31, 1995, reveal that it is a solvent corporation with the financial resources necessary to permit it to litigate this matter and to pay costs if necessary.

26 I do not accept the submission that since P.R.O. earns 95% of its revenue from running circuses for children, that if P.R.O. is ultimately ordered to pay costs, those costs would come from the children. The point is that P.R.O. generates significant revenue. I accept the evidence of Sydney Brown about its solvency.

27 Mr. Doane submitted that P.R.O. is not an appropriate representative since it has not been given proper authority to bring this action by the Waterloo police retirees. On September 14, 1995, at a quarterly general meeting of the Waterloo Regional Police Retirees Association, a motion was passed which requested that P.R.O. provide the Association with a loan for legal assistance to obtain a portion of the Excess Funds. Sydney Brown was present.

28 Following that request, Sydney Brown reported the request to the P.R.O. board which decided to take the action on behalf of the Waterloo Regional Retirees. P.R.O. did not pass its own resolution authorizing the legal proceedings and accepting responsibility for the legal expenses incurred on behalf of P.R.O. and the legal expenses to which it would be exposed if costs were ordered against P.R.O. Mr. Doane is correct in raising this formal deficiency. But I accept the uncontradicted evidence of the President that he has the requisite authority.

29 Mr. Doane asserts that P.R.O. cannot be appointed because it does not have the same characteristics as the members of the class whom it purports to represent: P.R.O. isn't a retiree and P.R.O. doesn't have a claim against the Excess Funds. If the proposed plaintiff were a natural person, that argument would be attractive. But if a corporation has status as a person pursuant to Rule 10, it follows that there must be some leniency in considering the extent to which the representative plaintiff shares the characteristics of the class. Without that leniency, a corporation could never succeed as representative plaintiff. Accordingly, the lack of shared characteristics is not fatal.

30 Mr. Doane also asserts that P.R.O. cannot be appointed because of the potential for conflict. Some of the members of P.R.O. have received benefits attributed to the social contract agreement. Mr. Doane raised the prospect that his clients would counterclaim against all of those who received such benefits (which he calculated as 70 of the P.R.O. members) to recover the benefits.

31 Once the representation order is made, the "threshold issue" will be addressed. At that point, P.R.O. will specify which of the five possible sub-classes summarized at paragraph 15 of the plaintiff's factum will be pursued. Conflict may then arise. At this stage, however, the possibility of conflict among the members represented does not prevent P.R.O. from acting in a representative capacity for purposes of addressing the threshold issue.

32 The statement of claim includes allegations against all defendants of breach of fiduciary duty and unjust enrichment. There are other claims such as breach of statutory duty and breach of constitution. The three police associations opposed the representation order. But OMERS supported the request for the limited purpose of determining the threshold issue as a matter of law or on the basis of a special case under Rule 22. The basis upon which OMERS supports the request are summarized in paragraph 31 of its factum.

33 I am particularly influenced by the support from OMERS. It must deal with all OMERS recipients throughout Ontario. If OMERS is content with the representation order, the opposition by the Police Associations should not be determinative.

Conclusion

34 For purposes of bringing a motion to establish entitlement only, an order will issue pursuant to Rule 10 appointing P.R.O. as representative of the retired members of the Waterloo Regional Police Force who were employed when contributions were made to fund a Supplementary Early Retirement Benefit (the SERB) provided under a Supplementary Agreement between the Waterloo Regional Police Services Board and OMERS. I have not specified the period during which contributions were made. In paragraphs 14 and 15 of the Factum, Ms. Campbell enlarged the interval to cover the period 1976 to the present. Mr. Stamp opposed some of the sub-classes in paragraph 15 while Mr. Doane opposed others. If I circumscribed the time frame, I would indirectly restrict the sub-classes. I am confident that counsel will be able to agree on which of the sub-classes are unaffected by such conflict. If they are unable to agree, I will hear further submissions.

SECURITY FOR COSTS

35 In his submissions, Mr. Moate raised the prospect of the court making an order for security for costs as a condition of the representation order. He argues that since the granting of a representation order is discretionary, that the court could exercise the discretion but on conditions. I have found that P.R.O. has sufficient solvency to justify a representation order. An order compelling P.R.O. to post security for costs would be inconsistent with that finding.

COSTS OF THIS MOTION

36 If counsel are unable to agree as to the costs of this motion, I will hear submissions. Toward that end, Ms. Campbell should attempt to elicit consensus. Failing such consensus, counsel should agree on a schedule for filing brief written submissions with Ms. Campbell and Mr. Stamp initiating and Mr. Moate and Mr. Doane responding. All submissions should be forwarded to me within 40 days unless the summer plans of counsel necessitate a more expanded timetable.

KITELEY J.

qp/d/ala/DRS/DRS

Tab 9

ENHANCED ENFORCEMENT OF WAGE CLAIMS UNDER CANADIAN BANKRUPTCY AND RECEIVERSHIP LAW

**Prepared for the Corporate Law Policy Directorate
by Ronald C.C. Cuming
College of Law - University of Saskatchewan**

April 1998

While this background paper has been prepared for Industry Canada, the content and any views expressed or recommendations made are those of the author and do not necessarily reflect the views or policies of Industry Canada.

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I. THE CONTEXT

Employees comprise the largest segment of those creditors of business organizations who have little capacity to protect themselves from the effects of insolvency of their debtors. This is due in large part to the fact that the circumstances surrounding the formation of employment contracts do not facilitate the use of protective measures. A prospective employee rarely has the bargaining power to demand some form of security interest in the property of a prospective employer to protect against the possibility that amounts owing under an employment contract are not paid. Even in the extremely unlikely event a security interest is given as part of the employment contract, there is no way to ensure that it would provide the desired protection for the employee or prospective employee. Without a special statutory priority rule, the security interest may be subject to extant security interests in the property of the employer.

Employees are disadvantaged in other respects. Unlike most other creditors, they have no capacity to assess the solvency of an employer or prospective employer. They do not have access to the private records of a business offering employment and generally do have the knowledge or resources to get information from commercial sources upon which an assessment of the risk involved in giving credit to the business can be made. Further, employees do not have the capacity to spread the loss resulting from non-payment over a large number of transactions. Nor can an employee "write-off" a loss from non-payment of wages against other income. By comparison, a commercial seller of goods to an employer has many customers. When employer does not pay, the seller can treat the loss as a cost of doing business which can be factored into the price charged generally for goods sold to all buyers. In any event, the non-payment is a business loss that can be taken into account when calculating the seller's income tax.

Historically, provincial legislators have been far more solicitous of the interests of employees than their federal counterparts. Extensive legislative measures have been implemented by provincial legislatures to address the problems that result from the very weak position that employee-creditors occupy under contract law and general debtor-creditor law. These measures are numerous and many of them are effective to the extent that they operate in the context of provincial (and other non-bankruptcy) law. However, only a few of them are effective in bankruptcy. An inordinately large number of proposals for change in bankruptcy law, including some contained in draft legislation, have been put forward to address this problem. But, to date, none has received the support of Parliament.

A wage claim made against a solvent employer¹ presents a very different set of issues than a wage claim made against an insolvent employer. By definition, a solvent employer has assets against which the wage claim can be enforced. Consequently, the principal issues that arise in this context are those related to speed and efficiency of enforcement. However, where the debtor-

¹ In the balance of this study, the term "employer" includes a former employer and an "employee" includes a former employee.

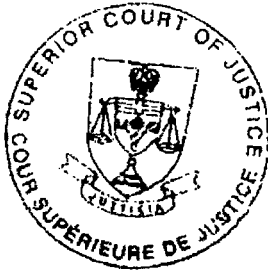
employer is insolvent, an additional issue arises: the priority position of the wage claim. Insolvency by definition means that the employer does not have sufficient assets to meet the claims of all of the employer's creditors. This being the case, the proceeds from the available assets will either be allocated on a priority basis with the result that some creditors will receive payment while other will receive nothing, or will be shared on some basis among most or all of the creditors. All bankruptcy and insolvency systems embody policy choices that determine how the insolvent employer's assets are to be distributed. One of the policy choices which is now reflected in section 136(1)(d) of the *Bankruptcy and Insolvency Act* is that employees, because of the circumstances in which their claims arise and their inability to take protective measures, are to be given a position superior, at least for a portion of their claims, over the other unsecured creditors.

An entirely different set of considerations must be addressed where the value of the property that vests in the trustee is small or disproportionately small compared to the value of the provable claims of the unsecured creditors, including unpaid employees, because the greatest portion of the assets of the bankrupt employer is subject to one or more security interests. A secured creditor has an *in rem* interest in property of the bankrupt with the result that it need not look to any aspect of *in personam* debtor-creditor law, whether provincial judgment enforcement law or bankruptcy law, when it comes to recovering payment from the debtor. The secured creditor can simply enforce its *in rem* interest in the collateral and recover payment in that way. Through the operation of the common law principle of *nemo dat quod non habet* as reflected in section 71(2) of the *Bankruptcy and Insolvency Act*, the trustee has at best a residual claim to the collateral since only the property interest of the debtor vests in the trustee. This can only be an interest subject to the property interest of the secured party.

Since bankruptcy law is not the law of secured transactions, one might expect the *Bankruptcy and Insolvency Act* to say nothing about the rights of secured parties, other than to recognize expressly or inferentially the *nemo dat* principle, and leave to provincial law the regulation of all aspects of security interests, including the extent to which security interests are to be given priority over the claims of special types of unsecured creditors such as unpaid employees of a bankrupt employer. While this may have been the intention of Parliament, the Supreme Court of Canada has interpreted the *Act* in such a way to give it a very intrusive effect on relative priority positions of unpaid employees and secured creditors of a bankrupt employer. The result of the approach taken by the Court is to produce, in some cases, a "priority flip" when bankruptcy occurs. In other words, the effect of bankruptcy is to reverse the priority position of unpaid employees and the secured creditors under the law of some provinces.

The practical result of the approach taken by the Court is, in many cases, to deny recovery or any appreciable recovery of unpaid wages when the employer becomes a bankrupt. Ironically, provincial legislators have unwittingly exacerbated the problem by providing modern, efficient systems for taking security interests. In most provinces it is very easy and inexpensive to take a security interest in all or most of the present and future personal property of a business organization. This all-encompassing security interest can be put in place well before the

Tab 10



Court File No. CV-09-8201-00CL

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

THE HONOURABLE MADAM
JUSTICE PEPALL

) THURSDAY, THE 20TH
) DAY OF AUGUST 2009

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED

B E T W E E N:

WESTLB AG, TORONTO BRANCH

Applicant

- and -

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

ORDER

THIS MOTION, made by Alvarez & Marsal Canada ULC, in its capacity as Court-appointed receiver and manager pursuant to section 101 of the Courts of Justice Act (Ontario) (the "CJA") and trustee and receiver and manager under the Construction Lien Act (Ontario), and McIntosh & Morawetz Inc., in its capacity as interim receiver pursuant to section 47(1) of the Bankruptcy and Insolvency Act (the "BIA"), (jointly and collectively, the "Receiver"), of the undertaking, property and assets of The Rosseau Resort Developments Inc. ("RRDI") for an Order: (i) approving and ratifying the retention of Miller Thomson LLP as representative counsel ("Representative Counsel") to represent those persons (the "Represented Unit Owners") who have entered into a rental pool management agreement with The Rosseau Resort Management Services Inc. ("RRMSI") and are either current owners (the "Unit Owners") of the condominium units at the Hotel or existing purchasers of Units who have not closed outstanding

agreements of purchase of sale with RRDI (the “Existing Unit Purchasers”) unless a Represented Unit Owner provides written notice to Representative Counsel that they do not wish to be included as a Represented Unit Owner in these proceedings and (ii), an Order abridging the time for bringing this motion and dispensing with any further service of this Motion Record; was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Receiver dated August 19, 2009 containing the Fifth Report to Court of the Receiver dated August 19, 2009, the Second Report to Court of the Receiver dated July 3, 2009 and the Fourth Report to Court of the Receiver dated August 12, 2009 (“Fourth Report”), filed and on hearing the submissions of independent counsel for the Receiver, counsel for WestLB AG, Toronto Branch and the Receiver, counsel for the Ad Hoc Committee of Unit Owners, counsel for Marriott Hotels of Canada Ltd., and counsel for Fortress Credit Corp. not opposing, no one appearing for any other person on the service list,

1. **THIS COURT ORDERS** that the timing and method of service of the motion record is hereby abridged and validated such that service on effected on the parties served with notice of this motion shall be good and sufficient notice of this motion record.

2. **THIS COURT ORDERS** that Miller Thomson LLP (“Representative Counsel”) is appointed in these proceedings to represent the Represented Unit Owners, unless and until written notice is provided by a particular Represented Unit Owner to Representative Counsel that such Represented Unit Owner does not wish to be a Represented Unit Owner, and that, subject to further order of the Court, the mandate of Representative Counsel pursuant to this Order shall be limited to (i) responding to the motion brought by RRMSI to vary or amend paragraph 6 of the Order of the Honourable Madam Justice Pepall made in these proceedings on August 18, 2009; and (ii) to bring or participate in a motion to be brought to appoint a receiver over certain assets of RRMSI. For greater certainty and without limitation, Representative Counsel shall not be charged with the responsibility for dealing with any individual Unit Owner or Existing Unit Purchaser’s purchase of or agreement to purchase a unit or units in the Hotel (as defined in the Fourth Report).

3. **THIS COURT ORDERS** that the Receiver of RRDI shall provide the last known e-mail addresses for each Represented Unit Owner to Representative Counsel who shall then provide to all Represented Unit Owners, within seven (7) days of the date of this Order, a copy of this Order, and that no further notice is required to be sent to the Represented Unit Owners in respect of the granting of this Order and the appointment of Representative Counsel.

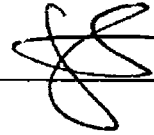
4. **THIS COURT ORDERS** that the fees and disbursements of Representative Counsel are not to exceed \$50,000, absent further order of this Court approving additional fees and disbursements.

5. **THIS COURT ORDERS** that Representative Counsel shall be paid its reasonable fees and disbursements by the Receiver out of the RRDI assets in a timely manner for fulfilling its mandate in accordance with this Order, on the provision of invoices by the Representative Counsel, to the Receiver. Representative Counsel shall have the benefit of the Receiver's Charge, established pursuant to the Amended and Restated Appointment Order of the Honourable Madam Justice Pepall dated June 2, 2009 in these proceedings in respect of its fees and disbursements. Upon the request of the Receiver, or any other party, Representative Counsel shall seek the approval of its fees and disbursements by this Honourable Court.

6. **THIS COURT ORDERS** that the Representative Counsel may from time to time apply to this Court for advice and directions in respect of its appointment or the fulfilment of its duties in carrying out the provisions of this Order or variation of the powers and duties of Representative Counsel, upon notice to the Receiver and to other interested parties, unless otherwise ordered by the Court.

7. **THIS COURT ORDERS** that, the Representative Counsel shall not be liable for any act or omission in respect of its appointment or the fulfilment of its duties in carrying out the provisions of this Order and that no action or other proceedings shall be commenced against Representative Counsel relating to its acting as such, except with prior leave of this Court, on at least seven (7) day's notice to the Representative Counsel and upon further order in respect of security for costs, on a substantial indemnity basis, of Representative Counsel in connection with any such action or proceeding.

8. **THIS COURT ORDERS** that the Representative Counsel shall be given notice of all motions relating to the matters identified in paragraph 2, to which Unit Owners or Existing Unit Purchasers are entitled in these proceedings and that Representative Counsel shall be entitled to represent those on whose behalf it is hereby appointed in all such proceedings.



Joanne Nicoara
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 20 2009

PER / PAR: 

WESTLB AG, TORONTO BRANCH
Applicant

V.

Court File No. CV-09-8201-00CL
THE ROSSEAU RESORT DEVELOPMENTS INC.
Respondent

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER

(August 20, 2009)

FRASER MILNER CASGRAIN LLP

1 First Canadian Place
100 King Street West,
Toronto, Ontario
M5X 1B2

Lawyer: R. Shayne Kukulowicz / Jane Dietrich
LSUC: 30729S / 49302U
Email: shayne.kukulowicz@fmc-law.com /
jane.dietrich@fmc-law.com
Telephone: 416 863-4740 / 416-863-4467
Facsimile: 416 863-4592

Independent Lawyers for Alvarez & Marsal
Canada ULC, and McIntosh & Morawetz Inc., in
their respective capacities as Court-appointed
Interim Receiver, Trustee, Receiver and Manager

Tab 11



Court File No.
CV15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE)	THURSDAY, THE 15TH
)	
REGIONAL SENIOR JUSTICE)	DAY OF JANUARY, 2015
)	
MORAWETZ)	

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 (the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Mark J. Wong sworn January 14, 2015 and the Exhibits thereto (the "**Wong Affidavit**") and the pre-filing report dated January 14, 2015 of Alvarez & Marsal Canada Inc. ("**A&M**") in its capacity as Proposed Monitor of the Applicants (the "**Pre-Filing Report**"), and on hearing the submissions of counsel for the Applicants and the partnerships listed on Schedule "A" hereto (the "**Partnerships**", and collectively with the Applicants, the "**Target Canada Entities**"), Target Corporation, A&M, the Directors and Employee Representative Counsel, and on reading the consent of A&M to act as the Monitor,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not Applicants, the Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicants, individually or collectively, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**"), between, *inter alia*, one or more of the Target Canada Entities and one or more classes of their applicable secured and/or unsecured creditors as the Applicants deem appropriate.

4. THIS COURT ORDERS that the amounts owing by Target Canada Co. ("**TCC**") to Nicollet Enterprise 1 S.à r.l. shall be subordinated and postponed to the proven claims of the unsecured creditors of TCC.

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that the Target Canada Entities shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Target Canada Entities shall continue to carry on business in a manner consistent with the preservation of the value of their business (the "**Business**") and Property. The Target Canada Entities shall each be authorized and empowered to continue to retain and employ the employees, advisors, consultants, agents, experts, appraisers, valuers, brokers, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further

Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. THIS COURT ORDERS that the Target Canada Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Wong Affidavit or, with the consent of the Monitor and the DIP Lender (as defined herein), replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System (including, without limitation, Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and JPMorgan Chase Bank, National Association ("**JPMorgan**")) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Target Canada Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Target Canada Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that the Target Canada Entities (other than Target Canada Property LLC and Target Canada Property LP) (collectively, the "**DIP Entities**") shall segregate all cash and non-cash receipts arising out of or in connection with the sale of the following Property of the DIP Entities (the "**DIP Property**"), which receipts shall be held in trust by the DIP Entities as follows:

- (a) net cash proceeds of any sale or other disposition (including as a result of casualty or condemnation) by the DIP Entities of any DIP Property other than inventory (whether such inventory is sold or disposed of through return to the vendor or wholesaler, the liquidation of the inventory by a liquidation agent if appointed by the Court in connection with the Liquidation Agent Solicitation Process (as defined herein) or otherwise), which shall be held in trust for and on behalf of the DIP Lender (as defined herein) and applied, except as otherwise agreed by the DIP Lender in

writing as follows, pursuant to and in accordance with the Term Sheet (as defined herein):

- (i) first, to pay accrued and unpaid interest on, and expenses in respect of, the DIP Obligations (as defined herein);
- (ii) second, to repay any principal amounts or other DIP Obligations outstanding; and
- (iii) third, the balance to be paid to the DIP Entities.

8. THIS COURT ORDERS that the Target Canada Entities shall be entitled but not required to pay the following expenses whether incurred prior to, on or after this Order to the extent that such expenses are incurred and payable by the Target Canada Entities:

- (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee medical, dental and similar benefit plans or arrangements), vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, and all other payroll processing expenses;
- (b) all outstanding or future amounts owing in respect of customer rebates, refunds, discounts or other amounts on account of similar customer programs or obligations;
- (c) all outstanding or future amounts related to honouring gift cards issued before or after the date of this Order;
- (d) the fees and disbursements of any Assistants retained or employed by the Target Canada Entities at their standard rates and charges;
- (e) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Target Canada Entities prior to the date of this Order by:
 - (i) logistics or supply chain providers, including customs brokers and freight forwarders and security and armoured truck carriers;
 - (ii) providers of credit, debit and gift card processing related services; and

- (iii) other third party suppliers up to a maximum aggregate amount of \$10,000,000, if, in the opinion of the Target Canada Entities, the supplier is critical to the Orderly Wind-down (as defined herein); and
- (f) any and all sums due and owing to Amex Bank of Canada and JPMorgan in respect of credit cards issued to management and employees of the Target Canada Entities.

9. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Target Canada Entities shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the Business in the ordinary course during the Orderly Wind-down after this Order, and in carrying out the provisions of this Order and any other Order of this Court, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Target Canada Entities following the date of this Order.

10. THIS COURT ORDERS that the Target Canada Entities shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from the Target Canada Entities' employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services taxes, harmonized sales taxes or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Target Canada Entities in connection with the sale of goods and services by the Target Canada Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or

where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business, workers' compensation or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Target Canada Entities; and
- (d) taxes under the *Income Tax Act* (Canada) or other relevant taxing statute giving rise to any statutory deemed trust amounts in favour of the Crown in right of Canada or any Province thereof or any political subdivision thereof or any other taxation authority.

11. THIS COURT ORDERS that, except as specifically permitted herein, the Target Canada Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any one of the Target Canada Entities to any of their creditors as of the date of this Order; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business or pursuant to this Order or any other Order of the Court.

ORDERLY WIND-DOWN

12. THIS COURT ORDERS that the Target Canada Entities shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the term sheet (the "**Term Sheet**") governing the DIP Facility (as defined herein), have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of their respective businesses or operations, and to dispose of redundant or non-material assets not exceeding \$1,000,000 in any one transaction or \$5,000,000 in the aggregate;
- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as the relevant Target Canada Entity deems appropriate;

- (c) pursue all offers for sales of material parts of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any sale (except as permitted by paragraph 12(a)) above;
- (d) in consultation with, and with the oversight of, the Monitor, engage in discussions with and solicit proposals and agreement(s) from third parties in respect of the liquidation of the inventory, furniture, equipment and fixtures located in and/or forming part of the Property (the "**Liquidation Agent Solicitation Process**") and return to Court for approval of such agreement(s); and
- (e) to apply to this Court for such approval, vesting or other Orders as may be necessary to consummate sale transactions for all or any part of the Property,

all of the foregoing to permit the Target Canada Entities to proceed with an orderly wind-down of the Business (the "**Orderly Wind-down**").

REAL PROPERTY LEASES

13. THIS COURT ORDERS that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Target Canada Entities shall pay, without duplication, all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts normally payable to the landlord under its lease, but for greater certainty, excluding accelerated rent) or as otherwise may be negotiated between the applicable Target Canada Entity and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

14. THIS COURT ORDERS that the Target Canada Entities shall provide each of the relevant landlords with notice of the relevant Target Canada Entity's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the relevant Target Canada Entity's entitlement to remove any such fixture under the provisions of the lease, such fixture

shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant Target Canada Entity, or by further Order of this Court upon application by the Target Canada Entities on at least two (2) days' notice to such landlord and any such secured creditors. If any of the Target Canada Entities disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the relevant Target Canada Entity's claim to the fixtures in dispute.

15. THIS COURT ORDERS that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA by any of the Target Canada Entities, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant Target Canada Entity and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Target Canada Entities in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

16. THIS COURT ORDERS that, notwithstanding anything to the contrary in any real property lease or elsewhere, the Target Canada Entities shall have no obligation to stock or re-stock and/or operate from any of its locations and/or remodel, fixture or open any new or renovated stores during these proceedings.

STAY OF PROCEEDINGS

17. THIS COURT ORDERS that until and including February 13, 2015, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Target Canada Entities or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Target Canada Entities and the Monitor, or with leave of this Court, and any and

all Proceedings currently under way against or in respect of the Target Canada Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

18. THIS COURT ORDERS that during the Stay Period, no Person having any agreements or arrangements with the owners, operators, managers or landlords of commercial shopping centres or other commercial properties (including retail, office and industrial (warehouse) properties) in which there is located a store, office or warehouse owned or operated by the Target Canada Entities shall take any Proceedings or exercise any rights or remedies under such agreements or arrangements that may arise upon and/or as a result of the making of this Order, the declarations of insolvency by the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to this Order and, without limiting the generality of the foregoing, no Person shall terminate, accelerate, suspend, modify, determine or cancel any such arrangement or agreement or be entitled to exercise any rights or remedies in connection therewith.

19. THIS COURT ORDERS that during the Stay Period, no Proceeding shall be commenced or continued against or in respect of Target Corporation and its direct and indirect subsidiaries (other than the Target Canada Entities) (collectively, "**Target US**") arising out of or in connection with any right, remedy or claim of any Person (as defined herein) against Target US in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of Target US under contract, statute or otherwise, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by indemnity, guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution, indemnity or otherwise, with respect to any matter, action, cause or chose in action, whether existing at present or commenced in future, which indebtedness, indemnity, liability or obligation is derivative of the primary liability of the Target Canada Entities except with the written consent of the Target Canada Entities and Target US and the Monitor, or with leave of this Court; provided that this paragraph shall not apply to any present or future bank providing the Cash Management System (including, without limitation, Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and

JPMorgan) in connection with any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

NO EXERCISE OF RIGHTS OR REMEDIES

20. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Target Canada Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the prior written consent of the Target Canada Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Target Canada Entities to carry on any business which the Target Canada Entities are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien, and provided further that this paragraph shall not apply to any present or future bank providing the Cash Management System (including, without limitation, Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and JPMorgan) in connection with any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

NO INTERFERENCE WITH RIGHTS

21. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Target Canada Entities, except with the written consent of the relevant Target Canada Entity and the Monitor, or leave of this Court. Without limiting the foregoing, no right, option, remedy, and/or exemption in favour of the relevant Target Canada Entity shall be or shall be deemed to be negated, suspended, waived and/or terminated as a result of this Order.

CONTINUATION OF SERVICES

22. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Target Canada Entities or statutory or regulatory mandates for the supply

of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, cash management services, payroll and benefits services, pharmaceutical services, insurance, warranty services, transportation services, freight services, security and armoured truck carrier services, utility, customs clearing, warehouse and logistics services or other services to the Business or the Target Canada Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Target Canada Entities, and that the Target Canada Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Target Canada Entities in accordance with normal payment practices of the Target Canada Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Target Canada Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Target Canada Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PLAN

24. THIS COURT ORDERS that the Key Employees Retention Plan (the "**KERP**"), as described in the Wong Affidavit, is hereby approved and the Target Canada Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

25. THIS COURT ORDERS that the key employees referred to in the KERP shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property, which charge shall not exceed an aggregate amount of \$6.5 million to secure

amounts owing to such key employees under the KERP. The KERP Charge shall have the priority set out in paragraphs 63 and 65 herein.

EMPLOYEE TRUST

26. THIS COURT ORDERS that the creation of the Employee Trust, as defined and described in the Wong Affidavit, is hereby approved on substantially the terms and conditions set out in the Employee Trust Agreement, including without limitation the appointments of Hon. John D. Ground as trustee and the Monitor as administrator (the "**Administrator**") of the Employee Trust and authorizes and directs the Monitor to act in such capacity.

27. THIS COURT ORDERS that TCC is authorized to process or cause to be processed all amounts received from the Employee Trust, including making payments to the Beneficiaries (as defined in the Employee Trust Agreement), subject to and in accordance with the terms and conditions of the Employee Trust Agreement.

28. THIS COURT ORDERS that the amounts received by TCC from the Employee Trust in the hands of TCC and when paid to any payment processor shall be deemed to be held in trust for and on behalf of the Beneficiaries, subject to and in accordance with the Employee Trust Agreement and shall not constitute property of TCC, including, without limitation, under the CCAA and the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") and shall not be subject to the claims of any person other than as provided under the Employee Trust Agreement.

29. THIS COURT ORDERS that the creation, establishment, funding and administration of the Employee Trust shall not, in whole or in part, directly or indirectly, (a) cause Target US to be or be deemed to be, or (b) in any way be relied upon to claim or assert that Target US is or is deemed to be, either (i) an employer or (ii) a common or related employer under contract, statute, common law or otherwise of any employee of the Target Canada Entities.

30. THIS COURT ORDERS that:

- (a) each Beneficiary shall be deemed to release the Releasees (as defined in the Employee Trust Agreement) on the payment of a distribution from the Employee Trust in respect of such Beneficiary's Eligible Employee Claim (as defined in the

Employee Trust Agreement), to the extent of such distribution (the "**Payment Release**"); and

- (b) each Beneficiary shall be deemed to release the Releasees in respect of the full amount of the Beneficiary's Eligible Employee Claim 60 days after the final payment to such Beneficiary under the Employee Trust or such later date as the Monitor in its sole discretion may designate, provided that the Beneficiary has not, on or before such date, provided notice of dispute to the Monitor and Employee Representative Counsel (as defined herein) substantially in the manner and form attached as Schedule "B"; provided further that in the event of any insufficiency of Trust funds to cover an individual's total Eligible Employee Claim, only the Payment Release shall be effective and there shall be no deemed full and final release of the full Eligible Employee Claim.

EMPLOYEE REPRESENTATIVE COUNSEL

31. THIS COURT ORDERS that Koskie Minsky LLP ("**Employee Representative Counsel**") is hereby appointed as counsel for all employees other than officers and directors (the "**Employees**") of the Target Canada Entities in these proceedings, any proceeding under the BIA or in any other proceeding respecting the insolvency of the Applicants which may be brought before this Honourable Court (the "**Insolvency Proceedings**"), for any issues affecting the Employees in the Insolvency Proceedings including, without limitation, with respect to the Employee Trust Agreement and the Claims Process (as defined in the Employee Trust Agreement).

32. THIS COURT ORDERS that the Employee Representative Counsel shall commence the process of identifying no more than 7 Employees to be nominated as Court-appointed representatives (the "**Employee Representatives**") as soon as practicable. The Employee Representatives, once appointed, shall represent the Employees in the Insolvency Proceedings, including, without limitation, for the purpose of settling or compromising claims by the Employees in the Insolvency Proceedings.

33. THIS COURT ORDERS that notice of the appointment of Employee Representative Counsel shall be provided to the Employees by:

- (a) referring thereto in a letter to be sent to the Employees, other than former employees, by Target Canada Entities, no later than January 19, 2015;
- (b) postings in each place of work;
- (c) notice on the Monitor's Website (as defined herein) and on the Representative Counsel's website; and
- (d) referring thereto in the notices provided for in paragraph 69 below.

34. THIS COURT ORDERS that the Target Canada Entities shall provide to Employee Representative Counsel, without charge:

- (a) the names, last known address and last known email addresses (if any) of all the Employees as well as applicable data regarding their entitlements, subject to a confidentiality agreement and to only be used for the purposes of these proceedings; and
- (b) upon request of Employee Representative Counsel, such documents and data as may be relevant to matters relating to the issues in these proceedings, including documents and data pertaining to the various benefits, termination allowance plans, severance and termination payments and other arrangements for group health, life insurance, retirement and severance payments, including up to date financial information regarding the funding and investments of any of these arrangements.

35. THIS COURT ORDERS that all reasonable fees and disbursements as may have been incurred by the Employee Representative Counsel prior to the date of this Order or which shall be incurred by the Employee Representative Counsel shall be paid by the Target Canada Entities on a weekly basis, forthwith upon the rendering of accounts to the Target Canada Entities. In the event of any disagreement regarding such fees, such matters may be remitted to this Court for determination.

36. THIS COURT ORDERS that Employee Representative Counsel is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including

dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

37. THIS COURT ORDERS that Employee Representative Counsel shall have no liability as a result of its appointment or the fulfilment of its duties in carrying out the provisions of this Order save and except for any gross negligence or wilful misconduct on its part.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

38. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Target Canada Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Target Canada Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Target Canada Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Target Canada Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

39. THIS COURT ORDERS that the Target Canada Entities shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Target Canada Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

40. THIS COURT ORDERS that the directors and officers of the Target Canada Entities shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of \$64 million, as security for the indemnity provided in paragraph 39 of this Order. The Directors' Charge shall have the priority set out in paragraphs 63 and 65 herein.

41. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 39 of this Order.

APPROVAL OF ADVISOR AGREEMENTS

42. THIS COURT ORDERS that the agreement dated January 14, 2015 engaging Lazard Freres & Co. LLC ("**Lazard**") as financial advisor to TCC in connection with the sales process for the real property assets held by the Target Canada Entities (the "**Real Property Portfolio Sales Process**") in the form attached as a confidential appendix to the Pre-Filing Report (the "**Financial Advisor Agreement**"), and the retention of Lazard under the terms thereof, is hereby ratified and approved and the Target Canada Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

43. THIS COURT ORDERS that Confidential Appendix "A" to the Pre-Filing Report shall be and is hereby sealed, kept confidential and shall not form part of the public record.

44. THIS COURT ORDERS that the agreement dated January 14, 2015 engaging Northwest Atlantic (Canada) Inc. ("**Northwest**") to provide real estate advisory services, including any required brokerage services, to TCC in respect of the Real Property Portfolio Sales Process in the form attached as Exhibit V to the Wong Affidavit (the "**Real Estate Advisor Agreement**"), and the retention of Northwest under the terms thereof, is hereby ratified and approved and the Target Canada Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the Real Estate Advisor Agreement.

45. THIS COURT ORDERS that Lazard and Northwest shall consult with and report to the Monitor on a regular basis in connection with the Real Property Portfolio Sales Process.

APPOINTMENT OF MONITOR

46. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Target Canada Entities with the powers and obligations set out in the CCAA or set forth herein and that the Target Canada Entities and their direct and indirect shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Target Canada Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

47. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Target Canada Entities' receipts and disbursements;
- (b) assist with the wind-down of the Business and operations of the Target Canada Entities;
- (c) liaise with Assistants with respect to all matters relating to the Property, the Business and such other matters as may be relevant to the proceedings herein;
- (d) oversee and consult with Lazard and Northwest with respect to the Real Property Portfolio Sales Process;
- (e) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the Shared Services, the Orderly Wind-down and such other matters as may be relevant to the proceedings herein;
- (f) assist the Target Canada Entities, to the extent required by the Target Canada Entities, in their dissemination to the DIP Lender and its counsel of financial and other information as agreed to between the Target Canada Entities and the DIP Lender

which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

- (g) advise the Target Canada Entities in their preparation of the Target Canada Entities' cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis in accordance with the Term Sheet;
- (h) advise the Target Canada Entities in their development of the Plan and any amendments to the Plan;
- (i) assist the Target Canada Entities, to the extent required by the Target Canada Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (j) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Target Canada Entities, to the extent that is necessary to adequately assess the Target Canada Entities' business and financial affairs or to perform its duties arising under this Order;
- (k) oversee and consult with the Target Canada Entities, any liquidation agent selected through the Liquidation Agent Solicitation Process and any Assistants retained (including brokers), to the extent required, with any and all wind-down activities and/or any marketing or sale of the Property and the Business or any part thereof;
- (l) administer the Employee Trust, in its role as Administrator thereof, in consultation with the Trustee thereof, TCC and Employee Representative Counsel;
- (m) be at liberty to engage independent legal counsel or such other persons, or utilize the services of employees of its affiliates, as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

- (n) be at liberty to serve as a "foreign representative" of the Applicants in any proceeding outside Canada;
- (o) assist the Target Canada Entities, to the extent required by the Target Canada Entities, with any matters relating to any foreign proceeding commenced in relation to any of the Target Canada Entities, including retaining independent legal counsel, agents, experts, accountants or such other persons as the Monitor deems necessary or desirable respecting the exercise of this power; and
- (p) perform such other duties as are required by this Order or by this Court from time to time.

48. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

49. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

50. THIS COURT ORDERS that that the Monitor shall provide any creditor of the Target Canada Entities and the DIP Lender with information provided by the Target Canada Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Target Canada Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Target Canada Entities may agree.

51. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for greater certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

52. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Target Canada Entities and counsel to the Directors shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or subsequent to the date of this Order by the Target Canada Entities as part of the costs of these proceedings. The Target Canada Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Target Canada Entities and counsel to the Directors on a weekly basis and, in addition, the Target Canada Entities are hereby authorized to pay to the Monitor, counsel to the Monitor, counsel to the Target Canada Entities and counsel to the Directors retainers in the aggregate amount of \$1,000,000 to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

53. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

54. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Target Canada Entities, counsel to the Directors, Employee Representative Counsel, Lazard (with respect to its Monthly Fee set out in the Financial Advisor Agreement) and Northwest shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$6.75 million, as security for their professional fees and disbursements incurred at their respective standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 63 and 65 hereof.

55. THIS COURT ORDERS that Lazard shall be entitled to the benefit of and is hereby granted a charge (the "**Financial Advisor Subordinated Charge**") on the Property with respect to its fees under the Financial Advisor Agreement other than its Monthly Fee thereunder (the "**Transaction Fee**"), which charge shall not exceed an aggregate amount of \$3 million, as security for the Transaction Fee. The Financial Advisor Subordinated Charge shall have the priority set out in paragraphs 63 and 65 hereof.

DIP FINANCING

56. THIS COURT ORDERS that the DIP Entities are hereby authorized and empowered to obtain and borrow, on a joint and several basis, under a credit facility from Target Corporation (the "**DIP Lender**") in order to finance the DIP Entities' working capital requirements and other general corporate purposes and allow them to make such other payments as permitted under this Order and the Term Sheet (the "**DIP Facility**"), provided that borrowings under the DIP Facility shall not exceed US\$175 million unless permitted by further Order of this Court.

57. THIS COURT ORDERS that the DIP Facility shall be on the terms and subject to the conditions set forth in the Term Sheet.

58. THIS COURT ORDERS that the DIP Facility and the Term Sheet be and are hereby approved and the DIP Entities are hereby authorized and directed to execute and deliver the Term Sheet.

59. THIS COURT ORDERS that the DIP Entities are hereby authorized and empowered to execute and deliver the promissory note as is contemplated by the Term Sheet (the

"Promissory Note"), and the DIP Entities are hereby authorized and directed to pay and perform all of their respective indebtedness, interest, liabilities and obligations to the DIP Lender under and pursuant to the Term Sheet and the Promissory Note as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

60. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the DIP Property, as security for any and all obligations of the DIP Entities under the DIP Facility, the Term Sheet and the Promissory Note (including on account of principal, interest, fees, expenses and other liabilities) (the aggregate of all such obligations being the "**DIP Obligations**"), which DIP Lender's Charge shall be in the aggregate amount of the DIP Obligations outstanding at any given time. The DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 63 and 65 hereof.

61. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or the Promissory Note;
- (b) upon the occurrence of an event of default under the Term Sheet, the Promissory Note or the DIP Lender's Charge, the DIP Lender, upon 3 business days' prior written notice to the DIP Entities and the Monitor and on application to the Court, may exercise any and all of its rights and remedies against the DIP Entities or the DIP Property under or pursuant to the Term Sheet, the Promissory Note and the DIP Lender's Charge, including without limitation, to cease making advances to the DIP Entities and set off and/or consolidate any amounts owing by the DIP Lender to the DIP Entities against the obligations of the DIP Entities to the DIP Lender under the Term Sheet, the Promissory Note or the DIP Lender's Charge, to give notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the DIP Entities and for the appointment of a trustee in bankruptcy of the DIP Entities; and

- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the DIP Entities or the DIP Property.

62. THIS COURT ORDERS AND DECLARES that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA, with respect to any advances made under the DIP Facility, the Term Sheet or the Promissory Note.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

63. THIS COURT ORDERS that the priorities of the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$6.75 million);

Second – KERP Charge (to the maximum amount of \$6.5 million);

Third – Directors' Charge (to the maximum amount of \$64 million);

Fourth – Financial Advisor Subordinated Charge (to the maximum amount of \$3 million); and

Fifth – DIP Lender's Charge.

64. THIS COURT ORDERS that the filing, registration or perfection of the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, and the DIP Lender's Charge, (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

65. THIS COURT ORDERS that each of the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge shall constitute a charge

on the Property and the DIP Lender's Charge shall constitute a charge on the DIP Property and such Charges (other than the DIP Lender's Charge) shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any Person who is a "secured creditor" as defined in the CCAA. For greater certainty, the DIP Lender's Charge shall rank behind all Encumbrances in favour of any Person.

66. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Target Canada Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge, unless the Target Canada Entities also obtain the prior written consent of the Monitor and the beneficiaries of the Administration Charge, the KERP Charge, the Directors' Charge and the Financial Advisor Subordinated Charge, or further Order of this Court.

67. THIS COURT ORDERS that the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the Term Sheet, the Promissory Note and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Target Canada Entities, or any of them, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Term Sheet or the Promissory Note shall create or be deemed

to constitute a breach by any of the Target Canada Entities of any Agreement to which they are a party;

- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Target Canada Entities entering into the Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Promissory Note; and
- (c) the payments made by the Target Canada Entities pursuant to this Order, the Term Sheet or the Promissory Note, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

68. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the relevant Target Canada Entity's interest in such real property leases.

SERVICE AND NOTICE

69. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and La Presse a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against the Target Canada Entities of more than \$1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available.

70. THIS COURT ORDERS that any employee of any of the Target Canada Entities that receives a notice of termination from any of the Target Canada Entities shall be deemed to have received such notice of termination by no more than the seventh day following the date such notice of termination is delivered, if such notice of termination is sent by ordinary mail, expedited parcel or registered mail.

71. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Guide") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: <http://www.alvarezandmarsal.com/targetcanada> (the "Monitor's Website").

72. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Guide is not practicable, the Target Canada Entities and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Target Canada Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Target Canada Entities and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

73. THIS COURT ORDERS that the Target Canada Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

74. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Target Canada Entities, the Business or the Property.

75. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give

effect to this Order and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

76. THIS COURT ORDERS that each of the Target Canada Entities and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as the foreign representative of the Target Canada Entities to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended, and to act as foreign representative in respect of any such proceedings and any ancillary relief in respect thereto.

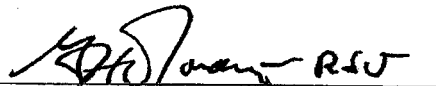
77. THIS COURT ORDERS that any interested party (including the Target Canada Entities and the Monitor) may apply to this Court to vary or amend this Order at the comeback motion scheduled for February 11, 2015, on not less than seven (7) calendar days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

78. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 10 2015

MJ

 R. J. V.

SCHEDULE "A"
PARTNERSHIPS

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

SCHEDULE "B"
NOTICE OF DISPUTE REGARDING ELIGIBLE EMPLOYEE CLAIM

I, _____ (insert name and employee number if known), am disputing that I have been paid in full in respect of my Eligible Employee Claim, as such term is defined in the Employee Trust Agreement. ****Please see the Monitor's website at www.alvarezandmarsal.com/targetcanada or Employee Representative Counsel's website at www.kmlaw.ca for further information.****

I am a _____ (insert position) in the Target Canada Co. store located at _____ (insert address/location).

The basis for my objection is:

(insert full particulars regarding dispute, including all facts and calculations on which you are relying)

Based on the foregoing, I claim that I am owed the sum of \$ _____.

Dated at _____ this _____ day of _____, 2015.

Signature: _____

Address: _____

Tel: _____

Email: _____

METHOD OF DELIVERY:

This notice of dispute must be sent to Employee Representative Counsel and to the Monitor at the following addresses:

To Employee Representative Counsel:

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Attention: Susan Philpott
Fax: (416) 204-2897
Email: targetemployees@kmlaw.ca

To the Monitor at:

Alvarez & Marsal Canada Inc.
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, ON M5J 2J1

Attention: Target Canada Monitor
Fax: (416) 847-5201
Email: targetcanada.monitor@alvarezandmarsal.com

**NOTE: THIS MUST BE SENT TO EMPLOYEE REPRESENTATIVE COUNSEL
AND THE MONITOR NO LATER THAN 45 DAYS AFTER YOU
RECEIVE YOUR LAST PAYMENT FROM TCC PAYROLL.**

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-15-10832001

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

INITIAL ORDER

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
Shawn Irving (LSUC #: 50035U)
Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
(re: appointment of Representative Counsel for
terminated employees, returnable May 18, 2016)

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
Tel: 416-595-2083
Fax: 416-204-2872
ahatnay@kmlaw.ca

James Harnum (LSUC# 60459F)
Tel: 416-542-6285
Fax: 416-204-2819

Proposed Representative Counsel to the
terminated employees of Danier Leather Inc.