

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, C.C-3, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA  
MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA  
PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET  
CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC**

Applicants

**MOVING PARTY'S FACTUM (ISSI INC.)**

**Motion by ISSI Inc. to Appoint an *Ad Hoc* Committee of 30 Day Suppliers**

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See Service List as of February 18, 2015

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**MOVING PARTY'S FACTUM**

**PART I - INTRODUCTION**

1. This is a Motion by ISSI Inc., for *inter alia*, an Order appointing an *ad hoc* committee comprised of those suppliers of Target Canada Co., the Canadian satellite business of Target Corporation (USA) ("TCC"), which supplied goods to TCC within the 30 days preceding the Applicants herein applying for and receiving protection under the *Companies Creditors Arrangement Act* ("CCAA") (the "30 Day Suppliers"). The detailed Order sought is found in the Notice of Motion.

2. ISSI Inc. also relies upon the Motion Record and Factum filed by RPI Consulting Group Inc. *et al.*

**PART II – THE FACTS**

3. ISSI Inc. formerly ISIS Inc. (“ISSI”), is a supplier of baby products to Target Canada Corporation (“TCC”). 1092072 Ontario Inc., carrying on business as Elfe Juvenile Products (“Elfe”), is an associated company. It too is a supplier of baby products to TCC.

4. The total sales in 2014 by ISSI Inc. to TCC were approximately \$1.2million. The total sales in 2014 by Elfe to TCC were approximately \$1.7million. The total for both companies is approximately \$2.9million.

**Motion Record of ISSI Inc., Affidavit of Shell Bern sworn May 8, 2015 (Second Bern Affidavit) Exhibit “A” Affidavit of Shell Bern sworn February 17, 2015 (“First Bern Affidavit”), para. 41**

5. Based on the purchase orders received, the required delivery dates and the rate of sale, the estimated inventory for ISIS Inc. at the end of January, 2015 would have ballooned to over \$1.2million. This would mean that TCC would have had on hand by the end of January, 2015 more than 100% as much inventory than it sold in 2014.

**First Bern Affidavit, para. 42**

6. Furthermore, based on the inventory received, the required delivery dates, and the rate of sale, the estimated inventory for Elfe at the end of January, 2015 would have ballooned to over \$1million.

**First Bern Affidavit, para. 43**

7. As a result, TCC would have had in its stores and distribution centres goods totalling approximately \$2,240,000.00 which is an amount far in excess of anything TCC could reasonably

have anticipated selling within the six month period (the first half of 2015), and certainly not in the quarter commencing in January, 2015.

**First Bern Affidavit, para. 45**

8. TCC did have the ability at any time to cancel any purchase orders already issued, or send ISSI Inc. and Elfe revised forecasts. It did not do so. In the retail industry, this is common practice because of inventory adjustment requirements. TCC did the exact opposite during this time period.

**First Bern Affidavit, para. 46**

9. Furthermore, there were also, for the first time, significant penalties imposed by TCC (Notice given November 19, 2014) if orders were delivered late. For example, on the order for \$759,404.10 of product (see paragraph 12 of the First Bern Affidavit), if it was eight days late, the penalty would have been in excess of \$50,000.00.

**First Bern Affidavit, para. 26, Exhibit I**

10. It is submitted that TCC wanted to ensure that product was delivered promptly during this anticipated CCAA time period.

**ISSI and Elfe are 30 Day Suppliers**

11. ISSI is a creditor of TCC for \$150,934.84 as a 30 Day Supplier. Elfe is a creditor for \$118,475.17 as a 30 Day Supplier.

**Second Bern Affidavit, para. 7**

12. Both ISSI and Elfe have \$62,785 owed to them by TCC, which was shipped outside of the 30 Day Period. ISSI and Elfe are a member of the class of suppliers to TCC as it relates to these unsecured claims.

**Second Bern Affidavit, para. 8**

**Quantum of 30 Day Suppliers of TCC**

13. In the Fourth Report of the Monitor, the Monitor stated that:

- (a) the quantum of goods received by TCC during the 30 Day Period was \$157 million;  
and,
- (b) the net unpaid goods received by Target Canada during the 30 Day Period was \$105.6 million.

**Second Bern Affidavit, para. 9 and Exhibit "B"**

14. As such, the quantum of the 30 Day Suppliers claim is substantial.

**Information Obtained Respecting Inventory**

15. Blaney McMurtry LLP, on behalf of the suppliers that they represent and on behalf of ISSI, posed numerous questions to the Monitor of TCC respecting, among other things, TCC's inventory and the 30 day goods.

16. The Monitor of TCC has provided answers to certain of the questions that have been posed by Suppliers, including ISSI. Further questions respecting the 30 day goods arise from these answers. No supporting documentation has been provided.

17. Further, the cross-examination of Mark Wong on his affidavit, although authorized by the Order of Justice Morawetz dated February 19, 2015 has not yet been scheduled.

### **30 Day Suppliers Ad Hoc Committee**

18. There remain issues with respect to the 30 Day Goods and the rights of the 30 Day Suppliers.

19. ISSI is prepared to be a member of a 30 Day Committee.

20. Solmon Rothbart Goodman LLP is prepared to act as 30 Day Committee Counsel to assert the rights of 30 Day Suppliers, and work cooperatively with the Suppliers Committee represented Blaney McMurty LLP, if so appointed.

## **PART III – STATEMENT OF ISSUES AND LAW**

### **Issue One: An *Ad Hoc* 30 Day Committee Should be Appointed**

21. *Ad Hoc* Committees and representative counsel have routinely been recognized by Canadian Courts in *Companies Creditors Arrangement Act* (“CCAA”) proceedings.

**Tab 1: Re: 4519922 *Canada Inc.* 2015 ONSC 124, para. 75**

22. In these proceedings, representative counsel has been appointed for the employees and a committee appointed representing certain interests of the pharmacies.

23. *Ad Hoc* Committees, as in class proceedings, allow large groups with common interests to assert their rights to the Court in an efficient and least expensive manner.

24. Section 11 of the CCAA grants broad discretion on the Court to make any order it deems necessary; this would include the appointment of an *Ad Hoc* Committee.

25. While the appointment is within the discretion of the Court, the Court will look to the following factors in considering whether to appoint a representative committee:

- (a) Collective influence and action;
- (b) Access and Control of Information;
- (c) Minimizing Fees and Expenses; and,
- (d) Balance of Convenience.

**Tab 2: Annual Review of Insolvency Law, Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World**

26. The 30 Day Suppliers are a clearly identifiable group of creditors that have a position that is unique to them and which can only be brought forward as a united group.

27. As well, because this class of creditors is limited to the supply of goods 30 days before the CCAA proceedings, there are many such suppliers, with smaller claims.

28. In this CCAA Proceeding, given the magnitude of the claims, the only way in which 30 Day Suppliers will have any influence and any ability to assert their rights is with a 30 Day Suppliers Committee and representative counsel.

29. This Honourable Court has ordered the cross-examination of Mark Wong, General Counsel and Secretary, and further production and disclosure may be required from TCC, and related entities.

30. There are issues that are unique to the 30 Day Suppliers. These issues can only be brought forward by an Ad Hoc Committee; it would be unwieldy for all 30 Day Suppliers to assert their rights.

31. ISSI, and its counsel, SRG, has been actively involved in these CCAA Proceedings from the outset and has brought the issue of the effect of these CCAA Proceedings on the 30 Day Suppliers. ISSI, and in particular its President, Shell Bern, is prepared to sit on the 30 Day Committee and abide by the By-Laws.

32. SRG is prepared to work with the Supplier Committee sought to be appointed by Blaney McMurtry LLP on behalf of the suppliers it represents on the common issues to all suppliers in this CCAA Proceedings to avoid duplication.

**Issue Two: Whether the suppliers of the 30 day goods should have been protected under the Order based on the intent of s. 81.1 of the BIA and the fact the Order of January 15, 2015 was intended to carry out a liquidation of the assets of TCC**

33. Liquidation under a CCAA proceeding should not be a means of avoiding the 30 day good provisions of Section 81.1 of the *BIA*.

34. While there is not the same provision in the CCAA, section 11 of the CCAA allows for an order the Court deems necessary and conveys discretion on the Court in CCAA Proceedings.

35. The clear legislative intent of section 81.1 of the BIA is to protect suppliers from insolvent debtors who ordered excessive amounts of inventory shortly before bankruptcy in order to increase the assets available to satisfy secured creditors.



36. It is a right of repossession of goods and it ranks ahead of any other claim in respect of those goods, other than a claim by a bona fide purchaser for value without notice of the repossession request.

37. In a CCAA Proceeding, there is a stay which does not give unpaid suppliers the right to repossess unpaid goods delivered to a debtor business. The effect of a CCAA Proposal is to automatically stay the ability of suppliers to then petition the debtor into bankruptcy and avail themselves of s. 81.1 of the BIA. Debtors have been known to liquidate assets during the stay period and pay other creditors from the proceeds of sale.

**Tab 3: *In the Matter of Woodward's Limited et al.* No. A924791, page 2**

38. While CCAA Proceedings have been utilized in liquidation scenarios, such as this, it is more traditionally used for reorganization and it was never intended that 30 Day Suppliers fund a liquidation of an insolvent person.

**Tab 4: *Bruce Agra Foods Inc. v. Proposal of Everfresh Beverages Inc. (Receiver of)* Doc. 32-077978**

**Tab 5: *In the Matter of Agro Pacific Industries Ltd.* 2000 BCSC 837**

39. There is a duty of good faith owed to the Court and stakeholders when applying for protection under the CCAA. It is intended on a motion without notice, which results in a stay under the CCAA, that the debtor will provide all material and correct information to the Court.

**Tab 6: *Re: San Francisco Gifts Ltd.* (2005) ABQB 91, para. 17**

40. As stated in *Re: San Francisco Gifts Ltd.*:

“...A debtor company should not be allowed to use the Act for any other purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for other improper purpose, the court has the means available to it, apart entirely from s.3 of the Act, to prevent misuse of the Act.”

*Supra*, para. 23

41. In addition, Courts have recognized the effect the stay may have on 30 Day Goods and have utilized their discretion under s. 11 of the CCAA to fashion a remedy that minimizes the prejudice caused to suppliers as a result of the stay. As stated by Justice Tysoe in *In The Matter of Woodward's Limited et al.*:

It is my view that the potential rights of the suppliers under a CCAA reorganization should be preserved in the same fashion as Parliament decided to preserve them under s. 81.1(4) of the B&I Act. If the potential rights are not preserved in this fashion it would probably lead to abuses of the insolvency legislation. Insolvent companies would attempt to defeat the potential rights of suppliers by utilizing the CCAA and the protection given to suppliers by s. 81.1 would become illusory. A theoretical answer to the potential abuse of the insolvency legislation is that the Court should refuse to exercise its discretion to grant a stay of proceedings under the CCAA if it believes that the insolvent company has chosen the CCAA over the B&I Act in order to defeat the potential rights of suppliers. However, there are other advantages of the CCAA over the B&I Act and it would be very difficult for suppliers to prove that there is an abuse. In my opinion, the Courts should avoid the possible abuse by treating suppliers in CCAA proceedings in the same way they are treated under the B&I Act.”

*Supra*, *In the Matter of Woodward's Limited, supra*, pages 6 and 7

42. There, in the context of a reorganization under the CCAA, Justice Tysoe balanced the interests by ordering that the running of the 30 day period under s.81.1 was suspended during the period of attempted reorganization so as to preserve potential rights of suppliers against goods that are not sold during the period of reorganization.

43. This exercise of equitable discretion is mirrored in such decisions as *Re Kitchener Frame Ltd.* that there should be a harmonious approach to the CCAA and BIA.

44. The jurisprudence, such as *In the Matter of Woodward's Limited*, makes it clear that if there is abuse, then the Court has an equitable discretion to ensure that no class of creditors, in this case the 30 Day Suppliers, is prejudiced by this conduct.

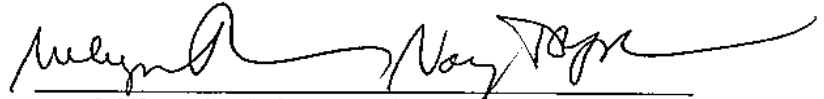
45. This Honourable Court has already recognized and endorsed the disclosure of information by TCC, through documentary disclosure and permitting the cross-examination of Mr. Wong, including respecting issues related to the 30 Day Goods.

46. After the disclosure of all information, the 30 Day Suppliers may have available the argument that, in the circumstances of this case, this Honourable Court should exercise its equitable discretion to grant priority, or some other appropriate remedy, to the 30 Day Suppliers as a result of the conduct of TCC.

**PART IV– ORDER REQUESTED**

47. ISSI Inc., seeks Orders as found in the Notice of Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8th day of May, 2015.



Melvyn L. Solmon and Nancy J. Tourgis

**SOLMON ROTHBART GOODMAN LLP**  
Barristers

Lawyers for ISSI Inc.

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Re: 4519922 Canada Inc.* 2015 ONSC 124
2. Annual Review of Insolvency Law, Ad Hoc Creditors' Committees in CCAA Proceedings:  
The Result of a Changing and Expanding Restructuring World
3. *In the Matter of Woodward's Limited et al.* No. A924791
4. *Bruce Agra Foods Inc. v. Proposal of Everfresh Beverages Inc. (Receiver of) Doc.*  
32-077978
5. *In the Matter of Agro Pacific Industries Ltd.* 2000 BCSC 837
6. *Re: San Francisco Gifts Ltd.* (2005) ABQB 91
7. *Re Kitchener Frame Ltd.* [2012] ONSC 234

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

##### General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

#### 2. *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3

##### Right of unpaid supplier to repossess goods

81.1 (1) Subject to this section, if a person (in this section referred to as the "supplier") has sold to another person (in this section referred to as the "purchaser") goods for use in relation to the purchaser's business and delivered the goods to the purchaser or to the purchaser's agent or mandatary, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier's own expense, and the purchaser, trustee or receiver, or the purchaser's agent or mandatary, as the case may be, shall release the goods, if

(a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in the prescribed form and containing the details of the transaction, within a period of 15 days after the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(b) the goods were delivered within 30 days before the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(c) at the time when the demand referred to in paragraph (a) is presented, the goods

(i) are in the possession of the purchaser, trustee or receiver,

(ii) are identifiable as the goods delivered by the supplier and not fully paid for,

(iii) are in the same state as they were on delivery,

(iv) have not been resold at arms' length, and

(v) are not subject to any agreement for sale at arms' length; and

(a) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.

**Where goods have been partly paid for**

(2) Where, at the time when the demand referred to in paragraph (1)(a) is presented, the goods have been partly paid for, the supplier's right to repossess under subsection (1) shall be read as a right

(a) to repossess a portion of the goods proportional to the unpaid amount; or

(b) to repossess all of the goods on paying to the purchaser, trustee or receiver an amount equal to the partial payment previously made to the supplier.

(3) [Repealed, 1999, c. 31, s. 23]

**If notice of intention or proposal was filed**

(4) If a notice of intention under section 50.4 or a proposal was filed in respect of the purchaser after the delivery of the goods to the purchaser and before the purchaser became bankrupt or became a person who is subject to a receivership, the 30-day period referred to in paragraph (1)(b) is the 30-day period before the filing of the notice of intention or, if there was no notice of intention, the filing of the proposal.

**Expiry of supplier's right**

(5) A supplier's right to repossess goods under this section expires if not exercised within the 15-day period referred to in paragraph (1)(a), unless the period is extended before its expiry by the trustee or receiver, or by the court.

**Ranks above other claims**

(6) Notwithstanding any other federal or provincial Act or law, a supplier's right to repossess goods pursuant to this section ranks above every other claim or right against the purchaser in respect of those goods, other than the right of a bona fide subsequent purchaser of the goods for value without notice that the supplier had demanded repossession of the goods.

**Application to court for directions**

(7) The purchaser, trustee or receiver may apply to the court for directions in relation to any matter relating to this section, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

**Supplier may appeal to court**

(8) Where a supplier is aggrieved by any act, omission or decision of the purchaser, trustee or receiver, the supplier may apply to the court and the court may make such order as it considers proper in the circumstances.

#### **Other rights saved**

(9) Nothing in subsection (7) or (8) precludes a person from exercising any right that the person may have under subsection 34(1) or section 37.

#### **No payment**

(10) A supplier who repossesses goods pursuant to this section is not entitled to be paid for those goods.

#### **Provincial rights saved**

(11) Nothing in this section precludes a supplier from exercising any right that the supplier may have under the law of a province.

#### **Definitions**

(12) The following definitions apply in this section.

*“person who is subject to a receivership”*

« mise sous séquestre »

*“person who is subject to a receivership”* means a person in respect of whom any property is under the possession or control of a receiver.

*“receiver”*

« séquestre »

*“receiver”* means a receiver within the meaning of subsection 243(2).



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Applicants

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

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**PROCEEDING COMMENCED AT  
TORONTO**

**FACTUM**

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