

CITATION: Target Canada Co. (Re), 2017 ONSC 327
COURT FILE NO.: CV-15-10832-00CL
DATE: 2017-03-01

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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.

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Marco Cedrone* and *Alex Ilchenko*, for Kulwinder Rai,

Robin B. Schwill and *Dina Milivojevic*, for Target Corporation

Lisa S. Corne, for Lou Pharma Corp. and Naser Ghasemlou and Fruits & Passion
Boutiques Inc.

Jay Carfagnini and *Jesse Mighton* for Alvarez & Marsal Canada Inc., Monitor

David Ullman and *Alexandra Teotorescu*, for Capital Brands LLC

Jeremy Dacks, for the Target Canada Entities

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Court appointed Monitor (the "Monitor") of the Applicant, brought this motion for advice and directions regarding the treatment of a number of claimants who have not filed timely claims in accordance with the claims procedure order issued in these proceedings, but who now seek to have their claims admitted for determination in the claims process.

[2] The Monitor specifically requests guidance on the following issues:

- (a) Should any of the known late claimants be permitted to file proof of claims in the claims process?
- (b) If so, and if such claims are determined to be allowed (in whole or in part), which distributions are such claimants entitled to participate in?

- (c) How is the Monitor to address any as-of-yet unknown late claims that may come forward in the future, bearing in mind the need for certainty and finality for the Estate and for all Stakeholders?

Background

[3] The Target Canada Entities (the “TCE”) were granted protection under the *Companies’ Creditors Arrangement Act* (“CCAA”) pursuant to the initial order dated January 15, 2015 (the “Initial Order”). The Initial Order appointed the Monitor.

[4] On June 11, 2015, the court issued the claims procedure order setting out the procedures to be followed for the filing and determination of claims against the TCE and their former directors and officers (the “Claims Procedure Order”), and the procedures set out therein, (the “Claims Process”).

[5] Pursuant to the Claims Procedure Order, the claims bar date for creditors asserting pre-filing claims was August 31, 2015, and for claimants with restructuring period claims, the bar date was the later of:

- (i) 45 days after the date on which the Monitor sent a claims package with respect to a restructuring period claim, and
- (ii) August 31, 2015.

[6] More than 1700 proofs of claim were filed with the Monitor in accordance with the Claims Procedure Order.

[7] On May 25, 2016, a creditors’ meeting was held (the “Creditors’ Meeting”) where Affected Creditors voting pursuant to the meeting order issued April 13, 2016 (the “Meeting Order”) unanimously voted to approve Applicant’s Joint Amended and Restated Plan of Compromise and Arrangement dated April 13, 2016 (the “Plan”).

[8] Among other things, the Plan includes broad releases in favour of Target Corporation and Target Brands in respect of claims not filed in the Claims Process.

[9] The Sanction and Vesting Order issued June 2, 2016 provides that the Plan, including the releases provided therein, shall become effective on the Plan Implementation Date.

[10] Plan implementation occurred on June 28, 2016.

[11] The Sanction and Vesting Order specifically provides:

“Any Affected Claim (...) for which a Proof of Claim has not been filed at the Claims Bar Date in accordance with the Claims Procedure Order, whether or not the holder of such Affected Claim (...) has received personal notification of the claims process established by the Claims Procedure Order, shall be and are hereby forever barred, extinguished and released with prejudice”.

[12] In the Twenty-Seventh Report of the Monitor dated May 11, 2016, the Monitor indicated that it would no longer accept Proof of Claim filed following the Creditors' Meeting.

[13] Since the Creditors' Meeting, the Monitor has been contacted by a number of putative claimants seeking to file Proofs of Claim for adjudication under the Claims Process. In each case, the Monitor declined to permit the filing of such late claims.

[14] In September 2016, the Monitor was contacted by counsel on behalf of Capital Brands Inc., ("CBI") a former supplier of the TCE, who indicated that a motion would be brought seeking to have the court approve the late filing of a Proof of Claim.

[15] Out of fairness to other late claimants who contacted the Monitor, but whose request to file late claims was declined, the Monitor indicated that the relief sought by CBI should be addressed through a motion for advice and direction where other claimants seeking to file late claims could have an opportunity to make submissions in an orderly process.

[16] In an Endorsement dated October 18, 2016 (the "October 18 Endorsement"), I directed that the Monitor's motion for advice and directions be heard on November 29, 2016 (the "November 29 Motion").

[17] The October 18 Endorsement set out the following processes pertaining to the November 29 Motion:

- (i) The Monitor is to serve a report regarding late claims by October 31, 2016;
- (ii) CBI is to file its responding materials by November 4, 2016; and
- (iii) Any other claimant seeking to late-file a claim is to serve and file responding materials, including an evidentiary record sufficient for the CCAA court to make a determination that the allowance of such claim at this late stage is appropriate in the circumstances, prior to the November 29 Motion, in accordance with the *Rules of Civil Procedure*.

First and Second Interim Distribution

[18] On June 29 and 30, 2016, the TCE, in consultation with the Monitor, issued the initial distribution totalling approximately \$672.5 million (the "Initial Distribution"). The Initial Distribution represented approximately 55.34% of affected creditors' proven claims.

[19] On October 19 and 20, 2016, the TCE, in consultation with the Monitor, issued a Second Interim Distribution in the amount of approximately \$87 million (the "Second Distribution"). The Second Distribution represented approximately 12.65% of affected creditors' proven claims. The Second Distribution was, subject to further order of the court, without prejudice to the rights of the putative late claimants in respect of this motion.

[20] As of October 31, 2016, the date of the Thirty-Second Report of the Monitor, approximately 68% of affected creditors' proven claims had been distributed.

[21] Following the Second Distribution, approximately \$3.5 million is being held in the TCE cash pool for scheduled vendor payments. An additional amount of approximately \$97.4 million is being held in reserve in the TCE disputed claims reserve account pending the resolution of disputed claims, including, in particular, the claims of the 27 remaining unresolved pharmacist franchisees and CRA.

[22] The Monitor has reported that current reserves are sufficient to satisfy distributions to the known late claimants, should they be permitted to file their claims, and such claims are ultimately accepted as proven by the Monitor (or the Claims Officer) in the amounts known to the Monitor at this time, without materially disturbing the estimated range of the coverage to affected creditors (being approximately 78% to 82%).

[23] In determining the motion, one must also take into account the terms of the October 18 Endorsement which are set out at [17] above. Specifically, (iii) sets out the process to be followed by any claimant seeking to file a late claim. The October 18 Endorsement specifically provides that any other claimant seeking to late file a claim is to serve and file responding materials, including an evidentiary record sufficient for the CCAA court to make a determination that the allowance of such claim at this late stage is appropriate in the circumstances (emphasis added).

[24] The test to evaluate whether a court will accept creditor claims after the passing of the claims bar date is articulated in *Blue Range Resource Corp. Re*, 2000 ABCA 285 (“Blue Range”).

[25] The question put before the court in *Blue Range* (para. 5) was as follows:

“What criteria in the circumstances of these cases should the court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?”

[26] The judgment of the court in *Blue Ridge* was delivered by Wittmann J.A. (as he then was). The relevant portions read as follows:

[14] I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view, inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in CCAA proceedings. But I also take some guidance from the *US Bankruptcy Rules* Standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and the *US Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included into other areas,

such as late reporting in insurance claims, and delay in the prosecution of a civil action.

...

[26] Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[27] In the context of the criteria, “inadvertent” includes carelessness, negligence, accident, and is unintentional. ...”

[27] On the subject of prejudice, the Blue Range decision is also instructive. At [40] the court stated:

“In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available process is an integral part of the process. A reduction in that share cannot be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd*. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

[28] There are certain similarities between Blue Range and Target Canada. Both entities filed under the *CCAA*, and both Blue Range and Target Canada were essentially liquidations. In addition, in both cases, the plans of arrangement had already been voted upon by the creditors and sanctioned by the court.

[29] In accordance with the terms of the October 18 Endorsement, certain claimants have filed materials in connection with the motions. Their reasons for not having filed timely claims are summarized as follows:

- (a) Fruits & Passion Boutiques Inc. ("Fruits & Passion"): Fruits & Passions claim that it did not file a timely claim because it did not receive the Claims Package that was mailed to it in late June 2015, perhaps because Fruits & Passion moved its head office in the summer of 2015. Fruits & Passion asserted its claim within a reasonable time after receiving notice of its claim bar date.
- (b) Lou Pharma Corp. ("Lou Pharma"): Lou Pharma claims that it did not file a timely claim because Mr. Ghasemlou (Lou Pharma's sole shareholder, officer and director) was in Iran for all of June and July 2015 and most of August 2015 and consequently was not aware of the Claims Procedure Order or Claims Bar date, did not receive the Claims Package, was not familiar with legal processes in Canada generally and has not previously had exposure to a claims process in any insolvency or restructuring proceeding.
- (c) Kulwinder Kaur Rai: Ms. Rai's claim is for damages arising from a slip and fall at a Target Shopping Centre in Surrey, B.C. A paralegal at the law firm representing Ms. Rai claims that a timely claim was not filed because of Mr. Rai's counsel's view that the CCAA proceeding did not apply to Mr. Rai's claims "because an insurer has already responded to the claim in British Columbia".
- (d) CBI: CBI claims that it assumed it had filed a timely claim because:
 - i. It received regular offers from claims traders to purchase CBI claim against Target Canada;
 - ii. It was listed on the list of creditors posted on the Monitor's website and it assumed, based on its understanding of U.S. bankruptcy procedure, that being listed on the list of creditors meant that its claim was deemed to be filed; and
 - iii. It was not aware of the disclaimer on the Monitor's website about the nature of the list of creditors.

CBI also states that it is "still unsure" that the proof of claim was not filed and relies on the turnover in its accounting department to justify its ignorance with respect to the status of the proof of claim.

- (e) Mohammad Alam: Mr. Alam commenced an action for damages as a result of injuries allegedly sustained by him on August 16, 2014 while a patron/invitee at a Target Shopping Centre located in Ajax, Ontario.

Mr. Alam retained counsel on August 21, 2014. Counsel to Mr. Alam sent a notice of claim to the defendant, Target, on August 27, 2014. The following day, August 28, 2014, Mr. Alam received a letter from Sedgwick Claims Management Services Canada Inc. advising that they had been assigned to handle the incident on behalf of Target Corporation and its insurer, ACE American Insurance Company.

On August 2, 2016, Counsel to Mr. Alam contacted the adjuster for the defendant Target Canada to inquire about the status of Target Canada.

Since the loss occurred on August 16, 2014, counsel to Mr. Alam maintains the limitation date for maintaining the claim is August 16, 2016.

On August 12, 2016, the Statement of Claim was issued against the defendants, Target Corporation, Target Canada Co. o/a Target Canada and 151516 Ontario Inc.

Mr. Alam takes the position the he relied on the wording of paragraph 54 of the Claims Procedure Order which reads as follows:

“THIS COURT ORDERS that nothing in this Order shall prejudice the rights ... or prevent or bar any person from seeking recourse against or payment from the Target Canada Entities insurance that exists to protect or indemnify ... or other Persons, whether such recourse or payment is sought directly by the Person asserting a Claim from the insurer or any Target Canada Entity; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter a defence to such Claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or portion thereof for which the Person receives a payment directly from, or confirmation that she is covered by, the Target Canada Entities insurance ... or other liability insurance policy or policies that exist to protect or indemnify the Directors or Officers or other persons shall not be recoverable as against a Target Canada Entity or Director or Officer as applicable.

[30] The claims of Fruits & Passion, Lou Pharma, Kulwinder Kai Rai, CBI and Mohammed Alam were supported by uncontroverted evidence that establishes, in my view, that their failure to file timely claims was caused by inadvertence and there was no suggestion that these claimants were not acting in good faith. Further, there is no evidence to suggest that these claimants were seeking to delay or otherwise avoid participating in the CCAA process. Indeed, it would have been contrary to their interest not to participate in the CCAA process.

[31] Turning now to the effect of permitting the claims in terms of the existence and the impact of any relevant prejudice caused by the delay. The second, third and fourth factors of the Blue Range test deal with any prejudice to other creditors if late claims are admitted. In this

case, the Monitor reports that even if the late claimants are permitted to file their claims and such claims are ultimately accepted as proven in the amounts known to the Monitor at this time, there will be no change in the estimated range of the distribution to affected creditors (being approximately 78% - 82%).

[32] A relevant question is whether other creditors lost a realistic opportunity to do anything that they otherwise might have done.

[33] From the outset, it was clear that this was a liquidation plan. Target Canada followed a court approved process to liquidate its assets. The proceeds from the liquidation were being made available to creditors in accordance with their legal priorities.

[34] Simply put, unsecured creditors are sharing *pro rata* in any assets of Target Canada available for distribution after satisfying secured creditors, preferred creditors and valid trust claims. There was no other choice available to unsecured creditors.

[35] There is, however, one significant variable that would affect the distribution to unsecured creditors. It concerns the status of the claim of the parent company, Target Corporation.

[36] Target Corporation, as Plan Sponsor (as defined in the Plan), made significant economic contributions to the CCAA proceedings and the Plan. These contributions included the following:

- a. Funding a trust established for the benefit of the employees of Target Canada in the amount of \$95 million;
- b. Making available debtor-in-possession financing to Target Canada to allow Target Canada to meet payroll and other obligations;
- c. Providing ongoing shared services to facilitate the orderly wind-down of the Applicant's operations; and
- d. Subordinating well in excess of \$3.1 billion in inter-company debt against Target Canada.

[37] Target Corporation submits that they made these contributions to the Plan and relied upon obtaining the releases provided for in the Plan. Specifically, pursuant to the Plan, Target Corporation and its subsidiaries (including Target Brands Inc.) ("Target Brands") were released from all claims (subject to certain exceptions which are not relevant for the purpose of this motion) existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions were taken to implement the Plan, that were arising out of or in connection with the Claims, the Business whether or however conducted, the Plan, the CCAA proceedings, or any Claims that were barred or extinguished by the Claims Procedure Order.

[38] Target Corporation also submits that it relied upon the anticipated recovery on its remaining unsecured claims which it did not subordinate, based on the Monitor's illustrative recovery.

[39] Finally, Target Corporation takes the position that it would not have sponsored the Plan on the terms to which it agreed without being able to rely on the finality and enforceability of the release and discharge of claims provided for in the Sanction Order. This evidence is set out in the affidavit of Cory Haaland, sworn November 22, 2016.

[40] Target Corporation has been named as defendant in three of the late claims and Target Brands has been named as defendant in one of the late claims. Each of these late claims was initiated after the Sanction Order was granted and the Plan implementation occurred. From the standpoint of Target Corporation, each late claim against Target Corporation or Target Brands has already been released pursuant to the terms of the Plan, as approved by the Sanction Order.

[41] Given the evidence of Target Corporation that they would not have sponsored the Plan on terms to which it agreed without being able to rely on the finality and enforceability of the release and discharge of claims provided for in the Plan, as approved by the Sanction Order, I am satisfied that Target Corporation and Target Brands have established that they would be prejudiced if such late claims were permitted to be filed to the extent that such claims are being made as against Target Corporation and Target Brands. Further, I am satisfied that given the contributions of Target Corporation and the fact that the Plan has been sanctioned and distributions have already been made to creditors, the relevant prejudice to Target Corporation and Target Brands cannot be alleviated by attaching any appropriate conditions to an order permitting late filings.

[42] I conclude that Fruits & Passion, Lou Pharma, Kulwinder Kaur Rai, CBI and Mohammed Alam have satisfied the test as set out in *Blue Range*.

[43] Accordingly, an order is granted permitting Fruits & Passion, Lou Pharma, Kulwinder Kaur Rai, CBI and Mohammad Alam, to file their claims. The Monitor is directed to review and value them and, to the extent that the claims are proven, against Target Canada, these claimants are entitled to participate in a distribution.

[44] To the extent that the claims are made against Target Corporation or Target Brands, the Monitor is directed not to accept such claims. The claims as against Target Corporation and Target Brands have been barred and the release is effective.

[45] Two other claimants made submissions at the November 29 Motion, but did not file an evidentiary record.

- (a) Erin Wolf Bloom: Ms. Wolf-Bloom commenced a lawsuit against Target Canada Co. and Target Brands, Inc. as a result of injuries which Ms. Bloom alleges persist following her purchase of a Target brand shampoo known as "Up and Up".

The Statement of Claim has not been served as Ms. Bloom has been advised by the Monitor that no claims are permitted against Target-related companies.

Ms. Bloom's position is that she is not a creditor of the TCE as she has a claim against the insurer and ought to be allowed to effect service of her

Statement of Claim and to prove her claim for payment under the third-party liability insurance in place.

- (b) Wazir Chand & Co. PVT Ltd.: In response to receiving the Motion Record, Wazir Chand sent an email to the Monitor on November 3, 2016 in which they state that they are resubmitting the details of outstanding claims against Target Canada totalling U.S. \$10,747.90.

The email also references attachments of scanned copies of three invoices, respective purchase orders and the relative 3FCRs in support of their claim.

In response, on November 21, 2016 counsel to the Monitor requested further information from Wazir Chand, specifically an explanation as to why Wazir Chand did not file a proof of claim with the Monitor, noting that a claims package was sent to Wazir Chand in June 2015.

In reply, by email dated November 23, 2016, Wazir Chand indicates that they never received any communication whereby a proof of claim was required. This was the reason provided as to why Wazir Chand could not send the proof of claims earlier.

[46] The claims of Ms. Wolf Bloom and Wazir Chand have not been supported by any evidence as required by the November 18 Endorsement. The Monitor is directed to advise Ms. Wolf Bloom and Wazir Chand that if they intend to pursue their claims, they are required to file some evidence as to why they did not file a timely proof of claim with the Monitor. If and when such evidence is filed, the Monitor can request direction from the court, taking into account the reasons set out in this endorsement.

[47] The second issue is to provide the Monitor with directions with respect to distributions in which late claimants are entitled to participate. The Monitor has made two distributions, pursuant to court order. These distributions are not to be disturbed.

[48] The Monitor has approximately \$97.4 million being held in reserve. The Monitor has reported that these reserves are sufficient to satisfy distributions to the known late claimants, if these claims are ultimately accepted as proven by the Monitor.

[49] Accordingly, I direct, to the extent that the claims of the late claimants are proven, that the Monitor effect distributions from this reserve. The distributions to these late claimants should be made in amounts sufficient to provide them with the equivalent of the First and Second Interim Distributions. These distributions should be made prior to any further distribution being made to all unsecured creditors.

[50] Finally, the Monitor has asked for direction as to how to address any as of yet unknown claims that may come forward in the future, bearing in mind the need for certainty and finality for the Estate and for all stakeholders.

[51] Consistent with my reasons, the Monitor is directed not to accept any further claims as against Target Corporation or Target Brands.

[52] With respect to claims as against Target Canada, the allowance of any such claims will be determined, taking into account, among other things, all notices sent to creditors respecting distributions, notice of the November 29 Motion and the *Blue Range* principles as set out above.

[53] Further, consistent with these reasons, any distributions already made to unsecured creditors are not to be disturbed.


Regional Senior Justice G.B. Morawetz

Date: March 1, 2017