

CITATION: Target Canada Co. (Re), 2017 ONSC 6413
COURT FILE NO.: CV-15-10832-00CL
DATE: 2017-11-10

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: *Francy Kussner, Melaney Wagner and Jason Wadden*, for Alvarez & Marsal
Canada Inc., Monitor

François Gagnon and David Elman, for Bell Canada and BCE Nexxia

Robin B. Schwill, for Target Corporation

Jeremy Dacks and Shawn T. Irving, for the Target Canada Entities

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as court-appointed monitor (the "Monitor") of the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended (the "CCAA") brought this motion for an order providing advice and directions of the court regarding a request by Bell Canada ("Bell Canada") and Bell Nexxia Corporation ("Bell Nexxia"), together with Bell Canada ("Bell"), to amend certain claims that they have filed in the claims process in these proceedings (the "Original Claims").

[2] Specifically, the Monitor requests guidance on the following issue: Should the Monitor accept Bell's proposed amended claims for review and consideration?

[3] In 2015 Bell filed the Original Claims against Target Canada asserting amounts owing for both the pre-filing and post-filing periods. The Original Claims were not for amounts owing for goods or services provided but rather for formulaic "termination fees" under disclaimed contracts (the "Agreements") totally approximately \$4.7 million.

[4] The proof of claim form required Bell to provide all particulars of its claim and supporting documentation, including amount, and description of transactions or agreements, or legal breaches giving rise to the claim.

[5] At the time of filing, Bell took the position that the Original Claims were post-filing obligations and submitted the Original Claims on a without prejudice basis.

[6] The Monitor, in consultation with the Applicants, allowed the Original Claims in the amounts Bell filed as pre-filing claims only pursuant to the Notices of Revision or Disallowance dated December 15, 2015. Bell disputed the Notices of Revision or Disallowance. In June 2016, the Original Claims were determined, with the agreement of Bell, to be pre-filing proven claims under the Plan and the amounts as agreed to were accepted for all purposes in the CCAA proceedings. Bell withdrew its dispute and the Original Claims, thereby became uncontested as to their characterization.

[7] In the fall of 2016, Ms. Patricia Green, Director of Finance with Bell, was made aware that there were credit balances in certain accounts. At the time, it was not clear whether these credit balances related to pre-filing obligations or post-filing payments.

[8] If the credit balances related to the pre-filing obligations, Bell would need to reduce the amount of the Original Claims. If the credit balances related to post-filing payments, Bell would have been overpaid and would owe Target Canada a refund. Ms. Green began a review to determine the nature and extent of the credit balances in the accounts.

[9] In April 2017, Bell advised the Monitor of this review and that if it discovered material variances in the amount of the Original Claims, it intended to file amended claims.

[10] The review was completed in May 2017. Bell discovered that the credit balances related to post-filing payments. Consequently, there had been overpayments in the post-filing payments and the Original Claims had understated the amount owed to Bell.

[11] Bell reimbursed Target Canada approximately \$406,000 for the discovered overpayments in the post-filing obligations (the "Refund") and advised the Monitor that the Original Claims were substantially understated and that they would be filing amendments to the Original Claims reflecting the correct amount owed.

[12] On May 18, 2017, Bell filed amendments to the Original Claims (the "Amended Claims"), which increased the amount of the Original Claims by approximately \$4.1 million.

[13] In an affidavit sworn in support of this motion, Ms. Green stated that the Original Claims substantially understated the amount owed as a result of inadvertent errors. The specific errors were:

- (a) A misunderstanding of the term length of the Agreements; and
- (b) A misunderstanding of the factors to be applied to the revenue generated during the term of the Agreements.

[14] Ms. Green stated that the Original Claims were based on calculations of the termination fees owed to Bell in accordance with the applicable Agreements and those fees were calculated based on the remaining term length of Agreements. In the Original Claims, the term was calculated as 60 months after the date of execution of each service schedule and this was in error.

The Agreements provided that the terms be calculated as sixty (60) months after the customer acceptance of the last IPVPN Circuit Installed Under the Initial 132 Site Commitment. That date was November 15, 2013.

[15] With respect to the misunderstanding of the factor to be applied, Ms. Green stated that the Original Claims calculated the termination fees by applying a factor of 50% to the revenue to be generated to the end of term and that this was in error.

[16] Ms. Green went on to explain that, for Bell Canada, the Agreements provided that a factor of 100% be applied for the first thirty (30) days after receipt of the Notice of Termination and 50% for the remainder of the term. For Bell Nexxia, the Agreements provide that a factor of 100% be applied for ninety (90) days following receipt of the Notice of Termination and 50% for the remainder of the term.

[17] On April 13, 2016, Target Canada filed its Amended and Restated Joint Plan of Arrangement and Compromise (the "Plan"). The Plan was further amended on May 19, 2016 with the filing of the Second Amended and Restated Joint Plan of Arrangement and Compromise (the "Amended Plan").

[18] The Monitor reported to creditors on their potential recovery and estimated that the Affected Creditors could expect to receive a dividend in the range of 71% to 80% of the Affected Creditors Proven Claims. The Affected Creditors voted in favour of the Amended Plan.

[19] The Amended Plan was sanctioned on June 2, 2016.

[20] Target Canada is currently holding approximately \$36.8 million in a disputed claims reserve account pending the resolution of currently disputed claims, which includes an amount related to the Amended Claims pending the outcome of this motion.

[21] With respect to the impact of the Amended Claims on creditor recovery, in its Thirty-Sixth Report, the Monitor advised that unsecured creditors would receive aggregate distributions in the Plan in the range of approximately 82.7% to 84.3% of such Affected Creditors Proven Claims, with a low range calculated for illustrative purposes using the full amount the Amended Claims.

[22] If the Amended Claims are not accepted, the Monitor estimates that unsecured creditors would ultimately receive aggregate distributions under the Plan in the approximate range of 83.2% to 84.3%.

[23] The Monitor estimates that if the Amended Claims are accepted in full, the estimated recovery range would be reduced by approximately 0.45%.

[24] Bell takes the position that the Amended Claims should be admitted and payment should be made accordingly.

[25] Target Corporation, the parent company of Target Canada, and an unsecured creditor in these proceedings takes the position that the Amended Claims should not be admitted for distribution purposes for a number of reasons, including that this motion did not concern "late

claims” or “amended claims” as referred to in *Blue Range Resources Corp. (Re)*, 2000 ABCA 285. Rather, it was a plea for being able to correct a unilateral mistake – i.e., rectification.

[26] I do not accept this argument. No attempt is being made by Bell to seek rectification of the Agreements, nor is there any attempt to seek rectification of the court sanctioned Amended Plan. There is no question that the Amended Plan is binding on all the unsecured creditors of Target Canada. Bell does not take issue with the legal effect of the Amended Plan as being binding on all unsecured creditors.

[27] In my view, Bell seeks an amendment to the quantum of its proof of claim as submitted in these proceedings.

[28] Having determined that this is not an issue of rectification, I do not accept the submissions of Target Corporation to the effect that the well-established principles for remedying mistakes apply (see: Factum of Target Corporation at para. 25, referencing GHL Fridman, *The Law of Contract in Canada*, 6th Edition (Scarborough: Carswell, 2011) at 252-254).

[29] In my view, this matter should be evaluated on the basis of the principles set out in *Target Canada Co., Re*, 2017 ONSC 327, pertaining to the late filed or amended claims, which applied the test set out by the Alberta Court of Appeal in *Blue Range*. It should be noted that *Blue Range* addressed the issues relating to both late claims and amended claims filed after a claims bar date (see: *Blue Range* at [3], [5] and [41].)

[30] Target Corporation also takes the position that permitting already proven, agreed to and admitted claims to be amended in these circumstances is inconsistent with the requirements of appropriateness and due diligence which are baseline considerations that a court should always bear in mind when exercising CCAA authority. Target Corporation submits that Bell has not acted with due diligence in disclosing its mistake and given that Bell is a sophisticated commercial party, who explicitly agreed to the \$4.7 million quantum of its claim, and now wishes to claim an additional \$4.1 million – the existence of established grounds for equitable relief are not present.

[31] Target Corporation submits that this is not a case of an inadvertently missed invoice, misclassification of claim type (secured vs. unsecured), or initial misapprehension as to the correct debtor party, as dealt with in *Blue Range*.

[32] I do not accept these submissions.

[33] Target Corporation did not challenge the affidavit of Ms. Green.

[34] As Ms. Green stated at paragraph 31 of her affidavit, the discussions between Bell and the Monitor focused on the characterization of the claim as the Monitor had accepted the quantum of the Original Claims. As a result, Bell never reviewed or reassessed the quantum of the Original Claims.

[35] It was not until the fall of 2016 that Ms. Green was made aware that there were credit balances in certain accounts. She stated that it was not clear whether these credit balances related to pre-filing obligations or post-filing obligations.

[36] As stated at paragraph 37 of her affidavit, as a result of the review of the accounts, it became evident to Bell's finance department that amounts received as post-filing payments would need to be reimbursed and that the amounts of the Original Claims would need to be amended.

[37] As noted in [11] above, Bell reimbursed Target Canada approximately \$406,000 for the discovered overpayments in the post-filing obligations and advised the Monitor that the Original Claims were substantially understated. Ultimately the Amended Claims increased the amount of the Original Claims by approximately \$4.1 million.

[38] I am satisfied, from a review of the evidence, that the Original Claims substantially understated the amounts owed as a result of inadvertent errors. The specific errors were:

- (a) A misunderstanding of the term length of the Agreement; and
- (b) A misunderstanding of the factors to be applied to the revenue generated during the term of the Agreements.

[39] In arriving at this conclusion, I have taken into account the statements made by Ms. Green in her affidavit at paragraphs 38, 38.1 and 38.2.

[40] I am also satisfied that Bell acted in good faith throughout the proceedings. The Amended Claims are legitimate claims and a legitimate explanation for the error has been provided. To impose a strict application of the claims bar process would not, in these circumstances, be fair to Bell.

[41] Further, there is no evidence to suggest that Bell was seeking to delay or otherwise avoid participating in the CCAA process. Indeed, it would have been contrary to Bell's interests not to participate in the process.

[42] As noted at [31] of my earlier Endorsement (2017 ONSC 327), the second, third and fourth factors of the *Blue Range* test deal with any prejudice to other creditor. If the Amended Claims are accepted in full, it will reduce the estimated recovery range by 0.45% to between 82.7% and 83.9%. This range is substantially in excess of the anticipated recovery range reported by the Monitor and which was referred to at the time that the creditors voted on the Amended Plan. The reduction in the estimated recovery for unsecured creditors may negatively affect Target Corporation by \$1 million, but the fact remains that the recovery for Target Corporation on its unsecured claim is in excess of expectations.

[43] Paragraphs [32] –[34] of my earlier Endorsement address the issue of whether other creditors lost a realistic opportunity to do anything that they otherwise might have done. The same analysis holds true for this endorsement. From the outset, this was a liquidation plan. The proceeds from liquidation were made available to creditors in accordance with their legal priorities with unsecured creditors sharing *pro rata* in any assets of Target Canada available for

distribution after satisfying priority creditors. There was no other choice available to unsecured creditors.

[44] In my view, if the Amended Claims are admitted, no creditor can demonstrate any relative prejudice caused by the resolution of this claim.

[45] There remains, however, one outstanding point. It is clear that Target Canada, the Monitor and its counsel spent a considerable period of time evaluating the Original Claims and then addressing issues arising out of the Amended Claims. In these circumstances, the costs relating to issues arising out of the Amended Claims should not be borne by the creditors of Target Canada, but rather should be borne by Bell.

[46] During argument, certain submissions were made with respect to the amount of time spent by the Monitor, the Monitor's counsel, and Target Canada's counsel on this issue. Further, in the event that it was determined that the Amended Claims should be admitted, counsel for Bell acknowledged that Bell should contribute to such costs.

[47] In the result, I am satisfied that the test as set out in *Blue Range* has been met by Bell and that there is no prejudice in permitting Bell to amend its claim to take into account specific errors that arose from a misunderstanding.

[48] Accordingly, I exercise my discretion to direct the Monitor to accept the Amended Claims for review and consideration.

[49] Bell is to cover the reasonable costs of the Monitor, the Monitor's counsel, and Target Canada incurred as a result of Bell's error arising out of the misunderstanding. I would ask that the parties use their best efforts to arrive at an appropriate amount for the costs incurred, with such costs to be paid by Bell. If the parties are unable to reach agreement, they should schedule a 9:30 a.m. appointment with me.

[50] Finally, the Monitor is to effect any distributions to Bell in respect of the Amended Claims from the monies that it is holding in reserve. The distributions should be made in amounts sufficient to provide Bell with the equivalent of all interim distributions issued to date. Further, consistent with my prior decision, any distributions already made to unsecured creditors are not to be disturbed.


Regional Senior Justice Morawetz

Date: November 10, 2017