

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

**IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c.C-36, AS AMENDED**

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

**FACTUM OF BELL CANADA AND BCE NEXXIA CORPORATION
(Returnable September 13, 2017)**

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PART I - OVERVIEW

1. Bell Canada (“**Bell**”) and BCE Nexxia Corporation (“**Nexxia**” and together with Bell, the “**BCE Group**”) are creditors of Target Canada Co. (“**TCC**”) that have filed restructuring proofs of claim in these proceedings in accordance with the Claims Procedure Order made June 11, 2015, as amended September 21 and October 30, 2015 (collectively, the “**CPO**”).
2. Bell and Nexxia discovered errors in their respective initial claims and have submitted amended versions to Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed Monitor of the Target Group (in such capacity, the “**Monitor**”). The BCE Group has requested that the claims be accepted as amended.
3. The Monitor brings this motion seeking advice and directions regarding the BCE Group’s amended claims.
4. The BCE Group’s amended claims ought to be accepted in the circumstances. The errors in the initial claims were the result of inadvertence and the BCE Group has acted in good faith at all times.

5. Accepting the BCE Group's amended claims will not cause relevant prejudice to any party. However, refusing the amended claims would cause significant prejudice to the BCE Group.
6. The BCE Group submits that the equities and law clearly support the acceptance of the BCE Group's amended claims.

PART II - FACTS

Services Provided

7. Prior to and during these proceedings, the BCE Group provided TCC with telecommunications services, including a virtual private network. TCC had multiple accounts with the BCE Group and received service at most, if not all of its numerous locations across Canada, including all of its retail stores, as well as connectivity to the Target Corporation head office in the United States.

Affidavit of Patricia Greene sworn August 16, 2017 (the "Greene Affidavit") at Exhibit W.

8. With respect to post-filing services, the BCE Group, TCC and the Monitor entered into a post-filing agreement dated February 19, 2015 setting out terms for pre-payment for services rendered after the date of the Initial Order made in these proceedings on January 15, 2015.

The Initial Order made in these proceedings on January 15, 2015.

Greene Affidavit, para 26 and Exhibit O.

9. From February 2015 to the end of July 2015, TCC made post-filing payments to the BCE Group (the "**Post-Filing Payments**").

Greene Affidavit, para 27.

The Claims Procedure Order

10. On June 11, 2015, this Court made an Order setting out a procedure for parties to file claims. The June 11, 2015 Order was amended by further Orders of this Court on

September 21 and October 30, 2015 (collectively defined above as the CPO). Pursuant to the CPO, the claims bar date for creditors asserting restructuring claims was the later of (i) 45 days after the date on which the Monitor sent a claims package with respect to a restructuring claim; and (ii) August 31, 2015, later extended to October 31, 2015.

The Order made in these proceedings on June 11, 2015.

The Order made in these proceedings on September 21, 2015.

The Order made in these proceedings on October 30, 2015.

11. On March 1, 2017, Regional Senior Justice Morawetz made an Order permitting the filing and allowance of various claims not submitted within the CPO deadlines (the “**Late Claims Order**”).

The Order made in these proceedings on March 1, 2017 (the “Late Claims Order”).

12. On April 12, 2017, R.S.J. Morawetz directed the Monitor to accept three additional late claims for filing purposes and, if appropriate upon its review, to admit the claims for distribution purposes.

The Endorsement made in these proceedings on April 12, 2017 (unofficial transcript attached).

The BCE Group Claims

13. In the course of these proceedings, TCC terminated all of the agreements with the BCE Group. Pursuant to the terms of the agreements between the BCE Group and TCC, the BCE Group is entitled to termination fees.

14. In accordance with the CPO:

- (a) Bell filed a restructuring proof of claim on September 24, 2015 and amended that restructuring proof of claim on December 2, 2015 in the amount of CDN\$4,012,715.30 (the “**Bell Claim**”); and,

Greene Affidavit, paras 6, 7 and 31 and Exhibit C.

- (b) Nexxia filed a restructuring proof of claim on September 24, 2015 in the amount of USD\$574,871.70 (the “**Nexxia Claim**” and, together with the Bell Claim, the “**Original Claims**”).

Greene Affidavit, para 14 and 31 and Exhibit H.

15. The Original Claims were prepared by Jill Gibson, Director of Billings and Collections for Bell. Ms. Gibson retired from Bell in August 2016.

Greene Affidavit, paras 25 and 32.

16. At the time of filing, the BCE Group took the position that the Original Claims were post-filing obligations and submitted the Original Claims on a without prejudice basis.

Greene Affidavit, paras 8 and 15 and Exhibits C and H.

17. On December 15, 2015, the Monitor took the position that the Original Claims constituted pre-filing obligations, but otherwise allowed the Original Claims in their full amounts.

Greene Affidavit, paras 10 and 16 and Exhibits D and I.

18. On January 20, 2016, the BCE Group filed Notices of Dispute of Revision or Disallowance seeking to have the Original Claims characterized as post-filing obligations.

Greene Affidavit, paras 11 and 17 and Exhibits E and J.

19. Between January 2016 and June 2016, the Monitor and the BCE Group discussed the appropriate characterization of the Original Claims as post-filing or pre-filing obligations. The Monitor did not dispute the amount of the Original Claims.

Greene Affidavit, para 31.

20. Further to the aforementioned discussions, the BCE Group withdrew its dispute in June 2016 and the Original Claims, which had already been allowed by the Monitor in

their full amount as pre-filing claims, thereby became uncontested as to their characterization.

Greene Affidavit, paras 12 and 18 and Exhibits F and K.

Discovery of Errors

21. As noted above, the Monitor did not dispute the amount of the Original Claims and the BCE Group had no reason, at that time, to review or re-assess the calculations performed in preparing the Original Claims.

Greene Affidavit, para 31.

22. In the fall of 2016, Patricia Greene, Director of Finance with Bell, was made aware that there were credit balances in the TCC Accounts with the BCE Group. It was not clear whether these credit balances related to pre-filing obligations or the Post-Filing Payments.

Greene Affidavit, para 33.

23. If the credit balances related to the pre-filing obligations, the BCE Group would need to reduce the amount of the Original Claims. If the credit balances related to the Post-Filing Payments, the BCE Group would have been overpaid and owe TCC a refund. Accordingly, Ms. Greene began a review to determine the nature and extent of the credit balances in the TCC accounts.

Greene Affidavit, para 34.

24. Since there were numerous accounts, this review was a significant project. To reconcile the Post-Filing Payments, the BCE Group needed to individually review each circuit and account for the post-filing period.

Greene Affidavit, para 36.

25. In April 2017, the BCE Group 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.

Greene Affidavit, para 39 and Exhibit P.

26. In May 2017, the BCE Group completed its review. In the course of that review, the BCE Group finance department discovered there had been overpayments in the Post-Filing Payments and that the Original Claims had understated the amount owed to the BCE Group.

Greene Affidavit, paras 37, 38.

27. The BCE Group reimbursed TCC approximately \$406,000¹ 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.

Greene Affidavit, paras 40 and 42 and Exhibit Q.

28. On May 18, 2017, Bell and Nexxia each filed amendments to the Original Claims (the “**Amended Claims**”).

Greene Affidavit, para 41 and Exhibits R, S and T.

29. The Amended Claims increased the amount of the Original Claims by approximately CAD\$4.2 million.

Greene Affidavit, para 41.

Basis for the Errors

30. The Original Claims substantially understated the amount owed as a result of inadvertent errors. Under the provisions of the agreements, the BCE Group is entitled to the amount of the Amended Claims. The specific errors were:
- (a) a misunderstanding of the term length of the agreements; and
 - (b) a misunderstanding of the factor to be applied to the revenue generated during the term of the agreements.

¹ Greene Affidavit, para 42: CAD\$49,846.90 from Bell and USD\$285,426.11 from Nexxia.

Greene Affidavit, paras 38, 38.1 and 38.2

Misunderstanding of the term of the agreement

31. The Original Claims are based on calculations of the termination fees owed to the BCE Group in accordance with the applicable agreements. Those fees are calculated based on the remaining term length of the agreements.
32. In the Original Claim, the term was calculated as sixty (60) months after the date of execution of each service schedule. This was an error.

Greene Affidavit, paras 38.1 and 38.1.2.

33. The agreements provided that the term 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.

Greene Affidavit, paras 38.1.2 and 38.1.3.

Misunderstanding of the factor to be applied

34. The Original Claims calculated the termination fees by applying a factor of 50% to the revenue to be generated to the end of the term. This was an error.

Greene Affidavit, para 38.2.

35. For Bell, 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 Nexxia, the agreements provided that a factor of 100% be applied for the first ninety (90) days following receipt of the notice of termination and 50% for the remainder of the term.

Greene Affidavit, para 38.2.

The Plan of Arrangement

36. On April 13, 2016, the Target Group filed its Amended and Restated Joint Plan of Arrangement and Compromise (the “**Plan**”). The Plan was further amended on May 19, 2016 when the Target Group filed its Second Amended and Restated Joint Plan of Arrangement and Compromise (the “**Amended Plan**”).

Greene Affidavit, paras 19 and 21.

37. The Monitor reported to creditors on potential recovery under the Plan and, in particular, estimated that the Affected Creditors (as defined in the Plan) could expect to receive a dividend in the range of 71% to 80% of the Affected Creditors’ Proven Claims (as defined in the Plan).

Greene Affidavit, paras 19 and 29 and Exhibit L.

38. On May 25, 2016, the Affected Creditors (as defined in the Amended Plan) voted and unanimously approved the Amended Plan.

Greene Affidavit, para 22.

39. On June 2, 2016, this Court sanctioned the Amended Plan.

Greene Affidavit, Exhibit N.

40. On June 28, 2016, the Target Group began the implementation of the Amended Plan.

Greene Affidavit, Para 24.

41. The Target Group, in consultation with the Monitor, has made interim distributions in accordance with the Amended Plan totalling \$759.5 million, representing approximately 68% of Affected Creditors’ Proven Claims.

***Target Canada Co. (Re)*, 2017 ONSC 217 (the “Late Claims Decision”), paras 18 to 20.**

The 35th Report of the Monitor dated September 1st, 2017, pg 5.

42. TCC is currently holding approximately \$36.8 million in a TCC 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 seeking advice and directions.

The 36th Report of the Monitor dated September 1st, 2017, pg 10.

Impact of the Amended Claims on Creditor Recovery

43. In its 36th report, the Monitor advised the Court regarding the impact of the acceptance of the Amended Claims on the anticipated recovery scenarios as follows:

6.9 The Monitor has estimated the effect that allowance of Bell's Proposed Amended Claims would have on the future distributions and ultimate overall creditor recoveries in the event the same approach is taken:

- (a) The Monitor provided an updated report on the estimated distributions to creditors in its Thirty-Fifth Report. In that Report, the Monitor estimated that Affected Creditors with Proven Claims would ultimately receive aggregate distributions under the Plan in the range of approximately 82.7% to 84.3% of such Affected Creditors' Proven Claims, with the low range calculated for illustrative purposes using the full amount of Bell's Proposed Amended Claims;
- (b) If Bell's Proposed Amended Claims are not accepted for consideration, the Monitor estimates that Affected Creditors with Proven Claims would ultimately receive aggregate distributions under the Plan in the range of approximately 83.2.% to 84.3%; and
- (c) Bell's Proposed Amended Claims, if accepted, would affect the estimated range of recovery for the Affected Creditors. The Monitor estimates that if Bell's Proposed Amended Claims were accepted in full, they would reduce the estimated recovery range by approximately 0.45% to between 82.7% and 83.9%.

The 36th Report of the Monitor dated September 1st, 2017, pgs 15 and 16.

44. It is not clear from the Monitor's 36th report whether the Monitor's calculation of the impact of the admission of the Amended Claims takes into consideration the Refund

remitted by Bell to the Monitor in the amount of approximately \$406,000.00, which increases the amount available for distribution to the Affected Creditors.

45. As noted above, at the time the Affected Creditors voted on the Amended Plan, the anticipated recovery range was between 71.3% and 79.5%.

The 27th Report of the Monitor dated May 11, 2016, pgs 42 and 43.

46. Accordingly, while the increased amount of the Amended Claims would result in a very small reduction in the dividend percentage payable to the Affected Creditors (less than half a percent), the final dividend percentage remains greater in all scenarios than the high range of dividend the Affected Creditors anticipated when they unanimously approved the Amended Plan.

PART III - THE ISSUE

47. The issue on this motion is: should the BCE Group be permitted to file the Amended Claims?

PART IV - THE LAW

A. Late Filed or Amended Claims are Permissible

48. As noted above, on March 1, 2017, R.S.J. Morawetz made an order in these proceedings directing that the Monitor accept various late filed claims for determination.

Late Claims Order.

49. In the Late Claims Decision, this Court applied the well-established test for considering claims filed or amended after a claims bar date, as set out by the Alberta Court of Appeal in the Blue Range Resources CCAA proceedings.

Late Claims Order, para 4.

Late Claims Decision, para 24.

***Blue Range Resources Corp. (Re)*, 2000 ABCA 285 (“Blue Range”).**

50. In *Blue Range*, the Alberta Court of Appeal addressed the claims of two types of late filing creditors. One group that had not filed claims at all and one group that filed claims but sought to amend those claims outside the dates set out in the claims procedure.

Blue Range, para 4.

51. The Court set out the following criteria to be applied in assessing whether to permit claims filed or amended after a claims bar date:

[41] In considering claims **filed or amended** after a claims bar date in a claims bar order, a CCAA supervising judge should proceed 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?

Blue Range, para 41 (emphasis added).

See also **Late Claims Decision**, paras 25 and 26 (quoting from **Blue Range**).

52. In the circumstances of the Amended Claims:

- (a) the amendments to the Original Claims resulted from inadvertence;
- (b) the BCE Group has acted in good faith throughout these proceedings; and
- (c) there is no relevant prejudice in allowing the Amended Claims.

B. There is No Distinction Between Late Filed Claims and Amended Claims

53. As noted above, the Alberta Court of Appeal in *Blue Range*, addressed the claims of two types of late filing creditors. One group that had not filed claims at all and one

group that filed claims but sought to amend those claims outside the dates set out in the claims procedure.

54. In assessing both types of late filing creditors, the Court applied the same test and reached the same result. As was the case in *Blue Range*, there is no principled basis to distinguish between the late filed claims recently permitted and the Amended Claims which are the subject of this motion.

C. The BCE Group has Acted in Good Faith Throughout

55. Good faith is required to ensure that parties have not delayed in advancing their claims in order to avoid participating in the proceedings or to obtain an advantage. Carelessness is not a basis to deny a creditor their opportunity to make a claim in the proceedings.

Ontario v. Canadian Airlines Corp., [2000] A.J. No. 1321, para 13.

56. The BCE Group participated in the process set out in the CPO. In accordance with that process, the Monitor and the BCE Group were engaged in discussions with respect to the characterization of the Original Claims. The amount of the Original Claims was not in issue.
57. The BCE Group had no reason to believe that it was necessary to review or reassess the Original Claims until the fall of 2016, nearly a year after the deadlines set in the CPO.
58. As soon as the BCE Group became aware of a potential error in the Original Claims (and in the Post-Filing Payments), it began a thorough review to ensure the amounts claimed and received were correct. This process required the recalculation and reconciliation of numerous accounts, which was time consuming.
59. Further, the BCE Group could not gain any advantage by initially understating the amount of its claims.

D. The Original Claims Contained Errors Due to Inadvertence

60. In *Blue Range*, the Alberta Court of Appeal held that: “in the context of the criteria, ‘inadvertent’ includes carelessness, negligence, accident, and is unintentional.” R.S.J. Morawetz followed this interpretation in the Late Claims Decision.

Blue Range, para 27.

Late Claims Decision, para 26.

61. The BCE Group would have preferred to have filed the Original Claims in the correct amounts from the outset, or to have filed the Amended Claims within the timelines set out in the CPO. However, its failure to do so falls squarely within the Court of Appeal’s definition of “inadvertent”.
62. The errors were the result of a BCE Group employee misunderstanding certain terms of the agreements. The delay was not intentional.

E. There is No Relevant Prejudice in Allowing the Amended Claims

63. In assessing whether there has been prejudice, the Alberta Court of Appeal held that the relevant question is: “did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done?” The Court expressly rejected a reduced recovery as relevant prejudice, finding that “[a]llowing all legitimate creditors to share in the available proceeds is an integral part of the process.” R.S.J. Morawetz followed this approach in the Late Claims Decision.

Blue Range, para 40.

Late Claims Decision, para 27, 32 and 34.

64. There is no evidence that any party would have acted differently if the Amended Claims had been filed within the CPO timeline. The BCE Group submits that there is no basis to conclude that there would be relevant prejudice in allowing the Amended Claims.
65. Prior to voting on the Amended Plan, the Affected Creditors were advised that their anticipated recovery would be between 71% and 80% of the Affected Creditors’

Proven Claims (as defined in the Amended Plan). Accordingly, when unanimously approving the Amended Plan, the Affected Creditors could only reasonably expect a recovery within that range.

The Monitor's 27th Report dated May 11, 2016.

66. The recovery is now expected to be significantly better than originally forecasted. In the Monitor's 35th Report dated September 1st, 2017, the illustrative recovery scenarios are in the range of 83.2% to 84.3% of the Affected Creditors Proven Claims (as defined in the Amended Plan).

The Monitor's 35th Report dated September 1st, 2017.

67. The effect of the Amended Claims would result in recovery between 82.7% and 83.9%² of the Affected Creditors Proven Claims (as defined in the Amended Plan).

The 36th Report of the Monitor dated September 1st, 2017, pgs 15 and 16.

68. Accordingly, at the time the Affected Creditors voted on (and approved) the Amended Plan, the anticipated recovery was significantly less than the recovery they can now expect even if the Amended Claims are permitted.
69. Although the impact on the recovery of other creditors, at any level, does not constitute relevant prejudice in the circumstances, it is noteworthy that the impact would not be material. In contrast, if the Amended Claims were not permitted, the prejudice to the BCE Group (a loss of approximately CAD \$3.4 million) would be very significant.
70. The BCE Group further notes that permitting the Amended Claims would not require any creditor to disgorge any funds they have received to date.
71. The BCE Group submits that, as was the case in the Late Claims Decision, there is no prejudice in allowing the Amended Claims and that the same result should follow.

² It is not clear from the Monitor's 36th report whether the Monitor's calculation of the impact of the admission of the Amended Claims takes into consideration the Refund remitted by Bell to the Monitor in the amount of approximately \$406,000.00, which increases the amount available for distribution to the Affected Creditors.

72. R.S.J. Morawetz held that Target Corporation and its subsidiaries (including Target Brands Inc.) were prejudiced only to the extent that late claims were permitted against those entities. In contrast, the Amended Claims (and the Original Claims) are solely against TCC.

Late Claims Decision, paras 37 to 41.

73. This Court should be guided by the principles set out in *Alary, Re* regarding when it is appropriate to use its discretion in granting certain relief. In *Alary, Re*, the Court held that when exercising its discretion in bankruptcy and insolvency proceedings, the Court should be guided by the following factors:
- (i) what is just and equitable in the particular circumstances from the perspective of the creditors and the bankrupt;
 - (ii) discretion should properly balance the interests of the parties and any prejudice;
 - (iii) the Court's exercise of discretion must be reasonable;
 - (iv) the Court must not erode confidence in, or frustrate the purposes of the insolvency legislation; and
 - (v) the Court should endeavor to provide certainty to other commercial parties when addressing a similar situation.

***Alary, Re*, 2016 BCSC 2108, 2016 CarswellBC 3189 at para 27.**

74. In considering the factors set out above, the BCE Group submits that, similar to *Alary, Re*, the Court should exercise its discretion in favour of permitting the BCE Group to file the Amended Claims, which has been brought to this Court's attention by way of a motion for advice and directions by the Monitor.

PART V - RELIEF REQUESTED

75. For all of the reasons set out above, the BCE Group requests that this Honourable Court render an order permitting BCE Group to file its Amended Claims and directing the Monitor to review and value such Amended Claims and, to the extent that Amended Claims are proven against TCC, the BCE Group claimants are entitled to participate in the distribution in accordance with the Amended Plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2017.



François D. Gagnon / David H. Elman

Lawyers for Bell Canada and BCE Nexxia Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Alary, Re*, 2016 BCSC 2108, 2016 CarswellBC 3189.
2. *Blue Range Resources Corp. (Re)*, 2000 ABCA 285
3. *Ontario v. Canadian Airlines Corp.*, [2000] A.J. 1321 (Q.B.)
4. *Target Canada Co. (Re)*, 2017 ONSC 327

Relevant Orders made in these proceedings

5. The Initial Order dated January 15, 2015.
6. The Claims Procedure Order dated June 11, 2015.
7. The Order amending the Claims Procedure Order dated September 21, 2015.
8. The Order further amending the Claims Procedure Order dated October 30, 2015.
9. The Order permitting the filing of claims outside the dates in the Claims Procedure Order (as amended) dated March 1, 2017.
10. The Endorsement permitting the filing of late claims dated April 12, 2017.

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

PROCEEDINGS COMMENCED AT TORONTO

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