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

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 AND 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

COSTS SUBMISSIONS OF THE OBJECTING LANDLORDS

Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc., SmartREIT (formerly Calloway Real Estate Investment Trust), Kingsett Capital Inc., Doral Holdings Limited, 430635 Ontario Inc., Faubourg Boisbriand Shopping Centre Holdings Inc., Sun Life Assurance Company of Canada, Primaris REIT

McLean & Kerr LLP
Barristers and Solicitors
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TO: **SERVICE LIST**

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Costs Submissions of the Objecting Landlords

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1. The Objecting Landlords each request their costs, at a partial indemnity rate, for successfully opposing the motion of the Applicants to, among other things, obtain an order accepting the filing of its Joint Plan of Compromise and Arrangement heard December 21 and 22, 2015. The costs claimed by each of the Objecting Landlords are set out in Schedule "A" appended hereto.

2. Rule 57.01 of the *Rules of Civil Procedure* sets out the principles that a court may consider in exercising its discretion as to costs. The starting point for determining an award of costs is the result and the relative success of each party. Costs generally follow the result. The factors to be considered include:

(a) the complexity of the proceeding;
(b) the importance of the issues; and
(c) the amount of costs an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding.

The Objecting Landlords Were Successful - Costs in CCAA Proceedings

3. The Objecting Landlords were successful in their opposition of the Applicants' motion and the Applicants were entirely unsuccessful. The general rule is that absent some special circumstance, costs follow the event[1].

4. Although costs orders are not often made in *CCAA* proceedings, the courts have awarded costs to successful parties for procedural steps in *CCAA* proceedings. By way of example, in

[1] *St. Jean (Litigation Guardian) v. Cheung*, [2009] 0.J. No. 27 at para. 4 (C.A.).

Return on Innovation[2], the Court granted costs on a partial indemnity basis in favour of TA Associates ("**TA**"). In determining that costs were appropriate, the Court recognized that TA was a substantial creditor; that it would be severely affected by the matter before the court; that TA fully participated in the motion, filed an affidavit and was involved in cross-examinations; that the motion was of importance to TA; and that the claimants could not have expected TA to "sit back" and not participate in the motion.

5. In the case at hand, there is no doubt that Target Canada expected opposition to its motion by the Objecting Landlords. In fact, prior to Target Canada releasing its proposed Plan, several of the Objecting Landlords specifically advised Target Canada that a plan that compromised guarantees would be vigorously opposed. In addition, similar to the facts considered by the court in *Return on Innovation*, the Objecting Landlords are substantial creditors that would be severely affected by the proposed Plan. Target Canada pursued this motion understanding that in so doing, the Objecting Landlords would be obligated to incur significant legal fees to ensure their interests were not disregarded by Target Canada. It follows that Target Canada appreciated that it would be liable for the costs expended by the Objecting Landlords if the Objecting Landlords were successful.

Complexity and Importance of Issues

6. The legal issues in this motion were complex, requiring two motion days for argument. The parties filed robust motion material including affidavits from numerous parties accompanied by comprehensive factums of law.

7. The issues to be addressed in the motion were not only of utmost importance to the parties and stakeholders, but would certainly have significant implication for all *CCAA* proceedings. The enforceability of post-filing agreements, the ability to vary court orders granted in *CCAA* proceedings and the fairness and transparency of the *CCAA* process are each significant issues that would undoubtedly impact insolvency proceedings in the future.

8. In its endorsement, the Court found, among other things, that Target Canada's proposed Plan clearly contravened post-filing agreements and consent orders of the Court and therefore could not be considered to be fair and reasonable in its treatment of the Objecting Landlords. The Court variously described the proposed Plan as "flawed"; falling short of promoting fairness and transparency in the *CCAA* process; not having a reasonable chance of success; ignoring, eliminating and rescinding consent orders of the court; a "change in direction over the objections [of] the Objecting Landlords" or a "change [in] the rules to suit the applicant and the Plan Sponsor, in midstream"; and counter to the building block approach underlying these proceedings from the outset.[3] Quite simply, the Plan was doomed to fail from the beginning, and this motion should not have been filed.

9. Given the complexity and significance of the issues at stake, the Objecting Landlords' participation in the motion was necessary to bring the full scope of the issues to the attention of the court and to preserve the integrity of the *CCAA* proceeding. As such, the Objecting Landlords should be awarded their costs.

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[2] *Return on Innovation v. Gandi Innovations*, 2011 ONSC 7465 (CanLII) at paras. 2-7, 16 (S.C.J. [Commercial List]) ("***Return on Innovation***").

[3] *Endorsement* dated January 15, 2016 at paras. 67, 68, 71, 72, 77, 78, 79, 80, 81, 84, 85, 86 (the "**Endorsement**").

The Costs Claimed are Fair, Reasonable and within Target Canada's Expectation

10. The Objecting Landlords request their costs on a partial indemnity basis (60% of actual costs) as set out in Schedule "A" appended hereto.

11. In assessing the quantum of costs, the overriding principle that should guide this Court is reasonableness. In deciding what is reasonable, the expectations of the parties concerning the quantum of costs are an important factor.[4]

12. His Honour held that "In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A."[5] These were sophisticated parties. By seeking to "change the rules...midstream"[6] and undermine the carefully negotiated bargain embodied in paragraph 19A the Applicants ought reasonably to have known that there would be significant opposition to their motion by the Objecting Landlords and that the costs of such opposition would be claimed.

13. The quantum of costs claimed by the Objecting Landlords is reasonable given the seriousness of the issues and the time and effort required to properly respond to the motion. The quantum claimed by each of the Objecting Landlords is also certainly within the range of costs that Target Canada itself likely expended to pursue the motion (particularly if Target Canada includes the fees it must also pay to the Monitor and its counsel).

Costs Saving to the Estate

14. In its submissions, supported by the Monitor, Target Canada requested that the issues raised by the Objecting Landlords be put over and addressed at a sanction hearing – after the Plan was voted upon by creditors. Given his Honour's finding that the proposed Plan was "flawed"; fell short of promoting fairness and transparency in the *CCAA* process; and did not have a reasonable chance of success, but for the opposition to the motion by the Objecting Landlords, Target Canada would have expended significant funds from the estate to serve all creditors with the Plan, hold a creditors meeting, tally votes, report on the results of the vote, and draft motion material for a sanction hearing, only to have the Plan fail at the sanction hearing stage. As such, the Objecting Landlord's opposition to Target Canada's motion resulted in significant cost savings to the estate for the benefit of all of the creditors. The savings to the estate are certainly far greater than the costs now claimed by the Objecting Landlords.

Target Corporation

15. The Objecting Landlords seek costs from the Applicant Target Canada. Although Target Corporation supported Target Canada's motion, it filed no material and brought no proceeding to which the Objecting Landlords responded. While numerous other stakeholders (including Target Corporation) stood to benefit if the proposed Plan proceeded to a vote, was sanctioned and implemented, the proposed Plan was that of Target Canada and it was Target Canada that requested court approval to file its Plan. As such, Target Canada is liable for the payment of costs.

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[4] *Boucher v. Public Accountants Council for the Province of Ontario,* [2004] 0.J. No. 2634 at paras. 37-38.
[5] Endorsement, at para 80
[6] Endorsement, at para 84

Schedule "A"

The Objecting Landlords claim their costs at a partial indemnity rate. The normal practice is to fix partial indemnity costs at 2/3 of the full costs incurred to address a proceeding. The Objecting Landlords have, however agreed to set their fees at 60% of their actual fees.

Below are the partial indemnity costs fix at 60% of actual fees, inclusive of disbursements and taxes.

Kingsett Capital Inc., ... $90,000.
Counsel: Matthew Gottlieb and Laura Wagner
Lax O'Sullivan Lisus Gottlieb LLP

Morguard Investments Limited,
Crombie REIT, Triovest Realty Advisors Inc., and
SmartREIT (formerly Calloway Real Estate Investment Trust) ..... $74,500.
Counsel: Linda Galessiere and Gustavo Camelino
McLean & Kerr, LLP

Primaris REIT..... $39,400.
Counsel: Catherine Francis
Minden Gross LLP

Faubourg Boisbriand Shopping Centre Holdings Inc. and
Sun Life Assurance Company of Canada ..... $87,400.
Counsel: Stephen Raicek and Matthew Maloley
DE GRANDPRÉ CHAIT S.E.N.C.R.L./LLP

Doral Holdings Limited and
430635 Ontario Inc. ..... $20,000.
Counsel: Vern DaRe
Fogler, Rubinoff LLP

TAB 1

CanLII

St. Jean v. Cheung, 2009 ONCA 9 (CanLII)

Date: 2009-01-07
Docket: C47654
Other citations: 45 ETR (3d) 171; 173 ACWS (3d) 984
Citation: St. Jean v. Cheung, 2009 ONCA 9 (CanLII), <http://canlii.ca/t/2221w> retrieved on 2016-02-05

CITATION: St. Jean v. Cheung, 2009 ONCA 9
DATE: 20090107
DOCKET: C47654

COURT OF APPEAL FOR ONTARIO

Rosenberg, Borins and Gillese JJ.A.

BETWEEN

J. Robert St. Jean, a party under disability by his litigation guardian, Jennifer L. St. Jean, Jennifer L. St. Jean, personally, and Nicole St. Jean

Plaintiffs (Appellants)

and

Dr. Wai Ming Cheung, Dr. John Murray, Dr. Rosalind Curtis, Dr. John Doe, North York General Hospital and Nurse Jane Doe

Defendants (Respondents)

Christine Fotopoulos and Robin Squires, for the appellants

Sarit E. Batner and Kenneth Morris, for the respondents

Heard: September 8, 2008

On appeal from the order of Justice John C. Murray of the Superior Court of Justice dated Tuesday, December 18, 2007, reported at (2007), 2007 CanLII 8025 (ON SC), 85 O.R. (3d) 275, and (2007), 2007 CanLII 38579 (ON SC), 87 O.R. (3d) 711.

COSTS ENDORSEMENT

[1] In a decision dated December 3, 2008, this court allowed the appeal and awarded costs of the appeal and of the lower court motion to the appellants in the amounts of $30,000 and $40,000, respectively. By letter dated December 9, 2008, the respondents asked to be permitted to make submissions on the costs award saying that the panel had not received submissions from counsel as to the appropriateness of costs of the lower court proceeding.

[2] We begin by noting that, in accordance with the court's practice direction, the time to make submissions respecting costs is at the time of the hearing: *Practice Direction Concerning Civil Appeals in the Court of Appeal* (October 7, 2003). Indeed, in the present matter, counsel provided costs outlines to the panel and addressed certain aspects of that matter. For example, respondents' counsel took issue with the appellants' entitlement to costs of the lower court motions on the basis that the appellants had not appealed that award. Further, respondents' counsel also made submissions on the quantum of costs sought by the appellants, as it was her view that the amount of time spent by counsel for the appellants was excessive. Counsel for the appellants contended that costs should follow the event and, if they were successful, asked to be awarded costs of the proceedings below. Nonetheless, to accommodate the contention of respondents' counsel that she had not been heard on the matter, the panel accepted further submissions.

[3] In respect of the costs awarded for the proceedings below, contrary to the submission of the respondents, we do not view the motion judge as refusing to award costs to any party solely due to a dearth of law on the subject or because of the novelty of the matters in issue. In our view, despite the respondents' success on the motion, the motion judge chose to exercise his discretion and make no award of costs after a consideration of all the circumstances, including:

(a) the impecuniosity of the appellants;

(b) the tragic circumstances of the case; and

(c) the novelty and importance of the issues raised on the motion.

[4] In general, costs follow the event. The appellants were successful on the appeal, and, as a result, also on the lower court motion. The general principle

when an appeal is allowed is that the order for costs below is set aside and the costs below and of the appeal are awarded to the successful appellant: see *Hunt v. TD Securities Inc.* (2003), 2003 CanLII 48369 (ON CA), 43 C.P.C. (5th) 211 (C.A.), at para. 2. Further, where the substantive disposition is different from that of the decision under appeal, leave to appeal costs is not necessary: see *Dines v. Harvey A. Helliwell Investments Ltd.*, [1992] O.J. No. 2107 (C.A.).

[5] Despite the novelty of the issues that were decided, we see no reason to depart from the general principle. As the appeal was successful, the circumstances and considerations have changed. The appellants were entirely successful on the appeal with the result that they are now permitted to continue their actions against the new defendants. As such, they are entitled to their costs both of the motion below and of the appeal.

[6] We wish to comment on an additional matter. The request to make additional submissions focussed on costs of the motion below. It would have been appropriate and preferable had counsels' submissions been limited to that matter.

[7] Accordingly, the decision to award the appellants costs of the motion and the appeal fixed at $40,000 and $30,000, respectively, is affirmed.

"M. Rosenberg J.A."
"S. Borins J.A."
"E.E. Gillese J.A."

TAB 2

CanLII

Return on Innovation v. Gandi Innovations, 2011 ONSC 7465 (CanLII)

Date: 2011-12-16
Docket: 09-CL-8172
Citation:Return on Innovation v. Gandi Innovations, 2011 ONSC 7465 (CanLII), <http://canlii.ca/t/fpczr> retrieved on 2016-02-05

CITATION: Return on Innovation v. Gandi Innovations, 2011 ONSC 7465
COURT FILE NO.: 09-CL-8172
DATE: 20111216

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

B E T W E E N:

RETURN ON INNOVATION CAPITAL LTD. as agent for ROI FUND INC, ROI SCEPTRE CANADIAN RETIREMENT FUND, ROI GLOBAL RETIREMENT FUND and ROI HIGH YIELD PRIVATE PLACEMENT FUND and ANY OTHER FUND MANAGED BY ROI from time to time

Applicants

-and-

GANDI INNOVATIONS LIMITED, GANDI INNOVATIONS HOLDINGS LLC, GANDI INNOVATIONS LLC, GANDI INNOVATIONS HOLD CO AND GANDI SPECIAL HOLDINGS LLC.

Respondents

BEFORE: Justice Newbould

COUNSEL: Harvey Chaiton and Maya Poliak, for the Monitor, BDO Canada Limited

Mathew Halpin and Evan Cobb, for TA Associates Inc.

Christopher J. Cosgriffe, for Harry Gandy, James Gandy and Trent Garmoe

ENDORSEMENT

[1] On August 25, 2011 I released my endorsement on a motion brought by BDO Canada Limited in its capacity as a court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

[2] The Monitor was successful and seeks costs of the motion on a partial indemnity basis. The position of the Monitor was supported by TA Associates, Inc. ("TA Associates ") which also seeks costs on a partial indemnity basis. The cost orders are opposed by the Claimants.

[3] The usual rule is that absent some special circumstance, costs follow the event. In this case, the Claimants assert that costs are rarely made in a CCAA proceeding and should not be made in this case. Reliance is placed on the following statement of the Ontario Court of Appeal in *Re Indalex Ltd.* (2011), 2011 ONCA 578 (CanLII), 81 C.B.R. (5th) 165:

> 4. We make no order as to costs of the underlying motions. We understand that the conventional approach in CCAA proceedings is to rarely make costs orders, with the result that each party bears its own costs. There are sound policy reasons that underlie this approach, which include the reality that as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs: see *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487, at para. 31 (Gen. Div.) and *Re Calpine Canada Energy Limited*, [2008] A.J. No. 965, at para. 1. We see no reason to depart from the usual practice.

[4] The statement of the Court of Appeal that cost orders are rarely made in CCAA proceedings is somewhat surprising. Recently, for example, in *Re: Grant Forest Products Inc* (2009), 59 C.B.R. (5th) 127 in a motion in a CCAA proceeding between the former chairman and the secured lenders, I ordered costs to be paid to the former chairman. That decision was affirmed by the Court of Appeal (2010), 2010 ONCA 355 (CanLII), 101 O.R. (3d) 383 (C.A.) in which costs were also awarded for the appeal. See also my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, [2011] O.J. No. 4378 in a case dealing with costs in a receivership matter.

[5] I do not read the decision of the Court of Appeal as laying down a principle that costs should rarely be ordered in CCAA proceedings. The statement is "We understand that..." and indicates that the court was essentially passing on what it was told, which I think was an overstatement. The cases cited do not stand for any general principle that costs are rarely ordered. In *Canadian Asbestos Services Ltd. v. Bank of Montreal*,, Chadwick J. in declining costs in a CCAA proceeding stated:

> I appreciate SGB 2000 Inc. has incurred a large number of legal costs in disputing these various applications. However, it was apparent very early in these proceedings that there was going to be limited funds available for distribution. As such counsel should have considered the cost to the client, and the likelihood they would not recover costs.

[6] In *Re Calpine Canada Energy Limited* Romaine J. ordered costs to be paid in a CCAA proceeding. Regarding the issue of whether costs are ordered in CCAA proceedings, she did not state that costs are rarely made, but rather that it was often that cost orders were not made. She stated:

> Often in proceedings under the Companies' Creditors Arrangement Act, costs are not awarded against unsuccessful parties.

[7] I agree with Romaine J. that cost orders are often not made in CCAA proceedings. I do not agree that they are rarely made and, as I said, I do not read the decision in *Re Calpine* as dictating otherwise.

[8] The Claimants contend that in CCAA proceedings, Monitors are officers of the court with an obligation to act independently and to consider the interests of the debtor and creditors, with a duty to remain neutral as between the various stakeholders in the CCAA proceedings. Thus it is claimed that the Monitor should not be entitled to costs for taking a position that was contrary to the interests of the Claimants.

[9] While Monitors are officers of the court and intended normally to provide neutral services and neutral advice, BDO in this case had obligations beyond that of a typical Monitor. By order of Cameron J. dated March 9, 2010, BDO as Monitor was empowered and authorized to do a number of things on behalf of the Gandi companies, including being authorized to file a plan of compromise or arrangement. This order was necessitated because under the CCAA process, all of the business and assets of the Gandi companies had been sold and all of the directors and officers had resigned and there was no functioning board of directors. Proceeds from the sale were sufficient to pay off secured creditors and on the same day, BDO was authorized by Cameron J. to establish a claims procedure to distribute the available cash from the sale of assets among the unsecured creditors.

[10] The claims process was substantially completed by November 2010 and the Monitor prepared a consolidated plan of compromise and arrangement and scheduled a motion for approval to file the plan. On December 20, 2010 the Claimants filed proofs of claim in excess of $76 million. The basis for their claim is set out in my endorsement of August 25, 2011. On February 18, 2011 the Claimants brought a motion for leave to file their claims. At that time the Monitor raised concerns regarding the evidence supporting the claims and the fact that a portion of them appeared to constitute equity claims. Morawetz J. granted the Claimants leave to file their claims late and noted that the Monitor could apply to the court regarding preliminary issues that had been identified.

[11] The Claimants alleged that they were *de jure* directors and officers of the corporate entities in the Gandi Group. TA Associates had advanced $75 million to the Gandi Group by way of $25 million of debt and $50 million of equity. In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the

arbitration TA Associates claimed damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

[12] The Claimants asserted an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration. Their right to be indemnified was hotly contested as was the question of whether their claim was an equity claim has to $50 million. The Claimants were thus not normal creditors in a CCAA proceeding, but rather sophisticated individuals seeking to put themselves in a position to substantially dilute the unsecured creditors on an indemnity that had to be determined, one way or the other. The indemnity claims of the Claimants, if permitted, would have delayed distributions to all creditors for a considerable period of time.

[13] On March 11, 2011 the Monitor disallowed the indemnity claims of the Claimants and advised them that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings. The Claimants then served a notice of dispute, which led to the motion before me.

[14] In the circumstances of this case, I find no fault with the actions of the Monitor in bringing the matter before the Court and taking the position that it did. It really had no other choice. It was the Monitor who was charged with the responsibility of filing a plan of compromise and arrangement, and the form in which the plan would finally be settled depended on the outcome of the motion.

[15] In the circumstances, I am of the view that Monitor is entitled to its costs on a partial indemnity basis as it was successful.

[16] The claim for costs by TA Associates is opposed by the Claimants. TA Associates is a substantial creditor and would be severely affected if the indemnity claims of the Claimants were accepted by the Monitor. It participated in the motion. It filed an affidavit of Mr. Johnson who was cross-examined by counsel for the Claimants. TA Associates' counsel examined one of the Claimants on his affidavit and participated fully in the motion. The Claimants oppose any order for costs in favour of TA Associates whose participation they contend was redundant. I do not agree. Whether the indemnities are proper claims in the CCAA proceedings is of importance to TA Associates because the indemnities are said to protect the Claimants in the event that an award is made against them in the arbitration commenced by TA Associates in the U.S. The Claimants had to know that if they succeeded in their position, that would give them some leverage in the arbitration proceedings as TA Associates would be making a claim in the arbitration that if successful would partially end up coming out of its own pocket. The Claimants could not have expected TA Associates to sit back, particularly as it was the Monitor who brought the motion for directions and it was not clear at the outset exactly what the Monitor would do in the motion.

[17] In my view TA Associates is entitled to its costs, although some recognition is to be given to the fact of duplication of efforts in considering what a fair and reasonable cost order is to be made against the Claimants.

[18] The monitor seeks costs of $45,431.09, inclusive of HST, for fees and disbursements of $10,804.91, inclusive of HST. It also seeks fees and disbursements from BDO of $12,178.99, inclusive of HST. Apart from the usual work done on a motion such as this, because the Claimants alleged they were officers and directors of all members of the Gandi Group, it was necessary to consult U.S. Counsel regarding some of the Gandi companies that were incorporated in Delaware and Texas. In the face of a lack of written indemnities, the Claimants took the position that the indemnities were in the possession, power or control of the Monitor. Because of that position taken by the Claimants, counsel for the Monitor had to attend at the offices of the former solicitors of the Gandi Group to review the corporate governance documents. BDO and its counsel had to review 11 boxes of books and records of the Gandi Group in storage and 29 additional boxes at the Claimants' request. The Monitor was also required to review the books and records of the Gandi Group to disprove the allegations made by the Claimants that the Monitor authorized payment of certain legal fees of the Claimants in the arbitration.

[19] The Claimants contend that the work done by counsel for BDO was excessive. While it is not required that the Claimants produce information as to the amount of time spent by its counsel, its failure to do so is something to be taken into account. In *Risorto v. State Farm Mutual Automobile Insurance Company* (2003), 2003 CanLII 43566 (ON SC), 64 O.R. (3rd) 135, Wrinkler J. (as he then was) stated:

> The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

[20] In *Frazer v. Haukioja*, 2010 ONCA 249 (CanLII), it was contended that the trial judge erred in awarding costs against the defendant. LaForme, J.A. for the court stated:

> Dr. Haukioja argued before the trial judge that Grant Frazer's counsel docketed almost twice as much time as his own. This, he says is relevant to Dr. Haukioja's reasonable expectations and establishes that he could not reasonably have expected Mr. Frazer's counsel to have invested so much more time than his own.
>
> The answer to this argument is found in the submissions of Grant Frazer that were made to this court.

> In making his finding with respect to the application of that part of rule 57.07 (1)(0.b) "the amount of costs that an unsuccessful party could reasonably expect to pay..." the trial judge noted Mr. Haukioja's failure to provide adequate information as to his own legal costs incurred. He also agreed with the observations of Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660 at para.16 that, "the failure to volunteer that information may undermine the strength of the unsuccessfully part's criticisms of the successful party's requested costs." In that regard, his decision is entirely consistent with the authorities, and in particular the dicta of the Divisional Court in Andersen, "the inference must be that the [unsuccessful] Defendants devoted as much or more time and money" as did the successful Plaintiffs: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. S.C.J.) at paras. 24 to 27.

[21] In reviewing the cost outline filed on behalf of the Monitor, nothing on the face of it would indicate that excessive time was spent. This was not a straightforward matter by any means and involved some novel issues. Nor do I think that the hourly rates used were excessive, being $350 per hour for Mr. Chaiton who was called in 1982 and $170 for Ms. Poliak who was called in 2007.

[22] The Claimants contend that work done by BDO should not be permitted. The work done by BDO was entirely in connection with the motion and was necessitated by the need to review books and records and to supervise the Claimants' review of the record boxes. These costs would not have been incurred but for the position taken by the Claimants. In my view the cost of the work done by BDO was for and incidental to the motion and permissible in accordance with section 131 of the *Courts of Justice Act*.

[23] TA Associates claims fees of $37,055 and disbursements of $4,522.11. In reviewing the cost outline filed on behalf of TA Associates, nothing on the face of it would indicate that excessive time was spent. As well, the hourly rates appear reasonable, being $350 per hour for Mr. Halpin who was called in 1986 and $165 per hour for Mr. Cobb who was called in 2008.

[24] Taking into account the factors enumerated in rule 57.01, including the time spent, the results achieved, the complexity of the matter, the issue of possible duplication by counsel for the Monitor and for TA Associates, and also considering the amount of costs that an unsuccessful party such as TA Associates in the circumstances of this motion could reasonably expect to pay, I order that costs be paid by the Claimants within 30 days as follows:

1. To the Monitor for its counsel's fees and disbursements, $50,000 inclusive of HST.

2. To the Monitor for its fees and disbursements, $12,000 inclusive of HST.

3. To TA Associates for its counsel's fees and disbursements, $30,000 inclusive of HST.

Newbould J.

DATE: December 16, 2011

TAB 3

CITATION: Target Canada Co. (Re), 2015 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15

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 Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for 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")

Linda Galessiere and *Gus Camelino* for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *Daniel Hamson* for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini and Jesse Mighton for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

Harvey Chaiton for the Directors and Officers of the Applicants

Stephen M. Raicek and *Mathew Maloley* for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada

Vern W. DaRe for Doral Holdings Limited and 430635 Ontario Inc.

Stuart Brotman for Sobeys Capital Incorporated

Catherine Francis for Primaris Reit

Kyla Mahar for Centerbridge Partners and Davidson Kempner

William V. Sasso, Pharmacist Representative Counsel

Varoujan C. Arman for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.

Brian Parker for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.

Roger Jaipargas for Glentel Inc., Bell Canada and BCE Nexxia

Nancy Tourgis for Issi Inc.

HEARD: December 21, 2015 & December 22, 2015

SUPPLEMENTARY WRITTEN SUBMISSIONS: December 30, 2015, January 6, 2016 and January 8, 2016

ENDORSEMENT

[1] The Applicants 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 ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

[2] On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

[3] These are the reasons.

[4] The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

[5] The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

[6] The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

[7] The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner,

[1] Capitalized terms not defined herein have the same meaning as set out in the Plan.

CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

[8] The Monitor also supports the motion.

[9] The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

[10] In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

[11] By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

[12] The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

[13] The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

[14] Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

[15] The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

[16] The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

[17] In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

[18] The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 – Breach of paragraph 19A of the Amended and Restated Order

[19] First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

[20] Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for

> the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan 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.

[21] The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> "A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order...[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation."

[22] The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;
>
> (a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and
>
> (b) a fair and reasonable balancing of interests.

[23] Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP – it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

[24] The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 – Breach of paragraph 55 of the Claim Procedure Order

[25] Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

[26] The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

[27] The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

[28] In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

[29] In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

[30] Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[31] Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

[32] Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

[33] Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

[34] The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

[35] Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

[36] The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

[37] With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

[38] Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

[39] The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

[40] The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

[41] If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

[42] Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

[43] The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, or any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of shareholders of the company, to be summoned in such manner as the court directs.

[44] Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.).

[45] Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd.*, Re, 2009 NSSC 163, 55 C.B.R. (5th) 205).

[46] Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

[47] Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

[48] Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

[49] Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of

the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

[50] The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List], affirmed 2008 ONCA 587, (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

[51] Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

[52] With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

[53] The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

[54] As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

[55] At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

[56] Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

[57] The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

[58] Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

[59] The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

[60] With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

[61] Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

[62] In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp.*, Re, 2013 ONSC 823, 2013 CarswellOnt 3043 [Commercial List]. Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

[63] In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,

> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.
>
> Likewise, the Claims Procedure Order, as amended, clearly provides that:
>
> (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
>
> (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
>
> (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.
>
> There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order…

[64] With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc.*, Re, 2003 ABQB 745, 20 Alta. L.R. (4th) 264, aff'd 2004 ABCA 31, 346 A.R. 28, where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

[65] Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

[66] Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[67] In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

[68] Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

[69] As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

[70] Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C.S.C.); *Re Dairy Corp. of Canada Ltd.*, [1934] O.R. 436 (Ont. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at p. 182, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re BlueStar Battery Systems International Corp.* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

[71] As explained below, the Plan cannot meet the required criteria.

[72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to

release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

[73] The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

[74] The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

[75] The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

[76] Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

[77] However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

[78] Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

[79] This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

[80] Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation,* 2015 ONSC 4004, 27 C.B.R. (6th) 134 at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having

any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be

considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

[87] Accordingly, the Plan is not accepted for filing and this motion is dismissed.

[88] The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

[89] At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Regional Senior Justice G.B. Morawetz

Date: January 15, 2016

TAB 4

CanLII

Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON CA)

Date: 2004-06-22
Docket: C40044
Other citations: 71 OR (3d) 291; [2004] CarswellOnt 2521; [2004] OJ No 2634 (QL); 132 ACWS (3d) 15; 188 OAC 201; 48 CPC (5th) 56
Citation: Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON CA), <http://canlii.ca/t/1hcgq> retrieved on 2016-02-05

Boucher et al. v. Public Accountants Council for the Province of Ontario et al.
[Indexed as: Boucher v. Public Accountants Council for the Province of Ontario]

71 O.R. (3d) 291
[2004] O.J. No. 2634
2004 CanLII 14579
Docket No. C40044

Court of Appeal for Ontario,
Abella, Cronk and Armstrong JJ.A.
June 22, 2004

Civil procedure -- Costs -- Costs grid -- Partial indemnity costs -- Fixing costs of abandoned application -- Factors in assessing costs -- Court to consider result produced and whether result is fair and reasonable -- Overall objective of fixing costs is to fix amount that is fair and reasonable for unsuccessful party to pay in particular circumstances, rather than amount fixed by actual costs incurred by successful litigant -- Error in principle to grant award of costs on partial indemnity basis that is virtually same as award on substantial indemnity basis -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.09(3), 57.01(1), (3), (3.1).

In earlier proceedings, the appellants, who were Certified General Accountants, and two other parties sought to have the court appoint disinterested persons to hear their applications for public accounting licences. Central to these proceedings was the allegation that the Public Accountants Council for the Province of Ontario ("PA Council") was controlled by the Institute of Chartered Accountants of Ontario ("CA Institute"), which was authorized by the

Public Accountancy Act, R.S.O. 1990, P.37, to appoint 12 of the 15 members of the PA Council. Lax J. stayed the earlier proceedings on the basis that the court lacked jurisdiction to make the order requested. Lax J. fixed costs against the appellant in the amount of $97,563.

The appellants commenced the immediate application and alleged reasonable apprehension of bias against the PA Council in its review of applications for licences to practise public accounting by members of the Certified General Accounting Association of Ontario. By court order, the material for the application before Lax J. was used in the new application.

The respondents moved to have the application quashed; however, before the application was heard, it was abandoned. The respondents moved for costs pursuant to rule 37.09(3) on a substantial indemnity basis. Epstein J. fixed the costs on a partial indemnity basis, including disbursements and GST as follows: PA Council, $88,896.45; individual respondents, $60,033.96; and CA Institute, $38,752.10 for a total of $187,682.51. (This sum was only $14,528.86 less than the amount claimed on a substantial indemnity basis.)

The appellants appealed and raised the grounds that (1) costs should have been referred for assessment and not fixed; and (2) the costs, which were calculated in accordance with the costs grid, were excessive.

Held, the appeal should be allowed.

Epstein J. did not err in fixing costs rather than having costs referred to an assessment officer. There is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. If a judge is able to effect procedural and substantive justice in fixing costs, he or she ought to do so. There was no basis upon which to interfere with the motion judge's discretion not to refer the costs for assessment. [page292]

However, the costs award calculated in accordance with the costs grid was excessive. While it was appropriate to do the costs grid calculation, it was also necessary to consider the result produced and determine whether in all the circumstances the result is fair and reasonable. Subrule 57.01(3) lists a broad range of factors that the court may consider in exercising its discretion to award costs, and the fixing of costs is not simply a mechanical exercise. The fixing of costs does not begin or end with the calculation of hours times rates. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by the actual costs incurred by the successful litigant.

Awarding $187,682.51 was not fair and reasonable in the circumstances of this case; the costs were so excessive as to call for appellate interference. In deciding what is fair and reasonable, the expectation of the parties concerning the quantum of a costs award is a relevant factor. Consideration should be given to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the PA Council by the CA Institute. The fact that all parties were satisfied to have the same evidentiary record in both cases suggested that there was much in common between the two applications. Further, the respondents filed no evidence, conducted no cross-examination and advanced substantially the same arguments in support of the motions to quash. Finally, there was no proportionality between the costs claimed on a substantial indemnity scale and the costs awarded on a partial indemnity scale. The granting of an award of costs said to be on a

partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. These factors suggested that the amounts awarded on a partial indemnity basis should be significantly reduced. A fair and reasonable award, taking into consideration all the factors discussed above, was as follows: PA Council, $30,000; individual respondents, $20,000; CA Institute, $13,000, for a total of $63,000, inclusive of disbursements and Goods and Services Tax.

APPEAL from an order of Epstein J. dated November 29, 2002, allowing costs for an abandoned application pursuant to rule 37.09(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

Cases referred to Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126, [2000] O.T.C. 694 (S.C.J.); Canadian Pacific Ltd. v. Matsqui Indian Band, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, 85 F.T.R. 79n, 177 N.R. 325, [1995] S.C.J. No. 1; Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2004] S.C.J. No. 72, 235 D.L.R. (4th) 193, 316 N.R. 265, 2004 SCC 9 (CanLII), 40 B.L.R. (3d) 1; Lawyers' Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921, [2002] O.T.C. 78, 17 C.P.C. (5th) 334 (S.C.J.); Murano v. Bank of Montreal (1998), 1998 CanLII 5633 (ON CA), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21, 41 B.L.R. (2d) 10, 22 C.P.C. (4th) 235, 5 C.B.R. (4th) 57 (C.A.); Stellarbridge Management Inc. v. Magna International (Canada) Inc. (2004), 2004 CanLII 9852 (ON CA), 71 O.R. (3d) 263, 187 O.A.C. 78, [2004] O.J. No. 2102 (C.A.); Toronto (City) v. First Ontario Realty Corp. (2002), 2002 CanLII 49482 (ON SC), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.); Wasserman, Arsenault Ltd. v. Sone, 2002 CanLII 45099 (ON CA), [2002] O.J. No. 3772, 164 O.A.C. 195, 38 C.B.R. (4th) 119 (C.A.); Zesta Engineering Ltd. v. Cloutier (2002), 2003 C.L.L.C. 210-010, 2002 CanLII 45084 (ON CA), 21 C.C.E.L. (3d) 164, [2002] O.J. No. 3738 (C.A.), supp. reasons (2002), 2002 CanLII 25577 (ON CA), 21 C.C.E.L. (3d) 161, [2002] O.J. No. 4495 (C.A.), revg 2001 CanLII 28294 (ON SC), [2001] O.J. No. 621, 2001 C.L.L.C. 210-024, 7 C.C.E.L. (3d) 53 (S.C.J.) [page293] Statutes referred to Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131 Public Accountancy Act, R.S.O. 1990, c. P.37 Public Officers Act, R.S.O. 1990, c. P.45 Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.09(3), 57.01, 58

David E. Wires, for appellants.

Michael D. Lipton, Q.C., for the Public Accountants Council for the Province of Ontario.

Cynthia Amsterdam, for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer and Thomas A. Hards.

Robert D. Peck, for The Institute of Chartered Accountants of Ontario.

The judgment of the court was delivered by

[1] ARMSTRONG J.A.: -- This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

[2] The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

[3] Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at $187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003. [page294]

Background of the Proceedings

[4] The judicial review application had its genesis in the prior proceeding of Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126, [2000] O.T.C. 694 (S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the Public Officers Act, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the Public Officers Act to make the order requested.

[5] In granting the stay, Lax J. said [at paras. 17 and 37] in obiter dicta:

> The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process. . ..
>
> . . . . .
>
> Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the Public Officers Act, there may be other creative ways for the applicants to have their concerns addressed.

[6] Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

[7] The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally

biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the Public Accountancy Act, R.S.O. 1990, c. P.37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

[8] At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

[9] The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' [page295] applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

[10] The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

[11] The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

[12] The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario $ 88,896.45

Individual Respondents $ 60,033.96

Institute of Chartered Accountants of Ontario $ 38,752.10

Total $187,682.51

Grounds of Appeal

[13] The appellants raise the following grounds of appeal:

(i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and

(ii) the costs awarded are excessive in that they are approximately 178 per cent of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

[14] The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which provides: [page296]

> 37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1), which states:

> 57.01(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

[15] The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said [at para. 52]:

> Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: BNY Financial Corp.-Canada v. National Automotive Warehousing Inc., [1999] O.J. No. 1273
> (Commercial List, Gen. Div.) (BNY Financial).

[16] I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See Murano v. Bank of Montreal (1998), 1998 CanLII 5633 (ON CA), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21 (C.A.) at p. 245 O.R., per Morden A.C.J.O.

[17] The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

[18] I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge may refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, [page297] including one party with two senior counsel. Although another judge might have exercised his or her

discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

[19] The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer C.J.C. in Canadian Pacific Ltd. v. Matsqui Indian Band, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, at p. 32 S.C.R.:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

[20] In a more recent case, Arbour J. said in Hamilton v. Open Window Bakery Ltd., [2004] S.C.J. No. 72, 2004 SCC 9 (CanLII), at para. 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (Duong v. NN Life Insurance Co. of Canada (2001), 2001 CanLII 24151 (ON CA), 141 O.A.C. 307, at para. 14).

[21] The appellants point out that the costs awarded in these proceedings are approximately 178 per cent of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

[22] Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were [page298] assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

[23] The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the Public Accountancy Act; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission

report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002, when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded [at para. 67] that:

> In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

[24] The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in Zesta Engineering Ltd. v. Cloutier, 2002 CanLII 25577 (ON CA), [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161 (C.A.) at para. 4 where it said:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

See also Stellarbridge Management Inc. v. Magna International (Canada) Inc. (2004), 2004 CanLII 9852 (ON CA), 71 O.R. (3d) 263, [2004] O.J. No. 2102 (C.A.) at para. 97.

[25] Zesta Engineering and Stellarbridge simply confirmed a well settled approach to the fixing of costs prior to the establishment of [page299] the costs grid as articulated by Morden A.C.J.O. in Murano v. Bank of Montreal at p. 249 O.R.:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprise the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

[26] It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> 57.01(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to

fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

[27] In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said [at paras. 69-70]:

> Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.
>
> While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. [page300] In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings.
>
> I agree with what Nordheimer J. said in Basedo v. University Health Network, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

[28] With respect, I disagree with the motions judge. The total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of $88,896.45, $60,033.96, and $38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

[29] While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

(a) the record in this application was the same record filed in the earlier proceedings;

(b) the respondents filed no evidence;

(c) the respondents conducted no cross-examination of any witness;

(d) the notices of motion to stay filed by the respondents were substantially the same; and

(e) the arguments to be advanced on the return of the motions to quash were substantially the same.

[30] In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only $14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis. [page301]

[31] The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

[32] The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis -- $350, $385 and $425. On a partial indemnity basis, he claimed $350 per hour. The time spent by the other senior counsel was listed at a rate of $300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only $295.

[33] Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at $400 per hour and at $350 per hour on the partial indemnity scale.

[34] There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of $330 and $350. Her partial indemnity rate was $300. For the first junior, the substantial indemnity rate was $230 and the partial indemnity rate was $225. The second junior had minimal time on the file and her time was claimed at rates of $85 on a substantial indemnity basis and $60 on a partial indemnity basis.

[35] In Wasserman, Arsenault Ltd. v. Sone, 2002 CanLII 45099 (ON CA), [2002] O.J. No. 3772, 164 O.A.C. 195 (C.A.), at para. 4, this court referred to a judgment of the Superior Court in Lawyers' Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921, 17 C.P.C. (5th) 334 (S.C.J.), where Nordheimer J. observed at para. 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

[36] In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in

principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in Stellarbridge at para. 96. [page302]

[37] The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

[38] In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See Toronto (City) v. First Ontario Realty Corp. (2002), 2002 CanLII 49482 (ON SC), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.) at p. 574 O.R. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

[39] Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

[40] No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly $100,000 in response to the first application, I am confident that counsel were not starting tabula rasa when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

[41] I also take into account the other factors referred to in para. 29 above, i.e., the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash. [page303]

[42] Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

[43] These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be $2,500 for a total of $7,500. I do not accept that submission.

[44] In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario $ 30,000.00

Individual Respondents $ 20,000.00

Institute of Chartered Accountants of Ontario $ 13,000.00

Total $ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

[45] In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in para. 44 above.

[46] I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of $12,000, including disbursements and Goods and Services Tax.

Order accordingly.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C.36 as am. 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**

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

COSTS SUBMISSIONS
OF THE OBJECTING LANDLORDS
Morguard Investments Limited, Crombie REIT, Triovest Realty Advisors Inc., SmartREIT (formerly Calloway Real Estate Investment Trust), Kingsett Capital Inc., Doral Holdings Limited, 430635 Ontario Inc., Faubourg Boisbriand Shopping Centre Holdings Inc., Sun Life Assurance Company of Canada, Primaris REIT

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