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 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

RESPONDING COSTS SUBMISSIONS OF THE APPLICANTS

(Motion to Accept Filing of a Plan)

February 12, 2016

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
Shawn Irving (LSUC #: 50035U)
Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

TO: **SERVICE LIST**

RESPONDING COSTS SUBMISSIONS OF THE APPLICANTS

1. The Applicants submit that the Court should decline to award costs on this motion. The Applicants worked in good faith under an expedited timeframe to develop a Plan[1] that would maximize creditor recoveries through the subordination of almost all intercompany debt and provide for prompt creditor distributions. Based on extensive negotiations and consultation with their stakeholders, the Applicants believed that it was the best available plan in the circumstances and that it struck an appropriate balance among their stakeholders. The motion was supported by the Monitor and a wide range of stakeholders, as the Plan would have provided very favourable economic recoveries to unsecured creditors.

2. It is rare for a CCAA Court to order costs against a CCAA debtor, and the Objecting Landlords have not cited any case in which such an order was made.[2] As the Court of Appeal recognized in *Indalex*, the "sound policy reasons" for not awarding costs against the debtor include the reality that there are limited funds available for distribution.[3] Stakeholders should not expect to recover their costs from the debtor because such recovery would be to the detriment of the other creditors. In this case, if costs were awarded to the Objecting Landlords, those costs would ultimately be borne by the other creditors. The Objecting Landlords opposed the motion in order to protect their own financial interests arising from the insolvency of the Target Canada Entities.

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1 Capitalized terms not otherwise defined have the meaning given to them in the Endorsement: *Target Canada Co. (Re)*, 2016 ONSC 316.

2 The *Return on Innovation* case cited by the Objecting Landlords did not involve an award of costs against a CCAA debtor. Rather, Justice Newbould awarded costs in favour of the Monitor and a creditor on a motion by the Monitor to resolve the validity of a claim that asked the estate to indemnify parties in an arbitration. The Court found that the Monitor had no other choice but to bring a motion to resolve the issue before proposing a plan.

3 *Indalex Ltd. (Re)*, 2011 ONCA 578 at para. 4, rev'd on other grounds 2013 SCC 6 [*Indalex*]; see also *Calpine Canada Energy Ltd. (Re)*, 2008 ABQB 537 at para. 1.

In such circumstances, there is no reason to depart from the conventional approach to costs in CCAA proceedings.

3. The Applicants disagree with the Objecting Landlords' statement that the Plan "was doomed to fail from the beginning, and this motion should not have been filed". This is a complex CCAA proceeding involving many competing stakeholder interests. Prompt creditor recoveries and the avoidance of protracted litigation are stated imperatives. The Plan was the result of several months of consultation with stakeholders, including extensive negotiations with Target Corp. regarding a structure whereby Target Corp. would cause significant intercompany debt to be subordinated for the benefit of all creditors. In structuring the Plan in the manner they did, the Applicants sought to achieve a fair and reasonable balancing of interests which achieved the stated imperatives, recognizing that Target Corp. had maintained throughout that it would only consider subordinating its intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including the Landlord Guarantee Claims, and that it would not agree to voluntarily subordinate these very material claims in bankruptcy proceedings. The Applicants acknowledged from the outset that the Plan was predicated on the Court's willingness to vary or delete paragraph 19A of the Initial Order.

4. The Court agreed with the Objecting Landlords that paragraph 19A should not be varied. However, that does not mean that the Applicants had no reasonable basis to bring the motion. The motion raised novel issues and had the support of the Monitor and a range of creditors. Moreover, the Court did not reject all aspects of the Plan. If the Court had accepted that paragraph 19A of the Initial Order could be varied, then "in all likelihood a meeting of creditors would be ordered."[4]

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4 *Target Canada Co. (Re)*, 2016 ONSC 316 at para. 76 [*Endorsement*].

5. The Applicants disagree with the suggestion that they should have expected that Objecting Landlords would be forced to incur "significant costs" or expected that the Target Canada Entities would be liable for those costs. First, the Objecting Landlords focus on the wrong party's expectations: courts have acknowledged that since the amount of funds available for distribution is limited in CCAA proceedings, "parties ought not to expect to recover their litigation costs".[5] Second, even if it were a relevant factor, the motion turned almost entirely on the existence of, and background to, paragraph 19A – facts that were never in dispute. There is no basis for requiring the other creditors to bear the costs of five separate counsel preparing extensive court materials when the facts were not in dispute.

6. In summary, this motion presents no compelling reason to depart from the usual rule that costs are generally not available against a CCAA debtor, especially in circumstances where a debtor puts forward a plan in good faith that has the support of the Monitor and a wide range of its creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Osler, Hoskin & Harcourt LLP per J. Shaw

Osler, Hoskin & Harcourt LLP

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5 *Indalex, supra.*

SCHEDULE "A": LIST OF AUTHORITIES

1. *Calpine Canada Energy Ltd. (Re)*, 2008 ABQB 537
2. *Indalex Ltd. (Re)*, 2011 ONCA 578
3. *Target Canada Co. (Re)*, 2016 ONSC 316

TAB A

2008 ABQB 537
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2008 CarswellAlta 1163, 2008 ABQB 537, [2008] A.W.L.D. 3911, [2008] A.W.L.D. 3915, [2008] A.J. No. 965, 172 A.C.W.S. (3d) 589, 46 C.B.R. (5th) 243

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Judgment: August 28, 2008
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean F. Collins, Fred Myers, Jay A. Carfagnini, Brian F. Empey for Applicants, CCAA
Patrick McCarthy, Q.C., Josef A. Kruger for Monitor
A. Robert Anderson, Q.C., Michael O'Brien for Independent Trustees of Calpine Commercial Trust, Directors of Calpine Power LP Ltd.
Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.
Brian P. O'Leary, Q.C., Patricia Quinton-Campbell for Khanjee Holdings (U.S.) Inc., Khanjee Power Generations LLC, WASP ENERGY LLC. et al
Anthony L. Friend, Q.C., Scott D. Bower for Catalyst Capital Group Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous issues

Corporation sought protection of Companies' Creditors Arrangements Act ("CCAA") — Group representing corporation ("group") sought to sell various assets — Process of marketing assets was abbreviated and evolved rapidly — K Inc. had signed agreement that restricted it from bidding on assets — H Inc. and C Inc. bid on certain assets — Group successfully applied for approval of H Inc.'s bid — C Inc. and K Inc. unsuccessfully applied to set aside approval — Parties made submissions on costs of C Inc. and K Inc.'s applications — Costs awarded against C Inc. and K Inc. — Costs are often not awarded against unsuccessful parties in CCAA proceedings as they are generally involuntary parties, compelled to participate due to debtor seeking CCAA protection — K Inc. and C Inc. were sophisticated commercial entities that entered into proceedings voluntarily in attempt to better their positions with respect to acquiring fund-related assets — Policy reasons underlying no-costs convention were not operative in present case — There was no reason to depart from general rule awarding costs to successful parties.

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous orders

Corporation sought protection of Companies' Creditors Arrangements Act ("CCAA") — Group representing corporation ("group") sought to sell various assets — Process of marketing assets was abbreviated and evolved rapidly — K Inc. had signed agreement that restricted it from bidding on assets — H Inc. and C Inc. bid on assets — Group successfully applied for approval of H Inc.'s bid — C Inc. and K Inc. unsuccessfully applied to set aside approval — Parties made submissions

on costs of C Inc. and K Inc.'s applications — Group awarded costs in sum of $15,000 against each of K Inc. and C Inc. — Applications had little chance of success, but given context in which they were brought it could not be found that they were so improper or vexatious as to warrant award of complete indemnity costs — Schedule C of Alberta Rules of Court was inappropriate guide to party and party costs claimed, given accelerated and intense process necessitated by nature of motions and litigation — Other successful parties were each entitled to costs in amount of $6,300 against each of K Inc. and C Inc., roughly commensurate with principle that costs award should provide 40 to 50 percent indemnity.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

LSI Logic Corp. of Canada Inc. v. Logani (2001), 100 Alta. L.R. (3d) 49, 2001 ABQB 968, 2001 CarswellAlta 1733, [2002] 4 W.W.R. 531 (Alta. Q.B.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs — referred to

ADDITIONAL REASONS regarding costs of unsuccessful applications to set aside order in *Companies' Creditors Arrangement Act* proceedings.

***B.E. Romaine J.*:**

1 Often in proceedings under the *Companies' Creditors Arrangement Act*, costs are not awarded against unsuccessful parties. There are policy reasons for this convention: generally, stakeholders in CCAA proceedings are involuntary parties in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act. Creditors and other stakeholders often bring applications in order to protect the priority of their positions or to seek a lifting of the stay provisions in circumstances they believe warrant such relief. The applications brought by Khanjee Holdings (U.S.) Inc. and the Catalyst Capital Group Inc. that are the subject of this decision on costs are different from the usual type of CCAA application in that they were disappointed bidders or potential bidders on the purchase and sale of an asset of one of the Calpine applicants. Catalyst sought re-consideration of an existing order and Khanjee sought an amendment to an existing order that would allow it to bid on the asset despite its contractual obligation not to do so. The parties are sophisticated commercial entities that entered the fray voluntarily in an attempt to better their positions, with respect both to their ability to acquire the Class B Units and the Fund-related contracts of CLP and the take-over bid for the publicly-traded trust units of the Fund. The policy reasons that underlie the no-costs convention are thus not operative in this case, and there is no reason to depart from the general rule awarding costs to the successful parties, not as a punishment but as a recognition of the usual risks of litigation. Thus, there will be costs awarded, and the remaining issue is to whom and in what amount.

2 The successful parties submit that since the Court was able to dismiss the applications without calling on submissions from parties other than the applicants, and for reasons that made it clear that I found the applications lacking substantial merit, there should be a costs award compelling the applicants jointly or separately to pay costs on a full indemnity basis. Although the applications had little chance of success for the reasons I expressed in my decisions, given the context in which they were brought, I cannot find that they were so improper or vexatious as to warrant an exceptional award of complete indemnity costs.

While there was an allegation at least in the case of Khanjee of impropriety in the mere fact that the application was brought in the face of the confidentiality agreement to which it had bound itself, that issue will be addressed more fully in terms of party and party costs.

3 As I noted in my reasons dated February 8, 2007, the process of marketing the Class B Units and Fund-related contracts of CLP was abbreviated and rapidly evolving, largely due to the complication and timing of the take-over bid proceedings for the Fund's A Units. Given the objective of obtaining the best price for the Fund-related assets for the benefit of stakeholders in the CCAA process, I could not afford interested parties the luxury of a lengthy auction process. The situation was further complicated by the Settlement Agreement application and the holiday season, which made it difficult for interested parties to respond to unfolding events. Despite the best efforts of interested parties and the extremely rapid response of the Monitor to competing offers, stakeholders were often put in a difficult position with respect to evaluating information. As I said previously, the process was not pretty, the financial stakes were very high and conduct that in other circumstances may have given rise to penal costs must be viewed with greater tolerance.

4 Khanjee applied to set aside the January 30, 2007 approval of the bid by HCP Acquisition Inc. with a direction that the party that successfully acquired the Fund's Class A Units be required to purchase the B Units at the price fixed by the Court on January 30, 2007. Alternatively, Khanjee submittted that there should be a new auction process, and that it be permitted in that process to submit an offer to purchase the Fund-related assets. I held that Khanjee's application was essentially a request that I allow it to circumvent a confidentiality and standstill agreement into which it had freely entered, that I did not have jurisdiction over an unknown purchaser of the Fund's A Units so as to compel it to purchase the Fund-related assets, and that Khanjee had failed to raise any new material evidence that would justify a reconsideration of my previous decision.

5 Khanjee was a participant in the Fund's search for a white-knight in response to Harbinger's take-over bid for the A Units. As a condition to being allowed access to confidential information in connection with the potential acquisition of the Fund, Khanjee executed a confidentiality agreement that restricted it from being able to submit an offer for the Fund-Related Assets. Khanjee submits that its participation in the take-over bid process was predicated on the understanding that the Fund was able to control the sale of both the Class A Units and the Fund-Related Assets and it is critical about the information made available to the Monitor and the Court relating to the marketing process and the disclosure made available by the Fund. Khanjee suggests that the combination of the take-over bid process and the CCAA process had become a "quagmire for any interested, serious" bidders, and that this justified its last minute application.

6 While the details of the confidentiality and standstill agreements may not have been fully-disclosed in the information before the Court on January 30, 2007, the gist of the contractual limitations and the negative effect they would have on the auction process was adequately described in the Monitor's reports. Khanjee's application added little by way of relevant information to the process. Participation in a public take-over bid for securities is indeed rife with strategic risk for an interested bidder, but that cannot justify the type of interference with contractual obligations unrelated to the Calpine applicants envisioned by the Khanjee application. These submissions do not justify relief from a costs award against Khanjee.

7 Catalyst's application requested that the January 30, 2007 approval of the bid by HCP Acquisition Inc. be set aside and that Catalyst be permitted to submit a written proposal for the acquisition of the Fund-Related Assets in a form that had been provided to the Monitor dated February 8, 2007. I held that the new proposal was not substantially different from that presented by counsel in oral submissions on January 30, 2007 and that it still suffered from serious contract termination risks. I also held that the application was an attempt to re-argue Catalyst's case. Catalyst submits in this costs application that it had not been able to make adequate representations in the first application about its operational expertise, which, it says, relates to whether it would have been unreasonable for the Fund to refuse its consent to the transfer of the Fund-related contracts. This was always a minor factor, as it was not the Fund's ability to withhold consent but the time it may have taken to resolve the issue through litigation that was of greater relevance to consideration of the competing offers.

8 Catalyst also complains that my reasons of February 8, 2007 were "for some reason" not provided to Catalyst or its counsel. Counsel of record for Catalyst at the time of the January 30, 2007 hearing was advised of the availability of these reasons at

the same time as all other counsel. It is unfortunate that Catalyst's change of counsel may have led to a delay in new counsel receiving a copy of the decision.

9 Catalyst also suggests that it brought its application only upon becoming aware that Khanjee was bringing an application in any event. That, unfortunately, did not relieve opposing parties from having to address Catalyst's application separately.

10 Catalyst also suggests that its February 8, 2007 offer was different from what had been presented on January 30, 2007. While there were some differences, I found the new offer not be substantially different, particularly in the key area of contract transfer and termination risks. In short, these submissions do not justify relief from a costs award against Catalyst.

11 Three parties seek costs from Khanjee and Catalyst. There are the Calpine parties (which seek costs, including the full-indemnity costs of any person entitled to indemnity from them with respect to the reconsideration applications), the Independent Trustees of Calpine Commercial Trust and the Directors of Calpine Power L.P. Ltd. (the general partner of Calpine Power L.P.) and HCP Acquisition Inc.

12 With respect to the party and party costs of each of these claimants, I am satisfied that, given the accelerated and intense process necessitated by the reconsideration motions and the nature of the litigation, Schedule C of the Rules of Court is inappropriate as a guide.

13 I also note that Khanjee and Catalyst did not act jointly, and that therefore joint and several cost awards are not appropriate in this case.

14 I have considered the estimated solicitor and client costs of each of the claimants, and have concluded that HCP Acquisition Inc. and the Trustees and Directors of the Fund and its general partner should receive the same level of reimbursement of costs, roughly commensurate with the principle that a costs award should aim at providing 40% to 50% indemnity: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.) at para. 8. I therefore award each of these claimants costs in the amount of $6,300 against each of Khanjee and Catalyst, plus one half of their reasonable disbursements.

15 The indemnity costs claimed by the Calpine applicants are considerably higher than those claimed by the other two successful parties, and I note that they impliedly include the costs of other parties who have a right to seek indemnification from the Calpine applicants for the costs of appearing on this application. As pointed out by Catalyst, security instruments that may contain such types of indemnity provisions were not in evidence, but I take note that the costs of the Monitor and the Monitor's counsel are costs that must be borne by the creditors of the estates of the Calpine parties. I therefore award the Calpine applicants parties costs in the amount of $15,000 against each of Khanjee and Catalyst plus one half of their reasonable disbursements.

Order accordingly.

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TAB B

2011 ONCA 578
Ontario Court of Appeal

Indalex Ltd., Re

2011 CarswellOnt 9077, 2011 ONCA 578, [2011] W.D.F.L. 5203, [2011] W.D.F.L. 5204, 206 A.C.W.S. (3d) 679, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277

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 Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Applicants / Respondents)

J.C. MacPherson, E.E. Gillese, R.G. Juriansz JJ.A.

Judgment: September 7, 2011
Docket: CA C52187, C52346

Proceedings: additional reasons to *Indalex Ltd., Re* (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.); reversing *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])

Counsel: Andrew J. Hatnay, Demetrios Yiokaris for Appellants, Former Executives
Darrell L. Brown for Appellants, United Steelworkers
Mark Bailey for Superintendent of Financial Services
Hugh O'Reilly, Adam Beatty for Intervenor, Morneau Sobeco Limited Partnership
Fred Myers, Brian Empey for Sun Indalex Finance, LLC
Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting Canada ULC
Harvey Chaiton, George Benchetrit for George L. Miller, Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; Estates and Trusts; Family; International; Property

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

Debtor company entered protection under Companies' Creditors Arrangement Act and secured debtor in possession loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Company was administrator of pension plans for its employees — Pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been up and executive plan had not — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — Appeal by pension claimants was allowed — Parties made written submissions on costs — Agreement reached in respect of retirees' legal fees and disbursements was approved — Retiree's full indemnity legal fees and disbursements in amount of $269,913.78 were to be paid from fund of executive plan attributable to each of 14 retirees' accrued pension benefits — Union sought order to same effect in respect of salaried plan — Order was not made because union was in materially different position than retirees — Union was bargaining agent, not beneficiary, for only 7 of 169 beneficiaries of salaried plan, none of whom had been given notice of, or consented to, payment of legal costs from salaried plan — No order as to costs of underlying motions were made — As for costs of appeal, no order was made for or against monitor due to its prior agreement with retirees and union — Retirees and union, as successful parties, were each entitled to their costs on

partial indemnity basis from debtor company and U.S. trustee, payable jointly and severally — Those costs were fixed at $40,000, inclusive of applicable taxes and disbursements.

Pensions --- Practice in pension actions — Costs

Debtor company entered protection under Companies' Creditors Arrangement Act and secured debtor in possession loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Company was administrator of pension plans for its employees — Pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been up and executive plan had not — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — Appeal by pension claimants was allowed — Parties made written submissions on costs — Agreement reached in respect of retirees' legal fees and disbursements was approved — Retiree's full indemnity legal fees and disbursements in amount of $269,913.78 were to be paid from fund of executive plan attributable to each of 14 retirees' accrued pension benefits — Union sought order to same effect in respect of salaried plan — Order was not made because union was in materially different position than retirees — Union was bargaining agent, not beneficiary, for only 7 of 169 beneficiaries of salaried plan, none of whom had been given notice of, or consented to, payment of legal costs from salaried plan — No order as to costs of underlying motions were made — As for costs of appeal, no order was made for or against monitor due to its prior agreement with retirees and union — Retirees and union, as successful parties, were each entitled to their costs on partial indemnity basis from debtor company and U.S. trustee, payable jointly and severally — Those costs were fixed at $40,000, inclusive of applicable taxes and disbursements.

Table of Authorities

Cases considered:

Calpine Canada Energy Ltd., Re (2008), 2008 CarswellAlta 1163, 2008 ABQB 537, 46 C.B.R. (5th) 243 (Alta. Q.B.) — referred to

Canadian Asbestos Services Ltd. v. Bank of Montreal (1993), 21 C.B.R. (3d) 120, [1995] G.S.T.C. 36, 1993 CarswellOnt 226 (Ont. Gen. Div.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

ADDITIONAL REASONS relating to costs of judgment reported at *Indalex Ltd., Re* (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.).

***Per curiam*:**

1 The court released its reasons for decision in this matter on April 7, 2011 (the Decision). In the Decision, the court indicated that if the parties were unable to agree on costs, they could make brief written submissions on the same. Despite extensive efforts to settle costs, no settlement was reached and the parties duly made written submissions. This endorsement follows due consideration of those submissions.

2 Morneau Shepell Ltd., the Ontario Superintendent of Financial Services and the Retirees reached an agreement in respect of the payment of the Retirees' legal fees and disbursements. The court approves the agreement. Therefore, it orders that:

i. the Retirees' full indemnity legal fees and disbursements in the amount of $269,913.78 shall be paid from the fund of the Executive Plan attributable to each of the 14 Retirees' accrued pension benefits. Specifically, such costs shall be allocated among the 14 Retirees in relation to their pension entitlement from the Executive Plan and will not be borne by the other three members of the Executive Plan, who are not appellants;

ii. the $269,913.78 amount shall be paid to Koskie Minsky LLP in trust on the first day of October, 2011;

iii. the costs of these proceedings ordered in favour of the Retirees shall be paid to the fund of the Executive Plan and once received, the amount shall be allocated among the 14 Retirees in relation to their pension entitlement from the Executive Plan.

3 The USW sought an order to the same effect in respect of the Salaried Plan. We decline to make that order because the USW is in a materially different position than the Retirees. The Retirees are beneficiaries of the pension fund. The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. By contrast, the USW is the bargaining agent (not a beneficiary) for only 7 of the 169 beneficiaries of the Salaried Plan, none of whom have been given notice of, or consented to, the payment of legal costs from the Salaried Plan. It is also significant that we are not dealing with surplus pension funds as the Salaried Plan is underfunded.

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 (Ont. Gen. Div.), at para. 31 and *Calpine Canada Energy Ltd., Re*, [2008] A.J. No. 965 (Alta. Q.B.), at para. 1. We see no reason to depart from the usual practice.

5 As for costs of the appeal, we make no order for or against the Monitor due to its prior agreement with the Retirees and the USW in which the parties agreed not to claim against one another for the costs of the leave to appeal motion or the appeal.

6 The Retirees argue that the court should award costs of the motion for leave to appeal, the motion for intervenor status and the appeal on a substantial or full indemnity basis. We see no reason to depart from the court's normal practice of awarding costs on a partial indemnity basis.

7 Thus, the Retirees and the USW, as the successful parties, are each entitled to their costs on a partial indemnity basis from Sun Indalex and the U.S. Trustee, payable jointly and severally. We fix those costs at $40,000, inclusive of applicable taxes and disbursements. The payment of costs in favour of the Retirees shall be done in accordance with para. 2(iii) above.

8 In making this order, we are mindful of the submissions of Sun Indalex and the U.S. Trustee that any costs award should be payable by the Canadian Debtors [Indalex]. However, we are not persuaded that we should depart from the usual practice in which the unsuccessful parties pay the costs of the successful parties.

9 Orders to go in accordance with these reasons.

Order accordingly.

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TAB C

CITATION: Target Canada Co. (Re), 2016 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, Jesse Mighton, Alan Mark and Melaney Wagner 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

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., *et al.*

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

RESPONDING COSTS SUBMISSIONS OF THE APPLICANTS

(Motion to Accept Filing of a Plan)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Canada M5X 1B8

Tracy Sandler (LSUC #: 32443N)
Jeremy Dacks (LSUC #: 41851R)
Shawn Irving (LSUC #: 50035U)
Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for the Applicants

Matter No: 1159785