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

RESPONDING FACTUM OF TARGET CORPORATION

(Re: Motion of the Monitor returnable September 13, 2017)

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PART I ~ OVERVIEW

1. This motion concerns the appropriateness of permitting already proven, agreed to and admitted claims to be amended or rectified in the *Companies' Creditors Arrangement Act*[1] ("**CCAA**") proceedings of Target Canada Co. ("**Target Canada**") and certain affiliated corporations and partnerships (collectively, the "**Applicants**").

2. Because the quantum of the claims in question was agreed to as the result of a settlement of what were originally disputed claims, this motion does not concern "late claims" or "amended claims" as referred to in *Blue Range*.[2] Rather, it is a plea for being able to correct a unilateral mistake – i.e., rectification.

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[1] R.S.C. 1985, c. C-36.

[2] *Blue Range Resources Corp. (Re)*, 2000 ABCA 285 [*Blue Range*]; Bell's Book of Authorities ("**Bell's BOA**"), Tab 2.

3. The motion is brought at a time when the claims bar date has long since passed, the Applicants' Amended and Restated Joint Plan of Compromise and Arrangement (the "**Plan**") has long since been approved, and the majority of the distributions pursuant to the Plan have already been made.

4. Significantly, the claims that are the subject of this motion have already been released pursuant to the Plan and the order approving that Plan.

5. The law regarding the ability to provide equitable relief to a party who has committed a unilateral mistake is well established. It requires that the party not in error knows or ought to have known of the other party's mistake. In this case, neither the Monitor nor the Applicants were aware of any mistake and, in fact, had spent a considerable amount of time vetting the quantum of the claims as filed and believed it to be correct. Accordingly, such equitable relief is simply not available here.

6. Furthermore, permitting already proven, agreed to and admitted claims to be amended or rectified in these circumstances is inconsistent with the requirements of appropriateness and due diligence which are baseline considerations that a court should always bear in mind when exercising CCAA authority.

7. Bell has not acted with due diligence in discovering its mistake and, given the circumstances of this case – Bell being a sophisticated commercial party who explicitly agreed to the $4.7 million quantum of its claim (a formulaic calculation of a contract termination fee) that it now wishes to re-calculate so as to provide for an additional $4.1 million of claim value – the existence of established grounds for equitable relief for unilateral mistakes and the policy objectives of efficient claim determination in insolvency proceedings

outweigh the objective of allowing all legitimate creditors to share in the available proceeds such that granting Bell's request would not be appropriate in the circumstances.

PART II ~ FACTS

8. Bell Canada ("**Bell Canada**") and Bell Nexxia Corporation ("**Nexxia**") (together, "**Bell**") have asked to amend certain claims that they had filed and fully and finally resolved during the claims process in these CCAA proceedings (the "**Original Claims**").[3]

9. In 2015, Bell Canada and Nexxia filed the Original Claims against Target Canada asserting amounts owing for both the pre-filing and post-filing periods.[4] The Original Claims were not for amounts owing for goods or services provided but rather for formulaic "termination fees" under disclaimed contracts totalling approximately $4.7 million.[5]

10. The proof of claim form attached as a schedule to the Claims Procedure Order made in these proceedings required Bell to provide all particulars of its claim and supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the claim. The proof of claim form also required Bell to certify that its claim was as set out in the proof of claim form and that complete documentation in support of the claim was attached.[6]

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[3] Thirty-Sixth Report of the Monitor dated September 1, 2017 (the "**Monitor's Report**"), p. 2, para. 1.4.

[4] Monitor's Report, p. 2, para. 1.5.

[5] Affidavit of Patricia Greene sworn August 16, 2017 (the "**Greene Affidavit**"), Exhibits "D" and "I"; Monitor's Motion Record, Tab 3. Monitor's Report, p. 13, para. 1.6; Monitor's Motion Record, Tab 2.

[6] Affidavit of Corey Haaland sworn September 11, 2017 (the "**Haaland Affidavit**"), para. 7. Greene Affidavit, Exhibits "C" and "H"; Monitor's Motion Record, Tab 3.

11. The Monitor, with the assistance of finance employees of Target Corporation who provided assistance to the Applicants during the course of the CCAA proceedings through a shared services arrangement, vetted and carried out due diligence on the Original Claims over the course of several days. As a result of that work, the Monitor and Target Corporation believed that the quantum of the Original Claims advanced by Bell had been correctly determined.[7]

12. In December 2015, the Monitor, in consultation with the Applicants, allowed the Original Claims in the amount Bell filed as pre-filing claims only pursuant to Notices of Revision or Disallowance dated December 15, 2015. Bell disputed the Notices of Revision or Disallowance.[8] As a resolution of its dispute, Bell accepted the Original Claims as pre-filing claims in the amount set out in the Monitor's Notices of Revision or Disallowance through the execution of Notices of Withdrawal of Dispute of Claim dated June 23, 2016 in respect of each of the Original Claims (the "**Bell Notices of Withdrawal of Dispute**").[9]

13. Accordingly, the Original Claims were determined to be Proven Claims under the Plan for the amounts as determined with the agreement of Bell and the amounts as agreed to were accepted for all purposes in the CCAA proceeding.[10]

14. Bell states that it only discovered errors in the method in which it quantified its Original Claims in April 2017, and seeks to file amended claims ("**Bell's Proposed**

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[7] Haaland Affidavit, para. 5 and Monitor's Report, pp. 10-11, para. 4.2.

[8] Greene Affidavit, Exhibits "E" and "J"; Monitor's Motion Record, Tab 3.

[9] Monitor's Report, p. 2, para. 1.5.

[10] Haaland Affidavit, para. 6, Monitor's Report, p. 14, para. 6.6.

Amended Claims") to rectify the alleged error. By Bell's Proposed Amended Claims, Bell claims an additional amount of approximately $4,100,000, almost double the Original Claims.[11]

15. Bell's Proposed Amended Claims, if accepted, would be material enough to affect the estimated range of recovery for the Affected Creditors (as defined in the Plan) by reducing the estimated recovery range by approximately 0.45%.[12] This will reduce recoveries to Target Corporation by approximately $1 million.[13]

PART III ~ ISSUES

16. This motion raises only one issue: Should Bell be permitted to file Bell's Proposed Amended Claims to rectify the alleged error in its Original Claims?

PART IV ~ LAW AND ARGUMENT

17. The Court should obviously consider that allowing all legitimate creditors to share in the available proceeds is an integral part of any insolvency process and that there is no prejudice in permitting Bell to correct an honest mistake it believes to have made in a context where all unsecured creditors in any event will be receiving greater recoveries than originally anticipated at the time the Plan was approved.

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[11] Monitor's Report, pp. 2-3, para. 1.6.

[12] Monitor's Report, p. 16, para. 6.9(c).

[13] Haaland Affidavit, para. 4.

18. But these cannot be the only considerations in this case. There are other policy objectives that need to be weighed and balanced given the statutory requirement that the Court must be satisfied that the relief being requested, on the facts of this case, is "appropriate in the circumstances". In these circumstances, it is not.

19. Bell is a large, sophisticated, well-resourced commercial party who settled a claim dispute with the Monitor by, in part, agreeing to the admitted quantum of its termination fee claim at $4.7 million.

20. This is not a case of an inadvertently missed invoice, misclassification of claim type (secured v. unsecured), or initial misapprehension as to the correct debtor party as dealt with in *Blue Range*.[14] This is a sophisticated commercial party who explicitly agreed to the quantum of its claim – a formulaic calculation of a contract termination fee – that it now wishes to re-calculate so as to provide for an additional $4.1 million of claim value.

21. The legal basis for doing equity in such circumstances is already well established. It requires that the unmistaken party knew or ought to have known about the mistake. This necessary fact does not exist in this case. Rather, it is quite the opposite – the Monitor and Target Corporation believed the quantum of the Original Claims to have been correctly determined after several days of due diligence.

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[14] *Blue Range*, paras. 28-35; Bell's BOA, Tab 2.

Legally Principled Basis for Remedying Unilateral Mistakes

22. Bell explicitly agreed with the quantum contained in its Original Claims in both its Notices of Dispute[15] and, again, in its Notices of Withdrawal of Dispute[16] as an outcome of settling its dispute with the Monitor.

23. In addition, a plan of arrangement is, among other things, a contract between a distressed company and its creditors.[17] A court sanctioned plan of compromise or arrangement is binding on all the creditors or the class of creditors, as the case may be.[18]

24. Accordingly, a proven, agreed to and admitted claim which is subject to a court sanctioned plan of compromise or arrangement is effectively a contract between the debtor company and that creditor to compromise the amount of its proven, agreed to and admitted claim pursuant to the terms of the plan.

25. If such a creditor later discovers that it made a mistake in agreeing to the amount of its claim in such circumstances, then the existing, well established equitable principles for remedying such mistakes should apply. In his leading text, *The Law of Contract in Canada,* Professor G.H.L. Fridman explains a unilateral mistake as follows:

> [I]t is important to distinguish these various kinds of bilateral mistake from unilateral mistake, where only one party is in error. Here it may be vital to the final result whether the party not in error is aware or unaware of the other party's mistake. If the

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[15] Greene Affidavit, Exhibits "E" and "J"; Monitor's Motion Record, Tab 3.

[16] Greene Affidavit, Exhibits "F" and "K"; Monitor's Motion Record, Tab 3.

[17] *Re Agro Pacific Industries Ltd.* (2007), 2007 CarswellBC 3026, 38 C.B.R. (5th) 161 (B.C.C.A.) at para. 28; Target Corporations' Book of Authorities ("**Target's BOA**"), Tab 1.

[18] Section 6.1(a) of the CCAA.

> party not in error knows or ought to know of the other's mistake, any purported agreement between them may not be enforceable in equity (whatever its effects may be at common law), on the ground that equity will not permit a party to take advantage of the error in offering or accepting by the other party. The rationale of such cases is that equity penalizes unconscionable conduct whether it actually constitutes fraud or involves something amounting to fraud in the view of equity. It must be unfair, unjust or unconscionable to enforce or uphold the contract.
>
> It is not necessary for the party seeking to avoid the contract on the ground of mistake to prove that the other party caused or induced the mistake (although if such causation is established it might lead to rescission for fraud, or for innocent misrepresentation). As long as the unmistaken party knows of the mistake, without having caused it, that party cannot resist a suit for rectification on the grounds of mistake. The same will apply if the other party had good reason to know of the mistake and to know what was intended. **The converse of that proposition as to knowledge of the other party's mistake is that if the unmistaken party is ignorant of the other's mistake the contract will be valid and neither rescission nor rectification will be possible**.[19] (emphasis added)

26. As noted above, the Monitor and Target Corporation believed that the quantum of the Original Claims advanced by Bell had been correctly determined. Accordingly, neither were aware of Bell's mistake and, therefore, under existing equitable principles, rectification is not possible.

27. Furthermore, even exclusively in the CCAA context, it must be kept in mind that while the Court's power to make orders under the CCAA is broad, it is not unlimited and must be exercised in a manner consistent with the purposes and provisions of the CCAA. These limitations are reflected in section 11 of the CCAA itself:

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[19] G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Scarborough: Carswell, 2011) at 252-254; Target's BOA, Tab 2.

General power of court

> 11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, **make any order that it considers appropriate in the circumstances.** (emphasis added)

28. *Century Services*, a case decided after *Blue Range*, is the landmark case interpreting the discretionary authority of the courts to make orders under the CCAA:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. **Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA**. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[20] (emphasis added)

29. It cannot be said that Bell has acted with due diligence in discovering its mistake – one of the baseline considerations that a court should always bear in mind when exercising CCAA authority.

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[20] *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 70; Target's BOA, Tab 3.

Good Policy Reasons for Not Permitting Bell's Proposed Amended Claims

30. Determining the universe and quantum of claims is a fundamental aspect of insolvency proceedings and is often a material time and cost component to such proceedings – an administrative cost which is borne by the creditors of an insolvent debtor.

31. Efficient claim determination processes maximize recoveries by reducing the administrative cost burden and minimize the time to effecting distributions to such creditors. These are principle economic goals in insolvency proceedings, especially liquidating CCAA proceedings.

32. To best achieve these objectives, creditors should be incented to file complete and accurate claims. Indeed, proof of claim forms almost always require certifications to this effect, as was the case in these proceedings.

33. Requiring creditors to file complete and accurate claims also permits a certain and timely determination of recovery percentages which is an important factor in assessing a creditor's general commercial response to a debtor's insolvency and, when relevant, fairly considering and negotiating the terms of any plan of compromise or arrangement of such claims. It is an essential element in upholding the general principles of certainty, predictability and equitable treatment of similarly-situated creditors that are fundamental to the CCAA.

34. Providing for the unconditional permission to rectify errors well after plan sanction undermines these policy objectives. It diminishes the incentive to file complete and accurate claims up front. It reduces the importance of the claim certification requirement. It

increases the administrative costs in having to re-adjudicate revised or amended claims. It decreases the certainty that can be afforded to estimated recovery percentages. It delays the timing of final distributions.

35. Such consequences can only be exacerbated if free license to amend already proven, agreed to and admitted claims well after plan sanction is made readily available in every case where recoveries turn out to be better than originally anticipated.

36. Given the facts in this case – Bell being a sophisticated commercial party who explicitly agreed to the $4.7 million quantum of its claim (a formulaic calculation of a contract termination fee) that it now wishes to re-calculate so as to provide for an additional $4.1 million of claim value – the existence of established grounds for equitable relief for unilateral mistakes and the policy objectives of efficient claim determination in insolvency proceedings must be weighed and balanced against the objective of allowing all legitimate creditors to share in the available proceeds.

37. In the circumstances of this case, the former considerations and objectives outweigh the latter and, therefore, granting Bell's request would not be appropriate.

PART VI ~ ORDER REQUESTED

38. For the foregoing reasons, Target Corporation respectfully submits that Bell should not be permitted to file Bell's Proposed Amended Claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2017.

Davies Ward Phillips & Vineberg LLP
Lawyers for Target Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Agro Pacific Industries Ltd.* (2007), 2007 CarswellBC 3026, 38 C.B.R. (5th) 161 (B.C.C.A.)

2. G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Scarborough: Carswell, 2011) at 252-254

3. *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, [2010] 3 S.C.R. 379

SCHEDULE "B"

STATUTORY PROVISIONS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

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Proceeding commenced at Toronto

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