2016 Hfx. No. 454744

Supreme Court of Nova Scotia

Application by Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited (the "Applicants") for relief under the Companies' Creditors Arrangement Act

MONITOR'S BOOK OF AUTHORITIES

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TAB 1

2003 CarswellOnt 4016
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2003 CarswellOnt 4016, [2003] O.J. No. 6058, 39 B.L.R. (3d) 153, 45 C.B.R. (4th) 13

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

In the Matter of Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of a Plan of Compromise or Arrangement of Air Canada and those Subsidiaries listed on Schedule "A"

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

Farley J.

Heard: May 30, 2003
Judgment: June 18, 2003
Docket: 03-CL-4932

Counsel: David R. Byers, Ashley John Taylor for Air Canada
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Greg Azeff, Robert Thornton for GECAS
Steven Golick, Jeremy Dacks for GE Capital
Jeff Carhart for Airport Authorities
Kevin McElcheran for CIBC
Alex MacFarlane, Marlo Kravetsky for R/T Syndicate
Dan MacDonald for BNS
Peter Osborne for Monitor
Ken Rosenberg for ALPA
Elizabeth Shilton for IAMAW
Stephen Wahl for CUPE
A. Kauffman for Ad Hoc Committee of Senior Bondholders
Ian Dick for Department of Justice and AG Canada

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

MOTIONS by creditors to vary initial order obtained by debtor under Companies' Creditors Arrangement Act.

Farley J.:

1 Bell Canada, Certain Airport Authorities (the Calgary Airport Authority et al) and the Bank of Nova Scotia in its capacity as Agent for the R/T Syndicate (collectively "Moving Creditors") brought motions to vary the Initial Order obtained by Air Canada ("AC") on April 1, 2003 by striking out the last seven words of the first sentence of paragraph 9 and the whole of the second sentence of paragraph 9.

2 At the present time the wording of paragraph 9 is as follows:

9. THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date.

3 If the relief requested by the Moving Creditors were granted, then paragraph 9 would be revised to:

9. THIS COURT ORDERS that persons may exercise only such rights of set-off as are permitted under Section 18.1 of the CCAA.

4 Paragraph 9A of the Initial Order (as added on April 25, 2003) provides:

9A. THIS COURT ORDERS that nothing in this Order shall be construed as overriding any provision of the CCAA.

5 There are three different types of set-off recognized under Canadian law:

(a) legal set-off;

(b) equitable set-off;

(c) set-off by contract or statute.

It does not appear that contractual or statutory set-off is at issue in these AC CCAA proceedings.

6 Section 18.1 of the CCAA, which was incorporated in the 1997 amendments provides:

Section 18.1 The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

7 As argued, AC accepted that the provisions of paragraph 9 of the Initial Order should be interpreted as not affecting equitable set-off as being available but merely that the ability of any party to invoke a right of set-off should be stayed on a temporal basis so that it not be invoked until a later time once the CCAA proceedings had been stabilized.

8 AC at paragraphs 19 and 20 of its factum stated:

19. The right of set-off is available as a defence to a proceeding and may arise in contract, in law, or in equity; however, in the context of the CCAA, it is the Applicants' position that post-filing claims can be set off against pre-filing claims only where there is a valid claim for equitable set-off such that the relationship between the two amounts are so closely related that it would be inequitable to sever the debts from one another by a CCAA Order.

20. The Applicants submit that paragraph 9 of the Initial Order is consistent with existing law. It is respectfully submitted that contractual and legal set-off are not available to a creditor in relation to post-filing as against pre-filing claims as the required mutuality is severed by the CCAA filing. Pre-filing claims may be set off against each other and post-filing claims may be set off against each other but post-filing and pre-filing claims may only be set off against each other pursuant to the principles of equitable set-off in the appropriate case.

9 AC went on at paragraphs 53 - 55 of its factum to conclude:

> 53. The law of set-off applies to obligations owed by, and claims owed to, a debtor company operating under the protection of a CCAA proceeding. However, pursuant to the law of set-off neither the requirements for legal set-off nor the requirements for contractual set-off are satisfied when dealing with pre-filing obligations owed by, and post-filing claims owed to, a debtor company operating under the protection of the CCAA. These types of set-off require, among other things, mutuality of parties in the same right. The fundamentally changed character of the debtor company and its obligations, which accrue post-CCAA filing, severs the requisite mutuality.
>
> 54. Pursuant to the law of set-off, equitable set-off does not require the mutuality of obligations. Equitable set-off is therefore available in appropriate cases between pre- and post-filing obligations. Other requirements, such as the existence of a close connection between the obligations, limit the application of equitable set-off. Paragraph 9 of the Initial Order is consistent with section 18.1 of the CCAA as it necessitates a court-supervised application process to deal with creditors' claims for equitable set-off which may arise during the CCAA proceeding.
>
> 55. For all the reasons stated above, the Applicants respectfully submit that the only amounts which are potentially susceptible to set-off are as follows:
>
> 1. Pre-filing liabilities that exist between a creditor and the Applicants can be set off against each other;
>
> 2. Post-filing liabilities between a creditor and the Applicants can be set off against each other; and
>
> 3. Set-off across the April 1, 2003 date in favour of a creditor will only be permitted where the Court determines pursuant to the principles of equitable set-off that pre- and post- filing debts are so closely connected that it would be inequitable to sever the two debts.

10 I take the foregoing to be a concession by AC that aside from the element of the impact of a temporal stay (as opposed to an absolute stay), it does not dispute that the right of a creditor to invoke set-off on an equitable basis is not affected by the Initial Order. Further, AC does not contest that legal set-off can be invoked by a creditor as to (a) debts existing between AC and a creditor before the CCAA filing or (b) debts arising post-filing between AC and a creditor. What AC contends, however is that, as to legal set-off, the law of set-off as applied in any CCAA proceeding does not permit a pre-filing debt to be set-off against a post-filing debt. However, as to equitable set-off, AC does not draw that distinction between pre-filing and post-filing debts; rather AC asserts that in applying equity, the Court must only be concerned with the debts being "so closely connected that it would be inequitable to sever the two debts".

11 It appears to me that AC's position as to legal set-off is that in a CCAA proceeding, the Court should view the situation as equivalent to that prevailing in a bankruptcy with the end result being that in essence there is a new party post CCAA filing.

12 It also seems to me that AC's position is that the substantive law of set-off is not affected by the terms of the Initial Order but rather that the substantive law of set-off, both legal and equitable, would govern and be applied in the particular fact circumstances. However, as noted immediately above, AC contends that application of the law of legal set-off would take into account that there was not a mutuality of parties once a CCAA filing had been made, no matter what the terms of the CCAA stated.

13 The requirements for legal set-off were stated in *Citibank Canada v. Confederation Life Insurance Co.* (1996), 42 C.B.R. (3d) 288 (Ont. Gen. Div.) at p. 298, affirmed (1998), 37 O.R. (3d) 226 (Ont. C.A.).

For set-off at law to occur, the following circumstances must arise:

> 1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and,
>
> 2. Both debts must be mutual cross-obligations, i.e. cross-claims between the same parties and in the same right.
>
> (emphasis added).

14 *In a bankruptcy*, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. When a bankruptcy occurs, there is a new estate created: there is the estate of the debtor under the direction and control of the debtor before the bankruptcy which is a different estate than the one post-bankruptcy where there is an estate of the bankrupt under the direction and control of the trustee in bankruptcy. Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. See *S. Piscione & Sons Ltd., Re*, [1965] 1 O.R. 515 (Ont. S.C.); *Reid, Re* (1964), 7 C.B.R. (N.S.) 54 (Ont. Bktcy.); *First Canadian Land Corp. (Trustee of) v. First Canadian Plaza Ltd.* (1991), 6 C.B.R. (3d) 308 (B.C. S.C.).

15 In *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.), at pp. 24-5, Gonthier, J. for the majority observed:

> ...for a particularly thorough and helpful discussion of the issues relating to set-off in bankruptcy and insolvency, see Kelly Ross Palmer, *The Law of Set-off in Canada* (Aurora, Ont. - Canada Law Book, 1993), at pp. 157-223.

At p. 186, Palmer notes:

> This case, as in receivership is fairly straight forward. The assignment of the bankrupt's property to the trustee results in a change of mutuality. Accordingly, any claim which arises after the assignment will be between the claimant and the trustee and not the claimant and the bankrupt. Mutual debts will not be present and set-off not allowed.

16 AC relies on what it asserts is the similarity of s. 73(1) of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("WURA") to s. 18.1 of the CCAA. It provides:

> 73.(1) The law of set-off, as administered by the courts, whether of law or equity, applies to all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.
>
> (emphasis added).

17 AC then goes on to argue that the reasoning of *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.) should be applied to this CCAA proceeding. *Lyall* was a case involving the predecessor to the WURA, namely the *Winding-up Act*, R.S.C. 1927, ch. 213 ("Old WUA"). It appears that s. 73 of the older legislation has been carried through unchanged into s. 73(1) of WURA. Masten J.A. for the Court stated at pp. 291-2 of *Lyall*:

> As I understand the decided cases the rule in winding up proceedings prescribing mutuality as essential to set off is the same in Canada as in England and the decisions of the English Courts are applicable though (except in the House of

Lords) not binding on this Court. Though the same person is both debtor and creditor, yet, if the debt and the credit attach to him in different capacities mutuality cannot exist.

As I shall indicate more fully hereafter the Winding-up Order establishes a quasi-trust of which the creditors are the beneficiaries and which for the purpose of set-off, is an entity essentially distinct from the original corporation when carrying on business for the benefit of its shareholders. The Winding-Up Order puts an end to the living company and establish a quasi-trust for liquidation. If no debt became due or accruing due until after the making of the winding-up order, then the $1,250 balance is a debt to the liquidation trust and set-off fails for lack of mutuality, the $1,400 being a debt of the company as a going concern, while the $1,250 is a debt to the company in liquidation as the result of the company's contract adopted by the liquidator and the appellant.

18 Notwithstanding that the Old WUA also provided for compromising debts so that there was a possible alternative to actually winding up a company under its provisions, it seems to me that the main thrust of the Old WUA was that the company be liquidated under its provisions. That thrust has been somewhat changed with the recent amendments to that legislation ending up with a greater acknowledgement to restructuring as is evident in the renaming of that statute. The amendments resulting in WURA are subsequent to the publication of the Palmer book.

19 AC suggests that the CCAA is not exclusively a restructuring statute since judicial interpretation has allowed for a winding up or liquidation of a debtor applicant if in the particular fact circumstances that course of action best accomplishes the objective of maximization and equitable distribution of value to stakeholders of an insolvent entity. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.), reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.); *Amirault Fish Co., Re*, [1951] 4 D.L.R. 203 (N.S. T.D.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.). However, it seems to me that the major thrust of the CCAA is restructuring.

20 As should be noted from the words which I have emphasized in s. 73(1) of the WURA, that section must be judicially interpreted under the circumstances of a winding up and not as to a restructuring.

21 Palmer explored the aspect of mutuality regarding the appointment of a liquidator under Old WUA at pp. 209-210 as follows:

(ii) Mutuality

(a) Appointment of liquidator changes mutuality

One difference between bankruptcy and winding-up proceedings which, at first, would seem to be quite important is the lack of any vesting provisions in the *Winding-up Act*. Under the *Bankruptcy and Insolvency Act*, s. 71(2), the property of the bankrupt is assigned to the trustee upon an assignment into bankruptcy. A change in mutuality will therefore result. However, an equivalent section providing for an assignment of the assets of the insolvent corporation to the liquidator is not found in the *Winding-up Act*, with the initial result that mutuality would appear not to change upon the appointment of a liquidator. This is not the case, however, as the Canadian courts have devised several descriptions of this event which effectively result in a change of mutuality.

Different Interests. The courts have noted that the liquidator is required to serve different interests than those served by the company and, accordingly, the appointment of the liquidator results in a change in the climate which debtors and creditors of the company faced prior to winding-up. "Prior to liquidation, the directors act in the interests of the shareholders but upon liquidation the liquidator represents the interests of the creditors and the shareholders." These different interests are sufficient to allow a court to effectively deal with mutuality as though it had changed, to the point of characterizing this change as being equivalent to an assignment.

The leading case in this area is the *Maritime Bank of the Dominion of Canada v. J. Morris Robinson*, where the defendant owed funds to the insolvent bank. On March 8th the bank stopped making payments (with this fact known to the defendant), and on March 17th a petition for winding-up was filed. Between these dates, the defendant bought a claim against the bank, bought a further claim after the appointment of the liquidator, and still another claim after the

order for winding-up. Set-off was allowed only for the debts bought prior to the filing of the petition. Speaking on the change in interests, the court said:

> It is evident, therefore, that the new interests are created by the winding up proceedings; the affairs of the company in liquidation being managed for the benefit, not solely of those who were alone directly interested previous to the commencement of the winding up proceedings, but of the whole body of creditors, shareholders and contributories. There is no formal assignment from the company to the liquidator, and the company remains nominally as debtor or creditor as the case may be, but the company in liquidation represents different interests from those represented by it before; and the real as well as the nominal position of the company in liquidation is to be looked at in determining the rights of parties.
>
> The company still being the nominal creditors and the nominal debtor, and any debts which are virtually due by and between the company in liquidation and the defendant would be subject to set-off notwithstanding the change in the interest; but where the alleged debts are not virtually due by and between the same parties and where, consequently, it would not be such that they should be set off, there the nominal company in liquidation should be treated as being virtually the whole body of creditors, shareholders and contributories. In such a case it is to be treated as if there were an assignment by the company of the debts due to it, and so the assignee would be affected by such rights of set-off as existed at the time the debtor received notice of the assignment.

Quasi-trust. A second view imports the notion of the establishment of a trust. While the *Winding-up Act* does not create a trust of the company's assets, the courts have seen the liquidator as holding the assets on a "quasi-trust" for the benefit of the shareholders and creditors of the company. The imposition of the trust therefore brings about a change of mutuality. This approach was noted in *Lyall & Sons Construction Co. v. Baker*:

> the winding-up order establishes a *quasi-trust* of which the creditors are the beneficiaries and which for the purpose of set-off, is an entity essentially distinct from the original corporation when carrying on business for the benefit of its shareholders. The winding-up order puts an end to the living company and establishes a *quasi-trust* for liquidation. If no debt became due or accruing due until after the making of the winding-up order, then the $1,250 balance is a debt to the liquidation trust and set off fails for lack of mutuality, the [cross debt of] $1,400 being a debt of the company as a going concern, while the $1,250 is a debt to the company in liquidation...

This view has been carried slightly further by some courts, with the liquidator being described as a trustee, rather than a "quasi-trustee", with the same resulting change in mutuality.

Change Assumed. Some courts do not define the basis for the change in mutuality upon the liquidator's appointment, but assume that it has occurred. The mere appointment of the liquidator does not destroy mutuality, however, as s. 73 of the *Winding-up Act* will preserve set-off rights that the appointment of a liquidator would otherwise remove.

22 In that analysis, Palmer discusses the three ways that Canadian courts have dealt with this question: (i) different interests; (ii) quasi-trust; and (iii) change assumed. No matter which way is taken as the approach, these cases have all dealt with situations where there is in fact a liquidation/true winding up. In the change assumed cases there is in fact no analysis, merely an assumption. The quasi-trust approach has been discussed in *Lyall, supra.* The different interests approach must also be viewed in the context of the circumstances of the *Maritime Bank* [1887 CarswellNB 10 (N.B. C.A.)]. As is obvious from the quote in Palmer, the bank there was in liquidation proceedings, not a restructuring mode.

23 Again, I would emphasize that these three approaches analyzed by Palmer are all within a liquidation scenario. However while a liquidation scenario under the CCAA is possible, the CCAA proceedings in this AC case are not aimed at a liquidation, but at a restructuring. While it is quite conceivable in any restructuring that may be possible in these proceedings will either eliminate the present shares held by existing shareholders or vastly dilute the existing share capital in number and value by the issuance of a large number of new shares to compromised creditors or to new equity investors, it does not seem to me that given the difference in the wording between s. 18.1 if the CCAA and s. 73(1) of the WURA, especially as to the

words which I have emphasized in the WURA, that I should apply the different interests approach to these present AC CCAA proceedings. That is particularly so when one appreciates that in the normal order under WURA, a liquidator as a Court officer is appointed to take charge of the liquidation (even though there is not a vesting of assets as in BIA with a trustee in bankruptcy). Here however the Court appointed Monitor does not have any similar powers to a liquidator. AC is in a restructuring mode, not a liquidation mode under the CCAA. It seems to me that it would take more explicit language in s. 18.1 of the CCAA where one is dealing with a restructuring situation to import the concepts of a section in the WURA which by the very wording of s. 73(1) requires that the company be in a liquidation mode. The draftsperson and Parliament had the advantage of reviewing the three insolvency statues and the set-off provisions (and specific wording thereof) in the first two statutes), the *Bankruptcy and Insolvency Act*, the Old WUA and the CCAA when s. 18.1 of the CCAA was drafted and enacted. Identical wording for set-off provisions was not adopted.

24 I have therefore reached the conclusion that paragraph 9 of the Initial Order should be modified by striking out the complained of wording so that paragraph 9 should be read as:

> 9. THIS COURT ORDERS that persons may exercise only such rights of set-off as are permitted under Section 18.1 of the CCAA.

25 With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise. However I leave that question open pending future submissions and further order of the court emanating as a result thereof.

26 Order to issue accordingly to delete the complained of language in paragraph 9 of the Initial Order and to impose the temporal stay pending further order of the Court.

Motions granted.

TAB 2

CITATION: Cline Mining Corporation (Re), 2015 ONSC 622
COURT FILE NO.: CV-14-10781-00CL
DATE: 2015-01-30

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 AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants Cline Mining Corporation et al.

Michael DeLellis and *David Rosenblatt*, for the FTI Consulting Canada Inc., Monitor of the Applicants

Jay Swartz, for the Secured Noteholders

HEARD: January 27, 2015

ENDORSEMENT

[1] Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and

b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

[2] Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

[3] Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

[4] The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

[5] The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

[6] The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corporation (Re),* 2014 ONSC 6998 and need not be repeated.

[7] The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

[8] As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

[9] The Applicants served the Amended Plan on the Service List on January 20, 2015.

[10] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

[11] Equity claimants will not receive any consideration or distributions under the Plan.

[12] The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any

Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

[13] The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[14] The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

[15] The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

[16] The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

[17] None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

[18] Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

[19] The general requirements for court approval of the CCAA Plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *Re SkyLink Aviation Inc.*, 2013 ONSC 2519)

[20] Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

[21] In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

[22] The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ("*ATB Financial*"); *SkyLink, supra;* and *Re Sino-Forest Corporation*, 2012 ONSC 7050, leave to appeal denied, 2013 ONCA 456).

[23] The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or

contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

[24] I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

[25] Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

[26] The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

[27] The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

[28] I am satisfied that in these circumstances, it is appropriate to grant the releases.

[29] The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

[30] The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

[31] The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

[32] Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

[33] For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

R.S.J. Morawetz

Date: January 30, 2015

TAB 3

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> ...

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

> 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>
> ....
>
> 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> ...
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should

> have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad

application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015