2024 Hfx No. 531463

SUPREME COURT OF NOVA SCOTIA

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

AND IN THE MATTER OF A PLAN OR ARRANGEMENT OF 3306133 NOVA SCOTIA LIMITED, 1003940 NOVA SCOTIA LIMITED, HEADLINE PROMOTIONAL PRODUCTS LIMITED, BRACE CAPITAL LIMITED, BRACE HOLDINGS LIMITED AND 4648767 NOVA SCOTIA LIMITED

BETWEEN:

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP,
each by their general partner, Fiera Private Debt GP Inc.

Applicants

-and-

3306133 Nova Scotia Limited, 1003940 Nova Scotia Limited, Headline Promotional Products Limited, Brace Capital Limited, Brace Holdings Limited and 4648767 Nova Scotia Limited

Respondents

BRIEF OF LAW

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TO: **The Service List**

2024 Hfx No. 531463

SUPREME COURT OF NOVA SCOTIA

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To the Honourable Justice Keith, KSV Restructuring Inc., in its capacity as court-appointed CCAA[1] monitor (the "**Monitor**"), submits:

PART I - OVERVIEW

1. The Monitor brings this motion seeking an order, among other things: (a) approving an extension of the Stay Period to March 28, 2025; and (b) approving the Sixth Report and the Monitor's activities described therein.

[1] Capitalized terms not defined herein have the meaning defined in the Sixth Report of the Monitor dated November 29, 2024 (the "**Sixth Report**").

PART II - FACTS

Background[2]

2. The Companies are private companies incorporated under the laws of Nova Scotia.

3. Prior to the closing of the Media Companies Transaction, the Media Companies published The Chronicle Herald, the Cape Breton Post, The Telegram (St. John's) and The Guardian (Charlottetown), as well as several digital publications. The Monitor understands that these are the largest media and newspaper publications in Atlantic Canada.

4. The Media Companies' names were changed to 3306133 Nova Scotia Limited (formerly known as The Halifax Herald Limited) and 1003940 Nova Scotia Limited (formerly known as Saltwire Network Inc.), being their original numbered companies, following completion of the Media Companies Transaction.

5. The Media Companies own the following locations (the "**Real Properties**") from which they presently operate or formerly operated, each of which is listed for sale, except George Street (as defined below), the sale of which has been approved by this Court under a transaction currently scheduled to be completed on or before February 17, 2025:

(a) 311 Bluewater Road, Bedford;

(b) 2 Second Street, Yarmouth;

(c) 255 George Street, Sydney ("**George Street**"); and

(d) 36 Austin Street, St. John's.

---

[2] Sixth Report, at s. 2, paras. 1-3, 9.

6. As of the date of the ARIO, the Media Companies had approximately 390 employees and 800 independent contractors. At the closing of the Media Companies Transaction, approximately 25% of the Media Companies' employees were union members. As of the date of the Sixth Report, the Media Companies had approximately 36 employees, the majority of which are providing transition services pursuant to the TSA, with the remainder either having been terminated or hired by PNI or its affiliates. The Monitor understands that PNI has also offered to engage certain of the independent contractors who used to work for the Media Companies.

Stay Extension[3]

7. The Stay Period currently expires on December 13, 2024.

8. The Monitor recommends that the Stay Period be extended to March 28, 2025 for the following reasons, among others:

(a) the Companies are continuing to act in good faith and with due diligence to advance their restructuring;

(b) the Stay Extension will allow for completion of the George Street Transaction and continued marketing of the other Real Properties;

(c) the Stay Extension will allow for time to deal with the remaining wind-down activities, including transition matters with PNI, the preparation and filing of tax returns and continuation of the WEPP;

[3] Sixth Report, at s. 9, paras. 1-2.

(d) the Monitor does not believe that any creditor will be materially prejudiced if the extension is granted as the Cash Flow Forecast projects that the Companies are forecasted to able to meet their obligations; and

(e) as of the date of the Sixth Report, the Monitor is not aware of any party opposed to the requested extension.

Monitor's Activities[4]

9. Since the date of the Fifth Report, the Monitor has, among other things:

(a) monitored the Companies' receipts and disbursements, including reviewing and commenting on the Companies' cash flow reporting required under the Interim Financing Facility;

(b) engaged extensively with its counsel, Chaitons LLP, as well as Fiera and Norton Rose Fulbright Canada LLP (Fiera's legal counsel) regarding various matters relating to these proceedings, including employee issues, pension issues and operating matters in the context of the Titan Transaction;

(c) assisted the Companies in their dealings with suppliers;

(d) continued to prepare schedules to assist the Companies' eligible former employees to apply for WEPP relief;

(e) continued to correspond with Osler, Hoskin & Harcourt LLP, counsel representing Eckler AdminCorp Ltd., appointed as the interim administrator of the Herald

[4] S□□□□ □ □□o□□, □□□□

Retirement Plan, to discuss the status of these proceedings and its claims against 3306 and its directors and officers; and

(f) prepared the Sixth Report.

PART III - ISSUES AND ANALYSIS

10. The issues to be addressed on this motion are whether this Court should approve: (a) the proposed extension of the Stay Period; and (b) the Monitor's activities.

PART IV - LAW & ARGUMENT

A. Extension of the Stay Period

11. Pursuant to Section 11.02(2) of the CCAA, the Court has the jurisdiction to extend the stay of proceedings after an initial order has been made.[5]

12. The Court may not make the order unless: (a) the Court is satisfied that the circumstances exist that make the order appropriate; and (b) the Court is satisfied that the debtor has acted, and is acting, in good faith and with due diligence.[6]

13. The proposed extension of the Stay Period is appropriate in this case for the reasons set out above in paragraph 8.

[5] CCAA, s 11.02(2).
[6] CCAA, s 11.02(3).

B. Approval of the Monitor's Activities

14. As noted by R.S.J. Morawetz (as he then was) in *Target Canada Co. (Re)*[7], requests to approve a CCAA monitor's report are not unusual, and there are good policy and practical reasons for the court to do so, including:

(a) allowing 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) bringing 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) providing certainty and finality to processes in a CCAA proceeding and activities undertaken (e.g., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enabling 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) providing protection for the monitor not otherwise provided by the CCAA; and

(f) protecting creditors from the delay in distributions that would be caused by:

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

[7] *Target Canada Co (Re)*, 2015 ONSC 7574 □□□□□□ 23□

(ii) potential indemnity claims by the monitor.

15. For all of these reasons, approval of the Sixth Report and the Monitor's activities described therein is appropriate at this stage.

PART V - RELIEF SOUGHT

16. For the reasons set out above, the Monitor respectfully requests the relief set out above in paragraph 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2024.

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Lawyers for the Monitor

SCHEDULE “A”

LIST OF AUTHORITIES

1 *Target Canada Co (Re)*, 2015 ONSC 7574.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Target Canada Co. (Re), 2015 ONSC 7574 (CanLII)

Date:	2015-12-11
File number:	CV-15-10832-00CL
Other citation:	31 CBR (6th) 311
Citation:	**Target Canada Co. (Re), 2015 ONSC 7574 (CanLII), <https://canlii.ca/t/gmp4d>, retrieved on 2024-12-04**

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), 1997 NSCA 153 (CanLII), 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 CanLII 15145 (ON SC), [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