

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 Debt 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

BOOK OF AUTHORITIES OF THE MONITOR

December 4, 2025

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**Lawyers for KSV Restructuring Inc., in its
capacity as CCAA Monitor**

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TAB 1

**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 FORME DEVELOPMENT GROUP INC.
AND THE OTHER COMPANIES LISTED ON SCHEDULE "A"
HERETO**

**APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

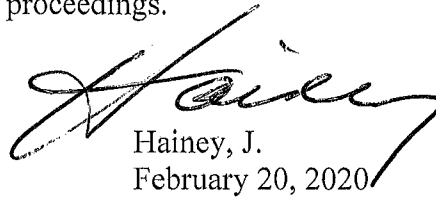
Sean Zweig / Aiden Nelms for Moving Party (KSV as Monitor)
D.J. Miller / Alex Soutter for Moving Party (Ferina)
Adam Slavens for Tarion Warranty Corporation
Dom Michaud for –various mortgagees in claims process
Chris Besant for Non-Applicant companies
Bobby Sachdeva / Stephanie DiCarie for Grant Thornton, Trustee in Bankruptcy
Jeffrey Larry for First Source Mortgage
George Benchetrit for Home Trust Company
John N. Birch for Cassels Brock
Mario Forte for CCAA entities

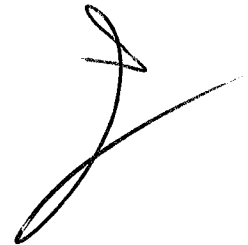
**ENDORSEMENT OF MR. JUSTICE HAINEY
DATED FEBRUARY 20, 2020**

1. The Monitor brings a motion for relief to be reviewed below. The motion is supported by all stakeholders represented by counsel recorded on the Counsel Slip except the Non Applicant companies represented by Mr. Besant who opposes the motion.
2. At the outset of the motion the Monitor's counsel, at my direction, suggested to Mr. Besant that the order could be granted without prejudice to his client's position. Mr. Besant declined to proceed in this fashion and insisted that the motion proceed.
3. Despite Mr. Besant's submissions, I granted the order for the following reasons:
 - (i) The Kennedy approval and vesting order and the distribution order were not opposed and I am satisfied the sale and proposed distribution are in the best interest of the stakeholders;

- (ii) The ancillary order is appropriate and the time for service of the motion record is abridged. No one is prejudiced by this order as the motion record was served 8 days before the motion was heard.
- (iii) I am satisfied that the stay period should be extended to May 31, 2020. The *Applicants have acted in good faith and circumstances exist that make the order appropriate because it will permit the Monitor to maximize stakeholder recovery for the reasons set out at paragraph 53 of the Monitor's Factum.
- (iv) The confidential appendices of the Monitor's Twelfth Report contain sensitive commercial information that should be sealed in accordance with the test in *Sierra Club*. That aspect of the Order is not opposed.
- (v) The undertaking dated March 11, 2019 should be amended by order of the Court to substitute Bennett Jones LLP, the Monitor's legal counsel, to hold the surplus funds currently held in Cassels Brock & Blackwell LLP's ("CBB") trust account and any further realizations from the Non-Applicants unsold real property. CBB is therefore ordered to transfer these funds to Bennett Jones LLP forthwith on the terms set out in the order.
- (vi) I am satisfied that I should make an order pursuant to section 181(1) of the BIA annulling the assignments into bankruptcy made on January 28, 2020 by the Non-Applicant companies without any notice to the Monitor for the following two reasons;
 - (a) the Non-Applicant companies were not demonstrably insolvent persons. Each company has sold its real property generating sufficient proceeds to repay its mortgage debt in full and to fund the surplus funds currently held in CBB's trust account in the amount of approximately \$11 million. The only evidence before the Court is that the value of the Non-Applicant's assets exceeds their liabilities. This is not a "clear cut situation" of insolvency that is "clearly established by sound and convincing evidence"; and
 - (b) in my view the assignments into bankruptcy are all entirely duplicative and serve no valid purpose. The Non-Applicant's creditor relationships are already being managed in these CCAA proceedings and the Court supervised claims process, all of which was consented to by Mr. Wang, the controlling mind of the Non-Applicants. If these assignments are not annulled, they will stay the Court approved claims process at the expense of creditors and the Court and will not accomplish anything already achieved by these unique and heavily negotiated CCAA proceedings. The claims process is one of several integral "building blocks" in the CCAA proceedings and, in my view, must be respected. The assignments must not be permitted to undermine this important building block [see Chief Justice Morawetz's Reasons at paragraph 81 in *Target Canada Co.*, 2015 ONSC 303].

- (vii) I am satisfied that this CCAA claims process should continue and that proven Wang claims will be admitted as proven claims in the proceedings related to the Wang NOI.
 - (viii) Finally, without further order of the Court the surplus funds to be transferred from CBB to the Monitor's counsel shall not be used to pay any parties' legal fees.
 - (ix) In my view, this is an appropriate case to make an order as to costs. I have requested counsel provide me with short written cost submissions.
 - (x) I thank all counsel for their helpful submissions.
- References to "Applicants" acting in good faith in this context refers to the Monitor, as it is a super-Monitor in these CCAA proceedings.


Hailey, J.
February 20, 2020



TAB 2



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00713245-00CL

DATE: July 31, 2024

NO. ON LIST: 4

TITLE OF PROCEEDING: IN THE MATTER OF A COMPROMISE OR ARRANGEMENT OF
BALBOA INC. et al.

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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Noah Goldstein David Sieradkzi Nathalie El-Zakhem	Monitor – KSV Restructuring Inc.	ngoldstein@ksvadvisory.com dseiradkzi@ksvadvisory.com nelzakhem@ksvadvisory.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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Lori Bassett	Secured Lender	Jamie.bassett489@gmail.com
Cameron Topp	Lender	camerontopp@gmail.com
Karen Beckman	Lender	Karenbeckman7@gmail.com
Jeffrey Simpson	Counsel for the DIP Lender	jsimpson@torkinmanes.com

George Benchetrit	The Secured Lender Representative Counsel	george@chaitons.com
Jennifer Stam	Counsel for The Fuller Landau Group – Receiver of The Lion’s Share Group Inc.	Jennifer.stam@nortonrosefulbright.com
Mario Forte	The Unsecured Lender Representative Counsel	forte@gsnh.com
Jennifer O’Connell	Lender	Jennifer.montreal@gmail.com
Miriam Perks	Secured Lender	miriamperks@icloud.com

ENDORSEMENT OF JUSTICE STEELE:

- [1] The Monitor, KSV Restructuring Inc., seeks an order, among other things, extending the stay period for a month and approving the Property Management Agreement with Richmond Advisory Services Inc.
- [2] No party opposes the relief sought on this motion.
- [3] The Monitor is a so-called “super Monitor” and has expanded powers.
- [4] The Monitor seeks to extend the stay period to August 31, 2024. Section 11.02(2) of the CCAA empowers the court to grant a stay extension where the court is satisfied that circumstances exist that make such an order appropriate, and the applicants have acted and continue to act in good faith. In the context of a “super-Monitor” in CCAA proceedings, the monitor is held to the good faith standard: *Forme Development Group Inc. (Re)*, Court File No.: CV-18-608313-00CL.
- [5] The Monitor has acted in good faith and due diligence in discharging its duties and obligations under the CCAA and the Expanded Powers Order; there is no evidence to the contrary. In addition, I am satisfied that circumstances exist such that it is appropriate to extend the stay. As noted by the Monitor, additional time is needed to advance and present the Alternative Solution (as defined in section 3.3(2) of the Monitor’s Sixth Report). There is sufficient funding available to fund operations during the extension period based on the Cash Flow Forecast.
- [6] The replacement of the property manager, SID Management, was contemplated in the Expanded Powers Order. Further, the Monitor states that it makes commercial sense and will address issues in the business practices of SID identified by the Monitor. The Monitor wishes to retain Richmond Advisory Services. Before selecting Richmond, the Monitor solicited and received proposals from three parties to act as property managers. The Monitor sought proposals from additional property managers that declined the opportunity. The Monitor notes that Richmond is qualified to perform the mandate, has experience dealing with distressed properties and provided a superior proposal to the other prospective property managers.
- [7] The Monitor asks the Court to approve the Sixth Report and the activities set out therein. This is common practice and there are good policy and practical reasons for the court to do so: *Target Canada Co. (Re)*, 2015 ONSC 7574 at para. 23.

[8] The Monitor also seeks court approval of the fees and disbursements of the Monitor and its counsel incurred between April 1, 2024 to May 31, 2024. The Court will consider whether fees and disbursements are “fair and reasonable in all circumstances.” *Re Nortel Networks Corporation et al*, 2017 ONSC 673, at para. 13.

[9] In assessing the reasonableness of the Monitor’s fees, the court may consider the following factors set out in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at para 33:

- a. The nature, extent and value of the assets being handled;
- b. The complications and difficulties encountered;
- c. The degree of assistance provided by the company, its officers or its employees;
- d. The time spent;
- e. The Monitor’s knowledge, experience and skill;
- f. The diligence and thoroughness displayed;
- g. The responsibilities assumed;
- h. The results achieved; and
- i. The cost of comparable services when performed in a prudent and economical manner.

[10] In paragraph 7.0(3) of the Monitor’s Sixth Report, the Monitor states that an “extensive amount of work” has been undertaken in this CCAA proceeding to date. The Monitor further indicates in paragraph 7.0(4) that because the Investigation has concluded, the Monitor expects the pace of the incurrence of fees going-forward to be reduced. While the fees are significant, I agree with the Monitor that the hourly rates charged by their counsel are consistent with the rates charged by large corporate law firms practicing in this market in Toronto. The Monitor confirmed that their counsel’s “billings reflect work performed consistent with the Monitor’s instructions.” I also understand that because the expanded powers, significantly more work was required of the Monitor and its counsel than under a typical CCAA. The fees sought are supported by fee affidavits. The Monitor states that the overall fees charged by its counsel and the Monitor are reasonable and appropriate in the circumstances.

[11] Order attached.

A handwritten signature in black ink, appearing to be 'J. P. [unclear]', located at the bottom right of the page.

TAB 3

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 2025-02-25

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 asserts 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 is 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

TAB 4

CITATION: Triple-I Capital Partners Limited v. 12411300 Canada Inc., 2023 ONSC 3400
COURT FILE NO.: CV-22-00684372-00CL
DATE: 20230606

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

RE: Triple-I Capital Partners Limited, Applicant

AND:

12411300 Canada Inc., Respondent / Debtor

BEFORE: Peter J. Osborne J.

COUNSEL: Kevin Sherkin and Monica Faheim, for Crow Soberman Inc., Receiver

Hans Rizarri, for Crow Soberman Inc., Receiver

Avi Freedland, for the Respondent / Debtor

HEARD: June 6, 2023

ENDORSEMENT

1. Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.
2. The Respondent, 12411300 Canada Inc. (the “Debtor”), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the “Applicant”), nor the Second Mortgagees (defined below) appeared.

Chronology of This Matter

3. The Applicant advanced to the Debtor \$6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.
4. The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the “Receivership Order”). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft.².

5. As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of \$6,865,154 plus additional interest and accrued expenses.
6. Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the "Second Mortgagees"), were owed \$2 million, although on October 10 the Debtor made a payment to them in the amount of \$410,000, with the result that the principal amount owing to them was in the amount of \$1,590,000. There were no other significant creditors.
7. After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.
8. The Receiver then brought a motion for approval of a sales process.
9. Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.
10. On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.
11. That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.
12. On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.
13. On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor's refinancing transaction.
14. That same day, funds in the amount of \$6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.
15. The payment was made in two tranches given the dispute that underlies this motion. The first tranche of \$6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of \$396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

Should the Fees of the Receiver and its Counsel be Approved?

Material Filed and Positions of the Parties

16. The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.
17. The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.
18. Today, the Receiver seeks approval of fees of \$106,722.25 plus disbursements of \$32,851.56 and HST in the amount of \$17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of \$91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to \$247,953.15.
19. The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.
20. The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.
21. The Respondent submits that this Court ought to approve 50 percent of total fees (\$53,361.13 instead of \$106,722.25) and 80 percent of disbursements (\$26,281.25 instead of \$32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent (\$45,507.47 instead of \$91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to \$125,149.85.
22. The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

The Test

23. The factors to be considered have been sent out by the Court of Appeal for Ontario: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:
 - a. the nature, extent and value of the assets;
 - b. the complications and difficulties encountered;
 - c. the degree of assistance provided by the debtor;

- d. the time spent;
 - e. the receiver's knowledge, experience and skill;
 - f. the diligence and thoroughness displayed;
 - g. the responsibilities assumed;
 - h. the results of the receiver's efforts; and
 - i. the cost of comparable services when performed in a prudent and economical manner.
24. The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer*, at para. 33, citing with approval *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460.
 25. The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.
 26. While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer*, at para. 45).

Application of the Test to This Case

27. In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.
28. The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.
29. The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.
30. The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor

to challenge the activities that have already been approved by this Court (and therefore the fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31. The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.
32. The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.
33. The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.
34. Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.
35. At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.
36. The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance

premiums for the property which were necessary to preserve the asset of the value for the estate.

37. The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.
38. As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.
39. The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional (lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed \$5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.
40. The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.
41. The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.
42. Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.
43. In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.
44. The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.

45. The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.
46. The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days, or “workdays” when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).
47. Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver’s work over that period of time [late July and early August, see para. 18 of the Debtor’s factum] “brought no value to the Corporation or its creditors, including the Second Mortgagees”. I cannot give any weight to this submission based on that evidence.
48. The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.
49. The Debtor made vigorous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.
50. The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.

The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.
51. The source for this submission is the lawyer’s own affidavit at paragraphs 29 – 32 (CaseLines B-1-17).

52. The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: "I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of the work".
53. In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.
54. Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.
55. Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and disbursements of approximately \$248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately \$6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately \$125,000.
56. Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.
57. Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigorously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.
58. I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the

Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

59. The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued and repeated pleas, effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.
60. In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.
61. As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.
62. The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.
63. As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.
64. The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of \$247,953.15.

Approval of the Third Report and Activities

65. While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.
66. The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.
67. The Third Report and the activities described in it are approved.

Costs

68. Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of \$18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of \$10,719.18 on the same basis.
69. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.
70. Having considered the factors set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as they apply to this matter, in my view an appropriate award of costs is \$12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.
71. Order to go in accordance with these reasons.

P.J. Osborne J.

Date: June 6, 2023

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

-and-

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

Applicants

Respondents

2024 Hfx No. 531463

	SUPREME COURT OF NOVA SCOTIA
	IN THE MATTER OF THE <i>COMPANIES' CREDITORS</i> <i>ARRANGEMENT ACT</i> , 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
	BOOK OF AUTHORITIES
	CHAITONS LLP 5000 Yonge Street, 10 th Floor Toronto, Ontario M2N 7E9 George Benchetrit Tel: 416-218-1141 Email: george@chaitons.com Maleeha Anwar Tel: 416.218.1128 Email: manwar@chaitons.com Lawyers for KSV Restructuring Inc., in its capacity as CCAA Monitor