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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Business

EDITORS:

Steven Jeffery, Editor-in-Chief
416.593.3939
sjeffery@blaney.com

Kym Stasiuk, Editor
416.593.3995
kstasiuk@blaney.com

This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, the editor, or the head of our Corporate/Commercial Group:

S. Steve Popoff
416.593.3972
spopoff@blaney.com

IN THIS ISSUE:

"[Target Canada] closed all its 133 stores, eliminating the jobs of more than 14,000 employees and leaving its landlords and almost 1,800 other suppliers on the hook for close to $3 billion."

TARGET STORES INSOLVENCY BIGGEST IN CANADIAN RETAIL HISTORY: CREDITORS WORKING TOGETHER TO WIN EQUITABLE SETTLEMENT

Lou Brzezinski

The biggest insolvency in national retailing history, Target stores' Canadian subsidiary, is scheduled to take key steps on the road to resolution this month and over the summer.

Target Canada applied for protection under the *Companies' Creditors Arrangement Act* (CCAA) last January 15 so that it could restructure and liquidate. It then closed all its 133 stores, eliminating the jobs of more than 14,000 employees and leaving its landlords and almost 1,800 other suppliers on the hook for close to $3 billion.

Blaney McMurtry, led by commercial litigation partner Lou Brzezinski, has been intimately involved from the beginning in the effort to assure that the insolvency process is efficient and orderly and that Target Canada's creditors recover the greatest possible share of what they are owed.

Mr. Brzezinski and Mel Solomon of Toronto-based commercial litigation counsel Solomon Rothbart Goodman LLP were appointed May 11 by Ontario Superior Court Senior Regional Justice Geoffrey Morawetz to a court-ordered "consultative committee" with which the insolvency monitor is obliged to consult "regarding the claims process."

(The monitor, restructuring and insolvency specialist Alvarez & Marsal Canada, is tracking Target Canada's ongoing operations and is supporting the filing of, and creditors' voting on, Target Canada's proposal for paying the debt it owed when it made its initial court filing. It has met with Blaneys and Solomons a number of times.)

When it applied for CCAA protection last winter, Target Canada owed approximately $2.4 billion to governments, suppliers of goods and services and employees. It has since established a trust to meet its pay and severance obligations to all employees.

The biggest chunk of the debt, $1.9 billion, is owed to Target Canada Property LLC (Target Propco), which financed Target Canada's leases. (Target Propco is wholly owned by Target Canada's parent company, Target Corporation of Minneapolis.)

Target Canada's debt to its landlords may be smaller than thought originally. It has been determined that a number of the leases were guaranteed, and must be paid, by its American parent.

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"At present, Target Canada has approximately $720 million available to meet all obligations.... It has until June 30 to sell whatever remaining leases other retailers and other purchasers might want to buy."

Lou Brzezinski is a partner in Blaney McMurtry's commercial litigation practice and chair of the firm's Fraud Investigation Recovery and Enforcement (FIRE) Group. As counsel for seven suppliers to Target stores in Canada, he is playing a key role in Target Canada's liquidation proceedings under the Companies' Creditors Arrangement Act (CCAA).

Lou may be reached directly at 416.593.2952 or lbrzezinski@blaney.com.

This could mean the Canadian company will have more money available to meet other obligations.

At present, Target Canada has approximately $720 million available to meet all obligations. The company raised some of this money by liquidating inventory and other assets and by selling some leases back to landlords.

It has until June 30 to sell whatever remaining leases other retailers and other purchasers might want to buy.

Meanwhile, the court has ordered the monitor to develop, in discussion with the consultative committee, a "comprehensive claims process" that will spell out how all claims will be presented and resolved and will detail all inter-company claims, such as Target Propco's claims for compensation from Target Canada for abandoned leases.

The monitor circulated the draft process among stakeholders May 2 and the court was to hear arguments June 11 on the monitor's motion that the process be approved.

Once the comprehensive claims process has been approved, the court will be in a position to hear motions on the establishment of ad hoc creditors' committees to represent creditors in their efforts to get paid what they are owed. Both Blaneys and Solomons have already put forward such motions.

Blaneys, on behalf of seven Target Canada creditors, including Nintendo of Canada, Universal Studios Canada, and Mars Canada, has asked that an ad hoc suppliers' committee be established to represent all creditors in relation to Target Canada's $1.9 billion debt to Target Canada Property LLC.

Blaneys is of the view that ad hoc creditors' committees increase the efficiency of the insolvency process, protect and advance creditors' interests, minimize fees and expenses and add value for all stakeholders.

The committee would argue that the inter-company claim should be extinguished or put behind the claims of unsecured creditors by virtue of the 'doctrine of equitable subordination' or to extinguish the intercorporate claim by consolidating the two estates into one by way of substantial consolidation.

Blaneys established a special dedicated website last winter (http://blaneystargetccaa.com) to provide a "landing spot" for Target Canada suppliers. It uses the website and such social media as Facebook and Twitter to update interested parties on the most recent developments. Law firms do not commonly drive the creation of ad hoc creditors' committees. Blaneys' initiative has been considered something of an innovation.

Solomons, on behalf of ISSI Inc., a supplier of baby products, has asked the court to establish an ad hoc committee of suppliers of 30-day goods. These firms are seeking to recover goods shipped between December 15, 2015 and January 15, 2015 in priority over other unsecured creditors.

The ad hoc suppliers' committee motions will not be heard until the inter-company claims and dispute processes have been decided upon in July and August. ■

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"The Canadian Radio-television and Telecommunications Commission (CRTC) has issued its largest fine ever as a result of violations under Canada's Anti-Spam Legislation (CASL)."

Dina L. Maxwell is a member of Blaney McMurtry's Insurance Litigation and Privacy Groups. Her practice includes insurance defence, with a focus on professional negligence, privacy law and investigations, and insurance coverage. Called to the Ontario Bar in 2010, Dina holds a J.D. from the University of Toronto and a B.A. from Harvard. A member of the International Association of Privacy Professionals and a certified Information Privacy Professional (CIPP) in Canada and the United States, Dina has appeared as counsel on applications, motions and interlocutory proceedings before the Ontario Superior Court of Justice.

Dina may be reached directly at 416.593.3949 or dmaxwell@blaney.com.

A MILLION REASONS TO COMPLY - CRTC ISSUES $1.1 MILLION PENALTY AGAINST TRAINING FIRM FOR ANTI-SPAM LAW VIOLATIONS

Dina L. Maxwell

The Canadian Radio-television and Telecommunications Commission (CRTC) has issued its largest fine ever as a result of violations under Canada's Anti-Spam Legislation (CASL).

The action sends a powerful message to businesses that market directly by electronic means, such as text messages and email, and makes clear the need to have in place a compliance regime to protect against CASL complaints.

CRTC Issues Notice of Violation Against Compu-Finder

The fine in question is contained in a Notice of Violation issued by the CRTC on March 5, 2015 against Compu-Finder, a Quebec based company, which was cited for multiple CASL violations. Compu-Finder is in the business of advertising training courses to businesses on topics such as management, social media and professional development.

During the course of the CRTC's investigation, it determined that Compu-Finder sent commercial electronic messages (CEMs) without the recipient's consent and that the CEMs did not contain functioning unsubscribe mechanisms. The violations allegedly occurred between July 2, 2014 and September 16, 2014. The CRTC also noted that complaints against Compu-Finder accounted for 26 per cent of all complaints submitted within Compu-Finder's industry sector.

Compu-Finder had 30 days to either pay the penalty or submit written representations to the CRTC challenging the CRTC's decision. Compu-Finder also had the scope to provide the CRTC with an undertaking to take certain measures to comply with CASL. (The CRTC has the discretion to accept and consider such an undertaking before disposing of the matter.) The CRTC said at the end of May that the case was "still ongoing."

Overview of CASL

CASL came into force on July 1, 2014. It applies to all forms of electronic communication (including emails, text messages, and instant messages) that promote or encourage commercial activity.

CASL contains three key criteria that businesses must follow when sending CEMs.

First, businesses must have the recipient's consent before sending CEMs. This consent must be explicit or obtained on an opt-in, rather than opt-out, basis. Consent can be implied in certain situations, such as when the parties have a pre-existing business relationship.

Second, CEMs must contain information identifying the name of the sender and its contact information (email, address, telephone number, website, etc.).

Third, the CEM must contain a mechanism through which the recipient can, at no cost, 'unsubscribe' from receiving future communications from the sender. Businesses have 10 business days in which to remove the recipient from its lists.

"The maximum penalty for a violation is $1 million in the case of an individual and $10 million per violation in the case of any other 'person' (e.g. for-profit and not-for-profit corporations, partnerships, joint ventures etc.)."

Penalties Under CASL

As demonstrated by the Compu-Finder case, penalties for CASL violations can be steep. The maximum penalty for a violation is $1 million in the case of an individual and $10 million per violation in the case of any other "person" (e.g. for-profit and not-for-profit corporations, partnerships, joint ventures etc.). When issuing a penalty, the CRTC will consider various factors outlined in section 20 of CASL. Such factors include, but are not limited to, the purpose of the penalty, the nature and scope of the violation, the sender's history with respect to any previous CASL violation, any financial benefit that the sender obtained from the CASL violation, the sender's ability to pay the penalty, and whether the sender has voluntarily paid compensation to a recipient affected by the violation.

If the CRTC determines that CASL has been violated, it may opt to take measures other than issuing monetary penalties. For example, it may discuss corrective actions with the sender, which may lead to an undertaking or other corrective measures. The CRTC can also issue warning letters, preservation demands (requiring that various documents be retained), notices to produce (records of various kinds), restraining orders and notices of violation.

Compu-Finder is only one example of recent penalties issued under CASL. On March 25, 2015, Plentyoffish Media Inc., which operates the online dating service Plenty of Fish, paid $48,000 as part of an undertaking for violating CASL. After receiving complaints from members of the public, the CRTC launched an investigation and determined that Plenty of Fish had allegedly sent CEMs to registered users of its online dating service which contained an unsubscribe mechanism that was not clearly and prominently set out, and which could not be readily performed, as required by CASL. As part of the undertaking, Plenty of Fish will develop and implement a CASL compliance program that will include training and education for staff and the development of corporate policies and procedures.

Best Practices for Businesses to Avoid CASL Complaints

As of January 6, 2015, more than 210,000 complaints of alleged violations of CASL had been made to the CRTC. The CRTC has confirmed that it will focus on the most severe types of violations when launching investigations. Nevertheless, these recent cases underscore the importance of understanding CASL and ensuring that your company's CEM-sending practices comply with the law. Businesses are encouraged to adopt CASL-compliant processes such as:

- developing a policy and guidelines for determining whether a message is actually a CEM and whether an exception applies;
- determining if electronic addresses your organization collected previously can still be used under the existing law and, if not, either scrub existing databases or obtain express consent;
- ensuring all CEM templates contain all mandatory identity and contact information as well as a compliant unsubscribe mechanism; and
- auditing compliance with CASL and revise as necessary.

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"The dual purposes of such corporations would be financial profit and social good that extends beyond the creation of jobs and income."

Dennis J. Tobin is a partner in Blaney McMurtry's Corporate & Commercial, Real Estate & Leasing and International Trade and Business practice groups. In his corporate practice, he advises on mergers and acquisitions, venture capital transactions, shareholder agreements and disagreements, and start ups and provides strategic corporate advice to small, medium and large concerns. He is an authority on benefit corporations in Canada. In his international trade and business practice, he represents a number of overseas companies operating in Canada in their retail and corporate operations.

Dennis may be reached directly at 416.596.2897 or dtobin@blaney.com.

Conclusion

CASL has been in force for less than a year. It is evident that the CRTC is taking complaints seriously and will issue penalties where appropriate.

In addition to the threat of investigations, penalties, and potential damage to one's reputation, businesses should also be aware that CASL's provisions for private rights of action will come into force in July 2017, which will allow private citizens to sue CASL violators in civil actions.

Businesses are strongly encouraged to be proactive with respect to compliance in order to avoid becoming the targets of CASL complaints. ■

ONTARIO CONSIDERING ADVICE ON "DUAL-PURPOSE" CORPORATIONS

Denns J. Tobin and Lauren Dalton

The government of Ontario is about to start assessing advice that it has solicited from business and professional experts on the shape that legislation allowing for "dual-purpose" business corporations might take.

The dual purposes of such corporations would be financial profit and social good that extends beyond the creation of jobs and income.

Historically, the law has been taken to oblige corporations and their directors and officers to concentrate uniquely on financial profit. But, in recent years, there has been a trend among businesses to adopt a "triple-P bottom line" – profit, people, and planet.

The provincial government has said it wants to "support and attract both entrepreneurs and investors to do business in Ontario while contributing to the social good." The question is how to achieve that when directors and officers fear they will be found liable for compromising profit to other interests?

Last summer, the province asked corporate community stakeholders for comment on how legislation allowing for dual-purpose corporations might be structured. The comment period concluded in May, 2015.

The province received submissions from various parties, including one from the authors of this article. In our submission, we argue that the *Ontario Business Corporations Act* (OBCA), and the business-judgment rule within it, should be amended to:

- permit corporations to incorporate as benefit corporations or amend their articles and become benefit corporations… (This would) provide their directors and officers with enhanced freedom to pursue social goals in addition to profit-maximization without fear of potential liability for doing so;
- incorporate into the statute the common law principles set out in the BCE decision of the Supreme Court of Canada (which recognized that the legitimate interests of corporations go beyond profit alone.) In considering what is in the best interest of the corporation, directors should be permitted to consider not only the interests of shareholders, but also other stakeholders, including employees, creditors, consumers, governments and the environment in their decision-making. Directors

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"... if you guarantee a loan in partnership with somebody else and then, unilaterally, choose to pay it off in absence of a demand by the lender to do so, your co-guarantor will not be ordered to reimburse you for its share unless particular circumstances pertain."

Lauren Dalton is a member of Blaney McMurtry's corporate/commercial practice group. A law graduate of the University of Western Ontario and the holder of a masters degree in international business law from American University in Washington DC, Lauren's practice encompasses a variety of corporate and commercial matters.

Lauren may be reached directly at 416.596.4286 or ldalton@blaney.com.

should also be allowed to consider both short and long-term interests of the corporation, including benefits that may accrue to the benefit corporation from its long-term plans, and need not give priority to any particular interest.

- protect investors, shareholders and directors… by adding provisions for "purpose, accountability and transparency"….

The benefit corporation is a strictly voluntary status and serves as a for-profit model that enables a corporation to pursue profit-generating activities while contemporaneously promoting positive effects on society and the environment. It is complementary to non-profit and charitable activities but on a much larger scale.

While social enterprise legislation can be implemented at any point along the spectrum of corporate entities, it may be most useful for achieving goals of social good if implemented at the end of the spectrum where for-profit corporations live. The goal should be to enable for-profit enterprises to take action having regard to profit, people and the planet as a complement to the activities of governments and charities.

A solution at one point in the spectrum does not necessarily exclude a solution at any other point in the spectrum or diminish the contribution of an enterprise at any other point. Community Contribution Corporation (CCC) and Community Interest Corporation (CIC)-type legislation could be effective in the non-profit/charity context; however, legislation enabling benefit corporations at the for-profit end is a solution that is likely to be adopted quickly and have a lasting impact.

For The Rise of the For-Profit Socially Responsible Enterprise In Canada, a paper by Mr. Tobin and Ms. Dalton on their submission to the Ontario Ministry of Consumer Services that also contains background on benefit corporation regimes in other parts of Canada and the United States, please click here. ■

SUPREME COURT TURNS DOWN LEAVE TO APPEAL CASE IMPORTANT TO LOAN CO-GUARANTORS

Kym Stasiuk

The Supreme Court of Canada has declined to hear an appeal of an Ontario decision that left one of two parties who guaranteed a loan stuck for the entire obligation.

In doing so, the Supreme Court has let stand trial court and appeal court decisions that concluded if you guarantee a loan in partnership with somebody else and then, unilaterally, choose to pay it off in absence of a demand by the lender to do so, your co-guarantor will not be ordered to reimburse you for its share unless particular circumstances pertain.

It has also let stand the Ontario Court of Appeal's position that, unless a situation is dire, co-guarantors must work with each other to meet their obligations in a mutually satisfactory way.

All of this flows from the Supreme Court's recent dismissal of an application by *Can-Win Leasing (Toronto) Limited for leave to appeal Can-Win Leasing (Toronto) Limited vs. Rafael Moncayo.*

No reasons were given for the dismissal.

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Kym Stasiuk is a Partner in Blaney McMurtry's corporate/commercial practice group. Primarily, he is involved with lenders (both private and institutional) and borrowers in secured real estate financing transactions. He also acts for clients on the purchase and sale of businesses, general corporate matters and the provision of ongoing strategic advice to business owners and managers.

Kym may be reached directly at 416.593.3995 or kstasiuk@blaney.com.

For a discussion of the Court of Appeal decision, please see "*Law of Guaranty: Can-Win Leasing, Contribution and the Rights Between Co-Sureties*" published in the December 2014 issue of Blaneys on Business at http://www.blaney.com/articles/law-guaranty-can-win-leasing-contribution-and-rights-between-co-sureties ■

BLANEYS BLOGS

Blaney McMurtry LLP

Be sure to follow our regularly updated blogs, published by the Firm and individual lawyers, covering a variety of topics:

Blaneys on Target provides general information to creditors and other persons interested in the Target insolvency and its CCAA proceedings. [blaneystargetccaa.com/updates/]

Blaneys@Work examines recent events and decisions in the world of labour and employment law. [blaneysatwork.com]

Blaneys Ontario Court of Appeal Summaries (Blaneys OCA Blog) offers weekly summaries of all decisions released by the Court of Appeal for Ontario (other than criminal law decisions). [blaneyscourtsummaries.com]

Henry J. Chang's Canada-US Immigration Blog covers recent decisions, legislative changes and news related to Canada and US immigration. [www.americanlaw.com/immigrationblog/]

Blaneys Fidelity Blog provides updates on recent developments in fidelity insurance in Canada and the United States, and covers other topics of interest to fidelity insurers. [blaneysfidelityblog.com] ■

BLANEYS PODCAST

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Blaneys Podcasts are available for download at www.blaney.com/podcast. Topics to date include Powers of Attorney, Canada's Anti-Spam Legislation, Termination of Employment, Workplace Harassment, Family Law, Succession Planning and Target Canada's Insolvency Proceedings. In the newest episode of the Blaneys Podcast, our resident privacy expert, Dina Maxwell, discusses the implications and privacy concerns raised by Canada's proposed Bill C-51 (*Anti-Terrorism Act, 2015*), which is expected to become law as early as June, 2015.

New podcasts continue to be posted so check back regularly for the latest topic. Podcasts are also available for download on iTunes. ■

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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com