

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

PINNACLE CAPITAL RESOURCES LIMITED in its capacity as general
partner of RED ASH CAPITAL PARTNERS II LIMITED PARTNERSHIP
Applicant

- and -

KRAUS INC., KRAUS CANADA INC., STRUDEX FIBRES LIMITED,
and 538686 B.C. LTD.
Respondents

**APPLICATION UNDER SECTIONS 43 and 243 OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, as amended**

**BOOK FOR AUTHORITIES
(APPLICATION FOR BANKRUPTCY ORDER
AND RECEIVER RETURNABLE JUNE 11, 2012)**

June 8, 2012

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Court File No. CV12-9731-00CL

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I N D E X

Tab	Description
1	<i>Re Ivaco Inc.</i> , 2006 CarswellOnt 6292 (C.A.)
2	<i>Re Lambert</i> , 2002 CarswellOnt 2659 (C.A.)
3	<i>Bank of Montreal v. Scott Road Enterprises Ltd.</i> , 1989 CarswellBC 337 (C.A.)
4	<i>Canadian Tire Corp. v. Healy</i> , [2011] O.J. No. 3498 (S.C.J.)
5	<i>Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited</i> , 2011 ONSC 1007 (S.C.J.)(C.L.)
6	<i>Bank of Nova Scotia v. Freure Village on Clair Creek</i> , [1996] O.J. No. 5088 (O.C.J. Gen. Div.)

Tab 1

2006 CarswellOnt 6292, [2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43



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Ivaco Inc., Re

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"

Ontario Court of Appeal

J. Laskin, M. Rosenberg, J. Simmons JJ.A.

Heard: February 22, 2006
Judgment: October 17, 2006
Docket: CA C44455

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Proceedings: affirming *Ivaco Inc., Re* (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List])

Counsel: Frederick L. Myers, Jason Wadden for Appellant, Superintendent of Finance Services (Ontario)

Andrew Hatnay for Respondent, Quebec Pension Committee of Ivaco Inc.

Jeffrey S. Leon, Richard B. Swan for Respondent, National Bank of Canada

Dan V. MacDonald for Respondent, Bank of Nova Scotia

Geoff R. Hall for Respondent, QIT-Fer et Titane Inc.

Robert W. Staley, Evangelia Kriaris for Respondent, Informal Committee of Noteholders

Peter F.C. Howard for Monitor, Ernst & Young Inc.

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles

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Pension funds — I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees — I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") — To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans — Restructuring was unsuccessful — I Group's assets were sold — Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account — Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy — Stay was lifted, and bankruptcy petitions were allowed to proceed — Superintendent appealed from dismissal of its motion — Appeal dismissed — Motions judge did not err in law in refusing to order immediate payment of amount of deemed trusts under PBA or in refusing to segregate that amount — Combination of wording of s. 57 of PBA, paragraph 4 of pension stay order, and limited role of Monitor refuted Superintendent's argument that funds should have been segregated — CCAA itself did not require motions judge to execute deemed trusts — Because Federal legislative regime under CCAA and Bankruptcy and Insolvency Act determines claims of creditors of insolvent company, if rights of pension claimants are to be given greater priority, Parliament, not courts, must do so.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees — I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") — To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans — Restructuring was unsuccessful — I Group's assets were sold — Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account — Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy — Stay was lifted, and bankruptcy petitions were allowed to proceed — Superintendent appealed from dismissal of its motion — Appeal dismissed — Motions judge did not err in law in refusing to order immediate payment of amount of deemed trusts under PBA or in refusing to segregate that amount — Combination of wording of s. 57 of PBA, paragraph 4 of pension stay order, and limited role of Monitor refuted Superintendent's argument that funds should have been segregated — Because Federal legislative regime under CCAA and Bankruptcy and Insolvency Act determines claims of creditors of insolvent company, if rights of pension claimants are to be given greater priority, Parliament, not courts, must do so — Motions judge did not err in exercising his discretion to lift stay under CCAA and permit bankruptcy petition to proceed — Superintendent's unfairness argument was not accepted.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Stay of petition — General principles

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees — I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") — To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans — Restructuring was unsuccessful — I Group's assets were sold — Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account — Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy — Stay was lifted, and bankruptcy petitions were allowed to proceed — Superintendent appealed from dismissal of its motion — Appeal dismissed — Motions judge did not err in exercising his discretion to lift stay under CCAA and permit bankruptcy petition to proceed — Motion judge's order lifting stay was discretionary order, and appellate review of discretionary order under CCAA is justified only for error

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in principle or unreasonable exercise of discretion — Superintendent's unfairness argument was not accepted — Numerous conditions supported motions judge's decision to lift stay and permit bankruptcy petitions to proceed — Motions judge would have gone beyond his role as referee in CCAA proceedings if he had given effect to Superintendent's claim.

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous issues

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees — I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") — To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans — Restructuring was unsuccessful and I Group's assets were sold — Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account — Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy — Stay was lifted, and bankruptcy petitions were allowed to proceed — Motions judge made ancillary order to facilitate bankruptcy petitions, which ordered that head offices of two I Group companies be transferred from cities in Quebec to Toronto — Superintendent appealed from ancillary order on basis that motions judge lacked jurisdiction under CCAA to make such order or, alternatively, improperly exercised his discretion in doing so — Appeal dismissed — Motions judge did not err in ordering that head offices of companies in question be transferred from Quebec to Toronto — Argument that CCAA did not give motions judge jurisdiction to order transfer was accepted, but it was also accepted that transfer was not made to facilitate CCAA restructuring; instead, it was made to facilitate future bankruptcy proceedings — Nonetheless, motions judge did not need to resort to CCAA because he had express authority to order transfer under Canada Business Corporations Act ("CBCA") — Section 191 of CBCA gives court express authority to order transfer of head office of company that is subject to order under CCAA — Motions judge properly exercised his discretion in ordering transfer.

Cases considered by *J. Laskin J.A.*:

Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 2 C.B.R. (4th) 243, 1998 CarswellOnt 1475, 158 D.L.R. (4th) 65, (sub nom. *Abraham v. Canadian Admiral Corp. (Receivership)*) 109 O.A.C. 36, 39 O.R. (3d) 176, 37 C.C.E.L. (2d) 276, 19 C.C.P.B. 1, 13 P.P.S.A.C. (2d) 334 (Ont. C.A.) — referred to

Air Canada, Re (2003), 43 C.B.R. (4th) 1, 66 O.R. (3d) 257, 229 D.L.R. (4th) 687, 174 O.A.C. 201, 2003 CarswellOnt 2925 (Ont. C.A.) — referred to

Algoma Steel Inc. v. Union Gas Ltd. (2003), 169 O.A.C. 89, 39 C.B.R. (4th) 5, 2003 CarswellOnt 115, 63 O.R. (3d) 78 (Ont. C.A.) — referred to

Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) — referred to

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, 1989 CarswellBC 351 (S.C.C.) — considered

Dallas/North Group Inc., Re (1999), 17 C.B.R. (4th) 56, 1999 CarswellOnt 4720, 46 O.R. (3d) 602 (Ont. Gen.

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Div.) — referred to

General Chemical Canada Ltd., Re (2005), 51 C.C.P.B. 297, 2005 CarswellOnt 7306, C.E.B. & P.G.R. 8179 (Ont. S.C.J.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re*) 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) — distinguished

Harrop of Milton Inc., Re (1979), 1979 CarswellOnt 185, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 22 O.R. (2d) 239 (Ont. Bkcty.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — referred to

Ivaco Inc., Re (2004), 2004 CarswellOnt 3561 (Ont. S.C.J. [Commercial List]) — referred to

Lambert, Re (2002), (sub nom. *Lambert (Bankrupt), Re*) 162 O.A.C. 132, 216 D.L.R. (4th) 330, 2002 CarswellOnt 2659, 36 C.B.R. (4th) 256, (sub nom. *Buth-na-bodhiaga Inc. v. Lambert*) 60 O.R. (3d) 787 (Ont. C.A.) — referred to

Royal Crest Lifecare Group Inc., Re (2004), 2004 CarswellOnt 190, 181 O.A.C. 115, 46 C.B.R. (4th) 126, (sub nom. *Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 & 2225-12 v. Ernst & Young Inc. (as trustee for Royal Crest Lifecare Group Inc.)*) 2004 C.L.L.C. 220-014, (sub nom. *C.U.P.E., Locals 1712, 3009, 2225-05, 2225-06, 22512 v. Royal Crest Lifecare Group Inc. (Trustee of)*) 98 C.L.R.B.R. (2d) 210 (Ont. C.A.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — distinguished

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — distinguished

United Maritime Fishermen Co-op., Re (1988), 68 C.B.R. (N.S.) 170, 1988 CarswellNB 20, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (N.B. Q.B.) — referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46

s. 427 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 11(3) — referred to

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s. 11(4) — referred to

s. 43(5) — referred to

s. 43(7) — referred to

s. 67(1)(a) — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 109(1) — referred to

s. 173 — referred to

s. 173(1)(b) — considered

s. 191 — considered

s. 191(1) — considered

s. 191(1)(c) — considered

s. 191(2) — considered

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — referred to

s. 11.7(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.7(3) [en. 1997, c. 12, s. 124] — referred to

s. 13 — referred to

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

2006 CarswellOnt 6292, [2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43

s. 57 — referred to

s. 57(3) — considered

s. 57(4) — considered

s. 57(5) — considered

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally — referred to

Regulations considered:

Truck Transportation Act, R.S.O. 1990, c. T.22

Load Brokers, O. Reg. 556/92

s. 15 — referred to

s. 15(2) — referred to

APPEAL by Superintendent from judgment, reported at *Ivaco Inc., Re* (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), dismissing Superintendent's motion for order.

J. Laskin J.A.:

A. Introduction

1 This appeal arises out of a priorities dispute between two groups of creditors of an insolvent company, Ivaco Inc., and its related group of companies. The dispute is over the sale proceeds of the assets of Ivaco. On one side of the dispute are the employees and retirees in Ivaco's underfunded non-union pension plans. They claim under the deemed trust and lien provisions of Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8, ss. 57(3), (4) ("PBA"), and seek to recover unpaid contributions to the plans outside of bankruptcy. On the other side of the dispute are Ivaco's financial and trade creditors. They wish to put Ivaco into bankruptcy in order to take advantage of the scheme of distribution under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). The dispute arises because provincial deemed trusts do not, by virtue of that legislative designation, enjoy priority under the federal bankruptcy statute.

2 Ivaco and its related group of companies (collectively "the Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the Companies' obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are monies due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded).

3 The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure. In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

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4 The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which the Companies are deemed to hold in trust for the beneficiaries of the pension plans under the PBA. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Quebec Pension Committee ("QPC"), the administrator of the largest non-union plan, supported the Superintendent's motion. Two of the Companies' lenders, the Bank of Nova Scotia and the National Bank, brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy.

5 Farley J., who had supervised these CCAA proceedings for over two and a half years, heard all three motions. By order dated July 18, 2005 he dismissed the Superintendent's motion and partly granted the banks' motions. He lifted the stay and permitted the bankruptcy petitions to proceed, but he did not put the Companies into bankruptcy.

6 The Superintendent appeals. She argues that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submits that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contends that the PBA legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

7 Alternatively, the Superintendent submits that the motions judge erred by exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contends that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Companies' most vulnerable creditors.

8 The Superintendent also appeals an ancillary order made by the motions judge. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Quebec to Toronto. The Superintendent and the QPC submit that the motions judge had no jurisdiction under the CCAA to do so, or alternatively, improperly exercised his discretion in doing so.

9 This court granted leave to appeal under s. 13 of the CCAA. The court also stayed the two orders in favour of the banks pending the disposition of the appeal.

B. Relevant Facts and Chronology

a) The Companies

10 Six related corporations were granted protection under the CCAA: Ivaco Inc., Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc., Docap (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. Four of these corporations — Ivaco, IRM, Ifastgroupe and Docap — established the non-union pension plans in issue on this appeal.

11 Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets.

b) The non-union pension plans

12 The Companies had both a unionized and non-unionized workforce. They established various registered pen-

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sion plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Quebec and has both Quebec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

13 The QPC administers the Ivaco Salaried Plan, which is the largest of the four plans. Ivaco formerly administered the other three plans. However, the Superintendent appointed PricewaterhouseCoopers Inc. as administrator of the Designated Employees Plan and the Ingersoll Plan. A former Ivaco employee administers the Docap Plan for Ivaco.

c) The initial stay under the CCAA

14 After their operations became financially troubled, the Companies sought and were granted protection from their creditors under the CCAA. On September 16, the motions judge granted a comprehensive stay of all creditor claims up to that time. He appointed Ernst & Young Inc. as Monitor. As a result of the stay, debts of the Companies existing on the date of the initial stay order have not been paid.

15 During the CCAA proceedings the Companies continued to pay the wages and benefits of all active employees. The Companies also continued to pay their current contributions to their various pension plans.

d) The pension stay order

16 When the Companies began CCAA proceedings, the non-union pension plans were underfunded. Before the initial stay order the Companies had been making both special payments and past services contributions to rectify this underfunding. Under the PBA, past service contributions accrue daily and are to be paid monthly.

17 Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order.

18 The motions judge relieved the Companies from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

19 Paragraph 4 of the pension stay order stipulated that none of the Companies would incur any obligation because of the failure to make these past service contributions and special payments during the stay period:

THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

20 Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges

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may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim, lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated order.

21 Paragraph 6 of the order recognized that the pension stay did not compromise the Companies' obligations under their non-union pension plans:

Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

e) The sale to Heico

22 As the Companies were unable to restructure, they began to pursue a second option: selling their assets in a going concern sale. On August 18, 2004, the motions judge approved the sale of the assets of Ivaco, Ifastgroupe and IRM to the Heico Companies. As part of the transaction, the purchaser hired the Companies' unionized workforce and assumed the Companies' obligations to their unionized pension plans. The purchaser also hired almost all of the Companies' non-unionized workforce, but it was unwilling to assume the Companies' obligations to the four non-union pension plans. These obligations remained with the Companies.

23 Nonetheless, the Monitor supported the sale. In the Monitor's view, the sale gave the creditors and workers greater recovery and benefits than they would obtain in either a bankruptcy or a liquidation. Again, no party, including both the Superintendent and the QPC, opposed the sale.

24 The motions judge made two orders — on August 18, 2004 [2004 CarswellOnt 3561 (Ont. S.C.J. [Commercial List])] and November 30, 2004 — vesting the assets in the purchaser. These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

25 In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they are obligated to fund the wind-up liabilities of these plans.

f) The pension claims

26 The Companies' non-union pension plans have been severely underfunded and the deficit has increased during the stay period. At the beginning of the CCAA proceedings in September 2003, unpaid past service contributions to the non-union plans totalled about \$1.4 million and the solvency deficiency amounted to approximately \$11.1 million. By December 2004 these figures had grown to approximately \$11.6 million and \$29.1 million respectively. They continued to grow while the pension stay order remained in place.

27 The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is sixty-seven years old and earns a pension of \$14,000 per year. These pensioners will receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately \$1,200 to \$888. If only unpaid contributions are recovered, and not the full

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solvency deficiency, the average pension will be reduced by 17 per cent to \$996 monthly.

g) The claims of the financial creditors

28 The outstanding claims of the financial creditors of the Companies are also significant. We were told that the sale proceeds of the Companies' assets are insufficient to satisfy all claims, and are certainly insufficient to satisfy the unsecured claims.

29 The Bank of Nova Scotia was the lender to IRM. By October 2003, IRM owed the Bank about \$40 million. IRM had ceased to meet its liabilities generally as they became due, and had given notice to its creditors that it had suspended payment of its debts. On October 3, 2003 the Bank issued a petition for a receiving order against IRM. The issuance of the petition was permitted by the initial stay order, but that proceeding was otherwise stayed. The order under appeal lifted the stay and permitted the Bank of Nova Scotia to proceed with its petition.

30 The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005 it had a secured claim against Ivaco for \$17 million,^[FN1] and against Docap for \$55,622 U.S. and \$4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for \$45.5 million Canadian. Ifastgroupe is also indebted to La Caisse for \$14.9 million.

31 A large number of other creditors also have claims against the Companies: Ivaco has 792 creditors with claims totalling \$554.9 million; Docap has 82 creditors with claims totalling \$111.1 million; and Ifastgroupe has 645 creditors with claims totalling \$253.3 million.

C. Analysis

a) What is in issue on this appeal

32 The scope of this appeal is quite narrow. There are three issues:

- 1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?
- 2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?
- 3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Quebec to Toronto?

b) What is not in issue on this appeal

33 There are also three issues raised by the parties that do not need to be decided on this appeal: (1) whether, outside of bankruptcy, the deemed trusts under the PBA have priority over the Bank of Nova Scotia's security under s. 427 of the *Bank Act*, S.C. 1991, c.46; (2) whether the Superintendent can show "sufficient cause" under s. 43(7) of the BIA to deny the application for a bankruptcy order; and, (3) whether the deemed trusts under the PBA also meet the requirements for a common law trust and thus on bankruptcy should be excluded from the property of the Companies under s. 67(1)(a) of the BIA.

34 On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See *Abraham v. Canadian Admiral Corp.*

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(Receiver of) (1998), 39 O.R. (3d) 176 (Ont. C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

35 In their written and oral submissions, the Superintendent and the QPC argued that some of the motions judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

36 In my view, the motions judge appropriately considered what would likely happen at the bankruptcy hearing. He did so because the likely implications of lifting the stay were relevant considerations to the exercise of his discretion.

37 The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example *Dallas/North Group Inc., Re* (1999), 46 O.R. (3d) 602 (Ont. Gen. Div.); *Lambert, Re* (2002), 60 O.R. (3d) 787 (Ont. C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.

38 The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Indeed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

39 The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained its priority in bankruptcy only if it also meets the three attributes — the three certainties — of a common law trust: certainty of intent; certainty of subject matter; and certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example *Henfrey Sampson, supra*. Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

40 I now turn to the issues that do arise on this appeal.

c) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount?

41 The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA proceedings. The submission that the motions judge was legally required to order payment or segregation of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

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42 I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

43 The deemed trusts for unpaid past service and special contributions are found in ss. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind up are also deemed to be held in trust:

s. 57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

s. 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

44 At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.), Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act, 1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco Ltd.* is correct, but I do not need to resolve the issue on this appeal.

45 Under s. 57(5) of the PBA the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

s. 57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

46 The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, this legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so.

47 The Superintendent argues that the pension stay order supports her position because para. 5 the order, *supra*, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, *supra*, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation — statutory, fiduciary or otherwise — for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

48 The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

49 The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the

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Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

50 Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion.

51 Pension plan administrators do owe a fiduciary duty to plan members. See E.E. Gillese, *The Fiduciary Liability of the Employer as Pension Plan Administrator* (Toronto: The Canadian Institute, November 18, 1996, pp. 1-25). But the Monitor was not given that role. It is not an administrator of any of the four non-union plans. Indeed, the Superintendent never asked the court to give the Monitor responsibility for administering these plans.

52 Moreover, para. 59 of the initial stay order expressly states that the Monitor is not to be considered either a successor or related employer.

THIS COURT ORDERS that nothing in this Order shall result in the Monitor being or being deemed or considered to be a successor or related employer, sponsor or payor with respect to any Applicant or any employees or former employees of any Applicant under any legislation, including ... the *Pension Benefits Act* (Ontario) ... or under any other provincial or federal legislation, regulation or rule of law or equity applicable to employees or pensions, or otherwise.

[Emphasis added].

As the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans.

53 Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.) [hereinafter *TCT Logistics*] and an earlier decision of the motions judge in *Usarco Ltd.*, *supra*, support the argument for segregation. In my view, both cases are distinguishable.

54 In *TCT Logistics*, this court held that an interim receiver, who was both an officer of the court and stood in the shoes of the debtor, had a statutory duty under the legislation then in force, s. 15 of the *Load Brokers Regulation*, O.Reg. 556/92 (passed under the *Truck Transportation Act*, R.S.O. 1990, c. T.-22) to hold carriers' fees that it had collected in a separate trust account. *TCT Logistics* and this case differ in three critical ways.

55 First, the interim receiver in *TCT Logistics*, was not just an officer of the court, it stood in the place of the debtor company. Here, although the Monitor is an officer of the court, it does not stand in the place of the Companies. For the reasons outlined in para. 49 its role is far more limited.

56 Second, in *TCT Logistics* the court order authorized the interim receiver to hold the carriers' fees in a separate bank account until entitlement to that money was decided. Here, the pension stay order prohibited the Companies from making any past service or special contributions during the stay period.

57 Third, and perhaps most important, the applicable legislation in *TCT Logistics*, s. 15(2) of the *Load Brokers*

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Regulation required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account. Here, s. 57 of the PBA does not similarly require an employer to keep its unpaid contributions in a separate trust account. Moreover, in *TCT Logistics*, despite s. 15(2) of the Regulation, this court held that the carrier fees previously collected by the debtor company lost their character as trust money because they had been commingled with other funds. *TCT Logistics* thus does not support the Superintendent's position.

58 In *Usarco Ltd.*, *supra*, at para. 16, Farley J. commented that the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in *Usarco Ltd.*, did not step into the shoes of the debtor. Thus, *Usarco Ltd.* does not assist the Superintendent.

59 For these reasons, I reject the Superintendent's argument that the motions judge was required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. I now turn to the Superintendent's other submission: that the motions judge was required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings, but before bankruptcy.

60 The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example *United Maritime Fishermen Co-op., Re* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), at 173.

61 The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

62 The federal insolvency regime includes the CCAA and the BIA. The two statutes are related. A debtor company under the CCAA is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the BIA, and s. 11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

63 For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the CCAA. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

64 Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be

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a desirable result.

65 Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil*, *supra*, at paras. 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the BIA. It cannot do so.

66 The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco Ltd.*, *supra*. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the PBA. However, the facts in *Usarco Ltd.* differed materially from the facts in this case.

67 In *Usarco Ltd.*, CCAA proceedings did not precede the bankruptcy petition. Moreover, in *Usarco Ltd.* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco Ltd.* it was unclear whether bankruptcy proceedings would ever take place.

68 Recently in *General Chemical Canada Ltd., Re* (Ont. S.C.J.), Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between *General Chemical Canada Ltd.* and this case on the one hand, and *Usarco Ltd.* on the other, render *Usarco Ltd.* of no assistance to the Superintendent on this appeal.

69 Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the *Wage Earner Protection Program Act*, S.C. 2005 c.47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

d) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed?

70 In my view, the motions judge's order lifting the stay was a discretionary order. He summarized his reasons for rejecting the Superintendent's position and exercising his discretion to allow the bankruptcy petitions to proceed at para. 18 of his decision:

In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and

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that the Ivaco Companies are now essentially in a distribution of proceeds mode.

71 Appellate review of a discretionary order under the CCAA is limited. See *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) at para. 25; *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126 (Ont. C.A.) at para. 23; *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly — on a wrong principle — because he ignored the "unfair and prejudicial" effects of his order on the Companies' most vulnerable class of creditors: the pension beneficiaries. I disagree.

72 The Superintendent argues that the motions judge's order was unfair to the pension beneficiaries in three related ways. First, she points out that the pension beneficiaries agreed to a stay of the past service contributions to keep the Companies afloat, which in turn permitted the going concern sale to Heico. That sale greatly enhanced the return to the creditors. The Superintendent contends that now permitting the bankruptcy petitions to proceed, which would potentially deprive the pension beneficiaries of their rights, produces an unfair outcome.

73 Undoubtedly, and regrettably, the pension beneficiaries stand to suffer from the insolvency of the Companies. However, the Superintendent's argument implicitly assumes that the pension beneficiaries alone made sacrifices to maximize the recovery for all creditors. The motions judge rejected this assumption, which he said at para. 2 of his reasons, "somewhat overstates the situation". The motions judge accurately concluded:

[O]ther stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due.

In short, all creditors gave up something to permit the Companies to stay in business so that they could either reorganize or sell their assets in a going concern sale.

74 Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

75 The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.

76 Therefore, I do not accept the Superintendent's unfairness argument. Also, in my view, numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. These considerations include the following:

- The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be ne-

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gotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution.

- The petitioning creditors have met the technical requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C. C.A.), at 627, 630-631; *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bkcty.), at 244-245.

- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.

- The motions judge would have gone beyond his role as a referee in the CCAA proceedings if he had given effect to the Superintendent's claim. The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

77 The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

e) Did the motions judge err by ordering the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto?

78 Ivaco's head office was in Montreal; Ifastgroupe's head office was in Marieville, Quebec. The motions judge ordered that these head offices be transferred to Toronto. He did so in the light of s. 43(5) of the BIA, which states that an application for a bankruptcy petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. The Superintendent, supported by the QPC, submits that the motions judge had no jurisdiction to make this order, or that he improperly exercised his discretion in doing so. I disagree with both submissions.

79 The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 38.

80 I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Sections 191(1) and (2) provide:

s. 191(1) In this section, "reorganization" means a court order made under;

(a) section 241;

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(b) the *Bankruptcy and Insolvency Act* approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

s. 191(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

81 The applicable section here is section 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See *Beatrice Foods Inc., Re* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office:

s. 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

.....

(b) change the province in which its registered office is situated;

82 On my reading of the statute, s. 191 is a stand-alone section that gave the motions judge authority to order the transfer. Provided a corporation is subject to an order under s. 191(1), its articles may be amended. The amending order under s. 191(2) need not serve the purpose of the triggering statute in s. 191(1), in this case the CCAA. If Parliament had wanted to limit amendments to those that would facilitate a reorganization, it could have said so. Thus, the combination of ss. 191(1)(c), 191(2) and 173(1)(b) gave the motions judge the jurisdiction to order the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto. Resort to the CCAA was unnecessary.

83 The Superintendent and the QPC rely on this court's decision in *Stelco Inc., Re* in support of their argument. However, that case differs from the present case in a material way. In *Stelco Inc., Re* the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

84 By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

85 However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

86 Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court — Commercial List is familiar with the affairs of Ivaco and Ifastgroupe. Having all the issues common to all the Companies administered at the same time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their

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estates.

87 The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Quebec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severally liable, under Quebec law for satisfying the obligation to fund the plan.

88 The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Quebec law and therefore should be decided by a Quebec court. Whether the Quebec or the Ontario Superior Court presides over this future motion will turn on the application of the *forum conveniens* principle. One relevant factor in assessing the *forum conveniens* is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

89 It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. Conclusion

90 The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the *Pension Benefits Act* or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Quebec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

91 If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

M. Rosenberg J.A.:

I agree.

J. Simmons J.A.:

I agree.

Appeal dismissed.

FNI Taking into account a \$12 million distribution to the National Bank permitted by the motions judge in December 2004.

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Tab 2

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Lambert, Re

In the Matter of the Bankruptcy of John D. Lambert; And In the Matter of the Bankruptcy of Toni J. Lambert;
Buth-Na-Bodhiaga, Inc. o/a The Body Shop (Appellant) and John D. Lambert and Toni J. Lambert (Respondents)

Ontario Court of Appeal

Weiler, Abella, Goudge JJ.A.

Heard: May 8, 9, 2002

Judgment: August 19, 2002[FN*]

Docket: CA C36677

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Proceedings: affirming (2001), 26 C.B.R. (4th) 235 (Ont. S.C.J.); additional reasons at (), 2002 CarswellOnt 3142 (Ont. C.A.)

Counsel: *John E. Callaghan, Derek A. Vanstone*, for Appellant

Frank Bennett, for Respondents

Subject: Insolvency; International

Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Execution remaining unsatisfied

Debtors owned shares of corporations which were franchisees of creditor — Franchises were operated in Michigan — Debtors personally guaranteed obligations of franchisees — Creditor had option to purchase inventory upon termination of agreement — Creditor obtained consent judgments against franchisees, and took possession of franchises, including inventory and fixtures — Creditor obtained default judgment against debtors to enforce guarantees — Creditor's petition for receiving orders against debtors was dismissed — Trial judge found creditor retained assets and asserted full amount of indebtedness of franchisees without accounting for value of retained assets — Trial judge found creditor based its petition solely on default judgments rather than guarantees made by debtors — Trial judge concluded enforcement of default judgments would be egregious breach of widely accepted commercial morality and contrary to public policy expressed in creditors' rights legislation of both Ontario and Michigan and would bring administration of justice into disrepute — Trial judge found creditor sought double recovery not available to it in law in Ontario or Michigan — Trial judge found creditor's assertion of claims and failure to account for value of retained assets was unconscionable — Creditor appealed — Appeal dismissed — Double recovery by creditor constituted "sufficient cause" pursuant to s. 43(7) of Bankruptcy and Insolvency Act to dismiss petition — Applicable law was

2002 CarswellOnt 2659, 216 D.L.R. (4th) 330, 162 O.A.C. 132, 60 O.R. (3d) 787, 36 C.B.R. (4th) 256

that of bankruptcy rather than enforcement of foreign judgments — Court was not obliged to accept foreign judgment tendered on petition for receiving orders as proof of debt — Trial judge did not make manifest error in law — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 43(7).

Conflict of laws --- Enforcement of foreign judgments — Types of foreign judgments not enforced — Contrary to public policy of *lex fori*

Debtors owned shares of corporations which were franchisees of creditor — Franchises were operated in Michigan — Debtors personally guaranteed obligations of franchisees — Creditor had option to purchase inventory upon termination of agreement — Creditor obtained consent judgments against franchisees, and took possession of franchises, including inventory and fixtures — Creditor obtained default judgment against debtors to enforce guarantees — Creditor's petition for receiving orders against debtors was dismissed — Trial judge found creditor retained assets and asserted full amount of indebtedness of franchisees without accounting for value of retained assets — Trial judge found creditor based its petition solely on default judgments rather than guarantees made by debtors — Trial judge concluded enforcement of default judgments would be egregious breach of widely accepted commercial morality and contrary to public policy expressed in creditors' rights legislation of both Ontario and Michigan and would bring administration of justice into disrepute — Trial judge found creditor sought double recovery not available to it in law in Ontario or Michigan — Trial judge found creditor's assertion of claims and failure to account for value of retained assets was unconscionable — Creditor appealed — Appeal dismissed — Double recovery by creditor constituted "sufficient cause" pursuant to s. 43(7) of Bankruptcy and Insolvency Act to dismiss petition — Applicable law was that of bankruptcy rather than enforcement of foreign judgments — Court was not obliged to accept foreign judgment tendered on petition for receiving orders as proof of debt — Trial judge did not make manifest error in law — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 43(7).

Cases considered by *Abella J.A.*:

Beals v. Saldanha, 2001 CarswellOnt 2286, 54 O.R. (3d) 641, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 10 C.P.C. (5th) 191 (Ont. C.A.) — distinguished

Beals v. Saldanha (May 16, 2002), Doc. 28829 (S.C.C.) — referred to

Four Embarcadero Center Venture v. Kalen, 27 C.P.C. (2d) 260, 65 O.R. (2d) 551, 1988 CarswellOnt 412 (Ont. H.C.) — referred to

General Broadcasting Ltd., Re, 59 C.B.R. (N.S.) 99, 45 Sask. R. 72, 1985 CarswellSask 65 (Sask. Q.B.) — considered

Kadri Food Corp., Re, 41 C.B.R. (3d) 272, 153 N.S.R. (2d) 381, 450 A.P.R. 381, 1996 CarswellNS 312 (N.S. S.C.) — considered

McNichol Estate v. Woldnik, 2001 CarswellOnt 3342, 150 O.A.C. 68, 13 C.P.C. (5th) 61 (Ont. C.A.) — referred to

Old North State Brewing Co. v. Newlands Services Inc., 1998 CarswellBC 2294, 113 B.C.A.C. 186, 184 W.A.C. 186, 23 C.P.C. (4th) 217, 41 B.L.R. (2d) 191, 58 B.C.L.R. (3d) 144, [1999] 4 W.W.R. 573 (B.C. C.A.) — referred to

Paulin v. National Bank of Canada, 56 C.B.R. (N.S.) 3, 61 N.B.R. (2d) 179, 158 A.P.R. 179, 1985 CarswellNB 17 (N.B. C.A.) — followed

2002 CarswellOnt 2659, 216 D.L.R. (4th) 330, 162 O.A.C. 132, 60 O.R. (3d) 787, 36 C.B.R. (4th) 256

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 43(1)(a) — referred to

s. 43(1)(b) — referred to

s. 43(6) — considered

s. 43(7) — considered

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Creditors' Relief Act, R.S.O. 1990, c. C.45

Generally — referred to

s. 6 — referred to

s. 7 — referred to

s. 10 — referred to

Uniform Commercial Code, Michigan

s. 440.1101 et seq. — referred to

APPEAL by creditor from judgment reported 2001 CarswellOnt 2419, 26 C.B.R. (4th) 235 (Ont. S.C.J.), dismissing petition for receiving orders against debtors.

Abella J.A.:

1 This appeal by the Body Shop raises questions about when a petitioner's conduct constitutes "sufficient cause" to deny a petition for a receiving order under s. 43(7) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

BACKGROUND

2 The appellant, Buth-na-bodhiaga, Inc., o/a the Body Shop (the Body Shop) is an international retailer of hair and skin care products. The respondents, John D. Lambert and Toni J. Lambert, were shareholders in corporations (the Franchisees) that operated six Body Shop franchises in the State of Michigan. The franchises were operated under Franchise Agreements (the Agreements) signed between 1992 and 1996. Either or both of the Lamberts personally guaranteed the obligations of the Franchisees under each of the six Agreements.

3 The Agreements provided that they were to be interpreted under the laws of a specific state (some specified New

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Jersey and some North Carolina), and that any action by one party against the other should be brought in the courts of that state.

4 Among other provisions, the Agreements stated that Body Shop had an option to purchase inventory upon termination, with the right to set off amounts owing from the Franchisees from the purchase price of the inventory:

14.9 [The] Franchisor [the Body Shop] shall have the option, to be exercised within thirty (30) days after termination, to purchase from the Franchisee any or all of the inventory, furnishings, equipment, signs, fixtures, or supplies of the Franchisee related to the Franchised Business. Purchase of such inventory [etc.] . . . shall be at Franchisee's cost or fair market value whichever is less. If the parties cannot agree within a reasonable period of time on the fair market value of the inventory [etc.] an independent . . . appraiser's determination shall be binding. If the Franchisor elects to exercise any option to purchase herein provided, it shall have the right to set off all amounts due from the Franchisee . . . and the costs of appraisal . . . against any payment therefor.

5 By the Spring of 1997, the Lamberts had encountered financial difficulties, defaulted under the Agreements, and sought to reorganize under Chapter 11 of the *U.S. Bankruptcy Code*. At the time of those proceedings, the Franchisees had three secured American creditors: the Michigan National Bank (Michigan National), Citicorp Leasing Inc. (Citibank), and the Body Shop. The Lamberts had personally guaranteed the indebtedness to Michigan National and Citibank. The Body Shop had a security interest registered under the *Uniform Commercial Code of Michigan*, MCL 440.1101 et seq.

6 The Body Shop purchased the Citibank claim and security in July 1997.

7 In September 1997, the Body Shop obtained consent judgments against the Franchisees under the *U.S. Bankruptcy Code*, 11 USC Title 11, which allowed it to take possession of the six stores, including the inventory, receivables and fixtures, and to terminate the Agreements and sub-leases between it and the Franchisees. Significantly, the Franchisees retained the right to assert their rights under the Agreement.

8 There is no evidence in the record of the value of the six store operations obtained by the Body Shop under these judgments.

9 After obtaining the consent judgments, the Body Shop obtained the following default judgments against the Lamberts to enforce their guarantees in the courts of New Jersey and North Carolina, including the Citibank guarantee:

(a) Default judgment of the United States District Court for the Eastern District of North Carolina-Western Division dated September 22, 1998 against each of the Lamberts in the sum of U.S. \$513,730.35, plus post-judgment interest at a rate of 4.73% and costs (the "North Carolina Judgment"); and

(b) Default judgment of the Superior Court of New Jersey Law Division: Morris County dated May 19, 2000 in the sum of U.S. \$936,836.49 plus interest and costs as against Toni J. Lambert, and in the sum of U.S. \$318,334.41 plus interest and costs as against John D. Lambert (the "New Jersey Judgment").

10 After the default judgments were obtained, the Body Shop continued to operate each of the six stores. At the time of these proceedings, one of the stores had been closed, but the Body Shop continues to operate the remaining five.

11 On October 25, 1997, December 9, 1997, and January 26, 1998, the Lamberts asked the Body Shop to account for the value of the inventory and equipment it took over under the Chapter 11 consent judgments and as provided in the option to the Body Shop contained in the Agreements. The Body Shop refused to respond, and, to date, has not told

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the Lamberts whether it intends to sell, retain, or even value those assets.

12 The Lamberts moved back to Toronto in the summer of 1997. Mr. Lambert resumed his work as a registered securities dealer, but is currently unemployed.

13 During 2000, Mr. Lambert attempted, without success, to settle the claims with the Body Shop.

14 In September 2000, the Body Shop filed and served a Notice of Claim under ss. 6 and 7 of the *Creditors' Relief Act*, R.S.O. 1990, c. C.45 (*CRA*) claiming payment of the default judgments.

15 Mr. Lambert filed a responding affidavit under s. 10 of the *CRA*, contesting the claim on the following grounds:

- denying recollection of service of the legal proceedings in either North Carolina or New Jersey;
- denying either residence or the carrying on of business in either of those states;
- stating that the Lamberts had resided and carried on business in Michigan;
- asserting that the amounts set out in the default judgments cannot be confirmed since a proper accounting was never received from the Body Shop; and
- contesting the jurisdiction under which the actions were commenced.

16 The Body Shop did not proceed further with its claim under the *CRA*.

17 On February 7, 2001, the Body Shop filed the petitions in bankruptcy that are the subject of this appeal. The petitions state that the Lamberts, within six months preceding the filing of the petitions, committed acts of bankruptcy, namely: (a) ceasing to meet their liabilities generally as they become due; and (b) permitting an execution or other process issued against them to remain unsatisfied. The petitions state that each of the Lamberts is indebted to the Body Shop in amounts set out in the default judgments.

18 In February, 2001, when the petitions were filed, the Lamberts had four other creditors: Michigan National; Morris/Rose/Ledgett; Toronto-Dominion Bank; and Commercial Union Trust. Shortly after the filing of the petitions, the Lamberts made arrangements with these creditors, none of whom supported the petitions.

THE TRIAL

19 At the trial of the petitions, the Body Shop argued that the default judgments it obtained against the Lamberts constituted debts exceeding \$1,000 and that as of February 7, 2002, the Lamberts had ceased to meet their obligations to the Body Shop in accordance with s. 43(1)(a) and (b) of the *BIA*, which state:

s. 43 (1) Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,

- (a) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and
- (b) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

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20 It also argued that the Lamberts could not challenge the merits of the foreign judgments, which were obtained in courts of competent jurisdiction after service on the Lamberts, and which the Lamberts did not appeal, try to vary, set-aside or stay. Therefore, it argued, the Body Shop was entitled to an order under s. 43(6) of the *BIA* which states:

s. 43 (6) At the hearing of the petition, the court shall require proof of the facts alleged in the petition and of the service of that petition, and, if satisfied with proof, may make a receiving order.

21 The Lamberts acknowledged at trial that a final judgment of a foreign court will generally be recognized if the foreign court had jurisdiction to deal with the matter. They argued, however, that the conduct of the Body Shop in obtaining the default judgments raised issues of fraud, natural justice, and public policy, rendering them unenforceable.

22 The Lamberts further argued that the Body Shop's conduct represented "sufficient cause" for the trial judge to exercise his discretion to dismiss the petitions under s. 43(7) of the *BIA* which states:

s. 43(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, *or that for other sufficient cause no order ought to be made*, it shall dismiss the petition. [Emphasis added].

23 Cameron J. acknowledged that, subject to limited grounds of impeachment, our courts are obliged to honour foreign judgments and enforce them according to their terms, provided that the foreign court is one of competent jurisdiction. (See *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551 (Ont. H.C.) and *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 41 B.L.R. (2d) 191 (B.C. C.A.)).

24 Cameron J. rejected the Lamberts' allegations of fraud on the part of the Body Shop in invoking the jurisdiction of the New Jersey and North Carolina courts to enforce the guarantees given by the Lamberts to the Body Shop. As he noted (at paras. 69 and 70), there was no evidence:

... of the laws of those jurisdictions respecting the obligation on a plaintiff to advise the court of partial recovery of the amounts claimed, rights to double recovery and rights on foreclosure of security.

In these circumstances, I am not satisfied on a clear balance of probabilities that Body Shop acted fraudulently in seeking the jurisdiction of the New Jersey and North Carolina courts. If the court had the power and authority to hear and decide the claim, and to deny the claim based on a valid defence, it cannot be said the court lacked jurisdiction in the circumstances and that their jurisdiction was invoked by fraud.

25 Nor did Cameron J. find any breach of natural justice. The Body Shop's Complaints had been clear and outlined the causes of action and the amounts claimed. The Lamberts initially denied that they had been served with some of the Complaints, but Cameron J. found that they had in fact been served, had a reasonable opportunity to defend the claims, and had not filed defences because they could not afford to do so.

26 With respect to the guarantees assigned by Citibank to the Body Shop, however, Cameron J. found fraud going to jurisdiction, making this portion of the default judgments unenforceable. This was based on the fact that the Citibank guarantees were not governed by the Agreements between the parties and were signed in Michigan with respect to money borrowed in Michigan while the Lamberts were living there. As Cameron J. stated (at para. 67):

... The Lamberts had lived and carried on business in Michigan. The Citibank guarantees were signed in respect of borrowings in Michigan for the Franchised Businesses in Michigan. At the times of the Complaints the Lamberts were resident in Canada. They owned a house and cottage in Ontario and Mr. Lambert worked in Ontario.

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The attornment clauses in the guarantees were restrictions which were drafted by Body Shop on the Lamberts' rights and should be read *contra proferentem* against Body Shop so as to limit their application only to matters relating to the business dealings under the Franchise Agreements between the Franchisees, the Lamberts and Body Shop.

There is no evidence the New Jersey or the North Carolina courts had any grounds to assume jurisdiction over the Lamberts in respect of the Citibank guarantees. While the Lamberts were aware of these facts on service of the Complaints, these are matters of jurisdiction. I would refuse to recognize the Default Judgments to the extent they rest on the Citibank guarantees.

27 But the key to Cameron J.'s decision was his finding that the Body Shop's conduct towards the Lamberts was dishonest. The following (in paras. 66 and 68), explains his conclusion:

At the times of the services of the Complaints, Body Shop had not exercised its rights under the Franchise Agreements to purchase the inventory and equipment within 30 days. There is no evidence the Body Shop had made any demands on the guarantees. The Body Shop had refused to account for the inventory it had acquired. However there was no evidence of any duty to the foreign courts to plead potential defences. In my opinion the Lamberts had almost all the facts necessary to defend the claims against them on their merits in the jurisdictions to which they had attorned by agreement to the extent of the guarantees to the Body Shop.

The Lamberts did not know at the time of the Complaint that Body Shop had not given credit for the value of the inventory, . . . obtained under the Consent Judgments. The Complaints were silent on this issue. Further the Lamberts did not know that Body Shop had decided to retain the assets and would not give the Lamberts credit for their value.

.

. . . Body Shop knew or ought to have known it was wrong to obtain double recovery for the value of the retained assets. Body Shop did not account for the value of those assets in the Complaints and refused to reply to Mr. Lambert's requests to account.

Body Shop never told the New Jersey or North Carolina courts or the Lamberts that they intended to retain those assets and to sell them for its own account. Body Shop did not proceed further with its claims in the CRA proceedings following the objection filed by Mr. Lambert requesting an accounting for the values of the retained assets and contesting the jurisdiction of the courts to grant the Default Judgments.

I am satisfied, on a clear balance of probabilities, that on the basis of the law of Ontario, Body Shop acted dishonestly with a view to depriving the Franchisees, and the Lamberts as guarantors of the Franchisees indebtedness, of the value of the retained assets. Under our law it is an issue going to the merits of the proceeding.

28 This conclusion was based in part on the evidence at trial from the Lamberts' Michigan commercial bankruptcy lawyer, Max Newman, who had acted for the Franchisees and negotiated the consent judgments. Cameron J. expressed his concern (at paras. 72 to 74) that there were no legal bases for the Body Shop's actions:

Mr. Newman testified that as Body Shop gave no notice of the sale of its collateral to either the debtor or the guarantor, the creditor is completely barred from recovering a deficiency judgment.

.

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The rights of a debtor under Michigan law are similar to the rights of a debtor under s. 63, 64 and 65 of the *Personal Property Security Act of Ontario* ("PPSA") and the common law. A creditor, in the absence of an agreement to the contrary with the debtor or the surety, must preserve and protect the security and be in a position, unless excused by other agreement, to return or reassign the security to the debtor or the surety on repayment of the debt . . . A creditor may not act or neglect to act so as to worsen the position of a surety and, if by neglect of the creditor a security is lost, the surety is entitled to be discharged to the extent of the prejudice which he suffers as a result of that loss.

.

A creditor must deal with a security in a reasonable manner to ensure the maximum amount is derivable from it. If the surety is deprived of the fair value of the security then he is entitled to be discharged to the extent of the prejudice suffered subject to the contrary agreement. Our PPSA has modified this common law by requiring the creditor to deal with the security in a commercially reasonable manner and following proper notices. Where a creditor forecloses the secured property it will lose its right to claim against the surety.

29 He summarized the foundation for his conclusion that the Body Shop's conduct was "unconscionable" (at paras. 75, 76 and 78) as follows:

Neither the Franchise Agreements, nor the guarantees nor the Consent Judgments contained any provision by which the Lamberts contracted out of the equitable principles reflected in the Michigan U.C.C. and our legislation. The Consent Judgments provided for retention of the assets by Body Shop but left open the right of the Franchisees to assert their rights under the Franchise Agreements. The Franchise Agreements and Consent Judgments left open the obligations on Body Shop to value the collateral and reduce its claim by that amount, to deal with the retained assets in a commercially reasonable manner, to give notice of sale and to bear the consequences of foreclosure. Body Shop failed to give any notice of retention, sale, opportunity to redeem, accounting or valuation. There is no evidence of any waiver of those rights.

Body Shop seeks a double recovery not available to it in law either in Ontario or in Michigan. It seeks to retain assets transferred to it without taking account of their value in the Complaints or complying with its obligation to account to the Franchisees for the value of those assets. It seeks to recover the amounts of the primary indebtedness to it at the time of the Consent Judgments when it knew it was under an obligation to account for the assets it retained. There was no accounting in the Complaints for the value of the retained assets. The assertion of both the claims in the Consent Judgments and failing to account for the value of the retained assets is unconscionable. Enforcement of the Default Judgments would be an egregious breach of widely accepted commercial morality and contrary to the public policy expressed in the creditors' rights legislation of both Michigan and Ontario. It is not consonant with our system of justice and general moral outlook to countenance a double recovery in these circumstances. See *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (C.A.) per Carthy J. at p. 743 cited in *Beals* at p. 143. It would, in my view, bring the administration of justice into disrepute.

.

In these circumstances an Ontario court ought not to recognize the Default Judgments.

30 He then concluded (at paras. 81, 82 and 84) that the double recovery constituted "sufficient cause" pursuant to s. 43(7) of the *BIA* to dismiss the petition:

Body Shop's retention of the assets and asserting the full amount of the indebtedness of the Franchisees without accounting for the value of the retained assets . . . constitutes sufficient cause to dismiss the Petition. In retaining

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the assets Body Shop has waived its rights to claim the balance against the Franchisees, and so against the Lamberts as guarantors. This court should not encourage attempts by creditors to obtain double recovery on all or part of the debt owing no matter what the conduct of the debtor in attempting to avoid the debt. If the debtor's conduct warrants some further claim by the creditor, the creditor must be up front in asserting it. Retention of the assets without accounting for their value is contrary to public policy. [Emphasis added].

The Body Shop did not base its Petition on the guarantees and the indebtedness of the Franchisees. It relied solely on the Default Judgments. It offered no evidence of the value of the retained assets. Would the value of the retained assets have exceeded the indebtedness of the Franchisees resulting in no liability under the guarantees? We don't know.

.....

Body Shop chose to retain and foreclose on the assets without valuing them. It must live with that decision. Double recovery for part of a debt is contrary to public policy and the effort to do so without advising either the Franchisees or the Lamberts of the decision to do so was no less than contrary to recognized standards of commercial morality.

31 Cameron J. also observed that Mr. Lambert's licence to trade in securities likely depended on the outcome of these proceedings, and that if he lost his licence, he would be "less able to meet his apparently substantial obligations to his other creditors".

32 As a result of his findings, he dismissed the petitions against the Lamberts under s. 43(7) of the *BIA*.

ANALYSIS

33 The Body Shop's primary submission in this appeal is that the trial judge did not have the benefit of this court's decision in *Beals v. Saldanha* (2001), 54 O.R. (3d) 641 (Ont. C.A.)[FN1], which, it argued, so narrowed the "public policy" defence against the enforcement of a foreign judgment in Ontario as to render foreign judgments almost unimpeachable on those grounds. (See "*Beals v. Saldanha*: Striking the Comity Balance Anew", Janet Walker, Cdn. Int. Lawyer, Vol. 5, No. 1, (2002)). Because the default judgments were properly obtained in New Jersey and North Carolina, the Body Shop submitted, the trial judge erred in refusing to accept them as evidence of the debt owed by the Lamberts.

34 It is important to note that the Body Shop is not seeking to have the foreign default judgments obtained against the Lamberts in the United States enforced in Ontario, but instead is seeking receiving orders against the Lamberts, using those foreign judgments as evidence of their debt. As a result, the applicable law in this case is the law of bankruptcy, not the law relating to the enforcement of foreign judgments.

35 While the trial judge undoubtedly found that the foreign default judgments would be unenforceable on the grounds of public policy, he also clearly and independently found that the conduct which led him to conclude that the default judgments were unenforceable, constituted "sufficient cause" under s. 43(7) of the *BIA*.

36 That means, among other things, that this court's subsequent decision in *Beals* is not relevant to whether Cameron J. properly exercised his discretion to dismiss the petitions for "sufficient cause" under s. 43(7) of the *BIA*. Moreover, an application for a receiving order under bankruptcy law necessarily engages matters of domestic policy that go well beyond the principles of international comity relevant to the enforcement of foreign judgments.

37 I am not aware, in any event, of any case in bankruptcy suggesting that when a foreign judgment is tendered to prove a debt for the purpose of a receiving order, the court is obliged, automatically, to accept that judgment as proof

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of the debt. (See Houlden and Morawetz, p. 2-33). In *General Broadcasting Ltd., Re* (1985), 45 Sask. R. 72 (Sask. Q.B.), for example, the court held that while a petitioner in bankruptcy may prove his or her claim by establishing the existence of a foreign judgment, the question whether a foreign judgment can be enforced in Canada is an issue distinct from whether there is a debt owing.

38 We need not decide, therefore, whether Cameron J. erred in his application of the public policy defence relating to the enforcement of foreign judgments. He was entitled to take the same factors that informed his "enforceability" conclusion into consideration when undertaking his analysis to dismiss the petitions under s. 43(7).

39 Even if the default judgments had been accepted by him as valid and proper evidence of a debt over \$1,000, he nonetheless retained the discretion under s. 43(7) to refuse to make the order for "sufficient cause". A court is not even bound by the fact that the petitioning creditor has obtained a judgment in a domestic court for an amount in excess of \$1,000 — it still has the authority, notwithstanding the existence of the judgment, to inquire into the relevant circumstances.

40 The s. 43(7) jurisprudence offers illustrative circumstances in which courts have exercised their discretion to dismiss a petition. In *Kadri Food Corp., Re* (1996), 41 C.B.R. (3d) 272 (N.S. S.C.), for example, the court refused to make the receiving order where the petitioning creditor was a landlord whose illegal distress caused the failure of his tenant debtor's business. The following have also been held to represent improper conduct or purpose disentitling the petitioner to a receiving order:

- (a) the filing of a petition to get rid of a business competitor or to gain a business advantage;
- (b) using the bankruptcy court as a collection agency, not with the intent of obtaining the benefit of an equal distribution of the debtor's assets for all creditors, but with the intent of forcing the debtor to make some special arrangement for the payment of the petitioning creditor's debt, regardless of what is done for other creditors;
- (c) using the Bankruptcy court for extortion, that is, threatening bankruptcy unless the debtor pays something beyond what is legally due;
- (d) filing a petition in order to harass a debtor;
- (e) filing a petition in order to terminate a contract;
- (f) filing a petition in order to settle a dispute between shareholders;
- (g) purchasing a debt in order to be able to file a petition; and
- (h) filing a petition to prevent the debtor from defending itself against a disputed claim.

(see Houlden and Morawetz, *Bankruptcy and Insolvency in Canada* (Carswell: 1993) at pp. 2-65 to 2-66).

41 Based on the analogous guidance of this list, it seems to me that the Body Shop's repossession of the six stores formerly operated by the Lamberts without providing any accounting to them for the value of the retained assets, amply justifies Cameron J.'s characterization of this attempted double recovery as "sufficient cause" to dismiss the petitions.

42 On these facts, Cameron J. is entitled to deference in the exercise of his discretion. The facts he relied on to

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conclude that the Body Shop's conduct was so violative of public policy as to render the judgments unenforceable, were the same facts supporting his decision that there was "sufficient cause" for dismissing the petitions. He found not only that the Body Shop had intentionally deprived the Franchisees of their assets, but that its attempt to obtain recovery in circumstances it knew — or ought to have known — were improper, was dishonest and unconscionable.

43 The trial judge found that the Body Shop had improperly retained the assets of the Franchisees without the required accounting. This, to him, meant that the amounts of the default judgments could therefore be misleading, even to the possible extent that after an accounting, no money would be owing to the Body Shop. This conduct on the part of the Body Shop, Cameron J. concluded, contravened a fundamental principle of our law of debtor and creditor: the prohibition against double recovery. In my view, this was a proper basis for the exercise of his discretion to deny the petitions.

44 To warrant appellate intervention, the Body Shop would have to show a manifest error in principle or law. (See *Paulin v. National Bank of Canada* (1985), 56 C.B.R. (N.S.) 3 (N.B. C.A.). I see none here. The reasons of Cameron J. outlining the factors provoking his concerns were careful, thoughtful, and persuasive.

45 The Body Shop also argued that Cameron J. erred when he found that there was no jurisdiction in the New Jersey or North Carolina courts for the Citibank debt on which the default judgments were partially based. Relying on *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68 (Ont. C.A.), it submitted that because the trial judge found that the foreign courts had jurisdiction over the Body Shop guarantees in the Agreements, it was an error not to recognize the Citibank debt which involved the failure of the same franchises and same Franchisees. In view of my conclusion that Cameron J. made no error in the exercise of his discretion under s. 43(7) of the *BIA*, it is unnecessary to address this argument.

46 Accordingly, the appeal should be dismissed with costs. In order to fix costs of the appeal, the court will entertain brief written submissions dealing with the award of costs. Counsel for the Lamberts should deliver submissions and a bill of costs no later than 7 days from the date of this judgment. Counsel for the Body Shop may deliver a response, if any, no later than 7 days thereafter.

Weiler J.A.:

I agree.

Goudge J.A.:

I agree.

Appeal dismissed.

FN* Additional reasons given 2002 CarswellOnt 3142, 36 C.B.R. (4th) 269, (sub nom. *Lambert (Bankrupt), Re*) 162 O.A.C. 132 at 142 (Ont. C.A.).

FN1 Leave to appeal *Beals* ((May 16, 2002)), Doc. 28829 (S.C.C.) was granted by the Supreme Court of Canada, S.C.C. Bulletin, 2002, p. 781).

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Tab 3

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Bank of Montreal v. Scott Road Enterprises Ltd.

BANK OF MONTREAL v. SCOTT ROAD ENTERPRISES LIMITED

British Columbia Court of Appeal

Seaton, Esson and Wallace JJ.A.

Heard: March 3, 1989

Judgment: March 20, 1989

Docket: Vancouver No. CA008758

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Counsel: *P.A. Spencer*, for appellant.

R.D. Holmes, for respondent.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Parties.

Petitions for receiving orders — Hearing — Bank holding floating charge debenture over assets of debtor — Bank-appointed receiver closing business causing debtor to be in arrears for unpaid wages and employee deductions for income tax, unemployment insurance and Canada Pension Plan — Statutory liens giving wage earners and Crown claims priority over debenture — Liquidation value of assets not sufficient to cover indebtedness owed to bank — Bank petitioning debtor into bankruptcy and obtaining receiving order — Court upholding receiving order on appeal — Secured creditor invoking provisions of Bankruptcy Act to enhance its priority using s. 136(1) of the Act not constituting sufficient cause for refusing to grant a receiving order under s. 43(7) of the Act.

The petitioner granted the respondent a line of credit secured by a floating charge debenture to a maximum limit of \$3,000,000. The respondent was indebted to the petitioner for \$800,000 when the petitioner appointed a receiver who immediately took possession and closed the business. Until then the respondent had been current in all payments for wages, vacation pay and employee deductions for income tax, unemployment insurance and Canada Pension Plan. The receiver closed the payroll account out before that month's pay cheques could be presented, causing a default of \$39,000 in unpaid wages and vacation pay and \$15,000 in unremitted employee deductions. Aware that these claims would be secured by statutory liens with priority over the debenture and that the maximum value realizable on the liquidation of assets would be \$600,000, the petitioner petitioned the respondent into bankruptcy in order to establish its priority. The respondent appealed the resulting grant of a receiving order.

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Held:

Appeal dismissed.

Per ESSON J.A. (SEATON J.A. concurring): The purpose of the petitioner's petition in bankruptcy being solely to improve its position with respect to its security was not sufficient cause under s. 43(7) of the Bankruptcy Act to refuse the grant of a receiving order. Although inequitable consequences may occur to the other creditors, particularly to wage earners, it is up to Parliament to change the present state of the law.

Per WALLACE J.A. (concurring): The scheme of distribution in s. 136(1) of the Bankruptcy Act determines the priority of payment of the respective claimants therein, which priority applies to all creditors regardless of the status accorded them by provincial statutes. The fact that a secured creditor invokes the provisions of the Act to establish its priority in accord with the scheme of distribution provided by the Act cannot constitute a sufficient cause for refusing a receiving order. Any possible inequities which may arise from the application of the Act's scheme of distribution are matters to be resolved by Parliament.

Cases considered:

Black Bros. (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.) — *considered*

Clemenshaw, Re; W.C.B. v. C.C.M.T.A. (1961), 40 W.W.R. 199, 4 C.B.R. (N.S.) 238, 36 D.L.R. (2d) 244 (C.A.) — *considered*

Deloitte, Haskins & Sells Ltd. v. W.C.B., [1985] 1 S.C.R. 785, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 55 C.B.R. (N.S.) 241, 19 D.L.R. (4th) 577, 60 N.R. 81, 63 A.R. 321 — *referred to*

Dep. Min. of Revenue (Que.) v. Rainville, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. *Re Bourgault*) 105 D.L.R. (3d) 270, (sub nom. *Bourgault v. Dep. Min. of Revenue (Que.)*) 30 N.R. 24 — *considered*

F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 — *applied*

Hansard Spruce Mills Ltd., Re, 10 W.W.R. (N.S.) 344, 33 C.B.R. 217, [1954] 1 D.L.R. 326 (B.C.S.C.) — *referred to*

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.) — *considered*

Triona Invt. Ltd. v. Smythe, McMahon Inc. (1988), 23 B.C.L.R. (2d) 222, 67 C.B.R. (N.S.) 281 (C.A.) — *considered*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3

s. 43

s. 136(1)

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Employment Standards Act, S.B.C. 1980, c. 10

s. 15 [am. 1983, c. 16, s. 8; 1987, c. 24, s. 71]

Authorities considered:

Giroux, "The Use of the Bankruptcy Act by Secured Creditors", in Bankruptcy — Present Problems and Future Perspectives, Meredith Memorial Lectures (1985), McGill University, p. 240. Kemp-Gee, "Bankruptcy in a Receivership" (1984), 1 Nat. Insolvency Rev. 23, p. 27.

Appeal from judgment of McKenzie J. granting petition in bankruptcy.

Esson J.A. (Seaton J.A. concurring):

1 This appeal raises the question whether it is open to the court to dismiss a petition in bankruptcy on the ground that it has been brought by a secured creditor solely for the purpose of bringing into effect the scheme of distribution in the Bankruptcy Act, R.S.C. 1985, c. B-3, and thus destroying the priority which other creditors would otherwise have had. There is no decision directly on point which is binding on this court.

2 This is such a case. The appellant company carried on a substantial car dealership business under a bank line of credit secured by a floating charge debenture. In October 1987 the bank appointed a receiver who immediately took possession and closed the business. The amount owing to the bank was then about \$800,000, about \$200,000 more than the maximum amount likely to be realized on liquidation. As the bank's debenture secures it to a limit of \$3,000,000 it was obvious from the beginning that it would suffer a shortfall and that no one else could recover anything except someone holding a charge prior to that of the bank.

3 As with every going concern, there were a number of creditors entitled to such charges. There was unremitted sales tax of about \$20,000, Workers' Compensation Board ("W.C.B.") assessments of about \$4,000 and, most significantly, there was about \$39,000 in unpaid wages and vacation pay and some \$15,000 in unremitted employee deductions for income tax, Canada Pension Plan and unemployment insurance. The receiver recognized that all of those claims would be secured by statutory liens. I will not refer in detail to the source of those liens and charges except the one securing the wage claims. It arises under s. 15 of the Employment Standards Act, S.B.C. 1980, c. 10, which reads:

Lien and charge on property

4 15.(1) Notwithstanding any other Act, unpaid wages constitute a lien, charge and secured debt in favour of the director, dating from the time that the wages were earned, against all the real and personal property of the obligor, including money due or accruing due to the obligor from any source.

5 (1.1) Unpaid wages set out in an order or decision filed by the Industrial Relations Council pursuant to section 30 of the *Industrial Relations Act* constitute a lien, charge and secured debt in favour of the persons named in the order or decision against all the real and personal property of the employer or other person named in the order.

6 (2) Notwithstanding any other Act, the amount of a lien and charge and secured debt referred to in subsections (1) and (1.1) is payable and enforceable in priority over all liens, judgments, charges or any other claims or rights including those of the Crown in right of the Province and, without limiting the generality of the foregoing, the amount has priority over

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(a) an assignment, including an assignment of book debts, whether absolute or otherwise and whether crystallized or not,

(b) a mortgage of personal property,

(c) a debenture charging personal property, whether crystallized or not, and

(d) a contract, account receivable, insurance claim or proceeds of a sale of goods,

whether made or created before or after the date the wages were earned or the date a payment for the benefit of an employee became due.

7 It is to be noted that the lien and charge is specifically given priority over assignments of book debts and debentures charging personal property, the broad forms of security most often relied on by banks. I have not reproduced subs. (3) which excludes priority over a registered mortgage or debenture charging land except for advances made after the certificate of judgment was registered.

8 At one time, it was considered to be settled law in this province that such statutory charges were enforceable according to their tenor in a bankruptcy. A leading case was the judgment of Wilson J.A. (later C.J.S.C.) for this court in *Re Clemenshaw; W.C.B. v. C.C.M.T.A.* (1961), 40 W.W.R. 199, 4 C.B.R. (N.S.) 238, 36 D.L.R. (2d) 244, which concerned the lien of the W.C.B. But the law laid down in that and other cases has been overruled by later decisions of the Supreme Court of Canada holding that, on the happening of bankruptcy, such charges securing Crown claims are effectively destroyed and that the order of distribution which must prevail is that set out in s. 136(1), formerly s. 107(1): *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. *Re Bourgault*) 105 D.L.R. (3d) 270, (sub nom. *Bourgault v. Dep. Min. of Revenue (Que.)*) 30 N.R. 24; and *Deloitte, Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 55 C.B.R. (N.S.) 241, 19 D.L.R. (4th) 577, 60 N.R. 81, 63 A.R. 321.

9 Upon learning of the substantial magnitude of the claims secured by statutory liens, the bank and its lawyers pressed the directors of the company to assign it into bankruptcy and, when the directors did not do so, filed the petition in bankruptcy which led to the receiving order now under appeal. We are told that, in light of the law laid down in *Rainville*, those steps have become routine in such situations.

10 In the petition, which was launched about six weeks after the appointment of the receiver, the bank asserted that the company had failed to meet its obligations generally as they became due. The company opposed the petition, submitting that it should be dismissed under what is now s. 43(7), then s. 25(7), which reads:

11 (7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

12 The first ground of opposition was that there had been no act of bankruptcy. At the date of the appointment of the receiver, that may have been so but, at the date of filing the petition, the company had ceased to meet its obligations. The chambers judge, Mr. Justice McKenzie, held that the relevant date was that of filing the petition. On this appeal, the company did not seriously attack the correctness of that conclusion. The second point raised by the company was rejected by McKenzie J. in these words:

13 In respect of the device used to satisfy s. 25(2), I find it to be an effective device to satisfy the provisions of

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that section and the employment of that or any other device on the part of this or any other creditor to avail itself of the provisions of this Act to enhance its position comes within the decision of Madam Justice McLachlin in *Re Black Bros. (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.).

14 To do what I am invited to do, that is to decline the petition on the grounds that it has been brought for an improper purpose, would be to elevate me without authority to an appellate position that I do not occupy. I am obliged under *Re Hansard Spruce Mills Ltd.*, 10 W.W.R. (N.S.) 344, 33 C.B.R. 217, [1954] 1 D.L.R. 326 (B.C.S.C.), to follow a considered decision and I find that *Re Black Bros.* was one that was considered and applies to the case at bar.

15 I find no other ground upon which I can consider refusing this petition and accordingly a receiving order will be granted against the respondent company.

16 What was then s. 25(2) is now s. 43(2). It reads:

17 (2) Where the petitioning creditor referred to in subsection (1) is a secured creditor, he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of a receiving order being made against the debtor, or give an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

18 The device referred to by the chambers judge is in these paragraphs of the petition:

19 2. THAT SCOTT ROAD ENTERPRISES LTD. is justly and truly indebted to the Petitioner in the sum of \$494,003.54 as at December 7, 1987, together with the Receiver's fees and expenses, which indebtedness is in consideration of the Petitioner extending credit to SCOTT ROAD ENTERPRISES LTD. and is evidenced by: a Demand Debenture in the principal amount of \$3,000,000, dated for reference June 1, 1987.

20 3. THAT the Petitioner holds security for part of the said sum but that the Petitioner will give up such security to the extent of \$1,000 for the benefit of the creditors of SCOTT ROAD ENTERPRISES LTD. in the event of a receiving order being made against it.

21 I question whether that language complies with s. 43(2) which appears to give to the secured creditor the option to take one of two positions. He can give up his security entirely or can give an estimate of its value. The language of para. 3 does neither. That paragraph also seems to be inaccurate in stating that the bank holds security for "part of the said sum". All of the other evidence is to the effect that its security covers all indebtedness.

22 However, as that question was not made a ground of appeal, we need not reach a decision on it. Were it to be resolved against the bank, the appropriate course might well be to allow it to amend to give a proper estimate of the value of the security. The question of substance is that in respect of which McKenzie J. felt bound to follow the decision in *Re Black Bros. (1978) Ltd.* In that case McLachlin J. (now C.J.S.C.) said at p. 165:

23 One purpose — usually the main purpose — of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. However, another purpose may be to permit creditors to avail themselves of provisions in the Act which may enhance their positions, for example, by giving them certain priorities which they would not otherwise enjoy. The latter purpose, on the authorities, is a proper and sufficient basis for granting an order. Thus, in *Re Harrop of Milton Inc. (1979)*, 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.), Henry J. found that since the assets were fully encumbered by the petitioner's debenture, there could be no assets available for distribution to the unsecured creditors. However, he went on to hold that a receiving order should go on the ground that it is not improper for a secured creditor to file a petition or procure an

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assignment in bankruptcy for the purpose of defeating other creditors' priorities, citing in support *Re Develox Indust. Ltd.*, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (H.C.), and *Re Gasthof Schnitzel House Ltd.*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.); see also *Re Koprel Enterprises Ltd.* (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.).

24 The use of bankruptcy proceedings in that way has often been directed against distraining landlords. One such case came before this court in *Triona Inv. Ltd. v. Smythe, McMahon Inc.* (1988), 23 B.C.L.R. (2d) 222, 67 C.B.R. (N.S.) 281. In giving judgment for the court, I commented at p. 224:

25 The propriety of a secured creditor employing the Bankruptcy Act in that way has been established by a line of cases, the correctness of which is not in issue on this appeal. The leading British Columbia cases in that line are the decision of Ruttan J. in *Re Gasthof Schnitzel House Ltd. and Sanderson*, [1978] 2 W.W.R. 756, 27 C.B.R. (N.S.) 75 (S.C.), and that of Legg J. in *Re Koprel Ent. Ltd.* (1978), 27 C.B.R. (N.S.) 22 (S.C.). In each case, it was accepted that there was no possibility of the bankruptcy conferring any benefit on the general creditors. It was nevertheless held to be proper for the secured creditor, in "jockeying for position" against the landlord, to "promote" a bankruptcy in order to defeat the priority which would otherwise be afforded to the landlord.

26 In the passage quoted from the judgment of McLachlin J. in *Re Black Bros.*, that learned judge relied on the judgment of Henry J. in *Re Harrop of Milton Inc.*, which is the most fully reasoned of the line of cases. It is of some interest that Henry J. felt bound to follow the earlier authorities, as he put it at p. 295, "notwithstanding that I have some misgivings". I detect an implication of similar misgivings in the language of McKenzie J. in this case, as there was in my observations in *Triona Inv. Ltd.*

27 We were also referred to expressions of misgivings by learned commentators. In an article entitled, "Bankruptcy in a Receivership" (1984), 1 Nat. Insolvency Rev. 23, Alan Kemp-Gee said at p. 27 under the heading "Is it equitable for a secured creditor to invoke a bankruptcy?":

28 Having discussed the technicalities surrounding the secured creditors' use of the *Bankruptcy Act*, a larger issue should be considered: is it appropriate for the secured creditor to invoke a bankruptcy? The Act was intended, after all, to protect unsecured creditors.

29 It may well be in the best interest of a secured creditor to use the mechanism of a bankruptcy to deal with claims of landlords or the Crown. However, bankruptcy is supposed to be the vehicle available to distribute the assets of a debtor equitably amongst the unsecured creditors. The *Bankruptcy Act* specifically states that, with few exceptions, secured creditors are free to deal with their security in a commercially reasonable fashion outside the Act. Therefore, use of bankruptcy by a secured creditor seems to contravene the spirit of the legislation.

30 In an article entitled "The Use of the Bankruptcy Act by Secured Creditors", in *Bankruptcy — Present Problems and Future Perspectives*, Meredith Memorial Lectures (1985), McGill University, Andre Giroux said at p. 240 under the heading "Priority Claims":

31 One issue that is still debated by creditors who may be entitled to privileges is whether the order of distribution of section 107 applies when the secured creditor proceeds to realize on the basis of his security instrument or when there is no equity for the trustee in the realization of the assets. Although the courts seem to continue to maintain that the ranking order of the privileged creditors is affected by the bankruptcy of a debtor and that therefore the secured creditors are entitled to the proceeds of realization without regard to the claims of these creditors, recent judgments tend to question more and more the use of the *Bankruptcy Act* strictly for the purpose of reversing the priorities. However, there is no doubt that section 107 does apply when the realization of the assets and the distribution of the proceeds are made by the trustee in bankruptcy.

1989 CarswellBC 337, 73 C.B.R. (N.S.) 273, 36 B.C.L.R. (2d) 118, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623

32 The circumstances of this case illustrate starkly the inequitable consequences which can flow from permitting the debenture holder to employ the Bankruptcy Act to destroy the priority which would otherwise have been enjoyed by the Crown and the wage earners. The affidavit of Mr. Day, a director, states that until 19th October, on which day the receiver was appointed, the company had met all its obligations as they became due or within the terms of arrangements with creditors. More specifically, he says, and there is no suggestion that this is not the fact, that until that day the company had been current in all payments for wages and vacation pay, to Revenue Canada for employee deductions, to the Minister of Finance for provincial sales tax, and to the W.C.B. The receiver was appointed on a pay-day. The bank closed out the payroll account before the cheques could be presented, and thus the default to the employees arose.

33 The submission of the appellant is, in essence, that what has taken place here is contrary to the spirit, the purpose, and the object of the Bankruptcy Act, and is so clearly inequitable in its consequences as to provide "sufficient cause" for refusing to make the order. The bank's first response to that is that there is no real unfairness because, although it is the agents of the Crown and the employees of the bankrupt who may lose their priority, it is not they who are prosecuting this appeal. It is, rather, the company on the instructions of its directors who admittedly are pursuing the matter in an attempt to avoid the liability which may be imposed upon them by statute for the tax deductions, unpaid wages and like liabilities. The bank emphasizes that, if the company was meeting its obligations up to the date of the receivership, it was doing so in reliance on the bank's line of credit and in a way which created a deficit position, and that there is nothing wrong with the bank doing all it can to reduce its ultimate loss as much as possible. While all that may be true, it is no answer to the real question which is whether valid legislative schemes for protecting Crown revenues and wages should be set at naught by the happening of a bankruptcy which serves no useful purpose. Nor is it an answer to throw the liability on the directors, even if they are in a position to meet it.

34 Were it not for one matter to which I have not yet referred, I would conclude that the facts and circumstances to which I have referred constitute "sufficient cause" why no order ought to be made, and that the petition ought to have been dismissed on that ground. That matter is a decision of the Supreme Court of Canada released since the granting of the petition in this case. On 26th May 1988 the court gave judgment in *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. In that case, the contest was between a trustee for bondholders and the Workers' Compensation Commission. The Court of Appeal of Quebec had distinguished *Rainville*, supra, and *Deloitte, Haskins*, supra, and had granted priority to the commission. The Supreme Court held that it erred in doing so. The specific facts and issues of the case need not concern us — the decision does not directly touch the issue which has arisen here. But, in giving judgment for the court, Lamer J. made an obiter statement which is clearly in point. At p. 1072 he said:

Conclusion

35 I therefore consider that the claims of the parties to the case must be ranked in the order determined by the *Bankruptcy Act*. As the federal Parliament has exclusive jurisdiction to set priorities in a bankruptcy matter, the scheme of distribution in s. 107 of the *Bankruptcy Act* must be applied here. As respondent's claim was covered by s. 107(1)(h) of the Act, respondent is a preferred creditor whose claim must be ranked after that of appellant, whether or not the trustee realized on his security outside the bankruptcy proceeding. Once the bankruptcy has occurred, the federal statute applies to all creditors of the debtor.

36 It is true that such a solution may encourage secured creditors to bring about the bankruptcy of their debtor in order to improve their title. On the other hand, this solution has obvious advantages. As soon as the bankruptcy occurs the *Bankruptcy Act* will be applied: the mere fact that a creditor is mentioned in s. 107 of the Act suffices for such creditor to be ranked as a preferred creditor and in the position indicated in that provision. As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.

37 It is the last paragraph which is relevant to the issue raised here. This is a case in which the secured creditor

1989 CarswellBC 337, 73 C.B.R. (N.S.) 273, 36 B.C.L.R. (2d) 118, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623

brought about the bankruptcy of its debtor solely in order to improve its title. The paragraph represents a considered dictum of the court in relation to a question, essentially one of policy, as to the effect to be given to a federal statute. It is a dictum which, in my view, we are bound to follow and to apply by holding that such a circumstance is not sufficient cause to refuse to grant the receiving order. If the present state of the law is unsatisfactory, it is for Parliament to remedy it.

38 If the position with respect to the wage earners is as the bank asserts it to be, the present state of the law may be most unsatisfactory. Wages are not a debt like any other — it has always been recognized that because of their nature they should be accorded a high degree of protection. The Bankruptcy Act recognizes that principle by putting wage earners just after the trustee in the order of distribution in s. 136(1). But, in presentday circumstances, that is an illusory benefit. The section has not been amended since, I believe, 1949 and the upper limit of the benefit remains at the archaically modest level of \$500. Even that modest protection is illusory because, in the ensuing 40 years, there has developed the virtually universal practice of banks taking floating security on everything, a practice which in combination with the law laid down in *Rainville*, supra, has greatly altered what was earlier thought to be the ordinary balance between the rights of creditors. The illusory nature of the benefit conferred by the Bankruptcy Act on wage earners may have been a factor in the enactment of provisions such as s. 15 of the Employment Standards Act and, before *Rainville*, was probably as effective a kind of protection as could be devised. But, if the rule in *Rainville* applies to this charge, that protection has itself become illusory in practical terms.

39 The difficulty thus created for wage earners may be very serious because the extent to which the legislative scheme can be set at nought by the device employed here may be almost complete. The essence of the legislative scheme is to provide a first charge. Most businesses large enough to have employees carry on at the sufferance of their bankers in the sense that their loans may be called on demand, thus crystallizing the bank's security on every asset of every kind. It follows that, in most cases, the bank will be in a position to do what was done here, i.e., to employ its security to make the debtor effectively bankrupt, and then to petition it into bankruptcy. Because of the inherent flexibility of its security, the bank in all such cases will be in a position to time the appointment of the receiver, as was done here, to arrange matters so that the undertaking will have the benefit of the employees' efforts for a maximum period. In those businesses which are labour intensive, that may be an important consideration. An incidental, undesirable consequence of this device is that in addition to the always substantial layer of costs created by a receivership, the happening of bankruptcy will create a further layer of costs to be met before any payment can be made to wage earners under s. 136(1)(d).

40 I should not be understood as holding that the charge created by s. 15 of the Employment Standards Act is destroyed by the happening of bankruptcy. That issue is not before us and could well be raised at a later stage in this proceeding. To this point I have discussed the matter on the assumption that it will be destroyed because both parties made their arguments on that assumption. We were not, however, referred to any case holding that to be so. The s. 15 charge is different from those in the decisions of the Supreme Court of Canada, which I have called the *Rainville* line of cases, all of which I think have been concerned with charges securing a claim of the Crown. The charge created by s. 15 does not secure a claim of the Crown but may be caught by the reasoning in the *Rainville* line of cases because of the preferred status conferred by s. 136(1)(d). I observe that, if that is the case, the result would seem to be the anomalous one that this small and largely futile preference leaves wage earners in a worse position than if they were not mentioned in the Bankruptcy Act. The question whether that result could have been intended by Parliament cannot be decided on this appeal.

41 The bank submitted, by way of preliminary objection, that because the directors of the bankrupt company are prosecuting this appeal in the pursuit of their personal interest in avoiding liability for the unpaid wages and other claims, the appeal should be quashed for lack of "standing". The point was pressed with more indignation than logic. The appellant is the bankrupt company. It is rarely the case that the principals of a closely held company have no personal interest in the outcome. I see nothing faintly improper in these directors having provided the wherewithal for the appeal to be pursued. I would therefore refuse the application to quash but, on the merits, would dismiss the appeal.

1989 CarswellBC 337, 73 C.B.R. (N.S.) 273, 36 B.C.L.R. (2d) 118, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623

Wallace J.A.:

42 I have had the opportunity of reading the reasons for judgment of my colleague Esson J.A. and agree with his conclusion that this appeal must be dismissed.

43 In my view, it is sufficient for the disposition of this appeal to reiterate that the scheme of distribution set forth in s. 136(1) of the Bankruptcy Act, R.S.C. 1985, c. B-3, determines the priority of payment of the respective claimants specified therein, which priority applies to all creditors regardless of the status accorded them by provincial statutes. As Lamer J. noted in *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061 at 1069, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308:

44 A provincial statute cannot override the scheme of distribution set out in s. 107 [now s. 136] of the Act ... In the event of bankruptcy, priorities are exclusively a matter for federal jurisdiction.

45 The fact that a secured creditor invokes the provisions of the Bankruptcy Act to establish its priority in accord with the scheme of distribution provided by that Act cannot constitute a "sufficient cause" for refusing a receiving order (s. 43(7)).

46 Any possible inequities which may arise from the application of the scheme of distribution provided by the Bankruptcy Act are matters to be resolved by Parliament if, after due consideration, it considers it appropriate to do so.

Appeal dismissed.

END OF DOCUMENT

Tab 4

Case Name:

Canadian Tire Corp. v. Healy

Between

**Canadian Tire Corporation, Limited, Applicant, and
Mark Healy and Mark V. Healy Sales & Distribution Inc.,
Respondents**

[2011] O.J. No. 3498

2011 ONSC 4616

81 C.B.R. (5th) 142

2011 CarswellOnt 7430

Court File No. CV-119250-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: July 28, 2011.

Judgment: July 29, 2011.

(33 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Receivers -- Appointment -- Application by creditor for appointment of fully-empowered receiver of dealership allowed -- Soft receivership had been appointed during arbitration -- Dealership had defaulted on four payments owing to creditor, which was major supplier and brand holder -- Dealership was unable to pay inventory, leaving creditor open to either increased financial exposure or damage to brand and reputation -- Dealership had breached dealer contract with creditor by intentional overstatement of invested equity -- Creditor rightly had little confidence that dealership could be trusted to run its business.

Application by Canadian Tire for the appointment of a fully-empowered receiver of Healy Inc. to take control of its business and assets and operating the Canadian Tire store in Mississauga, Ontario operated by Healy Inc. During arbitration of a contractual dispute between the parties, the receiver

had been appointed on limited powers for a soft receivership. In April 2011, Canadian Tire demanded payment of an outstanding debt. As of May 30, 2011, Canadian Tire's direct exposure to Healy Inc. was over \$12.9 million. From May 31, 2011 to July 12, 2011, Healy Inc. defaulted on four flex payments owing to Canadian Tire when its bank dishonoured payment because of insufficient funds.

HELD: Application allowed. Healy Inc. was unable to pay inventory. Canadian Tire was left with the options of continuing to supply inventory and increasing its financial exposure through Healy Inc. or ceasing inventory supply and damaging its brand and reputation. Healy Inc. was not a strong candidate for equitable consideration. Healy Inc. had breached its dealer contract with Canadian Tire by the intentional overstatement of invested equity through a temporary injection of funds. Canadian Tire rightly had little confidence that Healy Inc. could be trusted to run its business properly.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Counsel:

William J. Burden and John N. Birch, for the Applicant.

William C. McDowell and Trent Morris, for the Respondents.

Daniel Murdoch, for Franchise Trust and CIBC.

Kenneth Rosenberg, for Ernst & Young Inc.

1 F.J.C. NEWBOULD J.:-- In this application, Canadian Tire Corporation, Limited ("Canadian Tire") seeks the appointment of Ernst & Young Inc. as a fully-empowered receiver of Mark V. Healy Sales & Distribution Inc. ("Healy Inc.") for the purpose of taking control of its business and assets and operating the Canadian Tire store in Mississauga, Ontario operated by Healy Inc. Franchise Trust and CIBC, creditors of Healy Inc., support the application.

2 The application was heard on July 38, 2011, and at the conclusion of the hearing I ordered the appointment of Ernst & Young Inc. as receiver of Healy Inc. for reasons to follow. These are my reasons.

3 Healy Inc. is an Associate Dealer of Canadian Tire and operates Canadian Tire Store 152 located in Mississauga, Ontario. The relationship between Healy Inc. and Canada is the subject of a Dealer Contract, initially signed by Mr. Healy and then assigned to Healy Inc.

4 Canadian Tire acts as the primary supplier of inventory to dealers. It also leases store sites to dealers. Canadian Tire's relationship with dealers is governed by a Dealer Contract which each dealer executes in favour of Canadian Tire.

5 Mark Healy has been a Canadian Tire dealer since October 4, 1992. He executed various Dealer Contracts, each of which was assigned to Healy Inc., the corporation that operates Store 152. In or around, July 1995, Mr. Healy commenced operating the Canadian Tire store in Alliston, Ontario where he remained until July 13, 2000. In July 2000, Mr. Healy then became the dealer at Store 429 in Oakville, Ontario. He remained at Store 429 until August 2, 2006. On August 10, 2006, Mr. Healy became the dealer at Store 152 in Mississauga and he remains the dealer of Store 152 today, although Canadian Tire delivered a notice on June 1, 2011 terminating the Dealer Contract. Healy Inc. has delivered a notice of arbitration to have the termination declared invalid.

6 In December 2007, Healy Inc. commenced an arbitral proceeding in accordance with the Dealer Contract. The arbitral proceeding related only to alleged damages suffered by Healy Inc. in relation to Store 429, the Oakville store that Healy Inc. operated from 2000 to 2006. No claim was made in respect of Healy Inc.'s current Store 152. The trial of that proceeding before the arbitrator, Graeme Mew, began on May 26, 2010 and ran for 42 days to December 17, 2010. Healy Inc. claimed damages of \$40 million. The arbitrator released his award on March 23, 2011 in which he dismissed all of the claims except one claim in which he held Canadian Tire liable for \$250,000 for breach of a duty of good faith. Mr. Healy and Healy Inc. have appealed the award, which is to be heard on September 15 and 16, 2011. Mr. McDowell says that if entirely successful, Healy Inc. could realistically be entitled to an award of between \$3 and \$5 million.

7 On October 22, 2010, during the course of the arbitration, the arbitrator appointed Ernst & Young Inc. as receiver of Healy Inc., with the power to, inter alia,

- (i) attend at the store premises;
- (ii) review receipts, disbursements, revenue and expenses;
- (iii) exercise control over certain financial transactions such as manual sales and returns and inventory adjustments;
- (iv) complete a store inventory count; and
- (v) otherwise monitor the business.

8 In his reasons appointing E&Y as a monitoring receiver, the arbitrator noted that "CTC's proposal is for a soft receivership to review, assess, monitor and preserve the assets of the store pending the outcome of the arbitral trial".

9 Canadian Tire now says that since the appointment of E&Y as a monitoring receiver on October 22, 2010, there has been a significant change in circumstances which now require a receiver with full powers to take control of the business and assets of Healy Inc. and to operate the store.

10 In order to run his business, Healy Inc., like other dealers, obtains credit from the following three main lenders, all of which are secured creditors, and each of which provides credit to Healy Inc. for different purposes:

- (i) Franchise Trust, guaranteed by Canadian Tire;
- (ii) CIBC as the operating lender, guaranteed by Canadian Tire; and
- (iii) Canadian Tire.

11 Canadian Tire holds security from Healy Inc., including a general security agreement, which gives it the right to demand payment upon a default.

12 Because of the losses suffered at Store 152, Healy Inc. has, since 2006, had a bulge facility in place with CIBC over and above the CIBC operating credit line. That bulge facility is currently \$3.9 million. Canadian Tire has guaranteed this bulge facility.

13 Healy Inc. generates more than \$23 million in annual retail sales. It has had substantial losses over the past 10 years, both at Healy Inc.'s previous store in Oakville and at its current Store 152. Overall, from the time that Healy Inc. assumed Store 429 until August 31, 2006, shortly after moving to Store 152, it experienced total net losses of \$1,702,198. Since the time that Healy Inc. took over its current Store 152, operational losses have been \$3,363,775. This sustained history of losses has caused Healy Inc. to accumulate an ever-increasing dealer equity deficit (i.e., negative retained earnings).

14 On April 20, 2011, Canadian Tire demanded payment by May 2, 2011 of \$1,692,218.68 for outstanding flex payments owed by Healy Inc. for inventory purchases which were in default. Payment has not been made. That outstanding amount for overdue inventory payments owed to Canadian Tire is now \$2.3 million.

15 The letter also demanded that \$741,442 be re-injected into Healy Inc by May 2, 2011. These amounts represented a cumulative overdraw by Mr. Healy from the business as of the end of fiscal 2010 over and above the amounts permitted under the Dealer Contract. That money has not been injected into Healy Inc.

16 As of May 30, 2011, Canadian Tire's direct exposure to Healy Inc. was over \$12.9 million, consisting of the following items:

- (a) Canadian Tire's guarantee of the current CIBC \$3.9 million bulge excess credit facility, which is not supported by inventory, fixed assets, or any other security;
- (b) Healy's defaulted debt (as of July 12) to Canadian Tire for inventory, rent, and other flex charges in the amount of \$3,228,629; and
- (c) Canadian Tire's exposure of \$5,831,331 in respect of the Franchise Trust Loan, which Canadian Tire is required to purchase from the Franchise Trust if such loan becomes a Defaulted Loan.

17 The GSA held by Canadian Tire entitles it upon the occurrence of a demand that has not been cured to appoint a receiver or to apply to a court for the appointment of a receiver. Although more than three months have passed since demand was made, Healy Inc. has not cured the defaults and has committed four further payment defaults. From May 31, 2011 to July 12, 2011, Healy Inc. defaulted on four flex payments totalling \$612,769.92 when its bank dishonoured payment because of insufficient funds.

18 The appointment of a receiver under section 101 of the *Courts of Justice Act* or section 243 of the *BIA* is a matter of discretion. This is not a case such as *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 or *Anderson v. Hunking*, 2010 ONSC 4008 in which an applicant for an interim receiving order had no security to enforce and was effectively seeking execution before any right to any payment was established. I discussed this in *Bank of Montreal v. Carnival National Leasing Limited* (2011), 74 C.B.R. (5th) 300 and distinguished such a situation from *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274. In that case Blair J., as he then was, stated:

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver -- and even contemplates, as this one does, the secured creditor seeking a court appointed receiver -- and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

19 Healy Inc.'s primary argument is that if it is successful on the appeal from the arbitrator's award, it stands to collect somewhere between \$3 and \$5 million. It is said that this would be sufficient to pay off what had been demanded and Mr. Healy would be in a better position to build up the business and improve its balance sheet. Mr. McDowell put it that the prospect of the appeal being successful was not remote.

20 It is not for me to determine whether the appeal will succeed. It is to be noted, however, that the arbitration agreement provides for an appeal on a question of law only. There are two bows to the quiver of Healy Inc. The first is an allegation that a finding that Canadian Tire was not liable for negligent misrepresentation was made on an incorrect test, and an allegation that the amount of damages that the arbitrator said he would have awarded had he found liability for misrepresentation, being \$1.6 million, was based on a misapprehension of the evidence.

21 Normally, when a demand for payment has not been made, some reasonable time for payment is permitted before a receiver will be appointed by a court, and hopes of future financing falling into place will not be sufficient beyond what that reasonable time is. I dealt with this in *Bank of Montreal v. Carnival National Leasing Limited*, *supra*:

13. On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. Ct.) per Farley J.:

5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

22 If difficulties in obtaining replacement financing do not permit an open ended time for repayment beyond days, not weeks, I fail to see how the hopes of winning an arbitration appeal can put a debtor on any stronger basis. The amounts demanded have been outstanding for 3 months.

23 As things now stand, Healy Inc. has been unable to pay inventory, defaulting on payments when its bank dishonoured cheques because of insufficient funds. On his cross-examination, Mr. Healy said that if the bank would not let him draw on his credit line, he would not be ordering any more inventory but would operate his business until he ran out of inventory. This is not a satisfac-

tory situation. In spite of the \$2.3 million owed to Canadian Tire for inventory which is in default, there is a further \$1.5 that will become due for inventory based on May 30, 2011 figures.

24 Canadian Tire contends that if Healy Inc. is unable to pay for inventory when due, Canadian Tire will face the untenable choice between continuing to ship inventory to the store without any reasonable likelihood of payment and insisting on C.O.D. terms for inventory. In the first case, Canadian Tire would be significantly increasing its financial exposure. In the second case, Healy Inc. would likely stop ordering inventory, stock would be depleted, customer needs for products would go unfulfilled, and the Canadian Tire brand and reputation would suffer. I accept the concern of Canadian Tire as valid.

25 For a number of reasons, I do not view Mr. Healy as a strong candidate for equitable consideration.

26 Pursuant to an agreement dated February 8, 2010 between Mr. Healy, Healy Inc. and Canadian Tire, it was agreed that Canadian Tire would pre-approve and co-sign all cheques or other bank disbursement of any kind. The purpose of such control was to ensure that Healy Inc.'s funds were used only for proper business purposes relating to the store and to prevent further unauthorized transactions, including dealer over-draws. In April 2010, Mr. Healy breached the February 8 agreement by transferring \$82,425.83 from the Healy Inc. business account to the personal credit card accounts of Mr. Healy and his family members. He circumvented the February 8 agreement by making such payments through internet banking, rather than issuing a cheque which Canadian Tire would have to review and sign. This was raised in the arbitration and Mr. Healy replaced the funds. Mr. Healy also undertook transactions involving his family trust during fiscal 2010 when he made payments from Store 152 in the amount of \$178,215 allegedly on account of his children's educational expenses.

27 It appears that in 2011 Mr. Healy again breached the February 8 agreement when he took \$60,000 of money collected from daily sales for Store 152 on April 21 and 23, 2011 and used them to pay for legal fees, which required the approval of Canadian Tire. This came to light when Store 152 provided Canadian Tire with daily sales reports and bank deposit receipts. The missing \$60,000 appeared in Healy Inc.'s bank account on April 27, 2011 after Canadian Tire's counsel wrote to Healy's counsel to seek a full explanation about the \$60,000 cash diversion.

28 It appears that Mr. Healy has breached the Dealer Contract by the intentional overstatement of invested equity through a temporary injection of funds. In his award, the arbitrator made the following findings of fact:

- (a) "Healy repeatedly breached his contractual obligations under Policy 26.";
- (b) "Pursuant to Policy 26, the intentional overstatement of invested equity by a dealer through temporary injection is considered to be a non-curable event of default under section 20.1 of the Dealer Contract. Healy not only breached this obligation on several occasions, but also took excessive draws out of his business, when the business could ill afford for him to do so. As submitted by CTC, during his career as a dealer, Mr. Healy has been consistently overdrawn throughout the year";
- (c) In 2009, Healy obtained loans totalling \$554,990 so that he could re-inject into the business the amount of his overdraws prior to year end, and then draw out the same money after year end to re-pay to loans.

29 Actions such as these leave little confidence that Mr. Healy can be trusted to run the business properly. It is quite apparent that the relationship between Canadian Tire and Mr. Healy has broken down. The instances outlined in Mr. Lamanna's affidavit of Mr. Healy's behaviour during and after the arbitration are of obvious concern.

30 One reason that the business is losing money may be a lack of planning. In the first report of the receiver appointed by the arbitrator, the receiver reported that it asked Mr. Healy to provide copies of any and all cash flow statements with which to determine Healy Inc.'s ability to pay existing and accruing debts over the coming months. Mr. Healy advised the receiver that Healy Inc. does not prepare cash flow projections.

31 Mr. Healy has resisted attempts by Canadian Tire to assist him with store operations and to work out a viable plan to deal with the ongoing losses and substantial outstanding debts. In August 2009, Canadian Tire offered to put Mr. Healy into a Performance Support Initiative Program which is designed to help dealers improve their financial performance, and financial and operations experts were sent to the store to help. Mr. Healy ordered them out of the store and said he did not want help. On April 4, 2011, following the arbitral award, Canadian Tire encouraged Mr. Healy to provide two senior executives with a plan to resolve his financial situation on an urgent basis. Mr. Healy's response was that he would meet with one of them at a bar in Port Credit at 6 p.m. In spite of further requests that he meet with the executives to discuss plans to resolve his financial situation, Mr. Healy has refused to meet with them.

32 Canadian Tire has prepared a series of realistic and optimistic projections to determine whether Healy Inc. will be able to pay off its indebtedness over a matter of years. No matter which scenario Canadian Tire chose, the conclusion reached was that Healy would still have substantial negative equity even at the end of fiscal 2015. The negative equity ranges from \$9.4 million to \$3.3 million, the latter being the most optimistic with the store ranking in the top quartile of Canadian Tire dealers (it is in the bottom quartile at present). All of these projections assume that Healy Inc. will not expend any amount on legal fees, which appears unlikely as Mr. Healy and Healy Inc. have started at least four new arbitration proceedings apart from the appeal of the award of arbitrator Mew.

33 In all of the circumstances, I ordered that Ernst & Young Inc. be appointed receiver of Healy Inc. with the usual powers of a receiver, including the power to operate the business, but not at the moment to sell all or parts of it outside of the ordinary course of business. If the appeal from the arbitrator is successful, it will be open to Healy Inc. to apply to vary or rescind the order.

F.J.C. NEWBOULD J.

cp/e/qlrxg/qlvxw/qlhcs

Tab 5

Case Name:

Bank of Montreal v. Carnival National Leasing Ltd.

**RE: Bank of Montreal, Applicant, and
Carnival National Leasing Limited and Carnival Automobiles
Limited, Respondents**

[2011] O.J. No. 671

2011 ONSC 1007

74 C.B.R. (5th) 300

2011 CarswellOnt 896

Court File No. CV-10-9029-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: February 11, 2011.
Judgment: February 15, 2011.

(38 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Order -- Appointment of receiver -- Application by the Bank of Montreal (BMO) for the appointment of PriceWaterhouse Coopers as national receiver of the respondents allowed -- The respondents were indebted to BMO for approximately \$17 million -- It had been more than 70 days since demand for payment was made and BMO was entitled to payment of the outstanding loans and to enforce its security -- It was highly unlikely that the respondents would be able to pay out BMO in any reasonably foreseeable period of time and a court appointed receiver would be preferable to a privately appointed one.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Counsel:

John J. Chapman and Arthi Sambasivan, for the Applicants.

Fred Tayar and Colby Linthwaite, for the Respondents.

Rachelle F. Mancur, for Royal Bank of Canada.

ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- Bank of Montreal ("BMO") applies for the appointment of Price-Waterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243(1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately \$17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to \$1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to \$700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from \$21.9 million to \$20 million. That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of \$21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of \$1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling \$17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an

annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the \$1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be \$814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. Ct.) per Farley J.:

5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offer-

ing very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from \$49 million in 2006 to \$35 million in 2009. Carnival had a profit of \$1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of \$244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from \$1.5 million in 2006 to \$2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately \$5.6 million. Thus Carnival owes the two banks approximately \$22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately \$11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles \$6.5 million on leases currently financed by BMO and \$1.9 million on leases currently financed by RBC and (ii) on used vehicles, \$2 million on leases currently financed by BMO and \$392,000 on leases currently financed by RBC. A further \$2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be \$10.5 million and it might be less if, as is likely, there are not \$6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991), 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking* 2010 ONSC 4008 cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They

also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, (1995), 30 C.B.R. (3d) 49, in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon* (1981), 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc.*, (2002), 38 C.B.R. (4th) 7 in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.

...

On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the

appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd* (1997), 32 O.R. (3d) 565 in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank of Canada v. Boussoulas* [2010] O.J. No. 3611, in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facts filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6%. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in

to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek*.

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some \$4.4 million. As at November 25, approximately \$3 million was more than 120 days old. The book value of the leases of \$30 million is therefore questionable, and the repayment of \$22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

F.J.C. NEWBOULD J.

cp/e/qlloxr/qljzgz/qljxr/qlana

Tab 6

Indexed as:

Bank of Nova Scotia v. Freure Village on Clair Creek

Between

**Bank of Nova Scotia, applicant, and
Freure Village on Clair Creek, Freure Management and Freure
Investments, respondents/defendants, and
Toronto-Dominion Bank and Canada Trust, creditors**

[1996] O.J. No. 5088

40 C.B.R. (3d) 274

1996 CarswellOnt 2328

1996 CanLII 8258

Ontario Court of Justice (General Division)
Commercial List

Blair J.

May 31, 1996.

Mortgages -- Mortgage actions -- Action on covenant -- Practice -- Summary judgment -- Receivers -- Appointment -- By court.

This was a motion by the Bank of Nova Scotia for summary judgment regarding covenants in certain mortgages and the appointment of a receiver-manager. Three of the mortgages granted by Freure Village to the Bank had matured and had not been paid. A fourth mortgage was in default due to tax arrears. The Bank was owed in excess of \$13,200,000. Freure argued that the Bank had agreed to forebear for six months to a year such that the monies were not due and owing at the time the demand was made. The mortgage covenants permitted the Bank to appoint a private receiver-manager. Freure argued that the Bank could effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver. Freure also argued that a court-appointed receiver was more costly than a privately-appointed one.

HELD: Motion granted. On the evidence, there was no merit to the defence that the Bank had agreed to forebear. The Bank was entitled to summary judgment. It was just and convenient for there to be a court-appointed receiver. An attempt by the Bank to enforce its security privately

would probably have led to more litigation. The interests of debtors and creditors and the orderly disposition of the property were better served by the Court appointing a receiver-manager.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. 43, s. 101.

Ontario Rules of Civil Procedure, Rules 20.01, 20.04.

Counsel:

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

1 **BLAIR J.** (endorsement):-- There are two companion motions here, namely:

- (i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and
- (ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

The Motion for Summary Judgment

2 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of \$850,000. The Bank is owed in excess of \$13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

3 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225; *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545.

4 On his cross-examination, Mr. Freure admitted:

- (i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and
- (ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the \$13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

5 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issue exists in that regard.

6 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

7 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the Courts of Justice Act rate.

Receiver/Manager

8 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

9 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately \$20,000,000 between them, take no position on the motion.

10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

11 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary rem-

edy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

12 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

13 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

14 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

15 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

16 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

BLAIR J.

qp/s/mjb/qlrxg/qlana

PINNACLE CAPITAL RESOURCES LIMITED
in its capacity as general partner of RED ASH
CAPITAL PARTNERS II LIMITED
PARTNERSHIP

Applicant

and KRAUS INC., KRAUS CANADA INC., STRUDEX FIBRES LIMITED and
538626 B.C. LTD
Respondents

Court File No. CV12-9731-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

**BOOK OF AUTHORITIES
(APPLICATION FOR BANKRUPTCY ORDER AND
RECEIVER RETURNABLE JUNE 11, 2012)**

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