Court File No. CV10-9042-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

G.E. Canada Equipment Financing G.P.

Applicant

- and –

Northern Sawmills Inc.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. C-36, as amended, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, as amended.

BOOK OF AUTHORITIES

November 12, 2012

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10. E.A. Driedger, *The Construction of Statutes* (Scarborough: Butterworth & Co, 1974)
11. Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2008)

November 12, 2012

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Tab 1

In the Matter of a Plan of Compromise or Arrangement of Indalex Limited et al.

[Indexed as: Indalex Ltd. (Re)]

2011 ONCA 265

Court of Appeal for Ontario, MacPherson, Gillese and Juriansz JJ.A.
April 7, 2011

Debtors and creditors — Companies' Creditors Arrangement Act — Company obtaining order in CCAA proceedings permitting it to borrow funds pursuant to debtor-in-possession credit agreement — Order creating super-priority charge in favour of debtor-in-possession lenders — Super-priority charge not having priority over statutory deemed trust under Pension Benefits Act as deemed trust was not identified by court when charge was granted and affidavit evidence suggested such priority was unnecessary — No finding of paramountcy made — Valid provincial law continuing to operate — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Pension Benefits Act, R.S.O. 1990, c. P.8.

Fiduciaries — Pensions — Employer which acts as administrator of its pension plans having fiduciary duty to plan members — Company initiating proceedings under Companies' Creditors Arrangement Act and obtaining court order permitting it to borrow funds pursuant to debtor-in-possession credit agreement — Order creating super-priority charge in favour of debtor-in-possession lenders — Company aware that its pension plans were underfunded — Company subject to its fiduciary duties as administrator as well as its corporate obligations during CCAA proceedings — Conflict of interest existing between company's duties as administrator and its corporate duties — Company breaching its common law fiduciary duties and s. 22(4) of Pension Benefits Act — Appropriate remedy being order for payment from proceeds of sale of company of amounts sufficient to satisfy deficiencies in plans in priority to claim of debtor-in-possession lenders — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22.

Pensions — Winding up — Deemed trust in s. 57(4) of Pension Benefits Act not limited to payment of amounts contemplated by s. 75(1)(a), but rather applying to all payments required by s. 75(1) — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(4), 75(1).

A Canadian company was the administrator of two registered pension plans, one for its salaried employees (the "Salaried Plan") and one for its executive employees (the "Executive Plan"). The Company's U.S. parent company sought Chapter 11 protection in the United States, and the Company initiated proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). At that time, the Salaried Plan was being wound up and both Plans were underfunded. The Company obtained a court order authorizing it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order created a super-priority charge in favour of the DIP lenders. The obligation to repay the DIP lenders was guaranteed by the U.S. parent. The Company moved for approval of the sale of its assets and for the distribution of the proceeds to the DIP lenders, which would result in there being nothing to fund the deficiencies in the Plans. Representatives of the Plans' members objected. The court approved the sale, but the Monitor retained in reserve an amount approximating the deficiencies. The sale

proceeds were insufficient to pay the DIP lenders. The U.S. parent paid the shortfall. The representatives of the Plan members brought motions claiming that the reserve fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to the U.S. parent. They also claimed that during the *CCAA* proceedings, the Company breached its fiduciary obligations to the Plans' beneficiaries. The *CCAA* judge dismissed the Executive Plan motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments on the date of closing of the sale and no basis for a deemed trust. He dismissed the Salaried Plan motion on the basis that, as s. 31 of R.R.O. 1990, Reg. 909 permitted the Company to make up the deficiency in the Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. As there was no amount "due" under s. 57(4) of the *Pension Benefits Act* ("*PBA*") on the closing date of the sale, no deemed trust arose. The representatives of the Plans' members appealed.

Held, the appeal should be allowed.

The *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. The words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75, and not just to amounts payable under s. 75(1)(*a*). The deficiency in the Salaried Plan had accrued as of the date of wind up and, pursuant to s. 57(4), was subject to a deemed trust on the closing date of the sale.

The Company breached its fiduciary obligations as administrator of the Plans during the *CCAA* proceedings. When managing its business, an employer wears its corporate hat. When acting as the administrator of its pension plans, it wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries. The Company could not ignore its obligations as administrator once it decided to seek *CCAA* protection. It breached its fiduciary obligations by doing nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans and taking active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained an order that gave priority to the DIP lenders over "statutory trusts" without notice to the beneficiaries. It sold assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. It moved to obtain orders approving the sale and distributing the proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. Further, there was a conflict of interest between the Company's corporate duty and its duty as administrator. Even if the Company was not in breach of its common law fiduciary obligations, its actions amounted to a breach of s. 22(4) of the *PBA*.

The deemed trust motions were not barred by the collateral attack rule. That rule was not applicable, and even if it were, this was not a case for its strict application.

The *CCAA* judge's order granting a super-priority charge did not mean that the super-priority charge had the effect of overriding the deemed trust. The deemed trust was not identified by the court at the time the charge was granted, and the affidavit evidence suggested that such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continued to operate. The *PBA* deemed trust and the super-priority charge operated sequentially, with the deemed trust being satisfied first from the reserve fund.

Even if the conclusion that the deemed trust had priority over the secured credit was wrong, an order for payment from the reserve fund of amounts sufficient to satisfy deficiencies in the Plans was the appropriate remedy for the breaches of fiduciary obligation. That remedy was also appropriate for the Executive Plan, where it was not clear that a statutory deemed trust arose as the Plan had not been wound up at the time of sale.

Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170; *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.); *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.), affg [2005] O.J. No. 3337, 12 C.B.R. (5th) 213, 47 C.C.P.B. 62 (S.C.J.); *R. v. Domm* (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300, 95 O.A.C. 262, 111 C.C.C. (3d) 449, 4 C.R. (5th) 61, 40 C.R.R. (2d) 289, 33 W.C.B. (2d) 108 (C.A.); *R. v. Litchfield*, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, 161 N.R. 161, J.E. 93-1895, 14 Alta. L.R. (3d) 1, 145 A.R. 321, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137, 21 W.C.B. (2d) 369; *Soulos v. Korkontzilas* (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 146 D.L.R. (4th) 214, 212 N.R. 1, J.E. 97-1111, 100 O.A.C. 241, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1, REJB 1997-00862, 71 A.C.W.S. (3d) 194; *Toronto-Dominion Bank v. Usarco*, [1991] O.J. No. 1314, 42 E.T.R. 235, 28 A.C.W.S. (3d) 392 (Gen. Div.), **consd**

Other cases referred to

Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194, 105 A.C.W.S. (3d) 585 (C.A.); *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, 172 A.C.W.S. (3d) 915; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; *Bourdon v. Stelco Inc.*, [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, 2005 SCC 64, 259 D.L.R. (4th) 34, 341 N.R. 207, J.E. 2005-2067, 48 C.C.P.B. 167, 143 A.C.W.S. (3d) 569, EYB 2005-97371; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, J.E. 89-1098, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, 2 T.C.T. 4263; *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, 2010 SCC 34, 268 O.A.C. 1, 406 N.R. 109, 324 D.L.R. (4th) 498, 60 E.T.R. (3d) 1, 84 C.C.P.B. 1, 193 A.C.W.S. (3d) 1332, EYB 2010-180092, 2010EXP-3280, 2010EXPT-2234, J.E. 2010-1818, D.T.E. 2010T-674; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, 2007 SCC 22, 281 D.L.R. (4th) 125, 362 N.R. 111, [2007] 8 W.W.R. 1, J.E. 2007-1068, 75 Alta. L.R. (4th) 1, 409 A.R. 207, [2007] R.R.A. 241, 49 C.C.L.I. (4th) 1, [2007] I.L.R. I-4622, 157 A.C.W.S. (3d) 299, EYB 2007-120167; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; *Cusson v. Quan*, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, 2009 SCC 62, 258 O.A.C. 378, EYB 2009-167616, 2010EXP-89, J.E. 2010-36, 70 C.C.L.T. (3d) 1, 314 D.L.R. (4th) 55, 397 N.R. 94; *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158, 133 D.L.R. (3d) 647, 13 A.C.W.S. (2d) 384 (C.A.); *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, 2004 SCC 25, 237 D.L.R. (4th) 385, 319

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.]
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 18.3(1) [rep. S.C. 2005, c. 47, s. 131], 37
Excise Tax Act, R.S.C. 1985, c. E-15, s. 222 [as am.], (3) [as am.]
Pension Benefits Act, R.S.O. 1990, c. P.8 [as am.], ss. 1 [as am.], (1) [as am.], 8 [as am.], 14, 22 [as am.], 22(4), 57, (4), (5), 68(1), (2), (4), 69(1) [as am.], 70(1), (4), 74 [as am.], 75 [as am.], (1) [as am.], (*a*), (*b*) [as am.], (2), 76
Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)
Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 147 [as am.]
United States Bankruptcy Code, 11 U.S.C. tit. 11

Rules and regulations referred to

R.R.O. 1990, Reg. 909 (*Pension Benefits Act*), s. 31, (1), (2)

APPEAL from order of C. Campbell J., [2010] O.J. No. 974, 2010 ONSC 1114 (S.C.J.) dismissing motions for remedy for breach of deemed trust and breach of fiduciary duty.

Andrew J. Hatnay and *Demetrios Yiokaris*, for former executives, appellants.

Darrell L. Brown, for United Steelworkers, appellants.

Mark Bailey, for Superintendent of Financial Services.

Hugh O'Reilly and *Adam Beatty*, for Morneau Sobeco Limited Partnership, intervenor.

Fred Myers and *Brian Empey*, for Sun Indalex Finance, LLC.

Ashley Taylor and *Lesley Mercer*, for monitor, FTI Consulting Canada ULC.

Harvey Chaiton and *George Benchetrit*, for George L. Miller, the Chapter 7 trustee of the bankruptcy estates of the US Indalex Debtors.

The judgment of the court was delivered by

[1] GILLESE J.A.: — A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). A court order enables it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the "Guarantee").

[3] The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

Overview

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan") and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") (collectively, the "Plans").

[7] On March 20, 2009, Indalex's parent company and its U.S.-based affiliates (collectively, "Indalex U.S.") sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("Indalex" or the "applicants") obtained protection from their creditors under the *CCAA*.

At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the "Monitor") was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the "USW"). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the "Former Executives").

[12] Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the "Deficiencies") be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the "Reserve Fund"), an amount approximating the Deficiencies.[1]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

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1 The Monitor retained the Reserve Fund as part of the undistributed proceeds. The undistributed proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees and amounts owing under the DIP charge.

[15] In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the "Indalex bankruptcy motion"). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010 (the "Orders under Appeal"), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

[18] The USW and the Former Executives (together, the "appellants") appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the *United States Bankruptcy Code* (the "U.S. Trustee"), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of

reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

[26] Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light-weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end-users. In 2008, Indalex Limited accounted for approximately 32 per cent of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario ("FSCO") and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313)

and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were 18 members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a wind up basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

[39] In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40 per cent. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one-half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from

counsel for the Monitor dated July 13, 2009 indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a notice of proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and corporate governance during the CCAA proceedings

[44] Keith Cooper, the senior managing director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the chief restructuring officer for all of the Indalex U.S.-based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The initial order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the *CCAA* (the "Initial Order"). A stay of proceedings against Indalex was ordered.

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the "DIP lenders"). JP Morgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the administration charge and the directors' charge, as those terms are defined in the Initial Order.

The Initial Order is further amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the "June 12, 2009 order").

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an e-mail from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The sale approval order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009 by Campbell J. (the "*CCAA* judge").

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB ("SAPA"). Total consideration for the sale of Indalex and Indalex U.S. was approximately

US$151,183,000. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

[60] Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

[61] Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*"PPSA"*), which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

[62] The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

[63] The court approved the sale in an order dated July 20, 2009 (the "Sale Approval order"). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

[64] It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The guarantee is called on

[65] On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The orders under appeal (August 28, 2009)

[66] The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

[67] By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions [[2010] O.J. No. 974, 2010 ONSC 1114].

[68] The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' motion

[69] The *CCAA* judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW motion

[70] Because the Salaried Plan was in the process of being wound up, the *CCAA* judge dismissed the USW motion for different reasons.

[71] The *CCAA* judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the wind up deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The *CCAA* judge also considered s. 31(1) and (2) of R.R.O. 1990, Reg. 909 (*Pension Benefits Act*) (the "Regulations"). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

[73] The *CCAA* judge concluded [at paras. 49-51]:

> I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the *CCAA*.
>
> Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.

> Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex bankruptcy motion

[74] Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> In my view, *a voluntary assignment under the BIA should not be used to defeat a secured claim under valid Provincial legislation*, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.

(Emphasis added)

[75] He found no conflict between the federal and provincial legislative regimes and allowed the applicants to renew their request for bankruptcy relief in a further motion.

The Issues

[76] The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator.[2]

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding Up a Pension Plan

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

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2 The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

(1) *Current service or "normal cost" contributions* — the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

(2) *Special payments* — a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15-year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a five-year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

[85] The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer[3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

[88] The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

— the administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

— a wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

— no payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

— plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(*a*) and (*b*) read as follows:

> *Liability of employer on wind up*
>
> 75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (*a*) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (*b*) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act

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3 Or, in the case of a multi-employer plan, the administrator.

and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[90] Section 75(1)(*a*) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(*b*) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(*b*).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(*b*), in addition to being required to bring all contributions up to date because of s. 75(1)(*a*). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times". Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under s. 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

[93] The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> 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.*

(Emphasis added)

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[4]

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

[96] The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the wind up date — all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Ontario (Hydro-Electric Power Commission) v. Albright* (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a

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4 *Bell ExpressVu Limited Partnership v. Rex.*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.*, is not "due" until a later date).

[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the . . . regulations".

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(*a*), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Section 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

[104] Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[5]

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5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, at para. 13, relying on *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497 (C.A.), at p. 503 D.L.R.

safeguard the rights of pension plan beneficiaries[6] and ensure the solvency of pension plans so that pension promises will be fulfilled.[7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans.

(Citations omitted)

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: *Ivaco Inc. (Re)*, [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.), affd (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) and *Toronto-Dominion Bank v. Usarco*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court, whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s

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6 *Ibid.*

7 *Bourdon v. Stelco Inc.*, [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, at para. 24.

8 At para. 26.

9 At para. 11.

statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

[108] The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(*a*). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(*b*).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument — the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends

on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach its Fiduciary Obligation?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries.[10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

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10 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, at paras. 39-41.

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests.[11] The key factual characteristics of a fiduciary relationship are the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.[12]

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> *Care, diligence and skill*
>
> 22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> *Special knowledge and skill*
>
> (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

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11 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at para. 32.

12 *Ibid.*, at para. 30; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, at p. 646 S.C.R.

. . . . .

Conflict of interest

(4) An administrator . . . shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*.[13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.) (*"Imperial Oil"*), the Pension Commission of Ontario ("PCO") grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with ten or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the "enhanced benefit"). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had ten or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the "Entitlement 55 Group") objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

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13 In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, s. 147.

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the ten-year service qualification and thereby "qualified" for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the *PBA* allows an employer to wear "two hats" — one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

[131] I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one, that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered — much less protected — during the DIP negotiations.

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the chief restructuring officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement.

But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as chief restructuring officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

[137] In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice

to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans.[14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158 (C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

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14 On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time, I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

[146] The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and

do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation or nullification of the order. See *R. v. Wilson*, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, at para. 8.

[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, at para. 17. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 72.

[154] The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring

and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the "come-back clause"). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognized.

[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc. (Re)*, [2001] O.J. No. 1943, 147 O.A.C. 291 (C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order — brought on an urgent basis to deal with seemingly desperate circumstances — when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the *CCAA* judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction — but that is for another day."

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to

the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue.[15]

[161] Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

[162] Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

[163] In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

[164] At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack

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15 To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010 was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300 (C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

Do the Principles of Cross-Border Insolvencies Apply?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the *United States Bankruptcy Code* in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How is the Reserve Fund to be Distributed?

The Salaried Plan

[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> 30(7) *A security interest* in an account or inventory and its proceeds *is subordinate to the interest of a person who is the beneficiary of a deemed trust* arising under the *Employment Standards Act* or *under the Pension Benefits Act.*

(Emphasis added)

[173] The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings.[16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal

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16 See, for example, *InterTAN Canada Ltd. (Re)*, [2009] O.J. No 293, 49 C.B.R. (5th) 232 (S.C.J.). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, at para. 75, and *Nortel Networks Corp. (Re)* (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967 (C.A.), at para. 38, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws, including "regulatory deemed trust requirements".

[179] While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust

priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case-by-case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely, the desire to maximize recovery for their creditors — along with those other considerations — would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds and the total deficiencies in the Plans appear to be approximately $6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party

by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

[187] It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful — they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

[189] Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not

be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.[17]

[190] Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

[191] The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. 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 *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78.

[192] However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*.[18] Here, as I have noted, the *CCAA* proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a

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17 See para. 178 of these reasons.

18 See, for example, para. 23.

rules-based approach",[19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion".[20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings — greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J., at para. 70 of *Century Services*.

[194] The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees".[21]

[195] In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" (emphasis added). The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did — go to court

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19 At para. 13, for example.

20 See, for example, para. 14.

21 *Century Services*, at para. 60.

without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect, at paras. 62-63 of *Ivaco*.[22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

[197] However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the

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22 At para. 78.

result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at para. 86, and *Soulos v. Korkontzilas*, (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, at para. 34.

[202] In *Soulos*, at para. 36, McLachlin J. (as she then was), writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: (1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and (2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case — one in which there is unjust enrichment — is not relevant to these appeals, the first is.

[203] At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;

(3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

(4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; *e.g.*, the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.*, the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Disposition

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to

satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within 15 days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

Appeal allowed.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1)-(5), 70(1), 74(1), 75(1), (2), 76

Definitions

1(1) In this Act, . . .

"administrator" means the person or persons that administer the pension plan;

. . . . . .

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

. . . . . .

Administrator

Requirement

8(0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(*a*) the employer or, if there is more than one employer, one or more of the employers;

(*b*) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

. . . . .

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1)(*b*), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

. . . . .

Reduction of benefits

14(1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

. . . . .

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

. . . . .

Trust property

57(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as

the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(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.

Wind Up

(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.

Lien and charge

(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).

. . . . .

Wind up report

70(1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(*a*) the assets and liabilities of the pension plan;

(*b*) the benefits to be provided under the pension plan to members, former members and other persons;

(*c*) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(*d*) such other information as is prescribed.

. . . . .

Combination of age and years of employment

74(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(*a*) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(*b*) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(*c*) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . . . . .

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(*a*) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(*b*) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

. . . . . .

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

R.R.O. 1990, Reg. 909 (*Pension Benefits Act*), s. 31(1), (2) and (3)

31(1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(*a*) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(*b*) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(*b*) and (*c*).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

The Corporation of the City of Hamilton v. Svedas Koyanagi Architects Inc. et al.; Peto McCallum Ltd. et al., Third Parties

[Indexed as: Hamilton (City) v. Svedas Koyanagi Architects Inc.]

2010 ONCA 887

Court of Appeal for Ontario, Laskin, R.P. Armstrong and Juriansz JJ.A.
December 22, 2010

Civil procedure — Costs — Third party — Third party not defending main action but appearing on plaintiff's motion to set aside registrar's order dismissing action for delay — Motion judge not erring in exercising his discretion to award costs of motion to third party.

Civil procedure — Dismissal for delay — Setting aside — Plaintiff commencing action in March 2000 against architect and general contractor of arena project based on defects in arena which appeared in late 1994 — Plaintiff doing nothing to move action along until it asked for statements of defence in late 2005 — Counsel for plaintiff inadvertently failing to attend status hearing in February 2009 — Registrar dismissing action for delay — Motion judge not erring in dismissing motion to set aside registrar's order — Delay inordinately long — Plaintiff failing to provide adequate explanation for its failure to proceed with action between March 2000 and November 2005 — Defendants suffering actual prejudice as result of delay.

Tab 2

Toronto Dominion Bank v. Usarco Ltd.

Re USARCO LIMITED PENSION PLAN FOR ITS HOURLY EMPLOYEES; TORONTO-DOMINION BANK v. USARCO LIMITED and FRANK LEVY

Ontario Court of Justice (General Division)

Farley J.

Heard: June 4 and 17, 1991
Judgment: August 2, 1991
Docket: Doc. 52384/90

Counsel: *Harry Underwood*, for administrator.

M. MacNaughton, for Toronto-Dominion Bank.

N. Saxe, for receivers.

Subject: Estates and Trusts; Corporate and Commercial; Property; Insolvency

Bankruptcy --- Property of bankrupt — Trust property — General.

Pensions --- Surplus funds — Bankruptcy of employer.

Bankruptcy — Property of bankrupt — Trust property — Interaction of Bankruptcy Act and Pension Benefits Act, 1987 — Bankruptcy petition filed but not proceeded with — Claims of administrator of pension plan of bankrupt company having priority over claims of trustee in bankruptcy — Bankruptcy Act, R.S.C. 1985, c. B-3 — Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions — Interaction of Pension Benefits Act, 1987 and Bankruptcy Act — Bankruptcy petition filed but not proceeded with — Claims of administrator of pension plan of bankrupt company having priority over claims of trustee in bankruptcy — Bankruptcy Act, R.S.C. 1985, c. B-3 — Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions — Deemed trust under s. 58 of Pension Benefits Act, 1987 — Employer company wound up — Deemed trust to include moneys accrued but not yet due from employer to plan, and interest payable by employer on unpaid amounts — Pension Benefits Act, 1987, S.O. 1987, c. 35, ss. 58(4), 59(2).

The defendant company, a scrap metal dealer and processor, ceased operations on July 13, 1990. A bankruptcy petition had been filed against the company on January 5, 1990, but had not been proceeded with. The plaintiff bank was the defendant company's largest creditor, being owed some $18 million, secured by a general security agreement registered under the *Personal Property Security Act, 1989* (Ont.).

The defendant company had an employee pension plan which at the wind-up date was unfunded to the extent of approximately $600,000. The administrator of the pension plan informed the company late in 1990 that all the company's assets were subject to

a lien in favour of the administrator, on behalf of the employee beneficiaries of the plan, in the amount of the deemed trust under s. 58 of the *Pension Benefits Act, 1987*, and that this amount was to include interest on moneys that were due from the company but were unpaid under the plan. It was further claimed that by virtue of s. 67(a) of the *Bankruptcy Act* any payment received by the administrator from the company would not be part of the assets subject to the bankruptcy should the petition be proceeded with in the future.

The administrator moved to have the amounts it claimed paid to it on behalf of the plan, and the plaintiff bank moved to stay the administrator's motion.

Held:

The administrator's motion was granted, and the bank's motion was dismissed.

Since the bankruptcy petition had not been proceeded with, the security interest of the bank was subordinate to the interest of the beneficiaries of the deemed trust. According to s. 67(a) of the *Bankruptcy Act*, such trust property was not the property of a bankrupt, divisible among its creditors.

Furthermore, by virtue of s. 58(4) of the *Pension Benefits Act, 1987*, the deemed trust, in a wind-up situation, included any contributions to the plan which had accrued but were not yet due under the plan. Therefore, in the present circumstances, the deemed trust extended to the amount necessary for the defendant company to fully fund its pension obligation as of the wind-up date.

Pursuant to s. 59(2) of the *Pension Benefits Act, 1987*, interest was to be paid by the employer on contributions to the plan that remained unpaid. Therefore, the amount payable to the administrator was to include such interest.

Cases considered:

Black Brothers (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.) — *referred to*

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

Develox Industries Ltd. (No. 3), Re (1970), 15 C.B.R. (N.S.) 18 (Ont. S.C.) — *referred to*

Hillstead Ltd., Re (1979), 26 O.R. (2d) 289, 32 C.B.R. (N.S.) 55, 9 B.L.R. 74, 1 P.P.S.A.C. 136, 103 D.L.R. (3d) 347 (S.C.) — *considered*

I.B.L. Industries Ltd., Re (1991), 4 C.B.R. (3d) 301, 76 D.L.R. (4th) 439, 2 O.R. (3d) 140 (Bktcy.) — *applied*

McLean Co. v. Newton, 8 C.B.R. 61, [1926] 3 W.W.R. 593, 36 Man. R. 187, (sub nom. *Bortoluzzi v. Kaplan)* [1927] 1 D.L.R. 183 (C.A.) — *referred to*

Ontario Hydro-Electric Power Commission v. Albright (1922), 64 S.C.R. 306, [1923] 2 D.L.R. 578 [leave to appeal to Privy Council refused (1922), [1923] A.C. 167, [1923] 2 D.L.R. 599 (P.C.)] — *followed*

Price Waterhouse Ltd. v. Marathon Realty Co., [1979] 6 W.W.R. 382, 32 C.B.R. (N.S.) 71, 103 D.L.R. (3d) 699 (Man. Q.B.) — *referred to*

Sara, Re (1985), 56 C.B.R. (N.S.) 282 (Ont. S.C.) [supplementary reasons at (1985), 57 C.B.R. (N.S.) 185 (Ont. S.C.)] —

referred to

Southern Fried Foods Ltd., Re (1976), 12 O.R. (2d) 12, 21 C.B.R. (N.S.) 267, 67 D.L.R. (3d) 599 (S.C.) — *referred to*

W., Re (1921), 2 C.B.R. 176, 21 O.W.N. 301 (S.C.) — *referred to*

Weeks Ltd. v. Canadian Credit Men's Trust Assn. (1962), 40 W.W.R. 312, 4 C.B.R. (N.S.) 182 (B.C. C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 43(13)

s. 67(a)

s. 70(1)

s. 71(1)

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

s. 58(3)

s. 58(4)

s. 58(5)

s. 58(6)

s. 59(1)

s. 59(2)

s. 76(1)

s. 76(2)

Personal Property Security Act, 1989, S.O. 1989, c. 16 —

s. 30(7)

s. 30(8)

s. 33(1)

Regulations considered:

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

O. Reg. 708/87,

s. 1

s. 4(1)

s. 4(2)

s. 4(3)

s. 5(1)(b)

s. 11

Application by administrator of company pension plan, on winding-up of company, for payment of amount of deemed trust under s. 58 of *Pension Benefits Act, 1987.*

***Farley J.*:**

1 Ernst & Yonge Inc. ("administrator") is the administrator appointed by the Superintendent of Pensions pursuant to the *Pension Benefits Act, 1987*, S.O. 1987, c. 35 ("*PBA*") as to the hourly employee pension plan ("plan") at Usarco Limited ("Usarco").

2 The wind-up date for this plan was July 13, 1990, being the date that Usarco ceased operations. A bankruptcy petition was filed by A. Gold & Sons Ltd. ("Gold"), dated January 5, 1990; nothing has proceeded in regard to this petition. The Toronto-Dominion Bank ("bank") is the largest creditor, being exposed for some $18 million; it is secured by a general security agreement which was registered under the *Personal Property Security Act, 1989*, S.O. 1989, c. 16 ("*PPSA*") or a predecessor thereof.

3 The bank applied to the court on October 11, 1990 for the appointment of Coopers & Lybrand Limited ("receiver") as receiver of Usarco for the purpose of selling or otherwise disposing of Usarco's assets. As of April 30, 1991 the receiver had collected $503,571 from accounts receivable, $581,343 from inventory sales, and $475,238 from realization of other assets. This was a total of $1,560,152 less disbursements of $486,532, leaving cash on hand in the amount of $1,073,620.

4 Usarco conducted its business in Hamilton, as a scrap metal dealer and processor. Apparently there are concerns vis-à-vis environmental claims as to the Hamilton property. The bank indicates that it will not move to join the Gold bankruptcy petition and move it forward (the principal of Gold having died) until the Hamilton property is sold. However, the property is now for sale, and the bank claims that it will proceed expeditiously, after the sale, as to the bankruptcy proceedings.

5 Usarco failed to remit regular and special contributions to the plan. The plan did not require employee contributions. Regular contributions are required in respect of benefits accruing in the year contributions are to be made, and special contributions are in respect of unfunded liabilities as determined by a triennial actuarial report, the last of which (May 1989) was made as of December 31, 1988. That report showed that Usarco was $206,920 short. Usarco anticipated it would have been able to transfer a surplus in its salaried employees plan to remedy this; however, this was not permitted by the Pension Commission. Since December 31, 1988, Usarco failed to make regular contributions of $47,853.16 and special ones of $121,748.77, for a total of $169,601.93. Missed contributions then, on that basis, would be a total of $376,521.93.

6 The May 1989 report indicated that as of December 31, 1988 the plan was unfunded to the extent of $711,071. This amount was made up of $295,044 as at the end of 1985 (to be made up by special payments of $35,192 per year over 12 years) and a further $416,027 as at the end of 1988 (to be made up by special payments of $41,702 over 15 years). Deducting the missed special contributions, previously mentioned, to the wind-up date would result in a net of approximately $600,000. There was no solvency deficiency.

7 On November 7, 1990 and December 20, 1990, the administrator's counsel wrote to Usarco and the receiver, giving formal notice that all the assets of Usarco were subject to a lien and charge in favour of the administrator, and demanded payment of the amount of the deemed trust (see: subs. 58(3), (4), (5), (6), *PBA*). The then counsel for the receiver (now counsel for the bank) wrote back on February 7, 1991 and referred to an enclosed copy of the order of Borins J. of October 11, 1990 appointing the receiver. Paragraphs 9 and 10 of that order provided that no proceedings be taken against Usarco or the receiver without leave of the court, but that any interested party be at liberty to apply for further orders on seven days notice.

8 This matter came forward on April 16, 1991 and has been ad journed on consent of the administrator, bank, and receiver a number of times. A term of the adjournment was the undertaking by the receiver to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion ...".

9 Leave is granted if it is necessary pursuant to the order of October 11, 1990, to the administrator to bring its motion to have the Receiver pay to the administrator, on behalf of the employee beneficiaries of the plan, the amounts claimed. The bank's motion to stay the administrator's motion is dismissed. While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition [s. 43(13) *Bankruptcy Act*, R.S.C. 1985, c. B-3 ("*BA*")], it has not moved to do so. It is now approximately a year and a half since the Gold petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action. While the bank might point to the fact that the receiver has undertaken to hold $500,000 until the return of this motion to advance its assertion that the administrator would not be prejudiced awaiting the disposition of the bankruptcy petition, I am mindful of the bank's position that a bankruptcy petition would reverse priorities, that the amount claimed by the administrator is in excess of $500,000, and that the $500,000 being held does not have any interest attributed to it.

10 The relevant provisions of the legislation are as follows:

PBA	PPSA	BA	PBA Regs. [O. Reg. 708/87]
subss. 58(3), (4), (5), (6)	subss. 30(7), (8)	s. 43(13)	s. 1 (certain definitions)
subss. 59(1), (2)	s. 33(1)	s. 67(a)	subss. 4(1), (2), (3)
subss. 76(1), (2)		s. 70(1)	s. 5(1)(b)
		s. 71(1)	

I have set these out in an appendix.

11 It would appear that if the bankruptcy had come into effect as of a date prior to the administrator's claim, the subject matter of the deemed trust would not have come into existence; see *Re I.B.L. Industries Ltd.* (1991), 4 C.B.R. (3d) 301, 76

D.L.R. (4th) 439, 2 O.R. (3d) 140 (Bktcy.) relying on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 34 E.T.R. 1, 75 C.B.R. (N.S.) 1, 38 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164. The *Henfrey Samson* case at p. 18 [C.B.R. (N.S.)] pointed out the principle that the provinces cannot create priorities that would be effective under the *BA* by their own legislation. One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the *BA* which may enhance their position by giving them certain priorities which they would not otherwise enjoy; see: *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.).

12 Section 71(1) of the *BA* provides that a bankruptcy will have relation back to the date the bankruptcy petition was made; see also: *Re W.* (1921), 2 C.B.R. 176, 21 O.W.N. 301 (S.C.) and *Re Develox Industries Ltd. (No. 3)* (1970), 15 C.B.R. (N.S.) 18 (Ont. S.C.).

13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. The security interest of the bank is subordinate to the interest of the beneficiaries of the deemed trust (represented by the administrator) (see: s. 30(7), *PPSA*). The bank suggested that it was entitled to a purchase-money security interest in Usarco's inventory and its proceeds (see: s. 30(8), *PPSA*). It did not, however, advance any material to support the proposition that it did not need to send out a purchase-money security interest notice in light of its assertion that it was the only secured creditor or when the inventory came into Usarco's possession, vis-à-vis the bank's financing. I must reject the bank's contention because of this lack of evidence.

14 The administrator's position is that if it enforces its rights and obtains payment, such payment would not be subject to being put back into the bankruptcy pot pursuant to s. 71(1) of the *BA*. In support of this proposition the administrator cites s. 70(1) of the *BA*. L.W. Houlden and C.H. Morawetz, *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), Vol. 1, pp. 3-120 to 3-122 would appear to support that claim and specifically [at p. 3-121]:

> Section 70(1) does not refer to 'the date of bankruptcy' but to 'every receiving order and every assignment'. In *A.C. Weeks Ltd. v. C.C.M.T.A.* (1962), 4 C.B.R. (N.S.) 182, 40 W.W.R. 312 (B.C. C.A.), the British Columbia Court of Appeal held that the doctrine of relation back in s. 71(1) had no application to s. 70(1), and money paid to a judgment creditor after the filing of a petition but before the making of a receiving order could be retained by the creditor.

15 Aside from the *Weeks* case cited in Houlden and Morawetz [*Weeks Ltd. v. Canadian Credit Men's Trust Assn.* (1962), 40 W.W.R. 312, 4 C.B.R. (N.S.) 182 (B.C. C.A.)], the following cases would also appear to support the administrator's proposition: *Price Waterhouse Ltd. v. Marathon Realty Co.*, [1979] 6 W.W.R. 382, 32 C.B.R. (N.S.) 71, 103 D.L.R. (3d) 699 (Man. Q.B.); *Re Sara* (1985), 56 C.B.R. (N.S.) 282 (Ont. S.C.); *Re Southern Fried Foods Ltd.* (1976), 12 O.R. (2d) 12, 21 C.B.R. (N.S.) 267, 67 D.L.R. (3d) 599 (S.C.); *McLean Co. v. Newton*, 8 C.B.R. 61, [1926] 3 W.W.R. 593, 36 Man. R. 187, *(sub nom. Bortoluzzi v. Kaplan)* [1927] 1 D.L.R. 183 (C.A.).

16 The administrator is taking the steps that it feels are necessary to perfect its claim for the moneys in advance of the determination of the bankruptcy petition, one that conceivably may never be proceeded with further. In this respect, it is further ahead in the foot race than was the creditor attempting to perfect under the *PPSA* in *Re Hillstead Ltd.* (1979), 26 O.R. (2d) 289, 32 C.B.R. (N.S.) 55, 9 B.L.R. 74, 1 P.P.S.A.C. 136, 103 D.L.R. (3d) 347 (S.C.) or the union in the *Re I.B.L.* case, supra. In those cases the claimants brought their actions after the bankruptcy was determined, so that there was no hope of having completely executed payment prior to the bankruptcy determination. The deemed trust provision would also imply a fiduciary obligation on the part of Usarco. A trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation.

17 It seems to me that the administrator's position would be stronger than the types of claims set out in the above cases since it comprises a trust claim. If so, then according to s. 67(*a*) of the *BA*, such trust property would not be property of a bankrupt divisible amongst its creditors. The administrator asserts that the deemed trust under the *PBA* has been converted into a true trust either (a) by notice or (b) by virtue of an actual separation of the funds by the receiver. A true trust would, if it exists, prevail against a competing claim of a trustee in bankruptcy. While it appears to me that the administrator gave notice to the

receiver by the November and December letters (with an estimated amount of the deemed trust of $489,928), it does not seem that the receiver had notice of any further claim until June19, 1991 when the administrator advanced a further claim for approximately $600,000 plus interest. As to the question of an actual separation of funds by the receiver, the administrator relies on the terms of the undertaking given on one of the multiple adjournments of this matter. Its text is as follows:

> On consent adjourned to May 13, 1991 on the undertaking of the Receiver to
>
> 1. hold $500,000 collected since November 7, 1991 [sic] from the proceeds of accounts receivable and inventories at Usarco until the return of the motion on May 13, 1991, and
>
> 2. notify the Applicant of any motion for an order directing the Receiver to pay any funds in its hand to any creditor of Usarco or Frank Levy.

18

> (Indicated signed by counsel for the bank, receiver, and administrator.)

19 I would think that the claim of an actual separation of funds may not overreach what was said in this understanding. While there is no promise to hold the funds apart and separate per se, I do think that this can be inferred by the fact that para. 2 of the undertaking requires the receiver to notify the administrator of a motion to the effect of directing the receiver to pay out any funds (which I assume would include the $500,000 to any creditor of Usarco). The undertaking therefore would seem to have the $500,000 as being the subject matter of this judicial determination as to the administrator's trust claim. On this basis, it may meet the test of separation enunciated in the *Re I.B.L.* case, supra. Certainly, the administrator has given Usarco and the receiver notice, to the extent of $489,928.

20 If the funds are true trust funds, then they will not be property of Usarco in the event that Usarco is determined to be bankrupt (see s.67(*a*), *BA*). It is clear that if the funds are merely deemed to be trust funds, then such deeming is not sufficient to segregate such for the purposes of the *BA* (see: *Re I.B.L.* case, supra, at pp. 143-144 [O.R.]).

21 Section 58(4) of the *PBA* provides that the amount deemed to be held in trust on a wind-up situation is:

> equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

This should be contrasted with the language of s. 58(3), which deals with a non wind-up situation:

> equal to the employer contributions due and not paid into the pension fund.

Section 76(1)(*a*) obliges the employer in a wind-up situation to pay into the pension fund an amount "equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund." In this context what do "accrued", "due", "not yet due", and "not yet paid" mean? What is the extent of the trust? Does it apply to the non-current and unfunded liability; does it support a claim for inter est?

22 The administrator relies on the analysis of Duff J. in *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306, [1923] 2 D.L.R. 578, to support its claim for the additional moneys, which are referred to as the non-current, unfunded liability. DuffJ. indicated at pp. 312-313 [S.C.R.]:

> The subjects of this provision are such interest and sums payable for the purpose of a sinking fund as shall have accrued but shall not be due at the time mentioned; and in order to apply the provision you must ascertain what interest and what sums of the character mentioned fall at the specified time within the described category — the category defined by the words

interest and sinking fund payments ... accrued ... but not yet due.

The word 'due' in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense, in the present instance is perfectly clear — otherwise the contrast expressed between payments 'accrued' and payments 'due' would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as 'accrued payments' would be, and standing alone it would *prima facie* receive that reading, moneys presently payable; but the word 'accrued' according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. It is in this sense that it has been widely applied to express the fact that such a liability has been created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.

23 Quite clearly, in a wind-up situation, the wording of s. 58(4) [*PBA*] is to oblige the employer (Usarco) with a trust arrangement concerning those contributions which are accrued, even though such may not be due under the plan. This is distinct from an ongoing situation envisaged by s. 58(3) [*PBA*], where such obligation is with respect to contributions which are then due but not yet paid over to the pension fund. Section 58(5) [*PBA*] gives the administrator a lien and a charge over the deemed trust amounts. By s. 58(6) [*PBA*], the deemed trust applies whether or not the employer kept these moneys separate and apart. It is clear from s. 76(1)(*a*) [*PBA*] that "due" and "accrued" are not identical, as they are referred to separately therein.

24 The Regulations to the *PBA* are not particularly helpful in distinguishing on the basis of "contributions" versus "special payments". While it is true that s. 4(2)(*c*) of the Regulations refers to "special payments" without, as in subss. 4(2)(*a*) and (*b*), indicating these are contributions, it is also true that s. 4(3)4 refers to "employer contributions for a special payment." I also note that s. 4(1) refers to a contribution "both in respect of the normal cost [that is, a regular payment] and any going concern unfunded actuarial liabilities" [i.e., special payments]. I conclude that, as is the case with so much technical legislation, particularly if it has been patchworked, the language of intent has simply not been fully coordinated. The *PBA* and Regulations thereunder are legislation which is not designed for persons not actively working in the field to tread in with any comfort.

25 However, it should be noted that s. 76(1) of the *PBA* is segregated into two parts, (*a*) and (*b*). Section 76(1)(*b*) appears to deal with special payment requirements envisaged by "going concern assets", "going concern liabilities", "going concern unfunded", "actuarial liability", and "going concern evaluation". This is so especially when "going concern liability" is said to mean "the present value of the accrued benefits of a pension plan determined on the basis of a going concern valuation" [s. 1, *PBA Regs.*]. Such going concern valuation is one that is required in the triennial report as set out in s. 11 of the regulations. Section 76(1)(*b*)(ii) appears to pick up the concept of the unfunded liability that was to have been made good by the special payments. Section 76(1)(*b*) is then to be contrasted with s. 76(1)(*a*), which deals with payments which are "due or that may have accrued" but have not yet been paid into the pension fund. This contrast implies that the special payments are not either due or accrued, as otherwise s. 76(1)(*b*)(ii) would be redundant. Section 5(1) of the Regulations speaks of the special payments being required to "amortize" a "going concern unfunded actuarial liability. ..." The *Oxford (Shorter) Dictionary*, 3d ed. (1988), reprinted, defines "amortized" as "to extinguish a debt, etc. usually by means of a sinking fund." Thus it denotes a setting aside of the moneys, not payment. It is also evident that such special payments in a going concern situation may fluctuate depending on the investment results of the pension fund and the employer's ongoing contributions, together with the es timated demands on the fund by the beneficiaries. As of the date of crystallization being the wind-up date, the situation in the pension plan may be (significantly) different from that set forth in the last triennial report. At that time (or rather as of that time) it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim.

26 It therefore appears to me that the deemed trust provisions of subs. 58(3) and (4) only refer to the regular contributions

together with those special contributions which were to have been made but were not. In this situation, that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1988), together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances, however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency).

27 On that basis, I believe that there is merit in the bank's position that s. 58(4) takes into account those employee contributions (regular and special payments) which are developing, but not yet, but for that subsection, required to be paid into the pension plan. See Canadian Institute of Chartered Accountants, *Terminology for Accountants*, 3d ed. (C.I.C.A.: 1983), at p. 5, where "accrue" is defined as "in accounting, to record that which has accrued with the passage of time in connection with the rendering or receiving of service (e.g., interest, taxes, royalties, wages), but the payment of which is not enforceable at the time of recording." Section 59(1) states: "Money that an employer is required to pay into a pension fund accrues on a daily basis." Therefore, in my view the trust extends to the amount that Usarco was obligated to pay into the pension fund, prorated to July13, 1990.

28 It also seems to me that s. 59(2) of the *PBA* deals with the question of interest. It states: "Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements." This in my view means that interest is to be paid on contributions that are unpaid. I base this on the fact that contributions which are paid will generate income based upon what investments are in fact made (and could be interest, dividend, or other basket clause income), and secondly, that this obligation seems to relate to the obligations of the employer set out in the other part of the section (i.e., s. 59(1)).

29 There is then to be an order in the following terms:

(1) An order granting the administrator leave to bring this motion as per the order of Borins J. dated October 11, 1990.

(2) An order directing the receiver to pay the administrator an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan, prorated to July 13, 1990, together with interest at the prescribed rate as set out in s. 59(2) of the *PBA* on all unpaid amounts from the date such were due to, and including the date of payment under this order. Counsel should be able to work out these amounts with their respective pension consultants, but if they are unable to do so, they may speak to me further.

(3) As to the question of costs, the receiver took the position that it was merely a stakeholder, and asked for its costs in the amount of $3,500. I award the receiver costs in that amount, payable out of the funds that it holds. As between the administrator and the bank, there were mixed results. It is also to be noted that apparently the question of the non-current, unfunded liability was a novel one. Balancing these factors together with the additional factor that the bank did not wish to proceed with the bankruptcy matter until a time convenient to it (if at all), I am of the view that the administrator should have part of its costs payable by the bank. I estimate those related to the current, unfunded liabilities as being $3,500. In accordance with the usual procedures, costs are to be payable forthwith.

. . . . .

Application allowed.

APPENDIX — PBA

58. — (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the benefi-

ciaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(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.

(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).

(6) Subsections (1), (3) and (4) apply whether or not the moneys have been kept separate and apart from other money or property of the employer.

59. — (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

76. — (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(*a*) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(*b*) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and regulations if the Commission declares that the Guarantee Fund applies to that pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40(3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

(2) The employer shall pay the moneys due under subsection (1) in the prescribed manner and at the prescribed times.

Regulations

1. — (1) In this Regulation,

"special payment" means a payment or one of a series of payments determined for the purpose of liquidating a going concern unfunded actuarial liability or solvency deficiency.

(2) In this Part,

"going concern assets" means the value of the assets of a pension plan including accrued and receivable income determined on the basis of a going concern valuation;

"going concern liabilities" means the present value of the accrued benefits of a pension plan determined on the basis of a going concern valuation;

"going concern unfunded actuarial liability" means the excess of going concern liabilities over going concern assets;

"going concern valuation" means a valuation of assets and liabilities of a pension plan using methods and actuarial assumptions considered by the actuary who valued the plan to be in accordance with generally acceptable actuarial principles and practices for the valuation of a continuing pension plan;

4. — (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

(2) An employer who is required to make contributions to a pension plan or any person who is required to make contributions on behalf of an employer to a pension fund shall make payments to the pension fund or to the insurance company, as applicable, of amounts that are not less than the sum of,

(*a*) any contributions received from employees, including money withheld from an employee, whether by payroll deduc tion or otherwise, as the employee's contribution to the pension plan;

(*b*) contributions required to pay the normal cost; and

(*c*) special payments determined in accordance with section 5.

(3) The payments referred to in subsection (2) shall be made by the employer or the person who is required to make contributions on behalf of the employer within the following time limits:

1. All sums received by the employer from an employee or deducted from an employee's pay as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.

2. Employer contributions in respect of the normal cost for the period prior to the 1st day of January, 1988, not later than 120 days after the end of the fiscal year of the plan.

3. Employer contributions in respect of the normal cost for any period on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of such instalments to be either a fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage of either that portion of the payroll related to members of the pension plan or employee contributions, in accordance with such contributions as are certified under clauses 10(1)(a) or 11(2)(a).

4. Employer contributions for a special payment required to be made with respect to a fiscal year of the plan commencing prior to the 1st day of January, 1988, within thirty days after the end of the fiscal year.

5. All special payments determined in accordance with section 5, other than a payment made under paragraph 4, by equal monthly instalments throughout the fiscal year of the plan.

5. — (1) Subject to subsections (2) and (3) and section 7, the special payments to amortize a going concern unfunded actuarial liability or solvency deficiency shall not be less than the sum of,

(*a*) any remaining special payments determined in accordance with subsection (5) with respect to an initial unfunded liability or experience deficiency within the meaning of Regulation 746 of Revised Regulations of Ontario, 1980 (General) as it existed on the 31st day of December, 1987;

(*b*) the amount required to liquidate by equal instalments, with interest at the going concern valuation rate, any other going concern unfunded actuarial liability within a period of fifteen years after the date on which the going concern unfunded actuarial liability arose;

(*c*) the amount required to liquidate by equal instalments, with interest at the solvency valuation interest rate, any solvency deficiency, other than that part of a solvency deficiency referred to in clause (d), within five years after the review date of the solvency valuation in which the solvency deficiency is identified; and

(*d*) the amount required to liquidate by equal instalments that part of any solvency deficiency that exists on the 1st day of January, 1988 that is attributable to the application of subsection 75(7) of the Act, with interest at the solvency valuation interest rate, within fifteen years from that date.

PPSA

30. — (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act, 1987*.

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

33. — (1) A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor, if,

(*a*) the purchase-money security interest was perfected at the time,

(i) the debtor obtained possession of the inventory, or

(ii) a third party, at the request of the debtor, obtained or held possession of the inventory,

whichever is earlier;

(*b*) before the debtor receives possession of the inventory, the purchase-money secured party gives notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the purchase-money secured party; and

(*c*) the notice referred to in clause (b) states that the person giving it has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type.

BA

43.(13) Where proceedings on a petition have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is deemed just, substitute or add as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act and make a receiving order on the petition of the other creditor, and shall thereupon dismiss on such terms as it may deem just the petition in the stayed or non-procsecuted proceedings.

67. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

70. (1) Every receiviing order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachmentss, garnishments, certificates having the effect of judgments, judgments, certificats of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.

71. -(1) A bankruptcy shall be deemed to have relation back to, and to commence at the time of the filing of, the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

Tab 3

COURT FILE NO.: 06-CL-6820
DATE: 2007-10-18

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
TEXTRON FINANCIAL CANADA LIMITED	)	E. Patrick Shea, for Textron Financial Canada Limited
Applicant	)	
- and -	)	
	)	
BETA LIMITEE/BETA BRANDS LIMITED	)	Steven Weisz, for ~~Sun Beta Brands~~ Sun Beta, LLC
Respondent	)	
- and -	)	
	)	
BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242G	)	Duncan Grace - solicitor for the moving party, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242
	)	
- and -	)	
	)	
MINTZ & PARTNERS LIMITED	)	
	)	
	)	**HEARD:** July 19, 2007

LEITCH R.S.J.:

[1] The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 242G ("Local 242G") brings a motion for a declaration that its claim on account of vacation pay ranks in priority to the claims of the secured creditors of Beta Limitee/Beta Brands Limited ("Beta Brands") in and to Beta Brands accounts and inventory and any and all proceeds derived or to be derived therefrom. The motion is opposed by the applicant, a secured creditor of Beta Brands and Sun Beta LLC, an unsecured creditor of Beta Brands and a participant in the applicant's secured loan to Beta Brands.

Background Facts

[2] The applicant holds a security interest over all of the present and future personal property of Beta Brands including, without limitation, Beta Brands' inventory and accounts pursuant to a security agreement dated December 17, 2004, which was amended August 29, 2005, and June 20, 2006. Notice of this security interest was registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.1 (the "PPSA") on November 18, 2004. All secured creditors of Beta Brands that had registered financing statements against Beta Brands prior in time to the applicant's registration subordinated their interests to the applicant.

[3] A default letter and a statutory notice under section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 (the "BIA") were sent by the applicant's counsel to Beta Brands' counsel on November 24, 2006. Beta Brands was then in negotiations with Bremner Food Group Inc. ("Bremner") respecting a sale of its assets. The applicant entered into a forbearance agreement with Beta Brands dated December 13, 2006, to facilitate the sale to Bremner. The applicant agreed to forbear enforcement of its security on certain terms and conditions and to provide financing to Beta Brands to manufacture inventory required to complete the sale to Bremner.

[4] On January 3, 2007, pursuant to the order of Lax J., Mintz & Partners Limited (the "Receiver") was appointed the interim Receiver and Receiver of Beta Brands' property, which included accounts receivable and inventory. Lax J. found that the applicant has valid, perfected security over the property of Beta Brands.

[5] As of January 3, 2007, the members of Local 242G were owed substantial amounts including an amount on account of vacation pay estimated at $559,000. Local 242G had opposed the appointment of the Receiver. As noted by Lax J., Local 242G submitted that the "true purpose" of the receivership "was to avoid or eliminate the contractual and/or legislative obligations for severance and termination pay, which are substantial" (*Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.*, [2007] O.J. No. 84 at para. 10 (S.C.J.)).

[6] By order dated January 5, 2007, the Receiver was authorized to sell Beta Brands' bakery division and certain finished goods inventory to Bremner. Local 242G also participated at the hearing that led to that order. The employment of all members of Local 242G was terminated shortly thereafter.

[7] The Receiver was authorized to sell other assets by a further order dated April 12, 2007. The Receiver successfully collected some accounts receivables of Beta Brands.

[8] A bankruptcy application in respect of Beta Brands and an affidavit of verification were executed by the applicant on February 20, 2007. It is clear from the Sixth Report of the Receiver that there were communications relating to a bankruptcy proceeding in February 2007 in which Local 242G participated; however, no bankruptcy application was issued.

[9] An interim distribution order was granted on consent on March 1, 2007. Pursuant to that order, the Receiver established a vacation pay reserve of $550,000.00. As set out in the interim distribution order, the creation of this reserve "shall not constitute an admission or otherwise evidence that funds necessary to satisfy any liability of Beta Brands for Outstanding Vacation Pay were or are held separate and apart in trust or otherwise" (at para. 2). The order also provided that the reserve was deemed to have been drawn from the proceeds of distribution of Beta Brands' inventory and the collection of receivables.

[10] At the hearing of this motion, the applicant's counsel advised that a second bankruptcy petition was issued July 17, 2007, dated July 12, 2007, and an affidavit of verification was sworn July 12, 2007.

[11] It is clear that Local 242G has diligently pursued relief on behalf of its members and that there has been an ongoing "dispute" regarding their vacation pay from the outset of the receivership which predates any bankruptcy application.

Statement of Issues

[12] This motion raises the following issues:

1. Are the former employees of Beta Brands entitled to a statutory lien in respect of vacation pay that ranks in priority to the applicant's security interest in Beta Brands inventory and accounts?

2. Are the former employees of Beta Brands entitled to a deemed trust in respect of vacation pay that ranks in priority to the applicant's security interest in Beta Brands inventory and accounts?

3. Will the bankruptcy of Beta Brands have the effect of reversing or nullifying the priority that such statutory lien or deemed trust has in respect of vacation pay?

4. If the bankruptcy of Beta Brands will reverse or nullify the priority of any lien or deemed trust in respect of vacation pay, is it appropriate for the court to order a distribution to Local 242G's members prior to the bankruptcy application in respect of Beta Brands being determined?

5. If a distribution is ordered, what procedure should be put in place to determine the quantum of the vacation pay owing to Beta Brands' former employees?

The Statutory Lien Issue

[13] Section 40(2) of the *Employment Standards Act, 2000*, S.O. 2000, c.41 (the "*ESA*") establishes a statutory lien with respect to vacation pay. Section 40(2) of the *ESA* provides as follows:

> (2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

[14] Although s. 40(2) of the *ESA* provides the employees with a statutory lien in respect of their vacation pay, there is nothing in the *ESA* which establishes priority of that lien in respect of the other relevant security interests. As such, priority will be determined based on the chronological order in which the respective interest arose with the first in time having priority. The applicant was granted security over the assets and property of Beta Brands in 2004. There is no evidence that the vacation pay claimed by Local 242G on behalf of Beta Brands' former employees was accrued prior to 2004. Thus, it appears that the statutory lien does not have priority over the security interest of the applicant.

[15] As a result, although Local 242G can establish a statutory lien in accordance with s. 40(2) of the *ESA*, that lien does not have priority over the applicant's security interest granted in 2004.

The Deemed Trust Issue

[16] Section 40(1) the *ESA* "deems" Beta Brands to have held vacation pay in "trust" for the employees of Beta Brands. That section provides as follows:

> Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

[17] The section "deems" the vacation pay owing to Beta Brands' former employees to be held "separate and apart." Thus, there is no question that the employees have a deemed trust in respect of their vacation pay held by Beta Brands. It is important to note that such a trust has been described as "a legal fiction" (see *Ivaco*, *infra* at para. 46).

[18] The critical question is whether this deemed trust ranks in priority to the applicant's security interest in Beta Brands' inventory and accounts.

[19] There is nothing in s. 40(1) of the *ESA* that establishes priority of the deemed trust. Guidance on this point comes from the *PPSA*.

[20] Section 30(7) of the *PPSA* provides the following:

> A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

[21] Section 30(8) of the *PPSA* provides that subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

[22] A contentious issue on this motion is whether the applicant has a perfected purchase-money security interest in Beta Brands' inventory or its proceeds. There is no dispute that the applicant's security interest was perfected. If the applicant's interest in Beta Brands' inventory is a purchase-money security interest then the deemed trust in favour of Beta Brands employees will be subordinate to the applicant's security interest.

[23] A purchase-money security interest (a "PMSI") is defined in s. 1(1) of the *PPSA* as follows:

> "purchase-money security interest" means,
>
> (a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price,
>
> (b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire

> rights in or to the collateral, to the extent that the value is applied to acquire the rights, or
>
> (c) the interest of a lessor of goods under a lease for a term of more than one year;

[24] Local 242G takes the position that there is no evidence which suggests that the applicant's security interest is a PMSI in inventory or its proceeds. Local 242G points out that portions of the applicant's advances were operating loans, while acknowledging that the forbearance agreement contemplated funding for purposes of an inventory build. The applicant is of the view that they do, in fact, have such a security interest on the basis that it advanced all funds to produce the inventory, there were no other operating lenders, and the proceeds from the sale of that inventory are traceable.

[25] Local 242G also advances the proposition that when the agreement of purchase and sale with Bremner was signed, all of the assets of Beta Brands were converted to an account and thus, the applicant would lose the benefit of a PMSI. As Local 242G points out, the Ontario Court of Appeal in *Re Huxley Catering Limited; Irving A. Burton Limited v. Canadian Imperial Bank of Commerce* (1982), 2 P.P.S.A.C. 22 concluded that at p. 23:

> Accordingly, from the moment the contract for sale was made by Huxley Catering Limited the right to the purchase money was a chose in action that was capable of being assigned.

This contract for sale was made before Huxley Catering Ltd. made an assignment in bankruptcy. As a result, the bank was entitled to the purchase money pursuant to its assignment of book debts and the proceeds were not available to the Trustee in Bankruptcy for distribution to all creditors.

[26] Section 33 of the *PPSA* sets out the requirements that must be complied with in order for a PMSI in inventory or its proceeds to have priority over any other security interest in the same collateral. There is no dispute that the applicant's security interest was perfected at the time Beta Brands obtained possession of the inventory as required by subsection 33(1)(a). Although the applicant did not give notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the applicant as required by subsection 33(1)(b), I agree with the applicant's counsel that notice to such creditors was not required to obtain priority because the applicant had the benefit of subordination agreements from such creditors.

[27] It seems to me that the applicant has a PMSI in Beta Brands' inventory and its proceeds based upon its position set out above. Therefore, s. 30(7) would not be applicable and the deemed trust would not rank in priority to the applicant's PMSI in inventory and its proceeds. I appreciate the perspective of Local 242G that the evidentiary foundation for the PMSI is limited and indeed, the applicant took the position that it was unnecessary to determine whether it had a PMSI in inventory and its proceeds because the applicant was prepared to ground its opposition to the motion on the applicability of the priority rules in bankruptcy. As a result, the main issue on this motion was whether the priority of the deemed trust can prevail in these circumstances where a bankruptcy application was signed and an affidavit of verification sworn, after the

Receiver was appointed but remained outstanding. I will now turn to consideration of the impact of bankruptcy on the deemed trust.

The Impact of Bankruptcy on the Deemed Trust

[28] The law is well established that the change in priorities that is created by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") supersedes the priorities established by the relevant provincial legislation. Section 136 of the *BIA* establishes the priority of claims on a bankruptcy. Application of this provision creates a result in which the vacation pay claims of Beta Brands' former employees characterized as either a lien or a trust ranks subordinate to the claims of Beta Brands' secured creditors, but would have priority over the claims of Beta Brands' unsecured creditors. The *ESA* as provincial legislation cannot alter priorities established by the *BIA*. Thus, the priority in respect of the deemed trust established by s. 30(7) of the *PPSA* (assuming the applicant did not have a PMSI in inventory and its proceeds) would not be effective in a bankruptcy (see *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1 (S.C.C.) and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Local 242G quite properly acknowledged that if the priority rules in bankruptcy are relevant, then s. 30(7) of the *PPSA* is inoperative.

Will the Trust relating to the Vacation Pay be Excluded Property on Bankruptcy?

[29] As discussed more fully below, the position of Local 242G is that the priority rules in bankruptcy have no relevance on this motion. The alternative position is that even if those priority rules apply, Local 242G's claim to vacation pay would be effective against a trustee in bankruptcy because the Receiver was obliged to create a reserve for vacation pay as part of its fiduciary obligations.

[30] I will deal first with the alternative position of Local 242G. Local 242G relies on the provisions of s. 67(1) of the *BIA*, which defines property to exclude property that the bankrupt holds in trust. Thus, Local 242G submits that even if the priority rules under the *BIA* apply, the deemed trust would still have priority by virtue of the definition of property in s. 67(1) of the *BIA*. To fit within this exception, the trust must satisfy the requirements of the general law of trusts (described in *Re Ivaco, infra* at para. 39 as "the three certainties of a common law trust: certainty of intent; certainty of subject matter; and certainty of object") and the trust property must be kept separate and apart, and be traceable (see *British Columbia v. Henfry, supra*).

[31] The position of Local 242G is that the Receiver knew vacation pay was owed when it was appointed and when it terminated the employment Local 242G's members. Although Local 242G does not suggest on this motion that the Receiver is personally liable for vacation pay, it asserts that the Receiver knowing there was a priority dispute had the obligation to set aside moneys to answer the employees' claims to vacation pay in the event that their claims were found to have priority. To put it more simply, Local 242G says that the Receiver should have established a separate fund to which the deemed trust could attach and thus be excluded from Beta Brands' property upon bankruptcy. According to Local 242G, the interim distribution order in regard to vacation pay merely confirmed what the Receiver was already obliged to do –

identify and segregate property or proceeds to satisfy the vacation pay liability thereby creating a trust that is not excluded property in the event of a bankruptcy.

[32] The applicant's position, supported by Sun Beta, is that Beta Brands held no property in trust that can be excluded from the impact of bankruptcy – in other words, there is no actual trust that can survive the bankruptcy of Beta Brands. They note that Beta Brands did not actually segregate any assets separate and apart in respect of vacation pay and that the terms of the interim distribution order limited the significance of the creation of the reserve for vacation pay. They also take the position that it is important that the Receiver maintain the status quo. Thus, in their view, Local 242G's proposition is inconsistent with the Receiver's obligations and is unworkable because a Receiver ought not to determine priorities of competing complainants absent a specific statutory requirement such as was before the court in *TCT Logistics, infra* discussed in more detail below.

[33] Despite the able argument of counsel for Local 242G, I cannot accept the propositions he advanced. Beta Brands did not hold any funds separate and apart for vacation pay and was not obliged to do so. Therefore, there can be no actual trust in favour of the former employees that survives a bankruptcy. The interim distribution order required the Receiver to establish a reserve for the vacation pay pending a determination of the employees' entitlement in priority to the rights of Beta Brands' secured creditors. The order specifically provided that the reserve was not an admission or other evidence that the vacation pay was being held separate and apart from Beta Brands' assets and property. I disagree with Local 242G that the Receiver, knowing there was a priority dispute, was obliged to create a segregated fund for vacation pay. The Receiver's obligation cannot exceed what the debtor was obliged to do. The Receiver "stands in the shoes of the debtor, and is furthermore acting as an officer of the court" as the Court of Appeal noted in *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.* (2005), 7 C.B.R. (5th) 202 (Ont. C.A.) at 216. In that case, the legislation in issue required the debtor to maintain a segregated fund to satisfy the trust obligation in issue and the Receiver was similarly obliged to do so. Here Beta Brands was under no such obligation in relation to vacation pay. It was not required to, and did not, maintain a separate fund on account of vacation pay. Thus there is no segregated fund for the Receiver to maintain and preserve and the Receiver is under no obligation to create such a fund.

Are the Priority Rules in Bankruptcy Relevant?

[34] I will turn next to the issue of whether the priority rules in bankruptcy are relevant on this motion. Local 242G asserts that the court has an obligation to determine priority issues based on the facts as they exist at the time the rights of the competing complainants came into conflict. I am urged to focus on when the priority issue crystallized and determine the priority dispute as at that date.

[35] Local 242G emphasizes that its dispute regarding the vacation pay has been clear from "day one," and it made every possible effort to collect vacation pay from that day. Local 242G's position on this motion is grounded on the fact that when the dispute regarding the vacation pay arose a bankruptcy proceeding was not pending, nor had a bankruptcy occurred. The position of

Local 242G is that the employees ought not to be deprived of their vacation pay because there might be a bankruptcy.

[36] The applicant's position, again supported by Sun Beta LLC, is that the appointment of the Receiver does not crystallize the date on which priorities are determined and until a bankruptcy proceeding is effectively abandoned or denied, the court should not order a distribution to creditors whose claims would be subordinated by the bankruptcy.

[37] Local 242G relies on *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (C.A.) for its position that the priority issues should be determined when the priority dispute crystallized (which Local 242G asserts is the date the Receiver was appointed, and thus a date when there was no application in bankruptcy). The issue in *Sperry* was the priority of the security interests of Sperry Rand Inc. and the Canadian Imperial Bank of Commerce in the unpaid inventory of W.J. Allinson Farm Equipment & Supplies Limited. The Court of Appeal found that neither Sperry nor the bank had registered or perfected their security interests, with the result that Sperry's security interest had priority under s. 35(1)(c) of the *Personal Property Security Act*, R.S.O. 1980, c. 375 (now see R.S.O. 1990, c. P.10, s. 30(1)(4)) as the first security interest attached. After making that determination, the Court of Appeal went on to express its views "on different bases for coming to the same conclusion" (*Sperry, supra*, at 278). The Court said, in *obiter*, "that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interest came into conflict" (*Sperry, ibid*).

[38] This principle was adopted by the Ontario Court of Appeal in *Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board*, [1993] O.J. No. 4634 where it concluded, "The priority issue between the parties must be resolved as of the time when their respective security interests came into conflict" (at para. 4).

[39] The principle in *Sperry* that a priority dispute is addressed as at the date the conflict arose was also adopted by Mr. Justice Killeen in *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)*, [1993] O.J. No. 3021 (Gen. Div.), aff'd [1997] O.J. No. 4634 (C.A.) [*Melnitzer*]. At para. 194 of his reasons, Killeen J. concluded that once "808756 Ontario rights came into 'conflict' with those of other creditors on August 3 when the Receiver, Coopers & Lybrand, took over control of the assets [...] under the rule laid down in *Sperry Inc. v. CIBC* 808756 Ontario's then unperfected interest [was] prevented from acquiring a higher status by later acts such as the August 29 registration."

[40] Local 242G also relies on the decision in *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] CarswellOnt 540 (Gen. Div.). The decision in *Usarco* dealt with deemed trust provisions in the *Pension Benefits Act*, S.O. 1987, c. 35. In that case, a bankruptcy petition was filed, dated January 5, 1990. As a term of an adjournment, the Receiver undertook to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion [...]" (*Usarco, supra*, at para. 8).

[41] By the date of judgment on August 2, 1991, no further action had been taken on the petition in bankruptcy. The bank indicated that no such move would be made until certain real

property was sold, but without providing any likely timetable. The pension administrator argued that the deemed trust had been converted to a true trust by virtue of the Receiver having separated the funds pursuant to the undertaking, or by virtue of notice. Mr. Justice Farley found that "it would be inappropriate for the Bank to put all proceedings involving Usarco (including this motion by the Administrator) into suspended animation while the Bank determined if, as and when it wished to take action" (*Usarco, supra,* at para. 9). He ordered the Receiver to pay out the amounts covered by the deemed trust provisions in the *Pension Benefits Act, supra.*

[42] Local 242G submits that while *Usarco* was distinguished in *Re Ivaco Inc.*, [2006] CarswellOnt. 6292 (C.A.), a case relied on by the applicant, the principles underlying the reasoning in *Usarco* were not commented on and should be applied here where the circumstances are even more compelling because the priority dispute arose before the bankruptcy application began.

[43] The applicant submits that the decision in *Usarco* is also distinguishable on its facts on this motion, and relies on the principles established in *Ivaco* in support of its position. In *Ivaco* deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 were again considered. Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], had run their course, and an application under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] was pending. The court found that there was no requirement to segregate the amounts of the deemed trust under the *CCAA*, and that there was no gap between the *CCAA* and the *BIA* that would allow an order to pay out the deemed trust amounts. The Court of Appeal noted that provinces cannot directly alter priorities under the *BIA*, and in *Ivaco* refused to allow them to do so indirectly.

[44] While I agree with Local 242G that, according to *Sperry*, priorities as between competing security interests are determined when they come into conflict, I do not agree that priorities are "crystallized" or frozen on the date a Receiver is appointed such that the subsequent occurrence of a bankruptcy is not relevant to the court's analysis. It seems to me that it was key to the conclusion of Killeen J. in *Melnitzer* that the receivership order, by its terms, "effectively prevented 808756, or any other creditor, from improving its priority position thereafter" (*supra,* at para. 189). The receivership order made by Lax J. January 3, 2007 does not contain terms and provisions of a similar nature. Indeed, paragraph 5 of the order, as the applicants' counsel points out, permits the filing by creditors of any registration to preserve or protect a security interest and the registration of a claim for lien and the order specifically contemplates that any party may apply to amend or vary it.

[45] I agree with the applicant and Sun Beta that the facts on this motion are distinct from those considered by the court in *Usarco*. In *Usarco* the bankruptcy application had been effectively abandoned, and it was arguable that the funds were actually segregated and held in trust by the Receiver. As the court in *Ivaco* observed in distinguishing the case, "in *Usarco* 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* it was unclear whether bankruptcy proceedings would ever take place" (*Ivaco, supra,* at para. 67). For similar reasons, I find the facts on this motion different from those considered in *Usarco*. A bankruptcy application in respect of Beta Brands was signed by the applicant on

February 20, 2007, and a further petition was issued just prior to the hearing of this motion. Although the first application was not proceeded with it cannot be said that it has been "effectively abandoned" and, indeed, a further petition was issued.

[46] The *Ivaco* case established that the court should not exercise its discretion to order distribution of pension amounts where a bankruptcy application is pending and the effect of bankruptcy will be to subordinate the claim for pension amounts to claims of the secured creditors. In *Ivaco*, the court noted at paragraph 64 that "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 [...]. 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 a desirable result."

[47] The facts on this motion are in line with those before the court in *Ivaco* where the creditors were actively seeking to petition the debtor company into bankruptcy. The principles established in *Ivaco* support a determination that this court should not exercise its discretion to order distribution of vacation pay where a bankruptcy application is to be heard and the effect of the bankruptcy will be to subordinate the claim for vacation pay. As a result this motion by Local 242G must be dismissed.

[48] The following words of the Court of Appeal at para. 69 of *Ivaco* with respect to pension claimants are equally applicable to the claims of Local 242G's members in relation to their vacation pay:

> 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 priority, Parliament, not the courts, must do so.

Indeed as noted in *Ivaco* at para. 69, "Parliament has at least signalled its intentions to do so" by passage of the *Wage Earner Protection Program Act*, S.C. 2005, c.47, which, as the court noted, had not then been proclaimed in force. As of this date, this legislation still has not been proclaimed. This legislation, which defines "wages" to include vacation pay, would establish a program to enable individuals to collect "wages" from employers who are bankrupt or subject to a receivership. Regrettably for the members of Local 242G, without such legislation that would give their claim priority, the declaration they seek cannot be granted.

"Regional Senior Justice Lynne C. Leitch"
Regional Senior Justice Lynne C. Leitch

Released: October 18, 2007.

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Tab 4

COURT FILE NO.: 03-CL-5145
DATE: 20050718

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"	*Andrew J. Hatnay*, Ontario Agent for the Quebec Pension Committee of Ivaco Inc. *Fred Myers* and *Susan Rowland*, for the Superintendent of Financial Services *Geoff R. Hall*, for QIT-Fer et Titane Inc. *Jeffrey S. Leon*, *Sheryl E. Seigel* and *Richard B. Swan*, for National Bank of Canada *Daniel V. MacDonald*, for the Bank of Nova Scotia *Robert W. Staley*, *Kevin J. Zych* and *Evangelia Kriaris*, for the Informal Committee of Noteholders *Stephanie Fraser*, for Pension Benefit Guaranty Company *Peter F.C. Howard* and *Ashley John Taylor*, for Ernst & Young Inc., the Court-Appointed Monitor **HEARD:** June 13-15, 2005

FARLEY J.

[1] As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the

interests of a vulnerable group of persons – the pension beneficiaries. Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.

87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order

(a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;

(b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;

(c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

[2] The Superintendent's factum also stated at para. 2:

2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent – and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

[3] The November 28, 2003 order provided:

> **Pension Payments**
>
> 3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.
>
> 4. 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.
>
> 5. 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.
>
> 6. 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.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

[4] The overstatement would appear to me to be that other 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. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

[5] Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

[6] While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

[7] The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans (but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

[8] It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assumptions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14½ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

[9] The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

[10] The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT - Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut* v. *Brampton (City)* (2000), 48 O.R. (3d) 108 (C.A.); *Re Christian Brothers of Ireland* (2004), 69 O.R. (3d) 507 (S.C.J.). See also *Unisource Canada Inc. (cob Barber-Ellis Fine Papers)* v. *Hong Kong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co.* v. *D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Gen. Div.).

[11] While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia* v. *Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia* v. *National Bank* (1994), 119 D.L.R. (4th) 669 (B.C.C.A.); *Bassano Growers Ltd.* v. *Price Waterhouse Inc.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *Re IBL Industries Ltd.* (1991), 2 O.R. (3d) 140 (Gen. Div.); *Continental Casualty Co.* v. *Macleod-Stedman Inc.* (1996), 141 D.L.R. (4th), 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

[12] An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick* v. *Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B.C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd.* v. *Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd.* v. *Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

[13] The Superintendent relies on my earlier decision of *Toronto-Dominion Bank* v. *Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition ... it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith – and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.); *Bank of Montreal* v. *Scott Road Enterprises Limited* (1989), 73 C.B.R. 273 (B.C.C.A.); *Re Beverley Bedding Corporation* (1982), 40 C.B.R. (N.S.) 95 (Ont. S.C.); *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 245 (Ont. S.C.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this – see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, only relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

[14] Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is

this type of situation of the nature envisaged at para. 12 of *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

[15] The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

[16] Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

[17] Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *IBL* at pp. 143-4.

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

[19] However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these

reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

[20] While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper – but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. 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.

[21] With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

[22] In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

[23] This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction – and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt* v. *T&N plc*, [1993] 4 S.C.R. 289 where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a

foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.

Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.

The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case, most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised

> that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

[24] The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank et al.* v. *BCE Inc. et al.* (April 30, 2003) (Ont. S.C.J.) a decision of mine at para. 26. This motion is dismissed.

[25] Orders accordingly.

J.M. Farley

Released: July 18, 2005

COURT FILE NO.: 03-CL-5145
DATE: 20050718

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

REASONS FOR JUDGMENT

FARLEY J.

Released: July 18, 2005

Tab 5

2006 CarswellOnt 4675, 22 C.B.R. (5th) 298, 53 C.C.P.B. 284, 23 C.E.L.R. (3d) 184, 150 A.C.W.S. (3d) 16

2006 CarswellOnt 4675, 22 C.B.R. (5th) 298, 53 C.C.P.B. 284, 23 C.E.L.R. (3d) 184, 150 A.C.W.S. (3d) 16

General Chemical Canada Ltd., Re

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Plaintiffs) and GENERAL CHEMICAL CANADA LTD. (Defendant)

Ontario Superior Court of Justice [Commercial List]

Mesbur J.

Heard: May 29, 30, 2006
Judgment: July 28, 2006
Docket: 05-CL-6160

Counsel: Ashley John Taylor for Interim Receiver, PricewaterhouseCoopers Inc.

Robert Staley, Kevin Zych, Alan Gardner for Plaintiffs

Mark Zigler, Andrew Hatnay for Morneau Sobeco Limited Partnership in its capacity as Administrator of General Chemical Canada Ltd.'s pension plans

Ronald Carr for Ministry of the Environment

Tim Hogan for Sherway Contracting

Tyco Manson for Honeywell ASCA

Subject: Insolvency; Corporate and Commercial; Environmental

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Provincial — General principles

Environmental cleanup costs — Bankrupt was chemical company — Debt of bankrupt to creditor involved creditor becoming major shareholder of bankrupt — Minister claimed entitlement to costs related to environmental clean-up — Interim receiver brought motion for interim distribution of $3.75 million — Funds in question came from operation of business, rather than real estate holdings — Motion opposed by administrators of bankrupt's pension plan, and Minister — Motion granted — Minister was unsecured creditor and was not entitled to special priority for cleanup costs — As assets which generated funds were not connected to property which created environmental damage, no lien or priority existed — Provisions of Companies' Creditors Arrangement Act were inapplicable, as no arrangement in place and bankruptcy had commenced — Company did not have freestanding obligation to remedy environmental

contamination, as receiver did not create environmental contamination out of gross negligence or willful misconduct.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — General principles

Priority — Bankrupt was chemical company — Debt of bankrupt to creditor involved creditor becoming major shareholder of bankrupt — MInister claimed costs related to environmental clean-up — Interim receiver brought motion for interim distribution of $3.75 million — Funds in question came from operation of business, rather than real estate holdings — Motion opposed by administrators of bankrupt's pension plan, and Minister — Motion granted — Any lien created by Pension Benefits Act was at variance with Bankruptcy and Insolvency Act and therefore invalid.

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — General principles

Equitable alteration of priorities — Bankrupt was chemical company — Debt of bankrupt to creditor involved creditor becoming major shareholder of bankrupt — MInister claimed costs related to environmental clean-up — Interim receiver brought motion for interim distribution of $3.75 million — Funds in question came from operation of business, rather than real estate holdings — Motion opposed by administrators of bankrupt's pension plan, and Minister — Motion granted — No equitable alteration of priorities should be made — Transaction between creditor and bankrupt was true debt and not equity transaction — All financing was approved during related proceedings in United States — Bankrupt received direct financial benefit from transactions — Terms of financing documents indicated that transaction represented true debt — Equitable subordination used only in rare circumstances — No wrongdoing on part of bankrupt or creditors — Transaction regarding assets was not inequitable.

Cases considered by *Mesbur J.*:

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 15 C.B.R. (4th) 169, 259 A.R. 30, 2000 ABQB 4 (Alta. Q.B.) — followed

British Columbia v. Henfrey Samson Belair Ltd. (1989), 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] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — considered

Bulut v. Brampton (City) (2000), 2000 CarswellOnt 1063, 185 D.L.R. (4th) 278, 48 O.R. (3d) 108, 15 P.P.S.A.C. (2d) 213, (sub nom. *Bulut v. Sun Life Assurance Co. of Canada)* 131 O.A.C. 52, 16 C.B.R. (4th) 41 (Ont. C.A.) — followed

Calla, Re (1975), 9 O.R. (2d) 755, 20 C.B.R. (N.S.) 234, 61 D.L.R. (3d) 627, 1975 CarswellOnt 92 (Ont. Bktcy.) — referred to

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1992), 5 Alta. L.R. (3d) 193, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154, 7 B.L.R. (2d) 113, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 131 A.R. 321, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 25 W.A.C. 321, 97 D.L.R. (4th) 385, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 1992 CarswellAlta 298, 1992 CarswellAlta 790 (S.C.C.) — followed

Canadian Exotic Cattle Breeders' Co-operative, Re (1979), 14 B.C.L.R. 183, 31 C.B.R. (N.S.) 217, 103 D.L.R. (3d) 112, 1979 CarswellBC 573 (B.C. S.C.) — referred to

Christian Brothers of Ireland in Canada, Re (2004), 2004 CarswellOnt 574, 69 O.R. (3d) 507, 49 C.B.R. (4th) 12 (Ont. S.C.J. [Commercial List]) — considered

Clayton's Case, Re (1816), 35 E.R. 781, 1 Mer. 572, [1814-23] All E.R. Rep. 1 (Eng. Ch. Div.) — followed

Condominium Plan No. 762 0380 v. Edmonton (City) (2001), 2001 ABQB 97, 2001 CarswellAlta 155, 38 R.P.R. (3d) 279, 24 C.B.R. (4th) 9, [2001] 6 W.W.R. 316, 90 Alta. L.R. (3d) 329, 284 A.R. 62 (Alta. Q.B.) — referred to

Continental Casualty Co. v. MacLeod-Stedman Inc. (1996), 141 D.L.R. (4th) 36, [1997] 2 W.W.R. 516, 13 C.C.P.B. 271, 43 C.B.R. (3d) 211, 113 Man. R. (2d) 212, 131 W.A.C. 212, 1996 CarswellMan 537, C.E.B. & P.G.R. 8318 (headnote only) (Man. C.A.) — referred to

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613 (S.C.C.) — referred to

First Truck Lines, Inc., Re (1995), 48 F.3d 210 (U.S. C.A. 6th Cir.) — considered

Graphicshoppe Ltd., Re (2005), 2005 CarswellOnt 7008, 49 C.C.P.B. 63, 15 C.B.R. (5th) 207, C.E.B. & P.G.R. 8178, 21 E.T.R. (3d) 1, 260 D.L.R. (4th) 713, (sub nom. *Graphicshoppe Ltd. (Bankrupt), Re)* 205 O.A.C. 113, 78 O.R. (3d) 401 (Ont. C.A.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 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, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — followed

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]) — followed

Matter of Mobile Steel Co. (1977), 563 F.2d 692 (U.S. C.A. 5th Cir.) — followed

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) — distinguished

Rauf, Re (1974), 5 O.R. (2d) 31, 1974 CarswellOnt 79, 20 C.B.R. (N.S.) 143, 49 D.L.R. (3d) 345 (Ont. Bktcy.) — referred to

Rockland Chocolate & Cocoa Co., Re (1921), 1 C.B.R. 452, 50 O.L.R. 66, 61 D.L.R. 363, 1921 CarswellOnt 4 (Ont. S.C.) — referred to

United Air Lines Inc., Re (2005), 2005 CarswellOnt 1078, (sub nom. *United Air Lines Inc. (Bankrupt), Re)* C.E.B. & P.G.R. 8145, 9 C.B.R. (5th) 159, 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) — referred to

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2000), 2000 CarswellOnt 67 (Ont. S.C.J.) — followed

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2000), 2000 CarswellOnt 3414 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — considered

s. 14.06(1.1) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

s. 14.06(7)(a) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(7)(b) [en. 1997, c. 12, s. 15(1)] — considered

s. 47 — referred to

s. 67(1)(a) — considered

s. 183 — considered

s. 243(2) "receiver" — referred to

s. 244 — considered

s. 244(1) — considered

Cattle Lien Act, R.S.B.C. 1960, c. 44

Generally — referred to

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

Generally — considered

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — considered

s. 168.19(1) [en. 2001, c. 17, s. 2(39)] — referred to

s. 168.20(1) [en. 2001, c. 17, s. 2(39)] — referred to

Innkeepers Act, R.S.O. 1990, c. I.7

Generally — referred to

s. 3 — referred to

Legal Aid Act, R.S.O. 1990, c. L.9

Generally — referred to

Legal Aid Services Act, 1998, S.O. 1998, c. 26

s. 48(1) — referred to

s. 48(2) — considered

Mechanics' and Wage-Earners Lien Act, R.S.O. 1914, c. 140

Generally — referred to

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

Generally — considered

s. 57 — considered

s. 57(1) — considered

s. 57(3) — considered

s. 57(4) — considered

s. 57(5) — considered

s. 57(6) — considered

s. 69(1)(c) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — considered

s. 4(1)(a) — referred to

s. 4(1)(b) — referred to

s. 20(1)(a)(i) — referred to

s. 20(2)(a)(i) — referred to

MOTION by interim receiver for interim payment to creditor.

***Mesbur J.*:**

Nature of the motions and the positions of the parties

1 This series of motions arose out of the interim receiver, PricewaterhouseCoopers (PwC) moving to request the court's authorization to make an interim distribution of $3.75 million to the plaintiffs ("Harbert") as secured creditor of the defendant, General Chemical. The funds in question are a portion of the $6.5 million that has been generated from General Chemical's working capital assets, that is, its cash, accounts receivable and inventory, as opposed to being derived from any of its real estate assets. Harbert supports the interim receiver's motion, while the Administrator of General Chemical's two pension plans, and the Ministry of the Environment (MOE) both oppose it.

2 The Administrator takes the position that it has a lien over General Chemical's assets in relation to unpaid pension contributions and plan solvency issues, and that its lien takes priority over Harbert's alleged security. On this basis, it says there should be no interim distribution to Harbert. The Administrator goes even further, and says, first, that the Harbert secured loan transaction is really an equity acquisition disguised as debt, and should be treated as what it really is, and enjoy no priority at all. Second, it says that even if the transaction created valid security for Harbert, in priority to all or part of what it says is the Administrator's lien, the equities of the case require that Harbert's security be subordinated to the interests of the pension plan. The Administrator moves for declarations that it has a valid lien and charge on General Chemical's assets, and is a secured creditor ranking in priority to Harbert.

3 The MOE says that General Chemical and PwC as interim receiver have both statutory and court-ordered obligations to comply with provincial environmental safety requirements. It says they have failed to do so, and as a result, there are significant potential environmental cleanup costs, that exceed General Chemical's financial assurance under the *Environmental Protection Act*[FN1] (EPA). The MOE says that General Chemical has an obligation to meet those costs, and takes the position that until the environmental obligations have been quantified, it is premature to make any distribution to anyone, since to do so may have the result of leaving no assets to meet the costs of any environmental cleanup.

4 In order to understand the positions of the parties, it will be helpful to outline some of the history of the General Chemical, and its American parent, their respective restructuring efforts, and General Chemical's underlying business.

Some background facts

5 General Chemical produces calcium chloride, a chemical that is used primarily for melting ice in winter, and controlling dust in summer. It is a Canadian company, and is a wholly owned subsidiary of an American company, General Chemical Industrial Products Inc. ("Industrial"). General Chemical's business operations create significant chemical by-products, which in turn, create environmental issues in and around their plant facilities.

6 General Chemical's Canadian operations are centred primarily in a plant in Amherstberg, Ontario.

Industrial's Chapter 11 proceedings

7 In December of 2003, General Chemical's parent, Industrial, entered Chapter 11 protection pursuant to the United States Bankruptcy Code. Harbert was an Industrial bondholder. As such, it was a creditor of Industrial, and thus participated in the Chapter 11 proceedings. Industrial's initial debtor in possession (DIP) financing had been provided by JP Morgan Chase Bank in December of 2003. The DIP facility consisted of both a revolving line of credit, which the parties refer to as the Revolver, and a term loan facility.

8 Under the JP Morgan Chase Revolver, General Chemical is described as a primary borrower, and is entitled to take advances under the facility. Industrial is also a primary borrower, with similar rights. Each company provided security and also cross-guaranteed the obligations of the other. The term loan was advanced only to Industrial, secured against Industrial's assets, with General Chemical guaranteeing those obligations, and providing security for its guarantee.

9 JP Morgan continued as DIP lender until March of 2004, when it no longer was prepared to participate in Industrial's restructuring. At that point, Harbert took over that role.

Harbert's financing of Industrial and General Chemical

10 On March 31, 2004, General Chemical entered into a number of financing arrangements with Harbert. These also comprised a revolving loan facility and a term loan facility. Both were structured in the same way as the JP Morgan Chase Bank loans. Both were secured against the assets of both General Chemical and Industrial. Both companies cross-guaranteed the other's liabilities.

11 As was the case with the JP Morgan Chase financing, the Harbert term loan was made to Industrial only, with Industrial granting security in relation to the term loan, and General Chemical guaranteeing the term loan as well. General Chemical's guarantee was secured against General Chemical's assets.

12 The Revolver was stated as being to both General Chemical and Industrial. Harbert advanced $9 million to General Chemical on March 31, 2004, which in turn was used to pay JP Morgan Chase, to retire the Revolver. This had the effect of paying off Industrial's DIP financing, and provided exit capital for Industrial to emerge from Chapter 11 protection on April 1, 2004. Industrial's restructuring was successful, and it continues to operate as an active company.

13 After the $9 million advance on March 31, 2004, General Chemical drew down on the Revolver between April 4, 2004 and January 10, 2005, for an additional $7.5 million. During the same period, General Chemical made repayments totalling just over $3,070,000 on the Revolver.

14 Harbert registered all the necessary financing statements under the *Personal Property Security Act*[FN2] (PPSA) on March 31, 2004. All parties concede that Harbert's security instruments have been properly registered under the PPSA, and that on that basis, Harbert has a technically perfected security interest in General Chemical's personal property, with effect on March 31, 2004.

General Chemical's CCAA proceedings

15 General Chemical has not fared as well as Industrial. In January of 2004, it began to accumulate some **arrears** in its two pension plans. It also had difficulties in paying its accounts payable, its inter-company debt and its lenders. By January of 2005 it was in CCAA protection, with the usual stay of proceedings while it attempted to restructure or liquidate. From January to September of 2005 General Chemical actively tried to sell the company as a going concern. Unfortunately, their efforts failed, due in large part to ongoing environmental issues at the Amherstberg facility. For the purpose of these motions it is General Chemical's financial problems in relation to environmental costs and pension **arrears** that are most relevant.

Environmental issues at General Chemical

16 As part of its manufacture of calcium chloride, certain by-products of the process are sent to a large depression on the Amherstberg property. This is called the Soda Ash Settling Basin, or SASB. The SASB is a contaminated site, with significant costs to remedy. These range from an estimated $3.5 million to as high as $64 million. Harbert's security expressly excludes the SASB. It is obviously more liability than asset.

17 These potential environmental clean up costs were a significant factor in General Chemical's inability to restructure with a viable going concern sale. Environmental issues continue to be an ongoing issue.

18 The MOE has significant powers in terms of forcing compliance with environmental standards. One of its tools, utilized with enterprises with significant environmental concerns, is obtaining what is called a Financial Assurance from a contaminating company. In the case of General Chemical, it has been dealing with the MOE under a Provisional Certificate of Approval, which was issued by the Director of the MOE to General Chemical in April 1997. Among other things, it requires General Chemical to provide for the closure of the SASB, and for financial assurance for the costs of closing it.

19 The amount of the Financial Assurance is subject to annual review. Based on the information General Chemical provided to the MOE in March of 2004, the Director accepted $3.4 million in financial assurance at that time. The Ministry now takes the position that the costs of properly closing the SASB will be far in excess of the financial assurance amount, and may be as high as $64 million. Apparently the closure would take place over a number of years, and the cost is highly dependent on the supply of gypsum, which is required to cap the SASB.

20 The initial CCAA order had the usual broad stay provisions. However, as far as the MOE's position was concerned, paragraph 8 of the initial order contained the following exceptions to the stay:

> THIS COURT ORDERS that notwithstanding any other provision herein, but subject to paragraphs 9 and 10 herein:
>
> (a) with respect to Her Majesty the Queen in right of Ontario ("her Majesty"), as represented by the respective Ministers of Labour ("MOL") and of the Environment ("MOE"), and the Attorney General ("MAG"), each of which includes their respective employees and agents, this Order does not:
>
> (i) alleviate or alter in any way the obligations of the Applicant or any of its directors, officers and employees under any workplace health and safety statutes or regulations or instruments thereunder, administered by MOL or MOE, respectively;
>
> (ii) prohibit, restrain or in any way interfere with the exercise of the jurisdiction of MOE or MAG with respect to matters involving existing or imminent significant environmental effects (the "Environmental Matters"); or
>
> .....
>
> (iii) without detracting from the generality of paragraph 8(a), MOE, MAG and the Environmental Review Tribunal are permitted to immediately and at any time, with respect to Environmental Matters, exercise their powers and perform their duties under environmental statutes and regulations and instruments thereunder and the *Provincial Offences Act* (Ontario), including, without limitation, obtaining warrants and the commencement of enforcement proceedings thereunder;

21 The MOE's right to review General Chemical's financial assurance and require changes to it was, however, stayed by the CCAA order. In fact, the MOE sought of lifting of the stay for that very purpose in August of 2005. At that time it requested the authority to amend General Chemical's Provisional Certificate of Approval to require further financial assurance from General Chemical concerning the cost of closing the SASB, and to have that additional financial assurance provided in cash. The MOE's motion was denied.

22 In addition to these environmental cleanup issues, General Chemical also had problems maintaining proper funding for its pension plans.

The General Chemical Pension Plans

23 General Chemical maintains two separate pension plans for its employees. One is a plan for its salaried employees, and the other is for its unionized employees. I will refer to the first as the "Salaried Plan", and other as the "Union Plan". Both plans are defined benefit pension plans, and both are completely employer-funded.

24 The *Pension Benefits Act*[FN3] (PBA) requires pension plans to calculate the necessary amounts to fund what are called current service costs, and special payments. Actuaries conduct actuarial valuations of the pension plan's assets and liabilities in order to determine, on an annual basis, the amounts necessary to pay these current service costs, and the special payments. Included in the special payments are calculations to determine if there is any unfunded liability in the plan, or solvency deficiency. The actuary is also required to calculate what are called wind-up payments. Wind-up payments are to ensure the plan will have sufficient assets to provide the promised benefits to employees if the plan is wound up.

25 Until about January of 2004 General Chemical was making all the necessary payments due under the plans. It made the monthly payments of $495,448 under the Union Plan, and $35,833 under the Salaried Plan. These monthly payments included both the current service costs and special payments. In January 2004, General Chemical first fell into **arrears**, paying only $86,743 to the Union Plan, and nothing to the Salaried Plan. At March 31, 2004, the date Harbert's security was perfected, there was a total of $1,356,230 owing to the Union Plan, and a total of $107,499 owing to the Salaried Plan.

26 In 2005, General Chemical did not pay any special payments to either pension plan. The initial CCAA order permitted the company, but did not require it, to make payments to the plans during the CCAA process, except for the special payments. At the end of October, 2005, there were outstanding special payments owed to the Union Plan in the amount of $4,130,510 and to the Salaried Plan in the amount of $159,790, for a total outstanding of $4,290,300.

27 In addition to these sums, the Administrator points out that since General Chemical is now bankrupt, the PBA in section 69(1)(c) permits the Superintendent to make an order requiring the pension plans to be wound up, in whole or in part. The actuaries also make a calculation concerning the amount required to fund the plans on a winding up. The Administrator has calculated that the net deficiency, as of the date of bankruptcy was $47,648,626 for the Union Plan, and $14,178,692 for the Salaried Plan. As of the date of these motions, the Superintendent had not yet made any order pursuant to s. 69(1)(c), and thus there is currently no requirement for the winding up of the plans, although such an order is anticipated and will be requested by the Administrator.

The appointment of an interim receiver and General Chemical's Bankruptcy

28 By November of last year, it became apparent to Harbert that General Chemical's restructuring efforts were not likely to succeed. Their attempts at a going concern sale failed. Harbert therefore moved to terminate the CCAA proceedings, and have an interim receiver appointed pursuant to s. 47 of the *Bankruptcy and Insolvency Act*. At the same time, General Chemical wished to assign itself into bankruptcy. By this point, the Superintendent of Financial Services had taken over General Chemical's pension plans. The Superintendent opposed the appointment of an interim receiver and a bankruptcy, as did the MOE. They did so primarily on the basis that their positions might be diminished by a bankruptcy and the imposition of the provisions of the *Bankruptcy and Insolvency Act.* They wished their rights to be determined in the context of CCAA proceedings, rather than under the BIA.

29 On the motions before Campbell J. the Superintendent also sought payment of unremitted employer pension contributions to General Chemical's pension plans. Although current service payments were up to date at the time of the hearing before Campbell J, other payments were not.

30 On November 18, 2005 Campbell J appointed the interim receiver and made the bankruptcy order, notwith-

standing the Superintendent's and MOE's opposition. He rejected the Superintendent's motion for payment of funds to the pension plan prior to terminating the CCAA proceeding. He faulted the Superintendent for failing to move for the relief it sought earlier in the process. Having found that there was nothing improper in the CCAA proceedings, he granted the orders, stating that to do otherwise "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."

31 Justice Campbell found that the relief the MOE sought was similar to that of the Superintendent. He dismissed their motion for much the same reason, finding that since the MOE did not raise its objections while there was a prospect of a going concern sale, it should not be permitted to effect a pre-emptive position by postponing a bankruptcy. He did, however, comment on the unsettled state of the law regarding the "constitutional interplay between the provincial environmental legislation and federal bankruptcy and insolvency law."

The appointment of an Administrator pursuant to the PBA

32 Every pension plan must have an administrator. Prior to its bankruptcy, General Chemical was the administrator of its two pension plans. Once General Chemical was in CCAA protection, the Superintendent of Financial Services took over as the administrator of General Chemical's two pension plans. After General Chemical's bankruptcy, the Superintendent appointed Morneau Sobeco Limited as the Administrator of the General Chemical pension plans.

The current proposed distribution

33 PwC, in its role as General Chemical's interim receiver, has now collected $6.5 million from General Chemical's general operations. Since the funds do not come from any of General Chemical's real estate holdings, and since Harbert is the only creditor with security against all General Chemical's operations, PwC proposes to distribute $3.75 million of those funds to Harbert.

34 The MOE views a distribution now as being premature. Although the MOE concedes any secured claim it has attaches only to General Chemical's land, it still maintains that both General Chemical and the Receiver have an obligation to take care of the cost of the environmental cleanup before any funds are paid out to any creditor. It says that to allow any money to be paid out to any creditor before the environmental issues can be resolved will have the result of saddling the citizens of the Province of Ontario with these costs, if there are no funds remaining to pay the cost of cleanup.

35 As far as the pension plan deficiencies are concerned, the Administrator takes the position that it has priority over Harbert, for the various reasons I have set out in paragraph 2 above.

36 It is against this general factual background that I turn to the applicable law and an analysis of it.

The law and analysis

37 Disposing of the issues here requires an analysis of the interplay among the provisions of the *Bankruptcy and Insolvency Act*, the *Pension Benefits Act*, the *Environmental Protection Act*, and the *Personal Property Security Act*. I will set out briefly the most salient features of each of these statutes that bear on these motions. In this context, it must be remembered that the BIA, as federal legislation, occupies the field of bankruptcy and insolvency, and has paramountcy over the other statutes, which are all provincial legislation. Central to this discussion is the concept that provincial legislation may not, either directly or indirectly, seek to reorder the priorities set out in the BIA.[FN4]

38 For the purpose of the discussion, it is important to remember that the BIA does two things. First, it allows a

secured creditor to give notice and have a receiver appointed pursuant to the terms of its security in order to realize on the security.[FN5] Second, it sets out a scheme of priorities, which governs payment to the various creditors. The general rule is that unsecured creditors are paid subject to the rights of secured creditors. As to secured creditors, the order of payment is generally made on the basis of the timing of their respective securities in the same collateral, with those creditors having the earliest security being paid first. Unsecured creditors share in whatever remains, on a *pari passu* basis. There are some special rules giving special protection concerning environmental issues, and also concerning wage claims. There are also special rules concerning Crown claims, preferred creditors, and how they are dealt with.

39 As to environmental issues, the Crown's claim "for costs of remedying any environmental condition or environmental damage affecting real property" is given priority under section 14.06(7) of the *Bankruptcy and Insolvency Act*, and is a statutory exception to the general scheme under the BIA. Any claim by either the federal or provincial Crown for the costs of remedying any environmental condition or damage affecting real property is "secured by a charge on the real property and on any other real property of the debtor that is contiguous" to the real property, and "is related to the activity that caused the environmental damage or charge." Subsection 14.06(7)(a) makes the Crown's charge enforceable in the same way as a mortgage or charge on real property, and subsection (b) makes this Crown charge against the realty rank above any other claim, right or charge against the property.

40 The EPA permits the MOE to issue orders to a polluter to clean up polluted property. This right extends, in some limited circumstances, to issuing these kinds of orders to interim receivers or trustees in bankruptcy, but only in exceptional circumstances, namely, where there is danger to the health or safety of any person, there is an impairment or serious risk of impairment of the quality of the natural environment, or there is injury or damage or serious risk of injury or damage to any property or to any pant or animal life.[FN6] Unless these exceptional circumstances exist, the MOE is prohibited from issuing orders to receivers or trustees unless the order arises from the gross negligence or wilful misconduct of the receiver or trustee.[FN7]

41 The PBA is designed to protect the pension rights of workers in Ontario. It sets up various methods by which unpaid pension payments are to be secured. It creates what is called a "deemed trust" against the employer's assets in an amount equal to the unpaid payments.[FN8] It goes further, and creates a lien in favour of the pension administrator. This is described as a "lien and charge" on the employer's assets, in an amount equal to the amounts deemed to be held in trust by the deemed trust provisions.[FN9]

42 The PPSA sets up a scheme for "perfection" of security interests in personal property. An unperfected security interest will be subordinated to a perfected security interest in the same collateral.[FN10] While registration of a financing statement is the way to perfect general security agreements, such as those at issue in this case, this does not apply to certain statutory liens, which do not require registration.[FN11] The PPSA, and thus its registration requirements, do not apply to either statutory liens, or deemed trusts arising out of a statute. Thus, the PPSA does not apply to the deemed trusts or statutory liens established by the PBA in favour of the pension administrator. In situations where a debtor is bankrupt, however, the PPSA says that these statutory liens arise on the effective date of the bankruptcy.[FN12]

43 I propose to discuss the law, and analyse the positions of the parties by first considering the validity of the MOE's position. Having done that, I will consider the Administrator's position, first by determining whether it has a lien. If I decide that it does, I will then consider whether its lien has priority in whole or in part over Harbert's security. I will also decide whether, as the Administrator suggests, the Harbert transaction is really equity acquisition, not debt. Lastly, I will consider the Administrator's submission that even if Harbert has priority, its priority should be subordinated to the interests of the pension plans for equitable reasons.

The MOE's position

44 One of the roles of the MOE is to protect the public against environmental hazards. For this reason, the MOE is given special status in the BIA. As stated above, it has security on the contaminated property, and any contiguous property related to the activity that caused the contamination. The MOE's security is enforceable in the same way as a mortgage, and has priority over any other security in the same property.

45 Here, the MOE has valid concerns about the sufficiency of its security on realty to cover all the considerable cleanup costs relating to the SASB. Its position is that the current Financial Assurance it has from General Chemical is insufficient to meet any shortfall from the secured real property to pay the cleanup costs. In fact, in the CCAA proceedings, the MOE sought unsuccessfully to have the CCAA stay lifted to increase General Chemical's Financial Assurance. What it is seeking to do here, in delaying any distribution, is much the same.

46 Apart from its security, the MOE is an unsecured creditor like any other, and must prove its claim in the General Chemical bankruptcy. To permit the MOE to delay distribution to a secured creditor would give the MOE a quasi-priority to other unsecured creditors, and would defeat or delay the legitimate interests of secured creditors. I have been pointed to no precedent that would permit the court to do so.

47 The MOE argues that the court should apply similar principles here to those applied in CCAA proceedings, in considering whether a distribution should be made. The CCAA proceedings have been terminated. General Chemical is in bankruptcy, and its first secured creditor has had an interim receiver appointed. I fail to see how CCAA principles are applicable here.

48 Here, the assets that have generated the funds to be paid out are not derived from any real property that General Chemical owns. The MOE can have no lien or priority in relation to these funds.

49 The MOE suggests that somehow both General Chemical and the Receiver have an additional obligation to meet the unsecured liability for environmental cleanup. As I see it, this position runs contrary to both the initial CCAA order, the current order appointing the interim receiver, and the provisions of the BIA.

50 The initial CCAA order provided that General Chemical's obligations concerning any statutes or regulations administered by the MOE were not alleviated or altered in any way by the CCAA stay. The order also did not prohibit the MOE from exercising its jurisdiction with respect to "matters involving existing or imminent significant environmental effects". There is no suggestion General Chemical has failed to comply with any statutes or regulations. There is also no evidence of any imminent environmental effects.

51 The order appointing the interim receiver contains the following provision:

> 9. THIS COURT ORDERS that all rights and remedies against the Debtor or affecting the Property are hereby stayed and suspending pending written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (a) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (b) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environmental or other mandatory statutory or regulatory provisions of applicable law ... or (e) prevent the Ministry of the Environment from issuing orders or other instruments pursuant to the *Environmental Protection Act* in respect of this Property.

52 Lastly, the BIA itself has provisions concerning the rights and obligations of trustees and receivers concerning environmental issues. These are found in section 14.06. First, section 14.06(1.1) provides that the section applies equally to a bankruptcy trustee, a proposal trustee and an interim receiver within the meaning of subsection 243(2).

53 The section goes on to state in subsection (2) that a trustee is not personally liable for any environmental damage that arose prior to the trustee's appointment, or after the trustee's appointment unless the condition arose

because of the trustee's gross negligence or wilful misconduct.

54 The MOE suggests that the provisions of the order appointing the interim receiver are sufficient to require both General Chemical and the receiver to comply with all provisions of the *Environmental Protection Act*, including complying with orders issued by the MOE. It says that because the current financial assurance is insufficient to meet the costs of cleanup for the SASB, it should be able to require an increase in the financial assurance, and require the company to pay it. This may well be correct, as far as it goes. The position fails to consider, however, the status of the obligation in relation to the rights of secured creditors. The provisions of the order do not create a secured claim for the MOE's orders, nor do they suggest the MOE has priority over the interests of secured creditors.

55 As I read these provisions, and consider their interrelationships, I am drawn to the conclusion that first, none of General Chemical, the interim receiver or the trustee have any personal obligation to pay the cost of environmental cleanup; and second, the MOE can be nothing more than an unsecured creditor in the General Chemical bankruptcy for cleanup costs to the extent General Chemical's real property and the existing financial assurance are insufficient to meet those costs. As a result, I see no basis on which the court can delay the requested distribution on the bases advanced by the MOE.

56 In coming to this conclusion I have considered the MOE's argument concerning the applicability of the *Panamericana* decision[FN13] from the Alberta Court of Appeal. In *Panamericana*, the Alberta Court of Appeal found that a bankrupt company had an inchoate liability for the ultimate abandonment (or clean closure) of certain oil wells. The court found that the liability for the wells passed to the receiver-manager, who had been appointed pursuant to a secured creditor's security under s. 47 of the BIA. The court held that the Alberta statutory requirements concerning abandonment did not directly conflict with the scheme of distribution under the BIA, and thus the doctrine of paramountcy had no application. Even though this result meant less money for distribution in the bankruptcy, the court imposed the obligation.

57 At first glance, the reasoning in *Panamericana* seems somewhat compelling. However, it must be kept in mind that it was decided before section 14.06(7) of the BIA was enacted. It seems to me that section 14.06(7) now specifically legislates concerning the issue of priority of any environmental cleanup costs. That being the case, the provisions of the BIA must take precedence over any provincial legislation. The field has now been occupied, and any provincial effort to extend further rights to the Crown in respect of environmental contamination must be viewed as being in conflict with the provisions of the federal statute.

58 In addition, Harbert points out that *Panamericana* can also be distinguished on the basis that in *Panamericana* the interim receiver had taken possession of the contaminated wells pursuant to the secured creditor's security. Here, the Harbert security does not include the SASB, and thus the interim receiver is not in possession of the contaminated site.

59 As to the MOE's suggestion that the receiver and the company have freestanding personal obligations to remedy the contamination, that argument must also fail, in light of the fact that there is no suggestion the receiver has created environmental problems through gross negligence or wilful misconduct.

60 For these reasons, I reject the MOE's suggestion that an interim distribution should be delayed. I turn now to the more complex and vexing questions raised by the position of the Administrator.

Does the Administrator have a lien?

61 The Administrator relies on section 57(5) of the PBA to support its position that it has a valid lien against General Chemical's assets. Section 57 of the PBA deals with both trust obligations of employers regarding pension contributions, and the creation of a lien and charge in favour of a plan administrator.

62 Since both of General Chemical's pension plans are employer-funded, it is not necessary to consider section 57(1), which deals with the employer's obligation to hold employee contributions in trust until they are paid into the plan. In employer-funded plans, there are trust provisions relating to employer contributions. These are set out in section 57(3), which reads as follows:

> 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 pan an amount of money equal to the to the employer contributions due and not paid not the pension fund.

63 In subsection (4), section 57 goes on to make provision for what happens on a wind up of a pension plan. Section 57(4) says:

> 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.

64 In the context of subsection (4), it must be remembered that General Chemical's pension plans have not yet been wound up, although the Administrator expects that the Superintendent of Financial Services will no doubt request their winding up.

65 Lastly, in section 57(5), the PBA creates a lien and charge on an employer's assets in an amount equal to the amounts deemed to be held in trust under the trust provisions of sections 57(1), (3) and (4). Section 57(5) provides:

> 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).

66 Since General Chemical is now bankrupt, these provisions must be considered in the context of the BIA. All parties agree that the trust provisions created by sections 57(3) and (4) do not create true "trusts" of the sort contemplated by section 67(1)(a) of the BIA. That section excludes from the bankrupt's property, "property held by the bankrupt in trust for any other person". In *British Columbia v. Henfrey Samson Belair Ltd.*[FN14] the Supreme Court of Canada held that s. 67(1)(a) did not apply to statutory deemed trusts that lack the common law attributes of a trust. One of these attributes is that the property be kept separate, and not commingled with the bankrupt's own property. Clearly, a deemed trust does not meet this necessary criterion. Part of the court's reasoning was that to permit a provincially created statutory trust to operate as a "true" trust would permit provinces "to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province."[FN15]

67 Here, the question is whether the PBA's section 57(6) lien is similarly tainted. The Administrator takes the position that the lien is quite independent of the deemed trust provisions, and is no different than other provincially created statutory liens that create secured creditor status in a bankruptcy. For example, the Administrator points to the lien on cattle created by the British Columbia *Cattle Lien Act*, the lien on real property in favour of the Law Society created by Ontario's *Legal Aid Act*, a lien on horses or other animals created under Ontario's *Innkeepers Act*, or municipality that has a lien on real property for overdue taxes. All of these create secured debt under the BIA.[FN16] A significant difference, however, between these liens and the PBA statutory lien is that all these others are registered,[FN17] or require possession[FN18] of the collateral in order to be effective.

68 Harbert says that the lien provisions of the PBA were designed specifically to do indirectly what the trust provisions could not; that is, protect unpaid pension payments as secured claims in a bankruptcy. Harbert says two things suggest that the lien was expressly created to attempt to do indirectly what the trust provisions had failed to do

directly.

69 First, Harbert points to Ontario's 1980 *Report of the Royal Commission on the Status of Pensions in Ontario.* This Report noted that although the PBA "purports" to create a trust for unpaid contributions, the Act "makes no provisions for the enforcement of the trust by statutory lien or other such means, and it is doubtful if the trust as presently constituted is enforceable." The Report also recognized that "to the extent that such legislation falls within the federal bankruptcy jurisdiction, any provincial initiative to enforce the trust may be beyond the legislative authority of the province". The Report went on to state that existing bankruptcy legislation did not give any special protection to pension contributions, and that pension plan trustees could claim as ordinary creditors only.[FN19] The Report discussed proposed amendments to the BIA that might remedy the situation, but concluded at the present time there was no mechanism to protect these unpaid claims on a bankruptcy or insolvency. The Report therefore recommended that it would "seem advisable for the Government of Ontario to create by statute a lien to enforce the trust protection ... We recommend that legislation for this purpose be passed as soon as possible."[FN20]

70 I am drawn to the conclusion, therefore, that the lien provisions were enacted to try to enforce the deemed trust provisions on bankruptcy, and thus circumvent the difficulties encountered by the PBA trust provisions on bankruptcy. That being the case, it appears the lien provisions are an indirect attempt by the province to do indirectly what it could not do directly, and to legislate priorities for unpaid pension plan contributions. This is a matter solely within the sphere of federal legislation.[FN21]

71 Second, Harbert notes that Bill C-55, if proclaimed in force by the federal government, will amend the BIA to create a "Pension Charge" over all of a debtor's assets to secure first, any unremitted employee pension contributions, second, any unpaid employer-defined pension and contributions, and third, any unpaid normal costs as required by the applicable pension legislation. The proposed amendments in Bill C-55 exclude funding deficiencies under defined benefit plans from the proposed Pension Charge. Bill C-55 has not yet been proclaimed in force. I assume, however, that it is designed to alter the current state of the law. That being the case, I must conclude that the Pension Charge provisions are intended to create a charge where none existed before. That being the case, I am drawn to the conclusion that under the current provisions of the BIA there can be no lien or charge related to unpaid pension contributions. The proposed amendments must be designed to remedy something. Parliament will only pass or amend legislation for an intelligible purpose.[FN22]

72 As I see it, under the current BIA, the Administrator has no enforceable lien under the BIA. I am supported in this view by the decision of Farley J. in *Ivaco Inc., Re*.[FN23] In *Ivaco Inc.*, Farley J expressly held that "an administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy ... Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA lien." Campbell J followed this reasoning in his decision in this case to appoint the interim receiver. I, too, accept and follow their reasoning, and must conclude the Administrator has no lien.

73 If I am wrong on the issue of whether there is a lien or not, I will also consider the Administrator's position as if a lien were created, and address the issues of priority of such a lien in the context of all the arguments the Administrator has submitted.

Would a lien have priority over Harbert's security?

74 The question of priority is dependent on many things. As far as Harbert is concerned, their rights are easy to determine. There is no question that their security interest was perfected on March 31, 2004. The real question is whether the pension plan administrator would have had lien rights prior to this date, and if so, in what amount.

75 The BIA sets out a scheme of distribution among secured, preferred and unsecured creditors. It does not, however, determine the priorities of secured creditors among themselves. In bankruptcy, priorities between competing

secured creditors in the same collateral are determined according to the "first in time" rule, subject to the principles of equity. Therefore, where the equities between two competing secured creditors are equal, the creditor whose security arose first will have priority over the other.

76 It is clear that Harbert's security was effective March 31, 2004, when it was perfected under the PPSA. As between Harbert and the Administrator, the question, then, is if the Administrator had a lien, did it have a lien prior to March 31, 2004, and if so, in what amount.

77 The Administrator's lien is described in s. 57(5) of the PBA as being "in an amount equal to the amounts deemed to be held in trust." The deemed trusts are in "an amount of money equal to the employer contributions due and not paid into the pension fund." According to the Administrator's material, the employer contributions due and not paid as of March 31, 2004 totalled $1,356,230 for the Union Plan, and $107,499 for the Salaried Plan. Thus, the amount of the Administrator's lien that would have predated Harbert's security totalled $1,463,729. That, however, is not the end of the inquiry. The next issue is to consider the positions of the parties at the date of the bankruptcy, and to determine what was owing to each on that date in respect of their March 31 2004 secured debt.

78 In the case of the Administrator, matters are complicated by the fact that between March 31, 2004 and the date of the bankruptcy, further deficiencies accrued in both plans, and significant payments were also made. The question is whether the payments should be applied to the earliest deficiencies or not. The Administrator takes the position that it can decide where to apply the payments, while Harbert suggests that the court should apply the rule in *Clayton's* case[FN24], and credit the payments against the earliest deficiencies.

79 For the Union Plan, General Chemical should have paid $495,448 per month to cover both the current service costs and special payments due under the plan. As I have stated, at March 31, 2004, there were **arrears** of $1,356,230 in relation to this plan. Following March 31, 2004, General Chemical made some monthly payments to the Union Plan, but they were never in the total amount due. In June, September and December, they made no payments at all. By the end of December, the cumulative total of the **arrears** was $2,452,485. General Chemical did, however, make significant payments in both October and November of 2004. They paid $1,577,694 in each of those months, or $1,082,246 more than the amount due in each of those months. If those payments are applied to the oldest **arrears**, then General Chemical would have paid off the amount owing on the portion of the Administrator's lien that would have priority over Harbert.

80 Similarly, for the Salaried Plan, General Chemical made significant payments in both October and November of 2004. These payments exceeded the total monthly obligation for these two months by $113,472. Again, if these excess payments are applied to the earliest **arrears**, they would have discharged the Administrator's prior lien.

81 The question, therefore, is how the excess October and November payments should be allocated. The general rule, enunciated in *Clayton's Case, Re*, is that the court matches the repayment of various related debts so that the earliest payment goes toward the satisfaction of the earliest debts. This is also referred to as the "first in first out" rule. Cumming J. helpfully enunciated the rule in the *Sagaz* case[FN25] as follows:

> The rule is that when a debtor makes a payment to a creditor he may appropriate it to any debt owed to that creditor he pleases. The creditor must apply the payment accordingly. If the debtor does not so appropriate his payment, then the creditor has the right to do so to any debt he wishes. However, in the event there is no appropriation made by either party and there is one continuous account of several items, the rule is that the payment will be credited against the indebtedness according to the priority of time.

82 Here, there is no evidence from either General Chemical or the pension plans that either indicated any intention of how the payments were to be allocated when they were paid. It is true that the Administrator now seeks, some 18 months after the last payment was made, to allocate it to later debt. Surely the intention must be manifest at or around

the time the payment is made, not so long after the fact. Absent any evident intention from anyone at the time the payments were made, I apply the general rule, and find the payments were made to reduce the earliest pension indebtedness, thus retiring any lien for which the Administrator would have had priority.

83 I therefore conclude that even if the Administrator had a lien in priority to Harbert, it would have been discharged by the payments made in October and November of 2004. Harbert would be entitled to be paid on its security first, with the balance of the Administrator's lien ranking behind Harbert.

84 This leaves the Administrator's remaining two arguments. First I will consider its argument that the Harbert financing was really an equity acquisition, rather than true debt.

Is the Harbert transaction really equity, not debt?

85 The Administrator suggests that because Harbert became the majority shareholder of Industrial as part of its financing, with the right to appoint three members of its Board of Directors, its financing of Industrial was essentially an equity purchase, rather than debt. The Administrator says that as a result, Harbert is not really a creditor, and should have no priority at all. I disagree.

86 As Harbert points out, the initial DIP financing JP Morgan Stanley Chase provided was in virtually identical terms to the financing Harbert replaced it with. All the financing was court-approved in the Chapter 11 proceedings in the USA. Contrary to what the Administrator says, all the loans were cross-collateralized on the assets of both Industrial and General Chemical.

87 The Administrator also suggests that General Chemical did not receive any benefit from the Harbert loans, but rather, all money was advanced to Industrial, but secured only on the assets of General Chemical. The evidence does not bear this out. As I have already mentioned, all the loans were cross-collateralized on the assets of both Industrial and General Chemical. Also, the Revolver records show General Chemical draws on the facility quite apart from the $9 million used to repay the Industrial DIP loan. There were both draws, and repayments throughout the period from April 2004 to January of 2005, all of which suggests to me that General Chemical was using the facility for corporate purposes, in the usual fashion revolving lines of credit are used. Lastly, the Guarantee and Security Agreement, executed by both Industrial and General Chemical expressly recites that both borrowers "are engaged in related businesses, and...will derive substantial direct and indirect benefit from the making of the extensions of credit under the Credit Agreement."[FN26] Similarly, the Introductory Statement to the Revolver loan states that the proceeds of the loans will be used to repay all outstanding obligations under the DIP facility, and "for working capital and other general corporate purposes of the Borrowers and their respective subsidiaries."[FN27] I conclude from all of this that General Chemical received direct benefit from the Harbert's loan facility.

88 The Administrator also suggests that the Harbert financing documents lack true indicia of debt, such as repayment terms, interest and the like. This is not the case. The Revolver sets interest rates, and payment dates. It requires both Industrial and General Chemical to repay both principal and interest. The Revolver also requires principal payments in the amount of 75% of what is defined as "Excess Cash Flow", to ensure speedier repayment of the debt. All of these things point to true debt, not an equity acquisition.

89 As a result, I cannot conclude that the Harbert financing was designed solely to finance an equity investment in Industrial, as opposed to being a true loan to General Chemical. This aspect of the Administrator's argument must therefore fail.

Do the equities require an inversion of priorities?

90 The Administrator takes the position that even if Harbert is a secured lender, with priority over the Adminis-

trator, the equities require the subordination of Harbert's security to the position of the Administrator, and thus of the pension plans. The equitable jurisdiction of the bankruptcy court is likely broad enough to permit this.[FN28]

91 In *Christian Brothers of Ireland in Canada*, the court relied on three requirements for a successful claim of equitable subordination, as these had been articulated in both the American case of *Mobile Steel*[FN29], and by the Supreme Court of Canada in *Canadian Deposit Insurance Corp.*[FN30] These requirements are the following:

> (1) The Claimant must have engaged in some type of inequitable conduct;
>
> (2) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the Claimant; and
>
> (3) Equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

92 It should be remembered, however, that equitable subordination has been used sparingly by Canadian courts. Inequitable conduct requires the court to conduct a broad inquiry into the conduct of the parties to determine what is right and just in all the circumstances. The test is a "sense of simple fairness."[FN31] Equitable subordination is not used, however, to "adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the Court perceives the result as inequitable."[FN32] The court must therefore be careful not to approach the question on the basis of who the competing creditors are (i.e., the "innocent and vulnerable" employees, as opposed to the "sophisticated and wealthy" lender), but rather by the nature of their respective claims.

93 In support of its position concerning "inequitable conduct", the Administrator relies on the fact that as a result of the March 31, 2004 transaction, Harbert become the controlling shareholder of Industrial, General Chemical's parent. The Administrator claims that the Harbert $9 million advance was used to pay off Industrial's DIP loan, rather than directly benefit General Chemical. It says that as a result it would be inequitable for Harbert to be given priority over General Chemical's assets, when General Chemical did not benefit from the advance on the Revolver. To allow this would be at the expense of the members and retirees of the pension plans.

94 The essence of the Administrator's claim in relation to this part of the test is that General Chemical had no benefit from the Harbert loans. As I have already stated, the evidence does not bear this out. I am persuaded on the basis of Appendices "C" and "D" to the Monitor's twelfth report to the court (attached to the Interim Receiver's first report to the court), that General Chemical itself took draws on the Revolver, quite apart from the $9 million draw used to repay the Industrial DIP loan. That being the case, General Chemical did benefit from the loans.

95 It therefore cannot be said that it would be inequitable for Harbert to be given priority for its loans to General Chemical. Since the Administrator must meet all three elements of the test, its failure to meet this branch is sufficient to dispose of the issue of equitable subordination. For the sake of completeness, however, I will deal with the two remaining aspects of the question as well.

96 As to the requirement for injury to creditors or an unfair advantage to Harbert, the Administrator says that the true nature of the Harbert loans gives Harbert an unfair advantage over the other General Chemical creditors. There is no question that as first secured lender, Harbert has an advantage over the other creditors. That is the nature of having this kind of security. It is true that the interests of General Chemical's innocent and vulnerable employees and pensioners will be adversely affected by Harbert's priority. I cannot see, however, that Harbert's advantage is an *unfair* advantage, of the sort contemplated by the case law. This part of the argument must fail as well.

97 Lastly, equitable subordination is only permitted where it would not run contrary to the statutory scheme in the *Bankruptcy and Insolvency Act*. As the Administrator points out, Canadian courts have shown a willingness to apply

the principle of equitable subordination where the ranking provisions of the BIA are not applicable.[FN33] As the court put it in *Bulut*, the court will not apply the doctrine of equitable subordination to alter a *statutory* scheme for determining priorities among creditors. Here, if the Administrator had a lien, the issue of priority between its security and Harbert's would lie outside the BIA. The BIA does not set out a scheme of priorities among secured creditors; it merely says that secured creditors are to be paid in priority to unsecured creditors.

98 While the Administrator could meet the third branch of the test, its failure to meet the other two is sufficient to defeat the claim for equitable subordination. As a result, I do not view this as an appropriate case to employ the doctrine of equitable subordination.

Disposition

99 For these reasons, the interim receiver's motion is granted, and an order will go authorizing the interim receiver to pay out to Harbert the sum of $3.75 million on account of their secured debt, from the $6 million proceeds the interim receiver currently holds. The interim receiver's motion for similar relief and for the approval of the Receiver's First Report to the Court and the activities of the Receiver described therein is also granted. The Administrator's motion is dismissed.

100 As the parties have agreed, there will be no costs of any of the motions.

Motion granted.

FN1 R.S.O. 1990 c. E.19

FN2 R.S.O. 1990 c. P.10

FN3 R.S.O. 1990 c. P.8

FN4 *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.)

FN5 See sections 244 and 47 of the BIA. Where a secured creditor has given, or is about to give notice, of its intention to enforce its security under s. 244(1) of the BIA, the court may appoint a trustee as interim receiver over the debtor's property, if the court is satisfied that the appointment is necessary to protect the debtor's estate or the interests of the creditor. Here, C. Campbell J appointed PwC in that capacity, pursuant to Harbert's s. 47 notice.

FN6 EPA, s. 168.20(1)

FN7 EPA, s. 168.19(1)

FN8 PBA, s. 57(1),(3) and (4)

FN9 PBA, s. 57(5)

FN10 *Personal Property Security Act*, section 20(1)(a)(i)

FN11 PPSA, ss 4(1)(a) and (b)

FN12 PPSA, section 20(2)(a)(i)

FN13 *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 8 C.B.R. (3d) 31 (Alta. C.A.)

FN14 [1989] 2 S.C.R. 24 (S.C.C.)

FN15 *Ibid.* at 33

FN16 See, for example, *Canadian Exotic Cattle Breeders' Co-operative, Re* (1979), 103 D.L.R. (3d) 112 (B.C. S.C.); *Calla, Re* (1975), 9 O.R. (2d) 755 (Ont. Bktcy.); *Rauf, Re* (1974), 5 O.R. (2d) 31 (Ont. Bktcy.); *Rockland Chocolate & Cocoa Co., Re* (1921), 61 D.L.R. 363 (Ont. S.C.); *Condominium Plan No. 762 0380 v. Edmonton (City)* (2001), 24 C.B.R. (4th) 9 (Alta. Q.B.)

FN17 for example, s. 48(1) of the *Legal Aid Services Act, 1998* .S.O. 1998 c. 26 permits the Corporation to register a lien against the land of the person to whom a legal aid certificate is provided. S. 48(2) permits the lien to be enforced in the same manner as a mortgage.

FN18 *Cattle Lien Act*, R.S.B.C. 1960, c44; section 3 of the *Innkeepers Act*, R.S.O. 1970 c.223, now R.S.O. 1990 c. I.7, the former *Mechanics and Wage Earners' Line Act*, R.S.O. 1914 c.140, as referred to in *Rockland Chocolate & Cocoa Co., Re*, above

FN19 Report of the Royal Commission on the Status of Pensions in Ontario, Vol. 2 pp 148-149

FN20 *Ibid.*

FN21 *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.)

FN22 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham:Butterworths, 2002) at 472-473

FN23 (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), leave to appeal allowed 10 November 2005. For other cases taking a similar view, see *Graphicshoppe Ltd., Re* (2005), 78 O.R. (3d) 401 (Ont. C.A.); *United Air Lines Inc., Re* (2005), 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]); *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.)

FN24 *Clayton's Case, Re* (1816), 1 Mer. 572 (Eng. Ch. Div.)

FN25 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2000] O.J. No. 77 (Ont. S.C.J.), aff'd [2000 CarswellOnt 3414 (Ont. C.A.)]

FN26 Guarantee and Security Agreement dated March 31, 2004, recitals, page 512 of Harbert's responding motion record.

FN27 Introductory Statement to the Revolving Credit Agreement among General Chemical Industrial Products Inc., General Chemical Canada Ltd. As Borrowers, and The Banks Party Hereto, and HSBC Bank USA, as Administrative Agent and Canadian Administrative Agent, dated as of March 31, 2004, found at page 190 of Harbert's responding motion record.

FN28 Section 183 of the BIA vests the bankruptcy court with equitable jurisdiction. See *Christian Brothers of Ireland*

in Canada (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]) in which the court held there is no jurisdictional or constitutional impediment to the court utilizing the concept of equitable subordination if it feels it is appropriate to do so.

FN29 *Matter of Mobile Steel Co.*, 563 F.2d 692 (U.S. C.A. 5th Cir. 1977), Court of Appeal for the First Circuit, per Clark J.

FN30 *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1992), 97 D.L.R. (4th) 385 (S.C.C.)

FN31 *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.)

FN32 *First Truck Lines, Inc., Re*, 48 F.3d 210 (U.S. C.A. 6th Cir. 1995)

FN33 See *Christian Brothers of Ireland in Canada*, supra, and *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108 (Ont. C.A.)

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General Chemical Canada Ltd., Re

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Plaintiffs / Respondents) And GENERAL CHEMICAL CANADA LTD. (Defendant / Respondent)

Ontario Court of Appeal

S.T. Goudge, R.A. Blair, J. MacFarland JJ.A.

Heard: March 21-22, 2007
Judgment: September 6, 2007
Docket: CA C45784, C45800

Proceedings: affirming *General Chemical Canada Ltd., Re* (2006), 53 C.C.P.B. 284, 22 C.B.R. (5th) 298, 2006 CarswellOnt 4675, 23 C.E.L.R. (3d) 184 (Ont. S.C.J. [Commercial List])

Counsel: Mark Zigler, Andrew J. Hatnay, Fred L. Myers, Lawrence J. Swartz for Appellant, Morneau Sobeco Limited Partnership in its capacity as administrator of General Chemical Canada Ltd.'s pension plans

Ronald Carr for Appellant, Ministry of Environment

Ashley John Taylor for Pricewaterhouse Coopers Inc., interim receiver of General Chemical Canada Ltd.

Richard B. Swan, Robert Staley, Linda Visser for Respondents, Harbinger Capital Partners Fund, L.P., Harbinger Capital Partners Master Fund I, Ltd.

Tycho M.J. Manson for Honeywell ASCa Inc.

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

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — General principles

Priority — Bankrupt was chemical company — Bankrupt's contributions to employees' pension plans fell in arrears — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Motion judge found that lien created by s. 57(5) of Pension Benefits Act ("PBA") was not enforceable under Bankruptcy and Insolvency Act ("BIA") — Administrator of pension plans appealed — Appeal dismissed — Bankrupt was deemed to hold in trust for

beneficiaries of pension plans amount equal to its unpaid contributions under s. 57(3) of PBA, but this did not create trust as contemplated by s. 67(1)(a) of BIA — Section 57(5) of PBA did not qualify administrator as secured creditor for purposes of BIA — Lien and charge accorded to administrator under s. 57(5) of PBA secured employer's obligation to pay unpaid contributions to pension funds, but it did not secure debt owed to administrator.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous liens or charges

Bankrupt was chemical company — Bankrupt's contributions to employees' pension plans fell in arrears — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Motion judge found that lien created by s. 57(5) of Pension Benefits Act ("PBA") was not enforceable under Bankruptcy and Insolvency Act ("BIA") — Administrator of pension plans appealed — Appeal dismissed — Bankrupt was deemed to hold in trust for beneficiaries of pension plans amount equal to its unpaid contributions under s. 57(3) of PBA, but this did not create trust as contemplated by s. 67(1)(a) of BIA — Section 57(5) of PBA did not qualify administrator as secured creditor for purposes of BIA — Lien and charge accorded to administrator under s. 57(5) of PBA secured employer's obligation to pay unpaid contributions to pension funds, but it did not secure debt owed to administrator.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Provincial — General principles

Environmental cleanup costs — Bankrupt was chemical company — Ministry of Environment claimed that bankrupt failed to comply with provincial environmental safety regulations by depositing by-products in basin — Basin was contaminated site and remedial costs exceeded bankrupt's financial assurance given under Environmental Protection Act — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Ministry appealed — Appeal dismissed — There was no basis to interfere with discretion of motion judge to order interim distribution — Ministry was unsecured creditor against operating assets — Ministry had security against bankrupt's real property — Secured creditor's security did not extend to basin nor did interim receiver have possession of that real property — Motion judge found no evidence of non-compliance with environmental orders nor any threat of imminent environmental harm.

Cases considered by *S.T. Goudge J.A.*:

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.) — referred to

Clayton's Case, Re (1816), 1 Mer. 572, [1814-23] All E.R. Rep. 1, 35 E.R. 781 (Eng. Ch. Div.) — considered

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.) — considered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 1991 CarswellAlta 315, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "secured creditor" — considered

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — considered

s. 14.06(8) [en. 1997, c. 12, s. 15(1)] — referred to

s. 67(1)(a) — considered

s. 136(1) — referred to

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

Generally — referred to

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

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

Generally — referred to

s. 19(1) — referred to

s. 22(1) — referred to

s. 55(2) — considered

s. 56(1) — referred to

s. 57 — considered

s. 57(1) — considered

s. 57(3) — considered

s. 57(4) — considered

s. 57(5) — considered

s. 59 — referred to

s. 71 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

2007 CarswellOnt 5497, 2007 ONCA 600, 2007 C.E.B. & P.G.R. 8258, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 35 C.B.R. (5th) 163, 228 O.A.C. 385

Generally — referred to

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

Generally — referred to

APPEALS by administrator of bankrupt's pension plans and Ministry of Environment from judgment reported at *General Chemical Canada Ltd., Re* (2006), 53 C.C.P.B. 284, 22 C.B.R. (5th) 298, 2006 CarswellOnt 4675, 23 C.E.L.R. (3d) 184 (Ont. S.C.J. [Commercial List]), granting interim receiver's motion for interim distribution of funds to secured creditor.

Editor's Note

This decision adds to the small but growing body of jurisprudence on the interplay between pension law and insolvency law, in particular where there are unremitted contributions to an underfunded pension plan and the employer has been placed into bankruptcy. The Court of Appeal upheld the decision of the Superior Court, albeit on somewhat different grounds, which shift in reasoning may cause a touch of confusion when working through any similar fact situations which might arise in the future.

***S.T. Goudge J.A.*:**

1 The respondents, the two Harbert Funds ("Harbert")[FN1], are a secured creditor of General Chemical Canada Ltd. ("GCCL"), which was placed in bankruptcy effective November 18, 2005. Its interim receiver has accumulated $6.5 million from GCCL's operating assets, including cash, accounts receivable and inventory, and seeks the court's authorization to make an interim distribution from these funds to Harbert, as secured creditor, in the amount of $3.75 million.

2 This proposal is opposed by the administrator of GCCL's two pension plans and by the Ontario Ministry of the Environment ("MOE").

3 The administrator says that, pursuant to s. 57(5) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), it holds a lien over GCCL's assets in relation to GCCL's unpaid pension contributions, and this gives it priority over Harbert's security.

4 MOE says that GCCL has failed to comply with provincial environmental safety requirements, and there will therefore be significant cleanup costs that exceed GCCL's financial assurance given under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("EPA"). MOE says that GCCL and its interim receiver have an obligation to meet these costs, and that any distribution at this stage is premature and may leave no assets for environmental remediation.

5 At first instance, the motion judge found against both the administrator and MOE, and authorized the interim distribution to Harbert. Both the administrator and MOE have appealed. The appeals were argued together, although they each raise their own issues. I therefore propose to address each separately.

6 In each case, I agree with the result reached by the motion judge, although for somewhat different reasons.

The Administrator's Appeal

7 Until January 2005, when it discontinued operations, GCCL manufactured calcium chloride at its plant in

Amherstburg, Ontario. On March 31, 2004, Harbert advanced $9 million to GCCL, secured against GCCL's operating assets. No one questions that Harbert's security instruments were properly registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), and constitute a perfected security interest in GCCL's personal property as of that date.

8 However, GCCL developed financial problems, and on January 19, 2005, it was ordered under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*").

9 By November 2005, it became clear that GCCL's attempt to restructure while under *CCAA* protection was unlikely to succeed. Effective November 18, 2005, pursuant to the order of C. Campbell J. of the Superior Court of Justice, GCCL made an assignment in bankruptcy and an interim receiver of certain of its assets was appointed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

10 GCCL maintained two pension plans for its employees, one for its salaried employees and one for its unionized employees. Both are defined benefit plans and both are completely employer funded.

11 Until about January 2004, GCCL was making the contributions due under both plans. At that point, it began to fall into arrears, and by March 31, 2004, the date Harbert's security was perfected, that shortfall was $1,356,230 for the union plan and $107,499 for the salaried plan.

12 After March 31, 2004, while GCCL made several sporadic payments to both plans, the shortfalls continued to grow. The only exception to this pattern occurred in October and November 2004 when GCCL made payments to both plans in excess of the required contributions for those months. That excess amounted to $2,164,492 for the union plan and $113,472 for the salaried plan. Thereafter, the shortfalls continued to grow, although nothing in the *CCAA* order prohibited GCCL from making the required contributions.

13 The *PBA* requires that every pension plan have an administrator. Up until its bankruptcy on November 18, 2005, GCCL served in that role for both plans. However on December 8, 2005, the Ontario Superintendent of Financial Services, in his capacity as the regulator of Ontario registered pension plans, appointed Morneau Sobeco Limited Partnership (the "Administrator") as the administrator of both plans pursuant to s. 71 of the *PBA*.

14 This proceeding arose because the interim receiver has now collected $6.5 million from GCCL's general operations. These funds do not come from any of GCCL's real estate holdings. Since it views Harbert as the only creditor with security against GCCL's operating assets, the interim proposes to distribute $3.75 million of those funds to Harbert as secured creditor.

15 The Administrator opposes the motion approving that payment because of the security it says it has under the *PBA*. At the same time, the Administrator moved for a declaration that its security pursuant to s. 57(5) of the *PBA* makes it a secured creditor ranking ahead of Harbert's security.

16 The motion judge granted the interim receiver's motion and dismissed that of the Administrator. She found that the lien created by s. 57(5) of the *PBA* was not enforceable under the *BIA* because it was an attempt by the province to do indirectly what it could not do directly, namely to legislate priority under the *BIA* for unpaid pension plan contributions.

17 She drew support for this conclusion from Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess., 38th Parl., 2005 (assented to 25 November 2005), which has been passed by the federal Parliament but not proclaimed, and which would create a "pension charge" over a debtor's assets for unpaid pension plan contributions of the kind in issue here. The motion judge concluded that since this amendment

must be designed to alter the current state of the law, no such security presently exists.

18 The motion judge went on to find that even if the Administrator held a lien effective for *BIA* purposes, the rule in *Clayton's Case, Re* (1816), 1 Mer. 572, 35 E.R. 781 (Eng. Ch. Div.), should be applied, and absent any evident intention at the time of the excess contributions paid by GCCL in October and November 2004 as to which particular deficiencies they were to apply to, they should be applied to reduce the earliest pension indebtedness. This would eliminate all shortfalls prior to the effective date of Harbert's security for which the Administrator might have had priority.

Analysis

19 The important section of the *PBA* for the Administrator's appeal is s. 57. Section 57(1) applies to employee contributions required under a pension plan and hence is not relevant here, where both plans are completely employer funded. The same is true of s. 57(4), which applies where a pension plan is wound up, since that has not yet happened in this case.

20 The critical subsections are ss. 57(3) and 57(5). They read as follows:

> (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.
>
> . . . . .
>
> (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).

21 The *BIA* sets out a scheme of priorities governing payment by creditors in the event of a bankruptcy. Section 67(1)(a) excludes from the bankrupt's property any property held by the bankrupt in trust for another person. Then, in distributing the bankrupt's estate, those meeting the definition of "secured creditor" in s. 2 of the *BIA* are paid first, generally on the basis that the earliest security is paid first. Then, s. 136(1) sets out a list of other creditors who, subject to the rights of secured creditors, are to be preferred and paid in the priority listed in that subsection. Finally, unsecured creditors share *pari passu* in what remains.

22 The critical definition in the *BIA* is that of "secured creditor" defined in s. 2. It reads:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrumental held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
>
> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> (b) any of
>
> (i) the vendor or any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provision of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; [emphasis added]

23 There is no doubt that once GCCL began to fall short of its required contributions to both pension funds in January 2004, s. 57(3) of the *PBA* applied and GCCL was deemed to hold in trust for the beneficiaries of those plans an amount equal to its unpaid contributions.

24 However, the Administrator concedes that this section does not create a trust as contemplated by s. 67(1)(a) of the *BIA* and excludes nothing from the estate of GCCL for the purposes of distribution under the *BIA*. All parties to this appeal agree that that consequence is dictated by *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.). That case held that s. 67(1)(a) of the *BIA* does not apply to statutory deemed trusts that lack the common law attributes of a trust, such as the requirement that the property be kept separate and not commingled with the bankrupt's own property.

25 The Administrator's argument, however, is simply that the lien and charge accorded to it by s. 57(5) of the *PBA* is separate from the deemed trust created by s. 57(3), and is effective for the purposes of the *BIA*, even if the deemed trust is not.

26 For this argument to succeed, however, the first step is that, as holder of a s. 57(5) statutory lien, the Administrator must meet the definition of secured creditor in the *BIA*.

27 In my view, it cannot do so. The Administrator does not hold a charge or lien as security for a debt due or accruing due to the Administrator from the debtor GCCL.

28 The *PBA* provides that the Administrator is the person that administrates the pension plan. The Administrator is to ensure that the pension plan, and the pension fund maintained to provide benefits under the plan, are administered in accordance with the *PBA* and its regulations (s. 19(1)). In doing so, the Administrator must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person (s. 22(1)). Section 56(1) requires the Administrator to ensure that all contributions due under the pension plan are paid to the pension fund when due. To facilitate this, the Administrator is given the right to commence legal proceedings to obtain payment of contributions due under the pension plan (s. 59).

29 Section 55(2) sets out the employer's obligation to make contributions under a pension plan. It reads as follows:

(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

(a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

30 None of these provisions suggest that the contributions owed by GCCL are a debt due to the Administrator.

Rather, GCCL's legal obligation was to make the contributions to the pension funds that were required under the pension plans. Nor is there even any indication that the contributions are owed to the Administrator to be held in trust for the pension funds. Rather, the legislation contemplates that those contributions are owed to the pension funds pursuant to the pension plans, and are not the property of the Administrator.

31 The Administrator's right to commence legal proceedings simply permits it to seek to compel the employer to pay the contributions to the pension funds due under the pension plans.

32 The consequence of this is that the lien and charge accorded to the Administrator secures the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. It does not secure a debt owed to the Administrator. Hence s. 57(5) does not qualify the Administrator as a secured creditor for the purposes of the *BIA*.

33 That conclusion is sufficient to dispose of the Administrator's appeal, and makes it unnecessary to decide whether, if s. 57(5) of the *PBA* qualifies the Administrator as a secured creditor for the purposes of the *BIA*, that section is rendered inapplicable because its effect is to reorder the priorities for payment set out in the *BIA*.

34 The motion judge found that s. 57(5) has this effect. Relying on *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), she held that s. 57(5) does not give the Administrator an enforceable lien under the *BIA*. As I have indicated, I need not address this issue. Although it was not argued, my reluctance to do so is heightened because it does not appear that a notice of constitutional question was served, even though the issue squarely raises the constitutional applicability of s. 57(5) of the *PBA* in these circumstances.

35 As I have said, the motion judge also decided that even if s. 57(5) of the *PBA* gives the Administrator a lien and charge that is effective for *BIA* purposes, the debt thus secured should be treated as having been fully discharged by the overpayments made in October and November 2004. The motion judge reached that conclusion by applying the general principle in *Clayton's Case, Re* to treat these excess payments as being applied to the earliest arrears in GCCL's required contributions, consequently eliminating the shortfall that existed on March 31, 2004. This would exhaust the effect of any priority the Administrator's secured claim would have over Harbert's secured claim because it arose before Harbert registered its security on March 31, 2004. Any secured claim by the Administrator for GCCL contributions required after that date but not paid would rank after Harbert's secured interest.

36 Given my conclusion that the Administrator is not a secured creditor for *BIA* purposes, I need not address this issue either. In any event, on the assumption she makes of constitutionality, I would not interfere with the motion judge's conclusion. In my view, it was open to her on the facts before her to adopt the evidentiary presumption suggested by the rule in *Clayton's Case, Re*. Since there is no evidence from GCCL, the then administrator, concerning what indebtedness the overpayments in October and November 2004 were intended to apply to, and that the present Administrator was not in place when those overpayments were received or applied, I would conclude that the motion judge could properly resort to the default presumption suggested by the general principle. Nor do I see any equitable basis for not doing so. This is not a case where there is any suggestion that such a conclusion would reflect any attempt by GCCL to adversely affect pension plan members.

37 To summarize, I would dismiss the Administrator's appeal for the reasons I have given.

The MOE Appeal

38 At the root of the MOE opposition to the distribution ordered by the motion judge is one simple fact. In manufacturing calcium chloride at its Amherstburg plant, GCCL produced by-products that were deposited in what was called the Soda Ash Settling Basin ("SASB"). It is now a contaminated site and remedial costs could reach $64 million. The MOE is anxious to see that GCCL assets are available to pay for this clean up.

39 The MOE has a number of regulatory tools to use to protect the environment. In 1997, it issued a Provisional Certificate of Approval to GCCL which *inter alia* required GCCL to provide for the closure of the SASB and assurance that the costs of the closure would be paid for by the company. The latter was provided by a financial assurance that was subject to annual review by the MOE. In March 2004, the MOE accepted $3.4 million as the appropriate amount required of GCCL. Since then, the MOE has vastly increased its estimate of the cost of clean up, to as much as $64 million.

40 The *CCAA* order stayed the MOE's right to review and increase GCCL's financial assurance. In August 2005, the MOE sought the lifting of the stay to permit it to increase that amount, but it was unsuccessful.

41 The November 18, 2005 order appointing the interim receiver did not exempt either the receiver or GCCL from compliance with environmental regulations, nor did it prevent the MOE from issuing orders in respect of the SASB. However, that order expressly excluded the SASB from the property of GCCL over which the interim receiver was appointed.

42 It is uncontested that Harbert's security does not extend to the SASB. Rather, it expressly excludes it. Moreover, the MOE does not assert a security interest in GCCL's operating assets over which Harbert does have security. Section 14.06(7) of the *BIA* does give the MOE a security interest in the bankruptcy in GCCL's contaminated real property and any contiguous property related to the activity that caused the environmental damage. This security ranks above any other security against the same property.

43 However, it is the MOE's position that the decision to distribute on an interim basis should be guided by what is fair and reasonable having regard to all stakeholders, akin to the considerations applied under the *CCAA*. It argues that the "polluter pays" principle for environmental remediation requires no distribution until there can be an assurance that GCCL's assets are sufficient to clean up the SASB.

44 The motion judge found against the MOE and concluded that, in her discretion, the distribution should proceed. She held that the MOE was an unsecured creditor in relation to the GCCL operating assets that generated the funds to be paid out, that to permit the MOE to effect a delay in distribution would be to give it a *quasi* priority over other unsecured creditors, and in any event it has security over the SASB. She also found no evidence of any imminent environmental effects or any non-compliance by GCCL with any environmental regulations.

45 In this court, the MOE repeats its arguments below and raises, as it did there, the case of *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the *BIA*, and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.

46 I agree with the motion judge that the reasoning in that case has been overtaken because of subsequent amendments to the *BIA*. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim. Neither were in effect at the time of *Panamericana*. To give effect to provincial environmental legislation in the face of these amendments to the *BIA* would impermissibly affect the scheme of priorities in the federal legislation.

47 Beyond that, I see no basis to interfere with the discretion of the motion judge to order the interim distribution. Harbert is the only creditor secured against the GCCL operating assets that generated the funds for distribution. In that regard, the MOE is an unsecured creditor. The MOE does, however, have security against GCCL's real property, as provided by the *BIA*. Harbert's security does not extend to the SASB, nor does the interim receiver have possession of that real property. The motion judge found no evidence of non-compliance with environmental orders nor any threat of

imminent environmental harm. In these circumstances, I see nothing unreasonable in the interim distribution going forward.

48 I would therefore dismiss the MOE appeal. In the result, both appeals are dismissed.

49 Neither the Administrator nor Harbert sought costs. While the receiver sought costs against the MOE, the latter neither sought costs nor invited an adverse costs award. In the circumstances, I would order no costs to any party.

R.A. Blair J.A.:

I agree.

J. MacFarland J.A.:

I agree.

Appeals dismissed.

FN1 The two Harbert Funds have since changed their names to Harbinger Capital Partners Fund, L.P. and Harbinger Capital Partners Master Fund I, Ltd.

END OF DOCUMENT

2008 CarswellOnt 879, 385 N.R. 395 (note), 252 O.A.C. 396 (note)

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2008 CarswellOnt 879, 385 N.R. 395 (note), 252 O.A.C. 396 (note)

General Chemical Canada Ltd., Re

Morneau Sobeco Limited Partnership, in its capacity as pension plan administator of two pension plans sponsored by General Chemical Canada Ltd, a bankrupt, General Chemical Canada Ltd., Salaried Employees Pension Plan (CRA Registration No. 06925205) and the General Chemical Canada Ltd. Bargaining Unit Employees Pension Plan (CRA Registration No. 0695213) v. Harbert Distressed Investment Fund, L.P., Harbert Distressed Investment Master Fund Ltd., Pricewaterhouse Coopers Inc.

Supreme Court of Canada

Abella J., Bastarache J., Charron J.

Judgment: February 21, 2008
Docket: 32335

Proceedings: Leave to appeal refused, 228 O.A.C. 385, (sub nom. Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.) 2007 C.E.B. & P.G.R. 8258, 35 C.B.R. (5th) 163, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 2007 ONCA 600, 2007 CarswellOnt 5497 (Ont. C.A.); Affirmed, 53 C.C.P.B. 284, 22 C.B.R. (5th) 298, 2006 CarswellOnt 4675, 23 C.E.L.R. (3d) 184 (Ont. S.C.J. [Commercial List])

Counsel: None given

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

Pensions.

Bankruptcy and insolvency.

Environmental law.

Per Curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Numbers C45784 and C45800, 2007 ONCA 600, dated September 6, 2007, is dismissed with costs to the respondents Harbert Distressed Investment Fund, L.P. and Harbert Distressed Investment Master Fund Ltd.

END OF DOCUMENT

Tab 6

1977 CarswellMan 12, 27 C.B.R. (N.S.) 201, [1978] 1 W.W.R. 679, 82 D.L.R. (3d) 368

I.W.A., Local 1-324 v. Wescana Inn Ltd.

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 1-324 v. WESCANA INN LTD. AND CLARKSON COMPANY LIMITED

Manitoba Court of Appeal

Freedman C.J.M., Monnin and O'Sullivan JJ.A.

Heard: October 10, 1977
Judgment: November 28, 1977

Counsel: *W. C. Kushneryk*, for appellants.

M. Myers, Q.C., and *L. Cherniack*, for respondent.

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

Labour Law --- Bargaining rights — Practice and procedure — Application procedure — General.

Receivers --- Actions by and against — Actions against receiver.

Receivership — Application by union for certification — Order staying proceedings against defendant and receiver — Leave of court required by union to continue proceedings — Application for certification constituting a proceeding taken against the defendant or receiver.

A receiver-manager of a hotel was appointed by the court. The order appointing the receiver-manager contained a clause prohibiting proceedings against the defendant and the receiver-manager without leave of the court. A union applied to the Manitoba Labour Relations Board for certification as the bargaining agent for the employees who worked at the hotel. A judge of the Court of Queen's Bench ruled that the application for certification was not an action at law or other proceeding taken or continued against the defendant or the receiver-manager.

Held:

On appeal, the application for certification was a proceeding taken or continued against the defendant or the receiver-manager. The order staying proceedings was designed to give protection to the receiver-manager in the conduct of his business as a receiver and manager. Leave of the court is necessary for any proceeding which may affect the receiver-manager in carrying on such business. The majority of the court granted the union leave to continue the application for certification.

Per MONNIN J.A. (dissenting in part) — Leave of the court was required for the application for certification to

proceed, but leave to proceed should not be granted on the grounds that negotiating a collective bargaining agreement would impose an unwarranted burden upon the receiver-manager and interfere with his attention to the salvaging of the assets under his management.

Cases considered:

Considered:

Royce v. Macdonald (1909), 19 Man. R. 191, 12 W.L.R. 347 (C.A.).

Re Winnipeg and Western Dev. Co. (1916), 9 W.W.R. 1360 (Man.).

Re Great West Life Assur. Co.; Re Christie, [1927] 3 W.W.R. 302 (Man.).

Bldg. Service Employees Internat. Union, Loc. 204 v. Guar Trust Co. of Can. (1947), 47 C.L.L.C. 1243, para. 16,500.

Bazinet v. Coons, 10 W.W.R. (N.S.) 667, [1954] I D.L.R. 621 (Sask. C.A.).

Statute considered:

Labour Relations Act, 1972 (Man.), c. 75 (also C.S.M., c. L 10).

Authorities considered:

Kerr on Receivers, 14th ed. (1972), pp. 162-63 and 226-27.Falconbridge on Mortgages, 4th ed. (1977), pp. 759-60, para. 36.5.Pennington's Company Law, 2nd ed. (1967), p. 411.Gower's Company Law, 3rd ed. (1969), p. 437.

Appeal from an order of Wright J. declaring that an application by a union to the Manitoba Labour Relations Board for certification as the bargaining agent for the employees of a hotel in receivership was not a "proceeding" stayed by the order appointing the receiver-manager.

***O'Sullivan J.A.* (*Freedman C.J.M.* concurring):**

1 Wescana Inn is a hotel at The Pas, Manitoba, operated until 31st March 1977 by Wescana Inn Ltd. On that date an order was made in the Court of Queen's Bench appointing the appellant The Clarkson Company Limited (herein called "Clarkson") as receiver-manager. The receiver-manager was appointed at the request of the Federal Business Development Bank, a mortgagee of the assets.

2 The order appointing Clarkson contains a clause which reads:

> And This Court Doth Further Order that no action at law or other proceeding shall be taken or continued against the Defendant or the said Receiver and Manager without leave of this Court first being obtained.

3 The parties in the proceedings now before us do not challenge the propriety of the order. They accept that the order has validity but differ over the meaning and application of the clause.

4 International Woodworkers of America, Local 1-324 (herein called the "union") wants to become the certified bargaining agent for the employees who work at the Wescana Inn. The union has signed up sufficient members to

warrant its applying for certification.

5 On 9th May 1977 the union applied to the Manitoba Labour Board for certification as to a unit described as "all employees of the Wescana Inn, The Pas, except hotel manager and those excluded by the Act" [The Labour Relations Act, 1972 (Man.), c. 75 (also C.S.M., c. L10)]. The employer was described as Wescana Hotels Limited.

6 On 27th May Clarkson filed a notice of contestation. It alleged that Wescana Hotels Limited "is not and was not the employer of the employees of the Wescana Inn, The Pas, Manitoba" since 31st March 1977. It referred to para. 4 of the order appointing the receiver and to the lack of leave of the court for the taking of the "proceedings" before the Manitoba Labour Board.

7 On 1st June 1977 the union amended its application for certification and substituted as alleged employer "Wescana Inns Ltd. or the Clarkson Company Limited."

8 The Manitoba Labour Board suggested to counsel that it would be appropriate to seek leave of the Court of Queen's Bench before proceeding with the merits. The labour board hearing was then adjourned, and the union applied before Wright J. of the Court of Queen's Bench for an order granting leave under the receivership order and, alternatively, asking for a declaration that such leave was not necessary since an application for certification is not an "action at law or other proceeding taken or continued against the defendant (Wescana Inns Ltd.) or the receiver, Clarkson."

9 The learned Queen's Bench Judge, on 29th July 1977, made an order declaring that the application for certification "is not an action at law or other proceeding taken or continued against Wescana Inns Ltd. or the Clarkson Company Limited."

10 An appeal is now taken from that order. Mr. Kushneryk appeared purporting to act for both Wescana Inn Ltd. and for the receiver-manager. I am not clear how he can be acting at the same time for both Wescana Inn Ltd. and for Clarkson, but no point was made of this by counsel for the union, so I say no more on the subject. It is clear, at all events, that Mr. Kushneryk appeared on behalf of Clarkson.

11 During the hearing before us the question was asked, Who is and was the employer of the men who were working at Wescana Inn on 9th May 1977, the date of the application for certification? Mr. Cherniack, for the union, suggested that this might be a matter within the sole jurisdiction of the Manitoba Labour Board, but argued that the receiver-manager is the employer. He referred us to Kerr on Receivers, 14th ed. (1972), pp. 162-63 and 226-27. He said it was not a completely settled point. Mr. Kushneryk, for Clarkson, on the other hand, said that neither Wescana Inn Ltd. nor the receiver-manager is or was the employer at material times. He did not shrink from saying that the employer must be the court which appointed the receiver-manager.

12 I am satisfied that the court is not in any sense the employer of those who work at Wescana Inn. Since it is impossible to be an employee without having an employer, the employer must be either Wescana Inn Ltd. or Clarkson.

13 I think the position of a receiver-manager appointed by the court is accurately described in Falconbridge on Mortgages, 4th ed. (1977), pp. 759-60, para. 36.5:

> If a person is appointed by the court to be receiver and manager of a company, he is not the agent of the company. The company does not appoint him and cannot dismiss him, and he is not bound to obey its directions. Only the court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him if he is not carrying on the business properly. As it is impossible to suppose that the relation of agent and principal exists between him and the court, the inference is necessarily drawn that he acts in pursuance of his appointment on his own responsibility and not as an agent. He has in fact no principal....

14 On the issue whether Wescana Inn Ltd. or Clarkson is the employer, I agree that the point is not completely settled by authority. On the one hand, Pennington's Company Law, 2nd ed. (1967), says at p. 411:

> If a receiver is appointed by the court ... all contracts of employment ... are automatically terminated in the same way as if the company had ceased carrying on its business. It is immaterial that the receiver continues carrying on the business temporarily, for he does not do so as an agent for the company, and employees who continue to work for him do so under new contracts of employment with him.

15 On the other hand, Gower's Company Law, 3rd ed. (1969), says at p. 437:

> The appointment of a receiver, at any rate if he is appointed out of court, does not automatically terminate contracts of employment with the company ...
>
> ... the position of a receiver appointed by the court may be different. It may be, though this is obscure, that such an appointment automatically determines all contracts of employment and that a re-engagement will not be deemed to be continued employment with the company [footnote 74].

16 In view of the paucity of authority referred to us by counsel on either side, I would be reluctant to decide the question at this time unless it were necessary for the determination of the case. Since the application for certification is in the alternative, I hold that it is unnecessary to decide the issue.

17 The next issue to be considered in this case is whether or not an application for certification is "a proceeding taken against" Wescana Inn Ltd. or Clarkson. Wright J. held that it was not, but he did not give any reasons for his decision.

18 Counsel for the union invited us to view "proceedings" in the context of the clause in the receivership order as being ejusdem generis with the words "no action at law." He cited the judgment of Dysart J. in *Re Great West Life Assur. Co.; Re Christie*, [1927] 3 W.W.R. 302 (Man.). That judge interpreted s. 2(*c*) of The King's Bench Act, R.S.M. 1913, c. 46, which defined "action" as including "suit, set-off or counterclaim, and means a civil proceeding commenced by statement of claim or in such other manner as may be prescribed by the rules of court." Dysart J. held that the rule "ejusdem generis" applies and:

> ... that 'other proceeding' must mean some process or step in a matter to be brought before, or pending in, this Court. It cannot, I think, be extended to include extra-judicial matters such as the foreclosing of mortgages in the land titles office or registry office.

19 Counsel for Clarkson agreed there was some inconsistency in the cases, but he cited *Re Winnipeg and Western Dev. Co.* (1916), 9 W.W.R. 1360 (Man.), where Galt J. held that in s. 22 of the Winding-up Act, R.S.C. 1906, c. 144, "no suit, action or other proceeding" includes a mortgage sale through the land titles office.

20 Counsel also referred to what was said by Procter J.A. in *Bazinet v. Coons*, 10 W.W.R. (N.S.) 667 at 670, [1954] 1 D.L.R. 621 (Sask. C.A.): "No definition can be given to the word 'proceedings' which would give to the word a definite and specific meaning in all instances."

21 Counsel for Clarkson submitted that the better view is the one expressed in *Royce v. Macdonald* (1909), 19 Man. R. 191, 12 W.L.R. 347, where Perdue J.A. of this court held that in s. 24 of The Real Property Limitation Act, R.S.M. 1902, c. 100, "no action or suit or other proceeding" includes a proceeding to exercise a power of sale in a mortgage.

22 I agree that the word "proceeding" is one of those words of very wide import that must be interpreted according to the context in which it is used. I do not think that the ejusdem generis principle or, perhaps more correctly, the noscitur a sociis maxim is decisive. The order is designed to give protection to the receiver-manager appointed by the court in the conduct of his business as a receiver-manager, and I hold that the term "proceeding" in the receivership order embraces a proceeding before the Manitoba Labour Board to obtain certification as a certified bargaining agent.

23 Counsel for the union also submitted that, even if "proceeding" includes "certification applications", it cannot be said that an application for certification is one taken "against" an employer. He made an attractive argument for the view that the Manitoba Labour Relations Act contemplates that certification is a means of ensuring labour-management harmony and that collective bargaining cannot be considered an adversary procedure. However that may be, I am satisfied that what is contemplated by the receiving order is that leave is necessary for any proceeding which may affect the receiver-manager in the carrying on of his business and, therefore, I conclude, contrary to the decision of the learned Queen's Bench Judge, that an application for certification is "a proceeding taken or continued against the Defendant or the Receiver and Manager."

24 I reach that conclusion despite the argument advanced to the contrary by the Ontario Labour Board in *Bldg. Service Employees Internat. Union, Local 204 v. Guar. Trust Co. of Can.* (1947), 47 C.L.L.C. 1243, para. 16,500.

25 Counsel for the union suggested that a decision to reverse the decision of Wright J. would place employees at a disadvantage since the date of filing an application for certification is crucial to the establishment of the union's position and the statutory protection given to terms and conditions which are in effect at the date of certification. I agree that there is a legitimate concern among unions that employers in general should not have advance notice of an application for certification because of the possibility that some employers might take advantage of the period intervening between the notice and the application to change terms and conditions of work. But I cannot believe that this should be a concern of primary importance in a case where a receiver-manager appointed by the court is carrying on the business. He is an impartial officer and must act in an impartial manner as between the company, the debenture holder or mortgagee and all other creditors, including employees of the company.

26 The remaining question is whether or not leave should be given to the union in the circumstances of this particular case. In my opinion, the question is one for the discretion of the court. Among the considerations that would no doubt be considered is the length of time during which it is contemplated that the receiver-manager will carry on the business. No doubt the courts will proceed on the basis that it is clear legislative policy that the organization of employees into unions which conduct collective bargaining under the restraints and protection of The Labour Relations Act should be encouraged where a sufficient number of employees in an appropriate bargaining unit freely choose a union to be their bargaining agent.

27 In the case before us, it is apparent that the receiver-manager is not appointed for a limited period. He was still carrying on the business on 12th October, when the hearing was held before us. Under all the circumstances, I hold that this is an appropriate case for leave to be given.

28 Accordingly, I would allow the appeal to the extent of varying the order appealed from to delete the declaration therein set out and to substitute provision for leave to the union to continue its application for certification. I would make no order as to costs of the appeal.

***Monnin J.A.* (dissenting in part):**

29 This is an appeal from a decision of Wright J. in the nature of a declaration to the effect that an application for certification as a bargaining unit by certain employees of Wescana Inn Ltd., in receivership, is not an action at law or other proceeding taken or continued against Wescana Inn Ltd. or its receiver and manager, The Clarkson Company Limited, and that, consequently, leave of the court was not required by the employees in order to proceed before the

labour board for certification. This was a chambers motion, and Wright J. gave no reasons.

30 It was argued that the court-appointed receiver and manager was not an employer and that the employer was probably the Court of Queen's Bench itself, under whose authority the receiver and manager was appointed. There is a paucity of pronouncement on this particular issue in the various text books dealing with receivership. I am not surprised at this paucity, since the matter is not of such moment to require lengthy judicial pronouncements. Once the receiver and manager is appointed by the court, all contracts of employment are automatically terminated since the limited corporation is in temporary limbo and can no longer carry on business by itself or by its officers or employees. It has been cast aside by the court and the power to manage has been given to a receiver and manager.

31 If, as in this case, the receiver and manager continues to carry on the business in an attempt to salvage it and sell it as a going concern, he must of necessity rehire the employees, but as a principal, not as an agent of the company nor as an agent of the Court of Queen's Bench, for he is neither. He is a court-appointed official with the specific task of gathering all the assets, salvaging them and disposing of them for the benefit of one or more creditors who requested the assistance of the court. He is not an agent of the court, though he has received his mandate from it and is constantly under its supervision. He has ready access to it and can call upon it at any time for guidance. Likewise, he is not an agent of the limited corporation, since it has been deprived of its normal power to manage its own business.

32 The manager and receiver is therefore the employer of those employees he hires to assist him in his management and is solely responsible to them. This point gave me little difficulty and I now proceed to the next one.

33 It is totally unrealistic and contrary to facts to argue that collective bargaining cannot and must not be considered as an adversary procedure. It is exactly that. One side is pitted against the other to the extent that, regrettable as it may be, collective bargaining and mostly all employer-employee relations, including grievances, lead to withdrawal of services, strike, lock out and, unfortunately, too often to the use of violence. To attempt to hide this fact is to be totally detached from the realities of life and, equally, to be oblivious to what goes on around us. One may hope that the situation were different and that such relations could be carried on in a friendly manner devoid of all passions, but that is simply not the case.

34 I am satisfied that the receiving order contemplates that leave from the court is necessary for any proceedings or type of proceedings of any nature whatsoever which may affect the receiver and manager in the carrying on of his business, and whether he must enter into collective bargaining with his recently hired employees is a matter which certainly concerns his business. I have no hesitation in concluding that an application for certification to the labour board is a proceeding "taken or continued against the Defendant or the said Receiver and Manager without leave of this Court first being obtained."

35 Wescana Inn Ltd. had been in operation at The Pas for quite some time prior to the application for certification by certain of its employees. As a matter of fact, these and other employees previously worked for Wescana Inn Ltd. without the benefit of any certification. There now remains the question whether leave ought to be given to the union. There is no doubt that this is a matter of discretion, but one to be exercised judicially.

36 We are not dealing here with a simple case of one employer and a group of employees. Because of mismanagement or other financial difficulties a creditor had to exercise powers given to it under its security and ask the court for the appointment of a receiver-manager to gather the assets; to manage the property for an unlimited period of time which may, depending upon the circumstances of each case, be short or long; to pay debts; and, finally, to dispose of the assets by sale or otherwise — all under the direct supervision of the court.

37 If the assets can be sold as a going concern, it will be to the advantage of all creditors. A receiver and manager is ill equipped to enter into collective bargaining. He has probably no personnel manager and will have to retain the services of a professional negotiator. Furthermore, receivers may be hard to find if this task is now added to their

function.

38 A collective bargaining agreement is a delicate piece of negotiation with advantages and disadvantages to a business and especially to an ongoing concern. It must be negotiated with care as it binds the parties for much more than the agreed term of one or two years; also the agreement is usually written in such terms that few paragraphs can be withdrawn once agreed upon. It must, therefore, be negotiated in full cognizance of the business involved and with the difficulties of its future existence as an ongoing concern in mind. Furthermore, it is binding on subsequent purchasers.

39 A receiver and manager is appointed as a last resort. He has little time to safeguard the future existence of the business and must leave that to the next operator. An improvident collective agreement can seriously hamper the sale of the assets.

40 Notwithstanding legislative authority which states that collective bargaining should be facilitated in normal circumstances, I do not consider the relation of receiver and manager a normal one. On the contrary, it is an exceptional remedy. All the attention of the receiver and manager ought to be directed to the salvaging of the assets under his management. Problems of labour relations, employer-employee relations, ought to be kept to the bare minimum, within the law. The new operator, if there ever is one, can much better handle the matter, especially since the employees did not deem it necessary to take advantage of The Labour Relations Act, 1972 (Man.), c. 75 (also C.S.M., c. L10), prior thereto.

41 In other words, a period of "management and receivership" is a temporary one although the management may last for some months and the exercise is partly to solve financial difficulties and salvage assets of persons who have invested moneys with a business which cannot be carried on by its owners. It is not a time to create further tensions or to add additional costs and time-consuming discussions such as are required in order to negotiate a collective agreement. Under the circumstances of this case, and in most cases of management-receivership, I hold that leave should not be given, and am of the view that Wright J. erred when he granted it.

42 I would, therefore, allow the appeal.

Tab 7

CITATION: Nortel Networks Corporation (Re), 2010 ONSC 1304
COURT FILE NO.: 09-CL-7950
DATE: 20100318

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Fred Myers, J. Carfagnini and C. Armstrong, for Ernst & Young, Inc., Monitor

Derrick Tay, Alan Merskey and Suzanne Wood, for the Applicants

Adam Hirsh, for the Board of Directors of Nortel Networks Limited and Nortel Networks Corporation

Arthur O. Jacques, for Nortel Canadian Continuing Employees

Kevin Zych, for Informal Noteholder Group

John Marshall and James Szunski, for The Pensions Regulator (U.K.)

Mark Zigler, for the Former and Disabled Canadian Employees

William Burden and David Ward, for the UK Pension Trustee and the Pension Protection Fund

M. Starnino, for the Pension Benefit Guarantee Fund

Alex MacFarlane, for the Unsecured Creditors' Committee

HEARD: FEBRUARY 25, 2010

RELEASED: FEBRUARY 26, 2010

REASONS: MARCH 18, 2010

ENDORSEMENT

INTRODUCTION

[1] Ernst & Young, Inc., in its capacity as Monitor of the Applicants (the "Monitor") brings this motion for an order:

(a) validating short service;

(b) declaring that the purported exercise of rights and the commencement of proceedings against the Applicants, Nortel Networks Corporation and Nortel Networks Limited, by The Pensions Regulator under the *Pensions Act 2004* (U.K.) amount to breaches of paragraphs 14 and 15 of the Initial Order;

(c) authorizing, directing and requiring the Applicants and the Monitor to refrain from participating in any proceedings commenced by The Pensions Regulator in breach of the Initial Order; and

(d) declaring that the for the purposes of these proceedings all acts taken by the U.K. Pensions Regulator in the purported exercise of rights and in commencing any proceedings against any of the Applicants, without the consent of those Applicants and the Monitor or without leave of this court having been first obtained, are null and void and should be given no force or effect in these proceedings nor otherwise recognized as creating or forming the basis of any valid or enforceable rights, remedies or claims against the Applicants or any of their assets, property or undertaking in Canada.

[2] The motion was heard on February 25, 2010.

[3] On February 26, 2010, the Record was endorsed: "The Stay applies. The relief requested in (a), (b) and (d) of the Notice of Motion is granted. No order in respect of (c). Reasons will follow".

[4] These are those reasons.

FACTS

[5] Paragraphs 14 and 15 of the Initial Order, granted January 14, 2009, provide as follows:

> 14. THIS COURT ORDERS that until and including February 13, 2009 or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced, or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the affected Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the affected Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
>
> 15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of

the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the affected Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

[6] The Pensions Regulator ("The Pensions Regulator") is the body charged with the enforcement of certain provisions of the *Pensions Act 2004* (U.K.) (the "U.K. Statute").

[7] The U.K. Statute's objectives include protecting the benefits of employees in work-based pension schemes and promoting proper administration of those schemes. Under s. 96 of the U.K. Statute, the Regulator may determine whether or not to take regulatory action, which includes, *inter alia*, determining whether the applicable pension is underfunded, quantifying the deficit and holding the employer or a related party responsible for such deficit. The Determinations Panel, an internal group, determines whether the regulatory functions should be exercised.

[8] On August 24, 2009, The Pensions Regulator advised the Administrators of the Nortel Networks UK Limited ("NNUK") (the "Administrators") Pension Plan that it was considering issuing a warning notice, a mandatory step towards issuing a financial support direction ("FSD"). A warning notice sets out the grounds for the potential issuance of an FSD, which is a direction requiring a party to put financial supports in place for an underfunded pension scheme. Any company that is an associate of or is otherwise connected with an employer may be issued an FSD.

[9] On September 4, 2009, The Pensions Regulator wrote to Nortel Networks Corporation ("NNC") advising that it was considering issuing a warning notice seeking an FSD against NNC and other members in the Nortel Group.

[10] On September 16, 2009, NNC wrote to The Pensions Regulator advising that because of the stay issued by this court under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA"), it could not consider individual potential claims.

[11] On January 11, 2010, The Pensions Regulator issued a warning notice to NNC, NNI and 27 other companies in the Nortel Group (the "Notice"). The Notice was sent to Nortel Networks Limited ("NNL") and NNC in Canada.

[12] The Pensions Regulator informed NNL and NNC that they had until March 1, 2010 to make submissions under the U.K. Statute, failing which default proceedings would be taken. The court was advised that the issuance of an FSD is subject to time limits and that the decision to issue an FSD must occur no more than two years after the "relevant time." The relevant time is designated by The Pensions Regulator in this case as June 30, 2008, such that any decision to issue an FSD in respect of this matter must be made by June 30, 2010.

ISSUE

[13] By issuing the Notice, did The Pensions Regulator contravene the stay granted in the Initial Order?

POSITIONS OF THE PARTIES

[14] Counsel to the Monitor submits that the issuance of the Notice constitutes the commencement of an enforcement process by a tribunal that is stayed by paragraph 14 of the Initial Order and an assertion of rights by a governmental body that is stayed by paragraph 15 of the Initial Order.

[15] The Monitor takes the position that the Notice is effectively a pleading required under the U.K. Statute to enable The Pensions Regulator to make an FSD under the U.K. Statute. Such a determination would cause foreign affiliates of NNUK, including NNL and NNC, to become liable to provide financial support for the pension plan maintained by NNUK.

[16] The Monitor contends that in the Notice, The Pensions Regulator purports to exercise rights under the U.K. Statute including, without limitation, the commencement of proceedings to require NNL and NNC to pay up to £2.1 billion (approximately CDN$4 billion) to fund the deficit in NNUK's pension plan. The Pensions Regulator also exercises purported statutory rights, such as deeming certain facts for the purposes of the U.K. Statute and demanding a response by a time limit under threat of default proceedings. Counsel submits that these exercises of rights without consent or leave are stayed by paragraphs 14 and 15 of the Initial Order.

[17] Counsel to the Monitor further submits that if The Pensions Regulator is allowed to proceed under the Notice and the process described therein, the result would be extremely prejudicial to the Applicants' ongoing restructuring efforts and to their creditors generally because:

i. Management is fully engaged in the restructuring process and the Applicants cannot afford to sacrifice the time and resources required to participate in the complex process envisaged in the Notice.

ii. The restructuring would be disrupted and the progress already made therein, including the international efforts to negotiate the Allocation Protocol under the IFSA, would be threatened by The Pension Regulator's proceedings or its efforts to make determinations therein.

iii. This Court is the proper forum for proceedings to determine the validity of and resolve all claims against the Applicants at an appropriate time and in an appropriate manner.

[18] Regarding forum, the Monitor submits that the issues put forth by The Pensions Regulator can only be properly determined under the CCAA. The NNUK Pension Trust Limited (the "Trustee") and the U.K. Pension Protection Fund (the "PPF") filed proofs of claim in accordance with the October 7, 2009 Claims Process Order (the "Claims Process Order"). The

Trustee and the PPF claim "in the amount to be determined to be owing to [the Trustee and the PPF] pursuant to the Financial Support Direction Proceedings undertaken pursuant to the provisions of the [Pension Act]". Counsel to the Monitor submits that the filing under the Claims Procedure Order expressly raises the issues in the Notice.

[19] The Monitor submits that there are extensive issues of fact and law for resolution in those proceedings. Moreover, there are issues as to whether any FSD determination can or ought to be recognized as a proper claim under the CCAA. Counsel submits that these are substantial issues upon which determination may or may not be required depending on the outcome of the Allocation Protocol negotiations, and regardless of when such issues may be resolved, there are issues that have been raised in these proceedings by the parties having the economic interest in the FSD claims and who have appeared before this Court and have filed proofs of claims under the Claims Process Order. Counsel argues that it is not efficient, reasonable or appropriate for the Applicants to proceed with massive litigation now in a severely compressed timeframe before a foreign tribunal with an expressed interest in benefiting one group of creditors.

[20] At the very least, the Monitor submits that the Notice, having been issued in breach of the stay, should be declared null and void and of no force or effect due to the court's power to compel observance of its orders and to fulfill the purpose of the CCAA.

[21] The Monitor also seeks a direction that it refrain from engaging in the proceedings commenced by The Pensions Regulator due to the prejudice caused by a diversion of resources.

[22] The Applicants substantially adopt the Monitor's characterization of the Notice and the prejudice it would cause the parties.

[23] The Applicants support the Monitor's request for an order declaring that any findings or claims emanating from the Notice and the associated process be null and void, and not recognizable or enforceable in this proceeding.

[24] The position of the Monitor is also supported by counsel to the Noteholders, the Unsecured Creditors' Committee, the Former Disabled Canadian Employees and the Nortel Continuing Canadian Employees.

[25] Counsel to the PPGF and the Board of Directors of NNL and NNC took no position.

[26] The motion was opposed by counsel on behalf of The Pensions Regulator, which responds only to one of the heads of relief sought in the Monitor's Notice of Motion: whether the activities of The Pensions Regulator are a breach of paragraphs 14 and 15 of the Initial Order. The Pensions Regulator submits that the issue is whether this court has jurisdiction to make the order sought by the Monitor in relation to The Pensions Regulator.

[27] The Pensions Regulator further submits that if this Court does have such jurisdiction, it should not be exercised in this case in any event.

[28] Regarding the assertion by the Monitor and Applicants that the Notice is a pleading, Counsel for The Pensions Regulator took the position that that the Notice provides a standard

procedure for determining, internally, whether The Pensions Regulator should commence proceedings to exercise its statutory powers (the "Standard Procedure").

[29] Counsel to The Pensions Regulator submits that pursuant to the Notice, the Determinations Panel will consider exercising its powers to issue an FSD and that these powers have not yet been exercised and may never be exercised. A determination in this regard will not be made until the responding parties to the Notice have had an opportunity to make representations and those representations have been considered by the Determinations Panel pursuant to the Standard Procedure set out at sections 96(2)(b) and (c) of the U.K. Statute.

[30] Counsel further submitted that the FSD powers which The Pensions Regulator is considering exercising will not result in additional *ex post facto* claims in the proceedings under the CCAA as the Monitor has alleged, as the activities of the Determinations Panel will not result in making The Pensions Regulator a creditor of the Applicants.

[31] Counsel to The Pensions Regulators submits this court does not have jurisdiction to make, and/or ought not to make, the order sought by the Monitor for the following reasons:

(a) The Initial Order is of no effect in the UK;

(b) The Monitor has not sought to enforce the Initial Order in the UK by way of an application for a recognition order;

(c) Although it is speculative to predict whether a UK court would make a recognition order enforcing the Initial Order in the UK, a number of factors suggest that any such recognition would not stay the regulatory proceedings;

(d) The blanket request for aid and recognition in the Initial Order does not eliminate the need for an application for a recognition order and the inquiry by the UK court that would be triggered thereby; and

[32] Counsel further submits that this court lacks the jurisdiction to make an order under the CCAA that purports to have an inherent effect in a foreign state.

[33] Counsel to the Trustee of the NNUK Pension Plan also opposed the making of any order. In particular, counsel submitted that an FSD could assist this court in CCAA proceedings, as the Panel making the determination has expertise and operates in a similar legal system as Canada.

LAW AND ANALYSIS

[34] The CCAA stay of proceedings has been described as "the engine that drives a broad and flexible statutory scheme": see *Re Stelco Inc.*, 2005 CarswellOnt 1188 at para 36 (C.A.).

[35] This court had the jurisdiction to make the Orders in paragraphs 14 and 15 of the Initial Order. Subsection 11(3) (with respect to initial applications) and subsection 11(4) (with respect to subsequent applications such as extensions of the initial stay) of the CCAA expressly empower the Court to make an order staying "any action, suit or proceeding" against the company on such terms as it may impose.

[36] The court retains the ability to control its own process including litigation against CCAA debtors and claims procedures within a CCAA process. To ensure its effectiveness, s. 11, and in particular "proceedings" has been broadly interpreted to cover both judicial and extra-judicial proceedings which could prejudice an eventual arrangement.

[37] In *Re Woodward's Ltd.*, (1993) 17 C.B.R. (3d) 236 (B.C.S.C.), the court found that "if a step must be taken vis-a-vis the insolvent company" for the creditor to enforce its rights, that step was a proceeding (at para. 27). The B.C. court looked to Black's Law Dictionary's definition of "proceeding" to base its finding:

> "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding.

[38] In *Meridian Development Inc. v. Toronto Dominion Bank*, (1984) 52 C.B.R. (N.S.) 109 (Alta Q.B.), Wachowich J. provided a helpful analysis of the breadth of the definition of "proceeding" at para 27:

> ... I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official, because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act ... (i)n the absence of a clear indication from Parliament of an intention to restrict proceedings" to "proceedings which involve either a court or court official", I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance "proceedings before a court or tribunal".

[39] It has also been established that the term "proceeding" may refer to any procedural step that is part of a larger proceeding. Delivery of a certificate to the debtor company as a prerequisite to drawing on a letter of credit has been stayed as a proceeding against a CCAA debtor: see *Re Woodward's Ltd.*, *supra*, at paras 26-27.

[40] It seems to me that, even though the Notice may be described as a warning shot across the bow, the effect of the Notice in this case is something far more significant. It clearly puts the Applicants and the Monitor on notice that there is a substantial claim that is being considered in the CCAA proceedings. At the present time, the claim as filed by the U.K. Pension Trustee makes reference to the FSD which may very well flow from the activities being undertaken by The Pensions Regulator. Having already set out the parameters of this claim in the proof of claim, the claim has to be considered a contingent claim in the CCAA proceedings. In my view, the issuance of the Notice is another step on the road to crystallizing the contingent claim.

[41] The issuance of an FSD is a remedy created by a statute of the United Kingdom. Regardless of whether the U.K. Statute purports to extend its reach beyond the borders of the U.K., the Notice, naming the Applicants, NNC and NNL, as "target companies" affects these entities which are clearly within the jurisdiction of this Court. Moreover, The Pensions Regulator purported to deliver the Notice to NNL and NNC by sending it to them in Canada in purported compliance with the U.K. Statute. In my view, The Pensions Regulator took steps in Canada in respect of a proceeding. In this context, The Pensions Regulator is, in my view, a person affected by the Initial Order, with which it must comply when it takes any proceedings in Canada.

[42] The Pensions Regulator did not obtain the consent of NNC and NNL or the Monitor, and did not obtain the leave of this court, before taking steps in Canada which affected NNC and NNL. In my view, the delivery of the Notice in Canada was in breach of the Initial Order. It follows that any continuation of these proceedings in Canada and attempted enforcement of rights in Canada will also be in breach of the Initial Order.

[43] As such, section (b) of the relief requested by the Monitor should be granted.

[44] It also follows that for the purposes of the CCAA proceedings, the actions taken by The Pensions Regulator, are null and void in Canada and are to be given no force or effect in these CCAA proceedings. Accordingly, section (d) of the requested relief should also be granted.

[45] Having made this determination, in my view, it is not necessary to consider the arguments outlined at [17]. The points raised in [17] may be relevant to any motion to lift the stay, but that issue is not before the court.

[46] The Monitor also requested an order authorizing, directing or requiring the Applicants and the Monitor to refrain from participating in any proceedings commenced by The Pensions Regulator. In my view, it is not necessary to comment further and provide directions with respect to a proceeding which, on its face, is null and void. The UK proceedings operate under UK law, and I decline to make a declaration on their legitimacy or to provide direction to the Monitor and the Applicants on their obligations to attend.

[47] An order shall issue to give effect to the foregoing.

MORAWETZ J.

Date: March 18, 2010

CITATION: Nortel Networks Limited (Re) , 2010 ONCA 464
DATE: 20100622
DOCKET: C52117

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Feldman and Blair JJ.A.

BETWEEN

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

And in the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

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

John D. Marshall and J. Szunski, U.K. Pensions Regulator

B. Burden and D. Ward, Pension Protection Fund Trustee

F. Myers, Jay Carfagnini and P. Kolla, for Monitor, Ernst & Young Inc.

A. Merskey, for the Nortel Companies

M. Starnino, for the Superintendent of Financial Service

Jonathan Bida, for Former Employees of Nortel

Derek J. Bell, for Nortel Noteholders

Alex MacFarlane, for Canadian Lawyers for the Official Committee of Unsecured Creditors

Heard and orally released: June 16, 2010

On appeal from the order of Justice Morawetz of the Superior Court of Justice dated February 26, 2010.

ENDORSEMENT

[1] We agree with Morawetz J. that the service of the Warning Notice breached the stay provisions in the Initial Order. The service of the Notice is, therefore, a nullity for purposes of the *Companies' Creditors Arrangement Act* proceedings.

[2] With respect to the remedy, we do not interfere with para. 3 of the order below subject to this clarification: Paragraph 3 should not operate so as to preclude the U.K. Trustee and/or the Pension Protection Fund from seeking to assert, by way of amendment of the Proof of Claim, if necessary, a claim in the *Companies' Creditors Arrangement Act* process for pension contribution shortfalls, including for the relief they assert they would have been able to establish in the U.K. Financial Support Direction process.

[3] In the result, the appeal is dismissed.

[4] We are only going to deal with the costs in this court. The costs of the proceedings below are left to the court below. We order the U.K. Pensions Regulator to pay the Monitor's costs fixed in the amount of $50,000 and the Nortel companies' costs fixed in the amount of $40,000. Both awards include GST and disbursements and cover the motion to expedite, the leave to appeal and today's appeal. No other costs are ordered.

"Dennis O'Connor A.C.J.O."
"K. Feldman J.A."
"R. A. Blair J.A."

Tab 8

CITATION: Nortel Networks Corporation (Re), 2012 ONSC 1213
COURT FILE NO.: 09-CL-7950
DATE: 20120309

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Alan Mersky and Nicholas Daube, for the Applicants, Nortel Networks Corporation et al**

Joseph Pasquariello and Christopher Armstrong, for the Monitor, Ernst & Young Inc.

Ian Brady and Matthew Page, for Sydney Street Properties Corp.

Lyndon Barnes, for Directors of Nortel Networks Corporation

Leonard Marsello, William MacLarkey and Joshua Hunter, for Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of the Environment

R. Benjamin Mills, for the Corporation of the City of Belleville and the Algonquin and Lakeshore Catholic District School Board

Andrew Gray, for Nortel Networks Inc.

Craig Mills and Tamara Farber, for 2058756 Ontario Limited

Lee Cassey and Jonathan Bell, for Nortel Informal Noteholder Group

Jane Dietrich and Alex MacFarlane, for the Official Committee of Unsecured Creditors

Thomas McCrae and Arthur O. Jacques, for Nortel Canadian Continuing Employees

Brett Harrison, for Rogers Corporation

ENDORSEMENT

[1] A number of motions, detailed below, were brought in connection with environmental issues affecting Nortel Networks Corporation et al (collectively, "Nortel").

[2] The primary motion was brought by Nortel (the "Nortel Motion"). Nortel seeks authorization and direction that it cease performing any remediation at or in relation to the Impacted Sites (defined below) and a declaration that any claims in relation to such current or future remediation requirements by the Ministry of the Environment ("MOE") or any other person (as defined in the Initial Order) against Nortel or their current or former directors or officers in relation to the Impacted Sites be subject to resolution and determination in accordance with the terms of the Amended and Restated Claims Procedure Order dated July 30, 2009 (the "CP Order") and the Claims Resolution Order dated September 16, 2010 (the "CR Order").

[3] Nortel also seeks an order repudiating or disclaiming any contractual obligations to carry out remediation requirements at the Impacted Sites; an order declaring that the relief sought by the MOE Orders (defined below; referred to as the "2009 Order" in Nortel's Notice of Motion) is financial and monetary in nature and that the MOE Orders are stayed by the Stay of Proceedings (the "Stay") set out in paragraphs 14 and 15 of the Initial Order dated January 14, 2009, as amended and restated (the "Initial Order"); a declaration that the proceedings before the Ontario Environmental Review Tribunal in relation to the MOE Orders be stayed and finally, advice and direction with respect to the Retained Lands at the London site (defined below).

[4] Sydney Street Properties Corporation ("SSPC") brought a motion requesting that Nortel and its environmental consultants disclose and produce to SSPC all non-privileged documentation relating to the historical remediation and monitoring of the environmental condition of the property located at 250 Sydney Street, Belleville, Ontario and surrounding properties. The SSPC motion also requested an order extending the claims bar date to allow SSPC to file an amended claim related to the pollution at 250 Sydney Street, Belleville, to the later of 90 days from the date of determination of the Nortel Motion or 15 days from the date of approval by the MOE of the work plan required pursuant to the Directors' Order of September 7, 2011. The SSPC motion also requested a declaration that the revised proof of claim dated August 22, 2011 of SSPC is permitted to be filed with the Monitor and is not barred under the CP Order.

[5] The SSPC motion was adjourned to a scheduling appointment within 30 days of the disposition of the Nortel Motion.

[6] The Corporation of the City of Belleville and the Algonquin and Lakeshore Catholic District School Board brought a motion similar to that of SSPC, relating to property in Belleville, Ontario. This motion was also adjourned to a scheduling appointment within 30 days of the disposition of the Nortel Motion.

[7] Nortel also served a Notice of Constitutional Question indicating that Nortel intended to question the constitutional applicability of the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA"), in particular sections 18, 157, 157.1 (1), 196 (1), 196 (2), 197 (1) and 197 (2).

OVERVIEW

[8] The Nortel Motion arises from the untidy intersection of the CCAA and, in particular, the Stay provided for in the Initial Order and the powers of the MOE to make orders with respect to the remediation of real property in Ontario.

[9] Nortel and its predecessors once conducted manufacturing operations in Ontario which were largely terminated and the sites disposed of in the late 1990s. Nortel advises that in conjunction with the disposition of these sites, it identified environmental impacts arising from past operations at five Impacted Sites.

[10] At the time of its CCAA filing on January 14, 2009, Nortel had disposed of the Impacted Sites with the exception of a partial interest in one Impacted Site in London, Ontario. At the time of filing, Nortel was not subject to any MOE remediation orders. Nortel takes the position that it was conducting limited remediation of some of the Impacted Sites on a contractual or voluntary basis.

[11] Nortel takes the position that subsequent to the CCAA filing, but prior to the filing of the Nortel Motion, the MOE purported to make an order at one Impacted Site in London, Ontario and since the service of the Nortel Motion, the MOE has purported to:

(a) revoke, reissue and serve a new order for the Impacted London Site; and

(b) prepare orders concerning three other Impacted Sites (collectively, with the order for London, the "MOE Orders").

[12] Nortel raises the concern that the MOE Orders require extensive further remediation steps and it estimates that fully responding to the MOE Orders would require minimum expenditures of $18 million.

[13] Nortel takes the position that the MOE Orders are in substance and effect requirements for it to pay money.

[14] Nortel submits that the MOE already may access certain statutory remedies in insolvency and that the MOE Orders fall outside those remedies, effectively creating an unlegislated priority and exceeding the ambit of a regulatory action.

[15] Consequently, Nortel requests a declaration that the MOE Orders are stayed by the Stay and of no force and effect.

[16] Not surprisingly, the overview provided by the MOE is significantly different.

[17] The MOE points out that Nortel, as a former and current owner of environmentally contaminated property, is subject to regulatory obligations under the EPA which are in the nature of performance obligations. Further, on the facts of this case, the MOE submits that these performance obligations have not advanced to the point of being "claims" that can be stayed pursuant to s. 11 of the CCAA or compromised under a plan of arrangement.

THE FACTS

[18] As early as the 1940s, Nortel and its predecessors operated manufacturing facilities in Ontario which involved the use of various hazardous substances, particularly, chlorinated solvents (also known as volatile organic compounds, "VOCs"). In the late 1990s, Nortel disposed of the majority of its land holdings in Ontario and, in conjunction with such dispositions, identified environmental impacts in soil and groundwater at manufacturing sites in Brampton (the "Brampton Site"), Brockville (the "Brockville Site"), Kingston (the "Kingston Site"), Belleville (the "Belleville Site") and London (the "London Site") (collectively, the "Impacted Sites").

[19] As of the date of CCAA filing, Nortel retained a partial interest in one of the Impacted Sites (London). The other sites were sold off in the prior two decades.

[20] Notwithstanding the sales, Nortel had undertaken investigation, remediation, monitoring and risk assessment activities at the Impacted Sites. The MOE was generally apprised of such activities, with variations on a site-by-site basis. Nortel advises that it has invested approximately $30.2 million on these remediation efforts since the late 1990s.

[21] In the facta filed by Nortel and the MOE, considerable detail is provided with respect to the status of remediation at the Impacted Sites as well as the status of various orders issued by the MOE.

[22] Summary information was also set out in the 66th and 74th Reports of the Monitor.

BRAMPTON

[23] Nortel ceased manufacturing operations at the Brampton Site in 1999 and the property was sold in 2005. On June 30, 2011, Nortel entered into a Transition Agreement (the "Brampton Transition Agreement") with Rogers Communication Inc. ("Rogers"). Under the Brampton Transition Agreement, Nortel and Rogers agreed to a gradual cessation of Nortel's environmental risk assessment obligations at the Brampton property in order to effect an orderly transition of environmental responsibilities in relation to the property. Nortel has obtained court approval of the Brampton Transition Agreement. There are no MOE Orders relating to the Brampton Site. The execution of Nortel's obligations under the Brampton Transition Agreement has concluded all issues relating to the Brampton Site.

BROCKVILLE

[24] In 1999, Nortel sold the Brockville Site and its associated manufacturing operations. The subsequent owner (SCI) ceased manufacturing operations in approximately 2004. The Site was then sold in 2006 and is now used as a warehouse facility.

[25] At the time of Nortel's acquisition of the Brockville Site, environmental impacts to groundwater had been identified, including trichloroethylene ("TCE"). Remediation activities to extract and treat impacted groundwater were initiated during Nortel's ownership. At the time of its sale of the site, Nortel arranged access to conduct environmental work. To date, Nortel

continues to conduct remediation activities on a contractual basis by pumping and treating impacted groundwater.

[26] Nortel has provided annual updates to the MOE and the owner of the Brockville Site. Prior to this motion, there were no MOE Orders sought or enforced with respect to the Brockville Site.

[27] After service of this motion, the MOE posted a draft order on the Environmental Bill of Rights ("EBR") registry for public comment. The draft order requires Nortel and other responsible parties to submit and implement a workplan for additional groundwater investigations at and related to the Brockville Site in order to confirm the extent of contamination. The draft order will also require the implementation and completion of the remaining remediation and/or monitoring work and the decommissioning of the monitoring and recovery wells.

[28] Nortel estimates these environmental efforts will cost a minimum of $4.5 million over an estimated period of 18 years. The current property owner has filed a claim $16.5 million in the CCAA claims process for related amounts.

[29] The MOE submits that it is premature to fix the costs of the work required by the draft order. The draft order requires the submission of a workplan for review and approval, which will include investigations to determine the nature and extent of contamination. The MOE further takes the position that until these investigations are undertaken and the workplan is approved, the costs associated with the workplan are unknown.

[30] At the current time, Nortel is engaged in minimal maintenance operations at the Brockville Site.

KINGSTON

[31] Nortel sold the Kingston Site and its associated manufacturing operations in 1995. Manufacturing operations were subsequently discontinued around 2003.

[32] Impacts to soil and groundwater were identified with respect to aboveground and underground storage tanks (containing VOCs) formerly located at the Kingston Site. In the course of Nortel's remediation efforts to address the contamination, numerous monitoring wells were installed at the Kingston Site.

[33] Nortel has provided updates regarding the status of remediation activities to the owner of the Kingston Site and the MOE has been aware of this work. Prior to the Nortel Motion, there were no MOE Orders sought or enforced with respect to the Kingston Site.

[34] In contrast to Nortel's statement, the MOE alleges that it appears that between 1996 and April 2011, Nortel did not make any contact with the MOE concerning the Kingston Site, nor did it provide the MOE with any reports.

[35] Nortel, with the assistance of its environmental consultant, Golder Associates Ltd. ("Golder"), has assessed the risk to human health and the environment at the Kingston Site as

low. Contrary to Nortel's assertions, however, the MOE alleges that adverse effects related to soil vapour and groundwater impacts may arise, and migration may continue if an appropriate remediation and monitoring program is not implemented.

[36] After service of the Nortel Motion, the MOE posted a draft Director's Order on the EBR Registry for public comment. This draft order requires Nortel and other responsible parties to propose additional groundwater investigations, identify the remaining remediation and/or monitoring work required to remediate the site to appropriate cleanup standards, propose a timetable for the completion of the investigations, remediation and monitoring, and propose a decommissioning plan for the existing monitoring and recovery wells.

[37] Nortel estimates these efforts will cost a minimum of $1 million. The current property owner has filed a claim of $5.2 million in the CCAA claims process.

[38] The MOE alleges that it is premature to quantify the cost of required work under the draft order because the MOE does not know whether and to what extent the environmental conditions at the Kingston Site have been addressed since 1996. Consequently, the MOE contends that it is speculative to attach a cost estimate to the work required by the draft order.

BELLEVILLE

[39] Nortel ceased active manufacturing activities at the Belleville Site in late 1999 and 2000, when the Belleville Site was sold. In conjunction with the sale, Nortel entered into a lease with SSPL in order to conduct research and design activities as well as environmental work at the Belleville Site. Nortel's research and design activities continued at the site until 2009, when the operations were sold and the operating facilities sublet for a short period.

[40] Nortel conducted an environmental investigation at the time of the Belleville Site's sale and discovered impacts to soil and groundwater, including TCE impacts. To date, Nortel has performed remediation work on the Belleville Site on a contractual basis.

[41] Nortel and Golder have assessed the risk to human health and the environment at the Belleville Site as low. The MOE disputes these assertions.

[42] Prior to this motion, there were no MOE Orders sought or enforced with respect to the Belleville Site. After service of the Nortel Motion, the MOE posted a draft order on the EBR Registry for public comment.

[43] Nortel estimates these remediation efforts will cost a minimum of $2.5 million. The current property owner has filed a claim of $10 million in the CCAA proceedings for related amounts.

[44] The MOE disputes these figures and submits that it is premature to fix the costs of the work required by the draft order and that until the nature and extent of the required work is identified by Nortel and approved by the MOE, the costs associated with such work are unknown.

LONDON

[45] Nortel terminated manufacturing operations at the London Site in 1994. Nortel has identified environmental impacts to soil and groundwater, including the presence of TCE.

[46] In 1997 and 1998, Nortel sold portions of the London Site (the "Transferred Lands") while maintaining ownership of the remainder (the "Retained Lands").

[47] To date, Nortel has performed remediation activities on various portions of the London Site, doing so on a voluntary basis or subject to contractual obligations with purchasers, with notice provided to and approvals obtained from the MOE as necessary. In October 2009, the MOE issued an order (the "First London Order") which, according to Nortel, requires investigation and reporting as to the contamination at, and ongoing treatment activities conducted on the boundary between the Retained Lands and the Transferred Lands.

[48] In November 2009, Nortel requested particulars and filed an appeal of the First London Order before the Environmental Review Tribunal ("ERT"). The appeal has been adjourned pending Nortel's motion in these proceedings.

[49] After service of this motion, the MOE posted a draft Director's Order on the EBR Registry. The order requires Nortel to provide the MOE with adequate information to make a proper evaluation of the environmental situation.

[50] Nortel estimates that the remediation efforts set out in the Second London Order will cost a minimum of $12 million. The MOE disputes these figures, contending that any estimate of remediation cost at this point is premature because the order first requires an assessment of the nature and extent of contamination, the results of which will determine the extent of any remedial work.

[51] Currently, Nortel has arrived at a mutual accommodation with the MOE pending the release of these reasons. This accommodation provides that Nortel will continue in its small scale maintenance efforts at London. The ERT hearing rights have been preserved and adjourned.

ISSUES AND LAW

[52] Nortel sets out the issue raised on this motion as follows: "Are the MOE Orders subject to the Stay?".

[53] From the standpoint of the MOE, Nortel's motion raises the following issues:

(a) whether the MOE Orders referenced constitute compromisable claims under the CCAA;

(b) whether the MOE Orders referenced are stayed by operation of paragraphs 14 and 15 of the Initial Order or should be otherwise stayed; and

(c) whether, given principles of constitutional law, the MOE Orders ought to be characterized as compromisable "claims" and stayed.

[54] The relevant portion of the Initial Order reads as follows:

> [14] THIS COURT ORDERS that until and including February 13, 2009 or such later date as this court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced, or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the affected Applicant and the Monitor, or with leave of this court, and any and all Proceedings currently under way against or in respect of the affected Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this court.
>
> [15] THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants' or the Monitor, or affecting the business or the property, are hereby stayed and suspended except with the written consent of the affected Applicants and the Monitor, or leave of this court, provided that nothing in this order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety, or the environment, (iii) prevent the filing of any registration to preserve or protect a security interest, or (iv) prevent the registration of a claim for lien.

POSITION OF NORTEL

[55] Counsel to Nortel submits that the basis for the Stay was founded in s. 11 of the CCAA, which, as noted by the Court of Appeal in *Stelco Inc. (Re)*, [2005] O.J. No. 1171 at para. 36, is the engine that drives the broad and flexible statutory scheme of the CCAA. As noted by the Court of Appeal in these CCAA proceedings, exceptions to the Stay should be narrowly interpreted. See *Nortel Networks Corporation (Re)* 2009 ONCA 833 at para. 17.

[56] Counsel to Nortel also referenced *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60 at para. 22 for the proposition that stays provided for by the CCAA and other insolvency regimes enable the centralization and maximization of a debtor's assets for the benefit of all creditors.

[57] Counsel to Nortel submits that the MOE Orders conflict with the aforementioned goals of the CCAA, as the MOE Orders would entail an expenditure of funds to remedy past actions on lands Nortel, for the most part, no longer owns. Counsel contends that the necessary effects of the MOE Orders are to:

(a) require directly and indirectly the expenditure of a minimum of $18 million; and

(b) consequently, prioritize environmental liabilities over all other unsecured claims against Nortel, such as those asserted by pension, employee, trade and financial creditors.

[58] The thrust of the argument put forth by Nortel is that the true nature and substance of the MOE Orders is financial, not regulatory and thus the MOE Orders give rise to an operational conflict with the CCAA.

[59] Counsel to Nortel states that s. 11.8(8) of the CCAA provides for the preferred treatment of environmental liabilities in certain circumstances:

> 11.8(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
>
> > (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
> >
> > (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

[60] Section 11.8(9) is also relevant. It reads:

> A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[61] Counsel to Nortel contends that the effect of the above-referenced sections provides a specific remedy: "a super priority" over real property that is contaminated.

[62] Counsel also referenced *Harbert Distressed Investment Fund, LP v. General Chemical Canada Ltd.* 2007 ONCA 600, leave to appeal to the Supreme Court dismissed 2008 CarswellOnt 879, where the court noted, at paragraph 46, in reviewing similar provisions in the *Bankruptcy and Insolvency Act* ("BIA"):

> To give effect to provincial environmental legislation in the face of these amendments to the BIA would impermissibly affect the scheme of priorities in the federal legislation.

[63] Nortel acknowledges that the MOE retains the ability to act unilaterally against a debtor, where the MOE's orders are in substance regulatory. This exception is explicitly recognized in the Initial Order.

[64] Counsel to Nortel emphasized that it is important to note that Nortel no longer conducts operations at any of the Impacted Sites and the contamination on such sites has been present for decades.

[65] Further, counsel submits that there are no compliance obligations under Ontario's environmental legislation with respect to historic contamination and there is no mandatory duty or positive directive under any Ontario statute or regulation to undertake cleanup of impacted soil, remediate groundwater, or prevent offsite migration of contaminants.

[66] Counsel further submits that against this background, the court in its supervisory authority under the CCAA is required to determine the actual character of orders made by a regulator. In this respect, counsel to Nortel referenced the following passage from *AbitibiBowater inc. (Arrangement relative à)*, 2010 QCCS 1261, at paras. 144, 148, and 157, leave to appeal to QCCA refused, 2010 QCCA 965, leave to appeal to SCC granted (2010), 413 NR 397 ["*AbitibiBowater*"] (the appeal of which was heard by the Supreme Court of Canada on November 16, 2011):

> Applying these considerations to the situation at hand, the Court is of the view that it has the authority to decide if the EPA Orders qualify as claims under the CCAA and can be described as provable or contingent claims under the BIA.
>
> ...
>
> Accordingly, environmental obligations arising from a regulatory order that remain, in a particular fact pattern, truly financial and monetary in nature can be qualified as claims under the CCAA. Likewise, if one is convinced that there exists, in such a fact pattern, a claim that "might" be filed, it is open to be compromised on the plain reading of s. 12 of the CCAA.
>
> ...
>
> Parliament has therefore confirmed that the CCAA may be employed to place an appropriate check on regulatory actions, particularly when they are purely "monetary orders". This is exactly the kind of jurisdiction the court is exercising here. Of course, this exercise requires the court looking at substance over form.

[67] Counsel to Nortel further submits that there are competing interests in insolvency proceedings and that courts have adopted the "single proceeding model" so as to ensure a fair and orderly assessment of claims. The Supreme Court in *Century Services, supra*, at para. 22 stated:

> Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more

> aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[68] In this case, counsel to Nortel submits that the MOE Orders are promulgated with only one societal interest in mind: protection of the environment from and remediation of contaminants. That interest, counsel submits, however valid, is generally superseded by the "single proceeding model" of insolvencies.

[69] This issue was identified and addressed in *AbitibiBowater, supra,* at paras. 160 and 170-172, where the court stated:

> The true regulatory character or otherwise financial and monetary nature of a given order is influenced by who issues the order, who stands to benefit from it, what remains its genuine objective and what means of enforcement truly exist in reality.
>
> ...
>
> While the dividing line between regulatory claims and their financial consequences may be blurred at times, there can be no confusing the two when the regulatory authority is seeking to make orders concerning solely past actions and activities in relation to properties that the debtor has disposed or been dispossessed of.
>
> The broad CCAA and BIA provisions referred to above contain no comfort for a regulatory authority seeking to limit the Claims Procedure Order from impacting their plainly financially material actions with artificial distinctions about "regulatory" orders and "financial" ones. To an insolvent company in CCAA restructuring, an order to pay tens of millions of dollars directly is no different from an order to spend an equivalent amount on specific actions that will benefit others.
>
> Where, as here, the EPA Orders are moreover founded exclusively upon alleged actions in the past and relate in no way to activities taken after the commencement of proceedings, the supervising CCAA court applying such broad definitions has the jurisdiction to intervene.

[70] Nortel submits that the MOE Orders are, in reality, orders to pay money. They may be framed in the terminology of ordering investigations, or the drafting and implementation of workplans, but the inevitable consequence of those workplans and investigations is to cause Nortel to spend substantial funds at the behest of the MOE, on lands it largely no longer operates upon or owns.

[71] Counsel further contends that if Nortel fails to comply, it may be found guilty of an offence with various financial consequences. In addition, in the event the MOE Orders are not stayed, the EPA permits the Director to order Nortel to pay the costs for work performed should

Nortel fail to perform that work itself. The provisions of the EPA thus contemplate, from Nortel's standpoint, a monetary judgment as an ultimate means of enforcing an order.

[72] Counsel to Nortel submits that, in the circumstances, there is no meaningful distinction between the MOE presenting Nortel with a bill for remediation conducted by the MOE, and the MOE directing Nortel to conduct the remediation in the first instance.

[73] It was also put forth by Nortel that none of the above circumstances engage the MOE's core regulatory function of prevention and deterrence. According to Nortel, it is those functions which are untouched by the Stay and preserved by the Initial Order, where it stipulates that it does not: "... exempt the Applicants from compliance with or regulatory provisions relating to health, safety or the environment". To the extent that the MOE is concerned with events of non-compliance, Nortel contends that they are decades past, non-recurring, and have no connection to Nortel's current operations.

[74] Accordingly, counsel argues that, as was found in *AbitibiBowater*, the MOE's Orders are "plainly material financial actions" that are caught by the Stay.

[75] As indicated above, Nortel has served a Notice of Constitutional Question. The Attorney General of Canada declined to respond. The Attorney General of Ontario is present on behalf of the MOE.

[76] Counsel to Nortel submits that, if the MOE's orders are primarily monetary in nature, an operational conflict with the CCAA will exist and it is uncontroversial that, at that juncture, otherwise valid provincial legislation will be superseded. See *Canadian Western Bank v. Alberta* 2007 SCC 22; *Nortel Networks Corporation (Re)* 2009 ONCA 833 at paras. 36-38; *Harbert Distressed Investment Fund, LP v. General Chemical Canada Ltd.* 2007 ONCA 600, leave to appeal to the Supreme Court dismissed 2008 CarswellOnt 879; *AbitibiBowater, supra,* at para. 270.

[77] Counsel to Nortel concludes that the MOE Orders require the payment of large sums in direct contravention of the CCAA priority structure for claims, at the expense of recovery for all other creditors. As such, counsel argues that the MOE Orders must yield to the CCAA for the operational conflict they produce.

[78] The position of Nortel was supported by the Official Committee of Unsecured Creditors, the Nortel Informal Noteholder Group, the Nortel employee groups, and the directors of Nortel.

[79] The Monitor also recommended that the relief requested by Nortel be granted.

POSITION OF THE MOE

[80] The MOE argues that Nortel's position is incorrect regarding the statutory priority scheme in the CCAA. It submits that s. 11.8(8) of the CCAA addresses the priority standing of the MOE only when it is acting in its capacity as a creditor to recover costs. The MOE submits that Nortel's argument mischaracterizes performance obligations as financial or monetary obligations owed to the Crown. It argues that giving effect to Nortel's submission would unfairly shift any expense associated with environmental remediation to the taxpayers of Ontario

and away from the company's creditors who chose to do business with the company in the first place.

[81] The MOE takes issue with Nortel's argument that any MOE order relating to its responsibility for historic contamination must be monetary in nature. The MOE takes the position that, apart from the Quebec Superior Court decision in *AbitibiBowater*, this submission has no foundation in law. Further, as the MOE points out in Part II of its factum, Nortel acknowledges having conducted environmental work on properties it no longer owns. The MOE questions the position put forth by Nortel since, if the obligations were monetary in nature, on Nortel's theory of the case, Nortel need not have done the work after the date of the Initial Order.

[82] The MOE also takes the position that Nortel's analysis ignores the fact that obligations for historic contamination only become "claims provable" when the Minister exercises his discretion in such a way as to transform the performance obligations into monetary ones, thereby creating a debtor/creditor relationship. The MOE argues that it is not legitimate for Nortel to purport to exercise discretion on behalf of the Minister so as to create a debt owed to the Crown. The MOE acknowledges that in discharging its obligations as a regulator, it may, on occasion, take steps that constitute it as a "creditor". In this case, however, they take the position that ministerial discretion has not been so exercised.

[83] The MOE disputes Nortel's submission that because the MOE Orders require it to spend money, they are "orders for the payment of money". The MOE argues that any financial obligations Nortel might incur to third parties as a function of retaining their services for the purpose of complying with the MOE Orders are entirely different than monetary obligations incurred directly to the Crown itself.

[84] In its factum, the MOE states that its involvement with any particular site ranges along a regulatory continuum. On one end of that continuum, the MOE, acting as regulator, may impose performance obligations on a responsible party. On the other end of the continuum, the MOE, acting as creditor, may seek the recovery of money from the responsible party, thereby creating a financial obligation which is properly subject to a CCAA stay and a compromisable claim.

[85] The MOE sets out the continuum as follows, moving from regulatory actions to more creditor-like actions:

(i) receive and consider applications for Certificates of Approval in respect of regulated facilities, where applicable;

(ii) conduct announced or unannounced inspections of a site, but take no action/issue no orders to the regulated entity. This is sometimes done in conjunction with a plan of voluntary compliance agreed to by the regulated entity, but such a plan is not always necessary if the MOE is of the view that the *status quo* of the site is not an environmental concern;

(iii) issue a provincial officer's order/Director's order, for example under sections 18 and 157.1 respectively of the EPA, requiring the regulated entity to undertake a range of possible actions that could include retention of a consultant, assessment of the nature and extent of contamination, development of a workplan to address

the contamination, and implementation of that workplan, which might include monitoring of groundwater, surface water and/or soil conditions, and remediation in one or more forms. These orders deal with existing environmental concerns or with conditions that may lead to an environmental concern;

(iv) if it appears the regulated entity will not do the work, or if the regulated entity otherwise fails to do the work, the MOE will look to other parties such as former owners or those formerly in management or control of the property, and may issue orders to these other parties to assess and address the environmental concerns;

(v) if no other parties can be located to answer the environmental liability, the MOE may issue a notice of intent to do the work itself; however, this is a discretionary decision of the Director exercised only upon a consideration of many factors;

(vi) the MOE, in fact, does the work itself because there is no one else to do it and the environmental or human health concern is significant;

(vii) the MOE issues an order to recover costs pursuant to s. 150 of EPA;

(viii) the MOE takes steps to enforce its recovery order.

[86] The MOE contends that MOE Orders are not compromisable "claims" and should not be stayed for three principal reasons:

(a) The CCAA is an insolvency statute and is properly concerned only with obligations that create financial obligations owed to the MOE in its capacity as a creditor. On the facts, Nortel's environmental performance obligations are not monetary claims because any contingent financial liability remains inchoate, is too remote and speculative in nature and is not recoverable by legal process. Transforming regulatory performance obligations into an enforceable right to payment requires, among other things, the exercise of ministerial discretion that might never occur;

(b) By its terms, the Initial Order specifically preserves Nortel's obligation to comply with regulatory provisions relating to the environment and, accordingly, any actions taken by the MOE (short of seeking to enforce the recovery of money as a creditor) are not stayed. Given this result, there is no conflict between the Initial Order and the MOE Orders and accordingly, the constitutional doctrine of paramountcy need not be considered;

(c) In any event, any interpretation of the CCAA that would permit the characterization of environmental regulatory performance obligations as compromisable claims would usurp the province's regulatory powers and exceed the federal power over "Bankruptcy and Insolvency".

[87] Counsel to the MOE submits that Nortel's position would mean that any order issued by the MOE that requires Nortel to spend money to deal with historical pollution would constitute a compromisable claim. However, counsel submits that it is not the spending of money by Nortel or the fact that Nortel is no longer operating on the properties that makes an EPA order a claim.

The MOE submits that Nortel's argument mischaracterizes what are in their nature performance obligations and ignores the fundamental trigger that transforms public regulatory obligations into claims, namely, the exercise of ministerial discretion.

[88] At the heart of its argument, counsel to the MOE submits that the EPA contemplates a number of remedial and preventative measures, (stages (i) to (iv) on the regulatory continuum referenced above) that are injunctive in nature rather than monetary. Counsel submits that these remedial measures do not create a debtor/creditor relationship. They are consistent with the "polluter pays" principle which seeks to hold the polluting party responsible for remedying environmental contamination.

[89] In contrast, the MOE contends that the super priority created by sections 11.8(8) and (9) of the CCAA, which specifically referenced the "costs of remedying any environmental condition or environmental damages", were clearly intended to give the MOE a priority only when acting as creditor at stages (v) through (viii) of the regulatory continuum. Specifically, counsel contends that "costs" for the purposes of the super priority are only created where the regulator seeks to recover the costs of work the MOE has done from the responsible party or where the regulator has committed to spending public funds to undertake such environmental remediation, even though the costs have not yet been incurred.

[90] Counsel further argues that the CCAA applies only to liabilities or obligations in the nature of debts owed to the MOE in its capacity as creditor. Counsel submits that "claim" as defined in s. 12(1) of the CCAA applicable to this proceeding, currently s. 2(1), means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable (now called a "claim") in bankruptcy within the meaning of the BIA.

[91] Counsel for the MOE contends that s. 2 of the BIA defines "claim provable in bankruptcy" as including any claim or liability provable in proceedings under this Act by a creditor. Accordingly, counsel argues, an interpretation of "claim" that purports to include all performance obligations, including those that do not give rise to a right to payment to the MOE, would rewrite this express definition. In contrast to the position put forth by Nortel, the MOE argues that there is a very meaningful distinction between the MOE acting as a creditor to seek reimbursement for costs of work conducted by the MOE and the MOE acting as regulator issuing an order directing Nortel to carry out performance obligations.

[92] Counsel also contends that the MOE does not have a "contingent claim" within the meaning of s. 121 of the BIA on the basis that, first, claims that are remote and speculative in nature are not contingent claims; and second, a provable claim must also be recoverable by legal process. Counsel contends that both of these factors militate against a finding that the MOE Orders amount to a monetary claim. A contingent environmental liability, counsel submits, is not created by the mere fact that a property is polluted, by the fact that a regulator has statutory remedies that might or might not develop into monetary claims, or because performance obligations may require responsible parties to spend money to discharge environmental obligations.

[93] Counsel further submits that the MOE cannot enforce any right to receive payment until it exercises its broad regulatory discretion to do the requested work thereby transforming

regulatory "obligations" owed to the public into compromisable claims owed to the regulator as a creditor. Further, counsel to the MOE contends that while orders at stages (i) through (iv) of the regulatory continuum may well require payment by a company to a third party, such a payment does not create the necessary debtor/creditor nexus between the company and the MOE. On the facts of this case, counsel contends that crystallization of any contingent liability on the part of Nortel is speculative at best.

[94] Counsel to the MOE also takes issue with Nortel's reliance on *AbitibiBowater* for the proposition that any MOE order relating to its responsibility for historic contamination must be monetary in nature. Counsel contends that the CCAA court in *AbitibiBowater* found that Newfoundland had expropriated the sites at issue in retaliation for an unrelated claim by AbitibiBowater under NAFTA and, as owner, Newfoundland stood to benefit directly from any remedial work. Moreover, Newfoundland had requested proposals for remedial work and done emergency work to repair a dam. Compared factually with *AbitibiBowater*, counsel argues, the situation in this case compels a very different result. Counsel argues that none of the facts as found by the Quebec Superior Court exist in the present cases:

(a) No steps have been taken by the MOE to undertake any environmental work in Nortel's place or to act as a creditor;

(b) The MOE has not expropriated the subject properties from Nortel and does not stand to benefit financially as it does not own any of the Impacted Sites;

(c) The MOE has issued regulatory orders to require Nortel to continue to perform ongoing work to protect the environment. The Orders are not disguised debt obligations;

(d) The extent of and potential costs associated with environmental remediation on the properties cannot be reasonably identified and quantified at the present time;

(e) The 2009 EPA Order respecting the London properties not owned by Nortel requires the current owners of these sites to grant access to Nortel for the purpose of discharging its obligations under the Orders;

(f) The MOE's "target" was the enforcement of statutory duties and obligations, it was not Nortel. The MOE, in its role as regulator, has followed the "polluter pays" philosophy of environmental legislation and sought compliance from the polluter – Nortel. But, the MOE has also issued orders against other responsible persons to deal with the outstanding environmental obligations on the Nortel sites; and

(g) The MOE has and continues to act in good faith toward Nortel. There is no basis whatsoever in the evidence to, for example, conclude that the MOE has withheld making orders or taking action as any sort of legal tactic.

[95] Counsel to the MOE also cites several other cases to support their argument that, in the present circumstances, the MOE is acting solely in a regulatory capacity, rather than as a creditor. Counsel submits that these cases demonstrate that not all environmental regulatory

obligations fall within the scope of "claim" and the intended scope of ss. 11.8(8) and (9) of the CCAA.

- In *Shirley (Re)*, [1995] O.J. No. 3060 (Gen. Div.) [*Shirley (Re)*], the fact that the company had dispossessed of the contaminated property, as in the present case, did not bear on the court's determination that the MOE was a creditor. In that case, the MOE had already issued orders, entered onto lands, commenced cleanup actions, and made it clear that it intended to look to the debtor for reimbursement.

- In *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.,* [2006] O.J. No. 3087 (S.C.J.), aff'd 2007 ONCA 600, leave to appeal to the Supreme Court dismissed 2008 CarswellOnt 879 ["*Harbert*"], the court viewed the MOE as a creditor, rather than as a regulator, because the MOE had already made the decision to cause the bankrupt's Soda Ash Settling Basin to be remediated in the event that no one else would undertake such work.

- In *Lamford Forest Products Ltd. (Re)*, [1991] B.C.J. No. 3681 [*Lamford Forest Products (Re)*], the B.C. Supreme Court concluded that a Pollution Abatement Order was *not* a provable claim in bankruptcy because the Act did not expressly stipulate that the regulator could go onto the land of the polluter, perform the removal or remedial action, and then seek to recover those costs from the responsible party, thereby becoming the holder of a claim for the amount it cost to clean up the damage.

- In *Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc.* [2002] M.J. No. 172 (Q.B) [*CIBC v. Isobord*], Manitoba Conservation, as permitted by statute, contracted a third party to develop a rodent control program when the company failed to do so pursuant to an order of Manitoba Conservation. The regulator claimed a priority charge for the cost of the program, but lost its priority fight on the narrow ground that it had not complied with the statutory preconditions to acquire a claim under the provincial legislation.

- In *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, [2005] A.J. No. 915 (Q.B.) [*Strathcona*] the court ordered that the cost of uncompleted drainage work required by Strathcona County as a condition of issuing development permits be paid from the assets of the bankrupt estate in advance of debts to secured creditors. The court concluded that the County never assumed the role of creditor. A court order contemplated the County doing the required work at the developer's expense. The compliance plan also contemplated that the County would retain an engineer to do the drainage design, would get the work done, and that the developers would pay funds into court. The plan failed because the developer did not pay the funds into court and without that security, the County did not do the work.

[96] The MOE submits that not all environmental regulatory obligations fall within the definition of "claim" and the intended scope of ss. 11.8(8) and (9) of the CCAA, and that the court must first consider whether the environmental regulatory obligation is a certain and provable contingent claim within the meaning of the legislation. Counsel to the MOE suggests the following question is informative: "Is a debt presently due to the MOE or has the MOE

exercised its discretion to spend public funds to undertake such environmental remediation even though it may not as yet have incurred such costs?" In other words, has the regulator exercised its statutory jurisdiction to crystallize its claim as a creditor?

[97] Counsel to the MOE referred to the regulatory continuum discussed above, submitting that the parties are only at stage (iv), and that whether stage (v) is reached depends on certain factors, mainly:

(a) whether Nortel fails to do the work the MOE ordered;

(b) whether other potentially responsible parties will address the environmental liabilities; and

(c) whether the MOE issues a Notice of Intent to do the work itself.

Counsel to the MOE argues that the existence of fact (c) in this case is too speculative to constitute a "claim", because it assumes facts and the exercise of ministerial discretion which may never occur.

[98] Counsel to the MOE also submits that paragraph 15 of the Initial Order, which provides that "nothing in this Order shall (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment," requires Nortel to continue to comply with statutory or regulatory provisions relating to the environment. Further, counsel argues that s. 11 of the CCAA does not immunize companies under its protection from compliance with regulatory regimes. Because s. 11.1(2) specifically contemplates that a regulator may continue to operate outside of the CCAA regime, counsel submits that to deem any regulatory performance order as a "payment ordered" would narrow this exception into "virtual nonexistence".

[99] Counsel to the MOE also argues that the Initial Order should not be interpreted in a manner that prohibits the issuing of EPA orders to Nortel during the CCAA process and that the federal power over insolvency does not give Parliament the general power to release insolvent debtors from their obligations to comply with provincial legislation.

[100] The position of the MOE was supported by the City of Belleville and by 2058756 Ontario Limited ("2058").

ANALYSIS

[101] It is a simplistic statement but one that is necessary to emphasize: insolvency statutes such as the CCAA and the BIA do not mesh very well with environmental legislation. The environmental legislation and its regulatory framework functions more effectively when insolvency is not present. Unfortunately, that is not the situation that faces parties affected by the Nortel restructuring.

[102] Despite the able arguments of counsel to the MOE, and others opposed to the requested relief, I have concluded that the position put forth by Nortel must prevail.

[103] Counsel to the MOE referenced, on a number of occasions, the regulatory continuum, submitting that the MOE is only at stage (iv) and has not crossed over to stage (v). I have reached the conclusion that it is not possible to draw such a bright-line distinction.

[104] I do not take issue with the submission of counsel to the MOE that the Minister has the discretion under the legislation and, if the Minister is solely acting in its regulatory capacity, it can do so unimpeded by the Stay. This is the effect of s. 11.1(2) of the CCAA.

[105] However, it seems to me that, when the entity that is the subject of the MOE's attention is insolvent and not carrying on operations at the property in question, it is necessary to consider the substance of the MOE's actions. If the result of the issuance of the MOE Orders is that Nortel is required to react in a certain way, it follows, in the present circumstances, that Nortel will be required to incur a financial obligation to comply. It is not a question of altering its operational activities in order to comply with the EPA on a going forward basis. There is no going forward business. Nortel is in a position where it has no real option but to pay money to comply with any environmental issue. In my view, if the MOE moves from draft orders to issued orders, the result is clear. The MOE would be, in reality, enforcing a payment obligation, which step is prohibited by the Stay.

[106] In this respect, I am in agreement with the submissions made by counsel to Nortel. Regardless of whether the MOE's activities result in a direct claim as against Nortel, or a claim against third parties who in turn will make a claim against Nortel, the result, for practical purposes, is the same. It seems to me that the critical point to be determined is not the distinction between performance obligations and monetary obligations, but rather it is whether the actions of the MOE are such that Nortel is required to react or respond to a step taken by the MOE and in doing so, incur a financial obligation. In my view, the effect of the MOE Orders, if issued, is to require Nortel to prepare an action plan, which results in Nortel having to incur a financial obligation.

[107] I do not agree with the MOE's contention that financial obligations incurred by Nortel for the purpose of complying with the MOE Orders are different from obligations incurred directly to the Crown. For the purpose of Nortel's CCAA proceedings, what matters is that Nortel is obligated to undertake remedial work which will result in Nortel expending money. Any money expended by Nortel in respect of MOE obligations is money that is directed away from creditors participating in the insolvency proceedings. The same insolvency considerations ought to apply regardless of who receives the money. In my view, this view is consistent with the "single proceeding model" discussed by the Supreme Court in *Century Services*.

[108] I also do not believe the MOE is aided in this regard by the decision in *CIBC v. Isobord*. On the MOE's continuum, described above, this case would fit stage (vi). It supports the proposition that where a regulator contracts a third party to perform work that a debtor company has failed to perform, the regulator is acting as a creditor. However, it does *not* support the proposition that actions earlier in the MOE's continuum can *never* be characterized as the actions of a creditor. That is, it does not support the proposition endorsed by the MOE: that ordering a debtor company to perform work that requires the expenditure of resources (stage (iii)) does not render the MOE a creditor unless and until the MOE expends its own resources to ensure that the work gets done (stage (vi)).

[109] This interpretation is, in my view, the result directed by the governing insolvency statutes.

[110] In *Century Services*, at paras. 23-24, the Supreme Court emphasized the convergence of the BIA and the CCAA in terms of priorities:

> Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful...
>
> With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible...

[111] Subsection 12(1) of the CCAA (as it existed in January, 2009, and which applies in the present case) defines "claim" as "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act". The meaning of "indebtedness, liability or obligation" is to be determined by reference to whether a claim is a debt provable in bankruptcy.

[112] The reference to "debt provable" in s. 12(1) of the CCAA, which references the BIA, has to be considered in the context of s. 2 of the BIA, which refers to "claim provable" and directs that "claim provable in bankruptcy", "provable claim" and "claim provable" include any claim or liability provable by a creditor in proceedings under the BIA.

[113] Subsection 121(1) of the BIA addresses what are claims provable. It provides:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[114] Section 14.06(8) of the BIA, entitled "Claim for clean-up costs," contains an exception to s. 121(1):

> Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

[115] The impact of these statutory provisions requires a full consideration of the position of the MOE. In my view, it is necessary to take into account the defining event for a claim. In this case, the defining event is the point at which the condition arose or the damage occurred.

[116] It is also important to note that s. 14.06(8), unlike other subsections of s. 14.06, is not restricted in its application to a trustee. On the contrary, the focus of s. 14.06(8) is related to s. 121(1) – provable claims. As such, it seems to me that Parliament clearly directed its mind to the issue of creating an exception to s. 121(1) of the BIA and in doing so addressed the issue as to how environmental conditions and damage were to be addressed by an insolvent debtor. The BIA and CCAA have to take into account the reality that a debtor may not have continuing operations. If there are continuing operations, there has to be ongoing compliance with environmental legislation. But if there are no ongoing operations, the environmental regulator has to rely on its security, failing which it has unsecured status.

[117] Further, while it is apparent that s. 11.8(8) of the CCAA does not apply in the current circumstances as Nortel no longer owns any real property at the Impacted Sites, with the exception of the Retained Lands at the London site, s.11.8(9) does apply and is conspicuous in its similarities to s. 14.06(8) of the BIA. Subsection 11.8(9) of the CCAA, entitled "Claim for clean-up costs", directs that:

> A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[118] A priority scheme has also been enacted and is contained in s. 11.8(8). In this case, the priority scheme is of limited effect as Nortel does not own the property in question, save for the Retained Lands at the London site. The result, in my view, is straightforward. The MOE can look to whatever security may be available, failing which it has unsecured status.

[119] I do not accept the MOE's argument that the triggering event for a claim is when the Minister exercises his discretion. In my view, that is not what is directed by s. 14.06(8). Further, given the effect of s. 14.06(8), I do not believe that *Shirley (Re)* and *Lamford Forest Products*, relied upon by the MOE, are of any assistance, since both were decided before the addition of that subsection to the BIA.

[120] This is consistent with the decision in *Harbert*. In that case, the bankrupt intended to make a distribution to secured creditors. The MOE objected on the basis that the costs of remediation exceeded the value of the real property over which the MOE had statutorily granted security. The court ruled that, save for the real property, the MOE was an unsecured creditor. At para. 55, the court stated that although the MOE was acting as a creditor, it could "be nothing more than an unsecured creditor... for cleanup costs to the extent General Chemical's real property and existing financial assurance are insufficient to meet those needs." In that case, as here, the court order appointing an interim receiver did not exempt the debtor from complying with environmental regulatory provisions or MOE orders pursuant to the EPA. However, the court noted that "[t]he provisions of the order do not create a secured claim for the MOE's orders, nor do they suggest the MOE has priority over the interests of secured creditors." Thus, in my view, and contrary to the MOE's contention, the case does not stand for the proposition that companies subject to CCAA proceedings must prioritize compliance with MOE orders over the claims of secured creditors. Rather, it supports the position of Nortel.

[121] The event that gives rise to a CCAA claim against Nortel has already occurred, as the events giving rise to the "environmental condition or environmental damage" have taken place. The only step that has yet to take place is the quantification of the claim, but the absence of that quantification does not impact on the analysis of the position of the MOE. The MOE has the option of not filing a claim. If it chooses this route, there will eventually be a distribution to creditors without participation by the MOE. If the MOE attempts to crystallize its claim at some future time, it may have to accept the consequences of its failure to act in a more timely basis. Section 14.06(8) of the BIA makes it clear that any claim of the MOE is a provable claim in a CCAA proceeding.

[122] The preceding statutory analysis echoes the observations of the court in *AbitibiBowater*, at paragraphs 118 to 120. In my view, given the Supreme Court's guidance with respect to the convergence of the two insolvency statutes, the proper interpretation of the above provisions is they direct that once steps are taken by the MOE to require Nortel to take actions in respect of a factual matrix that arose prior to the filing date, if those actions require a monetary expenditure they must, for the purposes of the CCAA, be considered to be part of a claims process and must also, by necessity, be stayed.

[123] In my view, the distinction drawn by the MOE is blurred. In an insolvency context, the distinction should not be based on whether the order is characterized as a "regulatory" order or a "financial" order. Rather, it should be based on the real effect of the actions taken by the regulator. The MOE's position regarding where on its continuum it ceases to act as a regulator and commences acting as a creditor is not the determining factor in the analysis of this issue.

[124] It seems to me that it is not open to the MOE to take the position that the fact situation is too speculative or too remote, such that they cannot formulate a claim. This argument is addressed by s. 14.06(8) of the BIA.

[125] In my view, it is necessary to comment on the *Strathcona* case, relied upon by the MOE. I note that in this case the court applied what it referred to as the "Panamericana principle." Abiding by this principle, the court characterized a debtor's obligation to complete drainage work as an obligation owed to the public, not to the regulator per se. The regulator is just the vehicle that protects the public's interest, and where the Panamericana principle applies, the debtor must pay to fulfill the obligation to the public in priority to all secured creditors. The court interpreted s. 14.06(8) narrowly, stating, at para. 42, that it is intended "only to overcome what would otherwise be the effect of s. 121(1)." The court reasoned that but for s. 14.06(8), s. 121(1) would direct that an environmental claim arising after the date of bankruptcy but before discharge might not be a provable claim. The court's view was that s. 14.06(8) is designed only to deal with that timing issue.

[126] In my view, the Panamericana principle, as articulated above, does not reflect the clear intention of Parliament as evidenced in the BIA. Section 11.8(8) of the BIA delineates, and thus limits, the scope of the MOE's security in this context. It states that the "costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto." If the MOE's claim was characterized as an obligation Nortel owed to the public, and the Panamericana principle were applied, the MOE Orders would be granted priority

over all secured creditors, placing the MOE in a better position than that which is directed by s. 11.8(8).

[127] The MOE clearly does have options. It can maintain its position that it is not a creditor. However, if this position is maintained, the MOE must recognize that it will not be in a position to effect any remedy against Nortel arising out of any draft order that has been posted on the EBR Registry or any subsequent order. These draft orders "require" Nortel and other responsible parties to submit and implement workplans for certain investigations. The moment that Nortel is "required" to undertake such activity it is "required" to expend monies in response to actions being taken by the MOE. In my view, any such financial activity that Nortel is required to undertake is stayed by the provisions of the Initial Order.

[128] The assets of Nortel have been sold and substantial proceeds are being held pending a determination of the allocation of assets as between various Nortel entities and the quantification of claims as against various Nortel entities. At this point, a distribution to unsecured creditors seems likely.

[129] It is open to the MOE to maintain its position that it does not have a claim as a creditor. If so, the consequences of taking such a position are obvious. Distributions will eventually be made to creditors of Nortel and, if the MOE chooses not to participate as a creditor, it will not receive a distribution. On the other hand, if the MOE decides to file a claim, it could very well be that its claim will be valued and a distribution provided to the MOE. Section 14.06(8) of the BIA makes it clear that any claim of the MOE arising from environmental conditions on properties which are or have been owned by Nortel are claims in Nortel's CCAA proceedings.

THE POSITION OF 2058756 ONTARIO LTD.

[130] I will also deal with the submissions of 2058, which is the current owner of the Kingston Site. 2058 argues that Nortel should be precluded from disclaiming an Asset Purchase Agreement ("APA") and Environmental Access Agreement ("Access Agreement"), both of which were agreements between Nortel and Cable Design Technologies, from which 2058 purchased the Kingston Site. 2058 argues that the APA and the Access Agreement are "covenants running with the land" and that it would be inequitable to disclaim Nortel from its obligations under those agreements.

[131] In my view, Nortel has provided a complete answer to the arguments of 2058 in its Reply Factum. The APA and Access Agreement are not covenants that run with the land. A covenant that runs with the land can only bind persons with an interest in the land: *Royal Bank of Canada v. MacPherson* (2009), 311 DLR (4th) 361 (Ont Div Ct), para 44. Nortel does not have an interest in the land in question. Further, as obligations that require the expenditure of money or the doing of an act, the APA and Access Agreement are positive covenants. A positive covenant does not run with the land, even if the parties' intention is to the contrary: *Parkinson et al. v. Reid*, [1966] SCR 162 at 167; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 50 OR (3d) 670 (SCJ), paras 15-17, aff'd 58 OR (3d) 481 (CA).

[132] I also disagree with 2058's submission that it would be inequitable to disclaim Nortel's obligations under the APA and Access Agreement. In considering whether 2058 would be

prejudiced by such an order, it is necessary to consider the interests of all stakeholders in this highly complex cross-border insolvency. 2058 accepted Nortel's credit risk when it acquired the Kingston Site, and is in the same position as all other creditors of Nortel who accepted Nortel's credit risk on an unsecured basis. 2058 may have a claim for damages, but it would be inequitable to prioritize that claim above all of the other unsecured creditors.

CONCLUSION

[133] I agree with the court's analysis in *AbitibiBowater*, and, in my view, it applies to the present case. As the court in that case recognized, the relevant case law directs that CCAA courts ought to take a substance over form approach. In my view, the MOE Orders, if issued, are, in substance, financial obligations for Nortel.

[134] Further, through s. 11.8(8), the CCAA recognizes that claims for the costs of remedying environmental conditions and environmental damage can arise in an insolvency context. When this occurs, the CCAA stipulates the extent of the security accorded to the claimants: "a charge on the *real property* and on any other real property of the company that is contiguous thereto and *that is related to the activity that caused the environmental condition or environmental damage*" [emphasis added]. Where the security stipulated in s. 11.8(8) is absent, the claimant is unsecured.

[135] In *Nortel Networks Corp. (Re)* (2009) 55 C.B.R. (5th) 229, I recognized that the CCAA can be applied in a liquidating insolvency. In such circumstances, the CCAA directs that where the debtor does not own land on which an environmental condition or damage is present, any claim by the MOE in respect of that condition or damage is unsecured.

[136] Given my conclusion that the MOE Orders are, in these circumstances, financial obligations, an operational conflict between the EPA and the CCAA exists. I accept counsel to Nortel's submission that, given that conflict, otherwise valid provincial legislation is superseded. See *Canadian Western Bank v. Alberta* 2007 SCC 22; *Nortel Networks Corporation (Re)* 2009 ONCA 833 at paras. 36-38; *Harbert Distressed Investment Fund, LP v. General Chemical Canada Ltd.* 2007 ONCA 600, leave to appeal to the Supreme Court dismissed 2008 CarswellOnt 879; *AbitibiBowater, supra,* at para. 270.

DISPOSITION

[137] In the result, the Nortel Motion is granted. I have concluded that the MOE's posting of a draft Director's Order on the EBR Registry for public comment is the first step on the road to the enforcement of a financial and monetary claim. Because the MOE Orders are draft orders, they are not yet in breach of the Stay. However, if issued they would require Nortel to respond, causing Nortel to incur a liability which would be stayed by the Stay. It is not open for the MOE to take any steps to confirm the draft MOE Orders. It is open, however, for the MOE to take a step to withdraw the draft Director's Order.

[138] However, it is recognized that the MOE may have secured status under s. 11.8(8) with respect to the Retained Lands at the London site.

[139] A declaration is also to be issued that all proceedings before the Ontario Environmental Review Tribunal in relation to the MOE Orders are stayed.

[140] Authorization is also provided to the Nortel Applicants to cease performing any remediation at or in relation to the Impacted Sites and a declaration shall issue that any claims in relation to such current or future remediation requirements by the MOE against any of the Nortel Applicants or their current or former directors or officers in relation to the Impacted Sites, whether statutory, contractual, or otherwise, are subject to resolution and determination in accordance with the terms of the Amended and Restated Claims Procedure Order dated July 30, 2009 and the Claims Resolution Order dated September 16, 2010.

[141] The Nortel Applicants are also released from all contractual obligations to carry out remediation requirements at the Impacted Sites.

[142] I am indebted to counsel for their informative facta and oral argument on this motion.

[143] An order shall issue to give effect to the foregoing.

MORAWETZ J.

Date: March 9, 2012

Tab 9

COURT FILE NO.: 05-CL-5854
DATE: 20050907

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **GENERAL MOTORS CORPORATION**, Applicant

- and -

TIER0CON INDUSTRIES INC., Respondent

BEFORE: **Justice Alexandra Hoy**

COUNSEL: **D.J. Miller and Rachelle F. Moncur**, for the Applicant

Jeffrey C. Carhart and Margaret R. Sims, for the Receiver, Zeifman Partners Inc.

Paul G. Macdonald, for Royal Bank of Canada, National Bank of Canada, Bank of Nova Scotia and Comerica Bank

Ronald B. Moldaver, Q.C., for the Landlords, Galanda Properties Inc. and Blackridge Properties Inc.

DATE HEARD: **August 17, 2005**

ENDORSEMENT

[1] The three motions before me relate to whether a landlord, Galanda Properties Inc. (the "Landlord"), should be permitted to terminate a lease (the "Lease") and obtain immediate possession of an insolvent company's head office and main manufacturing facility.

[2] By order of Greer J. dated April 15, 2005 (the "Order"), a receiver and manager (the "Receiver") of all of the property of Tiercon Industries Inc. ("Tiercon") was appointed pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Tiercon manufactures component parts for sale to General Motors Corporation ("GM") and other customers. Ninety percent of its parts are sold to GM.

[3] In addition to the head office and manufacturing facility leased from the Landlord pursuant to the Lease, Tiercon leases approximately 15 acres of vacant land adjacent to the plant facility from Blackridge Properties Inc. ("Blackridge"), a company related to the Landlord, and another operating facility from a third party. In the motions before me, Blackridge sought possession of the vacant lands leased by it to Tiercon. The Receiver advised Blackridge by letter dated April 29, 2005 that it did not take possession of and had

no intention of occupying the vacant lands and the Receiver has not paid occupation rent in respect of the vacant land. The Landlord and Blackridge's motion for possession was filed with the court on June 10, 2005, after Blackridge was aware that the Receiver was not taking possession of the vacant lands. GM does not oppose the termination of the lease with Blackridge for the vacant lands. Accordingly, on consent, an order shall issue that Blackridge is entitled to possession of the vacant land. The Landlord's motion for possession of the premises subject to the Lease is opposed.

[4] While the senior lenders and certain other parties were given notice of GM's application for the Order, the Landlord was not.

[5] The form of the Order is essentially the standard form template order created by the Commercial List Users' Committee of the Ontario Superior Court of Justice. The Order contains the customary "come back provision", entitling any interested party to apply to this Court to vary or amend the Order on not less than seven days' notice. Paragraph 9 of the Order stays all rights and remedies against Tiercon, the Receiver, or affecting Tiercon's property, except with written consent of the Receiver or leave of this Court. The Receiver has taken possession of the leased plant facility and is paying occupation rent to the Landlord. Unless the Order is varied or this Court gives leave to the Landlord, the Landlord cannot terminate the Lease and obtain possession.

[6] In the first motion before me, the Landlord argues that it should be entitled to terminate the Lease because it was not given notice of the application resulting in the Order and because it alleges that GM, the applicant for the Order, failed to disclose material facts to the Court. The Landlord says that it is not seeking to vary the Order under the "come back provision", or seeking to have the stay under paragraph 9 lifted. Rather, it argues that because GM failed to give it notice, and it alleges, failed to disclose material facts, the Order should not be effective against it. The Landlord refers me to *Chitel* v. *Rothbart* (1982), 39 O.R. (2d) 513 (C.A.) and *Retrocom Growth Fund Inc.* v. *PFT Collingwood 1 Inc.*, [2001] O.J. No. 2569, Court File No. 01-CV-21100, a case dealing with a certificate of pending litigation, where relief was discontinued or set aside due to lack of full disclosure.

[7] Applications to appoint interim receivers are very often made *ex parte*. If notice is given, assets may be disposed of, or rights terminated, before the Receiver can obtain possession of them. The Order, by its terms, abridged the notice period and dispensed with further service. The failure of GM to give notice of the Application to the Landlord in the context of an insolvency is not in and of itself a reason to permit the Landlord to terminate the lease. I note the Landlord's position that if GM will not assume the full remaining term of the Lease, the Landlord would prefer to terminate the Lease and have the premises remain "fallow" rather than permit the Receiver to remain in possession and pay occupancy rent. While there is no suggestion that GM anticipated that the Landlord would take this position, the position now advanced by the Landlord perhaps justifies GM not giving the Landlord notice.

[8] The Landlord alleges two material facts were not disclosed to the Court on the Application.

[9] The first material fact that the Landlord says was not disclosed was that the Landlord had not consented to be bound by an agreement dated November 12, 2003 between GM and Tiercon (the "Access Agreement"), including the right to use the leased plant during a specified period defined as the "Access Period" in the Access Agreement. Under the Access Agreement, Tiercon agrees that GM is entitled to use and occupy Tiercon's operating assets and leased premises for the Access Period, upon a default, defined as a "Trigger Event" occurring. Under the Access Agreement, Tiercon agreed to, upon written request from GM, use "reasonable commercial efforts" to obtain the Landlord's consent to this, in the form attached to the Access Agreement. Such a request was not made and the Landlord's consent was not obtained.

[10] Pursuant to the Access Agreement, Tiercon also granted GM a security interest to secure Tiercon's obligation to provide the access to GM. Tiercon agreed that GM would have the right to appoint a receiver to effectuate the right of access.

[11] The form of the Access Agreement included in the Application Record was unexecuted.

[12] The affidavit of Mr. Bambury filed in support of the application for the Order does not say that the consent of the Landlord was obtained. Nor does it say that GM is entitled to occupy the leased premises.

[13] The Landlord says that because the form of landlord's consent that GM could ask Tiercon to sign was attached as a schedule to the unexecuted Access Agreement between GM and Tiercon, which Mr. Bambury indicated in his affidavit was entered into by GM and Tiercon, the Court would have been under the mistaken impression that the Landlord had consented to GM occupying the leased premises, and would therefore not oppose GM's application for the Order containing a "stay" with respect to the Landlord's rights.

[14] My review of the Application Record did not leave me with the impression that the Landlord had consented to GM occupying the leased plant pursuant to the Access Agreement. Accordingly, I conclude that the failure to specifically disclose that the Landlord had not consented to be bound by the Access Agreement did not constitute material non-disclosure.

[15] The second material fact the Landlord says that GM did not disclose was that the Lease specifically prohibited Tiercon from assigning or parting with possession of the demised premises without the prior consent of the Landlord. This is, in my experience, a virtually standard provision in a lease and would, I believe, have been assumed by Greer J. in reviewing the urgent Application before her. The Application Record, not surprisingly, does not address the restrictions on assignment in all of the various agreements affected by the stay in the Order. The failure to disclose this fact does not constitute material non-disclosure justifying leave to the Landlord to terminate the Lease.

[16] The arguments advanced by the Landlord do not convince me that the Order should not continue to be effective, *vis-à-vis* the Landlord, and it should therefore be permitted to terminate the Lease.

[17] As noted above, counsel for the Landlord was clear that he was not asking for leave to have the stay in paragraph 9 of the Order lifted. Had that been the basis on which the Landlord proceeded, I would have declined to lift the stay.

[18] Where relief from a stay is sought in an insolvency context, whether from an order issued pursuant to the *Courts of Justice Act* or the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, the Court should consider a balancing of the interests of all affected parties: *Toronto Dominion Bank* v. *Ty (Canada) Inc.*, [2003] O.J. No. 1552, (2003) 42 C.B.R. (4th) 142 (Ont. S.C.J.) at paragraph 22.

[19] Tiercon has over 700 employees. If the Landlord terminates the Lease, the Receiver will be unable to continue to operate the business and jobs will be abruptly lost. GM would suffer enormously expensive disruption to its operations. The evidence is that any interruption in production could result in lost sales of $500M per day.

[20] Economic and social consequences to the broader community would be inevitable if losses of that magnitude were sustained. There is no evidence before me of prejudice to the Landlord if the Receiver remains in possession and pays rent and fulfills the other obligations of the tenant relating to its period of possession in accordance with the Lease. It is anticipated that if no going-concern sale is effected, the Landlord would have possession of the leased premises in late 2005 or early 2006. There is no meaningful evidence that delay in being able to re-lease the affected premises should the Receiver not sell the business on a going-concern basis would result in a less favourable outcome to the Landlord than if it proceeded to re-lease them now. Nor is there evidence before me that the delay in the Landlord's ability to re-lease the plant facility adversely affects Blackridge's ability to lease or sell the vacant land. In this case, the desire of the Landlord to be able to deal with its property as and when it wishes does not outweigh the interests of the other affected parties in having the Receiver remain in possession of the leased premises.

[21] In the result, the Landlord's motion for possession of the premises subject to the Lease and for a reference to determine the damages sustained by the Landlord as a result of the proceedings in this matter is dismissed.

[22] In the second motion before me, a cross-motion by the Receiver, the Receiver seeks a declaration that it may remain in possession of the leased plant premises in exchange for payment of occupation rent in accordance with the terms of the Lease. The Receiver indicates that it has paid base and additional rent for the period commencing with its appointment, calculated on a *per diem* basis. In the materials filed, there is also an indication that the Receiver is performing maintenance obligations related to its period of occupancy. The dispute between the Receiver and the Landlord appears to be whether the Receiver must pay additional rent related to realty taxes for the period prior to its appointment that became due under the Lease after its appointment. If this is the scope of the dispute, based on the Receiver's Second Report, the amount in issue is $30,359.81. The Landlord suggested that more was owing, but was not in a position to make specific submissions. Accordingly, the Receiver's cross-motion is adjourned to a date to be fixed with the Commercial List Office, if the parties are unable to resolve the extent of the obligations of the Receiver under the Lease relating to its possession of the leased premises.

[23] Royal Bank of Canada ("RBC"), as agent for the senior lenders, brought the third motion before me. RBC seeks relief only in the event that the Landlord was permitted to terminate the Lease. Accordingly, the third motion is rendered moot by my dismissal of the Landlord's motion for possession of the premises subject to the Lease.

[24] If the parties are unable to agree on costs, the parties, other than the Landlord, may make brief written submissions within 15 days. The Landlord may provide brief written submissions in response within 15 days thereafter.

Hoy J.

DATE: September 7, 2005

Tab 10

quences as an excuse to place an unreasonable construction on words that can have only one reasonable grammatical construction.

THE MODERN PRINCIPLE

To-day there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. This principle is expressed repeatedly by modern judges. Lord Atkinson in *Victoria City* v. *Bishop of Vancouver Island*[20] put it this way:

> "In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."

The remaining chapters of this work seek to explain how an Act is to be so read and how problems that may be encountered on the way are to be solved.

Inland Revenue Commissioners, [1959] 1 Ch. 86, *per* Romer L.J., at p. 105.

[20][1921] A.C. 384, at p. 387.

Tab 11

that the court will point to the specific examples or illustrations and invoke the limited class rule, thus defeating the drafter's hopes — and the law-maker's intention.

A court may also refuse to apply the limited class rule where it is convinced that the legislature meant to establish not one but two or several classes. In *Eggers v. College of Dental Surgeons (British Columbia)*,[138] for example, the Court was asked to apply the rule to a provision from the Code of Ethics of the British Columbia College of Dental Surgeons which read:

> A dentist who commits any act of immorality, indecency or dishonesty or any other act involving abuse of the professional relationship in which he stands to a patient, is liable to have his name erased from the register.

Given this wording it would be possible to formulate a class based on the specific items mentioned, but narrower in scope than the general description which follows. The court, however, was unwilling to apply the rule. Norris J.A. said:

> On consideration, this Court is of opinion that the words "or any other act involving abuse of the professional relationship" are not *ejusdem generis* with the words "any act of immorality, indecency or dishonesty". Our opinion is that ... the first three classes form one category of unprofessional acts and the "other" acts involving abuse of the professional relationship form a second category.[139]

According to this analysis, the legislation creates two categories of acts: (1) those considered wrongful if done by members of the community at large and (2) those considered wrongful only if done by professionals to their clients. There is no reason why either should be used to limit the scope of the other. Given the purpose of the legislation, to control harmful conduct by dentists, it is plausible that the legislature would seek to discourage wrongdoing of every sort.

It was also relevant that the general words which the defendant hoped to limit, namely, "other acts involving abuse of the professional relationship", are not unduly vague. Taken by themselves they constitute an adequately defined and appropriately limited class of acts. Their unqualified application would not lead to inappropriate or unacceptable consequences. If a class is already appropriately limited, there may be little justification for applying the limited class rule.

IMPLIED EXCLUSION

The final maxim to be considered here is *expressio unius est exclusio alterius*: to express one thing is to exclude another. This maxim reflects a form of reasoning

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138 (1965), 56 D.L.R. (2d) 663 (B.C.C.A.). But compare *Buenavista on the Rideau v. Regional Assessment Commissioner, Region No. 2*, [1996] O.J. No. 1341, 28 O.R. (3d) 272, at 278-79 (Ont. Div. Ct.). When the general term is introduced by "like" or "similar" (as opposed to "other", for example, or by no qualifier at all, the court may be more insistent on identifying a single shared class.

139 *Ibid.*, at 667.

that is widespread and important in interpretation. Côté refers to it as *a contrario* argument.[140] Dickerson refers to it as negative implication.[141] The term "implied exclusion" has been adopted here because it accurately describes the inference underlying this particular maxim.

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent".[142] The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

An expectation of express reference can arise in a number of ways. It may arise from the conventions of ordinary language use or from presumptions relating to the way legislation is drafted. It is often grounded in presumptions about the policies or values the legislature is likely to express in its statutes.[143] Two common forms of the implied exclusion argument are examined below under the headings (1) failure to mention comparable items and (2) failure to follow an established pattern.[144]

Failure to mention comparable items. When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. As explained by Noel, J.A. in *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, dealing with a series of express exceptions, "if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended."[145]

The reasoning here is essentially counterfactual:[146] if the legislature had intended to include comparable items, it would have mentioned them expressly or used a general term sufficiently broad to encompass them; it would not have mentioned some while saying nothing of the others. This reasoning is grounded not only in drafting convention but also in basic principles of communication. If

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140 See Côté, *supra* note 74, at p. 334.

141 R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown & Co., 1975), p. 234.

142 *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, at para. 31 (Ont. C.A.).

143 For discussion of the presumptions of legislative intent, see Chapter 14.

144 For discussion of recurring patterns of expression, see *supra* at pp. 218-19.

145 [2004] F.C.J. No. 2115, at para. 96 (F.C.A.).

146 For an explanation of the counterfactual form of argument, see *supra* at pp. 219-21.

G.E. Canada Equipment Financing G.P.	Northern Sawmills Inc.	Court File No. CV10-9042-00CL
	and	
Applicant	Respondent	

Ontario
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

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