Court File No. CV-13-10046-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 101 OF THE *COURTS OF JUSTICE ACT*, RSO 1990, c C43 and SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED

B E T W E E N :

FREEPORT FINANCIAL LLC

Applicant

- and -

PRACS INSTITUTE CANADA B.C. LTD.

Respondent

BRIEF OF AUTHORITIES
OF THE APPLICANT
(returnable June 10, 2013)

MCMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON, M5J 2T3

Brett Harrison LS#: 44336A
Tel: (416) 865-7932
Fax: (416) 865-7048
Email: brett.harrison@mcmillan.ca

Lawyers for the Applicant

TO: THE SERVICE LIST (attached as Appendix A)

AND TO: Ontario Ministry of Labour
400 University Avenue, 14th Floor
Toronto, ON
M7A 1T7

Attention: Legal Department

AND TO: Office of the Superintendent of Bankruptcy
25 St. Clair Avenue E, 6th Floor
Toronto, ON M4T 1M2
Tel: 1-877-376-9902
Fax: 416-973-744

AND TO: Former Directors of PRACS Canada

Mr. Roy Dagnall
8350 Estero Blvd., Suite 625
Fort Meyers Beach, Florida 33931

Mr. Stephen Papalas
300 North LaSalle, Suite 5300
Chicago, IL 60654

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TAB 1

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, <u>only</u> 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

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COURT OF APPEAL FOR ONTARIO

LASKIN, ROSENBERG AND SIMMONS JJ.A.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.	**Frederick L. Myers and Jason Wadden for the appellant, The Superintendent of Finance Services (Ontario)**
AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"	**Andrew Hatnay for the respondent, Quebec Pension Committee of Ivaco Inc.**
	Jeffrey S. Leon and Richard B. Swan for the respondent, National Bank of Canada
	Dan V. MacDonald for the respondent, Bank of Nova Scotia
	Geoff R. Hall for the respondent, QIT-Fer et Titane Inc.
	Robert W. Staley and Evangelia Kriaris for the respondent, Informal Committee of Noteholders
	Peter F.C. Howard for the Monitor, Ernst & Young Inc.
	Heard: February 22, 2006

On appeal from the three orders of Justice James M. Farley of the Superior Court of Justice all dated July 18, 2005, reported at [2005] O.J. No. 3337.

LASKIN J.A.:

A. INTRODUCTION

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

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

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

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

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

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

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

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

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

B. RELEVANT FACTS AND CHRONOLOGY

a) The Companies

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

[11] Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's

principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets.

b) The non-union pension plans

[12] The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Quebec and has both Quebec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

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

c) The initial stay under the CCAA

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

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

d) The pension stay order

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

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

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

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

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

[20] Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

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

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

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

e) The sale to Heico

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

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

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

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

f) The pension claims

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

[27] The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is sixty-seven years old and earns a pension of $14,000 per year. These pensioners will

receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately $1,200 to $888. If only unpaid contributions are recovered, and not the full solvency deficiency, the average pension will be reduced by 17 per cent to $996 monthly.

g) The claims of the financial creditors

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

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

[30] The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005 it had a secured claim against Ivaco for $17 million,[1] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

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

C. ANALYSIS

a) What is in issue on this appeal

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

1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?

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

2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?

3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Quebec to Toronto?

b) What is not in issue on this appeal

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

[34] On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 39 O.R. (3d) 176 (C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

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

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

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

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

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

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

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

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

[41] The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA proceedings. The submission that the motions judge was legally required to order payment or segregation

of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

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

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

> s. 57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> s. 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

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

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

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

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

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

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

[49] The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[67] In *Usarco*, CCAA proceedings did not precede the bankruptcy petition. Moreover, 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.

[68] Recently in *Re General Chemical Canada Ltd*., [2005] O.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

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

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

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

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

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

> In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and

> con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

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

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

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

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

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

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

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

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

- The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be negotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution.

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

- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they

knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.

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

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

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

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

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

[80] I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s.

191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Sections 191(1) and (2) provide:

> s. 191(1) In this section, "reorganization" means a court order made under;
>
> (a) section 241;
>
> (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
>
> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
>
> s. 191(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

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

> s. 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> …
>
> (b) change the province in which its registered office is situated;

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

Ifastgroupe's head offices from Quebec to Toronto. Resort to the CCAA was unnecessary.

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

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

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

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

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

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

tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

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

D. CONCLUSION

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

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

RELEASED:

"OCT 17 2006"
"JL"

"John Laskin J.A."
"I agree M. Rosenberg J.A."
"I agree Janet Simmons J.A."

TAB 2

COURT FILE NO.: CV-08-7722-00CL
DATE: 20090126

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **THE BANK OF NOVA SCOTIA (Applicant) v. HURONIA PRECISION PLASTICS INC. (Respondent)**

BEFORE: **MORAWETZ J.**

COUNSEL: **Sam Rappos, for the Applicant, The Bank of Nova Scotia**

A'Amer Ather, for the Canada Revenue Agency

Chris Burr for Maxium Financial Services Inc.

HEARD: **NOVEMBER 4, 2008**

E N D O R S E M E N T

[1] The Bank of Nova Scotia ("BNS") seeks an order permanently lifting the stay of proceedings provided for in paragraph 9 of the order of September 17, 2008 (the "Appointment Order") as against Huronia Precision Plastics Inc. ("Huronia") for the purposes of permitting BNS to bring an application for a bankruptcy order against Huronia pursuant to s.43 of the *Bankruptcy and Insolvency Act* ("*BIA*"); and authorizing and directing Zeifman Partners Inc. ("Zeifman" or the "Receiver"), the court appointed Receiver of Huronia to consent, on behalf of Huronia, to BNS's application for a bankruptcy order.

[2] The Canada Revenue Agency ("CRA") has also brought a motion in which it seeks an order directing the Receiver to pay to CRA immediately, the amount of $63,164.17; and in the event that this court permits a lifting of the stay to permit BNS to apply for the bankruptcy order, a lifting of the stay to permit CRA to take the necessary steps to protect its priority position.

[3] The Appointment Order was made September 17, 2008. The Receiver subsequently brought a motion returnable September 30, 2008 seeking an order vesting certain equipment in Magna Closures Inc. ("Magna") and directing that the net proceeds of the sale would stand in the place of the equipment.

[4] The order was granted on September 30, 2008 (the "Vesting Order") and paragraph 9 of the Vesting Order provides:

> 9. THIS COURT ORDERS that notwithstanding paragraph 30 of the Appointment Order, the Receiver shall withhold from the net proceeds of the Purchased Assets the total sum of $130,000 (the "Holdback") pending resolution of the claim asserted by Canada Revenue Agency ("CRA") respecting possible pre-receivership GST arrears said to be owing by the Debtor (the "GST Claim"). The Receiver shall distribute the Holdback, or any balance thereof after payment to CRA of the amount of the GST Claim <u>to the extent that it is found to attach to the net proceeds in priority to the interest of Maxium and BNS</u>, to Maxium and BNS in accordance with their respective proportionate entitlements to the net proceeds under the terms of the Bill of Sale or as otherwise agreed upon by them, upon the consent of CRA, Maxium and BNS or a further order of this Court. [emphasis added]

[5] Subsequent to the granting of the Vesting Order, CRA informed BNS and Maxium that CRA's claim for GST for the period prior to the Appointment Order was $63,164.17.

[6] Pursuant to ss.222(1) of the *Excise Tax Act* ("*ETA*"), persons who have collected GST amounts but have not remitted them to CRA, as and when required to do so by the *ETA*, are deemed to hold those amounts in trust for the Crown.

[7] The one notable exception to the priority granted to the deemed trust is that it is subject to s.222(1.1) of the *ETA*, which provides that s.222(1) does not apply, at or after the time a person becomes bankrupt (within the meaning of the *BIA*), to any amounts that, before that time, were collected or became collectable by the person as or on account of tax under Division II of the *ETA*.

[8] Section 67(2) of the *BIA* provides that all deemed trusts created by federal or provincial legislation for Her Majesty are rendered invalid except those that would be valid in the absence of such legislation and except those set out in s.67(3) of the *BIA*. The deemed trust under the *ETA* is not listed in s.67(3), nor, in my view, is it analogous to the deemed trusts that are set out in that section.

[9] Counsel for BNS submits that it is clear that the *ETA* specifically contemplates that the priority afforded to the Crown under s.222 of the *ETA* can be extinguished and reversed on the occurrence of a bankruptcy. Further, both the *ETA* and the *BIA* recognize that any priority that CRA could potentially have with respect to the Holdback in the amount of the GST Claim would be reversed upon the bankruptcy of Huronia.

[10] CRA submits that it has priority over BNS with respect to the Holdback pursuant to the provisions of the *ETA* and since BNS has acceded to CRA's priority as a result of paragraph 9 of the Vesting Order, BNS should not be permitted to bring an application for a bankruptcy order to disrupt CRA's priority to which it acceded.

[11] Counsel for BNS submits that at no time prior to or after the issuance of the Vesting Order did it accede to the CRA having an interest in the Holdback in the amount of GST Claim in absolute priority to BNS.

[12] In my view, absent the wording of paragraph 9 of the Vesting Order, BNS would have the ability to reverse the priority of the GST Claim by bringing an application for a bankruptcy order.

[13] The Court of Appeal decision in *Re Ivaco Inc*. [2006] O.J. No. 4152 (C.A.) stands for the proposition that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority. In this case, it would be to reverse the priority position of CRA. Further, the timing of BNS's action has no bearing on the validity of the action being sought as there are no such time limitations imposed under s.222(1.1).

[14] It seems to me that the issue to consider is whether paragraph 9 of the Vesting Order operates so as to support the position put forth by CRA. In my view, the paragraph is clear where it provides that the Receiver "shall distribute the Holdback, or any balance thereof, after payment to the CRA of the amount of the GST Claim <u>to the extent that it is found to attach to the net proceeds in priority to the interest of</u> … [Maxium and BNS]". [emphasis added]

[15] I agree with the submission of counsel to BNS that paragraph 9 reflects that any distribution of the Holdback to CRA is dependent on a determination as to whether the GST Claim attaches to the Holdback in priority to the interest of BNS.

[16] In its factum, counsel to CRA, at paragraph 24 states that the Receiver's obligation to pay the deemed trust portion of the GST was made explicit and that the obligation to pay CRA was not otherwise qualified by any conditions. I disagree. The emphasized portion of paragraph 9 has to be given a common sense interpretation which, in this case, takes into account that, at the time of the issuance of the Vesting Order, there was an outstanding issue with respect to the priority of the interest of Maxium and BNS.

[17] CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

[18] Paragraph 9 does not, in my view, direct the Receiver to distribute the Holdback to CRA forthwith upon the CRA providing evidence to the Receiver with respect to the amounts owing by Huronia for the period prior to the issuance of the Appointment Order. If it did, the emphasized words in paragraph 9 would serve no purpose.

[19] Finally, with respect to the request of BNS to lift the stay for the purpose of bringing an application for a bankruptcy order against Huronia and authorizing the Receiver to consent to such application, I am satisfied that the desire for BNS to use the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy (see *Re Ivaco Inc*.) and the timing of the BNS's action has no bearing on the validity of this request.

[20] Consequently, it follows that the motion of BNS is granted and an order shall issue lifting the stay of proceedings against Huronia for the purpose of permitting BNS to bring the application for bankruptcy order and authorizing the Receiver to consent to such application on behalf of Huronia.

[21] In these circumstances, it also follows that no order is to be made directing the Receiver to make payment to CRA, nor is the stay to be lifted to enable CRA to take steps to protect its position. The motion of CRA is dismissed.

[22] If the parties are unable to agree on costs, brief written submissions, to a maximum of three pages, may be filed within 20 days.

MORAWETZ J.

DATE: January 26, 2009

TAB 3

H

1971 CarswellMan 78, [1972] 2 W.W.R. 178, 23 D.L.R. (3d) 301, 16 C.B.R. (N.S.) 158

Churchill Forest Industries (Man.) Ltd., Re

Re Churchill Forest Industries (Manitoba) Limited

Manitoba Court of Queen's Bench (In Bankruptcy)

Nitikman J.

Judgment: December 2, 1971

Counsel: *J. T. Weir, Q.C., A. K. Twaddle, Q.C.* and *B. D. Newton* , for Churchill Forest Industries (Manitoba) Ltd.

J. F. R. Taylor, Q.C., C. R. Huband and *W. S. Wright, Q.C.* , for Receiver (watching brief).

M. J. Arpin, Q.C. , for Metropolitan Investigation & Security (Canada) Ltd.

J. S. Lamont , for Dominion Catering Co. Ltd. and Pile Foundations Ltd.

T. Sturgeon , for Superintendent of Bankruptcy (watching brief).

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Within 6 months prior to petition

Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences

Bankruptcy --- Receiving order — Effect of receiving order

Acts of bankruptcy subsequent to appointment of Receiver.

The appointment of a receiver and manager does not alter the position of a debtor insofar as its liability for debts is concerned, particularly vis-à-vis acts of bankruptcy; it follows that petitioning creditors are entitled to rely on any requests for payment addressed after his appointment, on non-payment by him, on any consents to judgment given by him and on any other acts of the debtor which would normally come within the definition of s. 24 (1)(*j*) of the Bankruptcy Act, R.S.C. 1970, c. B-3, in support of their claims that an act of bankruptcy occurred within six months prior to the filing of the petitions. The appointment of a receiver does not dissolve or annihilate the company: *Moss SS. Co. Ltd. v. Whinney,* [1912] A.C. 254 ; *Re Newdigate Colliery Ltd.; Newdegate v. Newdigate*

Colliery Ltd., [1912] 1 Ch. 468 ; *Re Raitblat*, 28 O.W.N. 237, 5 C.B.R. 714, [1925] 2 D.L.R. 1219 , affirmed 28 O.W.N. 292, 5 C.B.R. 765, [1925] 3 D.L.R. 446 (C.A.) ; *Re Rayner*, 8 M.P.R. 369, 16 C.B.R. 411, [1935] 2 D.L.R. 542 (P.E.I.) applied.

***Nitikman J.* :**

1 On 14th September 1971 two bankruptcy petitions were filed in this Court against Churchill Forest Industries (Manitoba) Limited (hereafter referred to as "CFI" or "debtor") asking it be adjudged a bankrupt and that a receiving order be made in respect of its estate on the ground that the debtor, within six months next preceding the filing of the said petitions, committed the following act of bankruptcy, namely, that it had ceased to meet its liabilities generally as they became due.

2 One petition — by Metropolitan Investigation & Security (Canada) Limited ("Metropolitan") alleges an indebtedness to it by the debtor of $26,218.21. The other is by Pile Foundations Ltd. ("Pile") and Dominion Catering Company Limited ("Dominion"). Pile and Dominion allege indebtedness to them by the debtor of $10,532.12 and $241,547.55 respectively.

3 CFI opposes being adjudged bankrupt and the making of a receiving order against it as requested in the two petitions and alleges, inter alia:

> 1. That it did not cease to meet its liabilities generally as they became due within the six months next preceding the filing of the petitions.
>
> 2. That during the aforesaid period of six months its assets have been in the custody and control of the interim Receiver and Manager appointed by the Court of Queen's Bench of Manitoba with the duty to preserve the same for the benefit of the plaintiffs in the action.
>
> 3. That CFI has no immediately available property but has a claim to have the action brought in the Court of Queen's Bench of Manitoba, in which the interim Receiver and Manager above mentioned was appointed, dismissed, a claim to have the debenture given by it to the Montreal Trust Company reinstated, and a claim for damages for the mismanagement of its undertaking by the interim Receiver and Manager.
>
> 4. That CFI is not insolvent.
>
> 5. That if CFI is successful in its action against the Montreal Trust Company and the Manitoba Development Corporation, then CFI will be in a position to operate to the benefit of creditors, shareholders and CFI alike.
>
> 6. That the granting of a receiving order would be oppressive and in the discretion of the Court should be refused.

4 The order appointing the interim Receiver and Manager referred to in CFI's notice of dispute was made by Tritschler C.J.Q.B. on 7th January 1971, upon motion by Montreal Trust Company and Manitoba Development Corporation in a proceeding in the Court of Queen's Bench, wherein Montreal Trust Company and Manitoba Development Corporation were plaintiffs and CFI was defendant.

5 This order, as amended on 28th April 1971, provides, in part, as follows:

> 1. This Court doth order that Leifur Hallgrimson be and is hereby appointed until the trial or other final disposition of this action as Receiver and Manager of all the undertaking, property and assets of the Defendant, wheresoever situate, and that are subject to the security or charges created by a certain Indenture made as of the 27th day of February, 1969, between the Defendant and the Montreal Trust Company for the purpose of preserving and protecting the same and to carry on and manage the said undertaking ...
>
> 3. AND THIS COURT DOTH FURTHER ORDER that the Defendant do forthwith deliver over to the said LEIFUR HALLGRIMSON, as Receiver and Manager as aforesaid, all the undertaking, property and assets of every kind and wheresoever situate comprised in and subject to the security or charge created by the said Indenture (subject only to the rights of the bankers of the Defendant that may have arisen prior to the making of this Order under Section 88 of The Bank Act or other security pursuant to the terms of the said Indenture) and all books, documents, papers and records of every kind relating thereto.
>
> 4. AND THIS COURT DOTH FURTHER ORDER AND DECLARE that the Receiver and Manager be and he is hereby fully authorized and empowered to institute and prosecute all suits, proceedings and actions at law as may in his judgment be necessary for the proper protection of the said undertaking, property and assets of the Defendant, and likewise to defend all suits and proceedings instituted against him as such Receiver and Manager and to appear in and conduct the prosecution or defence of any such proceedings and actions now pending in any court for the benefit of or against the Defendant, the prosecution or defence of which will, in the judgment of the said Receiver and Manager, be necessary for the proper protection of the said property, assets, business and undertaking of the Defendant, and the authority hereby conferred shall extend to such appeals as the said Receiver and Manager shall deem proper and advisable in respect of any Order or judgment produced in such suit or actions; PROVIDED ALWAYS that no suit, proceedings or action shall be instituted against the Defendant or the said Receiver or Manager, in his capacity as aforesaid unless the leave of this Honourable Court shall first have been had and obtained.
>
> 5. THIS COURT DOTH FURTHER ORDER that no proceedings, actions or suits, respecting or in any way pertaining to or affecting the lands in which the Plaintiffs have any interest by virtue of said Indenture, shall howsoever be taken or instituted, unless the leave of this Honourable Court shall first have been had and obtained.

6 On 14th September 1971, by separate orders, Tritschler C.J.Q.B. gave leave to Metropolitan and Dominion and Pile to institute bankruptcy proceedings against CFI.

7 By my order dated 27th September 1971 the two petitions were consolidated and were subsequently heard together.

8 Under s. 24(1)(*j*) of the Bankruptcy Act, R.S.C. 1970, c. B-3, a debtor commits an act of bankruptcy if he ceases to meet his liabilities generally as they become due, and s. 25(1) (*a*) and (*b*) provides:

> (1) Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,
>
> (*a*) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars, and
>
> (*b*) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

9 It is not in dispute that the petitions were filed in the court having jurisdiction in the locality of the debtor and that all necessary services of the petition were properly made.

10 At the hearing counsel for CFI acknowledged that it was indebted to Metropolitan in the amount claimed, namely, $26,218.21, and to Dominion in a very substantial amount.

11 I deal now with the allegation that the debtor had ceased to meet its liabilities generally as they became due and relate myself first to the period up to 7th January 1971, the date of the receiving order made by Tritschler C.J.Q.B.

12 The evidence is overwhelming that as of that date the debtor had, indeed, ceased to meet its liabilities generally as they became due.

13 A statement of lien claimants against CFI as a primary debtor and a statement of other creditors against the debtor, prepared by Price Waterhouse & Co., chartered accountants, was filed as Ex. 76. According to Price Waterhouse & Co., this exhibit was prepared on the following basis:

1. Amounts are shown as claimed by the respective creditors and do not necessarily represent validated amounts.

2. In instances where settlement has been agreed between the parties the amount is included at what we are informed has been agreed.

3. Amounts are included which represent expenses and the costs of acquisition of spare parts, however the great majority is to the account of fixed assets.

4. Lien claims have been allocated among the companies generally on the basis of primary debtor as determined from review of particulars of claim by counsel for C.F.I.

14 A. Kerr Twaddle, Esq., Q.C., counsel for the debtor, in conjunction with J. Keith Knox, Esq., a member of the lien claimants' committee, prepared a list of lien claimants (Ex. 74) with the exception of three or four claimants added later. This list shows the lien claimants, counsel, the contract number, the primary debtor, owner of the land against which the lien was filed, the lien number, the amount claimed in each lien, the date on which the lien was filed, and the amount finally claimed in the particulars of each case.

15 Exhibit 76 lists 202 unsecured creditors, claiming from the debtor a total of $926,082.06. This amount, all owing and unpaid, is not disputed by the debtor and is shown as a current liability on the interim balance sheet filed by the debtor as Ex. 100. I shall make further reference to this exhibit later.

16 Additionally, Ex. 76 lists 13 unsecured creditors claiming a total of $98,671.21 against CFI common service account, that is, claims which involve CFI and other owners and participants in the project at The Pas.

17 Exhibit 76 shows 29 lien claimants with claims totalling $3,725,692.27. In Ex. 74 the amount claimed in the liens is shown as $3,976,038.32. The debtor's evaluation of these lien claims is $2,280,616.63 (Ex. 97). At this point it is not necessary for me to decide which of the amounts is correct. Suffice to say that as of 7th January 1971 the amount owing and unpaid under these liens was substantial, and again referring to Ex. 100, I point out that it is there shown as a current liability in the sum of $2,280,616.

18 The above lien claims do not include lien claims against CFI common service account. Exhibit 76 shows these claims at $1,912,783.59. The debtor's evaluation of them is $1,036,162.67 (Ex. 97).

19 While several liens were filed in the latter part of November 1969, the great majority were filed in the months com mencing with February 1970 and continuing up to and including December of the same year. Others were filed as late as 26th February 1971.

20 Claims for payment by lien claimants and other creditors continued to be made without success and at least two creditors, Beamer & Lathrop Limited and H. D. Booth & Associates Ltd., were forced into bankruptcy.

21 The account of Pile was incurred in September 1970. W. C. Harris, its president and director, testified that he made numerous requests for payment by letter and telephone. He received promises of payment but none was made.

22 Robert Arthur Pollard, an officer of Dominion and its district manager for Manitoba and Saskatchewan, testified that as of September 1970 there was due Dominion from the debtor approximately $250,000, including about $12,000 in respect of food and lodging supplied the debtor's own men on site. Pollard made numerous telephone calls to Derek Betts, comptroller of the debtor, and to one B. Chobotar, a chartered accountant with the debtor. As in the case of Pile promises of payment were made but not kept. In September 1970 Pollard flew to The Pas in an effort to effect settlement. On requesting payment he was told the debtor was not getting advances from certain parties who were financing the company and, therefore, could not make payment to Dominion. Pollard made further trips to The Pas in October and demanded, without success, payment of Dominion's account, which then exceeded $200,000. About 5th January 1971 he again flew to The Pas. Dominion's account was then approximately $235,000 and after efforts to collect extending over 1 $^{1}/_{2}$ days he finally obtained a cheque for just under $22,000, post-dated to the following day. The reason given for the post-dating was that the debtor was awaiting a transfer of funds to cover. This cheque was not honoured as the bank account was frozen pursuant to the receiving order granted on 7th January 1971.

23 Lloyd Wendell Hale, president of the debtor, was questioned about indebtedness owing by it prior to 7th January 1971. He attributed the delays in payment and the non-payment to disputed invoices, disputes on progress reports, extras and slowness in processing invoices. As I listened to his testimony and reasons advanced by him for non-payment I was minded of the adage, "The poorer the payer, the better the excuse". A review of his evidence confirms my respect for that old saying.

24 When confronted with admitted unpaid accounts Hale's evidence became more revealing. An indebtedness to Metropolitan covered by invoices of 15th and 30th November, 12th, 15th and 31st December, all in 1971, and a further invoice of 1st January 1971, is not disputed by the debtor but remains unpaid.

25 Questioned on this indebtedness Hale gave the following answers:

> Q. ... Why, if the account is not disputed and you were solvent at the time and you were able to meet your obligations as they became due, why were these invoices left unpaid? A. I don't know.
>
> Q. Is that the best you can do? A. That is the best I can do. I don't know.

26 Further questioning of Hale as to why the Metropolitan claim — undisputed and due before the date of the receiving order — was not paid, brought out the answer: "I have no excuse. I guess we were slow payers."

27 I conclude accordingly that the debtor had ceased to meet its liabilities generally as they became due prior to 7th January 1971, and consider next what occurred subsequent to that date and up to the filing of the petitions herein.

28 It is agreed that neither the debtor nor anyone on its behalf made any payments to the creditors in respect of these liabilities save a payment for insurance premiums approved by Hallgrimson. I should here point out that while Hallgrimson was appointed interim Receiver and Manager I shall, for convenience, refer to him simply as "Receiver".

29 The debtor contended that the appointment of the Receiver effectively blocked any payments to creditors except on his authority and, accordingly, no act of bankruptcy could be committed by the debtor after 7th January 1971. It further contended that, assuming but not admitting that the debtor had committed an act of bankruptcy prior to 7th January 1971, any effective bankruptcy petition would require to have been filed within six months of that date and, as the petitions were not filed until 14th September 1971, they must be dismissed.

30 I do not accept the contention that, because of the receiving order of 7th January 1971, the debtor could not commit an act of bankruptcy after that date.

31 The true nature and effect of the receiving order was simply the appointment of an interim Receiver and Manager. What, then, is his position and what are his duties and responsibilities? How is the status of CFI affected by them? In *Parsons et al. v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 , Viscount Haldane L.C. put it this way at p. 167:

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; the duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs.

32 In *Re Newdigate Colliery Ltd.; Newdegate v. Newdigate Colliery Ltd.*, [1912] 1 Ch. 468 , a receiver and manager of the property and undertaking of the company had been appointed in a debenture holders' action against it. At p. 472 Cozens-Hardy M.R. said:

> ... it is just as much the duty and the business of the receiver and manager to protect the goodwill and to guard against the destruction of the business or injury to the goodwill, as it is the duty of the receiver of mortgaged property, not being manager also, to take care that the property is preserved so far as it reasonably may be for the benefit of all whom it may concern — the mortgages and the mortgagor,

and at p. 477 Buckley L.J. said:

> The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business.

33 It is clear, and I agree with counsel for the petitioners, that the appointment of the Receiver did not freeze the obligations of the debtor nor did it create a new entity for the purpose of receiving or dealing with

claims against the debtor. All that happened was the substitution of Hallgrimson in management for Hale, with this difference, that while Hale could be removed from his position by majority action of the board of directors, Hallgrimson could be removed only by order of the court appointing him.

34 It was and continues to be the Receiver's duty and responsibility to properly manage and oversee, either personally or by direction, the operations of the company under his management and, as was said in *Newdigate* , supra, "to guard against the destruction of the business or injury to the goodwill". His appointment "does not dissolve or annihilate the company": *Moss SS. Co. Ltd. v. Whinney*, [1912] A.C. 254 at 263 .

35 It is not for the Court to speculate why the manager made no payments on account of liabilities falling due prior to his appointment and, while it is a reasonable inference that it was because of insufficient available current or liquid assets, it really is of no consequence, insofar as the bankruptcy petitions are concerned, why the payments were not made. The issue is the ceasing to meet liabilities generally as they became due, not the reasons therefor. Assuming, for example, that the Receiver, after a careful canvass of the company's position, became convinced that it was expedient that all available funds be paid to debenture holders, and other creditors should, in the mean time, receive nothing, with the result that these creditors, despite continued demands by them, received no payments over an extended period, that, surely, would be an act of bankruptcy as contemplated by the Act.

36 I hold, therefore, that the position of the debtor insofar as its liability for debts is concerned, particularly vis-à-vis acts of bankruptcy, was not altered merely by reason of the appointment of the Receiver on 7th January 1971. It naturally follows that the petitioners are entitled to rely on any requests for payment addressed to the Receiver after his appointment, on non-payment by him, on any consents to judgment given by or on his behalf, and on any other acts of CFI which would normally come within the definition of s. 24(1) (*j*) of the Act, in support of their claims that an act of bankruptcy occurred within six months prior to the filing of the petitions.

37 I have already pointed out that no payments save the insurance premiums were made in respect of the liabilities which fell due prior to 7th January 1971, but the matter does not end there. The six-month period prior to the presentation of the petition on 14th September 1971 commenced on 15th March 1971, and the act of bankruptcy must have been committed between those dates to meet the requirements of s. 25(1)(*b*).

38 The evidence is that during this period between 15th March and 14th September numerous demands for payment were made by and on behalf of CFI creditors. To mention but a few: on 29th March 1971 Arpin & Company, barristers, acting on behalf of Metropolitan, wrote the Receiver demanding payment of $26,399.26 owing to Metropolitan by the debtor as of 7th January 1971, and threatened that if payment were not made within one week application would be made to the court for leave to bring appropriate action.

39 On 6th April the Receiver wrote Arpin & Company in reply and stated, in part:

> With respect to amounts owing to your client at the date of the receivership, I wish to advise that I am not in a position to make any commitments as to payment of such claims. You are, of course, free to take whatever action you may deem advisable in the interests of your client.

40 On 18th June 1971 Arpin & Company wrote Richardson & Company, solicitors for the Receiver, relative to further negotiations for a new contract between Metropolitan and the debtor in receivership and stated at the end of their letter:

> Somehow it does not seem right to be entering into a formal agreement with a party against whom one is about to petition in bankruptcy.

41 A further demand for payment by Arpin & Company was addressed to the Receiver on 13th September 1971.

42 Under date of 24th August 1971 Smith & Kirby, solicitors for Pile, wrote the Receiver with regard to their client's claim and under date of 10th September 1971 the Receiver replied, stating:

> With reference to your letter dated August 24th, 1971, I wish to advise there have been no new developments in connection with creditors' claims since my letter to you dated February 25th, 1971. I am not in a position to make any commitment with respect to the payment of accounts incurred prior to the receivership, namely January 7th, 1971. When there is any change in this position, I will advise you.

43 In addition, a considerable number of statements of claim were issued by lien claimants during said period. In some cases the Court has given judgment for varying amounts in favour of claimants, in some the debtor has consented to judgment, some claims are still in the negotiating stages, and trial dates have been set for others.

44 Two cases in which consents to judgment were given were in respect of the claims of Pioneer Electric Manitoba Limited and V. K. Mason Construction Ltd. In the Pioneer claim the debtor consented to judgment against it for $54,000 and a further $46,000 against CFI common services. This consent, dated 17th September 1971, was executed on behalf of the debtor by its solicitor. In the claim of V. K. Mason Construction Ltd. the debtor consented to judgment against it in the amount of $90,000. This consent is dated 9th August 1971 and was also executed on behalf of the debtor by its solicitor.

45 Evidence was also led on behalf of the petitioners that certain indebtedness fell due in part within the six-month period in question, two of these being claims by Taylor Instrument Companies of Canada Limited and Combustion Engineering Superheater Ltd.

46 Taylor's claim is for installation of instruments. Its contract provided that the final payment of five per cent of the invoice value, $86,423.40, was to be retained 12 months after completion of installation or 15th August 1971, whichever is sooner. 15th August is admittedly the earlier date. Five per cent, which amounts to $4,321.17, became due at that time but remains unpaid.

47 The Combustion Engineering claim relates to a purchase order in the sum of $2,221,740 for supply and erection of a recovery boiler. Under its terms a final payment of five per cent fell due 90 days after successful continuous operation start-up, but not later than 12 months after a payment due on completion of acceptance tests. It appears from the evidence that the final payment fell due on or about 15th May 1971. This amount, $111,087, remains unpaid.

48 In summary, then, there were in the six-month period immediately prior to the filing of the bankruptcy petitions repeated demands by lien claimants and other creditors for payment of the debts due them. Statements of claim were issued. In some cases, judgments were recovered, and there were at least two cases of indebtedness which, in part, became due after 15th March 1971, and are still unpaid.

49 It is of no moment that practically all the debts were incurred before 7th January 1971 and more than six

months prior to the presentation of the petition. The further and continuous demands by the creditors for payment of these debts within the six months and the failure of the debtor to make payment as demanded, the statements of claim issued and judgments recovered — whether by consent or otherwise — constitute an available act of bankruptcy under s. 25(1)(*b*).

50 In *Re Raitblat*, 28 O.W.N. 237, 5 C.B.R. 714, [1925] 2 D.L.R. 1219 , affirmed 28 O.W.N. 292, 5 C.B.R. 765, [1925] 3 D.L.R. 446 (C.A.) , the petitioner was a single creditor and the amount owing him was $3,800. The debtor consistently defaulted in his payments but these defaults were all more than six months prior to the date of the presentation of the petition. The creditor, during the six-month period, made numerous demands for payment and the debtor admitted his liability. In finding there was an available act of bankruptcy and that the petitioner was entitled to a receiving order, Fisher J. said at p. 717:

> In the present case there were demands within six months and numerous admissions by the debtor that he was unable to meet his liabilities, so that in this case it must be held that there were continuing freshly occurring defaults within the six months.

51 The same principle was stated in *Re Rayner*, 8 M.P.R. 369, 16 C.B.R. 411, [1935] 2 D.L.R. 542 . There it was contended that no specific act of bankruptcy was shown to have occurred within six months immediately preceding the presentation of the petition. Dealing with that contention Mathieson C.J. of the Supreme Court of Prince Edward Island, who heard the petition, said at p. 414:

> The object of that limitation clearly is to prevent the filing of a petition for a stale default or isolated act of bankruptcy. It cannot, without disregarding the fundamental purpose of the Act, be held to apply to such a case as the present where a state of bankruptcy is shown to have continued without interruption from a time long prior to and down to the time of presentation of the petition and to be still subsisting; in other words a chronic state of bankruptcy existing for a period more than six months anterior to and down to the time of the presentation of the petition herein.

52 After pointing out that the claim was founded on a judgment in the Supreme Court of that province for $5,000 damages and costs for personal injuries sustained in a motor car accident, followed by appeals by the debtor to the Court of Appeal and the Supreme Court of Canada, all of which were dismissed with costs, and reviewing the evidence of the efforts made by the petitioner to obtain payment, the Chief Justice continued, on the same page:

> In my opinion the evidence shows the equivalent of a continuous demand for payment by the petitioner and a continuous refusal on the part of the debtor to pay the judgment debt and costs of suit owed by the debtor to the petitioner,

and on p. 415:

> From the evidence adduced on the part of the petitioner and in particular from the testimony of the debtor himself I find that within six months before the presentation of the petition herein the said Benjamin I. Rayner had ceased to meet his liabilities as they became due.

53 The receiving order was made.

54 The reasoning in *Rayner* applies with equal force to the facts in the within case. Here, too, we have neither a stale default nor an isolated act of bankruptcy and here, too, just as in *Rayner* , the evidence is clear that for a long time prior and up to the time of the filing of the petitions, the debtor had ceased to meet his liabilities generally as they became due, and, to quote *Raitblat* , there were "continuing freshly occurring defaults within the six months".

55 I find, accordingly, that within six months before the presentation of the petitions herein the debtor had ceased to meet his liabilities generally as they fell due.

56 It remains for me to consider s. 25(7) of the Act which provides, in part:

> Where the court ... is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

57 With regard to the debtor's ability to pay, the onus is on it to satisfy the Court that such is the case. This it has completely failed to do. The preponderance of credible evidence is all to the contrary and establishes beyond doubt that the debtor is insolvent.

58 An interim balance sheet (Ex. 75), showing the debtor's assets and liabilities as of 8th January 1971, was prepared by Touche, Ross & Co., chartered accountants, under the direction of Frederick Geoffrey Patrick, a chartered accountant for 30 years and associated with that firm for 14 years, and now one of its partners. Patrick has acted as assistant to the Receiver since 8th January 1971 and has had access to the financial books and records of the debtor to the extent that they were available.

59 Exhibit 75 shows current liabilities of $8,850,464 as against current assets of $5,661,757.

60 In considering the balance sheet I have not overlooked an amount of approximately $200,000 re federal sales tax rebates which should be added to the current assets, nor have I overlooked the other conditions set out in cls. 1, 2 and 3 on p. 2 of Ex. 75. Dealing only with the application for grant under the A.D.I. Act referred to in cl. 1, it suffices to say that this item is of such contingent character that it cannot, in my opinion, be considered a current asset; whether it will ever become an available asset I am not in this proceeding required to decide.

61 Patrick was, on examination, referred to the debtor's current asset and liability position, as of 8th January 1971, as set out in Ex. 75. Asked if its current position had improved, he answered "No". He was also asked:

> Q. Between the period January 8, 1971 and September 14, 1971, you already told us C.F.I. was able to carry on business at The Pas. Has it been carrying on business profitably? What I have in mind, has it generated such net income that its position or its ability to pay accounts outstanding as at January the 8th been improved in any way? A. The companies were not in operation when they were placed under receivership as at January 8th and it was part of the duties of the Receiver to complete the construction and to get the companies into an opening position. You will appreciate in the case of pulp and paper mill this is no simple matter and a considerable period of time is required in what is generally referred to as the start-up period when engineering refinements and production problems are being ironed out and production balanced to reach optimum levels. The costs or the loss incurred in the operation during this period is generally referred to as

start-up cost. The results of the operation including the start-up costs to date show a loss on operations.

62 I attach little value to the balance sheet prepared by Stanley John Haughey, a chartered accountant with the firm of Clarkson, Gordon & Co. and filed as Ex. 100. The possible grant under the A.D.I. Act, to which I have already referred, is in this exhibit listed as a current asset in the amount of $3,450,000. Without repeating my earlier reasons, I simply say that the inclusion of this item as a current asset is clearly incorrect. Also included in the current assets under accounts receivable is cash, "common services" $1,865,167, and an account receivable from shareholders in the sum of $764,352. Neither of these items are so shown on Ex. 75 and, in my opinion, are of questionable validity, if indeed they have any validity at all, and should certainly not be included in current assets. The current liabilities are shown in Ex. 100 in lesser amounts than in Ex. 75. Save for the $200,000 federal sales tax rebate I have no hesitation in saying that where there is a conflict I accept the figures in Ex. 75 in preference to those in Ex. 100.

63 I come now to the final point — and this was strongly urged by counsel for the debtor — that in any event I should exercise my discretion under s. 25(7) and dismiss the petition.

64 The exercise of that discretion must be for "other sufficient cause" and, as is basic to every exercise of discretion by the court, must be founded on sound judicial reasoning arrived at from the credible evidence adduced, and "must be exercised judicially according to common sense and justice, and in a manner which does not occasion a miscarriage of justice": McFarlane J.A. in *Approving Officer of Corpn. of District of Burnaby v. Mutual Development Corpn. Ltd.*, [1971] 5 W.W.R. 97 at 100, 20 D.L.R. (3d) 505 (B.C. C.A.) , quoting *Murdoch v. Attorney General for British Columbia*, 54 B.C.R. 496 at 501, [1940] 1 W.W.R. 267, 73 C.C.C. 222, [1940] 2 D.L.R. 74 (C.A.) .

65 Having carefully reviewed the pertinent credible evidence and given due weight to all relevant considerations, I am satisfied that no cause exists to justify that I exercise the discretion requested and dismiss the petition, and I refuse to do so.

66 I am of the firm opinion that it is not only expedient but necessary that the receiving order be made.

67 There will be a receiving order in the usual terms. Sydney John Down, chartered accountant associated with the firm of Thorne, Gunn, Helliwell and Christenson, will be appointed trustee.

68 Counsel may speak to me with reference to the costs of the petitioners.

END OF DOCUMENT

TAB 4

CITATION: G.E. Canada v. Northern Sawmills, 2012 ONSC 6664
COURT FILE NO.: CV10-9042-00CL
DATE: 20121126

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

RE: G.E. CANADA EQUIPMENT FINANCING G.P., Applicant

NORTHERN SAWILLS INC., Respondent

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

BEFORE: Justice Newbould

COUNSEL: Mary Paterson, for the Receiver PricewaterhouseCoopers Inc.
Elizabeth Pillon and Maria Konyukhova, for G.E. Canada Equipment Financing G.P.
Kristina Desimini, for Lucky Star Holdings Inc.
Stuart Brotman, for Morneau Shepell Ltd
Mark E. Bailey, for the Financial Services Commission of Ontario

DATE HEARD: November 19, 2012

E N D O R S E M E N T

[1] PwC was appointed as Receiver over the assets of Northern Sawmills Inc. in January 2011. It has completed a sale process and liquidated substantially all of the Northern assets. Once certain disputes are resolved, the Receiver will be able to finalize its distributions to the secured lenders. The Receiver brings this motion seeking (1) advice and direction to resolve disputes that are delaying finalizing distributions, (2) an order authorizing the Receiver to make certain distributions, and (3) an order approving its activities and its accounts and disbursements and those of its counsel.

[2] A total of $1,623,614 is available for distribution by the Receiver. Of this amount, and in accordance with the Receiver's Charge as provided in the initial receivership order and a prior

arrangement with Morneau, the costs of the Receiver are to rank in priority to all other charges and claims. The balance of the proceeds, less property taxes to be paid, total $498,181.20.

[3] The issue is what reserves are required for normal cost and wind-up deficiencies in Northern's Hourly and Salaried Plans. Morneau Shepell Ltd ("Morneau") as Plan Administrator makes two claims: (1) a section 81.6 *Bankruptcy and Insolvency Act* ("BIA") claim and (2) a *Pension Benefit Act* ("PBA") deemed trust claim.

[4] PwC was appointed on January 4, 2011 as receiver pursuant to section 243(1) of the BIA and section 101 of the *Courts of Justice Act* over all the assets, undertakings and properties acquired for or used in relation to a business carried on by Northern, including all proceeds thereof.

[5] At the initial hearing, the Receiver was authorized and directed to conduct a sales process in respect of the Northern property. The Northern property was sold by way of a liquidation sale/auction in respect of personal property and an agreement of purchase and sale in respect of the real property. The Receiver has liquidated virtually all of the Northern property. The proceeds will not satisfy Northern's obligations to its secured creditors, who will suffer a shortfall. GE is the largest secured creditor.

[6] The Northern assets are subject to two charges ranking ahead of the secured lenders, being a Receiver's charge and a tax liability to Thunder Bay in the amount of $157,864 undertaken to be paid in the sale of the realty. Northern has obligations to four secured lenders: GE, Royal Bank of Canada, Lucky Star Holdings Inc. and Buchanan Sales Inc.

Northern pension plans

[7] Northern was the employer under, and the administrator of, two defined benefit pension plans:

i) a Retirement Plan for Employees of Northern (the "Hourly Plan"); and

ii) a Retirement Plan for Salaried Employees of Northern (the "Salaried Plan").

[8] Unionized and non-unionized employees of Northern participated in the Hourly Plan prior to June 1, 2007. In February 2008, Northern filed amendments to the Hourly Plan with the Superintendent under the PBA seeking to cease participation of the non-unionized employees in the Hourly Plan effective June 1, 2007. Subsequently, on March 3, 2008, Northern filed documents with the Superintendent requesting the establishment of the Salaried Plan to be effective June 1, 2007.

[9] In the fall of 2008, Northern idled its operations and virtually all of its employees were laid off.

[10] In March 2010, the Superintendent issued notices of proposal giving notice that he intended to wind up the Hourly Plan and refuse to register the Salaried Plan.

[11] On September 2, 2010, the Superintendent ordered that:

(a) the Hourly Plan be wound-up with a wind-up date of January 1, 2008; and

(b) the Salaried Plan's registration be revoked, which operated to terminate the Salaried Plan as of a date to be specified by the Superintendent. The Superintendent has not yet specified the date.

[12] It would seem logical that the Superintendent could not revoke the registration of the Salaried Plan that had not been registered, but all counsel, including counsel for the Financial Services Commission of Ontario (FSCO), agreed that for the purposes of the PBA, revocation of a registered plan and a refusal to register a plan have the same effect.

[13] The Receiver was appointed on January 4, 2011, several months after the Superintendent made his orders in relation to the Hourly and Salaried Plans. The January 4, 2011 order also approved the proposed Sale Process.

[14] Morneau was appointed Administrator of the Hourly Plan on March 11, 2011 and Administrator of the Salaried Plan several months later on August 3, 2011.

Morneau recommendations

[15] In March 2011, the Superintendent sought Morneau's submissions on: (a) whether there were contribution arrears for the Hourly Plan relating to periods before and after the wind up date for the Hourly Plan; and (b) what date should be used as the termination date of the Salaried Plan.

[16] In response to the first question, on July 6, 2011 Morneau advised that if January 1, 2008, is the wind-up date, it had determined that there were no unpaid normal cost contributions with respect to the period prior to January 2008 for Hourly members. Morneau has since confirmed that there were no unpaid normal cost contributions for the period before January 2008 in relation to the Hourly Plan.

[17] In response to the second question, Morneau did not answer the question directly but rather made the preliminary suggestion that FSCO should approve a transfer of the assets in the Salaried Plan to the Hourly Plan.

[18] On November 7, 2011, Morneau's counsel wrote to the Receiver advising that Morneau intended to recommend to the Superintendent that the Hourly Plan and the Salaried Plan be treated as one plan and that the wind up date be November 16, 2010. Based on Morneau's initial calculations, if these two changes were made i.e., merging the Salaried Plan into the Hourly Plan and changing the wind up date for the Hourly Plan, normal cost arrears would be $335,777. Morneau also sought interest in the amount of $39,780 calculated to January 3, 2011, the day before the Receiver was appointed.

[19] Morneau also alleged that sections 57(4) and 57(5) of the PBA established a deemed trust and lien over all of the Northern assets for any wind-up deficiency under both Plans. Morneau alleged that, if the Salaried Plan was merged into the Hourly Plan in accordance with its Recommendation, the wind-up deficiency would be more than $12 million.

[20] On November 18, 2011, Morneau made submissions to the Insolvency Coordinator at FSCO, recommending that (1) the Superintendent issue a Notice of Intended Decision to revise

the wind up date of the Hourly Plan from January 1, 2008 to November 16, 2010; and (2) the Salaried Plan be merged into the Hourly Plan.

[21] On November 29, 2011, the Insolvency Coordinator at FSCO asked the Receiver and GE to make submissions on the Morneau Recommendation.

[22] On September 6, 2012, both GE and the Receiver made submissions to the Superintendent regarding the Morneau recommendations. They noted that if the Superintendent was to issue an order changing the wind up date for the Hourly Plan, such action could be a "proceeding" that was stayed by the receivership order. They also contended that the Superintendent had no jurisdiction under the PBA to change the wind up date for the Hourly Plan. The Superintendent has not taken any steps since GE and the Receiver made their submissions.

[23] On October 22, 2012, the Receiver asked Morneau for additional information to assist in quantifying any unpaid normal cost if the status quo was maintained. On November 6, 2012, Morneau confirmed that there was no normal cost deficiency with respect to the Hourly Plan and advised that, assuming the Salaried Plan was given a termination date of November 16, 2010, there was a normal cost deficiency in the amount of $147,732, which included $12,117 in interest. The Receiver does not yet have sufficient information to confirm this number.

[24] The amount of the claims asserted by Morneau on this motion depends in part on whether the wind up date for the Hourly Plan can be changed from January 1, 2008 to the date recommended by Morneau of November 16, 2010.

Issues

1. Stay of proceedings

[25] The Receiver, supported by PwC, take the position that the stay contained in the initial receivership order prevents the attempt by Morneau to have the Superintendent change the wind up date for the Hourly Plan and that no leave should be given to lift the stay for that purpose. They do not take the position that the stay prevents the Superintendent from determining the

wind up date of the Salaried Plan or from considering the merger of the Salaried Plan into the Hourly Plan.

[26] Morneau takes the position that the stay does not cover what it is asking the Superintendent to do and that if it does, leave should be given to lift the stay for that purpose. The Superintendent supports the position of Morneau insofar as the "issues" before the Superintendent are not stayed. What those issues are is not spelled out in the factum of the Superintendent, i.e. whether what is properly before the Superintendent includes the recommendation of Morneau to change the wind up date for the Hourly Plan.

[27] The stay of proceedings in the Receivership order is as follows:

> NO PROCEEDINGS AGAINST THE RECEIVER
>
> 7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY
>
> 8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.
>
> NO EXERCISE OF RIGHTS OR REMEDIES
>
> 9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, …

[28] Paragraph 7 stays a proceeding in a court or tribunal. The regulatory process in question is not in a court or tribunal and thus paragraph 7 is not applicable.

[29] Paragraph 8 stays a Proceeding against or in respect of Northern or its property, which includes the proceeds of that property. Morneau says that a Proceeding is only one in a court or

tribunal because it is so defined in paragraph 7 of the order. Paragraph 9 stays any remedies "affecting" the property of Northern. The Receiver and PwC contend that changing the wind up date of the Hourly Plan would affect the property, being the proceeds of the sale of Northern assets. Morneau contends that it would not affect the property, but only determine the claims against it.

[30] I do not think that it can be said that Proceedings in paragraph 8 are limited to proceedings in a court or tribunal. It is the case that paragraph 7 states that a process in a court or tribunal is a Proceeding, but that paragraph does not define a Proceeding or purport to limit a Proceeding to a process in a court or tribunal. It merely states that a court or tribunal process is a Proceeding.

[31] This reading of the stay provisions is supported by the decision in *Re Nortel Networks Limited* (2010), 65 C.B.R. (5th) 231 (Comm. List); aff'd (2010), 67 C.B.R. (5th) 19 (Ont. C.A.). In that case a stay provision in an initial CCAA order containing the same language as the stay in this case was held by Morawetz J. to prevent warning notices given by the U.K. Pensions Regulator to various Nortel entities. The process by the U.K. regulator was not a court or tribunal process. Morawetz J. referred to authorities that broadly interpreted the word "proceedings" to cover both judicial and extra-judicial proceedings. His decision was upheld by the Court of Appeal.

[32] Morneau refers to the recent legislative changes to the BIA and CCAA that prevent stays in proceedings under those statutes from affecting a regulatory body's investigations or a proceeding by or before a regulatory body. I am dealing however with a term of a court order that contains different language and cannot ignore that language.

[33] In my view, the process whereby the Superintendent is being asked to change the wind up date for the Hourly Plan is stayed by paragraphs 8 and 9 the receivership order. The process sought by Morneau to be undertaken is a proceeding in respect of Northern or its property, and thus is caught by section 8 of the order. It is also a remedy affecting the property of Northern, and is thus caught by section 9 of the order.

[34] In considering whether the stay should be lifted, a court is to consider the totality of the circumstances and the relative prejudice to both sides. See Houlden, Morawetz and Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2012) at L5, p. 993. See also *General Motors Corp. v. Tiercon Industries Inc*. [2005] O.J. No. 3750 per Hoy. J. (as she then was). A court may order that a stay be lifted if satisfied that a party seeking leave is likely to be materially prejudiced by the stay or there are other equitable grounds on which to justify lifting the stay. See *Village Green Lifestyle Community Corp., Re*, [2007] 27 C.B.R. (5th) 199 at para. 13 per Pepall J. (as she then was).

[35] In considering an application for leave to lift a stay under the BIA, it has been held that there is no requirement to establish a *prima facie* case but an applicant must establish that there are sound reasons to relieve against the stay. See *Re Ma* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). I think the principle can safely be applied to a stay in a receivership order. However, in *Re Ma*, it was stated that if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[36] I see no purpose in lifting the stay to permit consideration by the Superintendent to change the wind up date of the Hourly Plan. The Hourly Plan was wound up at the initiation of the Superintendent with a wind up date of January 1, 2008. This was a final order. It is conceded by counsel for the Superintendent that there is no authority in the PBA permitting the Superintendent to reconsider the wind up date of the Hourly Plan.

[37] The position of the Receiver and GE is that the Superintendent is *functus officio* with respect to the wind up date of the Hourly Plan.

[38] Morneau takes the position that with an administrative proceeding, a court has discretion to reopen the proceeding, and relies on *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. I do not think the case is of assistance to Morneau. In that case, Sopinka J. for the majority stated the following:

> 21. To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision

> was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> 22. Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. (Underlining added)

[39] Morneau and the Superintendent concede that there are no indications in the PBA that the decision of the Superintendent in question can be reopened. Thus the exception to the principle of *functus officio* enunciated by Sopinka J. has no application.

[40] I also see substantial prejudice to GE if the stay were lifted. At the time the receivership action was commenced in January, 2011, the Hourly Plan had been wound up on the initiation of the Superintendent and the wind up date of January 1, 2008 was set by a final order. The Salaried Plan had been refused or revoked. In correspondence on February 9, 2011 and July 6, 2011 FSCO confirmed that the wind up date of the Hourly Plan was January 1, 2008. Sales proceedings had been initiated, approved by the Court and implemented by the Receiver, on notice to FSCO and Morneau. The sales and receivership proceedings were funded by GE and it and other stakeholders participating in the receivership proceedings incurred costs in pursuing their claims with expectations of recovery. Only in November 2011, some ten months after the initiation of the Receivership, did Morneau seek to implement a new wind up date and merge the Plans, the result of which if successful would be to alter existing priorities and negatively affect GE and other secured creditors of the Northern estate. By this time, the vast majority of the costs associated with this receivership had been incurred and paid out of the proceeds or directly by GE.

[41] In these circumstances, I agree with the Receiver that given the fact that GE relied on the status quo in seeking to appoint the Receiver and the fact that Morneau raised and quantified its claims after the Receiver had incurred the majority of the expenses associated with the estate, it is not equitable to lift the stay and permit Morneau to seek priority over the secured creditors or

to permit the Superintendent to revise his final order in a manner that increases Morneau's claim at the direct expense of the other secured creditors.

[42] I would also note that even if there had been no stay, the proceedings sought to be initiated by Morneau would be futile as the Superintendent has no power to change the wind up date of the Hourly Plan. No attempt is made by the Receiver or GE to prevent the Superintendent from carrying out his obligation to set a wind-up date for the Salaried Plan or to consider merging the Salaried Plan into the Hourly Plan. Thus I see no prejudice to the Superintendent.

2. Section 81.6 BIA claim

[43] Section 81.6 of the BIA grants a limited super-priority with respect to "normal costs" owed to a pension plan. Under section 81.6(2), claims for payment of normal costs rank ahead of the claims of secured creditors. Normal costs are defined in section 81.6(c)(i).

[44] Morneau has confirmed that if the wind up date remains the same, then there are no unpaid normal costs in relation to the Hourly Plan. As I have held that the wind up date is to remain, no reserve is required for the Hourly Plan.

[45] The Superintendent revoked the registration of the Salaried Plan by an order made under section 18(1)(b) of the PBA. That order operates to terminate the Salaried Plan as of a date specified by the Superintendent. The Superintendent has not yet specified a termination date for the Salaried Plan. Based on information provided by Morneau, it appears that the latest possible termination date is November 16, 2010 because that appears to be the last date of employment for an employee who participated in the Salaried Plan.

[46] Morneau claims that there is a normal cost deficit of $147,732 including interest in the Salaried Plan using a termination date of November 16, 2010. The Receiver does not have sufficient information to confirm this figure. However the Receiver is agreeable to holding back this amount until the figure has been confirmed.

[47] If the wind up date of the Hourly Plan were changed to November 16, 2010 and the Salaried Plan merged into the Hourly Plan with that changed wind up date, Morneau calculates

the normal cost claim under section 81.6 of the PBA to be $383,646 inclusive of interest to November 19, 2012, and for the purposes of this motion asserts a priority claim in the amount of $383,646 plus interest to the date of payment. Counsel for the Receiver in argument said that if it was open to change the wind up date, the Receiver was prepared to hold back this amount of $383,646.

[48] In view of the fact that the wind up date for the Hourly Plan cannot be changed, the amount of the holdback agreed to by the Receiver for the Salaried Plan of $147,732 is sufficient for the section 81.6 Salaried Plan claim. I assume it will be held in an interest bearing account so that if that amount is to be eventually paid, there will be interest on that money available.

[49] During the argument on this motion, GE contended that because the Salaried Plan had never been registered by the Superintendent and because it had never been registered under the *Income Tax Act*, it was a retirement compensation arrangement as defined in section 248(2) of the *Income Tax Act* and therefore exempt by virtue of section 47(3) 5. of PBA regulation 909 from the application of the PBA. Therefore, GE contends, there can be no section 81.6 claim regarding the Salaried Plan and there should be no holdback by the Receiver.

[50] This argument was not included in the GE factum and counsel for Morneau and for the Superintendent said they would want time to consider it before responding to it. In the circumstances, the order I make is that there should be a holdback of $147,732 as undertaken by the Receiver but if GE wishes to pursue the point, a motion can be brought by GE requesting that the holdback be terminated and Morneau and the Superintendent will then be able to deal with the point.

3. PBA deemed trust claim

[51] Morneau alleges that special payment deficits as well as a wind-up deficit of $12,384,000 exists, assuming the Plans are merged, and claims this amount which is substantially more than the assets available for distribution. Morneau's calculation assumes that the Superintendent decides to follow Morneau's recommendations and merge the Salaried Plan into the Hourly Plan and change the wind up date for the Hourly Plan from January 1, 2008 to November 16, 2010.

Even if the Superintendent is not permitted or chooses not to make the changes recommended by Morneau, as at January 1, 2008 the Hourly Plan would have had a wind-up deficit of more than $5 million, which is well in excess of the assets of Northern available for distribution.

[52] In this case, the security granted to secured lenders took place in 2007 to 2009, well before the steps taken by the Superintendent to wind up the Hourly Plan and revoke the Salaried Plan. This is unlike the situation of the DIP lenders in *Indalex* in which their charge was created some two years after the salaried pension plan was terminated and the wind up date had been set. In *Indalex*, the executive pension plan was not wound up or a wind up date set until after the DIP charge had been created and thus the PBA deemed trust did not have first-in-time priority over the DIP charge. The situation in this case is akin to the executive plan in *Indalex*, and thus the Court of Appeal decision in *Indalex* is not authority that all Northern property is subject to a deemed trust. Unlike in *Indalex*, no constructive trust is claimed by Morneau over the Northern property.

[53] The PPSA creates a limited exception to the first-in-time rule that would ordinarily apply to determining priority between a security interest and a subsequent PBA deemed trust. Section 30(7) of the PPSA states:

> 30(7) A security interest in <u>an account or inventory and its proceeds</u> 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*. (Underlining added)

[54] Thus the beneficiaries of a PBA deemed trust have priority only over "an account or inventory and its proceeds". They are not granted priority over other property.

[55] In this case, the value of Northern's assets that constitute "account or inventory and its proceeds" realized in the auction of Northern's non realty assets was $4,725.

[56] In its factum Morneau stated that the deemed trust might apply to the amount in a GIC account that the Receiver was proposing to distribute to secured creditors. However, it appears clear from the definition of "account" in the PPSA that an account does not include a GIC.

[57] During argument, counsel for Morneau said Morneau had no opposition to any balance over the section 81.6 claim being paid out by the Receiver to secured creditors subject to the deemed trust amount of $4,725. He conceded that Morneau has no evidence to say that the figure was wrong. On the evidence, it appears that the section 30(7) deemed trust claim in this case is limited to $4,725.

[58] The Receiver and GE however take the position that the Receiver should not have to hold back this amount as the Receiver would be entitled under paragraph 3(r) of the receivership order to put Northern into bankruptcy and under the BIA, any PBA deemed trust would rank behind the secured creditors. If necessary the Receiver will take this step in order to protect the position of the secured creditors, but would prefer not to in order to avoid the extra expense of a bankruptcy, no doubt larger than $4,725. Counsel for Morneau in argument said that Morneau did not want to add to the costs by forcing a bankruptcy of Northern.

[59] In the circumstances, the appropriate order is that the Receiver need not hold back any amount for a section 30(7) deemed trust claim.

4. Approval of the Receiver's Fifth Report and fees and disbursements

[60] The Receiver seeks approval of its activities referred to in its Fifth Report and approval of its fees and disbursements and the fees and disbursements of its counsel. Morneau in its factum states that it has raised significant concerns in respect of the conduct of the Receiver and in the circumstances, it would not be appropriate to approve the Fifth Report or the conduct of the Receiver at this stage or to approve its fees and disbursements. Rather, such requests should be considered at a time when the regulatory process has been completed and the pension claims have been finally determined.

[61] In October, 2011 GE, which had been funding the receivership costs, took the position that in light of Morneau's pension claims that would rank ahead of GE's security, GE would not pay any further costs of the receivership unless Morneau confirmed that it did not intend to assert priority over the receivership costs. Morneau took the position that it would not fund any receivership costs.

[62] On October 27, 2011, Morneau confirmed to the Receiver in writing that Morneau would not assert a priority of the claims pursuant to the PBA or the BIA over the costs of the receivership proceedings, including amounts subject to the Receiver's Charge and the Receiver's Borrowings Charge. The letter stated that the confirmation represented a concession to achieve a commercial resolution in the circumstances that does not prejudice the position of any party with respect to the priority of the PBA Claims or the BIA Claims relative to other claims. One of its terms was that the Receiver would obtain court approval of its fees and disbursements and those of its counsel in accordance with the receivership order and that Morneau would have the right to oppose any request for approval.

[63] Morneau takes the position that in raising the stay issue and seeking to distribute all the amounts the Receiver thinks is owing rather than protecting the pension claimants, the Receiver has not acted properly and has breached its fiduciary duties.

[64] I do not agree with Morneau's assertions. The Receiver owed a duty as a court officer to take into account the interests of all stakeholders, including the secured creditors, and not just the pension claimants who would benefit from the pension claims asserted by Morneau. If the Receiver thought the claims of Morneau were not correct, it was entitled to raise that in its motion for directions, and even if the Receiver were not successful in the positions it took, that would not mean that it acted improperly.

[65] In this case, the Receiver readily agreed to hold back the amount of the section 81.6 claim as determined by the Court, which depended on the issue of the change of the wind up date for the Hourly Plan. It objected to any other holdback for the pension claims asserted by Morneau as it took the position that there were no other legitimate claims. I see nothing improper in that that would require its fees to be reduced.

[66] Morneau claims that the regulatory process in this case was developed by the Superintendent in consultation with the Receiver and that the Receiver should not have sat back with its position that the stay provisions of the receivership order prevented an attempt to change the wind up date for the Hourly Plan. I do not agree. First, everyone including the Superintendent was represented by counsel, and there is no reason why the Receiver was the person to advise

interested parties what the stay provisions meant. More importantly, it was only in November, 2011 that Morneau took the position that the wind up date for the Hourly plan should be changed. Prior to that, the Superintendent had not suggested looking at any change. By the time that Morneau took its position on the claims in November, 2011, the bulk of the Receiver's fees and those of its counsel had been incurred. It was at that stage that Morneau agreed to subordinate any pension claims to the Receiver's past and future receivership cost. While the Receiver could have provided a more timely response, I would not see that as a basis for reducing its fees.

[67] I have reviewed the Receiver's fees and disbursements and those of its counsel. They appear appropriate. No one has questioned the time spent or the hourly charges.

[68] In the circumstances, the activities of the Receiver in its Fifth Report and in its Supplement to its Fifth Report are approved, as are its fees and disbursements and those of its counsel.

Conclusion

[69] The Receiver may make distributions in accordance with the distribution schedule in paragraph 5 of its Supplement to its Fifth Report, which incorporates a holdback of $147,732 for the potential section 81.6 PBA claim. The cross-motion of Morneau is dismissed.

[70] If any party claims costs, and they cannot be agreed, brief written submissions may be made within 10 days, along with a cost outline, and brief written reply submissions may be made within a further 10 days.

Newbould J.

DATE: November 26, 2012

APPENDIX A

Appendix A

SERVICE LIST

Freeport Financial LLC v.
PRACS Institute Canada B.C. LTD.

Blake, Cassels & Graydon LLP **Barristers & Solicitors** **199 Bay Street** **Suite 4000, Commerce Court West** **Toronto, ON M5L 1A9** **Lawyers for the Receiver,** **PricewaterhouseCoopers Inc.**	**Linc Rogers** **Tel: (416) 863-4168** **E-mail: linc.rogers@blakes.com** **Matthew Kanter** **Tel: (416) 863-5825** **Fax: (416) 863-2653** **Email: matthew.kanter@blakes.com**
PRICEWATERHOUSECOOPERS INC. **18 York Street, Suite 2600** **Toronto, ON M5J 0B2** **Receiver**	**Michelle Pickett** **Tel: (416) 815-5002** **Fax: (416) 941-8393** **E-mail: michelle.pickett@ca.pwc.com**
McMillian LLP **Brookfield Place** **181 Bay Street, Suite 4400** **Toronto, ON M5J 2T3** **Lawyers for Freeport Financial LLC**	**Brett Harrison** **Tel: (416) 865-7932** **Fax: (416) 865-7048** **Email: brett.harrison@mcmillan.ca** **Waël Rostrom** **Tel: (416) 865-7790** **Fax: (647) 722-6736** **Email: wael.rostom@mcmillan.ca**
CANADA REVENUE AGENCY **DEPARTMENT OF JUSTICE** **The Exchange Tower** **130 King Street West, Suite 3400** **Toronto, ON M5X 1K6**	**Diane Winters** **Tel: (416) 973-3172** **Fax: (416)973-0810** **Email: diane.winters@justice.gc.ca**
HEALTH CANADA **2310 Midland Avenue** **Toronto, ON M1P 4R7**	**Richard Kirchner** **Tel: (416) 473-2024** **Flora Noitsis** **Tel: (416) 952-6361** **Fax: (416) 952-6370** **Email: flora.noitsis@hc-sc.gc.ca**

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE (Income Tax, PST) **PO Box 620** **33 King Street West, 6th Floor** **Oshawa, ON L1H 8E9**	**Kevin J. O'Hara** **Email: kevin.ohara@ontario.ca**
Circassia Ltd. **Magdalen Centre,** **Robert Robinson Avenue** **Oxford Science Park** **Oxford, OX4 4GA** **United Kingdom**	**Brett Haumann** **Tel: +44 778 992 8574** **Email: BrettHaumann@circassia.co.uk** **Charles Swingland** **Tel: +44(0)1865 784577** **Email: CharlesSwingland@circassia.co.uk**
Adiga Life Sciences, Inc. **McMaster Innovation Park,** **Suite 305, 175 Longwood Road South** **Hamilton ON L8P 0A1**	**Pascal L. C. Hickey** **Tel: (905) 667-1421** **Fax: (905) 546-1372** **Email: phickey@adiga.ca**
Merck & Co., Inc. **Early Stage Development, MRL** **351 N. Sumneytown Pike, UG 4D-48** **North Wales, PA 19454**	**Patty Castronuovo** **Tel: (267) 305-5008** **Email: patricia.castronuovo@merck.com** **Dr. Martin Behm** **Tel: 215-896-5012** **Email: martin_behm@merck.com**
IRB Services **372 Hollandview Trail, Suite 300** **Aurora, Ontario L4G 0A5**	**Jack Corman** **Tel: (905) 727-7989, ext 225** **Fax: 905-727-7990** **Email: jcorman@irbservices.com**
Cassels Brock & Blackwell LLP **2100 Scotia Plaza** **40 King Street West** **Toronto, Ontario M5H 3C2** **Lawyers for L. Perrigo Company**	**David Ward** **Tel: (416) 869 5960** **Fax: (416) 640 3154** **Email: dward@casselsbrock.com** **Larry Ellis** **Tel: (416) 869 5406** **Fax: (416) 640 3004** **Email: lellis@casselsbrock.com** **Keri Wallace** **Tel: (416) 860 2954** **Fax: (416) 640 3058** **Email: kewallace@casselsbrock.com**

Papazian Heisey Myers **Standard Life Centre** **Suite 510, 121 King Street West** **P.O. Box 105** **Toronto, Ontario M5H 3T9** **Lawyers for Standard Life Assurance Company of Canada**	**Michael S. Myers** **Tel: (416) 601-2701** **Email: myers@phmlaw.com** **James S. Quigley** **Tel: (416) 601-2712** **Fax: (416) 601-1818** **Email: Quigley@phmlaw.com**
Beard Winter LLP **130 Adelaide Street West Suite 701** **Toronto, Ontario M5H 2K4** **Lawyers for 2368350 Ontario Inc.**	**George D. Crossman** **Tel: (416) 593-7760** **Fax: (416) 593-7760** **Email: crossman@beardwinter.com**
Torys LLP **79 Wellington Street West, Suite 3000** **Box 270, TD Centre** **Toronto Ontario M5K 1N2** **Lawyers for 1893929 Ontario Inc.**	**Scott Bomhof** **Tel: (416) 865-7370** **Email: sbomhof@torys.com** **Lee J. Cassey** **Tel: (416) 865-7960** **Fax: (416) 865-7380** **Email: lcassey@torys.com**
Financial Services Commission of Ontario **5160 Yonge Street, Box 85** **4th Floor** **Toronto, Ontario M2N 6L9**	**Mark Bailey** **Tel: (416) 590-7555** **Fax: (416) 590-7070** **Email: mbailey@fsco.gov.on.ca**
THE FOOD AND DRUG ADMINISTRATION **10903 New Hampshire Avenue** **Silver Springs, MD 20993 USA**	
REITER-NEMETZ **298 Sheppard Avenue West, Suite 100** **Toronto, Ontario M2N 1N5** **Counsel to Anna Dan and 1018744 Ontario Limited**	**Marilyn Reiter-Nemetz** **Tel: (416) 665-1458, ext. 227** **Fax: (416) 665-0895** **Email: mreiter@reiternemetz.com**
DICKINSON WRIGHT **222 Bay Street** **18th Floor, P.O. Box 124** **Toronto, ON M5K 1H1** **Counsel to Apotex**	**Michael A. Weinczok** **Tel: (416) 777-4026** **Fax: (416) 865-1398** **Email: mweinczok@dickinsonwright.com**

FREEPORT FINANCIAL LLC
Applicant

and

PRACS INSTITUTE CANADA B.C. LTD.
Respondent

Court File No: CV-13-10046-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE APPLICANT (RETURNABLE June 10, 2013)

MCMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON, M5J 2T3

Brett Harrison LS#: 44336A
Tel: (416) 865-7932
Fax: (416) 865-7048
Email: brett.harrison@mcmillan.ca

Lawyers for the Applicant