Clerk's stamp:

COURT FILE NUMBER	2403-10147
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, as amended
	AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ALTEK INDUSTRIAL SUPPLY LTD., ALTEK USA HOLDINGS CORP., ALTEK SUPPLY USA INC., HDIM PROTECTIVE COATINGS INC., and 610461 ALBERTA LTD.
DOCUMENT	**BRIEF OF CANADIAN IMPERIAL BANK OF COMMERCE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Eighth Avenue Place East 43rd Floor, 525 8th Avenue S.W. Calgary, AB T2P 1G1 Attention: James W. Reid / Kyla Mahar Telephone: 403.298.2418 / 416.597.4303 Fax: 403.262.0007 E-mail: jwreid@millerthomson.com / kmahar@millerthomson.com File No: 0231194.0053

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CLERK OF THE COURT

BENCH BRIEF OF THE APPLICANT, CANADIAN IMPERIAL BANK OF COMMERCE

DATE OF HEARING: 3:30 p.m. on February 5, 2025

Before Justice M.E. Burns

INDEX

I. INTRODUCTION

1. This is the bench brief of Canadian Imperial Bank of Commerce ("**CIBC**") in support of its application seeking the following relief:

    (a) Abridging the time for service of this application and deeming service good and sufficient upon all interested parties;

    (b) Lifting the stay of proceedings against Altek Industrial Supply Ltd. ("**Altek**") granted pursuant to the Amended and Restated Initial Order on May 31, 2024 ("**ARIO**");

    (c) Adjudging Altek to be bankrupt;

    (d) Granting a Bankruptcy Order in respect of the property of Altek;

    (e) Appointing PricewaterhouseCoopers Inc. LIT ("**PwC**") as trustee in bankruptcy of the estate of Altek; and

    (f) Directing that costs of this application be paid out of the bankruptcy estate of Altek.

2. Altek is protected from bankruptcy proceedings by a stay of proceedings granted in this action. For reasons discussed below, CIBC seeks a limited lifting of the stay against Altek to allow this Court to make a bankruptcy order against Altek.

3. As shown below, Altek has met all of the legislated requirements for this Honourable Court to make a bankruptcy order against it and it is appropriate to do so.

4. PwC has consented to act as Altek's trustee in bankruptcy.

I. SUMMARY OF FACTS

5. Altek is an Alberta corporation having done business as a distributor of valves and coatings within the one year preceding the filing of this application.[1] Altek, along with Altek USA Holdings Corp., Altek Supply USA Inc., HDMI Protective Coatings Inc., and 610461 Alberta Ltd. comprise the "**Altek Group**".[2]

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[1] Affidavit of Supriya Sarin, affirmed February 3, 2025 ("2025 Sarin Affidavit"), paras. 5,24.

[2] *Ibid*.

6. CIBC is a secured lender to the Altek Group. Altek is currently indebted to CIBC for $22,316,075.19, plus interest, costs, and legal fees (the "**Indebtedness**"). The Indebtedness relates to credit facilities extended to the Altek Group by CIBC between July 2022 and November 2023 (the "**Credit Agreements**").[3]

7. CIBC holds first ranking security over all of Altek's present and after acquired personal property, the proceeds thereof (including from the APA transaction described below), choses in action, and accounts receivable collected and that will be collected, among other security granted by the Altek Group to secure the Indebtedness ("**Security**").[4] The Security is valid and enforceable.[5]

8. On May 6, 2024, following default, forbearance by CIBC, and further default by the Altek Group on the Credit Agreements, CIBC issued demands for repayment of the Indebtedness and notices of intention to enforce its Security.[6]

9. On May 17, 2024, CIBC and the Altek Group signed a consent receivership order (the "**Consent Receivership Order**") to appoint PwC as receiver of the Altek Group and empowering PwC to assign Altek into bankruptcy.[7] Instead of proceeding with an application for the Consent Receivership Order, CIBC, PwC and the Altek Group decided to proceed with monetizing the Altek Group's assets under the *Companies' Creditors Arrangement Act* (Canada) (the "***CCAA***").[8]

10. Since May 24, 2024, the Altek Group has been subject to *CCAA* proceedings. PwC was appointed monitor (the "**Monitor**") of the Altek Group.[9] On May 31, 2024, the ARIO was granted which continued a stay of proceedings against Altek, among other things.

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[3] 2025 Sarin Affidavit, above, para. 10, Exhibit "C" para. 41.

[4] *Ibid*, Exhibit "C" para. 44; See also Supplemental Affidavit of Supriya Sarin affirmed on February 5, 2025 ("Sarin Supplemental Affidavit"), paras. 5-6.

[5] Sarin Supplemental Affidavit, above, para. 5.

[6] 2025 Sarin Affidavit, above, Exhibit "C" para. 86.

[7] *Ibid*, para. 7, exhibit "B".

[8] *Ibid*, para. 8.

[9] *Ibid*.

11. On August 8, 2024, an Approval and Vesting Order was granted approving the sale of all of Altek's inventory for $3,600,000, resulting in the liquidation of substantially all of Altek's assets (the "**APA Transaction**").[10]

12. On November 26, 2024, a Stay Extension Order was granted by Justice D.R. Mah extending the stay of proceedings against Altek to March 31, 2025, or until further order of the Court.[11]

13. After the Monitor realizes upon all of CIBC's Security in Altek, CIBC estimates there will be a shortfall well in excess of $1,000.[12]

14. The Monitor currently has cash on hand of approximately $2,700,000 and there are ongoing realization efforts in respect of Altek's accounts receivable and that the Monitor is conducting ongoing investigation.[13]

15. The *CCAA* proceedings will not result in a plan of arrangement or compromise.[14]

16. Altek has failed to meet its liabilities generally as they have become due within the last six months.[15] Altek is no longer conducting business in the normal course and is insolvent.[16]

17. CIBC is unable to commence proceedings under the *Bankruptcy and Insolvency Act* (Canada) (the "***BIA***") unless the stay of proceedings against Altek is partially lifted.[17]

18. PwC has consented to act as trustee in bankruptcy of Altek.[18]

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[10] 2025 Sarin Affidavit, above, para. 12, Exhibit "D".

[11] *Ibid,* para. 13, Exhibit "E".

[12] Sarin Supplemental Affidavit, above, para. 8.

[13] *Ibid*, para. 9.

[14] 2025 Sarin Affidavit, above, para. 17.

[15] *Ibid*, para. 15,17.

[16] *Ibid*, para. 19,22,23.

[17] *Ibid*, para. 18.

[18] *Ibid*, para. 25; Sarin Supplemental Affidavit, above, para. 10, Exhibit "A".

II. ISSUES

19. The issues before this Honourable Court are (1) whether the Court should partially lift the stay of proceedings against Altek to permit this application; (2) If so, should Altek be adjudged bankrupt and is it proper for CIBC to seek a bankruptcy order; and (3) If so, should PwC be appointed as trustee in bankruptcy of Altek?

III. LAW

A. Lifting CCAA stay of proceedings; *CCAA* priority of Crown's GST deemed trust

20. Section 11 *CCAA* allows the Court to make any order it considers appropriate.[19] This power is described as extraordinarily broad.[20]

21. When considering lifting a *CCAA* stay, the moving party faces a heavy onus.[21] The Court should consider (a) whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, (b) the balance of convenience of the parties, (c) the relative prejudice to the parties, and (d) where relevant, the proposed merits of the action.[22]

22. Situations in which a Court will lift a stay order include (a) when the *CCAA* plan is likely to fail, (b) the applicant shows hardship caused by the stay order unrelated to the pre-existing condition of the debtor, (c) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or other creditors, and (d) it is in the interest of justice to do so.[23]

23. There should be no gap when transitioning from *CCAA* proceedings to *BIA* proceedings.[24] When lifting the general stay of proceedings to petition the debtor into bankruptcy, the

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[19] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), s.11 [**Tab 1**].

[20] *Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC), ("*Canwest*"), para. 27 [**Tab 2**].

[21] *Ibid*, para. 32.

[22] *Ibid*, para. 32.

[23] *Ibid*, para. 33.

[24] *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 ("*Century Services*"), [**Tab 3**] paras. 79-80;

court has authority to extend the stay of proceedings against the Crown's GST deemed trust claim.[25] Doing so furthers the purpose of the *CCAA*.[26]

24. The necessary partial lifting of the stay against the debtor should not trigger a race to the courthouse by creditors to obtain priority unavailable under the *BIA*. [27]

25. Crown claims for GST under statutory deemed trusts rank as unsecured claims in *CCAA* and *BIA* proceedings.[28]

B. Granting a bankruptcy order; proper purpose of *BIA* proceedings

26. Section 43 *BIA* governs the granting of a bankruptcy order.[29] The Court must be satisfied that (1) the debt owing to the applicant creditor or creditors amount to one thousand dollars, and (2) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.[30]

27. A debtor includes an insolvent corporation which carries on business or has property in Canada, whose provable claims under the *BIA* amount to $1,000, and who is unable to meet its obligations generally as they become due, has ceased paying current obligations in the normal course as they become due, or whose aggregate property if fairly sold would be insufficient to enable payment of all its obligations.[31]

28. An act of bankruptcy includes failing to meet one's liabilities generally as they become due.[32]

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[25] *Century Services,* above, paras. 74,79.

[26] *Ibid*, para. 78.

[27] *Ibid*, para. 80.

[28] *Ibid*, para. 3; See also *Bankruptcy and Insolvency Act*, RSC 1985, [**Tab 4**"] ("*BIA*") s. 67(2).

[29] *BIA*, above, s. 43.

[30] *Ibid,* s.43(1).

[31] *Ibid*, s. 2 "insolvent person".

[32] *Ibid*, s.42(1)(j).

29. A creditor may seek a bankruptcy order to alter priorities in its favour.[33] Using the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy order.[34]

C. Appointment of trustee

30. On a bankruptcy order being made, the Court must appoint a trustee of the property of the bankrupt.[35]

IV. ARGUMENT

A. Lifting the stay of proceedings against Altek is appropriate; Extending the stay against the Crown's GST deemed trust is appropriate

31. There are sound reasons for lifting the stay of proceedings against Altek:

(1) First, Altek is no longer conducting business in the normal course. One of the chief purposes of a *CCAA* stay is to allow the debtor's business to continue and preserve the *status quo* while the debtor plans the compromise or arrangement to be presented to the creditors.[36] A transition from preserving the *status quo* of the debtor to liquidation of the debtor requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*.[37] The stay no longer serves the remedial purpose of the *CCAA*.

(2) Second, the balance of convenience favors lifting the stay. Notwithstanding the sale of substantially all of Altek's assets, it remains indebted to CIBC in the amount of $22,316,075.19, plus interest, costs, and legal fees that continue to accrue. Altek is no longer conducting business. It is unlikely a plan of arrangement will

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[33] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONSC 199 ("*Bending Lake*"), para. 119 [**Tab 5**] citing *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570 ("*Grant Forest*"), para. 118 [**Tab 6**];

[34] *Ivanco Inc., Re,* 2006 CanLII 34551 (ON CA) ("*Ivance Inc.*") [**Tab 7**]. para. 76 *; BIA*, s. 43(7) ; See also *Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 CanLII 2319 (ON SC) [**Tab 8**], paras. 13,19.

[35] *BIA*, above, s. 43(9).

[36] *Century Services*, above, para. 60.

[37] *Ibid*, para. 80.

result. CIBC wishes to have a representative be an inspector of the estate and will suffer more prejudice from refusing to lift the stay than Altek would suffer from lifting it.

(3) Third, the merits of a *BIA* bankruptcy proceedings favor lifting the stay. Altek is a debtor under the *BIA*. Altek carried on business in Canada and its debts exceed $1,000. Altek is unable to meet its liabilities as they generally become due and its remaining property, if fairly sold, would be insufficient to pay its outstanding obligations, including the Indebtedness. Altek has committed an act of bankruptcy, namely, it has failed to meet its liabilities as they have generally become due, within the last six months and filed for *CCAA* creditor protection. Further, the value of its assets are insufficient to meet its liabilities to CIBC.

32. For the foregoing reasons, it is in the interest of justice to partially lift the stay of proceedings against Altek to allow CIBC to seek a bankruptcy order. The circumstances in which prior courts have lifted a *CCAA* stay are present, namely, a plan of arrangement is unlikely to result, CIBC will suffer hardship should the stay not be lifted, and there would be no resulting prejudice to Altek or any other creditors if the stay is partially lifted.[38]

33. There are also sound reasons for extending the stay against the Crown's GST deemed trusts, while also lifting the general stay as discussed above:

(1) First, it is a legitimate and proper purpose for CIBC to use the *BIA* to alter priorities.

(2) Second, the Crown ranks as an unsecured creditor in respect of GST under the *CCAA* and *BIA*. This status should be preserved when transitioning from the *CCAA* to the *BIA*.

(3) Third, when transitioning between the *CCAA* and *BIA*, there should be no gap between proceedings such that the Crown is able to claim a priority unavailable to it under the *BIA*. That scenario would interfere with an orderly liquidation of Altek contrary to the purpose of the *CCAA* and *BIA*, which are intended to operate in tandem.

[38] *Canwest*, above para. 33.

(4) Fourth, failing to maintain the stay against the Crown could result in CIBC being significantly prejudiced if Altek's assets were used to satisfy the Crown's GST claim in priority to its Security interest, as Altek may have no further assets to satisfy the Indebtedness.

B. Granting a bankruptcy order against Altek is appropriate

34. Altek has met the legislated threshold to be declared bankrupt.

35. As noted above, Altek is a debtor within the meaning of the *BIA*, its Indebtedness exceeds $1,000, and it has committed an act of bankruptcy, namely, failing to meet its liabilities as they have generally become due within the last six months and the filing for creditor protection under the *CCAA*.

36. The Court should exercise its discretion and make a bankruptcy order against Altek.

37. As noted above, it is a legitimate and proper purpose for CIBC to use the *BIA* to alter priorities, or in this case, to prevent other creditors from asserting a priority unavailable to them under the *BIA*.

C. Appointing PwC as trustee of Altek is appropriate

38. Upon making a bankruptcy order under the *BIA*, the Court is required to appoint a licensed insolvency trustee.[39]

39. PwC is a licensed insolvency trustee within the meaning of the *BIA* and has consented to act as trustee in bankruptcy of Altek's estate.

V. SUMMARY AND RELIEF REQUESTED

40. Wherefore, this Honourable Court should partially lift the *CCAA* stay of proceedings against Altek while maintaining the stay against the Crown's GST deemed trust; make a bankruptcy order against Altek; and appoint PwC as trustee in bankruptcy of Altek's estate.

41. There is sound reason to lift the *CCAA* stay of proceedings as it no longer supports the remedial purpose of the *CCAA* for which it was granted. Considering there is no possibility

[39] *BIA*, above, s. 43(9).

of a plan of arrangement between Altek and its creditors, it is in the interest of justice to lift the stay to allow CIBC to seek a bankruptcy order. It is also in line with the purpose of the *CCAA* and *BIA* to achieve an orderly liquidation of Altek's assets by maintaining the stay of proceedings against the Crown's GST deemed trust claim.

42. All of the pre-conditions to making a bankruptcy order against Altek are established. Altek is a *BIA* debtor who has committed an act of bankruptcy within the preceding six months of filing this application. Altek's Indebtedness exceeds $1,000. It is proper for CIBC to seek a bankruptcy order to alter priorities. PwC is a *BIA* licensed trustee who has consented to act as trustee in bankruptcy of Altek's estate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF FEBRUARY, 2025.

MILLER THOMSON LLP

For:/ Dakota Bailey

James W. Reid

Counsel for Canadian Imperial Bank of Commerce

TABLE OF AUTHORITIES

TAB	**AUTHORITY**
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
2.	*Canwest Global Communications Corp. (Re)*, 2009 CanLII 70508 (ON SC)
3.	*Century Services Inc., v. Canada (Attorney General*), 2010 SCC 60
4.	*Bankruptcy and Insolvency Act*, RSC 1985
5.	*2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONSC 199
6.	*Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570
7.	*Ivanco Inc., Re,* 2006 CanLII 34551 (ON CA)
8.	*Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 CanLII 2319 (ON SC)

CANADA

CONSOLIDATION

CODIFICATION

Companies’ Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to December 15, 2024

Last amended on December 12, 2024

À jour au 15 décembre 2024

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Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091215

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

COUNSEL: *Lyndon Barnes, Alex Cobb and Shawn Irving* for the CMI Entities

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders

K. McElcheran and G. Gray for GS Parties

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild

Hilary Clarke for Senior Secured Lenders to LP Entities

Steve Weisz for CIT Business Credit Canada Inc.

DATE HEARD: December 8, 2009

REASONS FOR DECISION

PEPALL J.

Relief Requested

[1] The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and

[27] The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[28] The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of

section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

[31] The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

[32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

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8 (1992) 14 C.B.R. (3d) 303.
9 R.S.O. 1990, c.C.43.
10 Supra, note 6 at paras. 24 and 25.
11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.
12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.
13 Ibid, at para. 68.

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

[14] Supra, note 3.

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^{o} du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

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

L.R.C. (1985), ch. B-3

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income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l’année précédant l’ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d’un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l’Industrie. (*Minister*)

moment de la faillite S’agissant d’une personne, le moment :

a) soit du prononcé de l’ordonnance de faillite la visant;

b) soit du dépôt d’une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu’il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d’une cession de biens la visant;

b) le dépôt d’une proposition la visant;

c) le dépôt d’un avis d’intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu’elle est visée par un avis d’intention déposé aux termes de l’article 50.4 ou une proposition déposée aux termes de l’article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l’alinéa d), le dépôt de la requête à l’égard de laquelle une ordonnance de faillite est rendue;

f) l’introduction d’une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

PART II

Bankruptcy Orders and Assignments

Acts of Bankruptcy

Acts of bankruptcy

42 (1) A debtor commits an act of bankruptcy in each of the following cases:

(a) if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;

(b) if in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;

(c) if in Canada or elsewhere the debtor makes any transfer of the debtor's property or any part of it, or creates any charge on it, that would under this Act be void or, in the Province of Quebec, null as a fraudulent preference;

(d) if, with intent to defeat or delay his creditors, he departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling-house or otherwise absents himself;

(e) if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized, levied on or taken in execution to remain unsatisfied until within five days after the time fixed by the executing officer for the sale of the property or for fifteen days after the seizure, levy or taking in execution, or if any of the debtor's property has been sold by the executing officer, or if the execution or other process has been held by the executing officer for a period of fifteen days after written demand for payment without seizure, levy or taking in execution or satisfaction by payment, or if it is returned endorsed to the effect that the executing officer can find no property on which to levy or to seize or take, but if interpleader or opposition proceedings have been instituted with respect to the property seized, the time elapsing between the date at which the proceedings were instituted and the date at which the proceedings are finally disposed of, settled or abandoned shall not be taken into account in calculating the period of fifteen days;

PARTIE II

Ordonnances de faillite et cessions

Actes de faillite

Actes de faillite

42 (1) Un débiteur commet un acte de faillite en chacun des cas suivants :

a) si, au Canada ou à l'étranger, il fait une cession de ses biens à un syndic au profit de ses créanciers en général, que cette cession soit autorisée ou non par la présente loi;

b) si, au Canada ou à l'étranger, il donne, livre ou transfère frauduleusement ses biens ou une partie de ces derniers;

c) si, au Canada ou à l'étranger, il fait un transport ou transfert de ses biens, ou d'une partie de ces derniers, ou les grève d'une charge, et qu'une telle transaction serait nulle, d'après la présente loi, comme entachée de préférence frauduleuse;

d) si, avec l'intention de frustrer ou de retarder ses créanciers, il quitte le Canada, ou, étant parti du Canada, il reste à l'étranger, ou il quitte son logement ou s'absente d'autre manière;

e) s'il permet qu'une procédure d'exécution ou autre procédure contre lui, et en vertu de laquelle une partie de ses biens est saisie, imposée ou prise en exécution, reste non réglée cinq jours avant la date fixée par l'huissier-exécutant pour la vente de ces biens, ou durant les quinze jours suivant la saisie, imposition ou prise en exécution, ou si les biens ont été vendus par l'huissier-exécutant, ou si la procédure d'exécution ou autre procédure a été différée par ce dernier pendant quinze jours après demande par écrit du paiement sans saisie, imposition ou prise en exécution, ou règlement par paiement, ou si le bref est retourné portant la mention que l'huissier-exécutant ne peut trouver de biens à saisir, imposer ou prendre; cependant, lorsque la saisie des biens a donné lieu à des oppositions ou entreplaideries, le temps qui s'écoule entre la date à laquelle ces procédures ont été intentées et la date à laquelle il est définitivement statué sur ces procédures, ou à laquelle celles-ci sont définitivement réglées ou abandonnées, ne peut être compté dans le calcul de cette période de quinze jours;

(f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

(h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(i) if he defaults in any proposal made under this Act; and

(j) if he ceases to meet his liabilities generally as they become due.

Unauthorized assignments are void or null

(2) Every assignment of an insolvent debtor's property other than an assignment authorized by this Act, made by an insolvent debtor for the general benefit of their creditors, is void or, in the Province of Quebec, null.

R.S., 1985, c. B-3, s. 42; 1997, c. 12, s. 26; 2004, c. 25, s. 27.

Application for Bankruptcy Order

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

If applicant creditor is a secured creditor

(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

f) si, à une assemblée de ses créanciers, il produit un bilan démontrant qu'il est insolvable, ou présente ou fait présenter à cette assemblée un aveu par écrit de son incapacité de payer ses dettes;

g) s'il cède, enlève ou cache, ou essaie ou est sur le point de céder, d'enlever ou de cacher une partie de ses biens, ou en dispose ou essaie ou est sur le point d'en disposer, avec l'intention de frauder, frustrer ou retarder ses créanciers ou l'un d'entre eux;

h) s'il donne avis à l'un de ses créanciers qu'il a suspendu ou qu'il est sur le point de suspendre le paiement de ses dettes;

i) s'il fait défaut à toute proposition concordataire faite sous le régime de la présente loi;

j) s'il cesse de faire honneur à ses obligations en général au fur et à mesure qu'elles sont échues.

Les cessions non autorisées sont nulles

(2) Toute cession de ses biens, autre qu'une cession consentie conformément à la présente loi, faite par un débiteur insolvable au profit de ses créanciers en général, est nulle.

L.R. (1985), ch. B-3, art. 42; 1997, ch. 12, art. 26; 2004, ch. 25, art. 27.

Requête en faillite

Requête en faillite

43 (1) Sous réserve des autres dispositions du présent article, un ou plusieurs créanciers peuvent déposer au tribunal une requête en faillite contre un débiteur :

a) d'une part, si la ou les dettes envers le ou les créanciers requérants s'élèvent à mille dollars et si la requête en fait mention;

b) d'autre part, si le débiteur a commis un acte de faillite dans les six mois qui précèdent le dépôt de la requête et si celle-ci en fait mention.

Cas où le créancier requérant est un créancier garanti

(2) Lorsque le créancier requérant est un créancier garanti, il doit, dans sa requête, ou déclarer qu'il consent à abandonner sa garantie au profit des créanciers dans le cas où une ordonnance de faillite est rendue contre le débiteur, ou fournir une estimation de la valeur de sa garantie; dans ce dernier cas, il peut être admis à titre de créancier requérant jusqu'à concurrence du solde de sa créance, déduction faite de la valeur ainsi estimée, comme s'il était un créancier non garanti.

Affidavit

(3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.

Affidavit

(3) La requête doit être attestée par un affidavit du requérant, ou d'une personne dûment autorisée en son nom, qui a une connaissance personnelle des faits qui y sont allégués.

Consolidation of applications

(4) If two or more applications are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on any terms that the court thinks fit.

Jonction des requêtes

(4) Lorsque plusieurs requêtes sont déposées contre le même débiteur ou contre des codébiteurs, le tribunal peut joindre les procédures, ou quelques-unes d'entre elles, aux conditions qu'il juge convenables.

Place of filing

(5) The application shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La requête est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Proof of facts, etc.

(6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

Preuve des faits et de la signification

(6) À l'audition, le tribunal exige la preuve des faits allégués dans la requête et de la signification de celle-ci; il peut, s'il juge la preuve satisfaisante, rendre une ordonnance de faillite.

Dismissal of application

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

Rejet de la requête

(7) Lorsque le tribunal n'estime pas satisfaisante la preuve des faits allégués dans la requête, ou de la signification de celle-ci, ou si le débiteur lui a démontré à sa satisfaction qu'il est en état de payer ses dettes, ou si le tribunal juge que, pour toute autre cause suffisante, aucune ordonnance ne devrait être rendue, il doit rejeter la requête.

Dismissal with respect to some respondents only

(8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.

Rejet de la requête à l'égard de certains défendeurs seulement

(8) Lorsqu'il y a plus d'un défendeur dans une requête, le tribunal peut rejeter la requête relativement à l'un ou à plusieurs d'entre eux, sans préjudice de l'effet de la requête à l'encontre de l'autre ou des autres défendeurs.

Appointment of trustee

(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

Nomination de syndics

(9) Lorsqu'une ordonnance de faillite est rendue, le tribunal nomme un syndic autorisé à titre de syndic des biens du failli en tenant compte, dans la mesure où le tribunal le juge équitable, de la volonté des créanciers.

Stay of proceedings if facts denied

(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's

Sursis des procédures

(10) Lorsque le débiteur comparaît relativement à la requête et nie la véracité des faits qui y sont allégués, le tribunal peut, au lieu de rejeter la requête, surseoir aux procédures relatives à la requête aux conditions qu'il juge convenable d'imposer au requérant quant aux frais ou au property and for any period of time that may be required for trial of the issue relating to the disputed facts.

débiteur afin d'empêcher l'aliénation de ses biens, et pendant le temps nécessaire à l'instruction de la contestation.

Stay of proceedings for other reasons

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

Suspension des procédures pour autres raisons

(11) Le tribunal peut, pour d'autres raisons suffisantes, rendre une ordonnance suspendant les procédures intentées dans le cadre d'une requête, soit absolument, soit pour un temps limité, aux conditions qu'il juge équitables.

Security for costs

(12) Applicants who are resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the application may be stayed until the security is furnished.

Cautionnement pour frais

(12) Le requérant qui réside à l'étranger peut être contraint de fournir au débiteur un cautionnement pour les frais, et les procédures découlant de la requête peuvent être suspendues jusqu'à ce que le cautionnement soit fourni.

Bankruptcy order on another application

(13) If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

Ordonnance de faillite sur autre requête

(13) Lorsque des procédures relatives à une requête ont été suspendues ou n'ont pas été poursuivies avec la diligence et l'effet voulus, le tribunal peut, s'il croit juste de le faire en raison du retard ou pour toute autre cause, substituer au requérant ou lui adjoindre tout autre créancier envers qui le débiteur peut être endetté de la somme prévue par la présente loi; il peut rendre une ordonnance de faillite sur la requête d'un tel autre créancier, et doit dès lors rejeter, aux conditions qu'il croit justes, la requête dont les procédures ont été suspendues ou n'ont pas été poursuivies.

Withdrawing application

(14) An application shall not be withdrawn without the leave of the court.

Retrait d'une requête

(14) Une requête ne peut être retirée sans l'autorisation du tribunal.

Application against one partner

(15) Any creditor whose claim against a partnership is sufficient to entitle the creditor to present a bankruptcy application may present an application against any one or more partners of the firm without including the others.

Requête contre un associé

(15) Tout créancier dont la réclamation contre une société de personnes est suffisante pour l'autoriser à présenter une requête en faillite peut présenter une requête contre un ou plusieurs membres de cette société, sans y inclure les autres.

Court may consolidate proceedings

(16) If a bankruptcy order has been made against one member of a partnership, any other application against a member of the same partnership shall be filed in or transferred to the same court, and the court may give any directions for consolidating the proceedings under the applications that it thinks just.

Jonction des procédures par le tribunal

(16) Lorsqu'une ordonnance de faillite a été rendue contre un membre d'une société de personnes, toute autre requête contre un membre de la même société est déposée ou renvoyée au même tribunal, et ce dernier peut donner les instructions qui lui semblent justes pour joindre les procédures intentées dans le cadre des requêtes.

Continuance of proceedings on death of debtor

(17) If a debtor against whom an application has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if the debtor were alive.

R.S., 1985, c. B-3, s. 43; 1992, c. 27, s. 15; 2004, c. 25, s. 28.

Application against estate or succession

44 (1) Subject to section 43, an application for a bankruptcy order may be filed against the estate or succession of a deceased debtor.

Personal liability

(2) After service of an application for a bankruptcy order on the executor or administrator of the estate of a deceased debtor, or liquidator of the succession of a deceased debtor, the person on whom the order was served shall not make payment of any moneys or transfer any property of the deceased debtor, except as required for payment of the proper funeral and testamentary expenses, until the application is disposed of; otherwise, in addition to any penalties to which the person may be subject, the person is personally liable for the payment or transfer.

Act done in good faith

(3) Nothing in this section invalidates any payment or transfer of property made or any act or thing done, in good faith, by the executor, administrator of the estate or liquidator of the succession before the service of an application referred to in subsection (2).

R.S., 1985, c. B-3, s. 44; 2004, c. 25, s. 28.

Costs of application

45 (1) If a bankruptcy order is made, the costs of the applicant shall be taxed and be payable out of the estate, unless the court otherwise orders.

Insufficient proceeds

(2) If the proceeds of the estate are not sufficient for the payment of any costs incurred by the trustee, the court may order the costs to be paid by the applicant.

R.S., 1985, c. B-3, s. 45; 1992, c. 1, s. 14; 2004, c. 25, s. 28.

Interim Receiver

Appointment of interim receiver

46 (1) The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of

Continuation des procédures advenant le décès d’un débiteur

(17) Advenant le décès d’un débiteur contre qui une requête a été déposée, les procédures sont continuées, à moins que le tribunal n’en ordonne autrement, comme s’il était vivant.

L.R. (1985), ch. B-3, art. 43; 1992, ch. 27, art. 15; 2004, ch. 25, art. 28.

Requête contre la succession d’un débiteur décédé

44 (1) Sous réserve de l’article 43, une requête en faillite peut être produite contre la succession d’un débiteur décédé.

Responsabilité personnelle

(2) Le liquidateur de la succession d’un débiteur décédé, l’exécuteur testamentaire de celui-ci ou l’administrateur de sa succession, après qu’une requête en faillite lui a été signifiée, ne peut payer aucune somme d’argent ni transférer aucun bien du débiteur décédé, sauf ce qui est requis pour acquitter les frais funéraires et testamentaires convenables, avant qu’il ait été décidé de la requête; sinon, en sus des peines qu’il peut encourir, il en est tenu responsable personnellement.

Actes faits de bonne foi

(3) Le présent article n’a toutefois pas pour effet d’invalider un paiement ou un transfert de biens fait ou tout acte ou chose accompli de bonne foi par le liquidateur, l’exécuteur testamentaire ou l’administrateur avant la signification de la requête.

L.R. (1985), ch. B-3, art. 44; 2004, ch. 25, art. 28.

Frais de requête

45 (1) Lorsqu’une ordonnance de faillite est rendue, les frais du requérant sont taxés et payables sur l’actif à moins que le tribunal n’en ordonne autrement.

Insuffisance de l’actif

(2) Lorsque le produit de l’actif ne suffit pas à payer les frais subis par le syndic, le tribunal peut ordonner au requérant de payer ces frais.

L.R. (1985), ch. B-3, art. 45; 1992, ch. 1, art. 14; 2004, ch. 25, art. 28.

Séquestre intérimaire

Nomination d’un séquestre intérimaire

46 (1) S’il est démontré que la mesure est nécessaire pour la protection de l’actif du débiteur, le tribunal peut, après la production d’une requête en faillite et avant qu’une ordonnance de faillite ait été rendue, nommer un syndic autorisé comme séquestre intérimaire de tout ou

(b.3) without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Deemed trusts

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Exceptions

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

b.3) sans restreindre la portée générale de l’alinéa b), les biens détenus dans un *régime enregistré d’épargne-retraite*, un *fonds enregistré de revenu de retraite* ou un *régime enregistré d’épargne-invalidité*, au sens de la *Loi de l’impôt sur le revenu*, ou dans tout régime prescrit, à l’exception des cotisations aux régimes ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

mais ils comprennent :

c) tous les biens, où qu’ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu’il peut acquérir ou qui peuvent lui être dévolus avant sa libération, y compris les remboursements qui lui sont dus au titre de la *Loi de l’impôt sur le revenu* relativement à l’année civile — ou à l’exercice lorsque celui-ci diffère de l’année civile — au cours de laquelle il a fait faillite, mais à l’exclusion de la partie de ces remboursements qui :

(i) soit sont des sommes soustraites à l’application de la présente loi,

(ii) soit sont des sommes qui lui sont dues et qui sont saisissables en vertu d’un bref de saisie-arrêt signifié à Sa Majesté en application de la *Loi d’aide à l’exécution des ordonnances et des ententes familiales* dans lequel il est nommé comme débiteur;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

Fiducies présumées

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l’application de l’alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l’absence de la disposition législative en question, il ne le serait pas.

Exceptions

(3) Le paragraphe (2) ne s’applique pas à l’égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des montants réputés détenus en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a ***provincial pension plan*** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

R.S., 1985, c. B-3, s. 67; 1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32; 2019, c. 29, s. 134.

d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est ***une province instituant un régime général de pensions*** au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un ***régime provincial de pensions*** au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

L.R. (1985), ch. B-3, art. 67; 1992, ch. 27, art. 33; 1996, ch. 23, art. 168; 1997, ch. 12, art. 59; 1998, ch. 19, art. 250; 2005, ch. 47, art. 57; 2007, ch. 36, art. 32; 2019, ch. 29, art. 134.

Directives re surplus income

68 (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt.

Instructions du surintendant — revenu excédentaire

68 (1) Le surintendant fixe, par instruction, pour les provinces ou pour un ou plusieurs districts ou parties de district, des normes visant l'établissement du revenu excédentaire du failli qui est une personne physique et de la somme que celui-ci doit verser à l'actif de la faillite.

Definitions

(2) The following definitions apply in this section.

surplus income means the portion of a bankrupt individual's total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1). (*revenu excédentaire*)

total income

(a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, including those received as damages for wrongful dismissal, received as

Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

revenu excédentaire Le montant du revenu total d'une personne physique en faillite qui excède ce qui est nécessaire au maintien d'un niveau de vie raisonnable, compte tenu des normes applicables mentionnées au paragraphe (1). (*surplus income*)

revenu total Malgré les alinéas 67(1)b) et b.3), revenus de toute nature ou source gagnés ou reçus par le failli entre la date de sa faillite et celle de sa libération, y compris les sommes reçues entre ces dates à titre de dommages-intérêts pour congédiement abusif ou de règlement en matière de parité salariale, ou en vertu d'une loi fédérale ou provinciale relative aux accidents du travail. Ne sont pas visées par la présente définition les sommes

CITATION: 2403177 Ontario Inc. v. Bending Lake iron Group Limited, 2016 ONSC 199
COURT FILE NO.: CV-14-0274-00
DATE: 2016-01-08

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
2403177 Ontario Inc.	*Michael Strickland*, for the Applicant
Applicant	
- and -	
Bending Lake Iron Group Limited	*Robert MacRae*, for the Respondent
Respondent	
	Kenneth Kraft, for A. Farbert & Partners Inc.
	Paul Denton the Receiver *Caitlin Fell*, for Legacy Hill Resources Ltd.
	HEARD: December 29 and 30, 2015, and by way of written submissions received on January 6, 2016, at Thunder Bay, Ontario

Mr. Justice D. C. Shaw

Decision On Motion

[1] A. Farber and Partners Inc. was appointed receiver ("the Receiver") of all of the assets, undertakings and properties ("the Property") of Bending Lake Iron Group ("BLIG" or "the Debtor") by order dated September 11, 2014.

[118] The fact that the directors of BLIG may be personally liable for the claim of Canada Revenue Agency for HST that BLIG failed to remit is not a reason to deny an assignment in bankruptcy.

[119] In *Grant Forest Products Inc. v. Toronto-Dominion Bank* 2015 ONCA 570, at para.118, the Court of Appeal held that a creditor may seek a bankruptcy order under the *Bankruptcy and Insolvency Act* to alter priorities in its favour.

[120] To similar effect is the following statement by Wallace J.A. in *Bank of Montreal v. Scott Road Enterprises* 1989 Carswell BC 387 (B.C.C.A.):

> The fact that a secured creditor involves the provision of the Bankruptcy Act to establish its priority in accord with a scheme of distribution provided by that act cannot constitute a "sufficient cause" for refusing a receiving order (s. 43(7)) [of the Bankruptcy and Insolvency Act.

[121] As observed in *Deakin v R.*, 2012 TCC 270 (Tax Ct. of Can.), at para. 24, the directors' liability provisions of the Excise Tax Act should be regarded by business persons as similar to a form of personal guarantee by the directors.

[122] If HST was properly payable by BLIG I see no principled basis why it would be preferable that the outstanding amounts should be borne by the secured creditors rather than by the persons who had the responsibility at law to ensure that HST, like the outstanding source deductions, was remitted to the government.

[123] There is no issue that BLIG is insolvent within the meaning of the Bankruptcy and Insolvency Act. I see no reason to deny an assignment in bankruptcy.

COURT OF APPEAL FOR ONTARIO

CITATION: Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570
DATE: 20150807
DOCKET: C58636

Doherty, Gillese and Lauwers JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

BETWEEN

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Applicants

and

The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security

Respondents

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Heard: February 3, 2015

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

Gillese J.A.:

OVERVIEW

[1] The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

[2] The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

[3] Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

[4] During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

[117] In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

[118] As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

[119] The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, and in the Matter of a Plan or Plans of Compromise or Arrangement of Ivaco Inc. et al.

[Indexed as: Ivaco Inc. (Re)]

83 O.R. (3d) 108

Court of Appeal for Ontario,
Laskin, Rosenberg and Simmons JJ.A.
October 17, 2006

Debtor and creditor -- Companies' Creditors Arrangement Act -- Pensions -- Monitor appointed under CCAA not having fiduciary duty to debtor Company's pension plan beneficiaries -- Company or Monitor not having duty under Pension Benefits Act to keep unpaid contributions to pension plan in separate account -- Motions judge not required by CCAA to order that amount of deemed trust under Pension Benefits Act for unpaid contributions be paid at end of CCAA proceedings but before bankruptcy -- No gap existing between CCAA and Bankruptcy and Insolvency Act in which provincial deemed trusts can be executed -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Debtor and creditor -- Companies' Creditors Arrangement Act -- Powers of court -- Motions judge ordering transfer of debtor Companies' head offices from Qubec to Toronto -- CCAA not giving motions judge authority to order transfer -- Motions judge not having to resort to CCAA because he had express authority to order transfer under s. 191 of Canada Business Corporations Act -- Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 191 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. [page109]

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. [page128]

-- 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, 73 C.B.R. (N.S.) 273 (B.C.C.A), at pp. 627, 630-31 D.L.R.; Re Harrop of Milton Inc. (1979), 22 O.R. (2d) 239, [1979] O.J. No. 4015 (S.C.), at pp. 244-45 O.R.

-- 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 Qubec to

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:

[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**