TAB 8

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

General Chemical Canada Ltd., Re

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

Ontario Superior Court of Justice [Commercial List]

Mesbur J.

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

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

Robert Staley, Kevin Zych, Alan Gardner for Plaintiffs

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

Ronald Carr for Ministry of the Environment

Tim Hogan for Sherway Contracting

Tyco Manson for Honeywell ASCA

Subject: Insolvency; Corporate and Commercial; Environmental

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

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

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

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

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

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

Cases considered by *Mesbur J.*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

Generally — considered

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

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

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

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

s. 47 — referred to

s. 67(1)(a) — considered

s. 183 — considered

s. 243(2) "receiver" — referred to

s. 244 — considered

s. 244(1) — considered

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

Generally — referred to

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

Generally — considered

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

Generally — considered

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

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

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

Generally — referred to

s. 3 — referred to

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

Generally — referred to

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

s. 48(1) — referred to

s. 48(2) — considered

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

Generally — referred to

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

Generally — considered

s. 57 — considered

s. 57(1) — considered

s. 57(3) — considered

s. 57(4) — considered

s. 57(5) — considered

s. 57(6) — considered

s. 69(1)(c) — considered

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

Generally — considered

s. 4(1)(a) — referred to

s. 4(1)(b) — referred to

s. 20(1)(a)(i) — referred to

s. 20(2)(a)(i) — referred to

MOTION by interim receiver for interim payment to creditor.

***Mesbur J.*:**

Nature of the motions and the positions of the parties

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

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

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

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

Some background facts

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

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

Industrial's Chapter 11 proceedings

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

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

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

Harbert's financing of Industrial and General Chemical

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

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

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

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

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

General Chemical's CCAA proceedings

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

Environmental issues at General Chemical

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

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

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

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

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

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

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

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

The General Chemical Pension Plans

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

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

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

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

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

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

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

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

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

standing the Superintendent's and MOE's opposition. He rejected the Superintendent's motion for payment of funds to the pension plan prior to terminating the CCAA proceeding. He faulted the Superintendent for failing to move for the relief it sought earlier in the process. Having found that there was nothing improper in the CCAA proceedings, he granted the orders, stating that to do otherwise "would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions."

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

The appointment of an Administrator pursuant to the PBA

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

The current proposed distribution

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

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

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

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

The law and analysis

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

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

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

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

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

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

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

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

The MOE's position

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Does the Administrator have a lien?

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

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

> An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension pan an amount of money equal to the to the employer contributions due and not paid not the pension fund.

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

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

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

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

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

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

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

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

directly.

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

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

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

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

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

Would a lien have priority over Harbert's security?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Is the Harbert transaction really equity, not debt?

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

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

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

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

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

Do the equities require an inversion of priorities?

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

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

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

(1) The Claimant must have engaged in some type of inequitable conduct;

(2) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the Claimant; and

(3) Equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

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

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

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

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

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

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

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

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

Disposition

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

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

Motion granted.

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

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

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

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

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

FN6 EPA, s. 168.20(1)

FN7 EPA, s. 168.19(1)

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

FN9 PBA, s. 57(5)

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

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

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

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

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

FN15 *Ibid.* at 33

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

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

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

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

FN20 *Ibid.*

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

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

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

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

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

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

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

FN28 Section 183 of the BIA vests the bankruptcy court with equitable jurisdiction. See *Christian Brothers of Ireland* *in Canada* (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]) in which the court held there is no jurisdictional or constitutional impediment to the court utilizing the concept of equitable subordination if it feels it is appropriate to do so.

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

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

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

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

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

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2007 CarswellOnt 5497, 2007 ONCA 600, 2007 C.E.B. & P.G.R. 8258, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 35 C.B.R. (5th) 163, 228 O.A.C. 385

General Chemical Canada Ltd., Re

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

Ontario Court of Appeal

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

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

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

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

Ronald Carr for Appellant, Ministry of Environment

Ashley John Taylor for Pricewaterhouse Coopers Inc., interim receiver of General Chemical Canada Ltd.

Richard B. Swan, Robert Staley, Linda Visser for Respondents, Harbinger Capital Partners Fund, L.P., Harbinger Capital Partners Master Fund I, Ltd.

Tycho M.J. Manson for Honeywell ASCa Inc.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure; Environmental

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

Priority — Bankrupt was chemical company — Bankrupt's contributions to employees' pension plans fell in arrears — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Motion judge found that lien created by s. 57(5) of Pension Benefits Act ("PBA") was not enforceable under Bankruptcy and Insolvency Act ("BIA") — Administrator of pension plans appealed — Appeal dismissed — Bankrupt was deemed to hold in trust for beneficiaries of pension plans amount equal to its unpaid contributions under s. 57(3) of PBA, but this did not create trust as contemplated by s. 67(1)(a) of BIA — Section 57(5) of PBA did not qualify administrator as secured creditor for purposes of BIA — Lien and charge accorded to administrator under s. 57(5) of PBA secured employer's obligation to pay unpaid contributions to pension funds, but it did not secure debt owed to administrator.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous liens or charges

Bankrupt was chemical company — Bankrupt's contributions to employees' pension plans fell in arrears — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Motion judge found that lien created by s. 57(5) of Pension Benefits Act ("PBA") was not enforceable under Bankruptcy and Insolvency Act ("BIA") — Administrator of pension plans appealed — Appeal dismissed — Bankrupt was deemed to hold in trust for beneficiaries of pension plans amount equal to its unpaid contributions under s. 57(3) of PBA, but this did not create trust as contemplated by s. 67(1)(a) of BIA — Section 57(5) of PBA did not qualify administrator as secured creditor for purposes of BIA — Lien and charge accorded to administrator under s. 57(5) of PBA secured employer's obligation to pay unpaid contributions to pension funds, but it did not secure debt owed to administrator.

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

Environmental cleanup costs — Bankrupt was chemical company — Ministry of Environment claimed that bankrupt failed to comply with provincial environmental safety regulations by depositing by-products in basin — Basin was contaminated site and remedial costs exceeded bankrupt's financial assurance given under Environmental Protection Act — Interim receiver accumulated $6.5 million from bankrupt's operating assets — Interim receiver successfully brought motion to make interim distribution to secured creditor in amount of $3.75 million — Ministry appealed — Appeal dismissed — There was no basis to interfere with discretion of motion judge to order interim distribution — Ministry was unsecured creditor against operating assets — Ministry had security against bankrupt's real property — Secured creditor's security did not extend to basin nor did interim receiver have possession of that real property — Motion judge found no evidence of non-compliance with environmental orders nor any threat of imminent environmental harm.

Cases considered by *S.T. Goudge J.A.*:

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

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

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

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

Statutes considered:

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

Generally — referred to

s. 2 "secured creditor" — considered

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

s. 14.06(8) [en. 1997, c. 12, s. 15(1)] — referred to

s. 67(1)(a) — considered

s. 136(1) — referred to

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

Generally — referred to

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

Generally — referred to

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

Generally — referred to

s. 19(1) — referred to

s. 22(1) — referred to

s. 55(2) — considered

s. 56(1) — referred to

s. 57 — considered

s. 57(1) — considered

s. 57(3) — considered

s. 57(4) — considered

s. 57(5) — considered

s. 59 — referred to

s. 71 — referred to

2007 CarswellOnt 5497, 2007 ONCA 600, 2007 C.E.B. & P.G.R. 8258, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 35 C.B.R. (5th) 163, 228 O.A.C. 385

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

Generally — referred to

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

Generally — referred to

APPEALS by administrator of bankrupt's pension plans and Ministry of Environment from judgment reported at *General Chemical Canada Ltd., Re* (2006), 53 C.C.P.B. 284, 22 C.B.R. (5th) 298, 2006 CarswellOnt 4675, 23 C.E.L.R. (3d) 184 (Ont. S.C.J. [Commercial List]), granting interim receiver's motion for interim distribution of funds to secured creditor.

Editor's Note

This decision adds to the small but growing body of jurisprudence on the interplay between pension law and insolvency law, in particular where there are unremitted contributions to an underfunded pension plan and the employer has been placed into bankruptcy. The Court of Appeal upheld the decision of the Superior Court, albeit on somewhat different grounds, which shift in reasoning may cause a touch of confusion when working through any similar fact situations which might arise in the future.

***S.T. Goudge J.A.*:**

1 The respondents, the two Harbert Funds ("Harbert")[FN1], are a secured creditor of General Chemical Canada Ltd. ("GCCL"), which was placed in bankruptcy effective November 18, 2005. Its interim receiver has accumulated $6.5 million from GCCL's operating assets, including cash, accounts receivable and inventory, and seeks the court's authorization to make an interim distribution from these funds to Harbert, as secured creditor, in the amount of $3.75 million.

2 This proposal is opposed by the administrator of GCCL's two pension plans and by the Ontario Ministry of the Environment ("MOE").

3 The administrator says that, pursuant to s. 57(5) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), it holds a lien over GCCL's assets in relation to GCCL's unpaid pension contributions, and this gives it priority over Harbert's security.

4 MOE says that GCCL has failed to comply with provincial environmental safety requirements, and there will therefore be significant cleanup costs that exceed GCCL's financial assurance given under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("EPA"). MOE says that GCCL and its interim receiver have an obligation to meet these costs, and that any distribution at this stage is premature and may leave no assets for environmental remediation.

5 At first instance, the motion judge found against both the administrator and MOE, and authorized the interim distribution to Harbert. Both the administrator and MOE have appealed. The appeals were argued together, although they each raise their own issues. I therefore propose to address each separately.

6 In each case, I agree with the result reached by the motion judge, although for somewhat different reasons.

The Administrator's Appeal

7 Until January 2005, when it discontinued operations, GCCL manufactured calcium chloride at its plant in Amherstburg, Ontario. On March 31, 2004, Harbert advanced $9 million to GCCL, secured against GCCL's operating assets. No one questions that Harbert's security instruments were properly registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), and constitute a perfected security interest in GCCL's personal property as of that date.

8 However, GCCL developed financial problems, and on January 19, 2005, it was ordered under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*").

9 By November 2005, it became clear that GCCL's attempt to restructure while under *CCAA* protection was unlikely to succeed. Effective November 18, 2005, pursuant to the order of C. Campbell J. of the Superior Court of Justice, GCCL made an assignment in bankruptcy and an interim receiver of certain of its assets was appointed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

10 GCCL maintained two pension plans for its employees, one for its salaried employees and one for its unionized employees. Both are defined benefit plans and both are completely employer funded.

11 Until about January 2004, GCCL was making the contributions due under both plans. At that point, it began to fall into arrears, and by March 31, 2004, the date Harbert's security was perfected, that shortfall was $1,356,230 for the union plan and $107,499 for the salaried plan.

12 After March 31, 2004, while GCCL made several sporadic payments to both plans, the shortfalls continued to grow. The only exception to this pattern occurred in October and November 2004 when GCCL made payments to both plans in excess of the required contributions for those months. That excess amounted to $2,164,492 for the union plan and $113,472 for the salaried plan. Thereafter, the shortfalls continued to grow, although nothing in the *CCAA* order prohibited GCCL from making the required contributions.

13 The *PBA* requires that every pension plan have an administrator. Up until its bankruptcy on November 18, 2005, GCCL served in that role for both plans. However on December 8, 2005, the Ontario Superintendent of Financial Services, in his capacity as the regulator of Ontario registered pension plans, appointed Morneau Sobeco Limited Partnership (the "Administrator") as the administrator of both plans pursuant to s. 71 of the *PBA*.

14 This proceeding arose because the interim receiver has now collected $6.5 million from GCCL's general operations. These funds do not come from any of GCCL's real estate holdings. Since it views Harbert as the only creditor with security against GCCL's operating assets, the interim proposes to distribute $3.75 million of those funds to Harbert as secured creditor.

15 The Administrator opposes the motion approving that payment because of the security it says it has under the *PBA*. At the same time, the Administrator moved for a declaration that its security pursuant to s. 57(5) of the *PBA* makes it a secured creditor ranking ahead of Harbert's security.

16 The motion judge granted the interim receiver's motion and dismissed that of the Administrator. She found that the lien created by s. 57(5) of the *PBA* was not enforceable under the *BIA* because it was an attempt by the province to do indirectly what it could not do directly, namely to legislate priority under the *BIA* for unpaid pension plan contributions,

17 She drew support for this conclusion from Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess., 38th Parl., 2005 (assented to 25 November 2005), which has been passed by the federal Parliament but not proclaimed, and which would create a "pension charge" over a debtor's assets

for unpaid pension plan contributions of the kind in issue here. The motion judge concluded that since this amendment must be designed to alter the current state of the law, no such security presently exists.

18 The motion judge went on to find that even if the Administrator held a lien effective for *BIA* purposes, the rule in *Clayton's Case, Re* (1816), 1 Mer. 572, 35 E.R. 781 (Eng. Ch. Div.), should be applied, and absent any evident intention at the time of the excess contributions paid by GCCL in October and November 2004 as to which particular deficiencies they were to apply to, they should be applied to reduce the earliest pension indebtedness. This would eliminate all shortfalls prior to the effective date of Harbert's security for which the Administrator might have had priority.

Analysis

19 The important section of the *PBA* for the Administrator's appeal is s. 57. Section 57(1) applies to employee contributions required under a pension plan and hence is not relevant here, where both plans are completely employer funded. The same is true of s. 57(4), which applies where a pension plan is wound up, since that has not yet happened in this case.

20 The critical subsections are ss. 57(3) and 57(5). They read as follows:

> (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> .....
>
> (5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

21 The *BIA* sets out a scheme of priorities governing payment by creditors in the event of a bankruptcy. Section 67(1)(a) excludes from the bankrupt's property any property held by the bankrupt in trust for another person. Then, in distributing the bankrupt's estate, those meeting the definition of "secured creditor" in s. 2 of the *BIA* are paid first, generally on the basis that the earliest security is paid first. Then, s. 136(1) sets out a list of other creditors who, subject to the rights of secured creditors, are to be preferred and paid in the priority listed in that subsection. Finally, unsecured creditors share *pari passu* in what remains.

22 The critical definition in the *BIA* is that of "secured creditor" defined in s. 2. It reads:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrumental held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
>
> > (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
> >
> > (b) any of
> >
> > > (i) the vendor or any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provision of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; [emphasis added]

23 There is no doubt that once GCCL began to fall short of its required contributions to both pension funds in January 2004, s. 57(3) of the *PBA* applied and GCCL was deemed to hold in trust for the beneficiaries of those plans an amount equal to its unpaid contributions.

24 However, the Administrator concedes that this section does not create a trust as contemplated by s. 67(1)(a) of the *BIA* and excludes nothing from the estate of GCCL for the purposes of distribution under the *BIA*. All parties to this appeal agree that that consequence is dictated by *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.). That case held that s. 67(1)(a) of the *BIA* does not apply to statutory deemed trusts that lack the common law attributes of a trust, such as the requirement that the property be kept separate and not commingled with the bankrupt's own property.

25 The Administrator's argument, however, is simply that the lien and charge accorded to it by s. 57(5) of the *PBA* is separate from the deemed trust created by s. 57(3), and is effective for the purposes of the *BIA*, even if the deemed trust is not.

26 For this argument to succeed, however, the first step is that, as holder of a s. 57(5) statutory lien, the Administrator must meet the definition of secured creditor in the *BIA*.

27 In my view, it cannot do so. The Administrator does not hold a charge or lien as security for a debt due or accruing due to the Administrator from the debtor GCCL.

28 The *PBA* provides that the Administrator is the person that administrates the pension plan. The Administrator is to ensure that the pension plan, and the pension fund maintained to provide benefits under the plan, are administered in accordance with the *PBA* and its regulations (s. 19(1)). In doing so, the Administrator must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person (s. 22(1)). Section 56(1) requires the Administrator to ensure that all contributions due under the pension plan are paid to the pension fund when due. To facilitate this, the Administrator is given the right to commence legal proceedings to obtain payment of contributions due under the pension plan (s. 59).

29 Section 55(2) sets out the employer's obligation to make contributions under a pension plan. It reads as follows:

(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

(a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

30 None of these provisions suggest that the contributions owed by GCCL are a debt due to the Administrator. Rather, GCCL's legal obligation was to make the contributions to the pension funds that were required under the pension plans. Nor is there even any indication that the contributions are owed to the Administrator to be held in trust for the pension funds. Rather, the legislation contemplates that those contributions are owed to the pension funds pursuant to the pension plans, and are not the property of the Administrator.

31 The Administrator's right to commence legal proceedings simply permits it to seek to compel the employer to pay the contributions to the pension funds due under the pension plans.

32 The consequence of this is that the lien and charge accorded to the Administrator secures the employer's obligation to pay the unpaid contributions required by the pension plans to the pension funds. It does not secure a debt owed to the Administrator. Hence s. 57(5) does not qualify the Administrator as a secured creditor for the purposes of the *BIA*.

33 That conclusion is sufficient to dispose of the Administrator's appeal, and makes it unnecessary to decide whether, if s. 57(5) of the *PBA* qualifies the Administrator as a secured creditor for the purposes of the *BIA*, that section is rendered inapplicable because its effect is to reorder the priorities for payment set out in the *BIA*.

34 The motion judge found that s. 57(5) has this effect. Relying on *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), she held that s. 57(5) does not give the Administrator an enforceable lien under the *BIA*. As I have indicated, I need not address this issue. Although it was not argued, my reluctance to do so is heightened because it does not appear that a notice of constitutional question was served, even though the issue squarely raises the constitutional applicability of s. 57(5) of the *PBA* in these circumstances.

35 As I have said, the motion judge also decided that even if s. 57(5) of the *PBA* gives the Administrator a lien and charge that is effective for *BIA* purposes, the debt thus secured should be treated as having been fully discharged by the overpayments made in October and November 2004. The motion judge reached that conclusion by applying the general principle in *Clayton's Case, Re* to treat these excess payments as being applied to the earliest arrears in GCCL's required contributions, consequently eliminating the shortfall that existed on March 31, 2004. This would exhaust the effect of any priority the Administrator's secured claim would have over Harbert's secured claim because it arose before Harbert registered its security on March 31, 2004. Any secured claim by the Administrator for GCCL contributions required after that date but not paid would rank after Harbert's secured interest.

36 Given my conclusion that the Administrator is not a secured creditor for *BIA* purposes, I need not address this issue either. In any event, on the assumption she makes of constitutionality, I would not interfere with the motion judge's conclusion. In my view, it was open to her on the facts before her to adopt the evidentiary presumption suggested by the rule in *Clayton's Case, Re*. Since there is no evidence from GCCL, the then administrator, concerning what indebtedness the overpayments in October and November 2004 were intended to apply to, and that the present Administrator was not in place when those overpayments were received or applied, I would conclude that the motion judge could properly resort to the default presumption suggested by the general principle. Nor do I see any equitable basis for not doing so. This is not a case where there is any suggestion that such a conclusion would reflect any attempt by GCCL to adversely affect pension plan members.

37 To summarize, I would dismiss the Administrator's appeal for the reasons I have given.

The MOE Appeal

38 At the root of the MOE opposition to the distribution ordered by the motion judge is one simple fact. In manufacturing calcium chloride at its Amherstburg plant, GCCL produced by-products that were deposited in what was called the Soda Ash Settling Basin ("SASB"). It is now a contaminated site and remedial costs could reach $64

million. The MOE is anxious to see that GCCL assets are available to pay for this clean up.

39 The MOE has a number of regulatory tools to use to protect the environment. In 1997, it issued a Provisional Certificate of Approval to GCCL which *inter alia* required GCCL to provide for the closure of the SASB and assurance that the costs of the closure would be paid for by the company. The latter was provided by a financial assurance that was subject to annual review by the MOE. In March 2004, the MOE accepted $3.4 million as the appropriate amount required of GCCL. Since then, the MOE has vastly increased its estimate of the cost of clean up, to as much as $64 million.

40 The *CCAA* order stayed the MOE's right to review and increase GCCL's financial assurance. In August 2005, the MOE sought the lifting of the stay to permit it to increase that amount, but it was unsuccessful.

41 The November 18, 2005 order appointing the interim receiver did not exempt either the receiver or GCCL from compliance with environmental regulations, nor did it prevent the MOE from issuing orders in respect of the SASB. However, that order expressly excluded the SASB from the property of GCCL over which the interim receiver was appointed.

42 It is uncontested that Harbert's security does not extend to the SASB. Rather, it expressly excludes it. Moreover, the MOE does not assert a security interest in GCCL's operating assets over which Harbert does have security. Section 14.06(7) of the *BIA* does give the MOE a security interest in the bankruptcy in GCCL's contaminated real property and any contiguous property related to the activity that caused the environmental damage. This security ranks above any other security against the same property.

43 However, it is the MOE's position that the decision to distribute on an interim basis should be guided by what is fair and reasonable having regard to all stakeholders, akin to the considerations applied under the *CCAA*. It argues that the "polluter pays" principle for environmental remediation requires no distribution until there can be an assurance that GCCL's assets are sufficient to clean up the SASB.

44 The motion judge found against the MOE and concluded that, in her discretion, the distribution should proceed. She held that the MOE was an unsecured creditor in relation to the GCCL operating assets that generated the funds to be paid out, that to permit the MOE to effect a delay in distribution would be to give it a *quasi* priority over other unsecured creditors, and in any event it has security over the SASB. She also found no evidence of any imminent environmental effects or any non-compliance by GCCL with any environmental regulations.

45 In this court, the MOE repeats its arguments below and raises, as it did there, the case of *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.). In that case, the court found that provincial environmental legislation concerning oilwell clean up costs did not conflict with the scheme of distribution under the *BIA*, and had to be complied with even though that reduced the amounts otherwise available for distribution in the bankruptcy.

46 I agree with the motion judge that the reasoning in that case has been overtaken because of subsequent amendments to the *BIA*. Section 14.06(7) now expressly provides for priority to be accorded to environmental clean up costs and s. 14.06(8) now ensures that a claim against the debtor for environmental clean up costs is a provable claim. Neither were in effect at the time of *Panamericana*. To give effect to provincial environmental legislation in the face of these amendments to the *BIA* would impermissibly affect the scheme of priorities in the federal legislation.

47 Beyond that, I see no basis to interfere with the discretion of the motion judge to order the interim distribution. Harbert is the only creditor secured against the GCCL operating assets that generated the funds for distribution. In that regard, the MOE is an unsecured creditor. The MOE does, however, have security against GCCL's real property, as provided by the *BIA*. Harbert's security does not extend to the SASB, nor does the interim receiver have possession of

that real property. The motion judge found no evidence of non-compliance with environmental orders nor any threat of imminent environmental harm. In these circumstances, I see nothing unreasonable in the interim distribution going forward.

48 I would therefore dismiss the MOE appeal. In the result, both appeals are dismissed.

49 Neither the Administrator nor Harbert sought costs. While the receiver sought costs against the MOE, the latter neither sought costs nor invited an adverse costs award. In the circumstances, I would order no costs to any party.

***R.A. Blair J.A.*:**

I agree.

***J. MacFarland J.A.*:**

I agree.

Appeals dismissed.

FN1 The two Harbert Funds have since changed their names to Harbinger Capital Partners Fund, L.P. and Harbinger Capital Partners Master Fund I, Ltd.

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