Case Name:

Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.

Between
Harbert Distressed Investment Fund, L.P. and Harbert Distressed Investment Master Fund, Ltd., Plaintiffs,
and
General Chemical Canada Ltd., Defendant

[**2006] O.J. No. 3087**

22 C.B.R. (5th) 298

23 C.E.L.R. (3d) 184

53 C.C.P.B. 284

150 A.C.W.S. (3d) 16

2006 CarswellOnt 4675

Court File No. 05-CL-6160

Ontario Superior Court of Justice
Commercial List

R.E. Mesbur J.

Heard: May 29 and 30, 2006.
Judgment: July 28, 2006.

(100 paras.)

Environmental law -- Offences -- Liability for cost of clean-up -- The Ministry of Environment claimed that until the bankrupt's environmental clean-up obligations had been quantified, it was premature to make any distribution to anyone -- Held, that the Ministry was nothing more than an unsecured creditor in the defendant's bankruptcy for cleanup costs to the extent that the defendant's real property and the existing financial assurance were insufficient to meet those costs -- As a result, there was no basis on which to delay the requested distribution.

Insolvency law -- Claims -- Equitable claims -- Application by the interim receiver to make an interim distribution of $3.75 million to the plaintiff as secured creditor of the bankrupt -- Administrator of the bankrupt's two pension plans claimed that the equities of the case required that the plaintiff's security be subordinated to the interests of the pension plans -- Application allowed -- It was clear that the bankrupt received a benefit from the plaintiff's loan -- It therefore was not inequitable for the plaintiff to be given priority.

Insolvency law -- Creditors -- Proof of value of claim -- Application by the interim receiver to make an interim distribution of $3.75 million to the plaintiff as secured creditor of the bankrupt -- Administrator of a pension plan opposed application, and claimed the plaintiff's secured loan transaction was really an equity acquisition disguised as debt -- Application allowed -- All of the evidence demonstrated that the loan was indeed a debt, and not an equity investment.

Insolvency law -- Creditors -- Secured creditors -- Statutory liens -- Application by the interim receiver to make an interim distribution of $3.75 million to the plaintiff as secured creditor of the bankrupt -- Administrator of the bankrupt's two pension plans claimed a lien pursuant to provincial legislation over the bankrupt's assets in relation to unpaid pension contributions -- Application allowed -- Deeming of a lien under provincial legislation did not make the pension plan a lien pursuant to s. 2(1) of the Bankruptcy and Insolvency Act.

Application by the interim receiver, PricewaterhouseCoopers, for the court's authorization to make an interim distribution of $3.75 million to Harbert as secured creditor of the defendant, General Chemical -- The funds were a portion of the $6.5 million that had been generated from General Chemical's working capital assets, which included its cash, accounts receivable and inventory, as opposed to being derived from any of its real estate assets -- Harbert supported the interim receiver's motion, while the Administrator of General Chemical's two pension plans, and the Ministry of the Environment both opposed it -- The Administrator contended that it had a lien over General Chemical's assets in relation to unpaid pension contributions and plan solvency issues, and that its lien had priority over Harbert's alleged security -- On this basis, it claimed that there should be no interim distribution to Harbert -- The Administrator went further, and alleged, first, that the Harbert secured loan transaction was really an equity acquisition disguised as debt, and should be treated as such and enjoy no priority at all, and, second, that even if the transaction created valid security for Harbert, in priority to all or part of what the Administrator claimed was its lien, the equities of the case required that Harbert's security be subordinated to the interests of the pension plan -- The Administrator sought declarations that it had a valid lien and charge on General Chemical's assets, and was a secured creditor ranking in priority to Harbert -- The Ministry of Environment contended that General Chemical and PricewaterhouseCoopers as interim receiver had both statutory and court-ordered obligations to comply with provincial environmental safety requirements -- It alleged that they had failed to do so, and as a result, there were significant potential environmental cleanup costs that exceeded General Chemical's financial assurance under the Environmental Protection Act -- The Ministry of Environment claimed that General Chemical had an obligation to meet those costs, and took the position that until the environmental obligations had been quantified, it was premature to make any distribution to anyone, since to do so may leave no assets to meet the costs of any environmental cleanup -- HELD: Application by interim receiver's was granted -- The Court authorized 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 held --

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 was also granted -- The Administrator's motion was dismissed -- The Administrator's lien, which was pursuant to s. 57(5) of the Pension Benefits Act (Ontario), was ineffective in a bankruptcy; even though the provincial legislation may deem something to be a lien, that deeming does not make it a lien pursuant to s. 2(1) of the Bankruptcy and Insolvency Act -- However, even if the Administrator had a lien in priority to Harbert, it would have been discharged by payments made in October and November of 2004, and Harbert would be entitled to be paid on its security first, with the balance of the Administrator's lien ranking behind Harbert -- With respect to the nature of the loan, while the Administrator claimed that the Harbert financing documents lacked true indicia of debt, such as repayment terms and interest, this was not the case -- The loan set interest rates, and payment dates -- It required General Chemical to repay both principal and interest, and required principal payments in the amount of 75% of what was defined as "Excess Cash Flow", to ensure speedier repayment of the debt -- All of these things pointed to true debt, not an equity acquisition -- With respect to the claim of equitable subordination, it was clear that General Chemical received a benefit from the Harbert loan -- It therefore could not be said that it would be inequitable for Harbert to be given priority for its loans to General Chemical -- Finally, With respect to the Ministry of Environment's claim, neither General Chemical, the interim receiver or the trustee had any personal obligation to pay the cost of environmental cleanup -- The Ministry of Environment was 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 were insufficient to meet those costs -- As a result, there was no basis on which to delay the requested distribution.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 2(1), s. 14.06(7), s. 14.06(7)(a), s. 14.06(7)(b), s. 47, s. 67(1)(a), s. 243(2), s. 244, s. 244(1)

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

Environmental Protection Act, R.S.O. 1990 c. E.19, s. 168.19(1), s. 168.20(1)

Innkeepers Act, R.S.O. 1970 c. 223, now R.S.O. 1990 c. I.7, s.

Legal Aid Services Act, 1998, S.O. 1998 c. 26, s. 48(1), s. 48(2)

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

Pension Benefits Act, R.S.O. 1990 c. P.8, S. 57, s. 57(1), s. 57(3), s. 57(4), s. 57(5), s. 69(1)(c)

Personal Property Security Act, R.S.O. 1990 c. P.10, s. 4(1) (a), s. 4(1)(b), s. 20(1)(a)(i), s. 20(2)(a)(i)

Provincial Offences Act (Ontario)

Counsel:

Ashley John Taylor, for PricewaterhouseCoopers Inc., the Interim Receiver

Robert Staley, Kevin Zych and Alan Gardner, for the Plaintiffs

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

Ronald Carr for the Ministry of the Environment

Tim Hogan for Sherway Contracting

Tyco Manson for Honeywell ASCA

REASONS FOR DECISION

R.E. 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*[1] (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*[2] (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*[3] (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, notwithstanding 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.[4]

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.[5] 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.[6] 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.[7]

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.[8] 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.[9]

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.[10] 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.[11] 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.[12]

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[13] 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 free-standing 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.,*[14] 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."[15]

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.[16] A significant difference, however, between these liens and the PBA statutory lien is that all these others are registered,[17] or require possession[18] 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.[19] 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."[20]

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.[21]

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.[22]

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 *Re Ivaco Inc.*[23] In *Ivaco,* 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[24], 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,* 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[25] 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."[26] 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."[27] 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 Administrator, 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.[28]

91 In *Re Christian Brothers,* 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*[29], and by the Supreme Court of Canada in *Canadian Deposit Insurance Corp.*[30] 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."[31] 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."[32] 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.[33] 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.

R.E. MESBUR J.

cp/e/qw/qlhjk/qlbxs/qlhcs

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

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

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

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

5 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.

6 EPA, s. 168.20(1)

7 EPA, s. 168.19(1)

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

9 PBA, s. 57(5)

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

11 PPSA, ss. 4(1)(a) and (b)

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

13 *Panamericana de Bienes y Servicos SA v. Northern Badger Oil & Gas Ltd.,* 8 C.B.R. (3d) 31 (Alberta Court of Appeal)

14 [1989] 2 S.C.R. 24

15 *Ibid.* at 33

16 See, for example, *Canada Exotic Cattle Breeders Co-op (Re),* (1979), 103 D.L.R. (3d) 112 (BCSC); *Re Calla,* (1975), 9 O.R. (2d) 755 (S.C.); *Re Rauf* (1974) 5 O.R.(2d) 31 (Ont. S.C.); *Re Rockland Chocolate and Cocoa Co.* (1921), 61 D.L.R. 363 (Ont. S.C.); *Condominium Plan No. 7620380 v. Edmonton* (2001), 24 C.B.R. (4th) 9 (Alta. Q.B.)

17 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.

18 *Cattle Lien Act,* R.S.B.C. 1960, c. 44; 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 *Re Rockland Chocolate,* above

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

20 *Ibid.*

21 *Re Deloitte Haskins & Sells Ltd. And Workers' Compensation Board et al.,* [1985] 1 S.C.R. 785

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

23 (2005), 12 C.B.R. (5th) 213 (S.C.J.), leave to appeal allowed 10 November 2005. For other cases taking a similar view, see Re *Graphicshoppe Limited,* (2005), 78 O.R. (3d) 401 (C.A.); *Re United Air Lines Inc.* (2005), 9 C.B.R. (5th) 159; *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.)

24 *Devaynes v. Noble* (1816), 1 Mer.572 (Eng. Ch. Div.)

25 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2000] O.J. No. 77 (S.C.J), aff'd, [2000] O.J. No. 3378, (Ont.C.A.)

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

27 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.

28 Section 183 of the BIA vests the bankruptcy court with equitable jurisdiction. See *Re Christian Brothers of Ireland in Canada* (2004) 69 O.R. (3d) 507 (S.C.J.) 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.

29 *Benjamin v. Diamond (In re Mobile Steel Co.),* 563 F.2d 692 (5th Cir. 1977), Court of Appeal for the First Circuit, per Clark J.

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

31 *Re Blue Range Resource Corp.* (2002) 15 C.B.R. (4th) 169 (Alberta Q.B.)

32 *United States v. Noland (In re First Truck Lines, Inc.)* 48 F. 3rd 210 (1995)

33 See *Christian Brothers*, supra, and *Bulut v. Brampton* (2000), 48 O.R. (3d) 108 (C.A.)