DATE: 20061027
DOCKET: M34314 (C44455)

COURT OF APPEAL FOR ONTARIO

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"

BEFORE: ROSENBERG J.A. (In Chambers)

COUNSEL: Benjamin Zarnett for the appellant
Superintendent of Financial Services

Andrew Hatnay for the appellant
Quebec Pension Committee of Ivaco Inc

John R. Varley for RBC Deyia Investors Services Trust

Kevin Zych for the respondent
Informal Committee of Noteholders

Richard B. Swan for the respondent
National Bank of Canada

Daniel MacDonald for the respondent
Bank of Nova Scotia

Geoff R. Hall for the respondent
QIT-Fer et Titane Inc.

Ashley John Taylor
for the Monitor, Ernst & Young Inc.

HEARD: October 24, 2006

ENDORSEMENT

[1] The Superintendent of Financial Services, supported by the Quebec Pension Committee, seeks a stay of the Order of this court dated October 17, 2006 pending determination of an application for leave to appeal to the Supreme Court of Canada. The facts underlying the appeal and the legal issues are fully set out in the reasons of Laskin J.A. for the court.

[2] In short, the moving party seeks to preserve the *status quo* and, in particular, to prevent the Bank of Nova Scotia and the National Bank from commencing proceedings that would put the Ivaco companies into bankruptcy. The Superintendent's concern is that if a bankruptcy order is made, the non-unionized pensioners will suffer significant harm because the assets are not sufficient to cover the large unfunded pension liability. They are concerned that as the *Bankruptcy and Insolvency Act* now reads, the pensioners' claims have no priority to the Banks' secured claims and possibly claims of other creditors.

[3] The Banks and some of the other creditors oppose the motion for a stay. They submit that the motion is premature in that the Superintendent can oppose the making of bankruptcy orders in the Superior Court of Justice, can seek terms from the bankruptcy judge charging the pool of funds and can appeal any order made by the bankruptcy judge. They also submit that they will suffer irreparable harm because the stay of this court's order will tie up the entire pool of funds, not just the amount required to protect the

pensioners, and if the *Wage Earners Protection Program Act* is proclaimed in force in the interim there will be a change in priorities.

[4] In their very helpful submissions, counsel for the Banks suggest that the bankruptcy judge can make a number of orders that will, in effect, preserve the *status quo* without the further delay inherent in a stay order from this court. For example, they suggest that the bankruptcy judge could make a "bubble order" that could protect a sum of money sufficient to cover the unfunded liability and insulate the pensioners from the impact of a bankruptcy order. Counsel for one of the creditors, QIT-Fer et Titane Inc. suggests that in the alternative this court could stay the making of a bankruptcy order but allow the preliminary steps to proceed. Finally, counsel for the Monitor asks that the motion be denied because of the already significant delay that has ensued.

[5] The test for granting a stay pending an application for leave to appeal is as set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and requires a showing that the application raises a serious issue, that the applicant will suffer irreparable harm if the stay is not granted and that the balance of convenience favours granting a stay.

[6] I am satisfied that the application raises a serious issue. This case involves complex issues respecting the interplay of provincial and federal law in the area of pensions and deemed trusts. These are issues that have not been considered by the Supreme Court of Canada. I recognize that the Supreme Court may decide not to deal

with the issue because of the pending proclamation of the WEPPA. On the other hand, there is no indication when, if ever, that legislation will be proclaimed. Further, that legislation would apply to only a relatively small portion of the amounts in issue in this case. As the moving party and counsel for the QPC point out, pension benefit legislation like the Ontario legislation exists in all provinces and the Supreme Court of Canada may consider this a matter of national importance.

[7] I also accept the submissions of the Superintendent that the pensioners may suffer irreparable harm. If the bankruptcy order is made, the pensioners' position will be rendered moot and they will suffer irreparable harm. While the Banks have offered various alternatives as ways to protect the position of the pensioners, none of these alternatives are foregone conclusions. The National Bank has said that it would agree to a "bubble" proposal, but it is not clear that the other creditors would agree or that such an order is feasible given the uncertainty of the amounts involved.

[8] I also have some concern that if the bankruptcy order is made, the Superintendent's appeal would be rendered moot and this would itself lead the Supreme Court to refuse leave. The parties have indicated that they would not rely on mootness and I, of course, accept that position; but it is for the Supreme Court, not the parties, to decide whether to hear a moot appeal and the circumstances in which they will do so are very limited. See *Borowski v. Canada (Attorney General)*, [1989] 1S.C.R. 342.

[9] I am not satisfied that it would be appropriate to allow the preliminary steps in the bankruptcy proceedings to go forward but stay the bankruptcy order. I am not entirely convinced that I have the jurisdiction to make such an order. More importantly, in my view, that would be an intrusion into the jurisdiction of the bankruptcy judge. As Mr. Zarnett pointed out, the decision whether to order a stay is for this court or the Supreme Court of Canada. If I considered that there should be no stay of this court's order, I would not presume to dictate how the bankruptcy court should thereafter order the companies' affairs.

[10] I am also satisfied that the balance of convenience favours the Superintendent. The short delay before the Banks and other creditors can get access to the pool of funds pending determination of the leave application has to be balanced against the serious harm to the rights of the pensioners whose already modest pension will be reduced by 17 to 26 percent. It should also be borne in mind that this problem arose because the companies were not required to make the past service contributions and special payments while the companies were under *CCAA* protection. The Superintendent did not oppose this part of the stay order because all parties agreed that there was otherwise no possibility of restructuring. As events transpired, the companies could not restructure and the assets were sold. The companies have been in *CCAA* proceedings for over three years. A further few months' delay will not seriously inconvenience the Banks and other creditors. The pool of money is protected and accruing interest.

[11] The possible re-ordering of priorities as a result of the proclamation of the WEPPA is not, in my view, an important consideration. There is no indication when this Act will be proclaimed. More importantly, the parties agree that the Act would apply only to current service contributions, which is a relatively small part of the amounts in issue in this appeal.

[12] Accordingly, the motion is granted and the stay orders of the Ontario Superior Court of Justice made by Farley J. on July 18, 2005 as extended by the orders of Catzman J.A. in September 2005 and this court in November 2005 are extended until determination of the application for leave to appeal to the Supreme Court of Canada.

[13] As agreed by the parties, there will be no costs of this motion.