1901-04336

COURT FILE NUMBER	**BK No. 25-095090**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED
	AND IN THE MATTER OF THE BANKRUPTCY OF GENCO (WALDEN) LTD.
APPLICANT	**MAYNBRIDGE CAPITAL INC.**
RESPONDENT	**GENCO (WALDEN) LTD.**
DOCUMENT	**BRIEF OF THE APPLICANT, MAYNBRIDGE CAPITAL INC.**

Clerk's Stamp

CLERK OF THE COURT
FILED
MAR 20 2020
JUDICIAL CENTRE
OF CALGARY

BANKRUPTCY APPLICATION SCHEDULED BEFORE THE HONOURABLE MR. JUSTICE K. D. YAMAUCHI ON APRIL 1, 2020 AT 2:00 P.M.

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I. INTRODUCTION

1. The Applicant, Maynbridge Capital Inc. ("**Maynbridge**"), brings the within Application for an Order adjudging the Respondent, Genco (Walden) Ltd. ("**Walden**"), as bankrupt. This Application follows the sale of Walden's real property in its receivership proceedings, after which there continues to be a deficiency in respect of the amounts owing by Walden to Maynbridge. As the outstanding debt is under-collateralized, Maynbridge has standing to bring this Application despite holding security in respect thereof. Jurisprudence supports Maynbridge's position as creditors are entitled to bring bankruptcy applications for the purpose of enhancing their priority.

II. FACTS

2. Maynbridge is a secured creditor of Walden and its parent company, Genco Holdings Ltd. ("**Holdings**"). Pursuant to a Credit Agreement dated December 22, 2017, Maynbridge advanced to Holdings and Walden a loan in the principal amount of $18,000,000 (the "**Loan**").[1]

3. As security for the Loan, Walden and Holdings each executed a general security agreement to pledge, in favour of Maynbridge, a security interest over all of its present and after-acquired personal property and a floating charge over all of its property.[2] Walden also pledged a collateral mortgage in the principal amount of $18,000,000 over a commercial property generally referred as the "Walden Lands".[3] The security also includes a general assignment of rents and leases in respect of certain real properties, including the Walden Lands.[4]

4. Genco and Walden defaulted under the terms of the Loan and the applicable security. Among other acts of default, Genco and Walden breached their repayment obligations to repay balances under the Loan as they came due.[5]

5. Maynbridge appointed Ernst and Young Inc. ("**EY**") as the receiver and receiver-manager over the undertakings, assets and properties of Holdings and Walden, excepting certain real properties owned by Holdings (in such capacity, the "**Receiver**").[6]

6. The Receiver conducted a formal sale process in respect of the real properties of Holdings and Walden, including the Walden Lands.[7] With the assistance of its selling agent, Cushman &

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[1] Affidavit of Verification of Stephen Davies, sworn January 29, 2020, filed March 2, 2020 [**Davies Affidavit**] at para 6.
[2] *Ibid.*
[3] Davies Affidavit at paras 8(b), 9.
[4] Davies Affidavit at para 8(c).
[5] Davies Affidavit at para 10(c).
[6] Davies Affidavit at para 11.
[7] Davies Affidavit at para 12.

Wakefield ULC ("**C&W**"), and input from Maynbridge, the Receiver entered into an asset purchase agreement with G&E Vending Ltd. ("**G&E**") for the purchase and sale of the Walden Lands.[8] The sale was approved by this Honourable Court on September 20, 2019.[9]

7. Of the gross sale proceeds of $13,560,000, Maynbridge received distribution in the amount of $12,665,000.[10] Maynbridge estimates the value of it security against Walden to be approximately $53,000, resulting in an unsecured claim against Walden of $6,622,084.86 as at January 24, 2020.[11] Although Maynbridge holds security in the form of a collateral mortgage over certain real properties of Holdings, Maynbridge is a subsequent mortgagee over most of these properties and unlikely to recover from the realization thereof.[12] Even accounting for real properties over which Maynbridge holds a first-priority mortgage, Maynbridge estimates that it has an unsecured claim in the amount of $4,522,084.86.[13]

8. According to the Notice and Statement of the Receiver dated April 15, 2019, there were approximately $173,277 of aggregate unsecured claims as on that date.[14] Of this amount, the Canada Revenue Agency (the "**CRA**") holds an unsecured claim in the amount of $85,000.[15]

9. In addition to its role as Receiver, EY has consented to act as the trustee in bankruptcy of Walden.[16] EY has also consented to lift the stay of proceedings imposed in the receivership proceeding for the limited purpose of permitting Maynbridge to bring this Application.[17]

III. ISSUES

10. Maynbridge respectfully requests that this Honourable Court determine the following issues in this Application:

    (a) Has Maynbridge satisfied the necessary statutory requirements for a bankruptcy application?

    (b) Is Maynbridge permitted to bring this Application for the purpose of enhancing its priority vis-à-vis the CRA's unsecured claim?

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[8] Davies Affidavit at paras 13-14.
[9] Davies Affidavit at para 15.
[10] Davies Affidavit at para 16.
[11] Davies Affidavit at para 20.
[12] Davies Affidavit at paras 21.
[13] Davies Affidavit at para 21.
[14] Davies Affidavit, Exhibit "E".
[15] *Ibid.*
[16] Davies Affidavit at para 22, Exhibit "F".
[17] Davies Affidavit at para 22.

IV. LAW AND ANALYSIS

A. This Application Satisfies the Statutory Requirements for a Bankruptcy Application

11. Maynbridge has complied with the statutory requirements for a bankruptcy application pursuant to section 43 of the *Bankruptcy and Insolvency Act* (the "***BIA***").[18]

12. Creditors are entitled to bring an application for a bankruptcy order against a debtor where it is alleged that the debt owing to the applicant amounts to $1,000, and the debtor has committed an act of bankruptcy in the 6 months preceding the application.[19] The *BIA* defines an "act of bankruptcy" to include, among other things, where the debtor ceases meeting liabilities generally as they become due.[20] Courts have held that the failure to meet liabilities does not need to commence in the period of 6 months preceding the bankruptcy application, only that the failure occurred at some time and continues during the 6-month period.[21] The applicant creditor need not prove special circumstances to establish an act of bankruptcy if it is able to establish the existence of other unpaid debt.[22]

13. Where the applicant for a bankruptcy order is a secured creditor, the *BIA* further requires that the applicant affirmatively give up their security for the benefit of the creditors or provide an estimate of the value of its security.[23] In general, a secured creditor is entitled to submit its own valuation and the Court does not inquire into the valuation unless it is a sham or absurdly low.[24]

14. The applicant must also satisfy formal filing requirements of a bankruptcy application. The applicant must provide an affidavit sworn by an authorized person having personal knowledge of the facts alleged in the application.[25] The applicant must also file the bankruptcy application in the judicial district for the locality of the debtor, which is defined to mean the principal place where the debtor has carried on business in the year preceding the date of the initial bankruptcy event (in this case, the filing of this Application).[26]

15. In the present case, there remains at least $6.6 million of debt due and owing by Walden to Maynbridge. It is clear that Walden has committed an act of bankruptcy as it has failed, and continues to fail, to meet its obligations under the Loan and the various security instruments, including the failure to repay balances due and owing to Maynbridge. Walden's failure to meet its liabilities

[18] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*] [**TAB 1**], s 43.
[19] *BIA*, s 43(1) [**TAB 1**].
[20] *BIA*, s 42(1)(j) [**TAB 1**].
[21] *Re Joyce*, 1984 CarswellOnt 143 (OntSC, in bankruptcy), 51 CBR (NS) 152 [*Joyce*] [**TAB 2**] at para 5.
[22] *Joyce* at para 5 [**TAB 2**].
[23] *BIA*, s 43(2) [**TAB 1**].
[24] *Re C Tokmakjian Ltd*, [2003] OJ No 4667 (OntSCJ), [2003] OTC 1027 at paras 36, 39 [**TAB 3**].
[25] *BIA*, s 43(3) [**TAB 1**].
[26] *BIA*, ss 2: "locality of a debtor"; 43(5) [**TAB 1**].

commenced prior to the appointment of EY as the Receiver, and this failure continues to date. The Notice and Statement of Receiver indicates that Walden has numerous other unsecured claims. These unsecured claims are unlikely to be satisfied by realization on Walden's assets. Walden remains subject to receivership proceedings and unable to meet its liabilities.

16. In the Affidavit of Verification sworn by Stephen Davies, Maynbridge's corporate representative, the approximate value of its security is $53,000. Maynbridge has affirmatively provided an estimate of the value of its security. Here, Maynbridge has provided its own valuation of the value of the balance of Walden's limited assets. There is nothing on the record to suggest that Maynbridge's valuation is a sham or absurdly low.

17. Maynbridge has also satisfied the formalities of a bankruptcy application. Mr. Davies is Maynbridge's Senior Vice President and Chief Risk Officer, and has positively attested to his personal knowledge of the loans advanced by Maynbridge to Walden. The Affidavit of Verification sworn by Mr. Davies satisfies the requirement of an affidavit sworn by an authorized person having personal knowledge of the facts alleged in the application. The bankruptcy application has also been filed in the proper judicial district. The judicial district of Calgary properly governs the locality of the debtor, as Walden has a registered office in Calgary and was landlord of commercial leases for property located in Calgary.

18. It is submitted that Maynbridge has complied with all filing requirements set out under the *BIA*.

B. Maynbridge is Permitted to Bring a Bankruptcy Application to Enhance its Priority

19. The CRA's unsecured claim against Walden does not bar Maynbridge from bringing the within Application. Although the proposed bankruptcy order would have the effect of reversing the CRA's priority position in respect of its unsecured claim relative to Maynbridge, there is ample judicial authority to support the proposition that a secured creditor, like Maynbridge, is entitled to bring a bankruptcy application for the purpose of enhancing its priority vis-à-vis the CRA.

20. Courts have found that a secured creditor can bring a bankruptcy application for the purpose of obtaining a priority it would not otherwise have enjoyed, even where there are no assets available for distribution to unsecured creditors.[27] Further, secured creditors are entitled to avail themselves of the mechanisms of a bankruptcy to reverse priorities with respect to the preferred claims of the Crown.[28]

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[27] *Re Black Brothers (1978) Ltd*, [1982] BCWLD 651 (BCSC, In Bankruptcy), [1982] BCJ No 1582 [***Black Brothers***] **[TAB 4]** at para 6; *Bank of Montreal v Scott Road Enterprises Ltd*, [1989] 4 WWR 566 (BCCA), [1989] BCWLD 1130 [***Scott Road***] **[TAB 5]** at para 22.
[28] *Scott Road* at paras 33-37 **[TAB 5]**.

21. In *Re Black Brothers (1978) Ltd*, McLachlin J. of the British Columbia Supreme Court, as she then was, confirmed that seeking a bankruptcy order to bring certain statutory provisions into operation and to enhance priority is a proper basis for granting a bankruptcy order:

> One purpose — usually the main purpose — of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. <u>However, another purpose may be to permit creditors to avail themselves of provisions in the Act which may enhance their positions, for example, by giving them certain priorities which they would not otherwise enjoy. The latter purpose, on the authorities, is a proper and sufficient basis for granting an order.</u> [Emphasis added][29]

22. In *Bank of Montreal v Scott Road Enterprises Ltd* ("***Scott Road***"), the British Columbia Court of Appeal found that, the fact that the secured creditor brought a bankruptcy application for the sole purpose of improving its priority relative to the preferred claims of wage earners and the Crown, did not constitute a sufficient cause to refuse a bankruptcy order.[30]

23. More recently, in *Grant Forest Products Inc v Toronto-Dominion Bank*, the Ontario Court of Appeal followed the approach taken in *Scott Road* to find that a secured creditor is not disentitled from obtaining a bankruptcy order in respect of a debtor because the application was brought to defeat the deemed trust priority regime.[31]

24. In the context of the CRA's preferred claim in respect of unremitted Goods and Services Taxes ("**GST**"), more specifically, courts have similarly held that it is permissible for a secured creditor to bring an application for a bankruptcy order to alter priorities. In *Bank of Nova Scotia v Huronia Precision Plastics Inc*, Morawetz J. of the Ontario Superior Court of Justice confirmed that secured creditors may nullify the Crown's deemed trust for unremitted GST.[32] Similarly, in *Re Chartrand*, the Ontario Court of Appeal implicitly affirmed that secured creditors may obtain a bankruptcy order to enhance their position vis-à-vis the CRA when it granted a secured creditor's application, which was brought for the sole purpose of reversing the priorities between itself and the CRA.[33]

25. Given the foregoing, the fact that the granting of a bankruptcy order against Walden would have the effect of enhancing Maynbridge's priority vis-à-vis the CRA is not a cause to deny the within bankruptcy application. Maynbridge's position is supported by the jurisprudence that permits secured creditors to bring bankruptcy applications for the sole purpose of engaging the bankruptcy process and obtaining enhanced priority.

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[29] *Black Brothers* at para 6; see also para 5 [**TAB 4**].
[30] *Scott Road* at para 37 [**TAB 5**].
[31] *Grant Forest Products Inc v Toronto-Dominion Bank*, 2015 ONCA 570, [2015] WDFL 4098 at para 118 [**TAB 6**]. See also: *2403177 Ontario Inc v Bending Lake Iron Group Ltd*, 2016 ONSC 199, 264 ACWS (3d) 122 at paras 119-120 [**TAB 7**].
[32] *Bank of Nova Scotia v Huronia Precision Plastics Inc*, 2009] GSTC 12 (OntSCJ (Commercial List)), [2009] OJ No 312 at paras 13, 19 [**TAB 8**].
[33] *Re Chartrand*, 2010 ONCA 456, 189 ACWS (3d) 599 at para 8 [**TAB 9**].

26. The fact that Maynbridge has already received distribution from the sale of the Walden Lands should also not deter this Honourable Court from granting the bankruptcy application. As has been confirmed by the Supreme Court of Canada in *Callidus Capital Corp v Canada* ("***Callidus***") (adopting the dissenting decision from the Federal Court of Appeal), a demand for payment by the Crown does not crystallize the amount of liability owing to the Crown.[34] In *Callidus*, Pelletier J.A., dissenting in the Federal Court of Appeal, confirmed that the bankruptcy of a tax debtor rendered the Crown's deemed trust for unremitted GST ineffective against a secured creditor who received proceeds prior to the bankruptcy.[35] In this case, Maynbridge's receipt of net sale proceeds from the Walden Lands as a secured creditor prior to bankruptcy does not prevent it from reversing the CRA's deemed trust in respect of the amount of the CRA's unsecured claim. Maynbridge is a proper party having standing to bring this Application, even for the sole purpose of enhancing its priority and reversing the Crown's deemed trust claim.

27. Maynbridge submits that this Court should grant the within Application on the basis that Maynbridge has satisfied the requirements for bringing a bankruptcy application under the *BIA*, Walden has committed an act of bankruptcy over the preceding 6 months, and that this Application was not brought for an improper purpose.

V. RELIEF SOUGHT

28. Maynbridge respectfully requests that this Court grant an Order substantially similar to the form of Order attached at Schedule "A" of the Application, to declare and adjudge Walden to be bankrupt, and to appoint EY as the Trustee in Bankruptcy.

ALL OF WHICH is respectfully submitted this 20th day of March, 2020.

BORDEN LADNER GERVAIS LLP

for Peter Bary

Per: **Matti Lemmens**
Solicitors for the Applicant, Maynbridge Capital Inc.

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[34] *Canada v Callidus Capital Corp*, 2017 FCA 162, [2017] GSTC 60 at paras 62, 68 [***Callidus***] [**TAB 10**]; aff'ed 2018 SCC 47, [2018] 3 SCR 186 [**TAB 11**].
[35] *Callidus* at para 68 [**TAB 10**].

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended.
2.	*Re Joyce*, 1984 CarswellOnt 143 (OntSC, in bankruptcy), 51 CBR (NS) 152.
3.	*Re C Tokmakjian Ltd*, [2003] OJ No 4667 (OntSCJ), [2003] OTC 1027.
4.	*Re Black Brothers (1978) Ltd*, [1982] BCWLD 651 (BCSC, In Bankruptcy), [1982] BCJ No 1582.
5.	*Bank of Montreal v Scott Road Enterprises Ltd*, [1989] 4 WWR 566 (BCCA), [1989] BCWLD 1130.
6.	*Grant Forest Products Inc v Toronto-Dominion Bank*, 2015 ONCA 570, [2015] WDFL 4098.
7.	*2403177 Ontario Inc v Bending Lake Iron Group Ltd*, 2016 ONSC 199, 264 ACWS (3d) 122.
8.	*Bank of Nova Scotia v Huronia Precision Plastics Inc*, 2009] GSTC 12 (OntSCJ (Commercial List)), [2009] OJ No 312.
9.	*Re Chartrand*, 2010 ONCA 456, 189 ACWS (3d) 599.
10.	*Canada v Callidus Capital Corp*, 2017 FCA 162, [2017] GSTC 60.
11.	*Callidus Capital Corp v Canada*, 2018 SCC 47, [2018] 3 SCR 186.

TAB 1

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2. Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

"common-law partnership" means the relationship between two persons who are common-law partners of each other; *("union de fait")*

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; *("personne morale")*

"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; *("tribunal")*

"creditor" means a person having a claim provable as a claim under this Act; *("créancier")*

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *("débiteur")*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"income trust" means a trust that has assets in Canada if

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

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

("fiducie de revenu")

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

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

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

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

("personne insolvable")

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

"locality of a debtor" means the principal place

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

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

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

("localité")

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

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

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

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"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 instrument 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 of 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 provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

"child" includes a child born out of marriage;

Currency

Federal English Statutes reflect amendments current to December 12, 2019

Federal English Regulations are current to Gazette Vol. 154:3 (February 5, 2020)

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part II — Bankruptcy Orders and Assignments (ss. 42-49) [Heading amended 2004, c. 25, s. 26.]
Acts of Bankruptcy

R.S.C. 1985, c. B-3, s. 42

s 42.

Currency

42.

42(1) Acts of bankruptcy

A debtor commits an act of bankruptcy in each of the following cases:

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

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

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

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

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

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

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

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

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

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

42(2)Unauthorized assignments are void or null

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

Amendment History

1997, c. 12, s. 26; 2004, c. 25, s. 27(1)-(3), (5)

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Federal English Statutes reflect amendments current to December 12, 2019

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R.S.C. 1985, c. B-3, s. 43

s 43.

Currency

43.

43(1) Bankruptcy application

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

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

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

43(2) If applicant creditor is a secured creditor

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

43(3)Affidavit

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

43(4)Consolidation of applications

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

43(5) Place of filing

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

43(6)Proof of facts, etc.

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

43(7)Dismissal of application

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

43(8)Dismissal with respect to some respondents only

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

43(9)Appointment of trustee
On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

43(10)Stay of proceedings if facts denied
If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.

43(11)Stay of proceedings for other reasons
The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

43(12)Security for costs
Applicants who are resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the application may be stayed until the security is furnished.

43(13)Bankruptcy order on another application
If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

43(14)Withdrawing application
An application shall not be withdrawn without the leave of the court.

43(15)Application against one partner
Any creditor whose claim against a partnership is sufficient to entitle the creditor to present a bankruptcy application may present an application against any one or more partners of the firm without including the others.

43(16)Court may consolidate proceedings
If a bankruptcy order has been made against one member of a partnership, any other application against a member of the same partnership shall be filed in or transferred to the same court, and the court may give any directions for consolidating the proceedings under the applications that it thinks just.

43(17)Continuance of proceedings on death of debtor
If a debtor against whom an application has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if the debtor were alive.

Amendment History
1992, c. 27, s. 15; 2004, c. 25, s. 28

Currency
Federal English Statutes reflect amendments current to December 12, 2019
Federal English Regulations are current to Gazette Vol. 154:3 (February 5, 2020)

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TAB 2

1984 CarswellOnt 143
Ontario Supreme Court, In Bankruptcy

Joyce, Re

1984 CarswellOnt 143, 51 C.B.R. (N.S.) 152

Re JOYCE

Saunders J.

Judgment: April 26, 1984
Docket: Kent No. 31-202771-T

Counsel: *W.R. Passi* , for petitioning creditor.
K.J. Williams , for debtor.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
  III.1 Grounds for petition
    III.1.c Act of bankruptcy within 6 months prior to petition
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Within 6 months prior to petition
Cessation may occur before six months prior to bankruptcy as long as it continues during six-month period.
A creditor contemplating a petition is not required to make an exhaustive investigation of the affairs of the debtor prior to commencing bankruptcy proceedings. If the investigation reveals the existence of other indebtedness, apparently unpaid, the creditor need go no further. Where there is no evidence to contradict the allegations, the existence of two other unpaid debts is sufficient to establish the act of bankruptcy. The cessation of meeting obligations does not have to commence within the six-month period. It is sufficient that a cessation occur at some time and continue during the six-month period.
Table of Authorities
Cases considered:
  Bookman, Re (1983), 47 C.B.R. (N.S.) 81 (H.C.) — *referred to*
  Holmes and Sinclair, Re (1975), 9 O.R. (2d) 240, 20 C.B.R. (N.S.) 111, 60 D.L.R. (3d) 82 (H.C.) — *referred to*

Petition for receiving order.

***Saunders J.* (orally):**

1 First American National Bank of Nashville petitions the court that Harry Joyce be adjudged a bankrupt and that a receiving order be made in respect of his property.

2 It is not disputed that Joyce owes at least $1,000 to the petitioning creditor and the issue on this hearing is whether he ceased to meet his liabilities generally as they became due within six months next preceding the date of the filing of the petition which was 25th October 1983.

3 In addition to the evidence of the debt owing to the petitioning creditor, there is evidence of unpaid debts to two other creditors which were incurred prior to the commencement of the six-month period and in respect of which executions have been filed with the sheriff of the county of Kent. There is also evidence that prior to the commencement of the six-month period

that the debtor admitted to an officer of the petitioning creditor that he had a considerable number of creditors who he was unable to pay.

4 The allegation of ceasing to meet liabilities is denied in the dispute but no evidence was called on behalf of the debtor. The evidence of the petitioning creditor is that prior to executing and filing the petition, an investigation was conducted which disclosed the two executions in the hands of the sheriff.

5 In my opinion the evidence is sufficient to establish the alleged act of bankruptcy. A creditor contemplating a petition is not, in my opinion, required to make an exhaustive investigation of the affairs of the debtor prior to commencing bankruptcy proceedings. If the investigation reveals the existence of other indebtedness, apparently unpaid, the creditor need go no further. Where, as here, there is no evidence to contradict the allegation, the existence of two other unpaid debts is, in my opinion, sufficient to establish the act of bankruptcy. Furthermore, the ceasing to meet obligations does not have to commence within the six-month period. It is sufficient that a cessation occur at some time and continue during the six-month period.

6 It was submitted on behalf of the petitioning creditor that there were special circumstances which would justify the granting of the receiving order (see *Re Holmes and Sinclair* (1975), 9 O.R. (2d) 240, 20 C.B.R. (N.S.) 111, 60 D.L.R. (3d) 82 (H.C.) , and *Re Bookman* (1983), 47 C.B.R. (N.S.) 81 (H.C.)). In view of the findings I have made it is not necessary to deal with that submission except to say that while the evidence may not be sufficient to establish fraud on the part of the debtor, it does indicate circumstances which, to say the least, are unusual. In brief, the debtor admitted to an officer of the petitioner that through the assistance of other parties, cheques were deposited with the petitioner on the basis of which funds were withdrawn. The cheques were subsequently dishonoured giving rise to the admitted indebtedness of the debtor, even though he was not a party to the cheques. The court has a discretion to refuse to grant a receiving order for sufficient cause even where an act of bankruptcy is proven. The circumstances here reinforce my view that the discretion ought not to be exercised.

7 I have accordingly endorsed the record: "Receiving Order to issue, Peat Marwick Limited to be the trustee. Costs to the petitioning creditor out of the estate on a solicitor and client basis".

Receiving order issued.

TAB 3

2003 CarswellOnt 4616
Ontario Superior Court of Justice

C. Tokmakjian Ltd., Re

2003 CarswellOnt 4616, [2003] O.J. No. 4667, [2003] O.T.C. 1027, 126 A.C.W.S. (3d) 905, 46 C.B.R. (4th) 227

IN THE MATTER OF THE BANKRUPTCY OF C TOKMAKJIAN LIMITED, formerly Tokmakjian Limited, of the City of Vaughan, in the Province of Ontario

Cameron J.

Heard: October 27-29, 2003
Judgment: November 20, 2003
Docket: 31-OR-207051-T

Counsel: Peter R. Greene, Jennifer Roberts-Logan for C. Tokmakjian
Harvey Chaiton, George Benchetrit for GE Canada Equipment Financing, G.P, GE Canada Leasing Services Company

Subject: Insolvency; Civil Practice and Procedure; Property
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.a Proof of allegations by creditor
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.v Improper purpose of creditor
Headnote
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Proof of allegations by creditor
Debtor operated tour business — Secured creditors seized buses on debtor's default of lease and financing agreements — Creditors petitioned for receiving order — Petition granted — Creditors complied with requirement of giving estimate of value of security — It was not necessary for creditors to prove value in order to be admitted as petitioners — Estimate was not sham or absurdly low — Formal appraisal was not necessary — Hearsay reports were admissible for purpose of establishing good faith of estimate — Evidence of debtor's witness was badly flawed.
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor
Creditors petitioned for receiving order — Petition granted — Creditors' purpose to appoint trustee to investigate debtor's conduct was not improper — Onus was on debtor to show cause why order should not be granted — There was strong evidence of suspicious activities by debtor and related companies — Companies made unlawful and confusing name changes — Companies transferred and mortgaged property in breach of financing agreements and guarantees.
Table of Authorities
Cases considered by *Cameron J.*:
Cappe, Re (1993), 18 C.B.R. (3d) 229, 1993 CarswellOnt 198 (Ont. Gen. Div. [Commercial List]) — considered
Fengar Investments Corp., Re (1993), 17 C.B.R. (3d) 167, 1993 CarswellOnt 194 (Ont. Bktcy.) — referred to
Hugh M. Grant Ltd., Re (1982), 41 C.B.R. (N.S.) 28, 1982 CarswellOnt 156 (Ont. S.C.) — referred to

Omni-Stone Corp., Re (1991), (sub nom. *First City Trust Co. v. Omni-Stone Corp.)* 4 O.R. (3d) 636, 1991 CarswellOnt 698 (Ont. Bktcy.) — referred to

484030 Ontario Ltd., Re (1992), 12 C.B.R. (3d) 302, 8 O.R. (3d) 243, 90 D.L.R. (4th) 218, 1992 CarswellOnt 171 (Ont. Bktcy.) — referred to

Statutes considered:

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

Generally — referred to

s. 42 — referred to

s. 43(1)(a) — referred to

s. 43(1)(b) — referred to

s. 43(2) — considered

s. 43(3) — referred to

s. 43(7) — referred to

s. 43(11) — referred to

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

Generally — referred to

Regulations considered:

Business Corporations Act, R.S.O. 1990, c. B.16

General, R.R.O. 1990, Reg. 62

s. 6(2)

PETITION by secured creditors for receiving order in bankruptcy.

***Cameron J.*:**

1 This is a Petition by secured creditors, GE Canada Equipment Financing G.P. ("GE Financing") and GE Canada Leasing Services Company ("GE Leasing") (collectively "GE") that their debtor C Tokmakjian Limited ("Debtor") be adjudged bankrupt.

2 In the Petition, dated July 7, 2003 based on an Affidavit of Verification dated July 4, 2003, GE asserts a debt of approximately $8,400,000 and estimates the value of its security at $6,400,000.

3 In the Notice Disputing Petition the Debtor alleges that:

a) the security is worth in excess of the indebtedness and so GE has no unsecured claims and is not entitled to bring the Petition;

b) the Petition was made for an improper purpose.

4 GE has discharged the onus on it to prove the requirement of s. 43(1)(b) of the *Bankruptcy and Insolvency Act* ("BIA") that the Debtor committed an act of bankruptcy, as defined in BIA s. 42, within the 6 months preceding the filing of the Petition.

5 In May 2003 the Debtor gave notice to GE that it was about to suspend payment of its debt owing under 3 leases of 15 MCI intercity tour busses (the "GE Leases") and 4 equipment financing agreements secured by 28 MCI intercity tour busses (the "GE Financing Agreements") (collectively the "GE Agreements"). Further, in June 2003 the Debtor ceased to meet its liabilities generally as they became due. It did not make the payments owing and payable on June 1 and July 1, 2003 to GE under the GE Agreements. The Debtor also failed to pay to CIT Financial amounts payable in June 2003 under agreements with Newcourt

Credit, CIBC Equipment Leasing and CIT Financing Limited. All the busses have been returned to GE by the Debtor. They are now being stored on the premises of RJ's Trucks. Seven of the busses have been sold.

6 GE has discharged the onus on it to prove under BIA s. 43(1)(a) and (2) that at the date of the Petition the Debtor was indebted to GE in the amount of about $8,400,000. The defaults in payment triggered the acceleration clauses under the GE Agreements.

Valuation of Security

7 The first issue before me is whether GE, as secured creditors, have complied with the requirement of BIA s. 43(2) to give "an estimate of the value of [their] security" sufficient to enable them to "be admitted as a petitioning creditor to the extent of the balance of the debt due . . . after deducting the value so estimated". The difference is required by BIA s. 43(1)(a) to be not less than $1,000.

8 The Debtor takes the position that GE has failed to establish the value of its security, namely the 43 busses, prior to filing the Petition by either performing an appraisal or obtaining a valuation from a third party.

9 Paul DeMarchi, Vice President, National Programs Group of GE Finance, swore the Affidavit of Verification of the facts alleged in the Petition. This included the estimate of the value of GE's security at $6,400,000. In response to undertakings given on cross-examination prior to this hearing, GE confirmed that its employees Brian Brown and Danny Belanger did not appraise the value of the busses. Mr. Brown was an account manager for GE respecting loans secured by busses and since 2001 has been Credit Manager for National Programs, in which position he was involved in portfolio management and delinquencies. He first became involved with the Debtor when it defaulted on loans in 2002 and on restructuring its financings in December 2002.

10 Mr. Belanger is GE's asset equipment manager in Montreal.

11 Neither Mr. DeMarchi nor Mr. Belanger testified before me. Mr. Brown was GE's principal witness.

12 Prior to filing the Petition, GE obtained a preliminary appraisal from RJ's Trucks, Appraisal Division. GE subsequently received a report from that company dated June 2003.

13 No one from RJ's Trucks testified as to the truth of the contents of its appraisal. The methodology and conditions of the appraisal stated in the reports appear reasonable to me. The report received by GE indicated the busses had a total Orderly Liquidation Value ("OLV") of $6,395,000, Gross Auction Value ("GAV") of $5,755,000 and a Fair Market Value ("FMV"), based on a retail sale to end user following an inspection, of $7,354,000. As an example, each 1999 MCI Model 102-EL3 bus, with mileages varying from 38,500 to 513,500, had an OLV of $200,000, a GAV of $180,000 and a FMV of $230,000.

14 On August 1, 2003 GE received an appraisal from Maynards Appraisals Ltd. of 40 of the busses. It was revised September 11, 2003. The stated methodology and conditions of the appraisal appeared reasonable to me. The values are said to be before costs of security, advertising, brokerage and disposal. No one from Maynards testified. Those busses were said to have a GAV of $5,375,000 and an OLV of $7,120,000. The 3 additional busses were 1998 models which RJ's Trucks had appraised at an OLV of $600,000 and GAV of $540,000.

15 I am satisfied from Mr. Brown's evidence of GE's resale efforts that GE is seeking an OLV and that as at the date of trial only 7 of the busses had been sold, although offers were being considered on 2 others.

16 Mr. Brown testified that as a result of GE's marketing efforts through the internet and its 50 regional managers in Canada, GE had received a number of cash offers. Most were very low and were rejected.

17 Mr. Brown also testified that there is a glut of used busses on the market which has a depressing effect on sale prices and that the longer a vehicle remains on the market the less it will realize on sale.

18 Mr. Brown testified that the glut of busses arises from reduced revenues by bus operators in Canada because of the turndown in the tourist industry in mid-2003, due in part to SARS and the Iraq war.

19 Mr. Brown testified that in 2001-2002 he was involved in selling 16 busses repossessed by GE on which $4 million was owing. The sales realized $2.9 million, a shortfall of more than 25% from their security value.

20 Mr. Brown calculated the payout amount under the terms of the GE Agreements for each of the seized busses as at June 30, 2003. This totalled $8,439,041. The repossession payment totalled $8,641,114. When he added the GST and PST on the repossessed leased busses the amount increased to $9,318,041. If one applies a 25% discount factor to the net payout figure to establish a rough resale price, the value of the busses would be about $6.3 million.

21 In calculating the repossession values Mr. Brown used the interest factors under the GE Agreements of 24% per year on the leased vehicles and 12% per year on the owned vehicles. While a repossessed vehicle remained unsold, the debt increased by accrual of interest at these rates, thus narrowing any positive difference between the value of the security and the indebtedness and increasing any unsecured difference between the indebtedness and the value of the security.

22 The only direct appraisal evidence before me was that of Mr. Uyeda who testified for the Debtor. He has been retained by the Ontario government, secured lenders and bus operators to appraise used busses.

23 Mr. Uyeda was trained and practiced as a mechanic until 1961. His expertise lies in the area of assessing mechanical fitness, damage to vehicles and costs of repairs. He has had experience in valuing busses. GE's counsel consented to the receipt of Mr. Uyeda's appraisal evidence.

24 Mr. Uyeda inspected the 37 busses which remained unsold in late August, 2003 on RJ's Trucks' lot where they had been since repossession by GE. He then consulted a 2002 edition of *The Official Bus Blue Book*, published by Bus Solutions (the "*Blue Book*"). He updated his opinion by consulting the March 2003 edition of the *Blue Book*. The *Blue Book* is intended for dealers, insurance companies, lending institutions, operators and others needing to evaluate or appraise coaches. It shows high, average and low retail values in U.S. dollars of various makes, models and years. The values are determined from retail sales during the preceding 6 months. The *Blue Book* notes that the high and the low is a range of value which will depend upon the condition of the vehicle and the number of units in the transaction. Values shown in the *Blue Book* are stated therein to be for vehicles with "normal" equipment and in good working order with little or no body damage, a clean interior and good tires.

25 The *Blue Book* notes that a variety of market conditions will affect prices and that time of year, availability, demand for particular models and geographical location need to be considered and could affect price.

26 The March 2003 edition of the *Blue Book* notes that:

> The year 2002 saw an unprecedented number of liquidated asset sales from fleet dispositions and lender repossessions. In an average yearly reporting period, these types of distressed sales represent less than ten percent of pre-owned coach sales, yet in 2002, they represented nearly half of the pre-owned coach sales. In order to maintain the historical continuity of the Blue Book, Bus Solutions made a conscious decision not to include the liquidated asset sales in our value calculations.

27 Mr. Uyeda determined from the *Blue Book* the Average Retail Value of each of the 37 busses. He then searched the internet and obtained the asking prices for comparable busses. He then averaged each asking price, there being 2 or 3 for some models, and the *Blue Book* retail sale price. Mr. Uyeda deducted from this average amount his estimate of the cost to repair or refurbish the bus.

28 Mr. Uyeda was not able to start the bus engines as the batteries were dead. He could not drive any of the busses. He merely inspected them on RJ's Trucks' lot.

29 Mr. Uyeda did not inspect any of the busses listed for sale on the internet.

30 Using his methodology, Mr. Uyeda valued the remaining 37 busses at $9,038,380 using a U.S. dollar conversion factor of $1.41. At July 7, 2003 the exchange rate was $1.35 and at trial was $1.31. The July 7 rate would lower the appraised values as at the date of the Petition by about 4% to about $8.7 million. The 6 busses which were sold realized $90,000 in cash and were

refinanced to the purchasers at a total value of $1,330,000. The refinancing terms were at interest rates substantially lower than the GE Agreements and more generous terms and greater credit risk than normal in order to make the resales.

31 Using Mr. Uyeda's appraisal methodology, an exchange rate of $1.35 and the cash and financed amounts, the 43 busses would have had a value in excess of $10 million.

32 There are blatant flaws in Mr. Uyeda's methodology. His average was weighted in favour of asking prices as opposed to sale prices. He did not take account of the *Blue Book's* caveats, the depressed Canadian market for used busses and the probability that they will be sold for less than retail value to end users, particularly after deduction of marketing costs and sales commissions of about 5% if sold by a dealer. Mr. Uyeda did not apply the depreciation factor he noted of 10-15% per year in the retail value of busses. Any bus not sold within a year would have depreciated by 15% at the end of the year and would presumably yield that much less on a resale by GE. I gave no weight to Mr. Uyeda's appraisal of the values because of these weaknesses in his calculations.

Law

33 BIA s. 43(2) provides:

> Where the petitioning creditor referred to in subsection (1) is a secured creditor, he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of a receiving order being made against the debtor, or give an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

34 The petitioning secured creditor need not prove the value of its security. It need only provide an estimate which it must establish is not a sham or absurdly low. The petitioning secured creditor must establish that $1,000 of unsecured debt is owing. See *Omni-Stone Corp., Re* (1991), 4 O.R. (3d) 636 (Ont. Bktcy.) at para. 5 citing *Hugh M. Grant Ltd., Re* (1982), 41 C.B.R. (N.S.) 28 (Ont. S.C.); *484030 Ontario Ltd., Re* (1992), 12 C.B.R. (3d) 302, 8 O.R. (3d) 243, 90 D.L.R. (4th) 218 (Ont. Bktcy.) at paras. 24-28; approved in *Fengar Investments Corp., Re* (1993), 17 C.B.R. (3d) 167 (Ont. Bktcy.) para. 32; *Cappe, Re* (1993), 18 C.B.R. (3d) 229 (Ont. Gen. Div. [Commercial List]).

35 The Debtor disputes GE's estimate of the value of the security. If successful, GE would have no status to petition.

36 The Debtor wants me to interpret s. 43(2) so as to require an appraisal of the security prior to the Petition, at least in circumstances where the Debtor proposes to dispute the estimate with appraisal evidence. In my opinion this is too much to expect of a creditor. Firstly, the issue before me is the status of the secured creditor to bring a petition, not the determination of the unsecured amount which the secured creditor can claim in the bankruptcy. Secondly, it would be unreasonable to require an appraisal or valuation in circumstances where the secured creditor could not obtain access to the security and time is of the essence. I acknowledge that was not the case here. Thirdly, s. 43(2) does not require an appraisal but only "an estimate of the value of his security". If the Debtor could derail the Petition by subsequently challenging it with an appraisal, it would force a secured creditor to obtain an appraisal when only an estimate is required by the BIA. The requirement in s. 43(3) of an affidavit by a person "having personal knowledge of the facts alleged in the petition" must be read in this light. See also *Cappe, Re* paras. 11-17.

37 I am satisfied that the petitioning secured creditor need not obtain a formal appraisal of its security. I am further satisfied that GE obtained a preliminary report from RJ's Trucks. There was no evidence to suggest that the preliminary report was substantially different from the written report offered in evidence through Mr. Brown.

38 Mr. Brown's calculations of a 25% shortfall in recovery from payout values, based on his experience in sales in 2001-2, confirmed RJ's Trucks' OLV appraisal.

39 I have considered Mr. Uyeda's evidence to ensure that GE's estimate is not a sham or absurdly low. His appraisal at a value exceeding the indebtedness contains substantial weaknesses. He failed to take account of the depressed market in Canada and the state of the market referred to in the *Blue Book*. He failed to consider the number of repossessed and other used busses on the market. He did not assess the operating condition of the busses he was appraising. He used a false methodology by including asking prices in the calculation of average retail market value. After making allowance for these weaknesses and considering the sources of GE's own estimate, I am satisfied that GE's estimate of the value of its security was neither a sham nor absurdly low. GE's estimate was a proper estimate.

Reports as Hearsay

40 The Debtor argues that the contents of the appraisals by RJ's Trucks and Maynards were hearsay and should not be accepted.

41 I am not involved in an exercise of fixing values. I need only determine that GE's estimate was neither a sham nor absurdly low. It is an exercise in good faith. The fact that GE consulted an independent appraiser and received an estimate from that appraiser is relevant to the issue. The Debtor challenged the estimate. In response GE produced two reports, one received on an oral basis before the Petition and both received in writing after the Petition.

42 I accepted the appraisal reports presented by way of hearsay solely for the purpose of determining that the estimate was made in good faith and was not a sham or absurdly low. I read them and considered them sufficiently reliable for this purpose. They clearly could not be accepted to prove the truth of their contents since GE could not prove the necessity of receiving the reports as evidence.

43 Mr. Brown also considered recent sales of busses repossessed by GE in which he was involved which yielded resale values substantially less than the amounts secured. He also prepared a list of 30 sales effected by others in the GE organization of busses in model years 1987 to 2001, 26 of which were MCI busses. A brief comparison of those sales in U.S. dollars with the *Blue Book* average retail value indicates only 2 sales were above the *Blue Book* values and the remainder were substantially below the *Blue Book* values. The experience of Mr. Brown and the collation of information from other sources was a sufficient exercise in good faith for the purposes of making or justifying an "estimate" under s. 43(2) of the BIA.

Improper Purpose

44 The Debtor asks me to exercise my discretion under BIA s. 43(7) and (11) to either dismiss or stay the Petition. GE acknowledged that it brought the Petition for the purpose of appointing a trustee in bankruptcy who would have the power to investigate suspicious transfers of assets by the Debtor. The Debtor argues that this was an improper purpose or an abuse of process and that there was no admissible evidence to support any transfer of assets or other improper conduct by the Debtor.

45 No other creditors have either joined in this Petition or opposed the Petition.

46 The onus is on the Debtor to show sufficient cause why the receiving order should not be granted and if the creditor fails to meet this onus the court will ordinarily make the receiving order: See Houlden and Morawetz, *Bankruptcy and Insolvency Act*, Carswell, 2003 Annotated Edition, at D§13, 14.1(1).

47 The Debtor called no evidence to establish its allegation of GE's improper purpose. It relied on the evidence of GE's witnesses.

48 The Debtor refused to acknowledge the truth of the contents of any of the 67 documents in Exhibit 1 offered by GE, including the organization chart at tab 1, the GE Agreements, the guarantees of them and correspondence from the Debtor's lawyers to GE's lawyers, except as proven in oral evidence. The Debtor did not dispute the authenticity of any of those documents.

49 I am satisfied that Mr. Brian Brown was substantially involved in GE's relationship with the Debtor including the Debtor's defaults in 2002 and the refinancing in December 2002. Mr. Brown was in a position to testify on the contents of the documents

to which GE was a party and the basic corporate structure of the companies in the Tokmakjian Group and Cy Vahe Tokmakjian's relationship to them.

50 The Debtor was amalgamated in 1993. It carried on three businesses:

a) operating tour coaches under the name of Can-ar Coach;

b) repairing busses under the name of S.N. Diesel; and

c) an export business with offshore customers.

According to the Companies Branch public records, the director, president and secretary of the Debtor is Cy Vahe Tokmakjian.

51 At the times of the negotiation and execution of the GE Agreements the Debtor's corporate name was Tokmakjian Limited.

52 The GE Leases were executed by the Debtor in 1998, 1999 and 2000. The GE Financing Agreements were executed by the Debtor on or about December 30, 2002 "as at September 30, 2002" to effect a refinancing of earlier security agreements under which the Debtor had defaulted in 2002.

53 Under the GE Agreements, assignment of the GE Leases or of the busses securing the GE Financing Agreements without GE's consent was an event of default.

54 The Debtor's holding company or parent company was Tokmakjian Group Inc. The Debtor had two sister companies, 534509 Ontario Ltd. and National Refurbishing Inc., and an affiliate (which was a subsidiary of a sister of Tokmakjian Group Inc.), 556962 Ontario Limited ("556"). These four companies guaranteed the GE Financing Agreements and two of the GE Leases.

55 Tokmakjian Group Inc. was a subsidiary of Tri-Star Tokmakjian Corp. which was also the parent of Victoria Export Limited. Victoria Export Limited was the parent of 780961 Ontario Limited and 556.

56 556 owned 3 commercial properties in Concord, Mississauga and Milton which were shown on 556's financial statements as at September 30, 2001 as having the following net book values, subject to the following mortgages:

	Net Book Values	**Mortgage**
Concord	$3,030,000	$1,729,000
Mississauga	$1,809,000	$894,000
Milton	$2,520,000	$1,159,000
TOTALS:	$7,360,000	$3,782,000

These financial statements were given to GE as part of the refinancing in 2002.

Confusing Name Changes

57 On December 30, 2002, S.N. Diesel Limited and Can-ar Coach Limited were incorporated. These were business names then used by Tokmakjian Limited, the then corporate name of the Debtor. Cy Vahe Tokmakjian was the sole director and officer of these new companies.

58 Can-ar Coach Limited changed its corporate name to Tokmakjian Inc. on January 21, 2003, three weeks after it was incorporated.

59 In mid-January, 2003, the Debtor briefly discussed with GE its desire to separate the Debtor's domestic and export operations. GE told the Debtor it would require further financial information and bank confirmation.

60 On March 26, 2003, probably in response to the Debtor's request to reorganize or refinance, GE advised the Debtor that the GE Leases would have to be assigned to Tokmakjian Inc. and the loans secured under the GE Financing Agreements would have to be redocumented and waivers would be required from all current creditors of "Tokmakjian Limited", which at that time was still the name of the Debtor.

61 Thereafter GE heard nothing further from the Debtor about the assignment of the GE Leases and the busses securing the GE Financing Agreements and GE never consented to any such assignments.

62 By Articles of Amendment filed April 11, 2003 the Debtor changed its name from Tokmakjian Limited to C Tokmakjian Limited.

63 By Articles of Amendment filed and effective May 12, 2003 S.N. Diesel Limited changed its name to Tokmakjian Limited, the same name as that of the Debtor when it signed the GE Agreements.

64 Thus by May 12, 2003, and then not yet known to GE, there were three companies with confusingly similar names, Tokmakjian Inc., Tokmakjian Limited and C Tokmakjian Limited.

65 The Debtor's former name was now being used by a company with which GE had no relationship. That change of name was contrary to s. 6(2) of the Names Regulation under the *Business Corporations Act of Ontario*, O. Reg. 62 because the Debtor was not dissolved. Compliance with the Regulations would also require the new Tokmakjian Limited, formerly S.N. Diesel Limited, to become successor to the business of the Debtor.

Default

66 On May 12, 2003 GE was advised that the Debtor would not be able to honour its commitments under the GE Agreements unless its debt was restructured. GE did not agree. On May 28, 2003 the Debtor advised GE that it would be defaulting under the GE Agreements and not making the payments.

Property Transfers

67 GE subsequently learned from title searches that 556, a guarantor of the Debtor's obligations, had dealt with its three properties as follows:

1. On March 20, 2003 the Milton property was transferred to HSAR Holdings Inc. ("HSAR") for $2,715,000. HSAR was incorporated September 27, 2002. Its directors were Hripsime Tokmakjian, Ani Tokmakjian, Raffi Tokmakjian and Sylvia Tokmakjian. They were, respectively, the President, Secretary-Treasurer and Vice President of HSAR.

2. On June 13, 2003, 556 charged its Concord property in favour of Victoria Export Ltd. with a debt of $4,139,650.

3. On August 21, 2003, the Mississauga property was transferred to 1582270 Ontario Limited for $2,700,000.

PPSA

68 Searches under the *Personal Property Security Act* revealed that since 2001 the Debtor had issued seven promissory notes secured by security agreements to Vahe Cy Tokmakjian, Tokmakjian Group Inc. and HSAR. By a number of assignments of some or all of these receivables and the collateral security, through some of the individuals who were directors of HSAR or directly, the registered security holders by the date of the Petition became Tokmakjian Limited, Victoria Export Limited, Tri-Star Tokmakjian Corp. and HSAR.

Dismiss or Stay

69 The Debtor asks me to dismiss or stay the Petition because GE has brought the Petition for an improper collateral purpose of appointing a trustee in bankruptcy to investigate circumstances where no wrongful conduct has been shown.

70 The onus is on the Debtor to show why I should exercise my discretion. The Debtor was represented by counsel but presented no evidence on the issue of the exercise of my discretion.

71 The confusing changes of names had no apparent legitimate purpose and the use of the Debtor's former name was contrary to law. The changes of names appear calculated to confuse creditors and others who deal with the Debtor and the guarantors.

72 The transfer of 2 valuable pieces of property and the mortgage of another by a guarantor to entities which were neither the Debtor nor a guarantor, clearly raised concerns as to the viability of the 556 guarantee. While the transfers were not contrary to the guarantees, in the context of the Debtor's inquiry in March, 2003 requiring a transfer, they are questionable.

73 GE learned in the summer of 2003 that on February 13, 2003 Tokmakjian Limited sent a letter "to whom it may concern", including another equipment financing creditor, CIT Financial, advising that as of January 31, 2003 the operating divisions of Tokmakjian Limited, S.N. Diesel Service and Can-ar Coach Service will operate as divisions of Tokmakjian Inc., a new company within the Tokmakjian Group "with no change in ownership". The letter was accompanied by a memorandum dated February 6, 2003 from the solicitors for Tokmakjian Limited stating that Tokmakjian Limited sold all of the assets of S.N. Diesel Service and Can-ar Coach Service to Tokmakjian Inc. as of January 31, 2003. There is no evidence that copies had been received by GE.

74 Assignments of the Leases and the busses securing the GE Financing Agreements would have been events of default under the GE Leases, clauses 18.1(f) and the GE Financing Agreements, clauses 11(e).

75 The Debtor's counsel suggested that a solicitor's memorandum cannot constitute evidence against the client. However, the letter written by the Debtor advised of the transfer. The Debtor did not refute the authenticity of the letter. The letter and solicitor's memo were introduced into evidence by Mr. Giroux, an officer of CIT Financial responsible for overseeing the management of clients' loan portfolios. He was subpoenaed by GE to testify at the Petition hearing. He was familiar with the Tokmakjian group of companies, including the Debtor, through management by CIT of loans to those companies from clients and by CIT itself, which leased busses and loaned on the security of busses to the Debtor and other Tokmakjian companies.

76 CIT received the letter and memo. The letter and memo were apparently reliable. The recipients were apparently intended to rely on it. The admission of the letter and memo to prove the truth of their contents was not challenged by evidence from the Debtor. The facts stated in the letter constituted a breach of the GE Agreements and guarantees and so were contrary to the interests of the Debtor on their face. I accepted the evidence.

77 Mr. Giroux testified that in September, 2003 CIT agreed to the transfer of assets by the Debtor and acceded to the Debtor's request for refinancing. He could not explain the change of name by the Debtor in April, 2003.

78 The Debtor has failed to establish grounds for me to exercise my discretion by dismissing or staying the Petition because of improper purpose or abuse of process by GE. I amsatisfied that GE had grounds for suspicion and good reason to have a trustee in bankruptcy appointed to investigate the affairs of the Debtor.

Conclusion

79 I grant the receiving order sought in the Petition.

Petition granted.

TAB 4

1982 CarswellBC 480
British Columbia Supreme Court, In Bankruptcy

Black Brothers (1978) Ltd., Re

1982 CarswellBC 480, [1982] B.C.W.L.D. 651, [1982] B.C.J. No. 1582, 13 A.C.W.S. (2d) 316, 41 C.B.R. (N.S.) 163

Re BLACK BROS. (1978) LTD.

McLachlin J. [in Chambers]

Heard: February 26, 1982
Judgment: March 10, 1982
Docket: Vancouver No. 103/82

Counsel: *R. Standerwick*, for petitioner.
A.R. Caplan, for respondent Black Bros. (1978) Ltd.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.c Miscellaneous
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — General
Bankruptcy petitions for receiving orders — Petition filed by secured creditor — Purpose being to give petitioner's claim priority over statutory claims and to improve its position with respect to transfers of funds prior to bankruptcy — Debtor opposing on ground no assets to be vested in trustee — Creditor having proper and sufficient basis for filing petition — Petition granted.
A secured creditor filed a petition against the debtor for the purposes of giving it priority over certain statutory claims and improving its position with respect to certain transfers of funds made shortly before it installed its receiver. The petitioning creditor held a debenture which contained a floating charge covering all the assets of the debtor. The petition was opposed on the ground that there were no assets to be vested in a trustee in bankruptcy.
Held:
Petition granted.
The absence of unsecured property for distribution, among the creditors was not sufficient cause to deny the petitioner's application. One purpose of an order in bankruptcy is to secure an equitable distribution of the debtor's property among creditors. However, another purpose may be to permit creditors to avail themselves of provisions of the Bankruptcy Act which may enhance their positions by giving them certain priorities which they would not otherwise enjoy. The latter purpose is a proper and sufficient basis for granting a bankruptcy receiving order.
Table of Authorities
Cases considered:
Develox lndust. Ltd., Re, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (H.C.) — *followed*
Gasthof Schnitzel House Ltd., Re, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.) — *followed*
Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.) — *followed*
Koprel Enterprises Ltd., Re (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.) — *followed*
Statutes considered:
Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 25(6), (7), 49(2).

Petition for bankruptcy receiving order.

***McLachlin J.*:**

1 The petitioner seeks an order that the respondent be adjudged bankrupt. It is not disputed that the respondent is insolvent. Indeed, the petitioner has already installed a receiver under the terms of a debenture between it and the respondent. The petitioner frankly admits that it seeks the order for bankruptcy to give it priority over certain statutory claims and improve its position with respect to certain transfers of funds made shortly before it installed its receiver. The respondent opposes on the ground that there are no assets to be vested in a trustee in bankruptcy.

2 Section 25(6) and (7) of the Bankruptcy Act, R.S.C. 1970, c. B-3, govern this matter:

> (6) At the hearing the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order.
>
> (7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

While the court is given a discretion as to whether to make the order, it is to be exercised judicially in accordance with the Act, and in particular s. 25(7).

3 The respondent does not dispute the facts alleged in the petition. Nor does it contend that it is able to pay its debts. The only question, therefore, is whether there is "other sufficient cause" why the order should not be made.

4 The respondent contends that the petition should be dismissed because there would be no assets for a trustee to take in hand. The petitioner's debenture is a floating debenture, giving it security on all the respondent's assets. Section 49(2) of the Act preserves the priority of secured creditors. Since the petitioner has security on everything owned by the respondent, it follows that there can be no property to vest in the trustee.

5 Courts generally will not make orders which they know to be ineffective. If the absence of unsecured property had the consequence that the order for bankruptcy would be totally ineffective, that might well be sufficient cause why no order should be made. But I do not think it has this consequence. An order for bankruptcy does more than vest property in the trustee for distribution among creditors. It brings into operation other provisions of the Act which affect priorities between creditors and the methods by which potential assets may be brought into account. Indeed, it is precisely because an order will have this effect that the petitioner seeks the bankruptcy and the respondent opposes it. Consequently, it cannot be said that an order for bankruptcy would be ineffective or useless in this case.

6 One purpose — usually the main purpose — of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. However, another purpose may be to permit creditors to avail themselves of provisions in the Act which may enhance their positions, for example, by giving them certain priorities which they would not otherwise enjoy. The latter purpose, on the authorities, is a proper and sufficient basis for granting an order. Thus, in *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.), Henry J. found that since the assets were fully encumbered by the petitioner's debenture, there could be no assets available for distribution to the unsecured creditors. However, he went on to hold that a receiving order should go on the ground that it is not improper for a secured creditor to file a petition or procure an assignment in bankruptcy for the purpose of defeating other creditors' priorities, citing in support *Re Develox lndust. Ltd.*, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (H.C.), and *Re Gasthof Schnitzel House Ltd.*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.); see also *Re Koprel Enterprises Ltd.* (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.).

7 In summary, sufficient grounds to support the petition are established and no sufficient cause has been shown why an order should not be made. Accordingly, the petitioner's application is granted.

Bankruptcy receiving order granted.

TAB 5

1989 CarswellBC 337
British Columbia Court of Appeal

Bank of Montreal v. Scott Road Enterprises Ltd.

1989 CarswellBC 337, [1989] 4 W.W.R. 566, [1989] B.C.W.L.D. 1130, [1989] C.L.D. 601, [1989] B.C.J. No. 485, 14 A.C.W.S. (3d) 337, 36 B.C.L.R. (2d) 118, 57 D.L.R. (4th) 623, 73 C.B.R. (N.S.) 273

BANK OF MONTREAL v. SCOTT ROAD ENTERPRISES LIMITED

Seaton, Esson and Wallace JJ.A.

Heard: March 3, 1989
Judgment: March 20, 1989
Docket: Vancouver No. CA008758

Counsel: *P.A. Spencer*, for appellant.
R.D. Holmes, for respondent.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.6 Practice and procedure on petition
III.6.a Parties
III.6.a.iii Miscellaneous
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Parties
Petitions for receiving orders — Hearing — Bank holding floating charge debenture over assets of debtor — Bank-appointed receiver closing business causing debtor to be in arrears for unpaid wages and employee deductions for income tax, unemployment insurance and Canada Pension Plan — Statutory liens giving wage earners and Crown claims priority over debenture — Liquidation value of assets not sufficient to cover indebtedness owed to bank — Bank petitioning debtor into bankruptcy and obtaining receiving order — Court upholding receiving order on appeal — Secured creditor invoking provisions of Bankruptcy Act to enhance its priority using s. 136(1) of the Act not constituting sufficient cause for refusing to grant a receiving order under s. 43(7) of the Act.
The petitioner granted the respondent a line of credit secured by a floating charge debenture to a maximum limit of $3,000,000. The respondent was indebted to the petitioner for $800,000 when the petitioner appointed a receiver who immediately took possession and closed the business. Until then the respondent had been current in all payments for wages, vacation pay and employee deductions for income tax, unemployment insurance and Canada Pension Plan. The receiver closed the payroll account out before that month's pay cheques could be presented, causing a default of $39,000 in unpaid wages and vacation pay and $15,000 in unremitted employee deductions. Aware that these claims would be secured by statutory liens with priority over the debenture and that the maximum value realizable on the liquidation of assets would be $600,000, the petitioner petitioned the respondent into bankruptcy in order to establish its priority. The respondent appealed the resulting grant of a receiving order.
Held:
Appeal dismissed.
Per ESSON J.A. (SEATON J.A. concurring): The purpose of the petitioner's petition in bankruptcy being solely to improve its position with respect to its security was not sufficient cause under s. 43(7) of the Bankruptcy Act to refuse the grant of a receiving order. Although inequitable consequences may occur to the other creditors, particularly to wage earners, it is up to Parliament to change the present state of the law.

Per WALLACE J.A. (concurring): The scheme of distribution in s. 136(1) of the Bankruptcy Act determines the priority of payment of the respective claimants therein, which priority applies to all creditors regardless of the status accorded them by provincial statutes. The fact that a secured creditor invokes the provisions of the Act to establish its priority in accord with the scheme of distribution provided by the Act cannot constitute a sufficient cause for refusing a receiving order. Any possible inequities which may arise from the application of the Act's scheme of distribution are matters to be resolved by Parliament.

Table of Authorities

Cases considered:

Black Bros. (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.) — *considered*

Clemenshaw, Re; W.C.B. v. C.C.M.T.A. (1961), 40 W.W.R. 199, 4 C.B.R. (N.S.) 238, 36 D.L.R. (2d) 244 (C.A.) — *considered*

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

Dep. Min. of Revenue (Que.) v. Rainville, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. *Re Bourgault)* 105 D.L.R. (3d) 270, (sub nom. *Bourgault v. Dep. Min. of Revenue (Que.))* 30 N.R. 24 — *considered*

F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 — *applied*

Hansard Spruce Mills Ltd., Re, 10 W.W.R. (N.S.) 344, 33 C.B.R. 217, [1954] 1 D.L.R. 326 (B.C.S.C.) — *referred to*

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.) — *considered*

Triona Invt. Ltd. v. Smythe, McMahon Inc. (1988), 23 B.C.L.R. (2d) 222, 67 C.B.R. (N.S.) 281 (C.A.) — *considered*

Statutes considered:

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

s. 43

s. 136(1)

Employment Standards Act, S.B.C. 1980, c. 10

s. 15 [am. 1983, c. 16, s. 8; 1987, c. 24, s. 71]

Authorities considered:

Giroux, "The Use of the Bankruptcy Act by Secured Creditors", in Bankruptcy — Present Problems and Future Perspectives, Meredith Memorial Lectures (1985), McGill University, p. 240.

Kemp-Gee, "Bankruptcy in a Receivership" (1984), 1 Nat. Insolvency Rev. 23, p. 27.

Appeal from judgment of McKenzie J. granting petition in bankruptcy.

***Esson J.A.* (*Seaton J.A.* concurring):**

1 This appeal raises the question whether it is open to the court to dismiss a petition in bankruptcy on the ground that it has been brought by a secured creditor solely for the purpose of bringing into effect the scheme of distribution in the Bankruptcy Act, R.S.C. 1985, c. B-3, and thus destroying the priority which other creditors would otherwise have had. There is no decision directly on point which is binding on this court.

2 This is such a case. The appellant company carried on a substantial car dealership business under a bank line of credit secured by a floating charge debenture. In October 1987 the bank appointed a receiver who immediately took possession and closed the business. The amount owing to the bank was then about $800,000, about $200,000 more than the maximum amount likely to be realized on liquidation. As the bank's debenture secures it to a limit of $3,000,000 it was obvious from the beginning that it would suffer a shortfall and that no one else could recover anything except someone holding a charge prior to that of the bank.

3 As with every going concern, there were a number of creditors entitled to such charges. There was unremitted sales tax of about $20,000, Workers' Compensation Board ("W.C.B.") assessments of about $4,000 and, most significantly, there was about $39,000 in unpaid wages and vacation pay and some $15,000 in unremitted employee deductions for income tax, Canada Pension Plan and unemployment insurance. The receiver recognized that all of those claims would be secured by statutory liens. I will not refer in detail to the source of those liens and charges except the one securing the wage claims. It arises under s. 15 of the Employment Standards Act, S.B.C. 1980, c. 10, which reads:

> **Lien and charge on property**
> 4 15.(1) Notwithstanding any other Act, unpaid wages constitute a lien, charge and secured debt in favour of the director, dating from the time that the wages were earned, against all the real and personal property of the obligor, including money due or accruing due to the obligor from any source.
> 5 (1.1) Unpaid wages set out in an order or decision filed by the Industrial Relations Council pursuant to section 30 of the *Industrial Relations Act* constitute a lien, charge and secured debt in favour of the persons named in the order or decision against all the real and personal property of the employer or other person named in the order.
> 6 (2) Notwithstanding any other Act, the amount of a lien and charge and secured debt referred to in subsections (1) and (1.1) is payable and enforceable in priority over all liens, judgments, charges or any other claims or rights including those of the Crown in right of the Province and, without limiting the generality of the foregoing, the amount has priority over
>
> (*a*) an assignment, including an assignment of book debts, whether absolute or otherwise and whether crystallized or not,
>
> (*b*) a mortgage of personal property,
>
> (*c*) a debenture charging personal property, whether crystallized or not, and
>
> (*d*) a contract, account receivable, insurance claim or proceeds of a sale of goods,
>
> whether made or created before or after the date the wages were earned or the date a payment for the benefit of an employee became due.

7 It is to be noted that the lien and charge is specifically given priority over assignments of book debts and debentures charging personal property, the broad forms of security most often relied on by banks. I have not reproduced subs. (3) which excludes priority over a registered mortgage or debenture charging land except for advances made after the certificate of judgment was registered.

8 At one time, it was considered to be settled law in this province that such statutory charges were enforceable according to their tenor in a bankruptcy. A leading case was the judgment of Wilson J.A. (later C.J.S.C.) for this court in *Re Clemenshaw; W.C.B. v. C.C.M.T.A.* (1961), 40 W.W.R. 199, 4 C.B.R. (N.S.) 238, 36 D.L.R. (2d) 244, which concerned the lien of the W.C.B. But the law laid down in that and other cases has been overruled by later decisions of the Supreme Court of Canada holding that, on the happening of bankruptcy, such charges securing Crown claims are effectively destroyed and that the order of distribution which must prevail is that set out in s. 136(1), formerly s. 107(1): *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. *Re Bourgault)* 105 D.L.R. (3d) 270, (sub nom. *Bourgault v. Dep. Min. of Revenue (Que.))* 30 N.R. 24; and *Deloitte, Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 55 C.B.R. (N.S.) 241, 19 D.L.R. (4th) 577, 60 N.R. 81, 63 A.R. 321.

9 Upon learning of the substantial magnitude of the claims secured by statutory liens, the bank and its lawyers pressed the directors of the company to assign it into bankruptcy and, when the directors did not do so, filed the petition in bankruptcy which led to the receiving order now under appeal. We are told that, in light of the law laid down in *Rainville*, those steps have become routine in such situations.

10 In the petition, which was launched about six weeks after the appointment of the receiver, the bank asserted that the company had failed to meet its obligations generally as they became due. The company opposed the petition, submitting that it should be dismissed under what is now s. 43(7), then s. 25(7), which reads:

> 11 (7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

12 The first ground of opposition was that there had been no act of bankruptcy. At the date of the appointment of the receiver, that may have been so but, at the date of filing the petition, the company had ceased to meet its obligations. The chambers judge, Mr. Justice McKenzie, held that the relevant date was that of filing the petition. On this appeal, the company did not seriously attack the correctness of that conclusion. The second point raised by the company was rejected by McKenzie J. in these words:

> 13 In respect of the device used to satisfy s. 25(2), I find it to be an effective device to satisfy the provisions of that section and the employment of that or any other device on the part of this or any other creditor to avail itself of the provisions of this Act to enhance its position comes within the decision of Madam Justice McLachlin in *Re Black Bros. (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.).
> 14 To do what I am invited to do, that is to decline the petition on the grounds that it has been brought for an improper purpose, would be to elevate me without authority to an appellate position that I do not occupy. I am obliged under *Re Hansard Spruce Mills Ltd.*, 10 W.W.R. (N.S.) 344, 33 C.B.R. 217, [1954] 1 D.L.R. 326 (B.C.S.C.), to follow a considered decision and I find that *Re Black Bros.* was one that was considered and applies to the case at bar.
> 15 I find no other ground upon which I can consider refusing this petition and accordingly a receiving order will be granted against the respondent company.

16 What was then s. 25(2) is now s. 43(2). It reads:

> 17 (2) Where the petitioning creditor referred to in subsection (1) is a secured creditor, he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of a receiving order being made against the debtor, or give an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

18 The device referred to by the chambers judge is in these paragraphs of the petition:

> 19 2. THAT SCOTT ROAD ENTERPRISES LTD. is justly and truly indebted to the Petitioner in the sum of $494,003.54 as at December 7, 1987, together with the Receiver's fees and expenses, which indebtedness is in consideration of the Petitioner extending credit to SCOTT ROAD ENTERPRISES LTD. and is evidenced by: a Demand Debenture in the principal amount of $3,000,000, dated for reference June 1, 1987.
> 20 3. THAT the Petitioner holds security for part of the said sum but that the Petitioner will give up such security to the extent of $1,000 for the benefit of the creditors of SCOTT ROAD ENTERPRISES LTD. in the event of a receiving order being made against it.

21 I question whether that language complies with s. 43(2) which appears to give to the secured creditor the option to take one of two positions. He can give up his security entirely or can give an estimate of its value. The language of para. 3 does neither. That paragraph also seems to be inaccurate in stating that the bank holds security for "part of the said sum". All of the other evidence is to the effect that its security covers all indebtedness.

22 However, as that question was not made a ground of appeal, we need not reach a decision on it. Were it to be resolved against the bank, the appropriate course might well be to allow it to amend to give a proper estimate of the value of the security. The question of substance is that in respect of which McKenzie J. felt bound to follow the decision in *Re Black Bros. (1978) Ltd.* In that case McLachlin J. (now C.J.S.C.) said at p. 165:

> 23 One purpose — usually the main purpose — of an order in bankruptcy is to secure an equitable distribution of the debtor's property amongst creditors. However, another purpose may be to permit creditors to avail themselves of provisions in the Act which may enhance their positions, for example, by giving them certain priorities which they would not otherwise enjoy. The latter purpose, on the authorities, is a proper and sufficient basis for granting an order. Thus, in *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (H.C.), Henry J. found that since the assets were fully encumbered by the petitioner's debenture, there could be no assets available for distribution to the unsecured creditors. However, he went on to hold that a receiving order should go on the ground that it is not improper for a secured creditor to file a petition or procure an assignment in bankruptcy for the purpose of defeating other creditors' priorities, citing in support *Re Develox Indust. Ltd.*, [1970] 3 O.R. 199, 14 C.B.R. (N.S.) 132, 12 D.L.R. (3d) 579 (H.C.), and *Re Gasthof Schnitzel House Ltd.*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C.S.C.); see also *Re Koprel Enterprises Ltd.* (1978), 27 C.B.R. (N.S.) 22 (B.C.S.C.).

24 The use of bankruptcy proceedings in that way has often been directed against distraining landlords. One such case came before this court in *Triona Invt. Ltd. v. Smythe, McMahon Inc.* (1988), 23 B.C.L.R. (2d) 222, 67 C.B.R. (N.S.) 281. In giving judgment for the court, I commented at p. 224:

> 25 The propriety of a secured creditor employing the Bankruptcy Act in that way has been established by a line of cases, the correctness of which is not in issue on this appeal. The leading British Columbia cases in that line are the decision of Ruttan J. in *Re Gasthof Schnitzel House Ltd. and Sanderson*, [1978] 2 W.W.R. 756, 27 C.B.R. (N.S.) 75 (S.C.), and that of Legg J. in *Re Koprel Ent. Ltd.* (1978), 27 C.B.R. (N.S.) 22 (S.C.). In each case, it was accepted that there was no possibility of the bankruptcy conferring any benefit on the general creditors. It was nevertheless held to be proper for the secured creditor, in "jockeying for position" against the landlord, to "promote" a bankruptcy in order to defeat the priority which would otherwise be afforded to the landlord.

26 In the passage quoted from the judgment of McLachlin J. in *Re Black Bros.*, that learned judge relied on the judgment of Henry J. in *Re Harrop of Milton Inc.*, which is the most fully reasoned of the line of cases. It is of some interest that Henry J. felt bound to follow the earlier authorities, as he put it at p. 295, "notwithstanding that I have some misgivings". I detect an implication of similar misgivings in the language of McKenzie J. in this case, as there was in my observations in *Triona Invt. Ltd.*

27 We were also referred to expressions of misgivings by learned commentators. In an article entitled, "Bankruptcy in a Receivership" (1984), 1 Nat. Insolvency Rev. 23, Alan Kemp-Gee said at p. 27 under the heading "Is it equitable for a secured creditor to invoke a bankruptcy?":

> 28 Having discussed the technicalities surrounding the secured creditors' use of the *Bankruptcy Act*, a larger issue should be considered: is it appropriate for the secured creditor to invoke a bankruptcy? The Act was intended, after all, to protect unsecured creditors.
>
> 29 It may well be in the best interest of a secured creditor to use the mechanism of a bankruptcy to deal with claims of landlords or the Crown. However, bankruptcy is supposed to be the vehicle available to distribute the assets of a debtor equitably amongst the unsecured creditors. The *Bankruptcy Act* specifically states that, with few exceptions, secured creditors are free to deal with their security in a commercially reasonable fashion outside the Act. Therefore, use of bankruptcy by a secured creditor seems to contravene the spirit of the legislation.

30 In an article entitled "The Use of the Bankruptcy Act by Secured Creditors", in Bankruptcy — Present Problems and Future Perspectives, Meredith Memorial Lectures (1985), McGill University, Andre Giroux said at p. 240 under the heading "Priority Claims":

> 31 One issue that is still debated by creditors who may be entitled to privileges is whether the order of distribution of section 107 applies when the secured creditor proceeds to realize on the basis of his security instrument or when there is no equity for the trustee in the realization of the assets. Although the courts seem to continue to maintain that the ranking order of the privileged creditors is affected by the bankruptcy of a debtor and that therefore the secured creditors are entitled to

> the proceeds of realization without regard to the claims of these creditors, recent judgments tend to question more and more the use of the *Bankruptcy Act* strictly for the purpose of reversing the priorities. However, there is no doubt that section 107 does apply when the realization of the assets and the distribution of the proceeds are made by the trustee in bankruptcy.

32 The circumstances of this case illustrate starkly the inequitable consequences which can flow from permitting the debenture holder to employ the Bankruptcy Act to destroy the priority which would otherwise have been enjoyed by the Crown and the wage earners. The affidavit of Mr. Day, a director, states that until 19th October, on which day the receiver was appointed, the company had met all its obligations as they became due or within the terms of arrangements with creditors. More specifically, he says, and there is no suggestion that this is not the fact, that until that day the company had been current in all payments for wages and vacation pay, to Revenue Canada for employee deductions, to the Minister of Finance for provincial sales tax, and to the W.C.B. The receiver was appointed on a pay-day. The bank closed out the payroll account before the cheques could be presented, and thus the default to the employees arose.

33 The submission of the appellant is, in essence, that what has taken place here is contrary to the spirit, the purpose, and the object of the Bankruptcy Act, and is so clearly inequitable in its consequences as to provide "sufficient cause" for refusing to make the order. The bank's first response to that is that there is no real unfairness because, although it is the agents of the Crown and the employees of the bankrupt who may lose their priority, it is not they who are prosecuting this appeal. It is, rather, the company on the instructions of its directors who admittedly are pursuing the matter in an attempt to avoid the liability which may be imposed upon them by statute for the tax deductions, unpaid wages and like liabilities. The bank emphasizes that, if the company was meeting its obligations up to the date of the receivership, it was doing so in reliance on the bank's line of credit and in a way which created a deficit position, and that there is nothing wrong with the bank doing all it can to reduce its ultimate loss as much as possible. While all that may be true, it is no answer to the real question which is whether valid legislative schemes for protecting Crown revenues and wages should be set at nought by the happening of a bankruptcy which serves no useful purpose. Nor is it an answer to throw the liability on the directors, even if they are in a position to meet it.

34 Were it not for one matter to which I have not yet referred, I would conclude that the facts and circumstances to which I have referred constitute "sufficient cause" why no order ought to be made, and that the petition ought to have been dismissed on that ground. That matter is a decision of the Supreme Court of Canada released since the granting of the petition in this case. On 26th May 1988 the court gave judgment in *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. In that case, the contest was between a trustee for bondholders and the Workers' Compensation Commission. The Court of Appeal of Quebec had distinguished *Rainville*, supra, and *Deloitte, Haskins*, supra, and had granted priority to the commission. The Supreme Court held that it erred in doing so. The specific facts and issues of the case need not concern us — the decision does not directly touch the issue which has arisen here. But, in giving judgment for the court, Lamer J. made an obiter statement which is clearly in point. At p. 1072 he said:

> **Conclusion**
>
> 35 I therefore consider that the claims of the parties to the case must be ranked in the order determined by the *Bankruptcy Act*. As the federal Parliament has exclusive jurisdiction to set priorities in a bankruptcy matter, the scheme of distribution in s. 107 of the *Bankruptcy Act* must be applied here. As respondent's claim was covered by s. 107(1)(*h*) of the Act, respondent is a preferred creditor whose claim must be ranked after that of appellant, whether or not the trustee realized on his security outside the bankruptcy proceeding. Once the bankruptcy has occurred, the federal statute applies to all creditors of the debtor.
>
> 36 It is true that such a solution may encourage secured creditors to bring about the bankruptcy of their debtor in order to improve their title. On the other hand, this solution has obvious advantages. As soon as the bankruptcy occurs the *Bankruptcy Act* will be applied: the mere fact that a creditor is mentioned in s. 107 of the Act suffices for such creditor to be ranked as a preferred creditor and in the position indicated in that provision. As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.

37 It is the last paragraph which is relevant to the issue raised here. This is a case in which the secured creditor brought about the bankruptcy of its debtor solely in order to improve its title. The paragraph represents a considered dictum of the court in

relation to a question, essentially one of policy, as to the effect to be given to a federal statute. It is a dictum which, in my view, we are bound to follow and to apply by holding that such a circumstance is not sufficient cause to refuse to grant the receiving order. If the present state of the law is unsatisfactory, it is for Parliament to remedy it.

38 If the position with respect to the wage earners is as the bank asserts it to be, the present state of the law may be most unsatisfactory. Wages are not a debt like any other — it has always been recognized that because of their nature they should be accorded a high degree of protection. The Bankruptcy Act recognizes that principle by putting wage earners just after the trustee in the order of distribution in s. 136(1). But, in presentday circumstances, that is an illusory benefit. The section has not been amended since, I believe, 1949 and the upper limit of the benefit remains at the archaically modest level of $500. Even that modest protection is illusory because, in the ensuing 40 years, there has developed the virtually universal practice of banks taking floating security on everything, a practice which in combination with the law laid down in *Rainville*, supra, has greatly altered what was earlier thought to be the ordinary balance between the rights of creditors. The illusory nature of the benefit conferred by the Bankruptcy Act on wage earners may have been a factor in the enactment of provisions such as s. 15 of the Employment Standards Act and, before *Rainville*, was probably as effective a kind of protection as could be devised. But, if the rule in *Rainville* applies to this charge, that protection has itself become illusory in practical terms.

39 The difficulty thus created for wage earners may be very serious because the extent to which the legislative scheme can be set at nought by the device employed here may be almost complete. The essence of the legislative scheme is to provide a first charge. Most businesses large enough to have employees carry on at the sufferance of their bankers in the sense that their loans may be called on demand, thus crystallizing the bank's security on every asset of every kind. It follows that, in most cases, the bank will be in a position to do what was done here, i.e., to employ its security to make the debtor effectively bankrupt, and then to petition it into bankruptcy. Because of the inherent flexibility of its security, the bank in all such cases will be in a position to time the appointment of the receiver, as was done here, to arrange matters so that the undertaking will have the benefit of the employees' efforts for a maximum period. In those businesses which are labour intensive, that may be an important consideration. An incidental, undesirable consequence of this device is that in addition to the always substantial layer of costs created by a receivership, the happening of bankruptcy will create a further layer of costs to be met before any payment can be made to wage earners under s. 136(1)(*d*).

40 I should not be understood as holding that the charge created by s. 15 of the Employment Standards Act is destroyed by the happening of bankruptcy. That issue is not before us and could well be raised at a later stage in this proceeding. To this point I have discussed the matter on the assumption that it will be destroyed because both parties made their arguments on that assumption. We were not, however, referred to any case holding that to be so. The s. 15 charge is different from those in the decisions of the Supreme Court of Canada, which I have called the *Rainville* line of cases, all of which I think have been concerned with charges securing a claim of the Crown. The charge created by s. 15 does not secure a claim of the Crown but may be caught by the reasoning in the *Rainville* line of cases because of the preferred status conferred by s. 136(1)(*d*). I observe that, if that is the case, the result would seem to be the anomalous one that this small and largely futile preference leaves wage earners in a worse position than if they were not mentioned in the Bankruptcy Act. The question whether that result could have been intended by Parliament cannot be decided on this appeal.

41 The bank submitted, by way of preliminary objection, that because the directors of the bankrupt company are prosecuting this appeal in the pursuit of their personal interest in avoiding liability for the unpaid wages and other claims, the appeal should be quashed for lack of "standing". The point was pressed with more indignation than logic. The appellant is the bankrupt company. It is rarely the case that the principals of a closely held company have no personal interest in the outcome. I see nothing faintly improper in these directors having provided the wherewithal for the appeal to be pursued. I would therefore refuse the application to quash but, on the merits, would dismiss the appeal.

***Wallace J.A.*:**

42 I have had the opportunity of reading the reasons for judgment of my colleague Esson J.A. and agree with his conclusion that this appeal must be dismissed.

43 In my view, it is sufficient for the disposition of this appeal to reiterate that the scheme of distribution set forth in s. 136(1) of the Bankruptcy Act, R.S.C. 1985, c. B-3, determines the priority of payment of the respective claimants specified therein, which priority applies to all creditors regardless of the status accorded them by provincial statutes. As Lamer J. noted in *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061 at 1069, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308:

> 44 A provincial statute cannot override the scheme of distribution set out in s. 107 [now s. 136] of the Act ... In the event of bankruptcy, priorities are exclusively a matter for federal jurisdiction.

45 The fact that a secured creditor invokes the provisions of the Bankruptcy Act to establish its priority in accord with the scheme of distribution provided by that Act cannot constitute a "sufficient cause" for refusing a receiving order (s. 43(7)).

46 Any possible inequities which may arise from the application of the scheme of distribution provided by the Bankruptcy Act are matters to be resolved by Parliament if, after due consideration, it considers it appropriate to do so.

Appeal dismissed.

TAB 6

2015 ONCA 570
Ontario Court of Appeal

Grant Forest Products Inc. v. Toronto-Dominion Bank

2015 CarswellOnt 11970, 2015 C.E.B. & P.G.R. 8139 (headnote only), 2015 ONCA 570, [2015] W.D.F.L. 4098, 20 C.C.P.B. (2nd) 161, 256 A.C.W.S. (3d) 269, 26 C.C.E.L. (4th) 176, 26 C.B.R. (6th) 218, 337 O.A.C. 237, 387 D.L.R. (4th) 426, 4 P.P.S.A.C. (4th) 358, 9 E.T.R. (4th) 205

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

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

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP, Applicants and The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security, Respondents

Doherty, E.E. Gillese, P. Lauwers JJ.A.

Heard: February 3, 2015
Judgment: August 7, 2015
Docket: CA C58636

Proceedings: affirming *Grant Forest Products Inc. v. GE Canada Leasing Services Co.* (2013), 7 C.C.P.B. (2nd) 239, 93 E.T.R. (3d) 15, 6 C.B.R. (6th) 1, 2013 ONSC 5933, 2013 CarswellOnt 14057, C.L. Campbell J. (Ont. S.C.J. [Commercial List])

Counsel: Mark Bailey, Deborah McPhail for Appellant, Superintendent of Financial Services
Jane Dietrich for Respondents, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP
John Marshall, Roger Jaipargas for Respondent, West Face Capital Inc.
Alex Cobb for Respondent, Mercer (Canada) Limited
David Byers, Dan Murdoch for Respondent, Ernst & Young Inc.
Andrew J. Hatnay, James Harnum, Adrian Scotchmer for Intervener, Court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Family; Insolvency; Property; Employment

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Bankruptcy and insolvency
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Bankruptcy and insolvency
X Priorities of claims
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I.2.l Bankruptcy or insolvency of employer
I.2.l.i General principles

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

G Inc. was subject to protection under Companies' Creditors Arrangement Act — Orders were made authorizing G Inc. to take steps to wind up two defined benefit pension plans — Monitor was ordered to hold back from distribution to creditors amount estimated to be wind up deficit in plans — Issues arose as to whether deemed trust arose as result of winding up orders, and as to priority of remaining funds as between administrator of pension plans and secured creditor — Motion judge granted secured creditor's motion to lift stay and ordered G Inc. into bankruptcy — Superintendent of Financial Services appealed — Appeal dismissed — Motion judge did not err in exercise of discretion to lift stay and order G Inc. into bankruptcy — It was clear that remaining funds were insufficient to meet claims of secured creditor and pension claimants — Breadth of motion judge's discretion was sufficient to construct bridge to Bankruptcy and Insolvency Act — Secured creditor did not fail to bring motion in timely manner — Even if secured creditor brought motion to defeat wind up deemed trust priority regime, it did not disentitle secured creditor from being granted relief, as creditor may seek bankruptcy order to alter priorities in its favour — Motion judge did not err in failing to order payment of wind up deemed trusts deficits before ordering G Inc. into bankruptcy.

Bankruptcy and insolvency --- Property of bankrupt — Pension funds

Deemed trust — G Inc. was subject to protection under Companies' Creditors Arrangement Act — Orders were made authorizing G Inc. to take steps to wind up two defined benefit pension plans — Monitor was ordered to hold back from distribution to creditors amount estimated to be wind up deficit in plans — Issues arose as to whether deemed trust arose as result of winding up orders, and as to priority of remaining funds as between administrator of pension plans and secured creditor — Motion judge granted secured creditor's motion to lift stay and ordered G Inc. into bankruptcy — Motion judge did not authorize deemed trust to prevail in insolvency by granting wind up orders — Motion judge held that priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind up deficiencies — Superintendent of Financial Services appealed — Appeal dismissed — Motion judge did not err in exercise of discretion to lift stay and order G Inc. into bankruptcy — It was clear that remaining funds were insufficient to meet claims of secured creditor and pension claimants — Breadth of motion judge's discretion was sufficient to construct bridge to Bankruptcy and Insolvency Act.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

G Inc. was subject to protection under Companies' Creditors Arrangement Act — Orders were made authorizing G Inc. to take steps to wind up two defined benefit pension plans — Monitor was ordered to hold back from distribution to creditors amount estimated to be wind up deficit in plans — Issues arose as to whether deemed trust arose as result of winding up orders, and as to priority of remaining funds as between administrator of pension plans and secured creditor — Motion judge granted secured creditor's motion to lift stay and ordered G Inc. into bankruptcy — Motion judge held that provincial provisions in pension areas prevail prior to insolvency but once federal statute is involved, insolvency regime applies — Motion judge held that priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind up deficiencies — Superintendent of Financial Services appealed — Appeal dismissed — Motion judge did not err in failing to order payment of wind up deemed trusts deficits before ordering G Inc. into bankruptcy — Once motion judge ordered G Inc. into bankruptcy, priorities established by Bankruptcy and Insolvency Act (BIA) applied to remaining funds and rendered wind up deemed trust claims inoperative — Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when motions were heard because payment would have had effect of frustrating priorities established by federal law of bankruptcy — Provincial statute cannot alter priorities within federal scheme nor can it be used in manner that subverts scheme of distribution under BIA.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Creation of statutory trust

Pensions — G Inc. was subject to protection under Companies' Creditors Arrangement Act — Orders were made authorizing G Inc. to take steps to wind up two defined benefit pension plans — Monitor was ordered to hold back from distribution to creditors amount estimated to be wind up deficit in plans — Issues arose as to whether deemed trust arose as result of winding up orders, and as to priority of remaining funds as between administrator of pension plans and secured creditor — Motion judge granted secured creditor's motion to lift stay and ordered G Inc. into bankruptcy — Motion judge held that G Inc. was not obligated to make special wind up payments and was correct to seek directions — Motion judge held that amounts held by monitor should not be applied to pension plans — Motion judge held that priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind up deficiencies — Superintendent of Financial Services appealed — Appeal dismissed — Motion judge did not err in exercise of discretion to lift stay and order G Inc. into bankruptcy — It was clear that remaining funds were insufficient to meet claims of secured creditor and pension claimants — Breadth of motion judge's discretion was sufficient to construct bridge to Bankruptcy and Insolvency Act.

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

G Inc. was subject to protection under Companies' Creditors Arrangement Act — Orders were made authorizing G Inc. to take steps to wind up two defined benefit pension plans — Monitor was ordered to hold back from distribution to creditors amount estimated to be wind up deficit in plans — Issues arose as to whether deemed trust arose as result of winding up orders, and as to priority of remaining funds as between administrator of pension plans and secured creditor — Secured creditor brought motion to declare that G Inc. no longer had to make payments to pension plans ("pension motion") — Motion judge granted secured creditor's motion to lift stay and ordered G Inc. into bankruptcy — Motion judge held that G Inc. was not obliged to make special wind up payments — Motion judge held that amounts held by monitor should not be applied to pension plans — Motion judge held that priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind up deficiencies — Superintendent of Financial Services appealed — Appeal dismissed — Motion judge did not act improperly in adjourning pension motion on his own motion and adjournments did not amount to procedural unfairness — There was no error in motion judge's reasoning that if pension claimants wanted payments be made on wind up deficits, they would have had to have taken steps to compel such payments to be made — Motion judge did not err by failing to answer question posed by pension motion because distribution of remaining funds had to be in accordance with Bankruptcy and Insolvency Act priorities scheme.

Pensions --- Private pension plans — Administration of pension plans — Winding up of plan — Distributions on winding-up

G Inc. was subject to protection under Companies' Creditors Arrangement Act — Orders were made authorizing G Inc. to take steps to wind up two defined benefit pension plans — Monitor was ordered to hold back from distribution to creditors amount estimated to be wind up deficit in plans — Issues arose as to whether deemed trust arose as result of winding up orders, and as to priority of remaining funds as between administrator of pension plans and secured creditor — Motion judge granted secured creditor's motion to lift stay and ordered G Inc. into bankruptcy — Motion judge held that G Inc. was not obliged to make special wind up payments and did not authorize deemed trust to prevail in insolvency by granting wind up orders — Motion judge held that priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind up deficiencies — Supreme Court of Canada released decision holding that, prior to initial order, deemed trust arose when pension plan was wound up in respect of wind up deficits notwithstanding difficulty in determining precise amount of trust — Superintendent of Financial Services appealed — Appeal dismissed — Motion judge did not err in failing to order payment of wind up deemed trusts deficits before ordering G Inc. into bankruptcy — Once motion judge made that order, priorities established by Bankruptcy and Insolvency Act applied and rendered wind up deemed trust claims inoperative — Facts and issues in Supreme Court of Canada case differed from those of this case — There was no error in motion judge's reasoning that if pension claimants wanted payments be made on wind up deficits, they would have had to have taken steps to compel such payments.

Table of Authorities

Cases considered by *E.E. Gillese J.A.*:

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Generally — referred to

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Generally — referred to

s. 57(3) — considered

s. 57(4) — considered

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

s. 30(7) — considered

APPEAL by Ontario Superintendent of Financial Services from judgment reported at *Grant Forest Products Inc. v. GE Canada Leasing Services Co.* (2013), 2013 ONSC 5933, 2013 CarswellOnt 14057, 6 C.B.R. (6th) 1, 93 E.T.R. (3d) 15, 7 C.C.P.B. (2nd) 239 (Ont. S.C.J. [Commercial List]), granting secured creditor's motion to lift stay and order debtor companies into bankruptcy.

***E.E. Gillese J.A.*:**

Overview

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

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

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

4 During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on wind up of each plan (the "*wind up deemed trust*"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

5 The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

6 Sections 57(3) and (4) of the PBA read as follows:

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

7 The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

8 The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

9 For the reasons that follow, I would dismiss the appeal.

The Cast of Characters

10 Grant Forest Products Inc. ("*GFPI*") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

11 GFPI and related companies (the "*Applicants*") brought an application for protection from creditors under the CCAA (the *CCAA Proceeding*"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "*Remaining Applicants*" in the CCAA Proceeding.

12 Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "*Administrator*"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

13 Stonecrest Capital Inc. was appointed the chief restructuring organization (the "*CRO*") by court order dated June 25, 2009.

14 Ernst & Young Inc. was appointed the monitor (the "*Monitor*") by court order dated June 25, 2009.

15 The "*First Lien Lenders*" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

16 The "*Second Lien Lenders*" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

17 The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "*Second Lien Lenders' Agent*").

18 The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

19 West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "*West Face*"), are parties to the *Second Lien Credit Agreement* with the Remaining Applicants. The Second Lien Lenders (including West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

20 Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("*USSC*") in USSC's unrelated proceedings under the CCAA (the "*Intervener*") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

21 By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 192 (Ont. C.A.). Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

Background in Brief

Sale of the Applicants' Assets

22 On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

23 The court gave that protection by order dated June 25, 2009 (the "*Initial Order*"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

24 In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

25 GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

26 GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("*Georgia Pacific*"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. - Englehart Plan, which was the pension plan associated with the assets it had purchased.

27 Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17, 2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

28 Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

29 The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

30 A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

31 As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "*Remaining Funds*").

The Pension Plans

32 GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI - Timmins Plant (the "*Salaried Plan*") and (2) the Pension Plan for Executive Employees of GFPI (the "*Executive Plan*") (together, the "*Plans*").

33 Both of the Plans are defined benefit pension plans under the PBA.

34 The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business".

35 On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

36 A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

37 The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "*Superintendent's Wind Up Orders*"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

38 As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

39 GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "*Pension Motion*"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

40 When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "*Reserve Funds*").

41 The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

42 On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans. [1]

43 It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

44 On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

45 On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

46 By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

47 The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

48 On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

49 On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

50 When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

51 By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

52 West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

53 By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada Leasing Services Company in the outstanding bankruptcy application issued against GFPI.

Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "*Bankruptcy Motion*").

54 On October 22, 2012, it was submitted [2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "*Motions")*, however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

55 The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

56 The Supreme Court released its decision in *Indalex* on February 1, 2013.

57 On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

58 A further oral hearing on the Motions took place on July 23, 2013.

The Transition Order

59 The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "*Transition Order*"). Among other things, in the Transition Order, the court ordered that:

1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;

2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and

3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

60 In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

61 The Superintendent then sought and obtained leave to appeal to this court.

The Decision Below

62 In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

63 The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

64 The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

65 In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

66 The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

67 The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

68 The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

69 The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

70 The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

71 West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

72 Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A Summary of the Parties' Positions On Appeal

The Superintendent

73 The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

74 The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

75 The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

76 The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

77 First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

78 Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

79 Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

80 Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

81 Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

82 The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

83 West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

84 West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

85 Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

86 However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;

2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;

3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and

4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

87 The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

The Issues

88 The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

89 The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

90 West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

91 In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

92 To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions: *Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69 (B.C. C.A.), at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (Ont. C.A.), at para. 10.

93 With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

94 To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?

2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and

3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

The Standard of Review

95 The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]), at para. 29.

96 I would not accept this submission for two reasons.

97 First, in articulating this standard of review, *Resurgence* purported to follow *Royal Bank v. Fracmaster Ltd.*, 244 A.R. 93, 1999 ABCA 178 (Alta. C.A.). However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

98 Second, the applicable standard of review has been established by two decisions of this court: *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) and *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.). In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

99 The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

100 Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

Did the CCAA Judge Make a Procedural Error?

101 The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

102 I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

103 It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Ted Leroy Trucking Ltd., Re*, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

104 *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

105 It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced because there would have been even fewer funds available to satisfy their claims.

106 The CCAA judge was also aware that in March 2012 — some three months before the Pension Motion was brought — counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

107 Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

108 That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

109 In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

Did the CCAA Judge Err in Principle or Act Unreasonably in Lifting the Stay and Ordering the Remaining Applicants into Bankruptcy?

110 In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

111 At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

112 In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA — that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> ... The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco*, at paras. 62-63). [Citation excluded.]
>
> . . .
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. <u>The CCAA is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the BIA. The court must do so in a manner that does not subvert the scheme of distribution under the BIA. Transition to liquidation requires partially lifting the CCAA stay to commence proceedings under the BIA</u>. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

113 Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

114 The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and

4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

115 Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

116 Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

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

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

2. The Wind up Deemed Trusts

119 The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

120 I would not accept either submission.

Federal Paramountcy

121 In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

122 As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

123 Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

124 As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

125 In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

126 There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

127 The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

128 A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

129 Both the facts and the issues in *Indalex* differ from those of the present case.

130 There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made - the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

131 Second, the BIA played no part in *Indalex* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding. [3]

132 The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

133 As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

134 Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

135 It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

136 I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments ... .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA*. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

137 I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

138 Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going — the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order permitted, but did not require, GFPI to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem

to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

139 Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps — such as those suggested by the CCAA judge — to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

140 I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

141 In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A Concluding Comment

142 In my view, this case illustrates the value that a CCAA proceeding - rather than a bankruptcy proceeding - offers for pension plan beneficiaries. Three examples demonstrate this.

143 First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

144 Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. - Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

145 Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

146 I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

Disposition

147 Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

148 If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

***Doherty J.A.*:**

I agree

***P. Lauwers J.A.*:**

I agree

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

SERVICE

1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty- Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. ("SCI") in its capacity as Chief Restructuring Organization (the "CRO"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the "Pension Plans") or their respective trustees or to the Pension Administrator.

6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

Appeal dismissed.

Footnotes

1 Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

2 The record is unclear as to which party or parties made this submission.

3 See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

TAB 7

2016 ONSC 199
Ontario Superior Court of Justice

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.

2016 CarswellOnt 2673, 2016 ONSC 199, 264 A.C.W.S. (3d) 122, 34 C.B.R. (6th) 125

2403177 Ontario Inc., Applicant and Bending Lake Iron Group Limited, Respondent

D.C. Shaw J.

Heard: December 29-30, 2015
Judgment: January 8, 2016
Docket: Thunder Bay CV-14-0274-00

Counsel: Michael Strickland, for Applicant
Robert MacRae, for Respondent
Kenneth Kraft, for A. Farbert & Partners Inc.
Paul Denton — Receiver
Caitlin Fell, for Legacy Hill Resources Ltd.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
II Assignments in bankruptcy
II.4 Procedure on assignment
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Debtor was mining company whose major asset was mine site — After raising initial financing, debtor was unable to raise further financing — Creditor had provided secured loans with expectation that further financing would be obtained — Creditor was owed $3,120,159.33 as of June 2014 — Debtor was placed into receivership in September 2014 — Debtor's unsecured liabilities totalled $8,454,506.85, and owed more than $450,000 to Canada Revenue Agency — Receiver obtained order permitting it to attempt to sell debtor's assets — Debtor contacted purchaser without receiver's knowledge with view to obtaining financing — Receiver subsequently allowed purchaser to pursue purchase of debtor's assets — Receiver and purchaser entered into asset purchase agreement — Receiver brought motion for order approving sale to purchaser and for ancillary relief — Debtor brought cross-motion for order disallowing sale and for ancillary relief — Motion granted; cross-motion dismissed — Receiver had acted reasonably in accepting sole offer received after months of marketing — Debtor had not been able to raise funds to redeem secured loans or even to put in competing offer — Transaction was in best interests of all parties — Creditor stood to incur shortfall on its security but still supported sale — Court would not lightly interfere with commercial judgment of receiver — Debtor had not complied with receivership order when it contacted purchaser without receiver's knowledge.
Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment
Debtor was mining company that was placed into receivership in September 2014 — Debtor's secured liabilities totalled over $3.5 million while its unsecured liabilities totalled over $8.4 million — Debtor also owed more than $450,000 to Canada Revenue Agency — Receiver brought motion for, inter alia, order approving sale of assets to purchaser and authorizing receiver to file assignment in bankruptcy on behalf of debtor — Motion granted — Fact that directors of debtor might be personally liable for claim of Canada Revenue Agency for HST that debtor failed to remit was not a reason to deny assignment in bankruptcy — If HST was properly payable by debtor, there was no principled basis why it would be preferable that outstanding amounts should be borne by secured creditors rather than by persons who had responsibility at law to ensure that HST was remitted to government.

Table of Authorities

Cases considered by *D.C. Shaw J.*:

Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) — considered

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — followed

Deakin v. R. (2012), 2012 TCC 270, 2012 CarswellNat 2764, 2012 CCI 270, 2012 CarswellNat 4091, 2012 G.T.C. 42 (Eng.), 2012 D.T.C. 1231 (Eng.), [2012] G.S.T.C. 77, 4 B.L.R. (5th) 73 (T.C.C. [General Procedure]) — considered

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245, 1986 CarswellOnt 172 (Ont. S.C.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Terrace Bay Pulp Inc., Re (2012), 2012 ONSC 4247, 2012 CarswellOnt 9470, 92 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

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

Generally — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

MOTION by receiver for order approving sale to purchaser and for ancillary relief; CROSS-MOTION by debtor for order disallowing sale and for ancillary relief.

***D.C. Shaw J.*:**

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

2 The Receiver brings this motion for an order:

• approving the Asset Purchase Agreement, dated November 27, 2015 (the "Sale Agreement") between the Receiver and Legacy Hill Resources Ltd. ("LHR"), as assigned by LHR to 1053895 B.C. Ltd. and satisfying the Receiver's execution of the Sale Agreement;

• approving the transaction contemplated by the Sale Agreement (the "Transaction") and authorizing the Receiver to execute any additional documents for the completion of the Transaction;

• vesting title in the purchased assets free and clear of all encumbrances;

• authorizing the Receiver to file an assignment in bankruptcy on behalf of the Debtor;

• approving paragraph 20 of the First Report of the Receiver, dated November 18, 2014, relating to legal work for which the Debtor continued to have responsibility;

• approving the Second Report of the Receiver, dated January 20, 2015 and the Third Report of the Receiver, dated November 30, 2015;

• approving the fees and disbursements of the Receiver and its legal counsel as set out in the Third Report; and

• authorizing the Receiver to seal the unredacted version of the Third Report, containing commercially sensitive information, filed with the court, until after the closing of the Transaction.

3 The Receiver's motion is opposed by the Debtor. The Receiver's motion is supported by the Applicant, 2403177 Ontario Inc. which is the security agent acting on behalf of the secured creditors, C. Stuart Livingston and James MacLean. The motion is supported by the purchaser, LHR.

4 BLIG brings a motion for an order that the court not approve the Sale Agreement and that the Receiver be restrained from dealing further with LHR pending further order of the court. BLIG also requests an order that it be entitled to disclose to the BLIG shareholders the value of the LHR offer in the Sale Agreement and that BLIG be provided 90 days within which to arrange funding in an amount equal to the cash amount that LHR has agreed to pay under the Sale Agreement. BLIG seeks to have numerous paragraphs of the Receiver's Third Report struck.

5 BLIG also requested an adjournment of the Receiver's motion for a period initially stated to be 90 days, but revised on the hearing of the motion to 30 days, based on new information that it had received from counsel for the Receiver on December 23, 2015. For oral reasons delivered on December 30, 2015 during the hearing of the motions, I denied the request for an adjournment with leave to the parties to deliver by January 6, 2015 written submissions, not exceeding five pages, focused on the Receiver's decision to enter into the Sales Agreement with LHR, together with two pages on the issue of the Receiver's request to assign BLIG into bankruptcy, plus applicable case law. Those submissions and cases have been received and reviewed.

Background

6 BLIG is an early stage iron ore mine development company whose major asset is a mine site located in the Kenora Mining Division. BLIG's registered office is in Thunder Bay.

7 Henry Wetelainen is the President and CEO of BLIG and a major shareholder of the company.

8 BLIG owns 100% of the iron ore deposit at the mine site which occupies 624 hectares.

9 Although BLIG was successful in raising equity from 2008 to 2011 to finance further development of the mine site, it was unable to arrange any major financing in 2011 and 2012.

10 During 2012 BLIG negotiated with a Chinese company, Aiwan Investment Corporation, to raise $110 million in debt and equity. However, that transaction failed to be completed in the Fall of 2012 when Aiwan was unable to obtain permission to export capital from China.

11 From November 2011 to September 2012, in anticipation of financing being successfully completed, Mr. Livingston and Mr. Maclean, through the Applicant, advanced a series of loans to BLIG to fund development of the mine. After financing was unsuccessful, development at the mine site was suspended in 2013.

12 BLIG failed to make any loan payments to the Applicant after November 2012. As of June 2014, the accrued secured loans from the Applicant were recorded at $3,120,159.33.

13 As of October 21, 2015, the secured lenders' loans totalled in excess of $3.5 million, inclusive of accrued interest and costs.

14 BLIG had no employees as of the date of the Receivership Order, September 11, 2014.

15 Significant development remains to be done before the mine is in a position to commence operations.

16 Canada Revenue Agency has a claim for payroll deductions not made by BLIG, in the sum of $63,596.83 as of October 20, 2014. On August 25, 2015, Canada Revenue Agency gave notice of an HST reassessment of $391,802.96, for the period August 11, 2011 to October 31, 2015.

17 BLIG's creditor list, as of September 11, 2014, shows unsecured liabilities totalling $8,454,506.85. That list has not been audited by the Receiver.

18 On November 27, 2014, on motion by the Receiver, the court granted a Sales and Investor Solicitation Process Order (the "SISP Order"), on consent.

19 Pursuant to the SISP Order, the Receiver completed a list of interested parties through consultation with BLIG and the Receiver's network of advisors and investors in both the mining and the investment community, posted information on the Receiver's website, arranged for advertisements in the Northern Miner and Globe and Mail, set up and operated a virtual data room for interested parties (after they signed a confidentiality agreement) and liaised with the Ministry of Northern Development and Mines and Thunder Bay Development Corporation to facilitate due diligence and identification of interested parties.

20 The deadline for submissions of proposals under the SISP Order was February 27, 2015. As noted in the Third Report, market conditions were not ideal for attracting interested parties given the continuing depressed conditions in the mining sector and, in particular, in the iron ore sector. Since the commencement of the receivership in September 2014 through to the end of March 2015, the market price for a dry metric ton of iron ore declined from $82.27 to $56.94.

21 Pursuant to paragraph 4 of the SISP Order, the bid deadline was extended to March 27, 2015.

22 As a result of the SISP Order, over 120 interested parties were contacted by the Receiver. Twelve of the parties signed confidentiality agreements, were provided access to the virtual data room and undertook varying levels of due diligence. No offer or proposals were submitted by the extended deadline of March 27, 2015.

23 Meanwhile, at the beginning of February 2015, Mr. Wetelainen, on his own initiative, contacted a representative of LHR, Andrew Malim, LHR's Director of Project Development and Finance. At the time, the Receiver had no knowledge of the contact between Mr. Wetelainen and LHR.

24 In response to an e-mail dated February 5, 2015 from Dawn MacKay, the Chief Administrative Officer of BLIG, Mr. Malim sent an e-mail of that same date, stating in part:

> We are looking forward to looking at ways we can work together. We are confident, based on our iron ore operation on Chile which we own and manage, we can at least speak the same language.

25 On March 2, 2015, at the annual Prospectors and Developers Association of Canada convention in Toronto, Mr. Wetelainen met with Mr. Malim.

26 On March 10, 2015, Mr. Malim wrote to Mr. Wetelainen by e-mail:

> A pleasure to meet you at PDAC. We are planning a long term management and financing program in Ontario with the full support of the Ministry of Northern Development and Mines.
>
> We would be pleased to work with you to fund and develop your family property. We understand that the company is in receivership but with goodwill and understanding on all sides, we can come up with a workable solution, I am sure. We would like to revisit the historic date.
>
> Do you have a generic NDA (Non-Disclosure Agreement)?
>
> I attach our NDA if it works for you.

I look forward to hearing from you.

Kind Regards Andrew.

27 On March 10, 2015, Mr. Wetelainen responded by e-mail to Mr. Malim and said that he was looking forward to working with him.

28 On March 12, 2015 BLIG and LHR entered into a Confidentiality Agreement (Reciprocal Non-Disclosure).

29 Paragraph 2 of the Confidentiality Agreement provided, in part:

> 2. **Disclosure of Confidential Information:** The Disclosing Party may from time to time, disclose and provide to the Receiving Party certain Confidential Information pertaining to the Disclosing Party and the Transactions. The Receiving Party shall be entitled to review the Disclosing Party's Confidential Information solely in connection with the Receiving Party's evaluations, negotiation and/or consummation of a possible investment (the "Purpose") in or together with the Disclosing Party concerning the Transactions. ....

30 The Receiver was not aware that BLIG and LHR had entered into the Confidentiality Agreement.

31 Mr. Wetelainen deposes that he did not disclose LHR's interest to the Receiver at this time "...because LHR and BLIG were working together."

32 Mr. Wetelainen deposes that following the signing of the Confidentiality Agreeement, BLIG made available to LHR all of BLIG's intellectual property as well as the intellectual property of Mr. Wetelainen, of Ms. McKay and of Jay Mackie, who was another officer of BLIG.

33 Mr. Wetelainen asserts that the confidential information was provided to LHR in the context of discussions between LHR and BLIG about a joint venture/restructuring and refinancing of BLIG. Mr. Wetelainen takes the position that it was never his intention to propose a sale of BLIG's assets to LHR. Mr. Wetelainen states that the Confidentiality Agreement and the release of confidential information to LHR in furtherance of a joint venture/restructuring and refinancing of BLIG created a fiduciary duty between LHR and BLIG that required both parties to act in a manner that was not harmful to the interests of either of them.

34 The Receiver did not become aware of the Confidentiality Agreement or of the fact that BLIG had provided confidential information to LHR until receipt of an affidavit of Mr. Wetelainen, sworn December 17, 2015, in support of BLIG's motion opposing court approval of the November 27, 2015 Sale Agreement between the Receiver and LHR.

35 The Receiver also reports that it had no knowledge of the existence of many of the confidential documents described in Mr. Wetelainen's affidavit of December 17, 2015 that he gave to LHR.

36 The Receiver takes the position that the actions of Mr. Wetelainen and BLIG in undertaking a parallel sales process, failing to provide confidential documents to the Receiver and negotiating and entering into agreements with LHR, without the Receiver's knowledge, contravene the Receivership Order. BLIG takes the position that because the Receiver was not appointed as manager of the Debtor and did not take possession or control of the property under the Receivership Order, Mr. Wetelainen was entitled, on behalf of BLIG, to enter into the Confidentiality Agreement with LHR and provide LHR with confidential information.

37 The Receiver first became aware of discussions between LHR and Mr. Wetelainen (but not of the Confidentiality Agreement or the disclosure of confidential information) on March 23, 2015, during a discussion between the Receiver and Mr. Wetelainen. The Receiver reports that at that time it informed Mr. Wetelainen that the negotiations with LHR should properly be under the Receiver's purview as part of the SISP Order.

38 Discussions between the Receiver and LHR ensued. LHR signed a Confidentiality Agreement with the Receiver on April 7, 2015. LHR then accessed the Receiver's virtual data room.

39 Although the extended bid deadline of March 27, 2015 under the SISP Order had expired, paragraph 7 of the SISP, attached as Schedule "A" to the SISP Order, provided that following the bid deadline:

> If the Receiver is unable to negotiate a Final Asset Purchase Agreement (APA), the Receiver shall be at liberty to negotiate and finalize an APA/transaction with such other offering party or parties as it deems appropriate, subject to consulting first with the secured lenders.

40 The Third Report of the Receiver sets out the due diligence activities of LHR from May through September 2015, which included extensive consultations with the Receiver, with the secured lenders, with BLIG representatives and with representatives of the Ministry of Northern Development and Mines.

41 The Receiver reports in its Third Report that Mr. Wetelainen was initially kept apprised of the Receiver's discussions with LHR and developments in their due diligence process. Mr. Wetelainen attended meetings with LHR and facilitated a visit to the mine site with representatives of LHR in early June 2015. The Receiver reports:

> As its due diligence progressed, Legacy Hill subsequently indicated to the Receiver that it would not be involving Mr. Wetelainin in the process going forward and it would not be seeking to offer Mr. Wetelainin a consultancy role or any other position with the Purchaser upon the closing of the Transaction.

42 During the period from April to September 2015, the Receiver received no concrete proposals nor expressions of interest for a restructuring or sale of BLIG in what continued to be very depressed conditions for the mining sector. Only LHR presented a proposal to the Receiver.

43 On September 30, 2015 LHR executed a non-binding letter of intent to purchase the assets of BLIG.

44 The Receiver and LHR concluded the Sale Agreement on November 27, 2015.

45 Mr. Wetalainen first learned of the Sale Agreement when counsel for BLIG received a November 26, 2015 e-mail from counsel for the Receiver advising that the Receiver would be bringing a motion returnable December 10, 2015, seeking an order approving an Agreement of Purchase and Sale in respect of the assets of BLIG. A redacted copy of the Sale Agreement was provided to BLIG's counsel on November 30, 2015. An unredacted copy was provided shortly thereafter.

46 Mr. Wetelainen deposes that the Receiver did not provide BLIG with any information with respect to meetings between the Receiver and representatives of LHR on September 29 and 30, 2015 leading to the execution of non-binding Letter of Intent on September 30, 2015. BLIG was not advised that LHR was intending to purchase the assets of BLIG. Mr. Wetelainen deposes that he continued to work towards the goal of refinancing BLIG while the negotiations between LHR and the Receiver for the sale of BLIG's assets were going on.

47 Mr. Wetelainen deposes that at all times it was his belief that LHR was committed to working with BLIG to refinance the mine project. Mr. Wetelainen also deposes that the Receiver knew that LHR and BLIG were working together to refinance BLIG out of receivership. He notes that there would be no other incentive for him to work on an unpaid basis to assist the Receiver as, for example, attending at the mine site in early June 2015, with representatives of LHR.

48 Mr. Wetelainen points to a September 17, 2015 e-mail from Mr. Malim to the Receiver:

> Am working on Toronto trip pref next week. Does Wed and Thurs make sense. We will spend some time with our lawyers papering agreements to give you time out. Are you able to guide me: if we elect that Henry's status going forward may be in the form of contracting work etc. rather than equity, do we fall foul of Treaty Law? Is equity carry mandatory for

Aboriginal interests. You will understand that in our view there was abuse of trust by Henry and his team which contributed to the downfall of the business....

49 Redacted

50 The secured lenders have given an undertaking to the Receiver that in the event the share consideration may be monetized to pay out the secured lenders in full, after application of the cash purchase price, the secured lenders will pay any funds received from the monetization of the share consideration in excess of the payment amount to the Receiver. This obligation remains open for three years after the closing date.

51 The Receiver recommends court approval of the Sale Agreement on the basis that the purchase price represents the only offer and therefore the best and highest offer in the circumstances. The Receiver reports that the offer was received after the market was adequately canvassed throughout 2015 in what was and continues to be a challenging market. During the years preceding the receivership (2012-2014), BLIG also canvassed the market in an attempt to secure debt financing and/or equity but without success.

52 The secured lenders have approved the Sale Agreement.

53 BLIG opposes approval of the Sale Agreement on the grounds that the Receiver has shown a lack of impartiality in its conduct after the e-mail of September 17, 2015 from LHR to the Receiver. BLIG submits that the e-mail demonstrates that LHR reneged in its commitment to BLIG and to the Receiver to work to refinance or restructure BLIG. BLIG submits that after the September 17, 2015 e-mail from LHR, the Receiver, as an officer of the court, having worked with BLIG and LHR to refinance or restructure the company, should have been on notice to make inquiries into why there had been a parting of the ways between LHR and BLIG and to inquire into the good faith of LHR. BLIG submits that the Receiver created an expectation on the part of BLIG that BLIG would successfully recover from the receivership by way of a transaction between LHR and BLIG.

54 BLIG submits that the Receiver has shown its partiality by failing to mention in its Third Report that BLIG was working with LHR to refinance or restructure the company when the Receiver knew or ought to have known that BLIG was to have a stake in the final arrangement. BLIG submits that the Receiver has refused to provide an affidavit which it characterizes as evidence of conduct designed to deprive BLIG of its opportunity to fully canvass the deficiencies and inaccuracies in the Receiver's report. BLIG contends that the Receiver's Third Report is biased and drafted in such a way as to suggest to the court that certain events occurred or did not occur and, as such, the Third Report should be rejected by the court.

55 BLIG submits that LHR violated its fiduciary duty to BLIG, under the Confidentiality Agreement, by purchasing the assets of BLIG, when the stated purpose of the Confidentiality Agreement was to allow LHR to evaluate, negotiate and consummate a possible investment in, or with, BLIG.

56 BLIG also submits that the Receiver has become an advocate for the Applicant and for LHR.

Discussion

57 All parties agree that the principles in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) are to be applied when reviewing a sale by a court appointed receiver. The duties which the court must perform in deciding whether the Receiver who has sold a property acted properly are summarized by Galligan J.A.:

(a) It should consider whether the receiver made a sufficient effort to obtain the best price and has not acted improvidently;

(b) It should consider the interests of all parties;

(c) It should consider the efficacy and integrity of the process by which the offers are obtained; and

(d) It should consider whether there has been unfairness in the working out of the process.

58 In *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]) (motion granted to quash the appeal (1999), [2000] O.J. No. 467 (Ont. S.C.J. [Commercial List]) at paras. 6 and 7 Farley J. set out additional principles to be applied:

> 6. Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors (citations omitted).
>
> 7. Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed (sic) in detail every element of the procedure by which the receiver made the decision (so long as the procedure fits with the authorized process specified by the court if a specific order to that affect (sic) has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval (citations omitted).

59 I will address the four *Soundair* principles as applied to the facts in this case.

1. Consideration of whether the Receiver made a sufficient effort to obatin the best price and has not acted improvidently.

60 I am satisfied that the Receiver made and adequate efforts at marketing the Property.

61 Under the SISP, the Receiver contacted more than 120 interested parties. Of those more than 120 parties, 12 signed confidentiality agreements and accessed the Receiver's virtual data room.

62 When none of the interested parties put in an offer by the end of the extended bid dealine, the Receiver continued to market the Property as he was entitled to do under the SISP Order.

63 The iron ore market is depressed. This is evidenced by the fact that none of the more than 120 interested parties contacted through the SISP were prepared to make an offer.

64 On the hearing of the motions, BLIG expressed the opinion that the mine site, when fully in default, was worth a minimum of $125 million.

65 Unfortunately for the shareholders and creditors of BLIG, the market has determined what the mine site is worth. The Receiver reported receiving only the one offer that is before the court for approval.

66 Although the secured creditors are owed approximately 3% of what BLIG says is the value of the mine site, BLIG has not been able to raise funds to redeem the secured loans or even to put in a competing offer.

67 The Receiver has acted reasonably and not improvidently in accepting the only offer it has received after months of marketing.

2. Consideration of whether the transaction is in the best interests of all parties.

68 Although the Receiver owes a duty to all stakeholders, its primary duty in this case is to maximize the return for the secured credtiors. Even with the sale, the secured creditors stand to incur a shortfall on their security. They are the only parties with a real economic interest in the sale. They support the sale. They do not want to hold out in the hopes of attracting a better offer, even in face of the shortfall.

69 BLIG opposes the sale, but does so not to provide the secured lenders with a better result, but in the context of wanting an opportunity over the next three months to match the cash purchase price offered by LHR, now that BLIG knows what cash purchase amount is, and to receive a discharge of the secured loans.

70 As noted in *Soundair*, in an appropriate case, the interests of the debtor must be taken into account. In this case, although the debtor may have had an expectation that it would be able to refinance the company through a relationshp with LHR, that expectation did not come to fruition. Approval of the sale should not be denied, and the modest recovery by the secured lenders jeopardized, on the mere possibility that BLIG could match the LHR offer. I will have more to say about BLIG's expectation interest.

71 In *Soundair*, Galligan J.A. observed that where a purchaser has bargained at some length and epxense, its interests also ought to be taken into account.

72 In my view, in this case, it is the interests of the secured lenders, who I note are the only ones paying the costs of the Receiver, which must prevail. As such, their support of the sale assumes great significance.

3. Consideration of the efficiency and integrity of the process by which the offer was obtained.

73 In respect of this principle, Galligan J.A. referred to the decision of Saunders J. in *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), at p. 246:

> In dealing with the request for approval the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection, I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R.(2)303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
>> In my opinion, if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they did a binding agreement. On the contrary, they would know that other bids could be received up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

74 Apart from the uncertainty, and indeed the speculative nature, of BLIG's proposal to be given time to match or even better the offer from LHR, acceptance of that proposal would adversely affect the integrity of the process undertaken by the Receiver.

75 The Receiver negotiated in good faith with LHR. The Receiver's decision to enter into an agreement with LHR, under the circumstances at the time the agreement was negotiated was reasonable. There were no competing offers despite months of marketing. The Receiver was not privy to the e-mails of February 5 and March 10, 2015 between Ms. MacKay and LHR and Mr. Wetelainen and LHR. The Receiver was unaware that Mr. Wetelainen had taken it upon himself to enter into a confidentiality agreement with LHR. The Receiver had been informed in September 2015 by LHR that Mr. Wetelainen would have no involvement with LHR's plans going forward. With the secured creditors' interests as its prime concern, the Receiver had no reason to reject the offer of LHR, with nothing to replace it.

76 The court will not lightly interfere with the commercial judgment of a receiver. Nor will it examine in minute detail all the circumstances leading up to the decision of a receiver to sell what, in this case, was an unusual asset in difficult economic conditions. See *Soundair* at para. 47.

4. Consideration whether there has been unfairness in the working out of the process.

77 BLIG's opposition to the sale is focussed on this principle.

78 I address, firstly, the question of the Confidentiality Agreement between BLIG and LHR and BLIG's provision of confidential documents to LHR under that Confidentiality Agreement.

79 In my view, these actions by BLIG were contrary to the provisions of the Receivership Order of September 11, 2014 and the SISP Order of November 24, 2014.

80 Paragraph 3 of the Receivership Order gives the Receiver broad powers. Pursuant to paragraph 3(g), these powers are exclusive to the Receiver. There is an express exclusion of the Debtor. Included in the Receiver's exclusive powers is the right, under paragraph 3(e) to execute any documents of any nature in respect of the assets, undertakings and properties of BLIG. Pursuant to paragraph 3(g), the Receiver alone has the right to market any or all of the assets, undertakings and properties of BLIG as the Receiver, in its discretion, may deem appropriate.

81 Under paragraph 2 of Schedule "A" of the SISP Order, the Receiver was empowered to solicit offers to purchase, or to invest in, the Debtor and/or the Property.

82 Paragraph 4 of Schedule "A" contemplates confidentiality agreements between the Receiver and prospective purchasers. It contemplates that the Receiver will establish a virtual data room. These are not activities upon which the Debtor should be embarking.

83 I do not accept BLIG's submission that because the Receiver was not appointed as manager of the Debtor and was not to operate the business, that this gave BLIG licence to engage in parallel negotiations that could well compromise the Receiver's negotiations. The fact that the Receiver did not operate the business does not derogate from the exclusivity of the powers that it the Receiver was given under the Receivership Order and the SISP Order.

84 I understand BLIG to be submitting that although the Receiver could pursue a sale of assets, it was open to BLIG to pursue the alternative of a refinancing or restructuring without the Receiver's knowledge or consent. This flies in the face of paragraph 2 of Schedule "A" of the SISP Order which provides that the Receiver may solicit both or either the purchase of or investment in the Debtor. If BLIG's submission is accepted, it could result in the Debtor working at cross-purposes with the Receiver and, as here, without the Receiver's knowledge of what marketing or solicitation activities that the Debtor might be engaged in.

85 There can be no questionning of the duty of the Debtor, and all persons related to the Debtor, to make full and frank disclosure and production of information and documents to the Receiver.

86 Paragraph 5 of the Receivership Order provides that all persons "...shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request".

87 Paragraphs 6 and 7 of the Receivership Order require all persons to advise the Receiver of the existence of any books, documents, contracts, records and computer or other data storage information, provide it to the Receiver and give the Receiver unfettered access to all electronic storage of information. "Contracts" would include the Confidentiality Agreement between BLIG and LHR.

88 By providing confidential information to LHR, without disclosing that fact to the Receiver, and by failing to provide much of that information to the Receiver, BLIG did not comply with the Receivership Order.

89 I accept that BLIG may have had an expectation that it was involved in discussions with LHR about refinancing or restructuring the company.

90 However in opposing the Receiver's sale, BLIG should not be able to rely on an expectation interest founded on a Confidential Agreement that it should not have signed, or rely on the delivery of confidential documents that it should not have given to LHR and, moreover, having done this while keeping the Receiver in the dark and while withholding from the Receiver significant portions of the confidential information that it had provided to LHR.

91 Even if the Receiver was aware of discussions between BLIG and LHR about possible refinancing or restructuring, the Receiver was not required to work towards restructuring or refinancing rather than an asset purchase. Paragraph 7 or Schedule "A" to the SISP Order provided that if, following the bid deadline, the Receiver was unable to negotiate a final agreement, it was at liberty to negotiate and finalize an asset purchase agreement with such other offering party as it deemed approprate, subject to the requirement that it consult first with the secured lenders. Paragraph 7 of Schedule "A" did not require the Receiver to consult with the Debtor, nor did any other provision of the SISP Order or the Receivership Order require the Receiver to consult with the Debtor before finalizing the Sale Agreement.

92 BLIG attacks the impartiality of the Receiver on the basis that (1) the Receiver knew that LHR had made a commitment to BLIG to work toward refinancing or restructuring the company, and (2) the Receiver itself created an expectation in BLIG that the receivership would be resolved by a refinancing or restructuring through LHR.

93 It bears repeating, in considering this attack on the Receiver's neutrality, that the Receiver had no knowledge of the Confidentiality Agreement between BLIG and LHR and no knowledge that BLIG had given LHR confidential documents, until this was revealed in Mr. Wetelainen's affidavit of December 17, 2015. This was well after the non-binding Letter of Intent from LHR in September 2015 and after the November 27, 2015 Sale Agreement.

94 Did the Receiver have notice of a commitment by LHR to work with BLIG? Mr. Wetelainen expressly deposes that he did not disclose the Confidentiality Agreement and delivery of confidential documents to LHR because BLIG and LHR "were working together". In my view, the e-mails between BLIG and LHR that the Receiver saw, and the fact that Mr. Wetelainen met with LHR representatives and toured the mine site with them, would not have reasonably led the Receiver to conclude that LHR had committed itself to work with Mr. Wetelainen in refinancing or restructuring the company. The only agreement that BLIG and LHR actually entered into was the Confidentiality Agreement which was unknown to the Receiver. In the circumstances as known by the Receiver, I do not see that the September 17, 2015 e-mail from LHR reasonably put the Receiver on notice that it should make inquiries about why LHR would not be working with BLIG to refinance or restructure the company. As the Receiver reports, LHR indicated to the Receiver that it would not be involving Mr. Wetelainen nor offering him a position with the purchaser. I see no reason why the Receiver should have been obligated to explore this straight forward position or, even more, why the Receiver should have been obligated to lobby LHR on behalf of BLIG.

95 I do not accept that the Receiver's actions between April and September, 2015 could be reasonably viewed as creating an expectation in Mr. Wetelainen that the receivership would be resolved by LHR and BLIG working together.

96 BLIG relies upon the June 1, 2015 e-mail from the Receiver to Mr. Wetelainen in which the Receiver stated that, in conducting its due diligence, LHR wanted to speak to Mr. Wetelainen "about the go forward and what stake you and the team would have going forward so I think it in your interest to work with them."

97 In my view, this does not rise to the level that the Receiver was representing that there was a commitment by LHR to involve Mr. Wetelainen and the "team" in a refinancing or restructuring.

98 I assume BLIG wants the court to conclude that if the Receiver had been put on inquiry after September 17, 2015:

(a) the Receiver would have learned of the Confidentiality Agreement between LHR and BLIG;

(b) the Receiver would have learned of the confidential information that BLIG gave to LHR; and

(c) the Receiver would have concluded that there was a fiduciary relationship between LHR and BLIG that precluded an asset purchase.

99 If this is BLIG's argument, it is of no avail. In effect, BLIG would be saying that if the Receiver had made inquiries the Receiver would have discovered BLIG's wrongful conduct and that this discovery would have been to the benefit of BLIG.

100 The Receiver was never presented with any refinancing or restructuring proposal by LHR or BLIG. It had only an asset purchase proposal from LHR. If in fact, LHR was going to refinance or restructure the company, it would have had to do so through the Receiver, not through Mr. Wetelainen.

101 BLIG submits that the Receiver has lost its impartiality by acting as an "advocate' for LHR and/or the Applicant, in the sense that the Receiver is a spokesperson or is campaigning on their behalf.

102 The fact that a receiver recommends a course of action does not mean that it has lost its neutrality. The Receiver has a duty to exercise its judgment under the mandate given to it by the Receivership Order and to make recommendations to the court. Provided that the Receiver has acted reasonably, prudently and fairly, its decision should be given deference.

103 Although the Receiver owes a duty to all the stakeholders to treat them fairly, the Receiver's primary task is to ensure that the highest value is received for the assets to maximize the return to the creditors. See *Soundair* a p. 12.

104 BLIG has presented no evidence that it is able to refinance or restructure the company. In the words of the Receiver, BLIG is "hopelessly insolvent". It owes over $3.5 million to the secured creditors, over $8 million to the unsecured creditors and more than $450,000 to Canada Revenue Agency.

105 I do not find that the conduct of the Receiver shows any unfairness to BLIG. At all times, BLIG had all of the information that it needed and, indeed, certain information that the Receiver did not have, to make its own proposal. BLIG simply did not have the financial wherewithal to make a commercially viable offer to the Receiver. Even during the month after BLIG became aware of the details of the Sale Agreement, it has not been able to put forward a concrete proposal, only a request for further time to raise funds.

106 In *Soundair*, Galligan J.A., at para. 58 adopted these statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.):

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiations of every sale would take place on the motion for approval.
>
> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

107 In my view, the Receiver acted reasonably, prudently and fairly and not arbitrarily. It followed a reasonable and thorough process to get the best price for the assets of BLIG, a process which was fair to all persons who might be interested in purchasing the assets of BLIG or investing in BLIG. There was only one offer. Mr. Wetelainen's actions in dealing directly with LHR and withholding confidential information from the Receiver, and any expectations that he may have had arising out of those activities, do not justify rejection of the Sale Agreement. This is not an "exceptional case" which warrants the court proceeding against the Receiver's recommendations.

108 Is there reason to refuse approval of the Sale Agreement because LHR had confidential information from BLIG that the Receiver did not have at the time the Sale Agreement was negotiated?

109 Firstly, this is confidential information that the Receiver should have had at the outset and that it would have shared with LHR. BLIG cannot rely on its own contravention of the Receiving Order to complain about this. Secondly, even with this new information, the Receiver does not seek to re-open the Sale Agreement to obtain a better price. Thirdly, and in my view most importantly, even with this new information, the secured lenders support approval of the Sale Agreement. The secured lenders are faced with a significant shortfall between their outstanding loans and what they will receive from the cash payment, net of the Receiver's fees and disbursements. Nevertheless, the secured creditors do not want to reopen the process on the chance that with this additional confidential information there may be another proposal that will give them a better result.

Sealing Order

110 The parties consent to an order sealing the unredacted version of the Third Report from the public record until after the closing of the Transaction.

111 In this regard, paragraph 49 of these Reasons have been redacted until after the closing of the Transaction. The unredacted paragraph has been released to counsel for the Receiver, counsel for the Applicant, counsel for BLIG and counsel for LHR, all of whom have the unredacted Third Report.

Fees and Disbursements of the Receiver and its Legal Counsel

112 The parties consent to an order approving the fees and disbursements of the Receiver and its legal counsel as set out in the Third Report.

Authorization for the Receiver to file an Assignment in Bankruptcy on Behalf of the Debtor.

113 The Receiver wishes to assign BLIG into bankruptcy.

114 Presently, the Property of BLIG is subject to a deemed trust in favour of the Crown in respect of the claim by Canada Revenue Agency for HST. An assignment in bankruptcy would nullify that deemed trust so that the HST claim would rank equally with all other unsecured creditors of BLIG.

115 Bankruptcy would not affect the amounts deemed to be held in trust with respect to source deductions.

116 Additionally, if BLIG was assigned into bankruptcy and funds were realized from the monetization of the share consideration in excess of the secured creditors' loans, those funds would go to the trustee in bankruptcy, to be distributed to the unsecured creditors.

117 BLIG opposes the request for an assignment in bankruptcy. BLIG submits that although bankruptcy would assist the secured lenders, it would be detrimental to the directors of BLIG because Canada Revenue Agency may proceed against them personally for the HST that was not paid.

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

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

120 To similar effect is the following statement by Wallace J.A. in *Bank of Montreal v. Scott Road Enterprises Ltd.*, 1989 CarswellBC 337 (B.C. C.A.):

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

121 As observed in *Deakin v. R.*, 2012 TCC 270 (T.C.C. [General Procedure]), at para. 24, the directors' liability provisions of the Excise Tax Act should be regarded by business persons as similar to a form of personal guarantee by the directors.

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

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

Thomas Unger

124 At the conclusion of submissions on the motions on December 30, 2015, Thomas Unger, who was Vice President, Corporate Development and a director and shareholder of BLIG and who had been present in the body of the court during submissions, asked to address the court Mr. Unger had not filed any materials with the court, he was not represented by counsel and he is not a party to the proceeding. Mr. Unger wanted to speak about an offer that he had made.

125 All parties — the Receiver, BLIG, the Applicant and LHR — objected to Mr. Unger addressing the court and took the position that he did not have standing.

126 I declined to hear the evidence that Mr. Unger wanted to give from the counsel table.

127 During the afternoon of January 6, 2016, the law firm of Kronio, Rotsztain, Margles, Cappel sent to my attention an e-mail, copied to the parties, which stated:

> We have been requested by 176724 Canada Ltd. and 1874084 Ontario Limited to forward to you the attached Affidavit of Thomas George Unger, sworn January 6, 2016
>
> Yours very truly,
>
> Kelly Banet Law Clerk
>
> Kronis, Rotaztain, Maryles, Cappel LLP.

128 I did not grant Mr. Unger standing on December 30, 2015 nor did I grant him leave to file an affidavit after the motions had been argued.

129 The law firm which e-mailed Mr. Unger's Affidavit is not shown as counsel of record for Mr. Unger. The affidavit shows him as unrepresented.

130 Mr. Unger deposes that on November 25, 2015, after having been in contact with the Receiver since late 2014, he sent a detailed written "offer" to the Receiver to confirm that 1874084 Ontario Limited, a company of which he was the principal, was "very serious" in wanting to complete the purchase of the assets of the debtor. I have reviewed this letter, attached as an Exhibit to the affidavit. It is not a formal offer but rather a letter setting out what steps Mr. Unger had taken and planned to take to purchase BLIG's assets.

131 Mr. Unger deposes that on November 27, 2015, at approximately 5:00 p.m., the Receiver confirmed that it had forwarded 187084's "offer" to the Applicant. Mr. Unger deposes that the Receiver advised that it was not able to consider 1874084's "offer" as it had just completed an agreement of purchase and sale with LHR that afternoon.

132 On December 1, 2015, Mr. Unger sent the Receiver a letter saying that he was "...well underway to complete a restructuring for the Bending Lake assets" and that he was raising an amount of money in excess of the amount set out in his letter of November 25, 2015. Again, I do not regard this letter as a formal offer.

133 On December 24, 2015, Mr. Unger delivered a Binding Letter of Intent on behalf of 1874084 to the Receiver for a purchase price in excess of the amounts set out in his first two letters.

134 On December 28, 2015, Mr. Unger wrote to the Receiver, criticizing the process that the Receiver had followed. He asked the Receiver to request that the Court approve the Binding Letter of Intent from 1874084 on the grounds that it was better for the secured lenders than the offer from LHR.

135 In my view, Mr. Unger does not have standing. He is not a party. If I am incorrect in this view, he has come to the proceedings too late to consider his position.

136 I rely on statements of O'Connor J.A., speaking for the Court of Appeal in *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), [2000] O.J. No. 467 (Ont. S.C.J. [Commercial List]), paras. 16, 17 and 22:

> 16. Moreover, the fundamental purpose of the sale approval motion is to consider the best interest of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.
>
> 17. In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg*, supra; *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right of interest in a prospective purchaser that is affected by a sale approval order.
>
> . . .
>
> 22. In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

137 I also refer to *Terrace Bay Pulp Inc., Re*, [2012] O.J. No. 3628 (Ont. S.C.J. [Commercial List]), a decision of Morawetz J, where he found that the Monitor in a *Companies' Creditors Arrangement Act* proceeding acted properly in accepting the Purchaser's Offer in the face of a non-binding offer from another party that was approximately 30% higher.

138 I find it noteworthy that the secured lenders opposed granting Mr. Unger standing at the hearing of the motions.

Motions by BLIG

139 For the reasons given, BLIG's motion to not approve the Sale Agreement, to restrain the Receiver from dealing with LHR and for leave to disclose to the shareholders of BLIG the value of the LHR offer to enable them within 90 days to match the LHR cash consideration portion of the LHR offer, is dismissed.

140 I also dismiss BLIG's motion to strike certain paragraphs of the Receiver's Third Report.

141 BLIG sought to strike the paragraphs, on various grounds including that the paragraphs failed to disclose certain information, that they did not provide adequate explanations for the Receiver's actions, that they lacked factual underpinnings and that they did not present the best option for the stakeholders.

142 BLIG did not provide any authority for its motion to strike the paragraphs of the Report. In essence, the motion to strike was based on the fact that Mr. Wetelainen's affidavit contained information that either added to the information in the Third Report, or set out a position different from the position taken by the Receiver. In my view, that is not a basis for striking the paragraphs of the Report, identified in the motion. Without deciding whether in an appropriate case the court may strike parts of a receiver's report, suffice it to say that in the circumstances of this case I do not accept that BLIG has established that there is reason to strike the impugned paragraphs of the Third Report.

143 In determining the outcome of the motions of the Receiver and of BLIG, I have considered the three reports of the Receiver, as well as the Receiver's Supplemental Report to the Third Report, and the affidavits of Mr. Wetelainen and Laura MacRae, filed on behalf of BLIG.

Conclusion

144 For the reasons given, the relief sought in the Receiver's Notice of Motion, dated November 30, 2015, is granted. The motions of BLIG are dismissed.

Costs

145 If costs of the motions are in issue, the parties shall contact the Trial Co-ordinator at Thunder Bay within 30 days to set a date to speak to the matter, failing which costs shall be deemed to be settled.

Motion granted; cross-motion dismissed.

2009 CarswellOnt 374
Ontario Superior Court of Justice [Commercial List]

Bank of Nova Scotia v. Huronia Precision Plastics Inc.

2009 CarswellOnt 374, [2009] G.S.T.C. 12, [2009] O.J. No. 312, 176 A.C.W.S. (3d) 31, 50 C.B.R. (5th) 58

The Bank of Nova Scotia (Applicant) v. Huronia Precision Plastics Inc. (Respondent)

Morawetz J.

Heard: November 4, 2008
Judgment: January 26, 2009
Docket: CV-08-7722-00CL

Counsel: Sam Rappos, for Applicant, Bank of Nova Scotia
A'Amer Ather, for Canada Revenue Agency
Chris Burr, for Maxium Financial Services Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

Tax

I General principles

I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for bankruptcy order against company — Canada Revenue Agency ("CRA") also brought motion in which it sought order directing receiver to pay CRA GST debt of $63,164.17, and in event that court permitted lifting of stay, order permitting CRA to take necessary steps to protect its priority position over GST held in trust — Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank — Bank's motion granted; CRA's dismissed — Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act — Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order — Desire for bank to alter priorities was legitimate reason to seek bankruptcy — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for bankruptcy order against company — Canada Revenue Agency ("CRA") also brought motion in which it sought order directing receiver to pay CRA GST debt of $63,164.17, and in event that court permitted lifting of stay, order permitting CRA to take necessary steps to protect its priority position over GST held in trust — Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank — Bank's motion granted; CRA's dismissed — Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act — Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order — Desire for bank to alter priorities was legitimate reason to seek bankruptcy.

Table of Authorities

Cases considered by *Morawetz J.*:

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — followed

Statutes considered:

TAB 8

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "bankrupt" — considered

s. 43 — pursuant to

s. 67(2) — considered

s. 67(3) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

Pt. IX, Div. II [en. 1990, c. 45, s. 12(1)] — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] — considered

MOTION for order permanently lifting order for stay of proceedings against company; MOTION for order directing receiver to pay Canada Revenue Agency amount of $63,164.17.

***Morawetz J.*:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA

submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

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

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

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

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

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

Order accordingly.

TAB 9

2010 ONCA 456
Ontario Court of Appeal

Chartrand, Re

2010 CarswellOnt 4044, 2010 ONCA 456, 189 A.C.W.S. (3d) 599, 267 O.A.C. 91, 69 C.B.R. (5th) 143

IN THE MATTER OF THE BANKRUPTCY OF MARCEL CHARTRAND, AN INDIVIDUAL RESIDING IN THE TOWN OF HAWKESBURY, COUNTY OF PRESCOTT, IN THE PROVINCE OF ONTARIO, BUSINESSMAN

CIBC Mortgages Inc., Trading as Firstline Mortgages (Applicant / Appellant) and Marcel Chartrand (Respondent / Respondent)

Karen M. Weiler, R.A. Blair, Paul Rouleau JJ.A.

Heard: June 2, 2010
Judgment: June 21, 2010
Docket: C50804

Proceedings: reversing *Chartrand, Re* (2009), 2009 CarswellOnt 8356 (Ont. S.C.J.)**Proceedings: additional reasons at *Chartrand, Re* (2009), 2009 CarswellOnt 8349 (Ont. S.C.J.)**

Counsel: Benjamin Frydenberg for Appellant
Marcel Chartrand for himself

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.vi Dispute of debt
Headnote
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Dispute of debt
Debtor owed mortgage debt to creditor in amount of $237,474.75 — Debtor was involved in litigation with Canada Revenue Agency (CRA) concerning arrears of GST in amount of $175,000 and his assets were frozen — Appraisal reports appraised value of property at between $209,000 and $230,000 — Debtor did not make payments to creditors — Creditor bank estimated value of security at $200,000 — Creditor brought application for bankruptcy against debtor and application was dismissed as creditor did not prove that it met requirements of s. 43(2) of Bankruptcy and Insolvency Act — Creditor appealed decision — Appeal allowed — Date for valuing creditor's security was date of application — Creditor's claim ranked behind CRA claim for GST, and on date of application, there was in excess of $100,000 of unsecured debt owed to creditor — Creditor's application appeared to overvalue secured debt by $100,000 to it's detriment and it therefore appeared that argument was not made before application judge — Debt owed was certain and it was apparent there was problem of unsecured indebtedness.
Table of Authorities
Cases considered:
A.E.S. Empire Inc., Re (1989), 77 C.B.R. (N.S.) 33, 1989 CarswellOnt 193 (Ont. S.C.) — considered
C. Tokmakjian Ltd., Re (2003), 2003 CarswellOnt 4616, [2003] O.T.C. 1027, 46 C.B.R. (4th) 227 (Ont. S.C.J.) — considered
Fred Walls & Son Holdings Ltd., Re (1999), 1999 CarswellBC 1873, 13 C.B.R. (4th) 60 (B.C. S.C.) — considered

Fred Walls & Son Holdings Ltd., Re (2003), 40 C.B.R. (4th) 171, 11 B.C.L.R. (4th) 315, 2003 CarswellBC 451, 2003 BCCA 132, 179 B.C.A.C. 140, 295 W.A.C. 140 (B.C. C.A. [In Chambers]) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 43(1) — considered

s. 43(2) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

s. 222(1) — referred to

APPEAL by creditor of judgment reported at *Chartrand, Re* (2009), 2009 CarswellOnt 8356 (Ont. S.C.J.), concerning whether creditor satisfied requirements of *Bankruptcy and Insolvency Act*.

***Per curiam*:**

Background

1 The respondent, Mr. Chartrand, owed a mortgage debt of approximately $237,474.75 to the appellant, Canadian Imperial Bank of Commerce (CIBC), including $37,000 for back taxes which CIBC paid.

2 The Canada Revenue Agency (CRA) had a claim for unpaid GST in the amount of $175,000 for which it claimed a super priority by virtue of s. 222(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, over the CIBC mortgage.

3 CIBC brought an application for a bankruptcy order against Mr. Chartrand. The issue on this appeal is whether CIBC satisfied the requirements of ss. 43(1) and (2) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 1; 1992, c. 27, s. 2., (the *BIA*) which state:

> s. 43(1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
>
> > (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
> >
> > (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application,
>
> if applicant creditor is a secured creditor.
>
> (2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

4 Inasmuch as CIBC did not wish to give up its security entirely, it had to give an estimate of the value of the security. For CIBC's application to succeed, the unsecured portion of its claim had to exceed $1,000. In addition, it had to prove that Mr. Chartrand had committed an act of bankruptcy within the six months preceding the application.

5 In its application dated March 5, 2008, CIBC estimated the value of its mortgage security to be $200,000, thus asserting that there was an unsecured balance owing of approximately $37,000. Mr. Chartrand disputed CIBC's application.

6 At the hearing, CIBC submitted two appraisal reports. The first dated March 6, 2007 valued the property at between $209,000 to $225,000; the second dated January 23, 2008 at $230,000. Mr. Chartrand, who represented himself, testified that the value of the property was $275,000.

The Application Judge's Decision

7 The application judge held that the evidence that Mr. Chartrand had committed an act of bankruptcy and was unable to pay his debts generally as they came due within the six months that preceded the application was overwhelming.

8 He was also satisfied that there was no merit in Mr. Chartrand's allegation that the application was brought for an improper purpose. If CIBC's application was granted, then, by virtue of the provisions of the *BIA* respecting distribution, the priorities between itself and the CRA would be reversed. The application judge held, in accordance with *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), that this was a legitimate reason to bring the application.

9 The application judge dismissed CIBC's application on the basis that he was not satisfied it had shown it had at least $1,000 of unsecured indebtedness. In so doing, the application judge was alive to the fact that the *BIA* did not require the applicant to provide an independent appraisal and that it need only provide an estimate which must establish that its valuation was not a sham or absurdly low. Although the appraisal reports were hearsay, they could be considered for the purpose of determining that the estimate of value was made in good faith and was not a sham or absurdly low. See *C. Tokmakjian Ltd., Re*, [2003] O.J. No. 4667 (Ont. S.C.J.) at para. 41. The application judge, however, distinguished *Tokmakjian* from the situation before him. In *Tokmakjian*, the applicant's account manager testified about efforts made to sell the security and gave evidence that these efforts had resulted in few offers and those that were received were low because the market was poor. In the instant case, CIBC had chosen not to offer any evidence in this regard. It had filed its application after just receiving the last appraisal valuing the property at $230,000, yet it had chosen to estimate the value at $200,000 without explanation. Thus, the application judge held that the estimate was absurdly low, that he could not find on the evidence that the estimate was made in good faith, and that CIBC had not established that the value of the property was at least $1,000 less than the debt owed by Mr. Chartrand.

Argument on Appeal and Analysis

10 Having regard to the very narrow margin between the debt claimed and the appraisals, combined with CIBC's omission to adduce any evidence of valuation, the application judge's decision in favour of the unrepresented Mr. Chartrand is certainly understandable.

11 On this appeal, CIBC submits that the application judge made a palpable and overriding error in concluding that it failed to establish at least $1,000 of unsecured debt.

12 CIBC makes two submissions in support of its argument. The first is that a valuation of $200,000 was not absurdly low. The appraisal of $230,000 did not take into consideration that property taxes in the approximate amount of $32,500 were owed. Thus, this amount should have been subtracted from the appraised value. The second is that, as CIBC's mortgage ranked behind CRA's claim for GST in the amount of $175,000 on the date of the application, there was in excess of $100,000 of unsecured debt owing to CIBC at that time.

13 CIBC's affidavit in support of its application valued its security at $100,000. Based on the argument CIBC now makes before us, the affidavit overvalued the amount of CIBC's secured debt by at least $100,000 to its detriment. It therefore appears that CIBC's submissions may not have been made to the application judge. In addition, had this been the case, it is likely the application judge would have addressed them in otherwise comprehensive reasons.

14 We agree that the date for valuing CIBC's security is the date of the application and that, taking into consideration the amount of the debt owing to the CRA and its priority, CIBC was an unsecured creditor. The relevant time for determining whether an act of bankruptcy has occurred is the date of the application. See *The 2010 Annotated Bankruptcy and Insolvency*

Act, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra at p. 148 and cases cited therein. It only makes sense that that date is also the relevant date for determining the value of the security.

15 Other jurisprudence also supports our conclusion that the application should succeed. The decision of *Fred Walls & Son Holdings Ltd., Re* (1999), 13 C.B.R. (4th) 60 (B.C. S.C.) appeal dismissed on procedural grounds at (2003), 40 C.B.R. (4th) 171 (B.C. C.A. [In Chambers]) holds that the relevant date for valuing a security is both the date of the application and the date that the application is heard. Payments made to reduce indebtedness to the applicant creditor after the date of the application and before the date of the hearing would thus be taken into consideration in determining the amount of unsecured debt. Here, there were none. I also note that in *A.E.S. Empire Inc., Re* (1989), 77 C.B.R. (N.S.) 33 (Ont. S.C.), Saunders J. dealt with a situation in which the applicant creditor was owed approximately $300,000. It alleged its security was worth only $250,000 although the property in issue had been sold to the debtor in an arm's length transaction a few months earlier in the same year for $351,000. The applicant creditor had not had the property appraised and there was no evidence of valuation from any person qualified to give such evidence. Saunders J. held, however, that the valuation was not a sham. The debt owing was certain, and, having regard to the evidence of second mortgagees, it was apparent there was a problem of unsecured indebtedness. In these circumstances, he held that a court ought to grant the petition rather than exercise its discretion to grant a stay.

16 For these reasons, the decision of the application judge is set aside, the appeal is allowed and the application is granted.

17 Having regard to the fact that the submissions now advanced on appeal were submissions that ought to have been made at first instance, we would order that there be no costs at first instance. Costs of this appeal are to the appellant and are fixed in the amount of $9,000, all inclusive.

Appeal allowed.

TAB 10

2017 CAF 162, 2017 FCA 162
Federal Court of Appeal

Canada v. Callidus Capital Corporation

2017 CarswellNat 3599, 2017 CarswellNat 9496, 2017 CAF 162, 2017 FCA 162, [2017] G.S.T.C. 60, 281 A.C.W.S. (3d) 209, 37 E.T.R. (4th) 177, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, 8 P.P.S.A.C. (4th) 1

Her Majesty The Queen (Appellant) and Callidus Capital Corporation (Respondent)

Donald J. Rennie, D.G. Near, J.D. Denis Pelletier JJ.A.

Heard: January 19, 2017
Judgment: July 27, 2017
Docket: A-400-15

Proceedings: reversing *Canada v. Callidus Capital Corp.* (2015), 13 E.T.R. (4th) 43, 2015 CF 977, 2015 CarswellNat 8223, 28 C.B.R. (6th) 209, [2015] G.S.T.C. 105, 5 P.P.S.A.C. (4th) 29, 2015 CarswellNat 4410, 2015 FC 977, Glennys L. McVeigh J. (F.C.)

Counsel: Louis L'Heureux, Edward Harrison, for Appellant
Harvey G. Chaiton, Sam P. Rappos, for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.v Miscellaneous
Tax
III Goods and Services Tax
III.12 Special rules
III.12.c Bankruptcy
Tax
III Goods and Services Tax
III.14 Collection and remittance
III.14.b GST held in trust

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Pursuant to forbearance agreement, tax debtor paid sales proceeds of property to defendant secured creditor C Corp. — Crown claimed deemed trust from defendant under Excise Tax Act (ETA) because of tax debtor's prior unremitted GST and HST — Tax debtor made assignment in bankruptcy — Crown brought action against defendant on basis of deemed trust mechanism — Defendant brought motion for determination of question of law, namely, whether bankruptcy of tax debtor and ETA s. 222(1.1) render deemed trust under ETA s. 222 ineffective as against secured creditor who received, prior to bankruptcy, proceeds from assets of tax debtor that were deemed to be held in trust for Crown — Federal Court granted creditor's motion and answered question in affirmative — Crown appealed — Appeal allowed — Question was answered in negative — ETA s. 222(3) deemed tax debtor's property to be held in trust for benefit of Crown where GST or HST was collected but not remitted — ETA s. 222(1.1) rendered deemed trust ineffective with respect to property of tax debtor at time of bankruptcy — Reasoning in prior case dealing with near-identical provisions under Income Tax Act (ITA) was dispositive of appeal — In this case, proceeds from sale of debtor's property were paid to creditor, and subsequently, debtor made assignment into bankruptcy — Pursuant to ETA s. 222(3), any proceeds should have been paid to Crown in priority to any security interest pre-bankruptcy — Proceeds were paid out of priority, which created obligation on creditor, independent of existence of deemed trust, to pay — There was no need for crystallizing event, as legislation established obligation to pay — Creditor's interpretation would dilute absolute priority of Crown and undermine purpose of legislation — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222, 317.

Tax --- Goods and Services Tax — Special rules — Bankruptcy

Pursuant to forbearance agreement, tax debtor paid sales proceeds of property to defendant secured creditor C Corp. and held rent proceeds in trust for creditor — Crown claimed deemed trust from defendant under Excise Tax Act ("ETA") because of tax debtor'sprior unremitted GST and HST — Tax debtor made assignment in bankruptcy — Crown brought action against defendant on basis of deemed trust mechanism — Defendant brought motion for determination of question of law, namely, whether bankruptcy of tax debtor and ETA s. 222(1.1) render deemed trust under ETA s. 222 ineffective as against secured creditor who received, prior to bankruptcy, proceeds from assets of tax debtor that were deemed to be held in trust for Crown — Federal Court granted creditor's motion and answered question in affirmative — Crown appealed — Appeal allowed — Question was answered in negative — ETA s. 222(1.1) rendered deemed trust ineffective with respect to property of tax debtor at time of bankruptcy — Subsequent extinction of deemed trust on bankruptcy was irrelevant with respect to assets that had already been sold — Reasoning in prior case dealing with near-identical provisions under Income Tax Act ("ITA") was dispositive of appeal — Secured creditors who did not comply with obligation to pay proceeds derived from deemed trust assets were personally liable to Crown under independent cause of action, irrespective of subsequent bankruptcy of debtor — In this case, proceeds from sale of debtor's property were paid to creditor, and subsequently, debtor made assignment into bankruptcy — Pursuant to ETA s. 222(3), any proceeds should have been paid to Crown in priority to any security interest pre-bankruptcy — Proceeds were paid out of priority, which created obligation on creditor, independent of existence of deemed trust, to pay — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222, 317.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

Goods and Services Tax — Pursuant to forbearance agreement, tax debtor paid sales proceeds of property to defendant secured creditor C Corp. — Crown claimed deemed trust from defendant under Excise Tax Act (ETA) because of tax debtor's prior unremitted GST and HST — Tax debtor made assignment in bankruptcy — Crown brought action against defendant on basis of deemed trust mechanism — Creditor brought motion for determination of question of law, namely, whether bankruptcy of tax debtor and ETA s. 222(1.1) render deemed trust under ETA s. 222 ineffective as against secured creditor who received, prior to bankruptcy, proceeds from assets of tax debtor that were deemed to be held in trust for Crown — Federal Court granted creditor's motion and answered question in affirmative — Crown appealed — Appeal allowed — Question was answered in negative — Reasoning in prior case dealing with near-identical provisions under Income Tax Act (ITA) was dispositive of appeal — In this case, proceeds from sale of debtor's property were paid to creditor, and subsequently, debtor made assignment into bankruptcy — Pursuant to ETA s. 222(3), any proceeds should have been paid to Crown in priority to any security interest pre-bankruptcy — Proceeds were paid out of priority, which created obligation on creditor, independent of existence of deemed trust, to pay.

The tax debtor failed to remit GST and HST. Pursuant to a forbearance agreement, the debtor paid sales proceeds of a property to the defendant secured creditor C Corp. and held rent proceeds in trust for the creditor. The Crown claimed a deemed trust pursuant to Excise Tax Act (ETA) s. 222 because of the unremitted GST and HST. The debtor then made an assignment in bankruptcy.

The Crown brought an action against the creditor for recovery of dispositions made before the bankruptcy on the basis of the deemed trust mechanism. The creditor brought a motion for the determination of a question of law, namely, whether the bankruptcy of a tax debtor and ETA s. 222(1.1) render a deemed trust under ETA s. 222 ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Crown. The Federal Court judge granted the creditor's motion and answered the question in the affirmative.

The Crown appealed.

Held: The appeal was allowed.

Per Rennie J.A. (Near J.A. concurring): The question was answered in the negative. ETA s. 222(3) deemed a tax debtor's property to be held in trust the for benefit of the Crown where GST or HST was collected but not remitted. ETA s. 222(1.1) rendered a deemed trust ineffective with respect to the property of the tax debtor at the time of the bankruptcy. The subsequent extinction of a deemed trust on bankruptcy was irrelevant with respect to assets that had already been sold.

The reasoning in a prior case dealing with near-identical provisions under the Income Tax Act (ITA) was dispositive of this appeal. Secured creditors who did not comply with their obligation to pay proceeds derived from deemed trust assets were personally liable to the Crown under an independent cause of action, irrespective of the subsequent bankruptcy of the debtor. While ETA s. 222(1.1) released a tax debtor's assets from the deemed trust upon bankruptcy, it did not extinguish the pre-existing personal liability of a secured creditor who received proceeds from the deemed trust. The continued existence of the cause of action arose because of the secured creditor's breach of the statutory obligation to remit.

In this case, proceeds from the sale of the debtor's property were paid to the creditor, and subsequently, the debtor made an assignment into bankruptcy. Pursuant to ETA s. 222(3), any proceeds should have been paid to the Crown in priority to any security interest pre-bankruptcy. The proceeds were paid out of priority, which created an obligation on the creditor, independent of the existence of a deemed trust, to pay. There was no need for a crystallizing event, as the legislation established an obligation to pay. The creditor's interpretation would dilute the absolute priority of the Crown and undermine the purpose of the legislation.

Per Pelletier J.A. (dissenting): The question would be answered in the affirmative. The trust created by ETA s. 222(3) lapsed due to the lack of subject matter by operation of ETA s. 222(1.1) following the debtor's bankruptcy. As of the date of bankruptcy, there were no amounts subject to the trust under ETA s. 222(1) and no property of the debtor was subject to a deemed trust pursuant to ETA s. 222(3). No proceeds of that property were payable to the Crown by the creditor. The failure to pay proceeds of the trust under ETA s. 222(3) did not give rise to a separate cause of action against the creditor. The Crown's interests were not unjustifiably put at risk by this interpretation. Section 67(2) of the Bankruptcy and Insolvency Act made it clear that Parliament intended to do away with deemed trusts in bankruptcy except for a deemed trust for unremitted source deductions.

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APPEAL by Crown from judgment reported at 2015 CarswellNat 4410, 2015 CarswellNat 8223, 2015 FC 977, [2015] G.S.T.C. 105, 28 C.B.R. (6th) 209, 13 E.T.R. (4th) 43, 5 P.P.S.A.C. (4th) 29 (F.C.), granting creditor's motion for determination of question of law and answering question affirmatively.

***Donald J. Rennie J.A.*:**

I. Introduction

1 The Crown appeals from the Order of the Federal Court (per McVeigh J.), dated August 17, 2015 (2015 FC 977, [2015] G.S.T.C. 105 (F.C.)), in which the Court answered the following question in the affirmative and awarded costs to Callidus Capital Corporation (Callidus):

> Does the bankruptcy of a tax debtor and subsection 222(1.1) of the *Excise Tax Act*, R.S.C. 1986, c. E-15, as amended (the "ETA") render the deemed trust under section 222 of the ETA ineffective as against a secured creditor who received, prior to bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Plaintiff?

2 The Crown claimed it was owed $177,299.70 plus interest in unremitted GST and HST by the operation of the deemed trust mechanism in section 222 of the *Excise Tax Act*, R.S.C. 1986, c. E-15, as amended (*Excise Tax Act*). It commenced an action in the Federal Court to recover the debt. Callidus defended, and the parties agreed to set down a question of law for determination. For the purposes of determining the question of law the parties submitted an agreed statement of facts, which is reproduced below:

> **Background**
>
> 1. Cheese Factory Road Holdings Inc. ("Cheese Factory") is a privately-held Ontario corporation that carried on business as a real estate investment company. Cheese Factory is or was the registered owner of properties municipally known as 680 Bishop Street, Cambridge, Ontario (the "Bishop Property") and 181 Pinebush Road, Cambridge, Ontario (the "Pinebush Property").
>
> 2. At all material times Callidus was a privately-held Ontario corporation that carried on business throughout Canada as a lender of monies to commercial enterprises on a secured basis.
>
> **Failures to remit GST and HST**
>
> 3. The Plaintiff [Her Majesty the Queen, or the appellant] claims that between 2010 and 2013, Cheese Factory collected but failed to remit GST and HST to the Receiver General for a total amount of $177,299.70.
>
> **BMO credit facilities**
>
> 4. Pursuant to a commitment letter dated September 22, 2004, Cheese Factory obtained a credit facility in the principal amount of $1,950,000 from the Bank of Montreal ("**BMO**"). Cheese Factory also granted the guarantee and security documents listed on **Schedule "A"** attached hereto [not attached, can be found at AB, Tab 4, page 35] in favour of BMO to secure its direct and indirect obligations to BMO (collectively, the "**Security**").
>
> 5. As of December 2, 2011:
>
>> (a) Cheese Factory was in default under the credit facility extended to it by BMO in the principal amount of $1,950,000;
>>
>> (b) Cheese Factory was indebted to BMO as borrower under the commitment letter in the amount of $1,416,418.61 (inclusive of principal and interest but exclusive of fees;
>>
>> (c) Cheese Factory was in default under the guarantees granted by it to BMO; and

(d) Cheese Factory was indebted to BMO as guarantor in the amounts of $3,387,658.53 and US$81,233,28, which amounts include principal and interest but do not include fees.

Assignment of debt and obligations to Callidus

6. Pursuant to an Assignment of Debt and Security agreement dated December 2, 2011, BMO assigned to Callidus all of its right, title and interest in and to the direct and indirect indebtedness and obligations owed to it by Cheese Factory, along with the Security.

7. Pursuant to a Forbearance Agreement dated December 2, 2011, Callidus agreed to forbear from enforcing the BMO agreements, subject to and in accordance with the terms and conditions of the Forbearance Agreement. Pursuant to the Forbearance Agreement, Callidus also agreed to extend to Cheese Factory (and other debtors) certain demand credit facilities, which amended the credit facilities granted by BMO.

Sale Proceeds from the Bishop Property

8. Pursuant to the terms of the Forbearance Agreement, Cheese Factory agreed to market the Bishop Property, among other properties, for sale and to deliver the net sales proceeds to Callidus to partially repay the amounts owed to Callidus under the credit facilities.

9. On or about April 5, 2012, Cheese Factory sold the Bishop Property to Poladian Holdings Inc. for a purchase price of $790,000.

10. On or about April 9, 2012, Callidus received the sum of $590,956.62 from the sale of the Bishop Property (the "**Sale Proceeds**").

11. Callidus has applied the Sale Proceeds to partially reduce the outstanding indebtedness and obligations owed to it by Cheese Factory.

Rent Proceeds from the Pinebush Property

12. Pursuant to the terms of the Forbearance Agreement and a Blocked Accounts Agreement dated November 9, 2011 (the "**Blocked Accounts Agreement**"), Cheese Factory also agreed to open blocked accounts (the "**Blocked Accounts**") at a Royal Bank of Canada ("**RBC**") and to deposit all funds received from all sources into the blocked accounts.

13. The Blocked Accounts Agreement provides that:

(a) Cheese Factory shall hold all cash and Cheques (as defined therein) received by it in trust for Callidus, segregated from all other funds and other property of Cheese Factory, until such time as the cash and Cheques are delivered to RBC for deposit in the Blocked Accounts; and

(b) RBC shall transfer, prior to the end of each Business Day, all amounts on deposit in the Blocked Accounts to Callidus' account or accounts.

14. All rent proceeds received from Cheese Factory or from the tenant of the Pinebush Property since December 2011 have been deposited into the Blocked Accounts.

15. Since the date that Callidus received an assignment of the BMO credit facilities and security on December 2, 2011 up to and including July 31, 2014, the sum of $780,387.62 in gross rent has been deposited into the Blocked Accounts.

16. Callidus has applied all amounts deposited into the Blocked Accounts to partially reduce the outstanding indebtedness and obligations owed to it by Cheese Factory.

Deemed Trust Asserted by the Plaintiff

17. On or about April 2, 2012, the Plaintiff, by way of a letter to Callidus, claimed an amount of $90,844.33 on the basis of the deemed trust mechanism of the *Excise Tax Act*, R.S.C. 1985, c. E.15, as amended (the "**ETA**")

Bankruptcy of Cheese Factory

18. On or about November 7, 2013, at the request of Callidus, Cheese Factory made an assignment in bankruptcy under the *Bankruptcy or Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

Action Commenced by the Plaintiff

19. The Plaintiff commenced this proceeding against Callidus pursuant to a statement of claim dated November 25, 2013.

20. The Plaintiff claims the total amount of $177,299.70 plus interest from Callidus on the basis of the deemed trust mechanism governed by section 222 of the ETA on account of GST and HST that Cheese Factory collected but failed to remit for reporting periods commencing on October 31, 2010 up to and including January 31, 2013.

21. The Plaintiff contends that as a result of Cheese Factory's failures to remit GST and HST to the Receiver General:

(a) all of Cheese Factory's assets were deemed to be held in trust in favour of the Plaintiff in priority to the claims of Callidus pursuant to section 222 of the ETA; and,

(b) all proceeds of Cheese Factory's property received by Callidus, up to the amount secured by the deemed trust, should have been paid to the Receiver General of Canada as a result of the deemed trust mechanism under section 222 of the ETA.

22. Callidus served and filed a statement of defence.

Question of Law

23. Does the bankruptcy of a tax debtor and subsection 222(1.1) of the ETA render the deemed trust under section 222 of the ETA ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust?

II. Legislation

3 The relevant provisions of the *Excise Tax Act* provide:

***Excise Tax Act*, R.S.C., 1985, c. E-15**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

(2) Withdrawal from trust — A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof ***and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.***

[Emphasis added]

***Loi sur la taxe d'accise*, L.R.C.** (1985), ch. E-15

222. (1) Montants perçus détenus en fiducie — La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) Montants perçus avant la faillite — Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la Loi sur la faillite et l'insolvabilité, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

(2) Retraits de montants en fiducie — La personne qui détient une taxe ou des montants en fiducie en application du paragraphe (1) peut retirer les montants suivants du total des fonds ainsi détenus:

a) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la présente section pour sa période de déclaration;

b) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.

Ce retrait se fait lors de la présentation au ministre de la déclaration aux termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

(3) Non-versement ou non-retrait — Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la Loi sur la faillite et l'insolvabilité), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés:

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, ***et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.***

[Emphase jouté]

III. Federal Court decision

4 The Court answered the question in the affirmative.

5 The Court found that the deemed trust mechanism under section 222 of the *Excise Tax Act* operates to grant the Receiver General "absolute priority", but that the deemed trust, and the accompanying priority, are extinguished upon bankruptcy of the debtor such that the Crown becomes an unsecured creditor in respect of unremitted amounts. The Court determined that any liability that arises under subsection (3) to disgorge proceeds is extinguished upon bankruptcy by the operation of subsection (1.1). Subsection (3) operates to extend the deemed trust created pursuant to subsection (1) to the debtor's property, and any liability arising from it is dependent on the continuing existence of the deemed trust.

6 The Court reviewed the legislative history and priority schemes of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the BIA), the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the CCAA) and the reasoning of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186 (S.C.C.) (*Century Services*), and observed that the enactment of subsection 222(1.1) appeared to align with Parliament's intent to "move away from asserting priority for Crown claims in insolvency law". While deemed trusts in relation to source deductions, such as Canada Pension Plan contributions, "remain operative" in bankruptcy, deemed trusts over GST/HST do not.

7 Applying the reasoning in *Century Services* and the earlier decision of *Ministre du Revenu national c. Caisse Populaire du bon Conseil*, 2009 SCC 29, [2009] 2 S.C.R. 94 (S.C.C.) (*Caisse Populaire du bon Conseil*), the judge held that the absence of express confirmation of the trust upon bankruptcy in the BIA reflected "Parliament's intention to allow it to lapse upon insolvency proceedings being commenced". The judge found that, similar to the factual scenarios in both Supreme Court of Canada cases, "the Crown seeks to maintain the deemed trust without express legislative language to do so," and further, that subsection 222(1.1) operates to "remove [the] imperative" language in subsection 222(3) of "shall be paid". The judge was not persuaded by the Crown's reference to legislative amendments in the year 2000 (the 2000 amendments) to the deemed trust mechanism in the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (*Income Tax Act*) because they were specific to source deductions, and distinguished the cases on which the Crown relied for the same reason. The judge favoured Callidus' argument that the amendments made to the *Excise Tax Act* in 1992 demonstrated Parliamentary intent to "oust the Crown priority over all other interests in bankruptcy," and that this interpretation was evident in the jurisprudence.

8 The judge dismissed the Crown's analogy to other collection tools in the *Excise Tax Act*, noting that those provisions did not assist the Crown's position. Both sections 317 (garnishment) and 325 (non-arms' length transfers) require a "crystallizing event" before liability will attach prior to bankruptcy, and the Crown had not demonstrated how to reconcile a "pre-existing, fully engaged cause of action" with subsection (1.1). In the case of a non-arms' length transfer, the event is the transfer of property for less than fair market value, while in the garnishment context the crystallizing event is service of a "requirement

to pay" (RTP) notice. The judge stated that, had an RTP notice been issued in this case, Callidus' obligation to pay would have survived bankruptcy of the debtor.

9 The judge ultimately held that the tax debtor's bankruptcy engaged subsection 222(1.1) of the *Excise Tax Act*, which rendered the deemed trust, and any independent liability arising from operation of the deemed trust, ineffective in regard to the pre-bankruptcy amounts Callidus had received.

IV. Issues

10 Before this Court, Callidus submits that, on a proper reading of the statutory language, the deemed trust under subsection (1) and the extension under subsection (3) are both extinguished upon bankruptcy. As the Crown relies on subsection (3) to establish the personal liability of the secured creditor, Callidus argues it should follow that any personal liability must be extinguished upon bankruptcy as well.

11 The Crown concedes that, upon the bankruptcy of a tax debtor, subsection 222(1.1) of the *Excise Tax Act* renders the deemed trust under subsection 222(3) of the *Excise Tax Act* ineffective with respect to the debtor's property at the time of bankruptcy. The Crown assert, however, that the contested question on appeal is whether subsection 222(1.1) of the *Excise Tax Act* also extinguishes the distinct and personal liability of the secured creditor that may arise prior to bankruptcy by virtue of subsection 222(3) of the *Excise Tax Act*.

12 The respondent urges that the judge correctly found that subsection (1.1) reflects Parliament's intent to move away from Crown priority in insolvency law, in particular with respect to GST/HST. It is conceded by the Crown that the deemed trust ceases to operate upon the debtor's bankruptcy, specifically in relation to GST/HST amounts collected but not remitted prior to bankruptcy. I agree with the judge that Parliament has drawn a clear distinction post-bankruptcy between source deductions under the *Income Tax Act* and GST/HST amounts under the *Excise Tax Act* by virtue of subsection 222(1.1) and subsections 67(2) and (3) of the BIA.

13 The issue here however, is the priority that may have existed prior to any insolvency or bankruptcy proceedings. Determination of the question of law turns on the interpretation of the effect of bankruptcy on the *prior* operation of the deemed trust mechanism as against a secured creditor who received proceeds from deemed trust assets of the tax debtor *prior* to bankruptcy.

V. Analysis

14 The answer to the question on appeal turns on the application of the governing principles of statutory interpretation. *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) (*Rizzo*) instructs at para. 21, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 that "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". Put otherwise, the intention of Parliament is to be gleaned from the text, read in its context and in light of its purpose. Applying these principles, it is my view that the question should be answered in the negative.

15 Support for this conclusion is found in the language of section 222, to which I turn. Section 222 of the *Excise Tax Act* provides a mechanism whereby the Crown can recover collected, but unremitted, GST or HST.

16 Subsection 222(3) operates to deem all of a tax debtor's property to be held in trust for the benefit of the Crown where GST/HST is collected but not remitted. It is undisputed that subsection 222(1.1) renders the deemed trust ineffective with respect to the property of the tax debtor at the time of bankruptcy. The issue in this appeal concerns the Crown's recovery mechanisms for dispositions made prior to bankruptcy.

17 The importance of timing is reflected in the text of subsection 222(3). Assets sold by the tax debtor, or realized upon by the secured creditor prior to bankruptcy are no longer "property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person" at the time of bankruptcy, and as a result, are not

available to all creditors upon bankruptcy. *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.), para. 42 (*First Vancouver Finance*) confirms that "when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset". The subsequent extinction of the deemed trust on bankruptcy is irrelevant with respect to assets that have already been sold — it has already disappeared. This interpretation is supported by the legislative evolution of subsection (1.1).

18 Amendments in the year 2000 to the deemed trust mechanism in both the *Income Tax Act* and the *Excise Tax Act* imposed an obligation on secured creditors to pay proceeds derived from trust assets to the Crown (subsection 222(3)). This amendment, including wording that proceeds "shall be paid to the Receiver General in priority to all security interests" was prompted by the decision in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) (*Sparrow*). In *Sparrow*, the Court held that analogous deemed trust provisions for source deductions did not oust a secured creditor's security interest in a debtor's inventory. In *Sparrow*, the Supreme Court of Canada suggested this wording as the language that Parliament could add if it wished to confirm the priority of the Crown's deemed trust.

19 The first test of the amended provisions arose in *First Vancouver Finance*. The Court held that the enhanced trust provisions confirmed Crown priority over secured creditors.

20 The amended trust provisions in the ITA came before this Court in *Canada (Procureure générale) c. Banque Nationale du Canada*, 2004 FCA 92, [2004] F.C.J. No. 371 (F.C.A.) (*Banque Nationale)* where, at paragraph 40, the Court held:

> [40] It seems obvious to me that a secured creditor who does not comply with his statutory obligation to "pay" the Receiver General the proceeds of property subject to the deemed trust in priority over his security interest is personally liable and thereby becomes liable for the unpaid amount. The amount is "payable" out of the proceeds flowing from the property and, as we have seen, section 222 of the ITA provides that "<u>All... amounts payable</u> under this Act <u>are debts due to Her Majesty and recoverable as such</u>...." (Emphasis added). In light of these provisions, and since the respondents concede that they received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.
>
> [Emphasis in original]

21 This Court, in *Banque Nationale* noted that the Crown has absolute priority over proceeds from property subject to a deemed trust, and that "the positive obligation imposed on the secured creditor to pay the Receiver General the proceeds from the property subject to the trust could not be clearer": *Banque Nationale* at para 37. The Court went on to note that a secured creditor who does not comply with this obligation "is personally liable," and the amount is "payable" to the Receiver General and may be enforced as a cause of action under the appropriate *Income Tax Act* provisions.

22 Similarly, I note that a "tax debt" in the "Collection" section of the *Excise Tax Act* is defined as "any amount payable or remittable by a person under this Part," and tax debts are recoverable by the Crown in Federal Court: *Excise Tax Act* subsections 313(1) and (1.1). The Court in *Banque Nationale* held that the cause of action arises "when the Minister becomes aware of the failure by the secured creditor to pay": at para. 44. On this Court's reasoning in *Banque Nationale*, the Crown has a cause of action to enforce the personal liability of a secured creditor who does not comply with its statutory obligation to pay under the *Excise Tax Act*.

23 Given the near-identical language of the two provisions, it is my view that the reasoning in *Banque Nationale* is dispositive of this appeal. Secured creditors who do not comply with the obligation to pay proceeds derived from deemed trust assets are personally liable to the Crown, which has a separate cause of action against them, irrespective of the subsequent bankruptcy of the debtor.

24 I note that the use of the imperative "shall" in subsection 222(3) "confers no residual discretion": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6 th ed. (Canada: LexisNexis, 2014), at 91-92. The protection offered the Crown by the provision is not passive — it creates a mandatory obligation: see *Banque Nationale* at paras. 37, 40. While the judge was correct to note that

Sparrow, First Vancouver and *Banque Nationale* pertained to the deemed trust mechanism specific to source deductions under the *Income Tax Act*, the salient point, from a statutory interpretation perspective, is that the 2000 amendments are materially identical to those made contemporaneous to the amendments to the *Excise Tax Act* and operate analogously prior to bankruptcy.

25 Given this similarity, both mechanisms render a secured creditor who receives funds out of the deemed trust personally liable for the amount owed to the Crown under an independent cause of action: *Banque Nationale*, at para. 40. The distinction urged by Callidus, namely that *Banque Nationale* concerned payroll deductions and not GST, is of no consequence. Prior to bankruptcy, the recovery mechanisms in subsection 227(4.1) of the *Income Tax Act* and subsection 222(3) of the *Excise Tax Act* operate, for present purposes, identically, and the related jurisprudence is equally applicable.

26 While subsection 222(1.1) releases a tax debtor's assets from the deemed trust upon bankruptcy, the subsection does not extinguish the pre-existing personal liability of a secured creditor who received proceeds from the deemed trust. The personal liability is fully engaged, the debt is due and can be pursued by the Crown in a cause of action independent of any subsequent bankruptcy proceedings. The continued existence of the cause of action is not dependent on the debtor's other assets that may or may not remain in trust, as it arises because of the secured creditor's breach of a statutory obligation to remit. To find otherwise would effectively neutralize the deemed trust mechanism with respect to GST/HST amounts.

27 I note that Callidus relies heavily on *Caisse Populaire du bon Conseil* and *Century Services* to support its argument with respect to liability. These cases are of limited assistance.*Caisse Populaire du bon Conseil* did not concern either the issue of a deemed trust or the independent liability of a secured creditor, rather, the issue was the extent of the Crown's interest in GST collected by a trustee in bankruptcy. *Caisse Populaire du bon Conseil* concerned whether the deemed trust provisions of the *Excise Tax Act* continued under CCAA proceedings, which are not at issue.

28 Callidus points further to the case of *Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (Ont. S.C.J. [Commercial List]) (*Huronia*), in which a receiver was appointed, some of the debtor's assets were sold, and the bank made a motion to lift the stay in order to bring a bankruptcy application against the debtor. The Crown moved for an order directing the receiver to pay unremitted GST immediately. The motion judge held that the bank had the ability to reverse the priority of the deemed trust by bringing an application for bankruptcy, and denied the Crown's motion. Callidus argues that, on the appellant's reading of the statute, the receiver in *Huronia* would have had a duty to remit GST to the Crown notwithstanding the subsequent bankruptcy of the debtor. Callidus argues that this was exactly what the motion judge in *Huronia* specifically rejected.

29 It is difficult to glean much from the very brief *Huronia* decision, which focused on the particular wording of a court order. There was also a receiver and a stay of proceedings in place in *Huronia*, such that it is not clear whether insolvency proceedings had already commenced. As well, the factual matrix in this appeal does not invoke the reversal of priority post-bankruptcy; rather this appeal addresses the effect of bankruptcy on the liability of a secured creditor that may arise as a result of pre-bankruptcy priority.

30 Again, continuing with the plain language of section 222, subsection (1.1) does not say that, upon the debtor's bankruptcy, all rights that arose as a result of the deemed trust are extinguished. Nor is there language in section 222 to the effect that the deemed trust evaporates retroactively so as to extinguish liability arising before bankruptcy. Subsequent bankruptcy simply operates to release the debtor's assets from the deemed trust. The argument that the evaporation of the trust on bankruptcy works retroactively, and undoes or unwinds legal obligations that are already engaged, has no support in the text, and, as we will see, undermines the purpose of the 1992 amendment.

31 In the present case, proceeds from a sale of the tax debtor's property were paid to the secured creditor. The debtor subsequently made an assignment into bankruptcy. Pursuant to the language of subsection (3), any proceeds should have been paid to the Crown in priority to any security interest pre-bankruptcy. Callidus has conceded that the deemed trust mechanisms in both the *Income Tax Act* and the *Excise Tax Act* operate in the same manner prior to bankruptcy. Proceeds were paid out of priority in contradiction to the express wording of subsection (3), which created an obligation, independent of the existence of the deemed trust, to pay.

32 I turn next to context, which includes analogous collection tools within the *Excise Tax Act* that impose obligations on third parties. For example, the garnishment provisions in section 317 of the *Excise Tax Act* use the same language regarding paramountcy over all statutes except the BIA. In this context, the courts have accepted that, where an RTP notice is served pre-bankruptcy, subsequent bankruptcy does not extinguish liability of a third party who fails to abide by the notice: *Banque Toronto Dominion c. R.*, 2010 FCA 174, 325 D.L.R. (4th) 174, [2010] G.S.T.C. 99 (F.C.A.), affirmed 2012 SCC 1, [2012] 1 S.C.R. 3, [2012] G.S.T.C. 2 (S.C.C.) (*Banque Toronto Dominion*).

33 Further, section 325 of the *Excise Tax Act* establishes liability for a non-arms' length third party who has been transferred property. The liability of the third party is not affected by the debtor's subsequent bankruptcy: *Heavyside v. R.*, [1996] F.C.J. No. 1608 (Fed. C.A.). Absent language suggesting otherwise, statutes should be read so as to achieve consistency and harmony across like provisions.

34 Referencing other collection tools available to the Crown, the judge stated that there must be a "crystallizing event" in order to ground an independent cause of action. Had an RTP issued, Callidus' obligation to pay would have survived bankruptcy. In my view, the search for a crystallizing event or something analogous to that is not quite apt, given that the deemed trust mechanism is not located within the section of the legislation dealing with assessments, and, in any event, there is no legislative requirement for, or mechanism by which, such a notice could issue. There is no need for a crystallizing event, as the legislation establishes the obligation to pay. The words "if at any time" make clear that the obligation has no temporal limitation, nor is it contingent on crystallizing events.

35 It has been held by this Court, and affirmed by the Supreme Court of Canada, that section 317 (garnishment) transfers ownership of amounts otherwise owing to a tax debtor, on receipt by the garnishee of an RTP notice: *Banque Toronto Dominion* at para. 52. In *Banque Toronto Dominion*, this Court held that the words establishing the supremacy of the *Excise Tax Act* over legislation except the BIA was simply intended to limit the Crown's power to issue an RTP post-bankruptcy.

36 Although the circumstances are not entirely analogous, under section 317 the Minister "may issue" an RTP and the amount similarly "shall be paid". It appears that amounts owing to the tax debtor by a third party may require notice in order to "crystallize," in the words of the judge, the Crown's cause of action in garnishment proceedings. Where the Crown seeks to garnish, it is not necessarily clear who the cause of action is against, and for what amount. The present circumstance is the opposite. Here, the trust operates over the amounts already in the debtor's possession, and the circumstances are such that an amount has left the trust. Both the amount and the party in receipt are known.

37 I note further that the subsequent bankruptcy of a tax debtor does not extinguish the Crown's right to amounts owing where an RTP issued pre-bankruptcy. It would be inconsistent if the Crown could prevent funds from entering the debtor's estate, but it could not recover amounts that were removed from the deemed trust out of priority to it and which have not since been returned to the debtor's estate.

38 To conclude, I turn to the purpose of the provision in question.

39 Callidus argues that Parliament's intent was that the Crown becomes an unsecured creditor upon the bankruptcy of the debtor in relation to amounts owed pre-bankruptcy, and that allowing this appeal would allow the Crown to recover indirectly what it cannot recover directly.

40 Callidus contends that, upon bankruptcy, subsection (1.1) operates to extinguish both the deemed trust and to remove the imperative in subsection (3) such that the personal liability of a secured creditor who received funds is also extinguished. I have explained why this interpretation is not supported by the language of the statute, but it would also undermine the purpose of the provision. The interpretation urged by Callidus would allow a secured creditor to manipulate both pre- and post-bankruptcy priority. Callidus agrees that the Crown has priority pre-bankruptcy, and it admits that it did not abide by that priority. Yet it asks this Court to enforce post-bankruptcy priority to the opposite effect or, put otherwise, to enforce post-bankruptcy priority to defeat priorities related to pre-bankruptcy distributions.

41 Callidus' interpretation effectively defeats the purpose of the addition of subsection 222(3), and would create perverse incentives on the part of the secured creditors to not abide by the deemed trust. This was the very mischief to which the amendments were directed:

> Thus, the amendment will ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown.
>
> The deemed trust provisions will not, however, override a prescribed security interest such as a mortgage interest in real estate or other exceptions that may be provided by regulation, where the failure to remit source deductions or net GST cannot benefit the secured creditor.
>
> [Department of Finance, Press Release, 1997-030, "Unremitted Source Deductions and Unpaid GST" (7 April 1997), online: Media Room — Press Releases www.fin.gc.ca, p.2; Appellant's Memorandum of Fact and Law, at para. 75]

42 A finding that the secured creditor's obligation to pay Crown proceeds from the deemed trust disappears on bankruptcy would allow the secured creditor to benefit from the debtor's failure to remit, as noted by the Supreme Court of Canada in *Sparrow*. As happened here, a secured creditor could choose the timing of bankruptcy and liquidate the deemed trust assets so as to satisfy their interests at the expense of the Crown. Even if the Crown sends a demand letter or commences an action, the secured creditor could, at any time, simply trigger the bankruptcy of the tax debtor and avoid all consequences of the deemed trust priority.

43 Callidus' interpretation would significantly dilute the absolute priority of the Crown confirmed by both Parliament and the courts in this context. This cannot be what Parliament intended. Part of the broader context is the fact that the Crown does not have knowledge of the state of affairs between the tax debtor and its creditors; hence the provision, in statute, of the ability to enforce the duty to collect and remit by third parties: *First Vancouver Finance*, at para. 22. To allow a secured creditor to avoid the priority created by the deemed trust mechanism pre-bankruptcy would render the mechanism, and the priority it creates, effectively useless. If Parliament had intended, as it did post-bankruptcy, for the deemed trust to have no discernable effect on priorities pre-bankruptcy, it simply could have removed the provision altogether.

44 I would allow the appeal with costs and answer the question in the negative to the extent outlined above.

***D.G. Near J.A.*:**

I agree

***Pelletier J.A.* (dissenting]):**

45 I have read the reasons of my colleague. I come to a different conclusion for the following reasons.

46 In brief, I am of the view that the trust created by subsection 222(3) of the *Excise Tax Act*, R.S.C. 1985 c. E-15 (the Act) lapsed due to lack of subject matter by operation of subsection 222(1.1) of the Act following Cheese Factory Road Holdings Inc.'s (Cheese Factory) bankruptcy. As of the date of bankruptcy, there were no amounts subject to the subsection 222(1) trust and therefore no property of Cheese Factory subject to a deemed trust pursuant to subsection 222(3) of the Act. As a result, no proceeds of that property were payable to the Crown by Callidus Capital Corporation (Callidus). The fact that, prior to the bankruptcy, a demand for payment was made on Callidus is irrelevant.

47 This is an appeal from a decision of the Federal Court in which it decided a question of law. As a result, the standard of review is the appellate standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.): correctness for questions of law and palpable and overriding error for questions of fact and mixed fact and law, except when it is possible to identify an extricable error of law, in which case the correctness standard applies. In this case, the standard of review is correctness.

48 To assist in the analysis, I reproduce below subsections 222(1), (1.1) and (3).

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

[...]

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la Loi sur la faillite et l'insolvabilité, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

[...]

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la Loi sur la faillite et l'insolvabilité), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie. Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

49 In order to avoid repetition and to enhance the readability of these reasons, references to subsections in the text which follows are references to subsections of section 222 of the Act, unless otherwise specified.

50 Subsection (1) creates a trust with respect to amounts collected as tax but not remitted or applied as permitted by subsection (2) which has no application here. Subsection (3) on the other hand creates a trust with respect to the property of the "person" i.e. the tax debtor.

51 The subsection (1) trust arises when an amount is collected as or on account of tax and ends when the amount is remitted to the Receiver General. The result is that the amount subject to the subsection (1) trust varies as amounts are collected and remittances are made to the Receiver General.

52 The event which gives rise to the deemed trust pursuant to subsection (3) is not the failure to remit the amounts collected as tax to the Receiver General, as is the case in subsection (1). It is the failure to remit the amount deemed by subsection (1) to be held in trust for Her Majesty:

> ...if at any time *an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General* ...property of the person .... is deemed ... to be held, from the time the amount was collected by the person, in trust for Her Majesty...
>
> [Emphasis added.]

53 As a result, if amounts are deemed to be held in trust pursuant to subsection (1) and not remitted to the Receiver General, then the property of the person is deemed to be held in trust from the time the amount was collected. It follows from this that if no amounts are deemed to be held in trust, no subsection (3) trust arises.

54 While the subsection (3) trust attaches to property of the person, it does not capture the whole of the person's interest in their property. The property subject to the subsection (3) trust is defined as:

> ... property of the person ... *equal in value to the amount so deemed to be held in trust [pursuant to subsection 222(1)]* is deemed ... to be held ... in trust for Her Majesty ...
>
> [Emphasis added.]

55 This means that the corpus of the statutory trust is a limited pecuniary interest in the property of the tax debtor. Every item of the tax debtor's property is subject to this trust but only to the extent of the amount deemed to be held in trust by subsection (1). This is a necessary limitation because of the obligation to pay imposed on secured creditors who realize on their security. Subsection (3) requires them to pay "the proceeds of the property" in priority to their security interest. The unqualified obligation to pay the proceeds would require secured creditors to pay the entire proceeds, not simply that portion of the proceeds equal to the amount deemed to be held in trust pursuant to subsection (1).

56 Absent a clear indication of a contrary intention, legislation should be drafted and interpreted on the assumption that the Crown only collects amounts which it is owed and not more. In this case, the legislative draftsman dealt with this issue by defining the property subject to the deemed trust in such a way that trust property, and therefore the proceeds of trust property, is equal to the amount of the subsection (1) deemed trust.

57 As this review shows, the deemed trusts created by subsections (1) and (3) are distinct but interlinked in two important ways. First, the subsection (3) trust arises when amounts deemed to be held in trust pursuant to subsection (1) are collected but not remitted. Second, the subject-matter of the subsection (3) trust is property of the tax debtor to the extent of the amounts deemed to be held in trust pursuant to subsection (1). The effect of this interlinking is that the creation of the subsection (3) trust depends on the existence of the subsection (1) trust. If no amounts are deemed to be held in trust pursuant to subsection (1),

then no subsection (3) trust arises. However, once a trust has arisen, it may subsequently fail for lack of subject-matter if the amount deemed to be held in trust is reduced to nil because of payments on account or otherwise. This is because the subject matter of the subsection (3) trust is defined by reference to the amount deemed to be held in trust pursuant to subsection (1).

58 The application of these provisions to property in the hands of the tax debtor is reasonably straightforward. The issue in this case is how these provisions apply to the tax debtor's secured creditors.

59 Prior to bankruptcy, subsection (3) provides that where amounts deemed to be held in trust pursuant to subsection (1) have not been remitted:

> *... property held by any secured creditor of the person that, but for a security interest, would be property of the person*, equal in value to the amount so deemed to be held in trust, *is deemed ... to be held*, from the time the amount was collected by the person, *in trust for Her Majesty ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests*.
>
> [Emphasis added.]

60 The operation of the deemed trusts in section 222 of the Act can be illustrated by an example. Let us assume that a tax debtor has collected and failed to remit $20,000 on account of GST/HST. The tax debtor has real property which is subject to a mortgage. The mortgage lender forces the sale of the property and receives proceeds of $50,000. Subsection (1) creates a deemed trust with respect to the $20,000 collected as tax but not remitted to the Receiver General. Subsection (3) creates a trust with respect to the debtor's property but only to the extent of the amounts held in trust pursuant to subsection (1). As a result, the mortgage lender, having received proceeds of property equal in value to the amount deemed to be held in a subsection (1) trust, i.e. $20,000, is liable to pay that amount to the Crown.

61 Would the result be any different if subsequent to the Crown's demand for payment of $20,000, the tax debtor made a $10,000 payment to the Receiver on account of GST/HST collected but not remitted? The amount for which the secured creditor was liable would be different but the manner of determining the amount of that liability would be the same. The payment to the Receiver General would reduce the amount of the subsection (1) deemed trust to $10,000 which in turn would reduce the extent to which the debtor's property was subject to the subsection (3) deemed trust. The secured creditor would be liable to pay the proceeds of the property subject to the subsection (3) trust, i.e. $10,000. Similarly, if the tax debtor were to pay the entire $20,000, the amount of the secured creditor's liability would be reduced to nil.

62 The significance of the last example is that a demand for payment by the Crown does not "crystallize" the amount of the debtor's or the secured creditor's liability to the Crown. That liability is determined by the amount deemed to be held in the subsection (1) trust which in turn determines the extent to which property of the debtor is deemed to be held pursuant to the subsection (3) trust.

63 How is this scheme affected by the bankruptcy of the tax debtor? Subsection (1.1) provides that at or after the time of bankruptcy, subsection (1) does not apply to any amounts that were collected on account of tax prior to that time. The result is that after bankruptcy, there is no amount deemed to be held in trust pursuant to subsection (1) for amounts collected as tax but not remitted pre-bankruptcy. The subsection (3) trust which arose prior to bankruptcy no longer has any subject matter because the trust only attaches to property of the tax debtor to the extent of the subsection (1) trust which no longer exists. This is true for the tax debtor as well as for the tax debtor's secured creditors.

64 I can see no difference in principle between the reduction of the subsection (1) trust to nil by payment or by operation of law. In either case, the subsection (3) trust whose operation depends upon the existence of an amount deemed to held in trust pursuant to subsection (1), is at an end. Had Parliament meant to make the subsection (3) trust a function of the continued existence of unremitted amounts, it could have said so easily enough.

65 Does this Court's decision in *Canada (Procureure générale) c. Banque Nationale du Canada*, 2004 FCA 92, 324 N.R. 31 (F.C.A.) (*National Bank*) affect this conclusion? In that case, this Court said, with respect to provisions of the *Income Tax Act*,

R.S.C. 1985 c.1 (5th Supp.) (the ITA) and the *Employment Insurance Act*, S.C. 1996 c. 23 (the EIA) that are substantially the same as subsections (1) and (3), that a secured creditor who received proceeds of property subject to a trust without remitting the amount of tax payable was liable to the Crown:

> It seems obvious to me that a secured creditor who does not comply with his statutory obligation to "pay" the Receiver General the proceeds of property subject to the deemed trust in priority over his security interest is personally liable and thereby becomes liable for the unpaid amount. The amount is "payable" out of the proceeds flowing from the property ... and since the respondents concede that they received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.
>
> *National Bank* at paragraph 40.

66 It is important to keep the facts of *National Bank* in mind. Secured creditors of tax debtors under the ITA and the EIA had realized on their security and had failed to remit the proceeds to the extent of the outstanding tax debt to the Minister of National Revenue. At all material times, the tax debt was outstanding and, therefore, the deemed trusts under the legislation were in effect. As a result, *National Bank* is a case about enforcing existing deemed trusts.

67 It is true that this Court, citing the decision of the Supreme Court of Canada's decision in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.) (*First Vancouver Finance*), said that "The trust continues to apply to all the assets for as long as the default [to remit source deductions] continues": *National Bank*, at paragraph 29. Both *National Bank* and *First Vancouver Trust* involved deemed trusts under the *ITA* which is not the case here. Furthermore, the *ITA* has no provision equivalent to subsection (1.1). As a result, *National Bank* is authority for the proposition that, prior the tax debtor's bankruptcy, the deemed trusts created by subsection 222 apply to all assets as long as there are amounts subject to the subsection (1) deemed trust. However, *National Bank* is not authority for the proposition that this state of affairs persists after the latter's bankruptcy.

68 The Crown argues that the failure to pay the proceeds of subsection (3) trust property to the Receiver General gives rise to a separate and fully engaged cause of action against the secured creditor. Contrary to the Crown's submissions, this argument cannot be supported by this Court's decision in *National Bank* which is authority for a much narrower proposition. As I hope to have shown earlier, the notion that a secured creditor's obligation is somehow crystallized at a particular point in time without regard to the status of the subsection (1) deemed trust cannot account for reductions in the secured creditor's obligations as a result of reductions in the amounts deemed to be held in trust. If, on the other hand, the secured creditor's obligation varies with the amounts held in the subsection (1) deemed trust, there is no statutory basis for distinguishing between reduction in the subsection (1) deemed trust due to payments on account and reductions which occur by operation of law.

69 I recognize that this results in a situation in which a secured creditor has an incentive to resist payment in the hope that the amount of the subsection (1) deemed trust will be extinguished and may even help that process along by petitioning the tax debtor into bankruptcy. I would only say that in this case, the Crown made a demand for payment in April 2012 but appears to have taken no steps to enforce its demand until November 2013. Nor does the Crown appear to have had recourse to the other collection tools available to in under the Act. I am not persuaded that the view I take of this matter puts the Crown's interests unjustifiably at risk.

70 To summarize, an examination of the text of subsection 222 of the Act teaches that the relationship between the deemed trusts created by subsection (1) subsection (3) is such that the extinction of the former upon bankruptcy - by operation of subsection (1.1) - puts an end to the latter at the same time.

71 As pointed out in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, [1998] S.C.J. No. 2 (S.C.C.), the interpretation of a statute must consider the text, the context and the purpose of the legislation. The conclusion to which I have arrived following my examination of the text of section 222 is supported by both its context and purpose.

72 Part of the context subsection 222, and subsection (1.1) in particular, is subsections 67(2) and (3) of the Bankruptcy and Insolvency Act R.S.C. 1985 c. B-3 (*BIA*)which provide as follows:

> **67 (2)** Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.
>
> **(3)** Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust ...
>
> **(2)** Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.
>
> **(3)** Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée ...

73 Subsection 67(2) makes it clear that Parliament intended to do away with the deemed trusts in bankruptcy. The effect of these trust is to withdraw the property subject to the deemed trust from the estate of the bankrupt so that the federal government's claim takes priority over the claims of unsecured creditors. By eliminating these trusts in bankruptcy, Parliament put the Crown on the same footing as unsecured creditors.

74 The preservation of the deemed trust for unremitted source deductions in subsection 67(3) is explained by the fact that source deductions are amounts which belong to the employee in question. The trust in respect of those funds is a real trust in favour of the employees as well as a deemed trust in favour of the Crown:

> Although [s. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer anymore. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.
>
> *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1992] 2 W.W.R. 641 (Man. C.A.) at p. 646, cited with approval in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385 (S.C.C.) at paragraph 28.

75 As a contextual factor, these provisions, together with the absence of a provision equivalent to subsection (1.1) in any of the Acts referred in subsection 67(3) of the *BIA*, tend to show that the Parliament intended to create a special regime for source deductions in the event of bankruptcy but that no such regime was intended in the case of amounts of unremitted tax under the Act.

76 The purpose of subsection (1.1) was outlined in *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.) where the rationale for amendments to statutory trusts in bankruptcy proceedings (including subsection (1.1) is reviewed at paragraphs 12-17. The purpose of amendments to the *BIA* and the Act was to ensure that "the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed": see paragraph 14.

77 The interpretation which I propose of subsections (1), (1.1) and (3) gives effect to this purpose.

78 As a result, I am of the view that the Federal Court correctly answered the question which was put to it. I would therefore dismiss the appeal with costs.

Appeal allowed.

End of Document

TAB 11

2018 SCC 47, 2018 CSC 47
Supreme Court of Canada

Callidus Capital Corp. v. Canada

2018 CarswellNat 6687, 2018 CarswellNat 6688, 2018 SCC 47, 2018 CSC 47, [2018] 3 S.C.R. 186, [2018] G.S.T.C. 91, 10 P.P.S.A.C. (4th) 211, 2018 D.T.C. 5128, 2018 D.T.C. 5129 (note), 298 A.C.W.S. (3d) 206, 427 D.L.R. (4th) 1, 45 E.T.R. (4th) 1, 65 C.B.R. (6th) 1

Callidus Capital Corporation (Appellant) and Her Majesty The Queen (Respondent) and Insolvency Institute of Canada, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: November 8, 2018
Judgment: November 14, 2018
Docket: 37768

Proceedings: reversing *Canada v. Callidus Capital Corporation* (2017), 2017 CAF 162, 2017 CarswellNat 9496, 37 E.T.R. (4th) 177, 2017 CarswellNat 3599, 8 P.P.S.A.C. (4th) 1, [2017] G.S.T.C. 60, 2017 FCA 162, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, D.G. Near J.A., Donald J. Rennie J.A., J.D. Denis Pelletier J.A. (F.C.A.); reversing *Canada v. Callidus Capital Corp.* (2015), 13 E.T.R. (4th) 43, 2015 CF 977, 2015 CarswellNat 8223, 28 C.B.R. (6th) 209, [2015] G.S.T.C. 105, 5 P.P.S.A.C. (4th) 29, 2015 CarswellNat 4410, 2015 FC 977, Glennys L. McVeigh J. (F.C.)

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Estates and Trusts; Goods and Services Tax (GST); Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
  X.5 Claims of Crown
    X.5.a Federal
      X.5.a.v Miscellaneous
Tax
III Goods and Services Tax
  III.12 Special rules
    III.12.c Bankruptcy
Tax
III Goods and Services Tax
  III.14 Collection and remittance
    III.14.b GST held in trust

Headnote

Tax --- Goods and Services Tax — Special rules — Bankruptcy

Tax debtor paid sale proceeds of property to defendant secured creditor C Corp. prior to bankruptcy — Crown brought action against creditor for recovery of dispositions made before bankruptcy on basis of deemed trust mechanism in s. 222 of Excise Tax Act (ETA) because of prior unremitted GST and HST — Creditor brought motion for determination of question of law, namely, whether bankruptcy of tax debtor and s. 222(1.1) of ETA render deemed trust under s. 222 of ETA ineffective as against secured creditor who received, prior to bankruptcy, proceeds from assets of tax debtor that were deemed to be held in trust for

Crown — Federal Court judge granted creditor's motion and answered question in affirmative — Majority of Federal Court of Appeal allowed Crown's appeal and answered question in negative — Majority held that, pursuant to s. 222(3) of ETA, any proceeds should have been paid to Crown in priority to any security interest pre-bankruptcy, and since proceeds were paid out of priority, obligation to pay was created on creditor, independent of existence of deemed trust — Dissenting Federal Court of Appeal judge answered question in affirmative and held that trust created by s. 222(3) of ETA lapsed due to lack of subject matter by operation of s. 222(1.1) of ETA following debtor's bankruptcy — As of date of bankruptcy, there were no amounts subject to trust under s. 222(1) of ETA and no property of debtor was subject to deemed trust pursuant to s. 222(3) of ETA — Dissenting judge found that s. 67(2) of Bankruptcy and Insolvency Act made it clear that Parliament intended to do away with deemed trusts in bankruptcy except for deemed trust for unremitted source deductions — Creditor appealed — Appeal allowed — Appeal was allowed for reasons of dissenting Federal Court of Appeal judge — Federal Court judgment that answered question in affirmative was reinstated.

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Tax debtor paid sale proceeds of property to defendant secured creditor C Corp. prior to bankruptcy — Crown brought action against creditor for recovery of dispositions made before bankruptcy on basis of deemed trust mechanism in s. 222 of Excise Tax Act (ETA) because of prior unremitted GST and HST — Creditor brought motion for determination of question of law, namely, whether bankruptcy of tax debtor and s. 222(1.1) of ETA render deemed trust under s. 222 of ETA ineffective as against secured creditor who received, prior to bankruptcy, proceeds from assets of tax debtor that were deemed to be held in trust for Crown — Federal Court judge granted creditor's motion and answered question in affirmative — Majority of Federal Court of Appeal allowed Crown's appeal and answered question in negative — Majority held that, pursuant to s. 222(3) of ETA, any proceeds should have been paid to Crown in priority to any security interest pre-bankruptcy, and since proceeds were paid out of priority, obligation to pay was created on creditor, independent of existence of deemed trust — Dissenting Federal Court of Appeal judge answered question in affirmative and held that trust created by s. 222(3) of ETA lapsed due to lack of subject matter by operation of s. 222(1.1) of ETA following debtor's bankruptcy — As of date of bankruptcy, there were no amounts subject to trust under s. 222(1) of ETA and no property of debtor was subject to deemed trust pursuant to s. 222(3) of ETA — Dissenting judge held that no proceeds of that property were payable to Crown by creditor and that failure to pay proceeds of trust under s. 222(3) of ETA did not give rise to separate cause of action against creditor — Creditor appealed — Appeal allowed — Appeal was allowed for reasons of dissenting Federal Court of Appeal judge — Federal Court judgment that answered question in affirmative was reinstated — No comment was made on scope of deemed trust or any liability under s. 222 of ETA prior to bankruptcy.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

Goods and Services Tax — Tax debtor paid sales proceeds of property to defendant secured creditor C Corp. prior to bankruptcy — Crown brought action against creditor for recovery of dispositions made before bankruptcy on basis of deemed trust mechanism in s. 222 of Excise Tax Act (ETA) because of prior unremitted GST and HST — Creditor brought motion for determination of question of law, namely, whether bankruptcy of tax debtor and s. 222(1.1) of ETA render deemed trust under s. 222 of ETA ineffective as against secured creditor who received, prior to bankruptcy, proceeds from assets of tax debtor that were deemed to be held in trust for Crown — Federal Court judge granted creditor's motion and answered question in affirmative — Majority of Federal Court of Appeal allowed Crown's appeal and answered question in negative — Dissenting Federal Court of Appeal judge answered question in affirmative and held that trust created by s. 222(3) of ETA lapsed due to lack of subject matter by operation of s. 222(1.1) of ETA following debtor's bankruptcy — Dissenting judge held that s. 67(2) of Bankruptcy and Insolvency Act made it clear that Parliament intended to do away with deemed trusts in bankruptcy except for deemed trust for unremitted source deductions — Creditor appealed — Appeal allowed — Appeal was allowed for reasons of dissenting Federal Court of Appeal judge — Federal Court judgment that answered question in affirmative was reinstated.

Taxation --- Taxe sur les produits et services — Règles spéciales — Faillite

Débiteur fiscal a payé les fonds recueillis à la suite de la vente d'une propriété à la défenderesse, la créancière garantie C Corp., avant la faillite — Couronne a entamé une poursuite judiciaire à l'encontre de la créancière en vue de récupérer les fonds disposés avant la faillite, faisant valoir le mécanisme de fiducie présumée prévu à l'art. 222 de la Loi sur la taxe d'accise (LTA) parce que des montants n'avaient pas été remis au titre de la TPS et la TVH — Créancière a déposé une requête visant à répondre à la question de droit suivante : est-ce que la faillite d'un débiteur fiscal et l'art. 222(1.1) de la LTA rend inopposable la fiducie présumée prévue à l'art. 222 de la LTA à l'encontre d'un créancier garanti qui a reçu, avant la fiducie, des fonds recueillis à partir des actifs du débiteur fiscal qui étaient considérés être détenus en fiducie au bénéfice de la Couronne? — Juge de la Cour fédérale a accordé la requête de la créancière et a répondu à la question par l'affirmative — Juges majoritaires de la Cour d'appel fédérale ont accueilli l'appel interjeté par la Couronne et ont répondu à la question par la négative — Juges majoritaires ont estimé qu'en vertu de l'art. 222(3) de la LTA, le produit découlant des biens du débiteur aurait dû être payé à la Couronne par priorité sur tout droit en garantie avant la faillite et comme le produit a été payé en violation de la règle de priorité, la créancière avait une obligation de payer malgré l'existence d'une fiducie présumée — Juge dissident à la Cour d'appel fédérale a répondu à la question par l'affirmative et a estimé que la fiducie créée par l'art. 222(3) de la LTA s'était éteinte faute de matière par l'effet de l'art. 222(1.1) de la même loi à la suite de la faillite du débiteur — À la date de la faillite, il n'y avait aucune somme assujettie à la fiducie créée par l'art. 222(1) de la LTA et aucun bien du débiteur n'était assujetti à une fiducie présumée sous le régime de l'art. 222(3) de la LTA — Juge dissident a conclu qu'il ressortait à l'évidence de l'art. 67(2) de la Loi sur la faillite et l'insolvabilité que le législateur avait l'intention d'en finir avec les fiducies présumées en cas de faillite, sauf dans le cas de la fiducie présumée pour les retenues à la source non versées — Créancière a formé un pourvoi — Pourvoi accueilli — Pourvoi a été accueilli pour les motifs du juge dissident de la Cour d'appel fédérale — Jugement de la Cour fédérale qui a répondu à la question par l'affirmative a été rétabli.

Taxation --- Taxe sur les produits et services — Perception et versement — TPS détenue en fiducie

Débiteur fiscal a payé les fonds recueillis à la suite de la vente d'une propriété à la défenderesse, la créancière garantie C Corp., avant la faillite — Couronne a entamé une poursuite judiciaire à l'encontre de la créancière en vue de récupérer les fonds disposés avant la faillite, faisant valoir le mécanisme de fiducie présumée prévu à l'art. 222 de la Loi sur la taxe d'accise (LTA) parce que des montants n'avaient pas été remis au titre de la TPS et la TVH — Créancière a déposé une requête visant à répondre à la question de droit suivante : est-ce que la faillite d'un débiteur fiscal et l'art. 222(1.1) de la LTA rend inopposable la fiducie présumée prévue à l'art. 222 de la LTA à l'encontre d'un créancier garanti qui a reçu, avant la fiducie, des fonds recueillis à partir des actifs du débiteur fiscal qui étaient considérés être détenus en fiducie au bénéfice de la Couronne? — Juge de la Cour fédérale a accordé la requête de la créancière et a répondu à la question par l'affirmative — Juges majoritaires de la Cour d'appel fédérale ont accueilli l'appel interjeté par la Couronne et ont répondu à la question par la négative — Juges majoritaires ont estimé qu'en vertu de l'art. 222(3) de la LTA, le produit découlant des biens du débiteur aurait dû être payé à la Couronne par priorité sur tout droit en garantie avant la faillite et comme le produit a été payé en violation de la règle de priorité, la créancière avait une obligation de payer malgré l'existence d'une fiducie présumée — Juge dissident à la Cour d'appel fédérale a répondu à la question par l'affirmative et a estimé que la fiducie créée par l'art. 222(3) de la LTA s'était éteinte faute de matière par l'effet de l'art. 222(1.1) de la même loi à la suite de la faillite du débiteur — À la date de la faillite, il n'y avait aucune somme assujettie à la fiducie créée par l'art. 222(1) de la LTA et aucun bien du débiteur n'était assujetti à une fiducie présumée sous le régime de l'art. 222(3) de la LTA — Juge dissident a conclu que la créancière n'était redevable à la Couronne d'aucun produit découlant des biens et le manquement à l'obligation de verser le produit de biens assujettis à la fiducie présumée de l'art. 222(3) de la LTA ne donnait naissance à une cause d'action distincte contre le créancier garanti — Créancière a formé un pourvoi — Pourvoi accueilli — Pourvoi a été accueilli pour les motifs du juge dissident de la Cour d'appel fédérale — Jugement de la Cour fédérale qui a répondu à la question par l'affirmative a été rétabli — Aucun commentaire n'a été émis sur la portée de la fiducie présumée ou de toute responsabilité découlant de l'art. 222 de la LTA avant la faillite.

Faillite et insolvabilité --- Priorité des créances — Réclamations de la Couronne — Fédérale — Divers

Taxe sur les produits et services — Débiteur fiscal a payé les fonds recueillis à la suite de la vente d'une propriété à la défenderesse, la créancière garantie C Corp., avant la faillite — Couronne a entamé une poursuite judiciaire à l'encontre de la créancière en vue de récupérer les fonds disposés avant la faillite, faisant valoir le mécanisme de fiducie présumée prévu à l'art. 222 de la Loi sur la taxe d'accise (LTA) parce que des montants n'avaient pas été remis au titre de la TPS et la TVH — Créancière a déposé une requête visant à répondre à la question de droit suivante : est-ce que la faillite d'un débiteur fiscal et l'art. 222(1.1) de la LTA rend inopposable la fiducie présumée prévue à l'art. 222 de la LTA à l'encontre d'un créancier garanti qui a reçu, avant la fiducie, des fonds recueillis à partir des actifs du débiteur fiscal qui étaient considérés être détenus en fiducie au bénéfice de la Couronne? — Juge de la Cour fédérale a accordé la requête de la créancière et a répondu à la question par l'affirmative — Juges majoritaires de la Cour d'appel fédérale ont accueilli l'appel interjeté par la Couronne et ont répondu à la question par la négative — Juge dissident à la Cour d'appel fédérale a répondu à la question par l'affirmative et a estimé que la fiducie créée par l'art. 222(3) de la LTA s'était éteinte faute de matière par l'effet de l'art. 222(1.1) de la même loi à la suite de la faillite du débiteur — Juge dissident a conclu qu'il ressortait à l'évidence de l'art. 67(2) de la Loi sur la faillite et l'insolvabilité que le législateur avait l'intention d'en finir avec les fiducies présumées en cas de faillite, sauf dans le cas de la fiducie présumée pour les retenues à la source non versées — Créancière a formé un pourvoi — Pourvoi accueilli — Pourvoi a été accueilli pour les motifs du juge dissident de la Cour d'appel fédérale — Jugement de la Cour fédérale qui a répondu à la question par l'affirmative a été rétabli.

The tax debtor paid the sales proceeds of property to the defendant secured creditor C Corp. before making an assignment in bankruptcy. The Crown brought an action against the creditor for recovery of the dispositions made before bankruptcy on the basis of the deemed trust mechanism in s. 222 of the Excise Tax Act (ETA) due to prior unremitted Goods and Services Tax (GST) and Harmonized Sales Tax (HST).

The creditor brought a motion for determination of a question of law, namely, whether the bankruptcy of a tax debtor and s. 222(1.1) of the ETA render a deemed trust under s. 222 of the ETA ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Crown. The Federal Court judge granted the creditor's motion and answered the question in the affirmative.

The majority of the Federal Court of Appeal allowed the Crown's appeal and answered the question in the negative based on the reasoning in a prior case dealing with near-identical provisions in the Income Tax Act. Secured creditors who did not comply with the obligation to pay the proceeds derived from deemed trust assets were personally liable to the Crown under an independent cause of action, irrespective of the subsequent bankruptcy of the debtor. Pursuant to s. 222(3) of the ETA, any proceeds should have been paid to the Crown in priority to any security interest pre-bankruptcy, and since the proceeds were paid out of priority, the creditor had the obligation to pay, independent of the existence of a deemed trust. There was no need for a crystallizing event, as the legislation established an obligation to pay.

The dissenting Federal Court of Appeal judge answered the question in the affirmative and held that a trust created by s. 222(3) of the ETA lapsed due to the lack of subject matter by operation of s. 222(1.1) of the ETA following the debtor's bankruptcy. As of the date of bankruptcy, there were no amounts subject to a trust under s. 222(1) of the ETA and no property of the debtor was subject to a deemed trust pursuant to s. 222(3) of the ETA. No proceeds of that property were payable to the Crown by the creditor and failure to pay the proceeds of a trust under s. 222(3) of the ETA did not give rise to a separate cause of action against the creditor. Section 67(2) of the Bankruptcy and Insolvency Act made it clear that Parliament intended to do away with deemed trusts in bankruptcy except for a deemed trust for unremitted source deductions.

The creditor appealed.

Held: The appeal was allowed.

Per Gascon J. (Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin JJ. concurring): The appeal was allowed for the reasons of the dissenting Federal Court of Appeal judge. The Federal Court judgment that answered the question in the affirmative was reinstated. No comment was made on the scope of a deemed trust or any liability under s. 222 of the ETA prior to bankruptcy.

Le débiteur fiscal a payé les fonds recueillis à la suite de la vente d'une propriété à la défenderesse, la créancière garantie C Corp., avant de faire cession de ses biens. La Couronne a entamé une poursuite judiciaire à l'encontre de la créancière en vue de récupérer les fonds disposés avant la faillite, faisant valoir que le mécanisme de fiducie présumée prévu à l'art. 222 de la Loi sur la taxe d'accise (LTA) s'appliquait aux montants qui n'avaient pas été remis au titre de la taxe sur les produits et services (TPS) et la taxe de vente harmonisée (TVH).

La créancière a déposé une requête visant à répondre à la question de droit suivante : est-ce que la faillite d'un débiteur fiscal et l'art. 222(1.1) de la LTA rend inopposable la fiducie présumée prévue à l'art. 222 de la LTA à l'encontre d'un créancier garanti qui a reçu, avant la fiducie, des fonds recueillis à partir des actifs du débiteur fiscal qui étaient considérés être détenus en fiducie au bénéfice de la Couronne? Le juge de la Cour fédérale a accordé la requête de la créancière et a répondu à la question par l'affirmative.

Les juges majoritaires de la Cour d'appel fédérale ont accueilli l'appel interjeté par la Couronne et ont répondu à la question par la négative en se fondant sur le raisonnement suivi dans une décision précédente dans laquelle il était question de dispositions presque identiques dans la Loi de l'impôt sur le revenu. Le créancier garanti qui ne s'acquitterait pas de son obligation de payer le produit découlant de biens détenus en fiducie présumée en serait personnellement redevable à la Couronne, qui a une cause d'action distincte contre lui, sans égard pour la faillite postérieure du débiteur. En vertu de l'art. 222(3) de la LTA, le produit découlant des biens du débiteur aurait dû être payé à la Couronne par priorité sur tout droit en garantie avant la faillite et comme le produit a été payé en violation de la règle de priorité, la créancière avait une obligation de payer malgré l'existence d'une fiducie présumée. Aucun événement déterminant n'était nécessaire, puisque la loi établissait l'obligation de paiement.

Le juge dissident à la Cour d'appel fédérale a répondu à la question par l'affirmative et a estimé que la fiducie créée par l'art. 222(3) de la LTA s'était éteinte faute de matière par l'effet de l'art. 222(1.1) de la même loi à la suite de la faillite du débiteur. À la date de la faillite, il n'y avait aucune somme assujettie à la fiducie créée par l'art. 222(1) de la LTA et aucun bien du débiteur n'était assujetti à une fiducie présumée sous le régime de l'art. 222(3) de la LTA. Ainsi, la créancière n'était redevable à la Couronne d'aucun produit découlant de ces biens et le manquement à l'obligation de verser le produit de biens assujettis à la fiducie présumée de l'art. 222(3) de la LTA ne donnait naissance à une cause d'action distincte contre le créancier garanti. Il ressortait à l'évidence de l'art. 67(2) de la Loi sur la faillite et l'insolvabilité que le législateur avait l'intention d'en finir avec les fiducies présumées en cas de faillite, sauf dans le cas de la fiducie présumée pour les retenues à la source non versées.
La créancière a formé un pourvoi.
Arrêt: Le pourvoi a été accueilli.
Gascon, J. (Wagner, J.C.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Le pourvoi a été accueilli pour les motifs du juge dissident de la Cour d'appel fédérale. Le jugement de la Cour fédérale qui a répondu à la question par l'affirmative a été rétabli. Aucun commentaire n'a été émis sur la portée de la fiducie présumée ou de toute responsabilité découlant de l'art. 222 de la LTA avant la faillite.

Table of Authorities

Statutes considered:

Excise Tax Act, R.S.C. 1985, c. E-15

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] — considered

APPEAL by creditor from judgment reported at 2017 CarswellNat 3599, 2017 CarswellNat 9496, 2017 FCA 162, [2017] G.S.T.C. 60, 51 C.B.R. (6th) 15, 414 D.L.R. (4th) 132, 37 E.T.R. (4th) 177, 8 P.P.S.A.C. (4th) 1 (F.C.A.), allowing Crown's appeal from determination of question of law.

POURVOI formé par une créancière à l'encontre d'une décision publiée à *Canada v. Callidus Capital Corporation* (2017), 2017 FCA 162, 2017 CarswellNat 3599, 51 C.B.R. (6th) 15, [2017] G.S.T.C. 60, 414 D.L.R. (4th) 132, 8 P.P.S.A.C. (4th) 1, 2017 CAF 162, 2017 CarswellNat 9496, 37 E.T.R. (4th) 177 (F.C.A.), ayant accueilli l'appel interjeté par la Couronne à l'encontre d'une décision ayant répondu à une question de droit.

***Gascon J.* (orally):**

1 We would allow the appeal for the reasons of the dissenting judge in the Federal Court of Appeal, and reinstate the order of Justice McVeigh of the Federal Court that answered in the affirmative the question of law submitted by the parties, with costs throughout in favour of Callidus Capital Corporation.

2 The question of law at issue was formulated as follows and assumed the existence of a pre-bankruptcy liability under s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"):

> Does the bankruptcy of a tax debtor and subsection 222(1.1) of the [*ETA*] render the deemed trust under section 222 of the *ETA* ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Plaintiff?

3 As a result, as it is not necessary to do so to resolve this appeal, this Court is not commenting, one way or the other, on the scope of the deemed trust or any liability under s. 222 of the *ETA* prior to bankruptcy.

Appeal allowed.

Pourvoi accueilli.