

COURT OF APPEAL FOR ONTARIO

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

Doherty, Gillese and Lauwers JJ.A.

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

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

BETWEEN

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

Applicants

and

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

Respondents

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

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

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

Alex Cobb, for the respondent Mercer (Canada) Limited

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

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

Heard: February 3, 2015

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

Gillese J.A.:

OVERVIEW

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

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

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

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

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 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[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: *Re Grant Forest Products Inc.*, 2015 ONCA 192. 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.

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 ..."

[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 submitted² 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.

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

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, 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 (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 *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, 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 *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93. 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: *Re Air Canada* (2003), 66 O.R. (3d) 257 and *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108. In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco*, 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 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 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. 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*. 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 *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

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

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

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

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.

Released:



AUG 07 2015

W. S. G. J.
I agree O'Keefe J.
I agree Pham J.

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.