Court of Appeal No. C58638
Court of Appeal No. M42978
Court File No.: CV-09-8247-00CL

COURT OF APPEAL FOR ONTARIO

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 OF ARRANGEMENT OF 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

RESPONDING FACTUM OF WEST FACE CAPITAL INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
40 King Street West
Toronto, Ontario
M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for the Respondent,
West Face Capital Inc.

TABLE OF CONTENTS

MINISTRY OF THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO
Financial Services Commission of Ontario
Legal Services branch
5160 Yonge St., 17th floor
Toronto, ON M2N 6L9

Mark Bailey
Tel: 416.590.7555
Fax: 416.590.7556
Deborah McPhail
Tel: 416.226.7764

Solicitors for the Superintendent of Financial Services

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jane O. Dietrich LSUC #: 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Lawyers for the Applicants (Respondents in Appeal) *Grant Forest Products Inc., Grant Alberta Inc. and Grant Forest Products Sales Inc.*

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

David R. Byers
Tel: (416) 869-5697
Daniel S. Murdoch
Tel: (416) 869-5529
Fax: (416) 947-0866

Lawyers for the Monitor

ERNST AND YOUNG INC.
P.O. Box 251
Ernst & Young Tower
Toronto-Dominion Centre
Toronto, ON M5K 1J7

Alex Morrison
Telephone: 416-941-7743
Facsimile: 416-864-1174
Simone Carvalho
Telephone: 416-943-2085

Monitor

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Alexander Cobb
Telephone: 416-862-5964
Facsimile: 416-862-6666

Lawyers for Mercer (Canada) Limited

BENNETT JONES LLP
One First Canadian Place, Ste. 3400
P.O. Box 130
Toronto, ON M5X 1A4

Richard Swan
Telephone: 416-777-7479
Facsimile: 416-863-1716

Lawyers for Peter Grant Sr.

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FACTUM OF THE RESPONDENT WEST FACE CAPITAL INC.

PART I - OVERVIEW

1. This Factum of the Respondent, West Face Capital Inc. ("**West Face**") is delivered in response to the appeal by the Superintendent[1] of the Order of the Honourable Mr. Justice Campbell (the "**CCAA Judge**") dated September

[1] All capitalized terms not defined herein shall have the meaning ascribed to them in the Factum of the Appellant, The Superintendent of Financial Services.

20, 2013 (the "**Transition Order**").[2] The Transition Order was granted pursuant to the written reasons of the CCAA Judge issued on the same date (the "**Reasons**").[3] The Transition Order, among other things, lifted the stay of proceedings granted on behalf of GFPI pursuant to the Initial Order for the purpose of allowing West Face, a secured creditor of GFPI, to obtain a bankruptcy order against GFPI.

2. The core issue on this appeal has been heard and determined in a prior appeal brought by the Superintendent. In 2006, the Court of Appeal for Ontario released its decision in *Re Ivaco*[4]. In that case, Laskin J.A. dismissed an appeal of the Superintendent seeking identical relief to the case at bar and stated:

> Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.
>
> Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. ... At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the BIA. It cannot do so.

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[2] Transition Order, Compendium of the Respondent, West Face, Tab 1.
[3] Reasons, Compendium of the Respondent, West Face, Tab 2.
[4] *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (Ont. C.A.), Appellant's Book of Authorities, Tab 10.

3. GFPI had, during the course of a CCAA proceeding supervised by the CCAA Judge over a four year period, completed the sale of its assets. In June 2012, certain parties in the CCAA proceeding embarked on a process that evolved into a debate over the payment of certain pension claims that arose during the CCAA proceeding. In response, West Face brought the Bankruptcy Motion to lift the stay and put GFPI into bankruptcy since it was indisputable that the pension claims would be unsecured in a bankruptcy. The CCAA Judge followed the decision of the Court of Appeal in *Re Ivaco*, considered all of the circumstances of the GFPI CCAA proceedings and exercised his discretion to issue a bankruptcy order with respect to GFPI without requiring the pension claims to be paid prior to the bankruptcy. As a result, any claim of the pension beneficiaries (and related deemed trust claims) will be dealt with in accordance with the provisions of the BIA.

4. It was appropriate for the CCAA Judge to lift the CCAA stay and make the bankruptcy order requested by West Face. This result is exactly what the Supreme Court of Canada indicated in *Century Services*[5] will foster the harmonious transition between reorganization, liquidation and distribution. The reasons of the Court of Appeal in *Re Ivaco* have not been displaced by the Supreme Court of Canada's recent decision in *Re Indalex*.[6]

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[5] *Century Services Inc. v. Canada (Attorney General),* (2010), 3 S.C.R. 379, 72 C.B.R. (5th) 170 (S.C.C.), at para. 77- 80, Appellant's Book of Authorities, Tab 6.

[6] *Sun Indalex Finance, LLC v. United Steelworkers,* [2013] S.C.J. No. 6, Appellant's Book of Authorities, Tab 1.

On the contrary, the reasons in *Re Ivaco* have been endorsed by the Supreme Court of Canada in *Century Services*.[7]

5. Over the course of the last several years, parties advocating for pension interests (including the Superintendent in *Re Ivaco*) have made repeated attempts to improve the position of pension beneficiaries in insolvency proceedings through various means - deemed trust claims, lien claims, requests for special payments during insolvency proceedings and other "equitable" (from the perspective of pension beneficiaries) re-ordering of priorities to attempt to secure funding for pension deficiency claims. This case is another such attempt. The Courts at all levels have consistently stated that any such priority will have to come from Parliament. As noted in the decision of Justice Deschamps in *Re Indalex*, Parliament has had a recent opportunity to consider the issue of priority status for pension deficiency claims and chose not to act[8]. There is simply no legal foundation for the position advanced by the Appellant with respect to its opposition to a bankruptcy of GFPI. Accordingly, the appeal of the Superintendent should be dismissed, with costs.

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[7] *Century Services*, *supra*, at para. 78, Appellant's Book of Authorities, Tab 6.
[8] *Re Indalex*, *supra*, para. 81.

PART II - THE FACTS

6. (a) **Accepted Facts** - West Face agrees with the facts set out in paragraphs 4 through 22 and paragraph 24 of the Appellant's factum.

(b) **Disputed Facts** – West Face disagrees with the facts set out in paragraphs 23 and 25-30 of the Appellant's factum. These statements are the Appellant's characterization of the *Re Indalex* case and the Reasons, not facts.

Additional Facts

7. There are certain additional facts that the Respondent considers relevant to note for the Court's consideration.

(a) **The consent of the Second Lien Lenders was necessary for any payment to a creditor in the CCAA Proceedings.**

The terms of the Initial Order in effect after August 26, 2011 prohibited GFPI from, *inter alia,* making a payment to any creditor without the consent of the Agent for the Second Lien Lenders. [9]

(b) **All parties were aware that counsel to the Agent for the Second Lien Lenders had asked to be removed from the Service List on March 19, 2012**

[9] Initial Order, paras. 10(a)-(o), Compendium of the Respondent, West Face, Tab 3. and Order of Justice Campbell dated August 26, 2011, para. 6, Compendium of the Respondent, West Face, Tab 4.

Goodmans LLP, counsel to the Agent for the Second Lien Lenders circulated an email to the Service List on March 19, 2012 that they no longer represented the Agent.[10]

(c) **West Face, one of the Second Lien Lenders retained counsel to respond to the Pension Motion when it appeared that the Agent could not obtain timely instructions from the Second Lien Lenders**

Although West Face was on the Service List, it had not retained counsel as the Agent for the Second Lien Lenders had counsel appearing on the Service List. After the Pension Motion was served, West Face became aware that the Agent would not be able to obtain timely instructions from the Second Lien Lenders and, accordingly, it retained Borden Ladner Gervais LLP ("BLG") on October 19, 2012. BLG immediately requested an adjournment of the Pension Motion that was scheduled for October 22, 2012. The Pension Claimants refused the adjournment request. Accordingly, West Face immediately served the Bankruptcy Motion, making it returnable at the same time as the Pension Motion.[11]

PART III - THE ISSUES

8. West Face disagrees with the characterization of the "issues to be determined on appeal" by the Appellant in paragraph 31 of the Appellant's Factum. As noted above, West Face submits that the core issue is whether it

[10] Affidavit of Peter Fraser, sworn October 19, 2012 (the "Fraser Affidavit"), para. 10, Compendium of the Respondent, West Face, Tab 5.

[11] Fraser Affidavit, para. 11-13, Compendium of the Respondent, West Face, Tab 5.

was necessary or appropriate for the pension claims to be paid as a "pre-condition" to an order to put GFPI into bankruptcy at the end of the CCAA proceedings. If this Court agrees with the disposition of the CCAA Judge on this issue, the remaining issues raised by the Appellant are moot.

9. West Face has responded to the issues raised by the Appellant in paragraphs 30-52, below. In addition, West Face adopts and relies on the submissions made by the Monitor in its Responding Factum in response to the issues raised by the Appellant.

Standard of Appellate Review

10. The Transition Order issued by the CCAA Judge lifting the stay imposed by the Initial Order and granting a bankruptcy order against GFPI is a discretionary order. This is acknowledged by the Appellant.[12]

11. This Court has repeatedly confirmed that appellate review of a discretionary order under the CCAA is limited. The CCAA Judge's discretionary orders are entitled to deference. Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion.[13]

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[12] Paragraph 32 of Appellant's Factum.

[13] *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) at para. 25, Book of Authorities of West Face, Tab 1, *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126 (Ont. C.A.) at para. 23, Book of Authorities of West Face, Tab 2, *Algoma Steel Inc. v.*

The exercise of the CCAA Judge's discretion was reasonable

12. Numerous considerations supported the CCAA Judge's exercise of his discretion to lift the stay and permit the bankruptcy order to be made against GFPI. The CCAA Judge summarized his reasons for rejecting the Pension Claimants' position in opposition to the bankruptcy of GFPI and exercised his discretion to allow the bankruptcy application to proceed at paragraphs 52-57 and 119-128 of the Reasons:

> [52] The liquidation of the applicant under the *CCAA* did not proceed under an explicit Plan voted on by the creditors and approved by the Court.
>
> [53] What did proceed was an Initial Order that in addition to a stay of proceedings (which has continued), permitted, but did not require the Applicant to pay ordinary operating expenses in the course of liquidating assets under the *CCAA* for the benefit of all stakeholders.
>
> [54] The Initial Order specifically provides in paragraph 5 as follows:
>
> > [5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;
> >
> > > (a) *all outstanding and future wages, salaries, employee benefits and pension contributions*, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and
>
> [55] No creditors including those representing the members of the pension plans opposed the granting of the Initial Order; the representatives of pension plans did not oppose the sale of assets on the occasions in which approval was sought and did not raise the issue of deemed trust until the windup orders made in August 2012.

Union Gas Ltd.(2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16, Book of Authorities of West Face, Tab 3.

[56] There was no objection on the part of any party to the payment which the Applicant made to the pension plans being the regular and ordinary contributions under the plans from 2009 until the wind up date.

[57] Up to August 2012 there was no request made on the part of the pension plans to set aside the Initial Order and provide for what might have been expected to be a deemed trust under wind up.

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[119] To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

[120] This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the *BIA* process.

[121] I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditor's position may be better advanced under the *BIA.*

[122] The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Court's decision in *Indalex,* I questioned whether it would be fair to permit the stay to be lifted if it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

[123] In this case West Face urges its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would *de facto* be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA.*

[124] I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA.* That has been the case here.

[125] If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the

> purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.
>
> [126] The Supreme Court of Canada in *Indalex* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.
>
> [127] For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.
>
> [128] While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in *Indalex*.

13. The Reasons reflect the fact that the CCAA Judge took into account the likely result of the pension deficiency claims if GFPI was put into bankruptcy. He recognized that the bankruptcy of GFPI would automatically make a claim for a deemed trust ineffective. He noted that none of the Pension Claimants had either: (i) challenged the terms of the Initial Order that provided that GFPI was not required to make pension contributions or (ii) asserted a "deemed trust" claim in the CCAA proceeding until August 2012. After weighing all of the competing interests and considerations, he quite properly exercised his discretion to lift the stay and permit the bankruptcy application to proceed. That discretion is entitled to deference by the Court of Appeal and the Appellant acknowledges that the CCAA Judge's exercise of discretion is entitled to deference.[14]

[14] Paragraph 32 of the Appellant's Factum.

The CCAA Judge did not Commit an Error in Principle

14. The CCAA Judge applied the correct considerations in connection with the law relating to both the lifting of the CCAA stay and the issuing of a bankruptcy order.

15. The BIA[15] provides that one or more creditors may file an application for a bankruptcy order if it is alleged that the debt or debts of the debtor to the applicant creditor are at least $1,000 and the debtor committed an act of bankruptcy within the six months preceding the filing of the bankruptcy application.

16. Section 43(7) of the BIA permits the court to dismiss an application for a bankruptcy order if it concludes "that for other sufficient cause no order ought to be made". Section 43(7) provides:

> (7) 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.[16]

17. Section 43(7) confers a discretion: the exercise of that discretion must be founded on sound judicial reasoning based on credible evidence and must

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[15] Section 43(1), *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA").
[16] Section 43(7), BIA

be exercised judicially according to common sense and justice and in a manner that does not occasion a miscarriage of justice.[17]

18. A court may dismiss a bankruptcy application "for other sufficient cause." However, it is accepted by Canadian courts that a creditor may seek a bankruptcy order, among other things:

(a) to seek remedies only available in bankruptcy, such as to investigate questionable transactions involving an alleged preference or transfer at under value; and

(b) as a legitimate way to alter priorities under the BIA.[18]

19. No sufficient cause could be (or was) shown that a bankruptcy order ought not to have been made at this stage in the CCAA proceeding. The Supreme Court of Canada in *Century Services* and the Ontario Superior Court of Justice in *Bank of Nova Scotia v. Huronia Precision Plastics*[19] (noted below) have established principles to the contrary - seeking to install the scheme of distribution established by Parliament under the BIA is a valid reason to make a bankruptcy order.

20. No issue has been raised by the Appellant regarding whether proper consideration was given to the issues regarding the lifting of the stay, except

[17] *Re Churchill Forest Industrial (Manitoba) Ltd.* (1971), 16 C.B.R (N.S.) 158 (Man. Q.B.), Book of Authorities of West Face, Tab 4

[18] *Re Ivaco Inc.* (2005), 12 C.B.R. (5th) 213 (S.C.J.), appeal dismissed, (2006), 83 O.R. 108 (Ont. C.A.), Book of Authorities of West Face, Tab 5.

[19] *Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (S.C.J.), Book of Authorities of West Face, Tab 6.

for the Appellant's position that West Face delayed bringing its motion to seek the bankruptcy order. This issue is addressed below.

The Bankruptcy of GFPI is Appropriate and Consistent with Established Principles

21. The fundamental principles applicable to a bankruptcy proceeding and the transition from the CCAA to the BIA have been clearly laid out by the Supreme Court of Canada in the *Century Services* case:

> Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankruptcy debtor's estate. 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 Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interest at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63). ...
>
> Source deductions deemed trusts aside, the 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 *CCCA* 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*.[20]

[20] *Century Services, supra*, at para. 78, 80.

22. The Supreme Court of Canada also commented on the objective of the stay to maintain the *status quo* during the CCAA:

> The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and the *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.
>
> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst shareholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.[21]

23. The intention of a party to use the BIA to alter priority is a legitimate reason to seek a bankruptcy and the timing of the request to initiate the BIA proceeding has no bearing on the validity of the request.[22]

24. It is entirely appropriate for the Court to consider the same principles it does when granting a stay as when it considers lifting the stay. Such an exercise ought to be conducted with strong consideration being given to a purposive and liberal interpretation of the court's powers, with

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[21] *Century Services, supra*, at para. 76-7.

[22] *Bank of Nova Scotia v. Huronia Precision Plastics Inc., supra*, para. 13.

due regard for the underlying purpose of the CCAA.[23] The CCAA Judge recognized that ordering the payment of the pension deficiency claims that arose post-filing would be, at least, contrary to the Initial Order. At worst, the payment would be a devastating blow to parties that negotiate and rely on the terms of the Initial Order to maintain the *status quo,* in this proceeding and potentially other CCAA proceedings.

25. The CCAA Judge correctly applied all of the above-referenced principles in his granting of the Transition Order and noted:

(i) that neither of the pension plans in this case were in the winding up process at the time of the Initial Order, or for some time thereafter; [24]

(ii) that the GFPI CCAA proceedings were a prime example of the flexible operation of the CCAA, which facilitated the sale of the assets to provide the maximum benefit possible to the widest group of stakeholders;[25]

(iii) that there are important policy considerations in maintaining a stay of proceedings under a liquidating CCAA and determining the appropriate time for the CCAA proceedings to

[23] *Century Services,* supra, at paras. 59, 65.
[24] Reasons, para. 46, Compendium of the Respondent, West Face, Tab 2.
[25] Reasons, para. 50, Compendium of the Respondent, West Face, Tab 2.

end or to lift the stay to provide for an orderly transition from the CCAA process to the BIA;[26]

(iv) that reversing priorities is a legitimate purpose for the institution of bankruptcy proceedings;[27]

(v) that GFPI was under no obligation to make special payments as a result of, *inter alia*, paragraph 5 of the Initial Order;[28]

(vi) that he was following the reasoning of Justice Deschamps in *Century Services* that the "BIA scheme of liquidation distribution necessarily supplies the backdrop for what will happen if the CCAA is ultimately unsuccessful";[29]

(vii) that there was no evidence on the Bankruptcy Motion that West Face was not acting in good faith;[30]

(viii) that there was no evidence of prejudice to any party of the alleged delay in West Face bringing the Bankruptcy Motion;[31]

(ix) that the purpose of the *process* in an insolvency proceeding is to provide predictability to the interests of creditors, allow for flexibility and maximize recovery and that these objectives

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[26] Reasons, para. 61, Compendium of the Respondent, West Face, Tab 2.
[27] Reasons, para. 63, Compendium of the Respondent, West Face, Tab 2.
[28] Reasons, para. 94, Compendium of the Respondent, West Face, Tab 2.
[29] Reasons, para. 106, Compendium of the Respondent, West Face, Tab 2.
[30] Reasons, para. 108, Compendium of the Respondent, West Face, Tab 2.
[31] Reasons, para. 119, Compendium of the Respondent, West Face, Tab 2.

would be jeopardized by allowing the imposition of a priority interest to arise in the middle of an insolvency proceeding;[32]

26. The CCAA Judge is in the best position to assess each of the above-noted factors in connection with his exercise of discretion in making the Transition Order.

Alleged Delay

27. On the other hand, the only issue raised by the Appellant to take issue with the exercise of the CCAA Judge's discretion to make the bankruptcy order is the allegation of delay – that West Face did not bring the Pension Motion in a timely manner after the Pension Motion was served. There is no authority in a CCAA case (or any bankruptcy case) cited by the Appellant that such a delay (which is denied by West Face) has ever been the basis for refusing to make a bankruptcy order. In any event, the issue of the alleged delay was considered by the CCAA Judge and dismissed, as clearly laid out in the Reasons.

28. It is interesting to contrast the position of the Appellant on the allegations of West Face's delay in bringing the Bankruptcy Motion with the Appellant's claim that it was unnecessary to assert (or even give notice of) its deemed trust claim prior to responding to the Pension Motion (see paragraphs 44-49 of the Appellant's factum). Despite being aware of the

[32] Reasons, paras. 124-5, Compendium of the Respondent, West Face, Tab 2.

potential for significant wind up deficits in the pension plans for almost two years preceding the Pension Motion, none of the Pension Claimants ever brought a motion (or cross motion) to amend the Initial Order or to otherwise compel the making of the pension deficiency payments or assert (or give notice of any assertion) a deemed trust claim.

Response to Issues Raised by Appellant

29. If this Court agrees that the CCAA Judge correctly exercised his discretion to lift the stay without imposing a pre-condition of the payment of the pension deficiency amounts prior to making the bankruptcy order, the issues raised by the Appellant in its factum are moot. The Appellant acknowledges[33], as it must, that the deemed trust created by section 57 of the PBA is ineffective in the event of a bankruptcy. If the pension deficiency amounts are not ordered to be paid as part of the termination of the CCAA proceedings, there is no reason for the Court to address the issues raised by the Appellant regarding the effect of a deemed trust that is claimed to arise during a CCAA proceeding.

Paramountcy puts an end to the potential for a deemed trust claim

30. However, if the Court considers it necessary to address the issue of whether the deemed trust is effective to require payment of the pension deficiency amounts in this case, West Face submits that the Transition Order

[33] Paragraph 50, Appellant's Factum

should be upheld to confirm that the payments are not required, in the circumstances of this case.

31. On this issue, the foundation of the Appellant's case on appeal is that there is no conflict between the terms of the Initial Order and the obligations imposed on GFPI under the PBA. As a result, the Appellant's position is that the test for paramountcy cannot be met in this case. This position does not accord with the facts in this CCAA proceeding or the law relating to paramountcy.

32. The doctrine of federal paramountcy applies where provincial and federal statutory regimes "are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament."[34]

33. The doctrine also applies where the provincial law produces defiance of an Order made under a federal law.[35]

34. Paragraph 5 of the Initial Order provides:

> [[5] **THIS COURT ORDERS** that the Applicants shall be entitled *but not required* to pay the following expenses whether incurred prior to or after this Order:
>
> > (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation

[34] *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23, 256 O.A.C. 131, 99 O.R. (3d) 708 (Ont. C.A.), para. 38, Book of Authorities of West Face, Tab 7.

[35] *Re Indalex, supra*, para. 60.

> pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and[36] (emphasis added)
>
> . . .

35. Section 55(2) of the PBA provides:

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

36. Section 57(4) of the PBA[37] reads as follows:

> 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. (emphasis added)

37. GFPI cannot comply with section 55(2) of the PBA - where it is *required* to make pension contributions - and paragraph 6 of the Initial Order - where it is *not required* to make pension contributions. Section 55 (2) of the PBA must yield to the terms of the Initial Order such that GFPI has no requirement to make pension contributions as long as the terms of the Initial Order are in force. As noted above, the Initial Order prohibits GFPI from making payment towards a pension deficiency claim without the consent of

[36] Initial Order, para. 5, Compendium of the Respondent, West Face, Tab 3.
[37] *Pension Benefits Act*, R.S.O. c.P.8, s.57(4).

the Agent for the Second Lien Lenders. As such, GFPI was, during the period of the stay, not a person that was "required" to make pension contributions.

38. In addition to raising a conflict between the PBA and the Initial Order, the removal of the requirement to make pension contributions removed the pre-condition that would otherwise trigger an obligation on the part of GFPI to be deemed to hold property in trust under section 57 of the PBA.

39. The Ontario Court of Appeal considered the issue of paramountcy in relation to the same provision of an Initial Order in the CCAA proceedings of Nortel. Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments, contrary to the obligations provided for under the *Employment Standards Act*[38] (the "ESA"). The former employees of Nortel brought a motion to vary the Initial Order to require Nortel to pay statutory termination and severance claims under the ESA that were not being paid pursuant to this section of the Initial Order.

[38] *Employment Standards Act, 2000*, S.O. 2000, c.41

40. The reasons of the Court of Appeal in *Re Nortel*[39] noted that the provincial statute requiring termination and severance pay to be paid to the former employees directly conflicted with the terms of the Initial Order. The Court held that Nortel was not required to make these payments. Again, the doctrine of paramountcy was triggered, and the Court stated that the intention of Parliament would be frustrated if the Court's stay order did not apply to statutory termination and severance payments owed to terminated employees in respect of past services. The Court noted that giving effect to these payments would essentially give the beneficiaries who received these payments a super-priority over unsecured and even secured creditors.

41. The Court went on to state:

> 38 Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:
>
>> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.
>
> 39 The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[39] *Re Nortel Networks Corp*, *supra*, para. 40.

...

43 The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6(a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

44. However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

45. Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.[40]

42. The issue of whether the terms of the Initial Order that remove the requirement to pay pension contributions was also considered by the Quebec Superior Court in *Re Aveos*.[41] In similar circumstances to this case, the CCAA judge held:

88 The interruption of payments to the pension plan has been allowed by C.C.A.A. courts when necessary to enhance liquidity to promote the survival of a company in financial distress[FN43]. In *Nortel*[FN44], the

[40] *Re Nortel, supra*, at paras. 38, 39, 43-45.

[41] *Re Aveos Fleet Performance Inc.* (2013), 9 C.C.P.B. (2nd) 186, 2 P.P.S.A.C. (4th) 60 (Q.S.C.), Book of Authorities of West Face, Tab 8.

company was being put through a sales process and did not appear to be able to continue its normal business operations.

89 The situation in the present case was not essentially different on March 19, 2012. However, the unfolding of the facts made it clear in short order that Aveos would not continue in business. Employees were not recalled to continue anything akin to normal business activity. The sales or divestiture process was approved by this Court on April 20, 2012. There were a number of sales and four (4) distributions of funds to the Secured Lenders between October 24, 2012 and October 21, 2013. The Superintendent was or should have been fully aware of the situation. However, no application was brought by the Superintendent or by Aon to vary the Initial Order as sought herein.

90 Had an application been brought, the Secured Lenders could have decided on a course of action which may have included provoking a bankruptcy or a receivership.

91 While the undersigned would not go so far as to say that priorities cannot be revisited following a sale, vesting order and distribution as did Campbell, J. recently in *Grant Forest*[FN45], I do believe that the Court should be extremely hesitant to alter the Initial Order, retroactively, after such a long period of time has elapsed and salient events in the C.C.A.A. process have occurred. As Farley, J. said :

> Come back relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question.[FN46]

92 The Initial Order was renewed six (6) times. The Appellant has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights, may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of « fin de non-recevoir »[FN47] in civil law.

93 It should also be noted that even in its petition for declaratory relief filed in April 2013, the Superintendent did not seek a modification of the Initial Order. The issue arose at the hearing.

94 In the circumstance described above, the Superintendent's delay in seeking a modification to the Initial Order appears unreasonable given that the other parties, particularly the Secured Lenders have relied on that Initial Order, in good faith.

95 Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.

43. Similarly, in *Collins & Aikman*[42], the United Steel Workers brought a motion to amend the Initial Order to remove the "not required" provision in relation to special payments during the currency of the CCAA proceeding. The Court declined to amend the Initial Order. The abrogation of any obligation to make payments due under the PBA through the terms of the Initial Order was specifically considered by Spence J.:

> 87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.[43]

44. The Pension Claimants are essentially requesting the CCAA Judge to make an Order that is contrary to the Initial Order. As stated in *Collins & Aikman*, the Court should not consider such an Order where it would be contrary to the existing Orders already made by the Court. Such an approach "would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others." [44]

45. The above-noted terms of the Initial Order were never appealed or varied and applied to GFPI throughout the CCAA proceeding. It should be noted that, similar to the *Re Aveos* case, the terms of the Initial Order were

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[42] *Collins & Aikman Automotive Canada Inc., Re* (2007), 63 C.C.P.B. 125, 37 C.B.R. (5th) 282, 161 A.C.W.S. (3d) 675 (Ont. Sup. C.J.), para. 9, Book of Authorities of the Appellant, Tab 8.
[43] *Collins & Aikman, supra*, para. 87.
[44] *Collins & Aikman, supra*, para. 108.

extended numerous times during the CCAA proceedings. The Appellant, who was on the Service List from the outset, did not oppose the terms at any time.

Pension claims should not be paid prior to a bankruptcy

46. As noted above, it would be improper for the Court to order a distribution to the Pension Beneficiaries during the currency of the CCAA proceedings as such an order would offend the doctrine of federal paramountcy. In *Ivaco*, the Court of Appeal expressly provided that this would not be an appropriate approach, and endorsed bankruptcy proceedings as the appropriate method of resolving pension deemed trust claims at the close of CCAA proceedings:

> The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.
>
> ...
>
> For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because The Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the Initial Order under the CCAA. Once the motions judge lifted the

> stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.[45]

47. In *Ivaco*, the Court of Appeal highlighted the precise time at which the transition from CCAA proceedings to a BIA distribution was appropriate:

> The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be negotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution.[46]

48. The Supreme Court of Canada has endorsed this approach, requiring that "the comprehensive and exhaustive mechanism under the BIA must control the distribution of the debtor's assets once liquidation is inevitable."[47]

49. The parties in this proceeding found themselves at the precise crossroads described in *Century Services* – there were no further assets to be sold, no plan to be put forward by GFPI, and only a portion of the proceeds from the Court-ordered sales remained to be distributed. Where Parliament has provided a regime by which this distribution should take place, the Court should not usurp this function by making an Order that would be inconsistent with this statutory regime. It was appropriate for the Court to lift the stay of proceedings so that a bankruptcy could occur.

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[45] *Re Ivaco, supra*, paras. 60, 62.
[46] *Ivaco, supra*, para. 76.
[47] *Re Century Services*, supra, at para. 80.

***Re Indalex* supports the subordination of the deemed trust**

50. The fact that the Transition Order adjudges GFPI as a bankrupt is also a significant factor that distinguishes this case from *Re Indalex* and *Re Usarco*, the cases cited by the Appellant. In both of those cases, no bankruptcy proceedings were pending.

51. In any event, the Supreme Court of Canada's decision in *Re Indalex* has not altered the effectiveness of the conclusions reached by the Court of Appeal in *Re Ivaco*. The *Re Indalex* decision addressed four issues[48], only one of which is partially relevant in this case - how a deemed trust claim is affected by the Initial Order. Although there is no "DIP charge" in this CCAA proceeding, the principles set out by the Supreme Court of Canada in its analysis are applicable. The Court held that the deemed trust under the PBA continued to apply in CCAA proceedings, *subject to the doctrine of federal paramountcy*[49]. The Court clarified the essence of the conflict between the PBA and the Initial Order as a circumstance where "compliance with the provincial law necessarily entails defiance of the order made under federal law".[50]

52. The same reasoning applies here to the provisions of the PBA that would otherwise compel GFPI to make pension contributions/payments.

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[48] *Re Indalex, supra*, para. 25.
[49] *Re Indalex, supra*, para. 52.
[50] *Re Indalex, supra*, para. 60.

Those provisions are obviously in conflict with the terms of the Initial Order that stipulate that GFPI is not required to make pension contributions during the stay period and is prohibited from making payments not approved by the Agent for the Second Lien Lenders. In *Re Indalex*, where there was only a CCAA proceeding to consider, the Court held that it could not "import" the bankruptcy priorities into the CCAA. This discussion and analysis was necessary because there was no bankruptcy proceeding pending for Indalex. However, the Court emphasized, that the "courts will favour an interpretation of the CCAA that affords creditors with analogous treatments"[51]. West Face was not asking for the CCAA Judge to import bankruptcy priorities into the CCAA. Given the pending bankruptcy application against GFPI, West Face was asking the Court not to order payment of any deemed trust claim prior to putting GFPI into bankruptcy. The CCAA Judge followed *Re Indalex*, "favoured an interpretation of the CCAA that affords creditors analogous entitlements" and used his discretion not to order payment of a claim that would be unsecured as soon as a bankruptcy order was made. That result is consistent with *Re Ivaco* and *Re Indalex*.

PART IV - ORDER REQUESTED

53. For the reasons set out above, West Face submits that the Superintendent's appeal should be dismissed, with costs.

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[51] *Re Indalex, supra*, para. 51.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July, 2014.

Craig J. Hill

Roger Jaipargas

Lawyers for West Face Capital Inc.

Court of Appeal File No. C58636
Court of Appeal File No. M42978
Court File No. CV-098247-00CL

COURT OF APPEAL FOR ONTARIO

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 GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

CERTIFICATE

I estimate that 60 minutes will be needed for my oral argument of the appeal, not including reply.

An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 8th day of July, 2014.

Craig J. Hill

SCHEDULE "A"

List of Authorities

1. *Sun Indalex Finance, LLC v. United Steelworkers,* [2013] S.C.J. No. 6
2. *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (Ont. C.A.);
3. *Century Services Inc. v. Canada (Attorney General),* (2010), 3 S.C.R. 379, 72 C.B.R. (5th) 170 (S.C.C.)
4. *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.)
5. *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126 (Ont. C.A.)
6. *Algoma Steel Inc. v. Union Gas Ltd.*(2003), 63 O.R. (3d) 78 (Ont. C.A.)
7. *Re Churchill Forest Industrial (Manitoba) Ltd.* (1971), 16 C.B.R (N.S.) 158 (Man. Q.B.)
8. *Re Ivaco Inc.* (2005), 12 C.B.R. (5th) 213 (S.C.J.), appeal dismissed, (2006), 83 O.R. 108 (Ont. C.A.)
9. *Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (S.C.J.)
10. *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23, 256 O.A.C. 131, 99 O.R. (3d) 708 (Ont. C.A.)
11. *Re Aveos Fleet Performance Inc.* (2013), 9 C.C.P.B. (2nd) 186, 2 P.P.S.A.C. (4th) 60 (Q.S.C.)
12. *Collins & Aikman Automotive Canada Inc., Re* (2007), 63 C.C.P.B. 125, 37 C.B.R. (5th) 282, 161 A.C.W.S. (3d) 675 (Ont. Sup. C.J.)

SCHEDULE "B"

STATUTORY REFERENCES

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

Bankruptcy application

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.

Dismissal of application

43 (7) 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.

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

Funding

55. (1) A pension plan must provide for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations. R.S.O. 1990, c. P.8, s. 55 (1); 2010, c. 9, s. 39 (1).

Payment by employers, etc.

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

(a) to the pension fund; or

(b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan. R.S.O. 1990, c. P.8, s. 55 (2); 2005, c. 31, Sched. 18, s. 6 (1); 2010, c. 9, s. 39 (2).

Payment by members

(3) Members of a pension plan that provides contributory benefits shall make the contributions required under the plan in the prescribed manner and at the prescribed times. 2005, c. 31, Sched. 18, s. 6 (2).

Same, jointly sponsored pension plans

(4) Members of a jointly sponsored pension plan shall make the contributions required under the plan (including their obligations in respect of any going concern unfunded liability and, except in the case of plans described in subsection 1 (2.1), in respect of any solvency deficiency) in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times. 2010, c. 24, s. 16.

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund. R.S.O. 1990, c. P.8, s. 57 (1).

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee. R.S.O. 1990, c. P.8, s. 57 (2).

Accrued contributions

(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. R.S.O. 1990, c. P.8, s. 57 (3).

Wind up

(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. R.S.O. 1990, c. P.8, s. 57 (4).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (4) is amended by striking out "in whole or in part". See: 2010, c. 9, ss. 40, 80 (2).

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4). R.S.O. 1990, c. P.8, s. 57 (5).

Application of subss. (1, 3, 4)

(6) Subsections (1), (3) and (4) apply whether or not the money has been kept separate and apart from other money or property of the employer. R.S.O. 1990, c. P.8, s. 57 (6).

Money to be paid to insurance company

(7) Subsections (1) to (6) apply with necessary modifications in respect of money to be paid to an insurance company that guarantees pension benefits under a pension plan. R.S.O. 1990, c. P.8, s. 57 (7).

Employment Standards Act, 2000, S.O. 2000, c.41

Pay instead of notice

61. (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2000, c. 41, s. 61 (1); 2001, c. 9, Sched. I, s. 1 (14).

Entitlement to severance pay

64. (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more. 2000, c. 41, s. 64 (1).

Court of Appeal No. C58638
Court of Appeal File No. M42978
Court File No.: CV-09-8247-00CL

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., et al (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)

COURT OF APPEAL FOR ONTARIO

RESPONDING FACTUM OF WEST FACE CAPITAL INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for the Respondent, West Face Capital Inc.

TOR01: 5645406: v1

Court of Appeal No. C58638
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COURT OF APPEAL FOR ONTARIO

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 OF ARRANGEMENT OF 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

COMPENDIUM OF THE RESPONDENT WEST FACE CAPITAL INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
40 King Street West
Toronto, Ontario
M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for the Respondent, West Face Capital Inc.

Court of Appeal No. C58638
Court of Appeal No. M42978
Court File No.: CV-09-8247-00CL

COURT OF APPEAL FOR ONTARIO

**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 OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

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Respondents

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SUPERIOR COURT OF JUSTICE
JUSTICIA
COUR SUPÉRIEURE DE JUSTICE

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 20th DAY OF
	)	
JUSTICE CAMPBELL	)	SEPTEMBER, 2013

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

TRANSITION ORDER

THIS MOTION, made by Grant Forest Products Inc. ("**GFPI**"), Grant Alberta Inc. ("**GAI**") and Grant Forest Products Sales Inc. ("**GFPSI**", and together with GFPI and GAI, the "**Remaining Applicants**") for the relief set out in paragraph 1(f) of the Notice of Motion dated June 8, 2012 (the "**June Notice of Motion**"), originally returnable June 25, 2012 and adjourned pursuant to the endorsements of Mr. Justice Campbell made on June 25, 2012, August 27, 2012, September 17, 2012 and October 22, 2012, and **THIS MOTION** made by 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. (together, the "**West Face Funds**"), by their adviser, West Face Capital Inc. ("**WFCI**") originally returnable on October 22, 2012 and adjourned pursuant to the endorsement of Mr. Justice Campbell made on October 22, 2012 for an Order, inter alia, lifting the stay of proceedings to permit the issuance of an application for a bankruptcy order and a bankruptcy order against GFPI, were heard together on November 27, 2012, with additional submissions heard on July 23, 2013, at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-Fifth Report to the Court of Ernst & Young Inc. ("**E&Y**"), in its capacity as Court-appointed monitor (the "**Monitor**"), dated June 20, 2012 (the "**Twenty-Fifth Report**"), the Twenty-Sixth Report of the Monitor dated August 22, 2012 (the "**Twenty-Sixth Report**"), the Twenty-Ninth Report of the Monitor dated February 21, 2013, (the "**Twenty-Ninth Report**"), the affidavit of Hap Stephen, sworn June 8, 2012 (the "**Stephen Affidavit**"), the affidavit of Charlie Evans, sworn August 17, 2012, the affidavit of Peter Fraser, sworn October 19, 2012, the Affidavit of Chantal Laurin, sworn April 2, 2013, filed, and the written and oral submissions from counsel for the Remaining Applicants, WFCI, the Monitor, Peter Grant Sr., the Superintendent of Financial Services, and PricewaterhouseCoopers Inc., in its capacity as administrator of (i) the Pension Plan for the Salaried Employees of GFPI - Timmins Plant, Registration Number 1053008 (the "**Timmins Salaried Plan**") and (ii) the Pension Plan for Executive Employees of GFPI, Registration Number 0992537 (the "**Executive Plan**") (collectively, in such capacities, the "**Pension Administrator**") and upon reading the Affidavit of Service of Roger Jaipargas, sworn October 22, 2012, filed.

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.

OPERATION OF ORDER

7. **THIS COURT ORDERS** that paragraphs 8 to 28 of this Order become effective only on further order of this Court or on the Monitor's filing with the Court a certificate in the form attached as Schedule "**A**" hereto (the "**Monitor's Certificate**") confirming that: (i) October 15, 2013 has passed and no person sought leave to appeal this Order; (ii) any leave to appeal sought in respect of this Order has been denied with any further time periods for seeking additional leave to appeal having expired or such additional leave requests having been denied; or (iii) this Order has been upheld in whole on appeal and no further leave to appeal has been sought in respect of the decision on appeal within the time periods for seeking such leave or, if further leave is sought, such leave is denied or if such leave is granted this Order has be upheld in whole on such further appeal.

PENSION PLANS AND RESERVES

8. **THIS COURT ORDERS** and declares that none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to subsections 57(3) or 57(4) of the *Pension Benefits Act* (Ontario).

9. **THIS COURT ORDERS** and declares that none of GFPI, the CRO, or the Monitor shall make any further payments to either of the Pension Plans or their respective trustees or to the Pension Administrator and 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.

10. **THIS COURT ORDERS** and declares that the Monitor be and is hereby relieved of any obligation to hold back from distribution to creditors of GFPI the funds currently held by the Monitor in the amount of $191,245.00 in respect of the Timmins Salaried Plan Reserve referred to in the Order of Mr. Justice Campbell dated August 26, 2011 and increased to the amount of $726,372 pursuant to the Order of Mr. Justice Campbell dated June 25, 2012 (the "**Timmins Reserve Funds**").

11. **THIS COURT ORDERS** and declares that the Monitor be and is hereby relieved of any obligation to hold back from distribution to creditors of GFPI the funds currently held by the Monitor in the amount of $2,185,000 in respect of the Executive Plan Reserve referred to in the Order of Mr. Justice Campbell dated September 21, 2011 and increased to the amount of $2,384,688 pursuant to the Order of Mr. Justice Campbell dated June 25, 2012 (the "**Executive Reserve Funds**").

12. **THIS COURT ORDERS** and declares that none of GFPI, the CRO, or the Monitor shall incur any liability for the release of the Timmins Reserve Funds or the Executive Reserve Funds (collectively, the "**Reserves**") or any other liabilities associated with the Pension Plans.

TERMINATION OF PROCEEDINGS UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT* ("CCAA") WITH PROCEEDINGS UNDER THE BANKRUPTCY AND INSOLVENCY ACT ("BIA")

13. **THIS COURT ORDERS** that GFPI, of the City of Toronto, Province of Ontario; GAI, of the City of Toronto, Province of Ontario; and GFPSI, of the City of Toronto, Province of Ontario, be and are hereby adjudged bankrupt and a bankruptcy order is hereby made against each of the Remaining Applicants and as necessary this Order may issue in those bankruptcy proceedings.

14. **THIS COURT ORDERS** that Ernst & Young Inc., of the City of Toronto, Province of Ontario, be and is hereby appointed trustee of the estates of the Remaining Applicants (the "**Trustee**"), without security.

15. **THIS COURT ORDERS** that the CRO be and is hereby authorized and directed to transfer any and all cash, cash equivalents, negotiable instruments and demand deposits held by or in the name of the Remaining Applicants to the Monitor or to bank accounts held by, in the name of or controlled exclusively by the Monitor (the "**Transferred Funds**").

16. **THIS COURT ORDERS** that the CRO be and is hereby authorized and directed to transfer control of all books and records of the Remaining Applicants to the Trustee.

17. **THIS COURT ORDERS** that, except as expressly provided in paragraph 18 hereof, the assets, undertakings and properties of the Remaining Applicants shall vest in the Trustee (as defined below) in accordance with the provisions of the BIA, and the Trustee may

rely on Orders in this proceeding in respect of the security opinion for the indebtedness of the Second Lien Lenders.

18. **THIS COURT ORDERS** that the Monitor shall:

(a) hold or continue to hold all of the funds currently in its possession or which it receives and all Transferred Funds (collectively, the "**GFPI Cash Proceeds**") pursuant to the terms hereof; for greater certainty, all amounts previously held in respect of the Reserves shall be deemed to be GFPI Cash Proceeds;

(b) from the GFPI Cash Proceeds, establish, maintain and hold a reserve of cash or cash equivalents in the amount of $550,000 CAD (the "**Administration Charge Reserve**"), which funds shall be used by the Monitor only for the payment of all amounts secured by the Administration Charge (as defined in the Initial Order);

(c) from the GFPI Cash Proceeds, pay to WFCI, the fees and expenses of WFCI in the amount actually invoiced to WFCI by Borden Ladner Gervais LLP in connection with these motions (the "**WFCI Costs**") up to a maximum of $300,000, plus any amounts responding to any appeal from this Order (the "**WFCI Appeal Costs**") upon receipt of a copy of an account statement indicating such invoiced amount; and

(d) from the GFPI Cash Proceeds, pay to the Trustee, the amount of $275,000 CAD as a third party guarantee (the "**Third Party Guarantee**") pursuant to a third party retainer agreement (the "**Third Party Retainer**") in respect of the Trustee's fees and expenses to complete its statutory obligations under the BIA.

19. **THIS COURT ORDERS** that, following the reservation and payment of funds set out in paragraph 18 hereof, all of the Charges (as defined in the Initial Order) created by the Initial Order, including without limitation, the Administration Charge, shall be fully and finally discharged.

DISTRIBUTION OF PROCEEDS TO SECOND LIEN LENDERS

20. **THIS COURT ORDERS** that after reservation or payment of the amounts set out in Paragraph 18(b) (c) and (d) hereof, the Monitor be and is hereby authorized and directed to forthwith make a distribution of immediately available funds from the remaining GFPI Cash Proceeds to the Second Lien Lenders' Agent for the Second Lien Lenders pursuant to the Second Lien Credit Agreement; and (ii) after payment of other amounts as set out in this Order the Monitor be and is authorized to make a distribution of any remaining funds from time to time, without further Court order to the Second Lien Lenders' Agent for the Second Lien Lenders pursuant to the Second Lien Credit Agreement (collectively, the "**Distributions**"), free and clear of any and all security interest, trusts, deemed trusts, or other claims, liens or encumbrances whatsoever.

21. **THIS COURT ORDERS** that the Distribution is to be applied on account of the indebtedness owing by the Remaining Applicants under the Second Lien Credit Agreement.

TERMINATION OF CCAA PROCEEDINGS AND DISCHARGE OF MONITOR AND CRO

22. **THIS COURT ORDERS** that upon payment of the amounts set out in paragraph 15 hereof and delivery of the books and records set out in paragraph 16 hereof and upon the CRO filing with the Court a certificate in the form set out in Schedule "**B**" hereto certifying that it has completed such, SCI shall be discharged as CRO of the Remaining Applicants, provided however that notwithstanding its discharge herein: (a) SCI shall remain CRO for the performance of such incidental duties as may be required to complete its administration; and (b) SCI shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of SCI in its capacity as CRO.

23. **THIS COURT ORDERS** that upon payment of the amounts set out in paragraphs 18 and ~~19~~ 20 hereof and upon the Monitor filing with the Court a certificate in the form set out in Schedule "**C**" (the "**Monitor's Discharge Certificate**") certifying that it has completed all necessary actions, E&Y shall be discharged as the Monitor of the Remaining Applicants, provided however that notwithstanding its discharge herein: (a) E&Y shall remain the Monitor for the performance of such incidental duties as may be required to complete its administration; and (b) E&Y shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of E&Y in its capacity as Monitor.

24. **THIS COURT ORDERS** that upon filing of the Monitor's Discharge Certificate these CCAA Proceedings and the Stay Period shall be and are hereby terminated.

PROTECTION OF CCAA PROFESSIONALS

25. **THIS COURT ORDERS** that the CRO, the Monitor, their respective affiliates and legal counsel and GFPI's legal counsel, Dentons Canada LLP, and their respective officers, directors, partners, employees and agents (collectively, the "**Released Parties**") shall be on issuance of this Order released from any and all claims that any person may have or be entitled to assert against them (and any of them), whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission of the CRO or the Monitor while acting in such capacities in respect of the Applicants (or any of them), or on any act or omission of any of the other Released Parties who have assisted the CRO or Monitor in the exercise of their powers and obligations, or based in whole or in part on any act, omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in connection with the Applicants (or any of them) or these CCAA proceedings (collectively, the "**Released Claims**"), and any such Released Claims shall be on issuance of this Order released, stayed, extinguished and forever barred and the Released Parties shall have no liability in respect thereof; provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released Parties.

26. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the CRO or the Monitor or any of the other Released Parties in any way related to their capacity or conduct in connection with any Applicant or Applicants, except with prior leave of this Court on at least seven (7) days prior written notice to the CRO, the Monitor, and any other applicable Released Party, and upon further order securing, as

security for costs, the solicitor and client costs of the CRO, the Monitor, and such other Released Party in connection with any proposed action or proceeding.

27. **THIS COURT ORDERS** that, notwithstanding any provisions of this Order, the CRO, the Monitor and other Released Parties shall continue to have the benefit of all orders made in the CCAA Proceedings (including all protections and stays of proceedings) and nothing contained in this Order shall affect, vary, derogate from or amend any of the protections in favour of the CRO or Monitor or the other Released Parties pursuant to the Initial Order and any other orders in the CCAA Proceedings.

ADVICE AND DIRECTION

28. **THIS COURT ORDERS** that each of the Trustee, the Monitor and the CRO shall be entitled to seek the advice and direction of this Court as to the implementation of this Order and, in the case of the Trustee, the discharge of the powers and duties of the Trustee under the BIA in connection with this Order, and/or any of them may apply for such further Order or Orders as may be appropriate.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

SEP 3 0 2013

MB

SCHEDULE "A"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

MONITOR'S CERTIFICATE

Pursuant to an Order of the Honourable Mr. Justice Campbell of the Ontario Superior Court of Justice (the "**Court**") dated September 20, 2013 (the "**Transition Order**") Ernst & Young Inc. in its capacity as Court-appointed monitor of the Remaining Applicants hereby certifies:

[check one]

[ ] October 15, 2013 has passed and no person sought leave to appeal this Order;

[ ] any leave to appeal sought in respect of this Order has been denied with any further time periods for seeking additional leave to appeal having expired or such additional leave requests having been denied; OR

[ ] this Order has been upheld in whole on appeal and no further leave to appeal has been sought in respect of the decision on appeal within the time

periods for seeking such leave or, if further leave is sought, such leave is denied or if such leave is granted this Order has been upheld in whole on such further appeal.

such that paragraphs 8 to 28 of the Transition Order are now operative.

THE MONITOR CERTIFIES the following:

This Certificate was delivered by the Monitor at ________ [TIME] on _______ [DATE].

ERNST & YOUNG INC., in its capacity as Court-appointed monitor of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

Per:

____

Name:

Title:

SCHEDULE "B"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

CRO'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of this Court made on June 30, 2010, Stonecrest Capital Inc. ("**SCI**") was appointed as Chief Restructuring Organization (the "**CRO**") of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc. (the "**Remaining Applicants**").

B. Pursuant to an Order of this Court dated September 20, 2013, (the "**Transition Order**") SCI was discharged as CRO of the Remaining Applicants upon the filing of this CRO's Certificate with the Court certifying that the CRO has completed the activities set out in paragraphs 15 and 16 of the Transition Order.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Discharge Order.

THE CRO HEREBY CERTIFIES that it has completed all of the actions set out in paragraphs 15 and 16 of the Transition Order.

This certificate was delivered by the CRO at ___________ on ___________________, 20___.

STONECREST CAPITAL INC., in its capacity as court-appointed Chief Restructuring Organization of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

Per:

____

Name:
Title:

SCHEDULE "C"

Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

- and -

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

MONITOR'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of this Court made on June 25, 2009, Ernst & Young Inc. ("**E&Y**") was appointed as monitor (the "**Monitor**") of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc. (the "**Remaining Applicants**").

B. Pursuant to an Order of this Court made dated September 20, 2013, (the "**Transition Order**") E&Y was discharged as Monitor of GFPI upon the filing of this Monitor's Certificate with the Court certifying that the Monitor has completed the actions set out in paragraphs 18 and ~~19~~ 20 of the Transition Order and all other necessary actions.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Transition Order.

THE MONITOR HEREBY CERTIFIES that it has completed all of the actions set out in the paragraphs 18 and ~~19~~ 20 of the Transition Order and all other necessary actions.

This certificate was delivered by the Monitor at __________ on ________________, 20___.

ERNST & YOUNG INC., in its capacity as Court-appointed monitor of all of the assets, undertakings and properties of Grant Forest Products Inc., Grant Forest Products Sales Inc. and Grant Alberta Inc.

Per:

____

Name:
Title:

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

and

THE TORONTO-DOMINION BANK, in its capacity as agent for 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 (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

TRANSITION ORDER

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: 416-367-6266
Fax: 416-361-7067
LSUC No. 43275C

Lawyers for West Face Capital Inc.

CITATION: Grant Forest Products Inc. (Re), 2013 ONSC 5933
FILE NO.: CV-09-8247-00CL
DATE: 20130920

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BETWEEN

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP, Applicants

- and -

GE CANADA LEASING SERVICES COMPANY, et al, Defendants

BEFORE: C. CAMPBELL J.

COUNSEL: Craig J. Hill, Roger Jaipargas for West Face Capital

Alex Cobb, for PWC, Pension Administrator

Mark Bailey, for Superintendent of Financial Services

Richard Swan, Jonathan Bell, for Peter Grant Sr.

David Byers, Daniel Murdock, for Ernst & Young

Jane Dietrick, for the remaining applicants

HEARD: July 23, 2013

REASONS FOR DECISION

[1] This decision deals with issues in respect of two defined benefit pension plans of Grant Forest Products Inc. (GFPI) both now in the process of being wound up.

Procedural Issues

[2] The motion seeking relief was originally made returnable June 25, 2012 and adjourned on several occasions, the latest being to enable counsel to make submissions following the release in February of this year of the decision of the Supreme of Canada in *Sun Indalex Finance, LLC v. United Steelworkers [2013] SCJ No.6.* (*Indalex*)

[3] The several specific issues arise based on certain of the facts of this case which give rise to a priority claim by pension beneficiaries in respect of the remaining funds in the hands of the Monitor following the sale of the assets of GFPI. The priority issue is between the Administrator on behalf of the pension plans of GFPI and a Second Lien creditor of GFPI, namely, West Face Capital.

[4] The Initial Order under the *CCAA* was made June 25, 2009 and provided for a Stay of proceedings to enable a restructuring (liquidation) of the assets of the various entities which for the purposes of this decision can be referred to as the remaining applicant or GFPI.

[5] As at June 25, 2009 there was an outstanding Petition in Bankruptcy issued March 19, 2009 of GFPI initiated by various senior secured creditors which has not to date been proceeded with.

[6] The Initial Order contained a term (standard model order language) that "entitled but not required" GFPI to make pension contributions among other ongoing expenses.

The Pension Plans

[7] As at the date of the Initial Order there were 4 pension plans of GFPI, two of which were defined benefit plans and are the ones at issue here.

[8] The relevant dates with respect to the windup of the two defined benefit plans are as follows:

> Salaried Plan:
>
> The initiation of windup was as a result of Order dated February 27, 2012. The effective date of windup was made as of March 31, 2011.
>
> Executive Plan:
>
> The initiation of Plan windup was undertaken by the Superintendent of the Pension Commission as a result of the Order dated February 27, 2012 with the effective date of wind up being June 30, 2010.

[9] The "effective date" as the term appears in the *Pension Benefit Act* (PBA) Ontario is chosen for actuarial purposes as the last date of contributions to the Plans.

[10] None of the above dates preceded the Initial Order of June 2009. The major sale of assets to Georgia Pacific was by Order dated May 26, 2010 with the last significant sale of assets February 20, 2011.

[11] There were no deemed trusts in existence either at the date of the Initial Order of June 2009 or the last significant sale of assets in February 2011.

[12] The Court granted Orders that were unopposed on the 26th day of August and 26th September 2011 which authorized the following:

i) GFPI to take steps to initiate windup of the Timmins Salaried Plan, the appointment of a replacement administrator of such plan;

ii) GFPI to take steps to initiate a windup of both the Salary and Executive Plans.

[13] The orders directed the Monitor to hold back from any distribution to creditors of GFPI the amount estimated at that time to be the windup deficit in the plans. The Monitor began holding in escrow an amount of $191,245 with respect to the Salaried Plan and $2,185,000 with respect to the Executive Plan.

[14] The issue of deemed trust arising as a result of the Windup Orders was not sought to be determined by any party at the time of the August and September 2011 Orders.

[15] When motions now before the Court first came on for hearing on August 27, 2012 the Court was advised that the Supreme of Canada had under reserve its decision in *Indalex* which among other things was to deal with the existence and priority of deemed trust amounts under the *PBA* in the context of *CCAA* proceeding.

[16] The motion returnable on August 27, 2012 by the applicant was for direction with respect to the payment of amounts held in escrow by the Monitor in respect of pensions.

[17] The position of both the Monitor and GFPI at that time was that there should be no further payments made on behalf of the pension plans or distribution of any further amounts to the Second Lien Lenders until following release of the decision of the Supreme Court of Canada in *Indalex*.

[18] The Monitor reported for the motion of August 2012 that the expectation of a windup deficit of both plans would be in excess of $2.3 million. The position of PWC as Administrator of the Plans was that amounts available by way of windup deficit under both plans should be made pursuant to the provisions of the *PBA*.

[19] The position of the Monitor and GFPI prevailed, the motion for direction adjourned to November 2012 when both that motion and the companion motion of West Face on behalf of Second Lien Lenders for a lifting of the stay under the *CCAA* to permit the petition in bankruptcy to proceed were heard.

[20] Following submissions, in November 2012 decision was reserved and following the decision of the Supreme of Canada in *Indalex* in February 2013 the parties to this proceeding

were invited to provide further submissions based on that decision together with updated figures on amounts held and sums claimed due under the windup of the Pension Plans.

[21] In addition Counsel and their clients did attempt to see if the issues could be resolved without the necessity of further decision. Not surprisingly, given the complexity of issues that still remain following *Indalex* and despite diligent efforts a determination on the motions is required.

Legal Analysis

[22] In the *Indalex* decision – the members of Supreme Court of Canada were divided and in particular on the issue of deemed trust arising on windup in the context of a *CCAA* proceeding pensions.

[23] Justice Cromwell in the introduction to his reasons in *Indalex* at paragraph 85 of the decision describes the general problem associated with pensions and insolvent corporations.

> [85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.
>
> [86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of -sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[24] Justice Deschamps described in paragraph 44 the importance of the deemed trust under the *PBA*:

> The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against the adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favors an approach that includes all wind up payments in the value of the deemed trust in order to achieve a broad protection.

[25] The majority position as set out above in the reasons of Justice Deschamps prevailed over the reasons of Justice Cromwell (for himself Chief Justice McLachlan and Rothstein J.) which held in essence the deficiency amounts could only "accrue" as that word is used in s. 57 (4) of the *PBA* when the amount is ascertainable. All of the justices agreed that the deemed trust provision contained in s.57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of *CCAA* proceedings.

[26] The legal analysis in *Indalex* commenced with the 2010 decision of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60.

[27] In addition to providing definitive guidance on the purpose of the *CCAA* and the relationship between the *CCAA* and the *BIA*, more specifically on the facts of *Century Services* the Court held the deemed trust provisions of the *Federal Excise Tax Act* did not give rise to a priority over other creditors in a *CCAA* proceeding.

[28] It was held in *Century Services* that the *CCAA* and the *BIA* are to be read harmoniously and further that in the absence of express language carving out an exception for GST claims the provisions in both statutes nullify statutory deemed trusts in favor of the Crown.

[29] In summary, the more limited and general provisions of the *CCAA* permit insolvent corporations to restructure or indeed liquidate in a flexible and less formal fashion than would otherwise prevail with respect to priorities under the *BIA*.

[30] Prior to the arrival of *Indalex* in this Court in 2009[1], the governing decision dealing with pension claims of a deemed trust under the *PBA* seeking priority for unpaid pension contributions over secured creditors in a *CCAA* proceeding where the companies were unable to restructure and secured creditors sought to put the company into bankruptcy is *Ivaco (Re)* [2006] OJ No. 4152 (C.A.).

[31] Laskin JA for the Court of Appeal dealt with the argument that the provincial deemed trust takes priority based on a gap that exists between the *CCAA* and the *BIA* in the following passage:

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[1] Decision in this Court at 2010, ONSC 1114 and in Court of Appeal for Ontario, 2011 ONCA 265.

[61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the *CCAA* and the *BIA* in which the Provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

[62] The federal insolvency regime includes the *CCAA* and the *BIA*. The two statutes are related. A debtor company under the *CCAA* is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the *BIA*, and s. 11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the *CCAA* period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the *CCAA* period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the *CCAA*. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of *CCAA* proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The *CCAA* and the *BIA* create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil, supra,* at paras. 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the *BIA*. It cannot do so.

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco, supra.* In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the *PBA*. However, the facts in *Usarco* differed materially from the facts in this case.

[67] In *Usarco, CCAA* proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

[68] Recently in *Re General Chemical Canada Ltd.*, [2005] O.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the *PBA*. He wrote at para. 35:

> To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both *CCAA* proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.

[69] Because the federal legislative regime under the *CCAA* and the *BIA* determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so.

[32] The further argument of unfairness in permitting a petition into bankruptcy to proceed if the companies was rejected (see paragraph 77 in *Ivaco*):

> The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

[33] The issues in *Indalex* involved, as those in this instance do, pension plans but with a difference. While both the plans faced funding deficiencies when *Indalex* filed for an Initial Order under the *CCAA* and requested a stay, the financial distress threatened the interests of all

plan members. Following the Initial Order the Company was authorized to borrow US$24.4 million from DIP (Debtor In Possession) lenders who were granted priority over all other creditors.

[34] The plan members in *Indalex* sought, at the time of the Sanction and Approval Order a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable way of priority over secured creditors with respect to the proceeds of assets sold. The parties reached agreement on an amount to be held by the Monitor subject to the Courts' determination as to whether or not the funds held were being held subject to a deemed trust.

[35] This Court's decision in *Indalex*[2] held that the deemed trust did not prevail over the priority of DIP financers was appealed. On appeal to the Court of Appeal of Ontario the claims of deemed trust, of breach of fiduciary duty against the company and the requested remedy of constructive trust were successful.

[36] At the time of the Initial Order in *Indalex* the *Indalex* salary plan was in windup with a windup deficiency order. As at the date of the *Indalex* Initial Order the executive plan had not been wound up.

[37] The Supreme of Canada in *Indalex* was divided on the issues before it. Four of the judges being Deschamps, Moldaver JJ joined by Lebel J. and Abella J. on the issue held that the deemed trust provision of s. 57 (4) of the *PBA* did provide a statutory scheme to provide a deemed trust in respect of the plan which had been wound up which trust extended to the windup deficiency payments required by s. 75 (1) (b) of the Act which had "accrued" but were not yet due at the time of the sale of assets.[3]

[38] The three judges of the minority on the issue being Chief Justice McLachlin, Justices Rothstein and Cromwell JJ. concluded that given the legislative history and evolution of the provisions the legislature never intended to include windup deficiency in a statutory deemed trust – rather the legislative intent is to <u>exclude</u> from the deemed trust liabilities that arise only <u>on</u> the date of Wind up.

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[2] 2010 ONSC 114, 2011 ONCA 265.

[3] Pension Benefit Act, RSO 1990, c. P.8 57

Accrued contributions

(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 a pension fund. R.S.O. 1990, c. P.8, s. 57 (3).

Wind up

(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. R.S.O. 1990, c. P.9, s.57 (4).

[39] Five of the judges which excluded Lebel and Abella JJ. concluded that given the doctrine of federal paramountcy the DIP charges superseded the provincial statutory deemed trust which Abella J., Lebel J., Deschamps J. and Moldaver J. had found.

[40] Those same five judges concluded that the circumstances for the application of a constructive trust were not met notwithstanding a breach of duty by the applicant to give all plan members notice prior to the return seeking at Initial Order.

[41] The context of *Indalex's* distress was set out in the following paragraph from the reasons of Deschamps J.:

> 8. Indalex's financial distress threatened the interests of all the Plan members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

[42] As was noted by the Supreme Court of Canada in *Century Services*[4] the *CCAA* and the *BIA* are two statutory regimes for re-organization and or liquidation. Of the two federal statutes the *CCAA* provides the opportunity for orderly restructuring and or liquidation with supervision by the Court.

[43] The *BIA* deals with priority distribution when there is no further purpose for the application of the *CCAA*. In the ordinary case under the *CCAA* an applicant company, following the Initial Order, seeks out agreement with its creditors and the formulation of a proposed Plan to be voted on by the creditors which when approved by the in effect creates a contract between the company and its creditors. (see Red Cross (2002) 35 CBR (4th) 43 (SCJ))

[44] What has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating *CCAA* of which both *Indalex* and GFPI are leading examples.

The Factual Distinction between *Indalex* and GFPI

[45] In this case the 29th Report of the Monitor dated February 21, 2013 describes the nature of the business of GFPI and its subsidiaries which manufactured Strand Board from facilities located in Canada and the United States.

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[4] 2010 SCC60 at para. 77.

[46] The Report goes on at paragraphs 29 to 32 to detail the deficiencies in the special payments required to be paid under the *PBA* to fund the windup deficiencies in the plans. Unlike the situation in *Indalex* neither of the pension plans of GFPI were in windup process at the time of the Initial Order or for some time after. Unlike *Indalex* there was no request made for DIP prior to sale of assets following the Initial Order.

[47] Unlike *Indalex*, the Initial Order re GFPI contemplated in this case that the business of the company would continue for the purpose of the orderly disposition of various assets being various types of mills in Canada and the United States. The most significant of which were sold to Georgia Pacific which have continued the operation of some of the mills.

[48] The summary of the position of the Plans as of the date of July 2013 is as follows:

> The Salaried Plan Wind Up Report disclosed an estimated windup deficit of $726,481. The Required Salaried Plan Payment as of August 24, 2012 was $328,298 plus interest from March 31, 2012, which amount was due to be paid by GFPI into the Salaried Plan.
>
> The required Salaried Plan Payment as at November 27, 2012 was $339,923. This amount includes interest in the amount of $11,625 (determined using the same rate used in determining the amount of the annual special payments needed to liquidate the windup deficiency). It is contested that interest should be included.
>
> The Required Salaried Plan Payment as at March 31, 2013 was $485,715, including interest in the amount of $15,883. It is contested that interest should be included.
>
> The Executive Plan Wind-Up Report disclosed an estimated wind-up deficit of $2,384,688.
>
> The required Executive Plan Payment as of August 24, 2012 was $1,263,186 plus interest from February 29, 2012, which amount was due to be paid by GFPI into the Executive Plan.
>
> The required Executive Plan Payment as at November 27, 2012 was $1,281,639, including interest in the amount of $18,453. It is contested that interest should be included.
>
> The required Executive Plan Payment as at March 31, 2013 was $1,764,275, including interest in the amount of $20,803. GFPI does not accept that interest should be included.

[49] Submissions with respect to the Pension Motion were heard on November 27, 2012. During the same hearing, submissions were also heard on a motion by West Face Capital Inc. for an order lifting the stay of proceedings herein to facilitate a bankruptcy order against GFPI (the Bankruptcy Motion). Following that hearing, further written submissions were provided by the

parties concerning the impact of the decision of the Supreme Court of Canada in Re Indalex on the issues in the two motions.

[50] The GFPI situation is a prime example of the flexible operation of the *CCAA*. The assets of the liquidating company were sold in a manner to provide the maximum benefit possible to the widest group of stakeholders.

[51] In this case the sale of certain of the assets on a going concern basis permitted the continuation of employment and benefits for many in the locality of the plants that they had previously worked in. The alternative in bankruptcy under the *BIA* might well have resulted in loss of employment for many and less recovery for all the secured creditors.

[52] The liquidation of the applicant under the *CCAA* did not proceed under an explicit Plan voted on by the creditors and approved by the Court.

[53] What did proceed was an Initial Order that in addition to a stay of proceedings (which has continued), permitted, but did not require the Applicant to pay ordinary operating expenses in the course of liquidating assets under the *CCAA* for the benefit of all stakeholders.

[54] The Initial Order specifically provides in paragraph 5 as follows:

> [5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;
>
> (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and

[55] No creditors including those representing the members of the pension plans opposed the granting of the Initial Order; the representatives of pension plans did not oppose the sale of assets on the occasions in which approval was sought and did not raise the issue of deemed trust until the windup orders made in August 2012.

[56] There was no objection on the part of any party to the payment which the Applicant made to the pension plans being the regular and ordinary contributions under the plans from 2009 until the wind up date.

[57] Up to August 2012 there was no request made on the part of the pension plans to set aside the Initial Order and provide for what might have been expected to be a deemed trust under wind up.

THE FIRST ISSUE

Are any funds held by the Monitor and/or GFPI deemed to be held in trust pursuant to subsections 57(3) or 57(4) of the PBA for the beneficiaries of each of the Pension Plans as a result of the wind-up of the Pension Plans, and if so, what amounts of the funds held by the Monitor and/or GFPI are deemed to be held in trust?

[58] As noted above one of the two defined benefit pension plans at issue in *Indalex* was wound up prior to the commencement of the *CCAA* proceeding, and the other pension plan was wound up after the filing and the sale of *Indalex's* assets. The Supreme Court of Canada in *Indalex* did not find a deemed trust in respect of the latter pension plan. In considering this first issue, therefore, it is necessary to address the threshold issue of whether a deemed trust can be created during the pendency of a stay of proceedings.

[59] The majority in the Supreme of Canada in *Indalex* concluded that prior to an Initial Order a deemed trust did indeed arise when a pension plan was wound up in respect of windup deficits notwithstanding the difficulty in ascertaining the precise amount of the trust.

[60] One of the arguments made before the Supreme Court of Canada in *Indalex* and was rejected was that the priorities under the *CCAA* should parallel those under the *BIA* with the result that at the time of the Initial Order under the *CCAA* the *BIA* priorities by which pension claims would be unsecured would prevail. The following passage in the decision of Deschamps J. for herself and the majority that dealt with that issue rejected the proposition:

> [50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:
>
> > Another point of convergence of the *CCAA* and the BIA relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]
>
> [51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*,

leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. *Indalex* achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the *BIA*.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[61] In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating *CCAA*, it is important for the Court to consider the appropriate time for the *CCAA* proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the *CCAA* process to the *BIA*. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The response of GFPI was to seek protection under the *CCAA* and carry out an orderly liquidation of its assets. The Court permitted the orderly liquidation of the assets in the context of the *CCAA* to maximize recovery in the assets.

[62] Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith

issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

[63] It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. Reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time Lien Lenders submit is the logical extension of that legitimate purpose. Accordingly, it is said appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

[64] I accept that to impose the same priorities under the *CCAA* as the *BIA* without careful consideration might well undermine the flexibility of the *CCAA*. For example the *CCAA* Court itself may make an order on application on notice declaring a person to be a critical supplier (s.11.4) with the charge in favor of that supplier. This is but one example of the flexibility of the *CCAA* that may not be available under the *BIA* once approved by the Court. The same is the case for DIP financing as was the case in Indalex.

[65] Where there is a *CCAA* Plan approved by creditors the effect of the contract created may alter what would otherwise be priorities under the *BIA*.

[66] Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when thre is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

[67] There may be good and solid reasons acceptable to creditors and stakeholders who agree to a process under the *CCAA* either in a formal Plan or during the course of a liquidation to alter the priorities that would come into play. should there be an assignment or petition into bankruptcy.

[68] The position of the Pension Administrator, the Superintendent of Pensions and those parties in support of their position in this case is that in the circumstances the deemed trust which they say arises under the *PBA* should prevail over other creditor claims notwithstanding the *CCAA* Initial Order.

[69] The arguments in support of a deemed trust arising upon windup of the pension plans within the *CCAA* regime are summarized as follows:

i) GFPI should not be excused from any obligation with respect to the pension plans.

ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.

iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.

iv) The Second Lien Creditor should not be permitted to challenge the deem trusts at this stage since they did not challenge the windup orders. [5]

[70] From my review of the decisions of the Supreme Court of Canada in *Century Services* and *Indalex* I am of the view that the task of an *CCAA* supervising judge when confronted with seeming conflict between Federal insolvency statute provisions and those of Provincial pension obligations is to make the provisions work without resort to the issue of federal Paramount city except where necessary.

[71] The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order.

[72] The *Indalex* decision provides predictability and certainty of entitlement to the stakeholders of an insolvent company. If on the application for an Initial Order any party seeks to challenge that priority for the purpose of providing DIP in financing furtherance of a Plan or work out liquidation they are free to do so at the time of the Initial Order. Secured creditors can then decide whether they are willing to pursue a Plan or immediately apply for bankruptcy order.[6]

Should GFPI be excused from wind up deficiency payments?

[73] I am of the view that the question advanced by the Pension Administrators should be put another way "Is GFPI obligated in view of the provisions in para. 5 of the Initial Order (see paragraph 54) above to make the special payments that arise by virtue of the provisions of the *PBA*.

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[5] submission was made in the factum of PWC that all funds held by the Monitor should be regarded as proceeds of accounts and inventory therefore resulting in priority being directed by the Personal Property Security Act (PP SA) s. 30 (7) which would subordinate other security to the team trusts. This submission was not seriously pursued and in view of the conclusion I reached on other grounds it is not necessary to deal with the argument.

[6] It is not entirely clear from the various decisions in *Indalex* as to precisely when the deemed trust which can take priority operates. The date of the Initial Order was given as one possibility the other being the date of sale of the assets. In this case it does not really matter which date applies as the Initial Order and Primary asset sale pre-date any deemed trust.

[74] I accept the argument of the Pension Administrator and all those urging the deemed trust application that the Approval and Vesting Orders necessarily do not for all purposes freeze priorities at the point of sale. Absent other order of the Court, made at the time however, they do provide the certainty required by creditors who are asked to concur with the sales.

[75] In the situation of GFPI there was a recognition in para. 5 of the initial Order that there may be a challenge to expenses on an ongoing basis.

[76] Where distribution to creditors is made following a sale of assets on full notice, that distribution in accordance with a Approval and Vesting Order does freeze the priorities with respect to that distribution, absent specific direction otherwise.

[77] In this case, the issue of priority is said to arise in respect of a specific sum of money in the hands of the Monitor in respect of funds from assets sold and not distributed and is said to be determined in accordance with the Court Order made at the time of determination which acknowledged all the pension obligations including wind up.

[78] To suggest that all claims and priorities never sought would apply to the Approval Orders past or future would, in my view, be entirely contrary to the principles and scheme of the *CCAA*. To conclude otherwise would risk that secured creditors to whom distribution had been made would be at risk of disgorgement and unpaid secured creditors to uncertainty of priority in future recovery.

[79] This is why in my view the only consistent and predictable operation of the *CCAA* should give predictability as of the Initial Order to enable an informed decision to be made whether or not to proceed with bankruptcy. This issue is implicitly revisited every time there is a sale and distribution of assets.

[80] The Supreme Court of Canada decision in *Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

[81] Justice Cromwell at paragraphs 177 and 178 in *Indalex* spoke of the problem of extending the deemed trust. While he was speaking of the entirety of the issue his comments below is equally applicable to a deemed trust said to arise during insolvency:

> 177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

> 178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*.

[82] That consistency prevails if the limitation on deemed trust is limited to those plans already in windup as of the date of the Initial Order.

[83] During the course of the sale of assets the Initial Order continued to operate presumably to the advantage of all stakeholders since the asset sale as here proceeded in an advantageous fashion for maximizing return on assets, for the benefit of those who were able to transfer employment and in an advantageous fashion for the pension plans which received the benefit of ongoing regular payments.

[84] The alternative had the bankruptcy petition proceeded would have seen a significant loss particularly to the pension plans.

[85] I note as have many judges before me that the solution to the problem created by section 67 of the *BIA* which leaves pension obligations unsecured and Provincial statutes which seek to raise the priority lies with the federal and provincial governments not with judicial determination. As Justice Deschamps noted in Indalex:

> [81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:
>
>> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at

> its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

[86] I conclude that given the uncertainty in this area of legal decision together with the provisions of paragraph 5 of the Initial Order that GFPI was not under an obligation to make the special windup payments and was correct is seeking direction from this area

[87] I can only presume that had GFPI sought to make the special payments that they would have been opposed on much the same grounds as now would dance by the second lien lenders.

THE SECOND ISSUE

Did the Court Order authorize the Deemed Trust?

[88] It is urged in the second ground for priority of the deemed trust that this Court authorized the wind up of the Pension plans which by the operation of the *PBA* imposes the deemed trust.

[89] The Order authorizing the windup in its operative provisions with respect to wind up is as follows:

> **This Court Orders** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.
>
> **This Court Orders** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

[90] Similar wording was in the order with respect to the Executive Plan.

[91] Nothing in those Orders dealt with the issue of deemed trust. No one appearing raised the issue of deemed trust .The paragraph above dealt with the issue presented and preserved the argument that arises today namely whether in context of a claimed deemed trust the estimated windup deficit was to be held from distribution.

[92] One can understand why the issue was not raised beyond setting aside the amount and leaving the issue for later determination. For their own reasons each side contends to have the *CCAA* process continued. It was to the benefit of all party stakeholders.

[93] When a pension plan is wound up the precise amount of money necessary to fulfill the obligation to each and every pensioner is it that time uncertain. Over time as windup occurs those amounts become more certain and that is why the deemed trust concept comes into play.

[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 an *CCAA* order areas unless agreed to. Even if the obligation could be said to be in the ordinary course for insolvent company GFPI was not obliged to make the payments. (See paragraph 4 of the Initial Order above).

[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. The decision of the Supreme Court of Canada in *Indalex* appears to stand for the proposition that once a valid Initial Order is made under the *CCAA* the Federal insolvency regime is paramount, and absent any agreement or other Order where there is conflict, the Initial Order prevails over an applicant's obligation under the provincial statute.

[96] This conclusion provides the predictability and certainty that is necessary for those who are willing to consider financing a distressed entity. It is unlikely that lenders would be willing to support a distressed entity if they had little or no information on the amount or timing of pension obligations.

[97] The Supreme of Canada decision in *Indalex* alerts lenders who are aware or are taken to be aware prior to insolvency of the fact of a deemed trust when there is wind up even though the amount may not be known.

[98] Where a pension has not been wound up prior to insolvency the potential for a windup deficiency is entirely uncertain. Since a deemed trust does not rise until there is a windup order it would be entirely inconsistent with the insolvency regime of the *CCAA* (absent additional legislation) to expose lending creditors to an uncertain priority both in time and amount.

[99] It is to be noted that on the sale of assets as they occurred there was no issue raised about the priority of claims prior to those sales or distribution of assets as reflected in the fact that payments were made to entirely discharge the security of the First Lien Lenders and a portion of the obligation to the Second Lien lenders.

[100] The Court did not authorize a deemed trust to prevail in insolvency by granting windup orders.

Should the Stay be lifted to permit the petition in bankruptcy to proceed?

[101] If one accepts the above analysis a lifting of the state to permit bankruptcy is not necessary to defeat a deemed trust said to arise after the Initial Order.

[102] The basis of the motion on behalf of West Face Capital Inc. (the Second Lien Lenders) is set out in paragraph 2 of their factum:

> The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that must be paid immediately. The factual and legal basis for those claims have been advanced during the *CCAA* proceedings, notwithstanding the stay of proceedings.

[103] Those opposed to the motion to lift the stay (which is supported by GFPI and the Monitor) urge that what is being requested is extraordinary relief from the requirements of the *PBA* and GFPI should not be excused from its obligation to make special payments simply at the asking.

[104] While acknowledging that the court does have broad discretion, it is urged there is nothing in the circumstances of this case which would justify relieving GFPI of its obligation to make special payments.

[105] It is further submitted that there is no decision that stands for the proposition that bankruptcy is automatic at the end of a *CCAA* proceeding and no independent reason for granting the bankruptcy order.

[106] It is well settled that bankruptcy may well be an appropriate outcome of a *CCAA* process that has failed or has run its course. In *Century Services* 2010 SCC 60 at paragraph 23, Justice Deschamps noted "because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation distribution necessarily supplies the backdrop for what will happen if a *CCAA* is ultimately unsuccessful".

[107] The issue of terminating a *CCAA* proceeding by permitting a petition in bankruptcy to proceed is one of discretion on the part of the supervising judge (see *Ivaco* (Re) [2006] O J. No. 4152 para. 77 and Nortel Networks Corp. (Re) 2009 ONCA 833 at para 41.)

[108] Those who seek to have a stay lifted or to oppose the stay being lifted to obtain other relief must be acting in good faith. There is no evidence of lack of good faith here beyond the suggestion of delay.

[109] The parties resisting the lifting of the state urge that it not be granted on several grounds. The first is based on the delay on the part of West Face in bringing the motion. It is asserted that

the motion should have been brought when the applicant first made it returnable on its motion for direction.

[110] It is also urged that given the passage of time that Monitor should be directed to make payments of those amounts which would otherwise have been made to date under the windup orders of the superintendent.

[111] The argument advanced by the Pension Administrator is that the *CCAA* process has completed what it set out to do, namely, liquidate the assets of GFPI and therefore there is no purpose to be served by lifting the stay and therefore the Order should not be granted to allow bankruptcy.

[112] West Face seeks to lift the stay of proceedings granted by the Initial Order to enable the Petition commenced in March 2010 to proceed.

[113] Like those opposing, West Face takes the position that the *CCAA* process has run its course and there is no likelihood of recovery on any other assets and adds therefore no reason for the applicant to continue to make any pension payments on account of pension plans. Since the security of West Face on behalf of the Second Liens Lenders is valid they are entitled to be paid from the assets on hand and a bankruptcy Order would expedite recovery.

[114] What then is the process that is involved under the *CCAA* when there is not one but several sales of assets of an insolvent company over a period of time during which no one objects to the continuation of "payments being made in the ordinary course" which include ongoing payments to pension plans.

[115] The *CCAA* continues to be sufficiently flexible to allow for an ongoing sale of assets without the necessity of a formal plan voted on by creditors. As I noted above, a sale of assets following an Initial Order is an implicit plan.

[116] In this case following the sale of the major assets to Georgia Pacific there was a distribution the effect of which was to pay out the First Lien Lenders in entirety and indeed some payments to the Second Lien Lenders.

[117] Following the granting of leave in *Indalex* by the Supreme Court of Canada all of the parties in this case recognized that the issue of priority of deemed trusts would likely be clarified by that Courts Decision in that case.

[118] From the time that the motion of GFP I for direction with respect to payments on windup deficiency was first brought before this court, there was agreement by all Counsel that the Supreme Court decision in *Indalex* if not determinative would provide considerable guidance on the issues in this case.

[119] To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

[120] This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the BIA process.

[121] I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditors position may be better advanced under the *BIA*.

[122] The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Courts decision in *Indalex* I questioned whether it would be fair to permit the stay to be lifted it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

[123] In this case West Face urges Its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would de facto be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA*.

[124] I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA*. That has been the case here.

[125] If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.

[126] The Supreme Court of Canada in *Indalex* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.

[127] For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.

[128] While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in Indalex.

Conclusion

[129] As noted above in this decision virtually all of the judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments.

[130] The difficulty of dealing with these complex issues is not restricted to Canada. In her book of 2008[7] Prof. Janis Sara has chronicled the way in which various countries around the world have sought to deal with the difficulty of pension priority in the context of business financing and insolvency. The conclusion is there is no easy answer.

[131] I have no doubt that the question of pensions will be an ongoing issue for some time to come. There is an urgency that legislators both Federal and Provincial address the issue.

[132] In this case and for the above reasons the priority of proceeds will be to the Secured Creditors in respect of those amounts that otherwise would be payable in respect of windup efficiencies.

[133] I would not think this is an appropriate matter for costs disposition but if any Counsel disagrees or there is any further issue with respect to an Order following from this decision I may be spoken to.

C. L. CAMPBELL J.

Date: September , 2013

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[7] Employee & Pension Claims during Company Insolvency – A Comparative Study of 62 Jurisdictions, Thomson & Carswell.

Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	**THURSDAY, THE 25TH**
	)	
JUSTICE NEWBOULD	)	**DAY OF JUNE, 2009**

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 GP

INITIAL ORDER

THIS APPLICATION, made by Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc. and Grant U.S. Holdings GP (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter Lynch sworn June 22, 2009 and the exhibits thereto (the "**Lynch Affidavit**"), the supplement affidavit of Peter Lynch sworn June 25, 2009 and the exhibits thereto (the "**Supplemental Lynch Affidavit**"), the report to Court of Ernst & Young Inc. ("**E&Y**") as proposed monitor and on hearing the submissions of counsel for the Applicants, The Toronto-Dominion Bank (the "**Agent**"), as agent for the first lien lenders (the "**First Lien Lenders**"), the independent directors of Grant Forest Products Inc.("**GFPI**"), E&Y, Peter Grant Sr., Peter Grant Jr., GE Canada Leasing Services Company, no one else appearing although duly served as appears from the affidavit of service of Jarvis Hetu sworn June 23, 2009,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (collectively, the "**Plan**") between, *inter alia*, the Applicants, or any of the Applicants, and one or more classes of its or their secured and/or unsecured creditors as it deems or they deem appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their businesses (the "**Business**") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "**Assistants**") currently retained or employed by them, with liberty, subject to obtaining the prior consent of the Monitor or further order of the Court, to amend in any material manner the mandate of any Assistants or to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order (except that such consent or further order shall not be required for the Applicants to hire new employees in the ordinary course of business).

5. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and

(b) the fees and disbursements of any Assistants retained or employed by any of the Applicants as permitted herein in respect of these proceedings or the Applicants' proposed restructuring at their standard rates and charges.

6. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and provided that the Applicants provide the Monitor with a list of their intended disbursements before making such disbursements, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course on or after this Order (or, in the case of the following subparagraph (c), prior to the date of this Order), and in carrying out the provisions of this Order including:

(a) subject to paragraph 10 below, all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including payments on account of insurance (including directors' and officers' insurance), maintenance and security services;

(b) expenses for goods or services actually supplied to any of the Applicants on or following the date of this Order; and

(c) expenses for goods or services actually supplied to any of the Applicants prior to the date of this Order provided:

(i) such payments are critical to any Applicant's Business and are made with the prior written consent of the Monitor; or

(ii) such payments are owing to a person or persons for the supply of logs or timber to GFPI.

7. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by any of the Applicants in connection with the sale of goods and services by any of the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by any of the Applicants.

8. **THIS COURT ORDERS** that the Applicants, or any of them, may, with the prior written consent of the Monitor, lend funds to Grant Allendale LP, Grant Clarendon LP and Grant US Sales Inc. (or any of them), to enable them to continue to carry on their respective businesses in the ordinary course and the Applicants, or any of them, may receive and retain any repayments made by Grant Allendale LP, Grant Clarendon LP and Grant US Sales Inc. (or any of them).

9. **THIS COURT ORDERS** that until such time as any of the Applicants repudiate a real property lease in accordance with paragraph 12(c) of this Order, the Applicants shall pay when

due all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under any lease) or as otherwise may be negotiated by the Applicants from time to time ("**Rent**"), for the period commencing from and including the date of this Order, monthly in advance (but not in arrears).

10. **THIS COURT ORDERS** that, except as specifically permitted herein or included in the Cash Flow Projection (as defined by the Lynch Affidavit) as amended or prepared for later periods from time to time with the Agent's approval (the "**Cash Flow Projections**"), the Applicants and their subsidiaries are hereby prohibited, without the prior written approval of the Agent and the Monitor, from:

(a) granting, or permitting to be outstanding, any lien, charge, security interest or any other encumbrance of any kind whatsoever (each an "**Encumbrance**") other than valid and enforceable Encumbrances existing on the date of this Order, charges created by this Order and liens arising solely by operation of law in the ordinary course of business of the Applicants and their subsidiaries;

(b) creating, incurring, assuming or suffering to exist, directly, contingently or otherwise, any debt or obligations other than:

A. debt or obligations existing on the date hereof; or

B. unsecured current liabilities (which are not the result of borrowing) incurred and payable in the ordinary course of business of the Applicants and their subsidiaries as permitted herein;

(c) entering into any transactions outside the ordinary course of its business;

(d) making expenditures or commitments of the Applicants on account of any capital or fixed asset account of the Applicants in the aggregate in excess of 110% of the capital expenditure amount indentified in the Cash Flow Projections, except that the Applicants may make capital expenditures or commitments for excess amounts with the Monitor's approval, to the extent required to carry on the existing oriented strand board Business;

(e) declaring any dividends or distributions to any shareholder or any person affiliated or associated with any shareholder whether by way of dividend or otherwise;

(f) guaranteeing, endorsing or otherwise becoming surety for or upon any obligations of any person;

(g) paying any amount to its employees and officers as such by way of salary, bonus, commission, directors' fees or otherwise in excess of the amounts currently being paid or at a rate in excess of the current rate thereof, provided that nothing in this Order shall prohibit the Applicants and their subsidiaries from reimbursing their employees and officers for reasonable expenses incurred by them in the ordinary course of business;

(h) paying any amount to any shareholder of GFPI, any person who owns shares of any shareholder of GFPI or any person related by blood or marriage to any such person, except for payments permitted by the immediately preceding subparagraph;

(i) making any cash payment (interest or otherwise) to any creditor including: (i) under the existing aircraft leases with GE Capital Equipment Financing; or (ii) under the First Lien Credit Agreement or the Second Lien Credit Agreement (as defined by the Lynch Affidavit);

(j) making expenditures or commitments in respect of any or all assets of an Applicant not required in connection with the Business;

(k) opening or maintaining deposit accounts other than the deposit accounts maintained with The Toronto-Dominion Bank, Wachovia Bank, National Association, Harris N.A. and Bank of Montreal as of the date hereof or such other account approved by the Agent (the "**Accounts**");

(l) making any changes to the officers or senior management, or to any of the signing authorities specified on the Accounts;

(m) making any payment of any amount owing pursuant to the tax refund purchase and sale agreement dated as of March 31, 2008 with respect to the sale by GFPI of certain of its tax refunds;

(n) entering into any interest or currency exchange agreement or any other swap agreement; and

(o) obtaining any debtor-in-possession financing from any lender other than one or more of the First Lien Lenders and in accordance with the further order of the Court.

11. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, the Applicants shall in all respects comply with their obligations under the First Lien Credit Agreement made as of October 26, 2005 among the Agent, the First Lien Lenders, GFPI and others in respect of reporting and the provision of information. The Applicants shall cooperate fully with PricewaterhouseCoopers Inc. ("**PWC**"), the financial advisor to the First Lien Lenders, in providing such information.

RESTRUCTURING

12. **THIS COURT ORDERS** that each of the Applicants shall have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $2 million in the aggregate, subject to the prior written consent of the Monitor and subject to subparagraph (c) of this section, if applicable;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise;

(c) in accordance with paragraphs 13 and 14, vacate, abandon or quit any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days' notice in writing to the relevant landlord on such terms as may be agreed upon between the Applicant and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise;

(d) repudiate such of its arrangements or agreements of any nature whatsoever, whether oral or written, as the Applicant deems appropriate on such terms as may be agreed upon between the Applicant and such counter-parties or, failing such agreement, to deal with the consequences thereof in the Plan or otherwise; and

(e) in accordance with the Marketing Process (as hereinafter defined), pursue all avenues of refinancing and recapitalization and pursue all purchase offers for material parts of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or recapitalization or any sale (except as permitted by subparagraph (a) of this section),

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. **THIS COURT ORDERS** that an Applicant shall provide the relevant landlord with notice of the applicable Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the relevant landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the applicable Applicant, or by further Order of this Court upon application by an Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If an Applicant repudiates the lease governing such leased premises in accordance with paragraph 12(c) of this Order, it shall not be required to

pay Rent under such lease pending resolution of any such dispute, and the repudiation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a lease is repudiated by an Applicant in accordance with paragraph 12(c) of this Order, then: (a) during the notice period prior to the effective time of the repudiation, the relevant landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and (b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the applicable Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

15. **THIS COURT ORDERS** that, subject to the other provisions of this Order (including the payment of Rent as herein provided) and any further Order of this Court, the Applicants shall be permitted to dispose of any or all of the Property located (or formerly located) at such leased premises without any interference of any kind from landlords (notwithstanding the terms of any leases) and, for greater certainty, the Applicants shall have the right to realize upon the Property and other assets in such manner and at such locations, including leased premises, as it deems suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom.

MARKETING OF INVESTMENT OPPORTUNITY

16. **THIS COURT ORDERS AND DIRECTS** the Applicants to immediately commence a marketing process (the "**Marketing Process**") in accordance with the protocol attached hereto as Appendix "A" to this Order (the "**Investment Offering Protocol**") for the purpose of offering the opportunity for potential investors to purchase the business and operations of the Applicants and their subsidiaries as a going concern or to sponsor a plan of arrangement of the Applicants or any of them.

17. **THIS COURT ORDERS** that the Investment Offering Protocol is hereby approved and the Applicants and the Monitor are hereby authorized and directed to perform each of their obligations thereunder.

18. **THIS COURT ORDERS** that the Applicants are hereby authorized and directed to engage an investment offering advisor (the "**Investment Offering Advisor**") in accordance with an Investment Offering Advisor engagement letter (the "**Investment Offering Advisor Engagement Letter**"), after it is approved by the Monitor and the Agent, to act as Investment Offering Advisor in connection with the conduct of the Marketing Process. The Investment Offering Advisor Engagement Letter shall not be affected by the Plan.

19. **THIS COURT ORDERS** that the Investment Offering Advisor shall be entitled to the benefit of and is hereby granted a charge (the "**Investment Offering Advisor Charge**") in the maximum amount of $200,000 of all Property of the Applicants to secure its fees and recoverable disbursements incurred in performing its obligations under the Investment Offering Advisor Engagement Letter but not including any indemnity or any fees or expenses incurred by the Investment Offering Advisor in connection with any right of indemnity included in the Investment Offering Advisor Engagement Letter. The Investment Offering Advisor Charge shall rank *pari passu* with the Administration Charge (as hereinafter defined) and the Applicants are directed to pay to the Investment Offering Advisor the fees and expenses payable under the Investment Offering Advisor Engagement Letter promptly when due.

20. **THIS COURT ORDERS** that the Investment Offering Advisor, its affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of either its engagement by the Applicants as Investment Offering Advisor or any matter referred to in the Investment Offering Advisor Engagement Letter except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Investment Offering Advisor in performing its obligations under the Investment Offering Advisor Engagement Letter.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

21. **THIS COURT ORDERS** that until and including July 24, 2009 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") (including the application for a bankruptcy order brought by GE Canada Leasing Services Company) shall be commenced or continued against or in respect of any of the Applicants or the Monitor, or affecting any Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting any Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

22. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property (including any right to submit a shotgun buy or sell offer with respect to GFPI's shares of Footner Forest Products Ltd. or GFPI's interest in the OSB facility at High Level, Alberta or related assets), are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on; (b) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment; (c) prevent the filing of any registration to preserve or perfect a security interest; (d) prevent the registration of a claim for lien under the *Construction Lien Act* or the *Forestry Workers Lien for Wages Act* or any other applicable statute; or (e) prevent GE Canada Leasing Services Company from selling the 1992 Dassault Falcon 50 aircraft or the 1994 Dassault Falcon 900B aircraft and related engines and parts pursuant to its lease thereof to GFPI.

NO INTERFERENCE WITH RIGHTS

23. **THIS COURT ORDERS** that, during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by any of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

24. **THIS COURT ORDERS** that, during the Stay Period, all Persons having oral or written agreements with any of the Applicants or statutory or regulatory mandates for the supply of goods and/or services including, without limitation, all resin supply, timber, log and wood supply, computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility services or other services to the Business or any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by any of the Applicants, and that each of the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider, the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

25. **THIS COURT ORDERS** that, notwithstanding anything else contained herein, no creditor of any of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to any of the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26. **THIS COURT ORDERS** that, during the Stay Period and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before or arises after the date hereof and that relates to any obligations of any of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or

performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27. **THIS COURT ORDERS** that each of the Applicants shall indemnify its directors and officers from all claims, costs, charges and expenses relating to the failure of any of the Applicants, after the date hereof, to make payments due and payable after the date of this Order of the nature referred to in subparagraphs 5(a), 7(a), 7(b), and 7(c) of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of any of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct.

28. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on all Property, which charge shall not exceed the aggregate amount of $3,000,000, as security for the indemnity provided in paragraph 27 of this Order. The Directors' Charge shall have the priority set out in paragraph 44 of this Order.

29. **THIS COURT ORDERS** that, notwithstanding any provision of any applicable insurance policy to the contrary: (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 27 of this Order or the insurer fails to fund defence costs on a timely basis (provided the insurance beneficiaries assign to the applicable Applicant the insurance beneficiaries' rights under the applicable insurance policy to receive such defence costs paid pursuant to the Directors' Charge).

APPOINTMENT OF MONITOR

30. **THIS COURT ORDERS** that E&Y is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors and Assistants shall advise the Monitor of all material steps taken by any of the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

31. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) perform its obligations under the Investment Offering Protocol;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the Marketing Process and such other matters as may be relevant to the proceedings herein;

(d) assist the Applicants, to the extent required the Applicants, in the dissemination to the Agent and BNY and their respective counsel on a bi-weekly basis or otherwise as required herein of financial and other information as agreed to between the Applicants and the Agent or BNY;

(e) advise the Applicants in relation to the Cash Flow Projections, including the reconciliation of actual results to Cash Flow Projections and the formulation of Cash Flow Projections as may be required herein, which information shall be reviewed with the Monitor and delivered to the Agent and its counsel on a periodic basis, but not less than bi-weekly, or as otherwise agreed to by the Agent;

(f) advise the Applicants in their development of the Plan and any amendments to the Plan;

(g) report and advise the Applicants, the Court and the Agent in relation to any offers to purchase or refinance the Business received in accordance with the Marketing Process;

(h) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(i) have full and complete access to the books, records, management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(k) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan; and

(l) perform such other duties as are required by this Order or by this Court from time to time.

32. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

33. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario*

Water Resources Act, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

34. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of any of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

<u>APPOINTMENT OF CHIEF RESTRUCTURING ADVISOR</u>

35. **THIS COURT ORDERS** that GFPI be and is hereby authorized and directed to continue the engagement of Stonecrest Capital Inc. ("**Stonecrest**") as Chief Restructuring Advisor (the "**CRA**") with services to be provided by Hap Stephen ("**Stephen**") and Sandra Rosch ("**Rosch**") on the terms and conditions set out in the amended engagement letter between GFPI and Stonecrest as referred to in the Supplemental Lynch Affidavit (the "**CRA Engagement Letter**").

36. **THIS COURT ORDERS** that the CRA Engagement Letter is hereby approved and given full force and effect in accordance with its provisions and that the claims, if any, of Stonecrest, Stephen or Rosch pursuant to the CRA Engagement Letter shall not be affected by the Plan.

37. **THIS COURT ORDERS** that the CRA shall have and may exercise and perform the powers, responsibilities and duties described in the CRA Engagement Letter, together with such other powers, responsibilities and duties as may be agreed upon by the CRA and GFPI and approved by the Monitor or this Honourable Court.

PROVISIONS RELATED TO THE MONITOR, THE CRA AND OTHERS

38. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor, the CRA, Stephen and Rosch shall incur no liability or obligation as a result of their appointments or the carrying out of the provisions of this Order (or, in the case of the CRA, Stephen and Rosch, the provisions of the CRA Engagement Letter), except for any gross negligence or wilful misconduct on their respective parts. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

39. **THIS COURT ORDERS** that the Monitor, PWC, counsel to the Monitor, counsel to GFPI's board of directors and counsel to the Applicants shall be paid by the Applicants their reasonable fees and disbursements, in each case at their standard rates and charges and whether incurred before, on or after the date of this Order, and that the CRA shall be paid by the Applicants its fees and disbursements as set out in the CRA Engagement Letter, as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, PWC, counsel to GFPI's board of directors, counsel for the Monitor, the CRA and counsel for the Applicants on a weekly basis and to pay the CRA's monthly work fee monthly in advance in accordance with the CRA Engagement Letter. Additionally, the Applicants shall pay the fees and disbursements of the Canadian and U.S. counsel to the Agent (each, "**First Lien Lenders' Agent's Counsel**") promptly on receipt of copies of their invoices.

40. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time and, for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

41. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, counsel to GFPI's board of directors, the CRA, the Applicants' counsel and the First Lien Lenders' Agent's Counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all Property, which charge shall not exceed the aggregate amount of $2,000,000, as security for all amounts owing to the Monitor, counsel to the Monitor, counsel to GFPI's board of directors, the CRA, the Applicants' counsel and the First Lien Lenders' Agent's Counsel as

set out in paragraph 39 hereof, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraph 44 hereof.

KERP PAYMENT

42. **THIS COURT ORDERS** that the key employee retention plan agreement dated December 19, 2008 between Peter Lynch ("**Lynch**") and GFPI, as amended by an amendment agreement dated as of April 1, 2009, as described in the Lynch Affidavit (the "**KERP Agreement**") be and is hereby approved and given full force and effect in accordance with its terms and the Applicants are hereby directed to make when due the payments provided for thereunder.

43. **THIS COURT ORDERS** that Lynch shall be entitled to the benefit of and is hereby granted a charge (the "**KERP Charge**") on all Property, which charge shall not exceed the amount of $1,134,000, as security for all amounts now or hereafter owing to Lynch pursuant to the KERP Agreement, both before and after the making of this Order. The KERP Charge shall have the priority set out in paragraph 44 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

44. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Investment Offering Advisor Charge, the KERP Charge and the Directors' Charge, as among them, shall be as follows:

(a) Firstly – Administration Charge (to the maximum amount of $2,000,000) and the Investment Offering Advisor Charge (to the maximum amount of an additional $200,000) on a pari passu basis; and

(b) Secondly – KERP Charge (to the maximum amount of $1,134,000) and Directors' Charge (to the maximum amount of $3,000,000) on a pari passu basis.

45. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the Investment Offering Advisor Charge, the KERP Charge and the Directors' Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered,

recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

46. **THIS COURT ORDERS** that each of the Charges shall constitute charges of all Property and the Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

47. **THIS COURT ORDERS** that, except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with any of the Charges without the written consent of the Monitor, and the beneficiaries of the Administration Charge, the Investment Offering Advisor Charge, the KERP Charge and the Directors' Charge, or further Order of this Court.

48. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any applications for bankruptcy orders issued pursuant to BIA or any bankruptcy order made pursuant to such applications in respect of any of the Applicants; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA by any of the Applicants; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds any of the Applicants and, notwithstanding any provision to the contrary in any Agreement:

(i) the creation of the Charges shall not create or be deemed to constitute a breach by any of the Applicants of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from, the creation of the Charges; and

(iii) the payments made by any of the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Applicants shall, within ten (10) business days of the date of entry of this Order, send a copy of this Order to their known creditors, other than employees and creditors to the Applicants owed less than $1,000.00, at their addresses as they appear on the Applicants' records, and shall promptly send a copy of this Order: (a) to all parties filing a Notice of Appearance in respect of this Application; and (b) to any other interested Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

50. **THIS COURT ORDERS** that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

51. **THIS COURT ORDERS** that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the

extent practicable, and the Monitor may post a copy of any or all such materials on the Monitor's website.

GENERAL

52. **THIS COURT ORDERS** that any of the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

53. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any of the Applicants, the Business or the Property.

54. **THIS COURT ORDERS** that the Monitor is hereby authorized to apply, after consultation with the Applicants, the Agent and BNY, for recognition of these proceedings as "Foreign Main Proceedings" in the United States pursuant to Chapter 15 of the *U.S. Bankruptcy Code.*

55. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

56. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

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57. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than four (4) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

58. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Daylight Time on the date of this Order.

59. **THIS COURT ORDERS** that the unredacted copy of the CRA Engagement Letter be and is hereby sealed and treated as confidential pending completion of the marketing process contemplated by the Investment Offering Protocol or further Order of this Court.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 2 5 2009

PER / PAR: JSN
Joanne Nicoara
Registrar, Superior Court of Justice

APPENDIX "A"

GRANT FOREST PRODUCTS INC.

INVESTMENT OFFERING PROTOCOL

Recitals

1. Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc. and Grant U.S. Holdings GP (collectively, the "**Grant Companies**") filed for protection with the Ontario Superior Court of Justice (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**").

2. Pursuant to the CCAA proceedings, Ernst & Young Inc. (the "**Monitor**") has been appointed as the monitor of the Grant Companies.

3. The Grant Companies carry on business in North America as manufacturers and distributors of oriented strand board and other similar and related products (the "**Business**").

4. The Grant Companies wish to engage **[<>]** as their investment offering advisor (the "**Investment Offering Advisor**") to assist them in identifying prospective parties and negotiating the terms of a refinancing or recapitalization of the Grant Companies and their subsidiaries or a sale of the Business, in whole or in part, in consultation with the Monitor, an agent (the "**First Lien Agent**") for the first lien secured lenders (the "**First Lien Lenders**") and the agent (the "**Second Lien Agent**") for the second lien secured lenders (the "**Second Lien Lenders**").

5. The marketing process set out herein (the "**Marketing Process**") is intended to focus the efforts of the Grant Companies and the Investment Offering Advisor (with the assistance of the Monitor and in consultation with the First Lien Agent and the Second Lien Agent) on the maximization of value for the First Lien Lenders , the Second Lien Lenders, the Grant Companies' other creditors and other stakeholders (collectively, the "**Stakeholders**") either through a refinancing or recapitalization or a sale of the Business.

Leading the Marketing Process

6. In order to ensure that the Marketing Process successfully identifies the best possible buyer or investor, among other things:

(a) the Grant Companies and the Investment Offering Advisor shall lead the marketing efforts in consultation with the Monitor, the First Lien Agent and the Second Lien Agent; and

(b) the Grant Companies shall devote all time and attention necessary to pursue the Marketing Process in a timely manner.

Objectives

7. The Marketing Process will be implemented to achieve the following objectives:

(a) value maximization for the Stakeholders of the Grant Companies;

(b) continuity of the Business; and

(c) timely implementation.

8. In order to achieve these objectives:

(a) interested parties shall be encouraged to consider:

(i) the opportunity of sponsoring a refinancing or a recapitalization of the Grant Companies and their subsidiaries through a plan of arrangement; or

(ii) the purchase of the Business in whole or in part; and

(b) interested parties shall be required to participate in the Marketing Process and to respect the timetable set out herein.

Supervision and Reporting

9. The Marketing Process shall be approved by the Court and subject to the Court's overriding supervision. The Monitor will facilitate and oversee the Marketing Process

undertaken by the Investment Offering Advisor, the Grant Companies and their other advisors, all in accordance with this Protocol. Any sale of the Business must be approved by the Court in accordance with the Initial Order.

10. Whether the transaction is to be implemented by a plan of arrangement or a sale of the Business, the Monitor will provide a report to the Court including a detailed summary as to how the Marketing Process was conducted, the key elements of the resulting transaction and the Monitor's recommendation with respect to such plan or sale, as the case may be.

Reporting to Stakeholders

11. The Grant Companies and the Monitor may provide periodic updates, as appropriate, to Stakeholders which have executed confidentiality agreements including the First Lien Lenders and the Second Lien Lenders.

Selection of Investment Offering Advisor

12. The Grant Companies confirm that they have selected the Investment Offering Advisor and the Investment Offering Advisor has agreed to accept its engagement in accordance with the Investment Offering Advisor Engagement Letter filed in the CCAA proceedings and approved in the Initial Order.

Identification of Potential Interested Parties

13. The Grant Companies and the Monitor will jointly agree on a preliminary potential interested party list with input from the Investment Offering Advisor with a view to ensuring that all parties that have expressed interest in the Business prior to the CCAA proceedings and any potential interested party whose interest may be known to the Grant Companies, the Monitor or the Investment Offering Advisor are included on the preliminary list. The Stakeholders may nominate interested parties for inclusion in the preliminary list.

Marketing Process

14. Phase I

(a) The Grant Companies will work with the Investment Offering Advisor to prepare a one page marketing overview (the "**Teaser**"), a draft non-disclosure agreement (an "**NDA**"), a communications package, a confidential information memorandum, the data room and other relevant marketing materials. The NDA shall not prohibit any person from buying or selling any debt owing by any of the Grant Companies. The Monitor and the advisors to the First Lien Lenders shall be entitled to review and provide input into these materials as they shall deem appropriate.

(b) The Investment Offering Advisor will contact all of the parties on the final potential interested party list and provide them with a copy of the teaser memorandum and form of NDA.

(c) Interested parties that execute the NDA (or have previously executed an NDA satisfactory to the Grant Companies) will receive information and will receive access to a limited electronic data room.

(d) Each potential interested buyer or investor will be asked to submit a non-binding preliminary proposal on or before July 31, 2009.

(e) The Grant Companies and the Monitor, in consultation with the Investment Offering Advisor, will evaluate the non-binding preliminary proposals based on the ability of the potential interested parties to complete due diligence on a timely basis as well as other buyer or investor selection criteria that may be developed by the Grant Companies in consultation with the Monitor and the Investment Offering Advisor.

(f) Given that all parties recognize the need to complete a transaction as quickly as possible, the number of parties invited to participate in Phase II of the Marketing Process will be limited in number and will be jointly selected by the Monitor and the Grant Companies in consultation with the First Lien Agent and the Second Lien Agent.

15. Phase II

(a) Interested parties invited to participate in Phase II will be provided with a management presentation and full electronic data room access.

(b) Interested parties must complete due diligence and submit to the Grant Companies, the Monitor and the Investment Offering Advisor a revised proposal on or before August 30, 2009.

(c) The Grant Companies and the Monitor, in consultation with the Investment Offering Advisor, will review the proposals and, in full consultation with the First Lien Agent and the Second Lien Agent, jointly select one or more parties which wish to proceed to Phase III.

16. Phase III

(a) The Grant Companies and the Monitor, in consultation with the Investment Offering Advisor, the First Lien Agent and the Second Lien Agent, will conduct final negotiations of an agreement to sponsor a plan of arrangement or to sell the Business with or to the interested parties selected to proceed to Phase III.

(b) The Grant Companies shall not, without the prior written approval of the First Lien Agent, at the direction of the First Lien Lenders then holding not less than 66 2/3% of the total amount of the then outstanding indebtedness owing by the Grant Companies to the First Lien Lenders:

(i) file any plan of arrangement with the Court; or

(ii) enter into an agreement to sell the Business or any material part of the Business.

(c) If the transaction is to be completed by a plan of arrangement, such plan will be filed with the Court and submitted to all required meetings of affected creditors for approval no later than September 30, 2009.

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(d) If the transaction is to be completed by a sale, the asset purchase agreement will be completed and submitted by the Grant Companies to the Court for approval not later than September 30, 2009.

Adjustments to the Marketing Process

17. The Grant Companies, in consultation with the Investment Offering Advisor, may adjust the Market Process (and extend any time limits) as necessary to achieve the objectives set out in this protocol, provided the Monitor and the First Lien Agent consent to such adjustment.

Court File No: CV-09-8247-00CL

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 GP (the "Applicants")

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

INITIAL ORDER

FRASER MILNER CASGRAIN LLP
1 First Canadian Place
100 King Street West,
Toronto, Ontario
M5X 1B2

Lawyer: Alex L. MacFarlane / Jane Dietrich
LSUC: 28133Q / 49302U
Email: alex.macfarlane@fmc-law.com
jane.dietrich@fmc-law.com
Telephone: 416 863-4700 / 416-863-4467
Facsimile: 416 863-4592

Lawyers for the Applicants Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

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Court File No. CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 26th DAY OF
	)	
JUSTICE CAMPBELL	)	AUGUST, 2011

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP

Applicants

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

ORDER

THIS MOTION, made by Grant Forest Products Inc. ("**GFPI**"), Grant Alberta Inc., and Grant Forest Products Sales Inc. (the "**Remaining Applicants**"), for *inter alia* an order in the form attached as Schedule "A" to the notice of motion of the Remaining Applicants dated April 15, 2011 (the "**Notice of Motion**") *inter alia*: (i) abridging and validating the timing and method of service of this Motion Record so that the Motion is properly returnable; (ii) authorizing GFPI to take steps required in accordance with the *Pension Benefits Act* (Ontario) (the "**PBA**") to initiate a wind-up of the two registered defined benefit pension plans of which GFPI is plan administrator namely: #0992537 - Pension Plan for Executive Employees of GFPI and #1053008 Pension Plan for the Salaried Employees of GFPI – Timmins Plant (the "**Timmins**

Salaried Plan") (collectively the "**DB Plans**") and authorizing GFPI to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to appoint a replacement plan administrator of the DB Plans; (iii) authorizing and directing Ernst & Young Inc. in its capacity as court-appointed Monitor of the Remaining Applicants (the "**Monitor**"), until further court order, to hold back from any distribution to creditors of GFPI an amount which is estimated to be the amount necessary to satisfy the wind-up deficits of the DB Plans; (iv) extending, until November 30, 2011, the Stay Period, as defined by the Order of the Honourable Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "**Initial Order**") and as previously extended until August 31, 2011; and (v) approving the twenty-first report to Court (the "**Twenty-First Report**") of the Monitor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Twenty-first Report, the affidavit of Hap Stephen sworn August 10, 2011, the affidavit of Hap Stephen sworn August 24, 2011 and on hearing submissions of counsel for GFPI, the Monitor, Financial Services Commission of Ontario, Peter Grant Sr. and the Second Lien Lenders, and no one appearing for any other person on the service list, although properly served as appears from the affidavits of Laura Bowles-Dove sworn August 10 and 17, 2011 and the affidavit of Jane Dietrich sworn August 24, 2011, filed:

1. **THIS COURT ORDERS** that the timing and method of service and filing of the notice of motion and GFPI's motion record are hereby abridged so that this motion is properly returnable today.

2. **THIS COURT ORDERS** that GFPI is hereby authorized to take steps required in accordance with the PBA to initiate a wind-up of the Timmins Salaried Plan and GFPI is authorized to work with the Superintendent of Financial Services and the Financial Services Commission of Ontario to facilitate the appointment of a replacement plan administrator of the Timmins Salaried Plan. For greater certainty, nothing in this Order shall fetter a replacement administrator's discretion, subject to the requirements of the PBA, whether to wind-up the Timmins Salaried Plan.

3. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

amount of $191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

4. **THIS COURT ORDERS** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

5. **THIS COURT ORDERS** that the Twenty-First Report and the activities of the Monitor as set out therein be and are hereby approved.

6. **THIS COURT ORDERS** that the preamble to paragraph 10 of the Initial Order be and is hereby, as of the date of this Order, deleted and replaced with the following, "*10. **THIS COURT ORDERS** that, the Remaining Applicants are hereby prohibited, without the prior written approval of Bank of New York Mellon as agent for the Second Lien Lenders and the Monitor, or further order of this Court from:*" and subparagraphs 10(a) to (o) of the Initial Order remain unchanged.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 2 6 2011

PER/PAR:

74

Court File No: CV-09-8247-00CL

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC AND GRANT EXCLUDED GP (the "Applicants")

-and-

THE TORONTO-DOMINION BANK, in its capacity as agent for 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 (the "Respondents")

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO
(Commercial List)

ORDER
(August 26, 2011)

FRASER MILNER CASGRAIN LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, Ontario M5K 0A1

Lawyer: Jane O. Dietrich
LSUC: 49302U
Email: jane.dietrich@fmcolaw.com /

Telephone: 416 863-4467

Facsimile: 416-863-4592

Lawyers for Grant Forest Products Inc., Grant Forest Products Sales Inc., and Grant Alberta Inc.

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Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

AFFIDAVIT OF PETER FRASER
(sworn October 19, 2012)

I, PETER FRASER, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY as follows:**

1. I am a Partner and Co-Chief Investment Officer at West Face Capital Inc. ("**WFCI**"), the investment adviser to certain Lenders under the Second Lien Credit Agreement (as defined below) and as such have knowledge of the matters hereinafter deposed to or, where I do not possess such personal knowledge, I have stated the source of my information and, in all such cases, do verily believe it to be true.

2. Pursuant to a Second Lien Credit Agreement made as of March 21, 2007, among, *inter alia,* Grant U.S. Holdings LLP as borrower and Grant Forest Products Inc. ("**GFPI**"), Grant Forest Products Sales Inc. ("**GFPS**"), Grant Alberta Inc. ("**GAI**"), The Toronto-Dominion Bank as Canadian Collateral Agent (the "**Second Lien Collateral Agent**") and the Financial Institutions from time to time parties thereto as "Lenders" (the "**Second Lien Credit Agreement**"), GFPI, GFPS and GAI (collectively, the "**Remaining Applicants**") are indebted to the Lenders for all Obligations referred to therein. A copy of the Second Lien Credit Agreement is attached hereto and marked **Exhibit "A"**.

3. GFPI, the Second Lien Collateral Agent and The Toronto-Dominion Bank, in its capacity as Collateral Agent for the First Lien Obligations (as defined therein) entered into an

Inter-Creditor Agreement dated as of March 20, 2007. A copy of the Inter-Creditor Agreement is attached hereto and marked **Exhibit "B"**.

4. WFCI is the investment adviser to the following Lenders which are owed the following amounts by the Remaining Applicants pursuant to the Second Lien Credit Agreement:

Lender	Amount Owing
West Face Long Term Opportunities Global Master LP	$17,553,863.00
West Face Long Term Opportunities Limited Partnership	$1,838,082.00
West Face Long Term Opportunities Master Fund LP	$7,310,545.00
West Face Long Term Opportunities (USA) Limited Partnership	$4,686,759.00

5. The above-noted amounts have been confirmed as owing to the Lenders by the Administrative Agent pursuant to the Second Lien Credit Agreement.

6. The Remaining Applicants have granted certain security on all of their undertaking, property and assets pursuant to the terms of certain general security agreements, the particulars of which are as follows:

Debtor	Security Agreement
Grant Forest Products Inc.	Second Lien General Security Agreement made as of March 20, 2007
Grant Forest Products Sales Inc.	Second Lien General Security Agreement made as of March 20, 2007
Grant Alberta Inc.	Second Lien General Security Agreement made as of March 20, 2007

7. Attached hereto and marked **Exhibit "C"** is a copy of the Twenty-Fourth Report of the Monitor dated February 17, 2012 (the "**Twenty-Fourth Report**"). The Twenty-Fourth Report provides:

- that the Second Lien Lenders are owed the principal amount of approximately $150 million, plus interest pursuant to the Second Lien Credit Agreement (paragraph 29).
- The Monitor's counsel has conducted a security review of various security held by the Second Lien Lenders in Canada granted in their favour by each of the Remaining Applicants over each of their respective property and assets for the benefit of the Second

Lien Lenders and rendered an opinion with respect to the validity and perfection thereof under the provincial laws of Ontario and Alberta and the federal laws of Canada (the "**Canadian Second Lien Security Opinion**") (paragraph 30).

- The Canadian Second Lien Security Opinion states that, subject to the assumptions and qualifications contained therein, including those relating to statutory and possessory liens and claims that have priority by operation of law, and subject to the priority of the First Lien Lenders, the Second Lien Lenders' security is valid and enforceable and ranks in priority to the other claims with respect to the personal properties secured, subject to certain registrations of secured parties made under the *Personal Property Security Act* of each of Ontario and Alberta prior to the registration of the security of the Second Lien Lenders' Agent (paragraph 31).

- Accordingly, based on the Monitor's counsel's reviews of the Second Lien Lenders' security, the cash held by the Remaining Applicants and the Monitor, subject to the qualifications noted above and the need to maintain reserves to fund certain post-filing obligations of the Remaining Applicants and the costs of the Remaining Applicants to complete the wind—up of the CCAA proceedings, may appropriately be paid to the Second Lien Lenders' Agent.

- Based on the analysis, the Remaining Applicants requested the Court's approval to distribute $6 million to the Second Lien Lenders (the "**Distribution**").

8. The Distribution was paid to the Second Lien Lenders' Agent for distribution to the Lenders. The Distribution was approved by Order of the Court dated February 23, 2012. A copy of the Order is attached hereto and marked **Exhibit "D"**.

9. Attached hereto and marked **Exhibit "E"** is a copy of an Application for Bankruptcy Order issued by G.E. Canada Leasing Services Company against Grant Forest Products Inc. on March 19, 2009. I am informed by Craig J. Hill, a partner with Borden Ladner Gervais LLP ("**BLG**"), that no proceedings have been taken pursuant to the Application for Bankruptcy Order.

10. On March 19, 2012, Goodmans LLP circulated an email to the Service List in these proceedings indicating that it no longer represented the Bank of New York Mellon as Second

Lien Lenders' Agent in these proceedings. A copy of the email is attached hereto and marked **Exhibit "F"**.

11. Subsequently, although WFCI has remained on the Service List, it had not retained counsel in connection with these proceedings. On August 31, 2012, the Monitor sent a letter to the Second Lien Lenders' Agent to seek the position of the Second Lien Lenders on the motion that is now returnable on October 22, 2012 (the "**Pension Motion**"). As described in the Twenty-Seventh Report, the Monitor hosted a telephone call open to all Second Lien Lenders. WFCI was not able to participate on that call. However, WFCI had discussions with the Monitor subsequent to the call. After discussions with counsel for the Second Lien Lenders' Agent, it became apparent that the Second Lien Lenders' Agent would not be able to obtain timely instructions. Therefore WFCI retained BLG on October 19, 2012 to respond to the Pension Motion.

12. On October 19, 2012, BLG served a Notice of Appearance in connection with the proceedings herein. A copy of the Notice of Appearance is attached hereto and marked **Exhibit "G"**.

13. I am advised by Mr. Hill that on October 19, 2012, he sent an email to the Service List indicating that it was BLG's current intention to seek an adjournment of the motion. Mr. Hill requested that any party opposing the request for an adjournment contact Mr. Hill. A copy of the email confirming same is attached hereto as **Exhibit "H"**. I am advised by Mr. Hill that he has received an indication from the solicitors for the Pension Administrator that it will oppose the adjournment request. A copy of the email is attached hereto and marked **Exhibit "I"**.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 19th day of October, 2012.	Peter Fraser
W Bell	**PETER FRASER**
A Commissioner for taking affidavits, etc.	

Whitney Elizabeth Bell, a
Commissioner etc., Province of Ontario,
while a Student-at-Law.
Expires May 24, 2014.

Court File No.: CV-09-8247-00CL

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., et al

828

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

AFFIDAVIT OF PETER FRASER

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for West Face Capital Inc.

TOR01: 5033419: v2

Court of Appeal No. C58638
Court of Appeal File No. M42978
Court File No.: CV-09-8247-00CL

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., et al (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)

COURT OF APPEAL FOR ONTARIO

COMPENDIUM OF THE RESPONDENT WEST FACE CAPITAL INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for the Respondent, West Face Capital Inc.

TOR01: 5646640: v1

Court of Appeal No. C58638
Court of Appeal No. M42978
Court File No.: CV-09-8247-00CL

COURT OF APPEAL FOR ONTARIO

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 OF ARRANGEMENT OF 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

BOOK OF AUTHORITIESOF THE RESPONDENT WEST FACE CAPITAL INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
40 King Street West
Toronto, Ontario
M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for the Respondent, West Face Capital Inc.

Court of Appeal No. C58638
Court of Appeal No. M42978
Court File No.: CV-09-8247-00CL

COURT OF APPEAL FOR ONTARIO

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 OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

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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

I N D E X

7. *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23, 256 O.A.C. 131, 99 O.R. (3d) 708 (Ont. C.A.)

8. *Re Aveos Fleet Performance Inc.* (2013), 9 C.C.P.B. (2nd) 186, 2 P.P.S.A.C. (4th) 60 (Q.S.C.)

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2003 CarswellOnt 2925, 43 C.B.R. (4th) 1, 229 D.L.R. (4th) 687, 174 O.A.C. 201, **66 O.R.** (**3d**) **257**

Air Canada, Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF SECTION 191 OF THE **CANADA** BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **AIR CANADA** AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Ontario Court of Appeal

Laskin, Sharpe, Cronk JJ.A.

Heard: July 11, **2003**
Judgment: July 25, **2003**
Docket: CA C40198

Proceedings: affirming (2003), 2003 CarswellOnt 2727 (Ont. S.C.J. [Commercial List])

Counsel: Frank J.C. Newbould, Michael J. MacNaughton for Appellants, Global Payments Direct, Inc., Global Payments Canada Inc.

William G. Horton, Linc A. Rogers for CIBC

Peter F.C. Howard, Ashley J. Taylor for Respondent, Air Canada

Peter H. Griffin for Monitor, Ernst & Young Inc.

Steven G. Golick for GE Capital Canada Inc.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General

Creditor provided credit card processing services to debtor airline — Debtor obtained initial stay order under Companies' Creditors Arrangement Act which required creditor to continue to process debtor's credit card transactions — Creditor took position that initial stay order required it to advance money or credit to debtor contrary to s. 11.3(b) of Act — Creditor brought motion for order declaring that it had no obligation to continue to provide credit to debtor via credit card processing services except upon terms satisfactory to it — Motions judged rejected creditor's claim for relief under s. 11.3(b) — Motions judge concluded that ordering creditor to continue its credit card processing services did not have effect of requiring it to provide further advance of money or credit to debtor — Motions judge concluded that credit was extended to cardholder by card issuer and that no credit was extended to debtor — Motions judge found that creditor's potential "chargeback" exposure was inchoate contingent liability — Creditor appealed — Appeal dismissed — Motions judge was correct that initial stay order did not have effect of requiring further advance of money of credit to debtor within meaning of s. 11.3(b) — Risk of chargeback exposure was contingent liability rather than extension of credit — Although debtor obtained money and benefit of its immediate use as result of credit card transaction processing arrangement no debt was created, as debtor's promise was for future performance of service, not future repayment, and there was no obligation to pay interest — "Further advance of money or credit" in s. 11.3(b) does not cover payments of any and every kind — "Advance" is typically used in connection with payments made by lender to borrower — Creditor would only become liable for chargebacks if debtor failed to perform service and credit card issuer decided to give refund to cardholder.

Cases considered by *Sharpe J.A.*:

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — considered

Best Products Co., Inc., Re (1997), 210 B.R. 714 (U.S. Bankr. E.D. Va) — referred to

Consumers Packaging Inc., Re (2001), 2001 CarswellOnt 3482, 27 C.B.R. (4th) 197, 150 O.A.C. 384, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Health Science Products, Inc., Re (1994), 181 B.R. 121 (U.S. Bankr. N.D. Ala.) — referred to

Klein Sleep Products, Inc., Re (1996), 64 U.S.L.W. 2530, 78 F.3d 18 (U.S. N.Y. Ct. App.) — referred to

National Hydro-Vac Industrial Services, Re (2001), 262 B.R. 781 (U.S. Bankr. E.D. Ark.) — referred to

Thomas B. Hamilton Co., Re (1992), 969 F.2d 1013 (U.S. 11th Cir. Ga.) — followed

UAL Corp., Re (2003), 393 B.R. 183 (U.S. Bankr. N.D. Ill.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

s. 365 — referred to

s. 365(c)(2) — referred to

s. 365(g) — referred to

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

Generally — referred to

s. 11 — referred to

s. 11.1 [en. 1997, c. 12, s. 124] — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

s. 11.3(b) [en. 1997, c. 12, s. 124] — considered

Words and phrases considered

further advance of money or credit

. . . "further *advance of money* or credit" [emphasis added] in s. 11.3(b) [of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36] does not embrace payments of any kind. The word "advance" is typically used in connection with payments made by a lender to a borrower.

APPEAL by creditor from judgment reported at 42 C.B.R. (4th) 166, 2003 CarswellOnt 2727 (Ont. S.C.J. [Commercial List]) dismissing creditor's motion for order declaring that it had no obligation to continue to provide credit to debtor via credit card processing services except upon terms satisfactory to it.

***Sharpe J.A.*:**

1 This appeal involves the interpretation of s. 11.3 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA") and its application to arrangements for processing of credit card payments. Farley J.'s initial stay order in Air Canada's CCAA application required Global Payments Direct, Inc. and Global Payments Canada Inc. ("Global") to continue to provide credit card processing services to Air Canada. Global submits that the order requires it to advance money or credit to Air Canada contrary to s. 11.3(b).

LEGISLATION

2 Section 11.3 of the CCAA provides that no s. 11 stay order to protect a company that has filed for CCAA relief shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

FACTS

3 The initial stay order required Global to continue to process Air Canada's VISA and MasterCard transactions under Global's pre-filing arrangements with Air Canada.

4 Approximately 80% of Air Canada's customers pay for their tickets using a credit card. There are four participants and four distinct but related contractual arrangements involved in a credit card purchase of an Air Canada ticket. The four participants are:

(1) the cardholder or customer;

(2) the merchant (Air Canada);

(3) the credit card issuer (a financial institution that issues credit cards to its customers); and

(4) the merchant acquirer or fund processor (Global).

5 The four contracts are:

(1) the cardholder - merchant agreement (between the cardholder and Air Canada for the purchase of a tick- et);

(2) the cardholder - credit card issuer agreement (the "cardholder agreement");

(3) the credit card issuer - merchant acquirer agreement; and

(4) the merchant acquirer - merchant agreement (between Global and Air Canada). With respect to VISA processing services, the agreement was initially between Air Canada and the Canadian Imperial Bank of Commerce (CIBC) ("VISA agreement"). Global subsequently assumed CIBC's rights and obligations under that agreement. Although the MasterCard agreement expired in 1997, on the evidence before the motions judge, Global has continued to process MasterCard transactions on similar terms.

6 Pursuant to these agreements, credit card purchases are processed as follows. The cardholder initiates the transaction by contracting with Air Canada for future air travel and agreeing to pay for that service immediately by using a credit card. The credit card issuer extends credit to the cardholder by debiting the cardholder's credit card account. Upon being notified of the transaction, Global makes an immediate payment to Air Canada and subsequently (at most two to three days later) receives payment from the credit card issuer. Global receives a fee or "discount rate" from Air Canada for providing this processing service.

7 Global's claim for relief under s. 11.3(b) arises from its exposure to liability for "chargebacks". A chargeback may arise where the cardholder has a claim against Air Canada. Such a claim would clearly arise if Air Canada were to fail to provide the cardholder with the travel service it had promised. In that situation, the cardholder may request a refund or credit from the credit card issuer. Under the terms of typical cardholder agreements, the credit card issuer has the right to refuse the cardholder's request in which case the cardholder's only recourse would be to seek a refund from Air Canada directly. However, under the terms of the VISA agreement, if the credit card issuer agrees to the cardholder's request for a refund, it can chargeback to Global the amount it refunds to the cardholder. Global is contractually bound to pay the credit card issuer the amount of the chargeback and is left to claim the same amount back from Air Canada.

8 Global submits that it faces a substantial risk of exposure for chargebacks should Air Canada cease opera-

tions. As of the date of Air Canada's CCAA filing, Global estimated that its exposure risk for chargebacks for VISA and MasterCard ticket purchases was $432,513,123.

9 Global's exposure to chargeback claims is, however, mitigated by two factors. First, in most cases, the credit card issuer is not obligated to refund the cost of the purchased flight to the customer. The typical VISA cardholder agreement does not grant the cardholder any entitlement either to refuse to pay or to seek recovery from the card issuer; instead, it provides that the cardholder "must still pay the amount owing and settle the problem directly with the store or merchant." Second, under the terms of the agreement whereby Global assumed the CIBC's rights and obligations under the VISA agreement, CIBC agreed to indemnify Global on certain terms in respect of its chargeback exposure to Air Canada. It would appear, however, that Global has no such guarantee or indemnity for its MasterCard chargeback exposure.

10 Global took the position that the initial stay order requiring it to continue to process Air Canada credit card transactions was contrary to s. 11.3. Global moved for an order declaring that it "has no obligation to continue to provide credit to Air Canada via the credit card processing services currently provided by Global to Air Canada except upon terms satisfactory to Global".

11 The motions judge ruled that pursuant to s. 11.3(a), Global was entitled to reasonable protection with respect to its post-filing fees. However, he rejected Global's claim for relief under s. 11.3(b), ruling that ordering Global to continue its credit card processing services did not have the effect of requiring Global to provide a "further advance of money or credit" to Air Canada. The motions judge ruled that credit was extended to the cardholder by the card issuer and that no credit was extended to Air Canada. He ruled as follows with respect to Global's chargeback exposure:

> [8] What of the chargeback situation? It seems to me that functionally and legally if AC is charged back for failure to provide the flight, then credit is not being extended in the sense of s. 11.3 but rather that AC becomes obligated to pay back to the card issuer (through Global) the price of the ticket for credit (mechanical accounting) to the account of the credit cardholder. Prior to any actual chargeback, there is no credit extended as to the chargeback but rather, the potential for a chargeback is an inchoate contingent liability.

12 Global was granted leave to appeal that decision to this Court and the appeal was heard on an expedited basis.

ANALYSIS

13 Global submits that the motions judge erred and that because Air Canada, through Global's services, receives payment for a service yet to be provided, Air Canada is receiving "the further advance of money or credit" within the meaning of s. 11.3(b). Global contends that because it may be liable to repay cardholders through the card issuer if Air Canada fails to provide the promised service, the net result is that Global is being required to advance money or credit to Air Canada contrary to s. 11.3(b).

14 In his oral submissions before us, counsel for Global abandoned the argument that Global was advancing money or credit to Air Canada on account of the delay between Global's payments to Air Canada and the credit card issuers' payments to Global. He made it clear that Global's argument that it is extending credit to Air Canada rests solely on the contractual arrangements relating to "chargebacks".

15 CIBC supports Global's position and submits that its agreement to indemnify Global is not relevant for

the purpose of s. 11.3(b) of the CCAA. CIBC argues that the existence of the indemnity cannot change the appropriate legal characterization of the relationship between Air Canada and Global and that, if the effect of the stay order is to advance credit to Air Canada through the credit card system, the precise location of the ultimate liability for the risk of Air Canada's default is irrelevant.

16 In my view, the motions judge correctly concluded that the initial stay order did not have "the effect of . . . requiring the further advance of money or credit" to Air Canada within the meaning of s. 11.3(b). I agree with the motions judge's characterization of Global's risk of chargeback exposure as a contingent liability rather than the extension of credit.

17 Extension of credit to a debtor generally arises in one of two ways. The first, contemplated by s. 11.3(a), is where goods, services or the like are provided on the promise of future payment. The second, contemplated by s. 11.3(b), is where a creditor advances funds on the debtor's promise of future repayment. In both situations, the extension of credit arises from the debtor's present promise to pay money in the future. A debt is created in favour of the creditor. There is almost invariably an obligation on the part of the debtor to pay interest to reflect the cost of borrowing, either immediately or after a specified period.

18 While I would not wish to exclude the possibility that credit might be extended in other ways for the purpose of s. 11.3(b), I cannot accept Global's submission that by receiving immediate payment for a service to be provided in the future, Air Canada is receiving "the further advance of money or credit" within the meaning of s. 11(3)(b). Air Canada does obtain money and the benefit of its immediate use, but no debt is created, Air Canada's promise is for future performance not future payment, and there is no obligation to pay interest. Air Canada is contractually bound to supply the promised service and may be liable to return the purchase price or pay damages if it fails to do so. While Air Canada does receive money, the phrase "further *advance of money* or credit" [emphasis added] in s. 11.3(b) does not embrace payments of any kind. The word "advance" is typically used in connection with payments made by a lender to a borrower. Moreover, Global is two steps removed from liability for chargebacks as it only becomes liable if Air Canada fails to perform and if the credit card issuer decides to refund the cardholder. As the motions judge explained, Global's exposure is more aptly characterized as an "inchoate contingent liability" rather than the advance of money or credit.

19 I also agree with the motions judge that Global's own characterisation of its role as merchant acquirer is telling. In its public filings with the United States Securities and Exchange Commission (Global Payments Inc. Form 10-Q for the quarterly period ending November 30, 2002), Global presents its chargeback exposure as a "contingent liability" rather than as an advance of money or credit:

> The Company processes credit card transactions for direct merchants. The Company's merchant customers have the liability for any charges properly reversed by the cardholder. In the event, however, that the Company is not able to collect such amount from the merchants, due to merchant fraud, insolvency, bankruptcy or another reason, the Company may be liable for any such reversed charges. *The Company requires cash deposits, guarantees, letters of credit or other types of collateral by certain merchants to minimize any such contingent liability.* The Company also utilizes a number of systems and procedures to manage merchant risk. [emphasis added].

Global did not bargain for any deposit or other form of security from Air Canada to cover its chargeback exposure, and when Global asked for such protection when Air Canada started to falter after the September 11, 2001 terrorist attacks, Air Canada refused, and Global continued to provide Air Canada with its processing services.

Moreover, in a press release issued by Global after the initial stay order, Global informed investors: "a material loss from the relationship [with Air Canada] is unlikely . . . "

20 Global submits that the credit card system has similarities with other multiparty or related bilateral agreements and arrangements such as letters of credit. I agree, but in my view, this argument undermines rather than advances Global's case. In 1997, Parliament chose to deal with some of these relationships and to exempt certain financial service providers under s. 11. Section 11.2 specifically provides that no s. 11 order shall stay the obligation arising under a letter of credit. Similarly, s. 11.1 exempts certain specified "eligible financial contracts" from stay orders. Although credit card processing arrangements were widespread and well-known in 1997, Parliament did not exempt them.

21 The motions judge cited a number of American cases dealing with credit card processing arrangements. While these cases are not directly applicable because they deal with the intricacies of the United States *Bankruptcy Code* (the "*Code*"), 11 U.S.C. § 365, they do, in the result they reach, support the motions judge's conclusion. Section 365(c)(2) of the *Code*, loosely analogous to section 11.3(b) of the CCAA, denies the debtor the right to assume an executory contract where "such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor". In several reported decisions, credit card processing agreements have been found to be assumable as they are not "financial accommodations" within the meaning of s.365: *Thomas B. Hamilton Co., Re*, 969 F.2d 1013 (U.S. 11th Cir. Ga., 1992), at 1018-20 (" *Hamilton*"); *National Hydro-Vac Industrial Services, Re*, 262 B.R. 781 (U.S. Bankr. E.D. Ark., 2001), 784; *Best Products Co., Inc., Re*, 210 B.R. 714 (U.S. Bankr. E.D. Va, 1997), at 717-18; *Health Science Products, Inc., Re*, 181 B.R. 121 (U.S. Bankr. N.D. Ala., 1994), at 124 n.2. Global points out that under the *Code*, where a contract is assumed post-filing and then breached, the creditor may gain some priority over other unsecured creditors (see s. 365(g) and *Klein Sleep Products, Inc., Re*, 78 F.3d 18 (U.S. N.Y. Ct. App., 1996); however, that arises from the specific provisions of the *Code* applicable to all assumed executory contracts, not from the legal nature of credit card processing arrangements.

22 The leading case, *Hamilton*, at 1020, held that the purpose of the credit card processing agreement at issue was to establish a relationship that would permit the merchant to accept credit cards instead of cash in the course of its business; the purpose was not to provide financing. Examining the relationship between the merchant, the merchant bank, the credit card company, the card-issuing bank, and the cardholder, the *Hamilton* court noted that it was the card-issuing bank, not the merchant bank, that carried the primary contractual obligation to extend credit: *Id.* at 1021. As noted by the motions judge, *Hamilton* was applied by Wedoff J., in the United Airlines bankruptcy proceedings: *UAL Corp., Re*, 393 B.R. 183 (U.S. Bankr. N.D. Ill., 2003), at 188:

> The Eleventh Circuit's 1992 decision in *Hamilton* is the leading case, and no published opinions disagree with its analysis of the question: (1) the purpose of a credit card processing agreement is "to establish a relationship that will permit [the debtor] to accept the use by customers of credit cards instead of cash in the course of its business"; (2) "the specific terms of the Agreement do not evidence any intent on the part of [the processing bank] to extend credit to [the debtor]"; (3) the fact that the debtor is liable to the processing bank for chargebacks "can only be viewed as incidental to the overall relationship"; and (4) "[t]he Agreement is not, therefore, a contract to extend financial accommodations within the meaning of §365(c)(2)." [quoting *Hamilton, supra* at 1020].

23 In holding that Global is not advancing money or credit to Air Canada within the meaning of s. 11.3(b), the motions judge appropriately weighed in the balance the general policy of promoting reorganization identified

in *Hamilton* at 1020:

> The Agreement at issue here is typical of credit card merchant agreements between all kinds of merchants and merchant banks. If these agreements may not be assumed by the trustee following a bankruptcy filing, rehabilitation will be virtually impossible for any merchant who relies heavily on credit card sales.
>
> . . .

24 In both written and oral submissions before this Court, counsel for Air Canada argued that even if we concluded that Global was advancing money or credit to Air Canada, we should dismiss the appeal as there is no evidence that Global's chargeback exposure has increased post-filing. Air Canada submits that even if Global is advancing money or credit, it is not advancing "further . . . credit" as contemplated by s. 11.3(b). As my conclusion with respect to the reach of s. 11.3(b) in relation to Global provides a sufficient basis to dispose of this appeal, it is unnecessary for me to express any opinion with respect to that alternative submission.

25 I would add, however, that quite apart from s. 11.3(b), the nature and extent of the risk faced by a credit card processor could be relevant to the appropriate terms for a s. 11 order. In some cases, it might well be appropriate to impose terms to protect a party such as Global from unreasonable risk: cf. *Hamilton* at 1021. The motions judge's reasons demonstrate that he carefully considered the nature and extent of Global's chargeback exposure. As the order against Global is not barred by s. 11.3(b), the relief sought by Global falls squarely within the discretion of the CCAA supervising judge that is to be afforded substantial deference on appeal: *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.); *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.).

26 Accordingly, I would dismiss the appeal.

27 If the parties cannot agree as to the costs of the appeal, the court will entertain brief written submissions dealing with all aspects of the award of costs. Counsel for any party claiming costs shall deliver submissions and a bill of costs no later than ten days from the date of this judgment. Responding submissions may be delivered within seven days thereafter.

Appeal dismissed.

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2004 CarswellOnt 190, 46 C.B.R. (4th) 126, 2004 C.L.L.C. 220-014, 181 O.A.C. 115, 98 C.L.R.B.R. (2d) 210

Royal Crest Lifecare Group Inc., Re

In the Matter of the Bankruptcy of The **Royal Crest** Lifecare Group Inc.

Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 and 2225-12, and Service Employees International Union, Locals 204 and 532 (Appellants) and Ernst & Young Inc., in its capacity as Trustee in Bankruptcy for the **Royal Crest** Lifecare Group Inc. (Respondent) and Confederation Life Insurance Company, in Liquidation (Respondent) and The National Life Assurance Company of Canada (Respondent) and Attorney General of Ontario (Intervenor)

Ontario Court of **Appeal**

Borins, MacPherson, Cronk JJ.A.

Heard: September 17, **2003**
Judgment: January 21, 2004
Docket: CA C39457

Proceedings: affirming *Royal Crest Lifecare Group, Re* (2003), 2003 CarswellOnt 683, 40 C.B.R. (4th) 146, 2003 C.L.L.C. 220-046 (Ont. S.C.J.)

Counsel: Sean Dewart, Michael Kainer for Appellants

John A. MacDonald for Respondent, Ernst & Young

Harold P. Rolph for Independent Counsel for the Trustee

L. Joseph Latham, Joseph K. Morrison for Respondent, Confederation Life

Kyla E.M. Mahar for Respondent, National Life

Robin K. Basu for Intervenor

Subject: Insolvency; Estates and Trusts; Labour

Bankruptcy and insolvency --- Administration of estate — Trustee continuing bankrupt's business — General principles

Company was petitioned into bankruptcy — Trustee in bankruptcy was appointed — Same day trustee brought motion for order that it not be considered successor employer and unions representing employees brought motion for leave to apply to Ontario Labour Relations Board for designation of trustee as successor employer — Both motions were dismissed — Unions appealed — Appeal dismissed — Bankruptcy judge did not err in concluding that unions' cross-motion was premature and should be dismissed.

Labour law --- Bargaining rights — Successor rights — Successor employer — General

Company was petitioned into bankruptcy — Trustee in bankruptcy was appointed — Same day trustee brought motion for order that it not be considered successor employer and unions representing employees brought motion for leave to apply to Ontario Labour Relations Board for designation of trustee as successor employer — Both motions were dismissed — Unions appealed — Appeal dismissed — Bankruptcy judge did not err in concluding that unions' cross-motion was premature and should be dismissed.

Bankruptcy and insolvency --- Administration of estate — Trustee continuing bankrupt's business — Personal liability of trustee

Company was petitioned into bankruptcy — Trustee in bankruptcy was appointed — Same day trustee brought motion for order that it not be considered successor employer and unions representing employees brought motion for leave to apply to Ontario Labour Relations Board for designation of trustee as successor employer — Both motions were dismissed — Unions appealed — Appeal dismissed — Bankruptcy judge did not err in concluding that unions' cross-motion was premature and should be dismissed.

A company operated 17 long-term care facilities and employed about 2,200 full-time and part-time employees. Approximately 1,400 of these employees were represented by certain unions. The company owed its creditors in excess of $128 million and was in default under its loan agreements. The company was granted protection under the Companies' Creditors Arrangement Act. Those proceedings were terminated less than one month later and an interim receiver was appointed. The interim receiver immediately engaged the former employees under terms and conditions of employment similar to those provided in the various collective agreements. One of the terms of employment was that the employees accepted that the interim receiver was not a successor employer. Almost two months later, the company was petitioned into bankruptcy and a trustee in bankruptcy appointed. The same day, the trustee in bankruptcy brought a motion for an order that it not be bound by the collective agreements between the company and the unions and that it not be deemed a successor employer. The unions brought a cross-motion for leave to pursue an application before the Ontario Labour Relations Board seeking the designation of the trustee as a successor employer.

The trustee's motion was dismissed. The unions' cross-motion was also dismissed, but without prejudice to such a motion being brought back on again with appropriate factual underpinnings. The unions appealed.

Held: The appeal was dismissed.

Per MacPherson J.A. (Cronk J.A. concurring): The unions acknowledged that they required the leave of the court in order to pursue their application to the Ontario Labour Relations Board. The bankruptcy judge did not apply the wrong test. The cross-motion was directly related to s. 215 of the Bankruptcy and Insolvency Act and the relevant case law was argued before the bankruptcy judge. The test for granting leave under s. 215 of the Bankruptcy and Insolvency Act established a low threshold for granting leave but there must be an evidentiary basis for the proposed cause of action. Prior to the date the trustee was appointed, there was no live successor employer issue. The bankruptcy judge's conclusion that both motions were premature was amply supported. The bankruptcy judge did not decide the successor employer issue on its merits but regarded resolution of that issue on that date as being premature. The bankruptcy judge did not err in the exercise of his discretion by deciding that unions' cross-motion seeking leave to make an application to the Ontario Labour Relations Board was premature and should be dismissed.

Per Borins J.A. (dissenting): The bankruptcy judge erred in the exercise of his discretion. When the unions' motion was before the court, it was clear that the operation of the homes was continuing in the same manner as it had before the company was granted protection under the Companies' Creditors Arrangement Act and throughout the two-month period of the interim receivership. From the letters written to the employees by the trustee as interim receiver and as trustee in bankruptcy, it was clear that the trustee did not wish to be declared a successor employer. The applicable test in considering an application under s. 215 of the Bankruptcy and Insolvency Act has three parts. The proposed application was neither frivolous nor vexatious. The evidence of the history of the trustee's operation of the company since its appointment as interim receiver provided a factual basis for the unions' application. In determining whether the unions' proposed application disclosed a "cause of action" against the trustee in bankruptcy, it was necessary that the bankruptcy judge consider not only the purpose of the successorship provision in s. 69 of the Labour Relations Act, but also the criteria relevant to the determination of whether the trustee could be found by the Ontario Labour Relations Board to be a successor employer. The bankruptcy judge failed to do so. The bankruptcy judge did not make a final assessment of the proposed application. The bankruptcy judge placed too much emphasis on the bankruptcy environment and gave insufficient weight to the essential character of the issues that the unions sought to advance before the Ontario Labour Relations Board. The unions' s. 215 application was timely and prudent. The unions should not be faulted for bringing it on the day that the court appointed the trustee in bankruptcy.

Cases considered by *MacPherson J.A.*:

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to

Banque nationale de Paris (Canada) v. Opiola (2001), 2001 ABCA 25, 2001 CarswellAlta 71, 22 C.B.R. (4th) 47, 1 C.P.C. (5th) 228, 277 A.R. 80, 242 W.A.C. 80, [2001] 6 W.W.R. 95, 89 Alta. L.R. (3d) 6 (Alta. C.A.) — referred to

Fred Walls & Son Holdings Ltd., Re (2003), 2003 BCCA 132, 2003 CarswellBC 451, 11 B.C.L.R. (4th) 315, 40 C.B.R. (4th) 171, 179 B.C.A.C. 140, 295 W.A.C. 140 (B.C. C.A. [In Chambers]) — referred to

Mancini (Trustee of) v. Falconi (1993), (sub nom. *Mancini (Bankrupt) v. Falconi)* 61 O.A.C. 332, 1993 CarswellOnt 1861 (Ont. C.A.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 50 O.R. (3d) 688, 20 C.B.R. (4th) 160, 137 O.A.C. 74 (Ont. C.A.) — followed

Vanderwoude v. Scott & Pichelli Ltd. (2001), 2001 CarswellOnt 1060, 143 O.A.C. 195, 25 C.B.R. (4th) 127

(Ont. C.A.) — referred to

Cases considered by *Borins J.A.*:

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

Mancini (Trustee of) v. Falconi (1993), (sub nom. *Mancini (Bankrupt) v. Falconi)* 61 O.A.C. 332, 1993 CarswellOnt 1861 (Ont. C.A.) — considered

Royal Crest Lifecare Group, Re (2003), 2003 CarswellOnt 683, 40 C.B.R. (4th) 146, 2003 C.L.L.C. 220-046 (Ont. S.C.J.) — considered

Saan Stores Ltd. v. Nova Scotia (Labour Relations Board) (1999), 173 N.S.R. (2d) 222, 527 A.P.R. 222, 172 D.L.R. (4th) 134, 9 C.B.R. (4th) 109, 1999 CarswellNS 473 (N.S. C.A.) — considered

Wong v. Lee (2002), 2002 CarswellOnt 742, 211 D.L.R. (4th) 69, 58 O.R. (3d) 398, 157 O.A.C. 340, 28 M.V.R. (4th) 165 (Ont. C.A.) — considered

588871 Ontario Ltd., Re (1995), 33 C.B.R. (3d) 28, 1995 CarswellOnt 313 (Ont. Bktcy.) — referred to

Statutes considered by *MacPherson J.A.*:

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

Generally — referred to

s. 46 — referred to

s. 215 — considered

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

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 109 — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally — referred to

s. 69 — referred to

s. 69(12) — referred to

s. 114 — referred to

s. 116 — referred to

Statutes considered by *Borins J.A.*:

Bankruptcy Act, R.S.C. 1970, c. B-3

s. 186 — referred to

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

Generally — referred to

s. 72(1) — considered

s. 215 — considered

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

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally — referred to

s. 69 — referred to

s. 69(1) — considered

s. 69(2) — considered

s. 69(12) — considered

s. 114(1) — considered

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Generally — referred to

Pay Equity Act, R.S.O. 1990, c. P.7

Generally — referred to

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

Generally — referred to

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)

Generally — referred to

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A

Generally — referred to

APPEAL by unions from judgment reported at [2003] O.J. No. 756, 2003 CarswellOnt 683, 40 C.B.R. (4th) 146, 2003 C.L.L.C. 220-046 (Ont. S.C.J.) dismissing unions' motion for leave to apply for designation of trustee in bankruptcy as successor employer.

***MacPherson J.A.*:**

A. INTRODUCTION

1 On January 10, 2003, a large group of related companies collectively known as The Royal Crest Lifecare Group Inc. ("Royal Crest"), which operated five nursing homes, six retirement homes and six mixed care (nursing and retirement) homes in southern Ontario, was petitioned into bankruptcy by several banks after it defaulted under its loan agreements with the banks. Ernst & Young Inc. ("Ernst & Young") was appointed as trustee of the estate of the bankrupt.

2 On the same day, and before the same judge, Farley J., who made the bankruptcy order, the trustee and the unions representing many of the employees of the bankrupt company brought duelling motions.

3 The trustee sought an order that it not be bound by the collective agreements between Royal Crest and the unions and that it not be deemed to be a successor employer under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. (the "*LRA*"), and other labour and employment laws.

4 The unions resisted the trustee's motion. In addition, based on their view that the question of 'successor employer' came within the exclusive jurisdiction of the Ontario Labour Relations Board (the "OLRB"), the unions made a cross-motion before the bankruptcy judge. In their cross-motion, the unions sought leave, pursuant to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), to pursue an application before the OLRB seeking the designation of the trustee as a successor employer.

5 The bankruptcy judge dismissed the trustee's motion. The trustee does not appeal.

6 The bankruptcy judge also dismissed the unions' cross-motion, but "without prejudice to such a motion being brought back on again with appropriate factual underpinning". The unions appeal.

B. THE FACTS

(1) The parties and the events

7 Royal Crest operated 17 long-term care facilities in Southern Ontario. These homes provided approximately 2300 beds for patients and residents. Royal Crest employed about 2200 full-time and part-time employees. Canadian Union of Public Employees Locals 1712, 3009, 2225-05, 2225-06 and 2225-12 and Service Employees International Union Locals 204 and 532 (the "unions") represent approximately 1400 of these employees.

8 Unfortunately, by late 2002 Royal Crest was in serious financial difficulty. It owed its creditors, mostly banks, in excess of $128 million and was in default under its loan agreements.

9 On October 21, 2002, Royal Crest was granted protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") by order of Crane J. On November 13, 2002, the proceedings under the *CCAA* were terminated and Ernst & Young was appointed as interim receiver pursuant to s. 46 of the *BIA*. The interim receiver immediately engaged the former employees under terms and conditions of employment similar, but not identical, to those provided in the various collective agreements. One of the terms of employment to which the employees had to agree was that they accepted that Ernst & Young was not a successor employer.

10 On January 10, 2003, Royal Crest was petitioned into bankruptcy. Ernst & Young was appointed as trustee.

(2) The litigation

(a) Before the bankruptcy judge

11 On January 10, 2003, the trustee and the unions brought their duelling or mirror motions on the question of whether the trustee should be deemed to be a successor employer within the meaning of s. 69 of the *LRA*.

12 The bankruptcy judge dismissed the trustee's motion. He reviewed considerable case law, much of it conflicting. It seems clear from his reasons that he doubted two of the propositions advanced by the trustee: (1) a trustee in bankruptcy cannot be a successor employer; and (2) collective agreements terminate with bankruptcy. All that the bankruptcy judge was prepared to order, consistent with *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), was:

> This Court orders that the employment of all employees engaged by the Interim Receiver is terminated by virtue of the bankruptcy. The Trustee is hereby authorized to engage any or all of such former employees of the Bankrupt or any other persons.

The trustee does not appeal this component of the bankruptcy judge's order.

13 The bankruptcy judge also dismissed the unions' cross-motion. Again, the bankruptcy judge conducted a full review of the relevant legislation and case law. He concluded:

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E & Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.

The unions appeal the bankruptcy judge's decision relating to their cross-motion.

(b) The appeal

14 The appeal is unusual in an important respect. Most appeals involve the same parties, issues and arguments that were before the trial, application or motion judge. To some extent, that is true of this appeal. Some of the matters that were before the bankruptcy judge, and which he resolved, are raised again on appeal.

15 However, significant attention was devoted on the appeal (in facta and in oral argument) to an issue that was invisible, or almost invisible, in the hearing before the bankruptcy judge. The issue is the relationship, in constitutional law terms, between the federal *BIA* and the Ontario *LRA*.

16 The appellants raised the purported constitutional issue in their factum by framing the first issue of the appeal as:

> (a) Did the learned bankruptcy judge err in effectively finding a conflict between the provisions of the *Bankruptcy and Insolvency Act* and the *Labour Relations Act, 1995*, where none in fact exists?

17 Rather than ignore the fact that the appellants' argument appeared to be put no higher than the assertion that the bankruptcy judge had made an *implicit* determination of a constitutional issue *raised by no one*, the respondent trustee decided to mount a full-scale attack on the applicability of the successor employer provisions of the *LRA* in a bankruptcy context. The trustee served a Notice of Constitutional Question upon the Attorney General of Canada and the Attorney General of Ontario, pursuant to s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

18 The Attorney General of Ontario intervened in the appeal. He noted that no Notice of Constitutional Question was served in the proceedings before the bankruptcy judge and, consequently, he had no opportunity to participate in those proceedings.

19 During the appeal hearing, the panel permitted the appellants and the trustee to make their constitutional arguments. However, at the conclusion of these submissions, the panel indicated that it did not need to hear further submissions on this issue, including submissions from the Attorney General who had filed an extensive factum on the purported constitutional issue. The panel essentially agreed with the Attorney General's submissions that: (1) the constitutional issue was not raised before, or addressed or determined by, the bankruptcy judge; and (2) the appeal could, and should, be determined without the necessity of dealing with the constitutional issue.

C. ISSUE

20 The sole issue on the appeal is whether the bankruptcy judge erred in the exercise of his discretion by refusing to permit the unions to proceed, on January 10, 2003, to the OLRB to have the question of the status of the trustee as successor employer resolved.

D. ANALYSIS

(1) The standard of review

21 A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.

22 The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.

23 Appellate courts have long recognized the unique difficulties faced by judges in bankruptcy and *CCAA* proceedings. The result is that appellate courts accord considerable deference to judges' decisions in these contexts: see, for example, *Algoma Steel Inc., Re*, [2001] O.J. No. 1943 (Ont. C.A.); *Banque nationale de Paris (Canada) v. Opiola*, [2001] 6 W.W.R. 95 (Alta. C.A.); and *Fred Walls & Son Holdings Ltd., Re*, [2003] B.C.J. No. 454 (B.C. C.A. [In Chambers]).

(2) <u>The test under s. 215 of the *BIA*</u>

24 The *LRA* gives the OLRB exclusive jurisdiction to decide successor employer applications: see ss. 69(12), 114 and 116. However, in bankruptcy proceedings, a party seeking to challenge a decision by a trustee must seek leave from a judge. Section 215 of the *BIA* provides:

> **215.** Except by leave of the court, no action lies against . . . a trustee with respect to any report made under, or any action taken pursuant to, this Act.

The appellants acknowledge that they require the leave of the court in order to pursue their application to the

25 The case law establishes that the threshold for granting leave under s. 215 of the *BIA* is a low one. In *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.), at 690 ("*SOCAN*"), Charron J.A. stated:

> [T]he evidence required to support an order under s. 215 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action. However, the evidence does not have to be sufficient to enable the motions judge to make a final assessment of the merits of the proposed claim. The sufficiency of the evidence must be measured in the context of the purpose of s. 215 which is to prevent the trustee from having to respond to actions which are frivolous or vexatious or which do not disclose a cause of action . . . .

See also: *Mancini (Trustee of) v. Falconi* (1993), 61 O.A.C. 332 (Ont. C.A.) and *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 143 O.A.C. 195 (Ont. C.A.).

(3) <u>Discussion</u>

26 The appellants contend that the bankruptcy judge made three errors in his reasons relating to their cross-motion: (1) he applied the wrong test for a *BIA* s. 215 application; (2) he determined a matter - whether the trustee was a successor employer - within the exclusive jurisdiction of the OLRB; and (3) he incorrectly found that the various collective agreements were in "suspended animation".

27 I do not agree that the bankruptcy judge applied the wrong test. The cross-motion was directly related to s. 215 of the *BIA* and the relevant case law was argued before the bankruptcy judge. It is true that the test under s. 215 of the *BIA* establishes a low threshold for granting leave. However, *SOCAN* makes it clear that there must be an evidentiary basis for the proposed cause of action.

28 The bankruptcy judge clearly turned his mind to this component of the test. In dismissing the cross-motion, he invited the unions to bring a further motion "with appropriate factual underpinning".

29 It is important to place the appellants' cross-motion in its proper context. Prior to January 10, 2003, there was no live successor employer issue because Ernst & Young, acting as interim receiver, engaged current employees only if they contractually agreed that Ernst & Young was not a successor employer. On January 10, 2003, this picture changed in a major way. When receiving orders were made and Ernst & Young was appointed as trustee of the estate of Royal Crest, the status of the trustee as a potential successor employer emerged as a live issue because the existing employment relation was automatically terminated: see *Rizzo & Rizzo Shoes Ltd., Re, supra*. Both the trustee and the unions decided, virtually instantaneously, to resort to their preferred institutions, the court and the OLRB respectively, to resolve the issue.

30 It is clear that the bankruptcy judge regarded both motions as premature. In my view, this conclusion was amply supported by the chronology of events and the record before the bankruptcy judge.

31 The trustee has many responsibilities - to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.

32 Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly 'business as usual' for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard.

33 I also do not accept the appellants' submission that the bankruptcy judge decided the successor employer issue. He explicitly did not do this. He dismissed the trustee's motion seeking an order that the trustee not be deemed a successor employer and authorized the trustee to engage former employees of the bankrupt company. He also dismissed the unions' cross-motion, but coupled that dismissal with an invitation to bring another motion later with an "appropriate factual underpinning". In my view, these careful combined dispositions establish clearly that the bankruptcy judge did not decide the successor employer issue on its merits. Rather, he regarded resolution of that issue on January 10, 2003 as being premature. Accordingly, in the exercise of his discretion, he left it open.

34 Finally, I do not agree with the appellants' challenge to the bankruptcy judge's description of the various collective agreements as "not terminated but rather . . . put into suspended animation".

35 On January 10, 2003, the first day of the bankruptcy, it strikes me that this description was entirely apt. On that date, it was simply too early to attach formal, and final, legal labels to the relationship between the trustee and the employees. Importantly, the bankruptcy judge explicitly recognized the existence and importance of the collective agreements. Immediately after his description of the collective agreements as contracts put into

"suspended animation", he effectively gave some advice to the trustee regarding the importance of the employment relationship established by those agreements:

> The trustee will also have to appreciate that if it does not accede to the union demands for union dues, pension contributions and grievance-type procedures, then conceivably after a period of time (which may vary in length) the personnel which it has employed may become disenchanted with continuing at the various locations and value may evaporate or start to do so unless "corrective" or "ameliorating" measures are taken.

36 For these reasons, I conclude that the bankruptcy judge did not err, in the exercise of his discretion, by deciding that the appellants' cross-motion seeking leave to make an application on the successor employer issue to the OLRB was premature and, therefore, should be dismissed.

E. <u>DISPOSITION</u>

37 I would dismiss the appeal with costs fixed at $20,000 inclusive of disbursements and G.S.T.

***Cronk J.A.*:**

> I agree.

***Borins J.A.* (dissenting):**

38 I have had the advantage of reading the reasons for judgment of my colleague, MacPherson J.A. With respect, I am unable to agree with his conclusion that this appeal should be dismissed.

39 In my view, this appeal is about the exercise of judicial discretion in the context of an application by two trade unions (the "appellants") pursuant to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") for leave to bring an application before the Ontario Labour Relations Board (the "OLRB") under s. 69(12) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A (the "*LRA*") for a declaration that Ernst & Young, Inc. ("EYI"), the trustee in bankruptcy of The Royal Crest Lifecare Group ("Royal Crest"), is a successor employer. Thus, the issue in this appeal is whether there is any basis on which this court can interfere with the discretion exercised by Farley J. in dismissing the appellants' application under s. 215 of the *BIA*. For the reasons that follow, I have concluded that the bankruptcy judge erred in the exercise of his discretion.

I

40 At the outset, I find it helpful to repeat what I said about the standard of appellate review of the exercise of judicial discretion in *Wong v. Lee* (2002), 58 O.R. (3d) 398 (Ont. C.A.), at 408-409:

> The standard of appellate review of judicial discretion has been considered by the Supreme Court of Canada in a number of cases. In *Reza v. Canada*, [1994] 2 S.C.R. 394 at pp. 404-05, 116 D.L.R. (4th) 61 at p. 68, the Supreme Court held that:
>
>> ...the test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77, *per* LaForest J. See also *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at pp. 154-55.

In *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77, La-Forest J. stated that in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14, the Supreme Court had essentially adopted the following standard of review articulated by Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, , [1942] A.C. 130 at p. 138 (H.L.):

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

II

41 It is also helpful to reproduce the legislation that is relevant to this appeal.

Bankruptcy and Insolvency Act

s. 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

s. 215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Labour Relations Act, 1995

s. 69(1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

s. 69(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

s. 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

III

42 Although MacPherson J.A. has reviewed the facts which formed the basis for both the appellants' s. 215 application and the trustee in bankruptcy's application for declarations that it is not a successor employer under s. 69(12) of the *LRA* and other labour and employment laws, his review does not make reference to a number of facts that, in my view, are relevant to this appeal. Therefore, I propose to outline these additional facts.

43 When EYI was appointed as interim receiver of the estate of Royal Crest on November 12, 2002, it immediately engaged the former Royal Crest employees on a temporary basis under terms and conditions of employment similar but not identical to those provided by the collective agreements. EYI was authorized to do so by a term of the order that appointed it as interim receiver. Excluded terms were access to a grievance procedure, full recognition of seniority, payment of union dues and contributions to the company pension plan. The former Royal Crest employees are members of the appellant unions which, prior to the bankruptcy, had entered into collective agreements with the Royal Crest companies. At the time of the interim receivership, there were, and remain, several outstanding labour relations issues, such as: outstanding grievances involving employee discipline; outstanding pay equity adjustments; the negotiation of a first time collective agreement; and default in contributions to the pension plan.

44 On November 13, 2002, EYI delivered a letter to each employee containing an offer of employment and discussing, *inter alia*, the terms of employment. In addition, the letter contained the following information:

> Our appointment as Interim-Receiver is on a temporary basis and for the limited purpose of continuing the operation of the homes and protecting the assets. It is our intent to stabilize the operations of the home by assuming control of the homes and protecting the interests of the stakeholders, including the residents whose health, safety and well being is of central concern. To assist in achieving this objective, we have retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Pursuant to the terms of the Order, your employment by the Companies has been terminated. We would like to engage your services on a temporary basis to assist with the continued operation of the homes, which will assist the Interim-Receiver in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> . . .
>
> In making this offer, the Interim-Receiver is acting solely in its capacity as Interim-Receiver and without personal or corporate liability. By accepting this offer you acknowledge that the Interim-Receiver is not a successor employer within the meaning or contemplation of the Ontario *Employment Standards Act, 2000*,

the Ontario *Labour Relations Act* or other similar federal or provincial legislation.

45 On January 10, 2003, EYI was appointed as trustee in bankruptcy of the estate of Royal Crest under the *BIA*. On January 17, 2003, pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), EYI was appointed as receiver over the assets, property and undertaking of Royal Crest for the purpose of realizing thereon. Although clause 11 of this order expressly precluded the engagement of any or all of Royal Crest's former employees, on January 17, 2003, the trustee delivered a letter to the former employees that contained an offer of employment.

46 The relevant portions of this letter read as follows:

> As noted previously, the Interim Receiver was appointed on a temporary basis until the appointment of the Trustee, and therefore the role of the Interim Receiver has come to an end effective January 17, 2003. The Trustee will continue to operate the homes in the same manner as the Interim Receiver, and the Trustee has retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Your employment with the Interim Receiver has ceased effective January 17, 2003 and the Trustee will immediately re-engage your services on a temporary basis to assist with the continued operation of the homes, on the same terms and conditions as outlined in the Offer of Employment. Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> You will be paid the same regular wages or salary that you have been receiving from the Interim Receiver. The Trustee will continue to provide all benefits provided by the Interim Receiver to you. The Trustee, in the same manner as the Interim Receiver, is unable to continue to provide benefits provided by the Companies to you prior to the appointment of the Interim Receiver (including, but not limited to, life insurance, disability or pension benefits or RRSP contributions). The Trustee will be making the usual payroll deductions to the appropriate government authority on your behalf.
>
> In making this offer, the Trustee is acting solely in its capacity as Trustee and without personal or corporate liability. By continuing to work in the homes after January 17, 2003 you will be deemed to have accepted this offer, have read and understand fully the terms of this letter and agreed to be bound by its terms. You have also acknowledged that the Trustee is not a successor employer within the meaning or contemplation of the Ontario *ESA*, the Ontario *Labour Relations Act* or similar federal or provincial legislation.

47 From the foregoing, it is clear that from the outset EYI, in its various capacities, recognized that it was prudent to operate the nursing homes as a going concern for two related reasons: (1) to accommodate the 2300 patients and residents of the homes; and (2) to maximize the potential dividend to be paid to Royal Crest's creditors by selling the nursing homes as a going concern. Moreover, it recognized that the most efficient way to continue to operate the homes was to engage the former employees of Royal Crest. Indeed, this appeared to be of such importance to EYI that in its second letter to the employees it wrote: "Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns".

48 When the appellants' motion was before the court, it was clear that the operation of the homes was continuing in the same manner as it had before Royal Crest was granted protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36 (the "CCAA") on October 21, 2002, and throughout the two month peri-

od of the interim receivership. It appeared that this operation would continue in the same manner until the trustee in bankruptcy was able to sell the nursing home business as a going concern. Thus, when the appellants' s. 215 motion was before the court, approximately 2200 employees were continuing the operation of the nursing homes for approximately 2300 patients and residents, and would continue to do so subsequent to EYI's appointment as trustee in bankruptcy and receiver until EYI was able to obtain a purchaser willing to acquire the nursing homes as a going concern. . . .

49 From the letters it wrote to the former employees of Royal Crest, it is clear that EYI did not wish to be declared a successor employer under s. 69(12) pf the *LRA*. It is evident from EYI's application for an order declaring that the trustee in bankruptcy is not a successor employer under the *LRA*, the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, the *Employment Standards Act, 2000*, S.O. 2000, c. 41, the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sch. A, the *Pay Equity Act*, R.S.O. 1990, c. P.7, the *Human Rights Code*, R.S.O. 1990, c. H.19, the *Pension Benefits Act*, R.S.O. 1990, c. P.8 and the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) or any other legislation or common law governing labour relations, that EYI recognized that in the administration of an estate under the *BIA*, a trustee in bankruptcy is required to do so in conformity with provincial legislation governing employees and employee rights.

IV

50 The test that applies in considering an application under s. 215 of the *BIA* for leave to bring proceedings against a trustee has received considerable judicial attention. As MacPherson J.A. points out, the case law establishes that the threshold for granting leave is a low one. However, in applying the test it is necessary to consider that s. 215 is part of the machinery of the *BIA* which is designed to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. As such, the purpose of s. 215 is to protect the trustee against frivolous and vexatious proceedings, or proceedings that have no factual basis.

51 This court considered s. 186 of the former *Bankruptcy Act*, the predecessor of s. 215, in *Mancini (Trustee of) v. Falconi* (1993), 61 O.A.C. 332 (Ont. C.A.). After reviewing a number of authorities, in para. 7 Osborne J.A. set out the factors to be considered on a s. 215 application:

> The following principles can be taken from the decided cases:
>
> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted: see *Peat Marwick Ltd. v. Thorne Riddell, supra.*
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave: see *Leblond c. Tremblay* (1985), 54 C.B.R. (N.S.) 199 (Que. C.A.).

52 In para. 12 Osborne J.A. stated that the court is required to consider the evidence filed in support of the application in the context of the proposed proceeding when adjudicating a s. 215 leave application. He continued: "The issue is not whether the evidence on the [s. 215] motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for *the* cause of action sought

to be asserted [against the trustee]" [emphasis in original].

53 Osborne J.A. commented further on what factors the evidence must establish and the sufficiency of the evidence in paras. 16 - 17:

> In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. *On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.*
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186 [emphasis added].

V

54 The bankruptcy judge's reasons for rejecting the appellants' s. 215 application are reported as *Royal Crest Lifecare Group, Re*, [2003] O.J. No. 756 (Ont. S.C.J.). Early in his reasons, in para. 6, the bankruptcy judge identified "the contentious issue or battlefield [to be] whether the trustee in bankruptcy can become a successor employer [pursuant to s. 69 of the *LRA*] if the trustee hires employees to do the work previously engaged in by employees pre-bankruptcy". After reviewing the positions of the parties, the bankruptcy judge considered the trustee's submission that collective agreements terminate upon an employer's bankruptcy. He appears to have accepted the reasoning of the Nova Scotia Court of Appeal in *Saan Stores Ltd. v. Nova Scotia (Labour Relations Board)* (1999), 172 D.L.R. (4th) 134 (N.S. C.A.) that although bankruptcy terminates the employment relationship between a bankrupt employer and its employees, a collective agreement is "not rendered inoperative" by reason of an employer's bankruptcy.

55 In paras. 24 - 26 the bankruptcy judge discussed the statutory mandate of a trustee in bankruptcy. In my opinion, as this discussion is relevant to his ultimate decision to dismiss the appellants' application, it is helpful to reproduce it in its entirety:

> It seems to me that when one appreciates that the mandate of a trustee in bankruptcy is to maximize value of the assets vested in the trustee on a bankruptcy for the purpose of providing a dividend to the creditors to partially satisfy their claims, the circumstance of operating the business (if the assets are the business and undertaking) *is merely ancillary and incidental to that function of realizing upon the assets.* Coupled with the rather "new-found" objective and thrust of the BIA since the 1992 amendments with the significant social and economic policy with particular positive impact for employees and the communities in which these employees live to have businesses, if possible and practicable, sold as a going concern (such being the usual way in which to maximize value as well), *it would be undesirable to saddle the Trustee with (heavy) personal liabilities which may arise either from a finding of "successor employer" against the trustee or a conclusion that a trustee who hires personnel "inherits" an operative collective agreement. Simply put, what role is the trustee truly playing - is it acting qua realizor of the assets or is it acting qua employer in essence.* Where the business cannot be conveniently mothballed (e.g. a steel mill where the blast furnaces must be kept active or otherwise the furnaces would "solidify" or, as here, where the residents cannot be easily trans-

ferred both physically and as well with concern for their emotional disruption), it seems that the trustee may be "forced" to operate the business during the period of marketing through sale. The maintenance of going concern goodwill will also be an important factor in determining whether it is reasonable to continue some or all of the operations, even if it were not a physical problem to shut down operations. *If the trustee did not operate the business where that was physically necessary or to maximize value of realization, then the trustee would be acting contrary to the principles of the BIA and in so acting would be derelict in its duties and obligations under that federal insolvency statute.*

It seems to me that where a trustee is operating the business as incidental to the trustee disposing of it and realizing on the assets and there is no question or issue raised that it is pursuing a marketing and ultimately sale/disposition program *in a reasonable and bona fide way with due dispatch, then the question of employment of personnel is only incidental to its function of realizing on the assets (and protecting stakeholder interests in going concern preservation).*

I certainly agree with the observations of Spence J. in *588871* at p. 33:

> PMTI also contended that this motion involves an important policy question. If, in circumstances such as those in the present case, a trustee in bankruptcy who is given authority to carry on the business is to be exposed to the risk of being considered a successor employer and the attendant liabilities of the status, *no trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA.* I think this concern may properly be taken into account.

I do not regard this as an "in terrorem" argument as so characterized by CUPE's counsel. Spence J. went on to state at p. 33:

> With respect to the request for leave, I think a delicate balancing of the relevant considerations is required. The [OLRB] clearly has jurisdiction under the OLRA to make a determination that there has been a sale of a business and that PMTI is a successor employer. The considerations which have been raised here concerning the apparent inconsistencies between a positive determination to that effect and bankruptcy principles and the order of December 14, 1994 could presumably be considered in those proceedings to the extent germane and in any other proceedings that may be taken in this matter. *The courts should ordinarily defer to the [OLRB] on a matter clearly within its statutory jurisdiction. On the other hand, if a decision were taken by the [OLRB] against the trustee, it would involve the inconsistencies mentioned above. It would be incompatible with the termination of the collective agreement as a result of the bankruptcy and the limited role of a trustee in bankruptcy in carrying on a business. It seems to me that such matters are properly to be addressed by this court on this application for leave under the BIA and not to be deferred for decision to a tribunal which is not charged with responsibility in respect of the bankruptcy law.* The stay of proceedings imposed by s. 215 of the BIA is one part of the machinery of the Act which functions to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. The stay imposed under s. 215 has a proper effect in this case, for the reasons mentioned above. Accordingly, the request for leave nunc pro tunc should not be granted [emphasis added].

56 In paras. 29 - 30, the bankruptcy judge then gave what I understand to be his reasons for dismissing the appellants' application:

There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y

> *Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.*
>
> In the meantime it appears to me that the collective agreement is not terminated but rather is put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the operation of the business acquires the business [emphasis added].

57 Read as a whole, as I read his reasons, the bankruptcy judge dismissed the appellants' application for leave to commence proceedings before the OLRB for a declaration that EYI is a successor employer under s. 69(12) of the *LRA* because he was of the view that if the application before the Board were to succeed, a declaration that the trustee in bankruptcy is a successor employer would interfere with the mandate of a trustee, saddle the trustee "with (heavy) personal liabilities", would discourage trustees from carrying on a business as a going concern and would be incompatible with the termination of a collective agreement consequent to the bankruptcy of an employer. As a result, the bankruptcy judge agreed with the opinion of Spence J. in *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (Ont. Bktcy.), that although the OLRB has exclusive jurisdiction over the determination of "whether a business has been sold by one employer to another", the court should not defer to the jurisdiction of the Board where a successor employer application is made in the context of a bankruptcy; instead, this determination should be made by a court "charged" with responsibilities in respect to bankruptcy law.

58 As his ultimate reason for dismissing the application for leave, the bankruptcy judge stated that the trustee in bankruptcy had not "been dragging its feet" and there was no suggestion that it would do so. However, the dismissal of the application was without prejudice to it being reinstated "with appropriate factual underpinning... to demonstrate that the trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

VI

59 In analyzing the bankruptcy judge's reasons for dismissing the appellants' application under s. 215 of the *BIA* it is helpful to recall that the authorities are uniform that the test to be applied by the court sets a low threshold.

60 With respect to the first element of the test established in *Mancini*, in my view, there can be no question that the proposed application to the OLRB is neither frivolous nor vexatious. At the time of the application, EYI was operating the same business that was operated by Royal Crest and had hired the same employees that had been employed by Royal Crest to perform the same function that they had performed previously. EYI had done so as interim receiver for two months prior to its appointment as trustee in bankruptcy and receiver. Moreover, neither EYI nor the bankruptcy judge suggested that the proposed application to the OLRB was frivolous or vexatious.

61 Under the second element of the test, the proposed application to the OLRB must disclose "a cause of action" against the trustee in bankruptcy. This is to be decided on the basis of evidence that is sufficient to establish a factual basis for the proposed OLRB application. In the context of these proceedings, the "cause of action" against the trustee consists of the assertion that in the operation of the Royal Crest's business as a going concern, the trustee had become a successor employer within the meaning of s. 69(12) of the *LRA*. It would appear that the trustee's operation of Royal Crest's business as a going concern for the benefit of its creditors and the pa-

tients and residents mitigates in favour of a finding by the OLRB that the trustee is a successor employer. There is little doubt that the evidence of the history of EYI's operation of the business since its appointment as interim receiver on November 12, 2002, provided a factual basis for the appellants' application as contemplated by the second element of the *Mancini* test.

62 In considering whether the proposed application to the OLRB discloses a cause of action against the trustee in bankruptcy it is important to recognize that s. 69(2) of the *LRA* provides that a union continues to be the bargaining agent for the employees of the person, or entity, to whom a business is sold *until the OLRB otherwise declares*. As pointed out by George W. Adams in his text, *Canadian Labour Law*, 2nd ed. looseleaf (Aurora:Canada Law Book Inc., 2003) at 8.10:

> ...collective bargaining rights flow through changes in ownership so long as there is a continuation of the same business. It is the business - and not the employer - to which collective bargaining rights have become attached...The successor provisions [of the *LRA*] have a two-fold purpose: to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination upon sale.

63 Moreover, as Mr. Adams points out at 8.190, labour boards have adopted a broad and liberal interpretation of successorship provisions, including what constitutes the sale of a business under s. 69(1) of the *LRA*, in accordance with the remedial nature of the legislation. After reviewing the case law, Mr. Adams concludes:

> For the most part, the Ontario and British Columbia courts accept and recognize that the substantial similarity of work performed subsequent to a transaction to that performed prior to a transaction normally creates a strong inference there has been a transfer of a business. The criteria relevant to such an interpretation are: (a) substantially the same jobs being performed at the same time and places; (b) in respect of substantially the same goods and services; and (c) for substantially the same customers or patrons.

64 In determining whether the appellants' proposed application to the OLRB disclosed a "cause of action" against the trustee in bankruptcy, it was necessary that the bankruptcy judge consider not only the purpose of the successorship provision in s. 69 of the *LRA*, but the criteria relevant to the determination of whether the trustee could be found by the OLRB to be a successor employer. The bankruptcy judge failed to do so. Based on the above criteria, there is an abundance of evidence in the record to establish a factual basis for the proposed successorship application to the OLRB.

65 As for the third element of the *Mancini* test, the bankruptcy judge must not make a final assessment of the proposed claim or application. Although the bankruptcy judge did not in fact do so in this case, in my view he came perilously close to doing so. He followed the decision of Spence J. in *588871 Ontario Ltd., Re* that the question of successorship should be effectively decided on a motion to the bankruptcy court under s. 215 of the *BIA*, contrary to s. 114(1) of the *LRA* that provides that the OLRB has exclusive jurisdiction to exercise the powers conferred upon it by the *LRA*.

66 In addition, I have difficulty in understanding what the bankruptcy judge meant in para. 24 by his characterization of the trustee's role as "acting *qua* realizor of the assets or *qua* employer in essence". In my view, if it is the opinion of the trustee in bankruptcy that the maximum dividend for creditors can be achieved by selling the bankrupt's business as a going concern it stands to reason that the trustee can do so only if it has the necessary employees to operate the business. The bankruptcy judge reasoned that the trustee's employment of personnel was "only incidental" to its function of realizing on the assets and "protecting stakeholder interests in going concern preservation". With respect, I do not agree with this reasoning. The operation of the business as a going

concern and the re-hiring of Royal Crest's employees to accomplish this are neither incidental nor ancillary to the trustee's role to maximize and maintain the value of the assets for the benefit of the creditors. In my view, they are central to that role. Without the former Royal Crest employees, the trustee could not operate the nursing home business as a going concern. The employees have statutory rights which an employer must respect. The unions were attempting to protect and enforce their members' rights in seeking leave to apply to the OLRB to obtain a successorship ruling.

67 The bankruptcy judge returned to this theme in para. 29, where he gave his ultimate reason for dismissing the appellants' s. 215 application. He was of the view that the length of time during which the trustee in bankruptcy had operated the business was pertinent to whether or not the trustee might be declared a successor employer under s. 69 of the *OLRA*. Thus, he permitted the appellants to make a further application should the trustee "[slip] over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

68 Moreover, in my view the bankruptcy judge minimized the fact that this case involves the rights of employees and workers and that under the legislative scheme of the *LRA* the only recourse available to the unions in protecting the rights of their members was to bring the appropriate proceeding before the OLRB. In addition, the bankruptcy judge appears to have placed the trustee's role under the *BIA* ahead of the employees' statutory rights conferred by the statutes that I have listed in para. 12. In doing so, it seems that he overlooked the proposition that except in the case of "operational conflict", valid provincial law of general application continues to apply in a bankruptcy context: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). This is also recognized in s. 72(1) of the *BIA* where Parliament has explicitly called for the application of provincial law in administering a bankrupt estate, except to the extent that it is inconsistent with the terms of the *BIA*.

69 In making these observations I am mindful that the court did not require submissions from the parties on the constitutional issue raised by the respondent trustee and I do not intend, by my observations, to be taken as determining that issue. The purpose of my observations is to indicate that as the rights of employees and workers are central to the unions' s. 215 application, it is my view that early recourse to the OLRB was an appropriate factor for the bankruptcy judge to take into account in applying the *Mancini* test.

70 In summary, the bankruptcy judge placed too much emphasis on the bankruptcy environment and gave insufficient weight to the essential character of the issues that the unions sought to advance before the OLRB on behalf of their members. While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. As, in my view, the bankruptcy judge did not give sufficient weight to these considerations and to the test to be applied on an application under s. 215 of the *BIA* as explained in *Mancini*, he erred in the exercise of his discretion.

71 In my opinion, the unions' s. 215 application was timely and prudent. Nothing about the application was premature. The unions should not be faulted for bringing it on the day that the court appointed EYI as trustee in bankruptcy. It was brought in response to EYI's application for a declaration that it be deemed not to be a successor employer. EYI was no stranger to the business operation of Royal Crest. For two months prior to its appointment as trustee, as interim receiver it had operated the nursing home business with Royal Crest's former employees. As trustee, it was intending to operate the business with the same employees. The employees had statutory rights which the unions believed required recourse to the OLRB for their protection. Had the bankruptcy judge granted the unions' application for leave to apply to the OLRB, or, indeed, should this court do so,

the work of the trustee in administering the estate would not have been delayed or frustrated as it would have continued its operation of the nursing homes, thereby benefiting both the creditors and the residents, while it continued its search for a purchaser of the business as a going concern. At the same time, the unions would have been able to prepare their application to the OLRB.

72 Indeed, nothing changed in the operation of the business on January 10, 2003 other than the status of EYI, which continued that operation as trustee in bankruptcy rather than as interim receiver. The trustee was of the opinion that the record supported its application, which acknowledged the existence of the collective agreements, for a declaration that it was not a successor employer. The unions relied on the same record. Moreover, had the bankruptcy judge granted the unions' application for leave to bring a s. 69(12) application before the OLRB, the record could only have improved in the time that it would have taken for the application to be heard by the OLRB.

VII

73 For all of the foregoing reasons, it is my view that there was a wrongful exercise of discretion by the bankruptcy judge as a result of his failure to apply the test in *Mancini* and to give sufficient weight to the relevant considerations as argued before us by the appellants. Therefore, this is a proper case for this court to interfere with the bankruptcy judge's exercise of discretion.

74 In the result, I would allow the appeal with costs, set aside the order of the bankruptcy judge and substitute an order granting leave to the appellants pursuant to s. 215 of the *BIA* to bring an application to the OLRB under s. 69(12) of the *LRA*.

Appeal dismissed.

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2003 CarswellOnt 115, 39 C.B.R. (4th) 5, 169 O.A.C. 89, 63 O.R. (3d) 78

Algoma Steel Inc. v. Union Gas Ltd.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 and the Business Corporations Act, R.S.O. 1990, c. B-16

In the Matter of a Proposed Plan of Arrangement With Respect to **Algoma** Steel Inc.

Algoma Steel Inc., Applicant (Respondent in Appeal) and Union Gas Limited, Respondent (Appellant in Appeal)

Ontario Court of **Appeal**

Weiler, Rosenberg, Feldman JJ.A.

Heard: September 10, 2002
Judgment: January 17, 2003
Docket: CA C37904

Proceedings: reversing in part (2001), 30 C.B.R. (4th) 163 (Ont. S.C.J. [Commercial List])

Counsel: *Geoff R. Hall*, for Algoma Steel Inc.

James P. Dube, for Union Gas Ltd.

Subject: Corporate and Commercial; Public; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

On April 23, 2001, debtor obtained initial order under Companies' Creditors Arrangement Act — As of date of order, debtor owed creditor $461,244 under 2000 gas services contract and $1,265,934 under 2000 assignment agreement — 2000 gas services contract was contingent upon 2000 assignment agreement which was attached to it as schedule — At same time debtor was entitled to rebate from creditor of approximately $2.2 million as result of overpayment for gas services in 1999 at which time relationship between parties had been governed by 1998 buy-sell contract — Creditor brought motion for order allowing it to set off amounts owed to it by debtor against rebate — Motion was granted in part — Motions judge held that creditor had not established claim for legal set-off as rebate was not liquidated amount — Motions judge held that creditor had established claim for equitable set-off in relation to amount owing under 2000 gas services contract — Creditor appealed — Appeal allowed in part — Motions judge did not err with respect to legal set-off but did err in limiting scope of equitable set-off — Connection between 2000 gas services contract and 2000 assignment agreement was so close that amounts owing on them could not be severed for purposes of equitable set-off — Close connection also existed between 1998 contract and both of 2000 contracts as they all facilitated supply of gas to debtor — To allow debtor to insist on payment of rebate arising under 1998 contract without allowing creditor to set-off all amounts owing under 2000 arrangement would be manifestly unjust — 2000 arrangement was nothing more than successor arrangement to accomplish what had been done under 1998 contract — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Public utilities --- Operation of utility — Collection of utility charges — General

On April 23, 2001, debtor obtained initial order under Companies' Creditors Arrangement Act — As of date of order, debtor owed creditor $461,244 under 2000 gas services contract and $1,265,934 under 2000 assignment agreement — 2000 gas services contract was contingent upon 2000 assignment agreement which was attached to it as schedule — At same time debtor was entitled to rebate from creditor of approximately $2.2 million as result of overpayment for gas services in 1999 at which time relationship between parties had been governed by 1998 buy-sell contract — Creditor brought motion for order allowing it to set off amounts owed to it by debtor against rebate — Motion was granted in part — Motions judge held that creditor had not established claim for legal set-off as rebate was not liquidated amount — Motions judge held that creditor had established claim for equitable set-off in relation to amount owing under 2000 gas services contract — Creditor appealed — Appeal allowed in part — Motions judge did not err with respect to legal set-off but did err in limiting scope of equitable set-off — Connection between 2000 gas services contract and 2000 assignment agreement was so close that amounts owing on them could not be severed for purposes of equitable set-off — Close connection also existed between 1998 contract and both of 2000 contracts as they all facilitated supply of gas to debtor — To allow debtor to insist on payment of rebate arising under 1998 contract without allowing creditor to set-off all amounts owing under 2000 arrangement would be manifestly unjust — 2000 arrangement was nothing more than successor arrangement to accomplish what had been done under 1998 contract — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Creditors and debtors --- Payment by debtor — Mode of payment — Set-off

On April 23, 2001, debtor obtained initial order under Companies' Creditors Arrangement Act — As of date of order, debtor owed creditor $461,244 under 2000 gas services contract and $1,265,934 under 2000 assignment agreement — 2000 gas services contract was contingent upon 2000 assignment agreement which was attached to it as schedule — At same time debtor was entitled to rebate from creditor of approximately $2.2 million as result of overpayment for gas services in 1999 at which time relationship between parties had been governed by 1998 buy-sell contract — Creditor brought motion for order allowing it to set off amounts owed to it by debtor against rebate — Motion was granted in part — Motions judge held that creditor had not established claim for legal set-off as rebate was not liquidated amount — Motions judge held that creditor had established claim for equitable set-off in relation to amount owing under 2000 gas services contract — Creditor appealed — Appeal allowed in part — Motions judge did not err with respect to legal set-off but did err in limiting scope of equitable set-off — Connection between 2000 gas services contract and 2000 assignment agreement was so close that amounts owing on them could not be severed for purposes of equitable set-off — Close connection also existed between 1998 contract and both of 2000 contracts as they all facilitated supply of gas to debtor — To allow debtor to insist on payment of rebate arising under 1998 contract without allowing creditor to set-off all amounts owing under 2000 arrangement would be manifestly unjust — 2000 arrangement was nothing more than successor arrangement to accomplish what had been done under 1998 contract — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Choses in action --- Equities to which assignments subject — Right of set-off

On April 23, 2001, debtor obtained initial order under Companies' Creditors Arrangement Act — As of date of order, debtor owed creditor $461,244 under 2000 gas services contract and $1,265,934 under 2000 assignment agreement — 2000 gas services contract was contingent upon 2000 assignment agreement which was attached to it as schedule — At same time debtor was entitled to rebate from creditor of approximately $2.2 million as result of overpayment for gas services in 1999 at which time relationship between parties had been governed by 1998 buy-sell contract — Creditor brought motion for order allowing it to set off amounts owed to it by debtor against rebate — Motion was granted in part — Motions judge held that creditor had not established claim for legal set-off as rebate was not liquidated amount — Motions judge held that creditor had established claim for equitable set-off in relation to amount owing under 2000 gas services contract — Creditor appealed — Appeal allowed in part — Motions judge did not err with respect to legal set-off but did err in limiting scope of equitable set-off — Connection between 2000 gas services contract and 2000 assignment agreement was so close that amounts owing on them could not be severed for purposes of equitable set-off — Close connection also existed between 1998 contract and both of 2000 contracts as they all facilitated supply of gas to debtor — To allow debtor to insist on payment of rebate arising under 1998 contract without allowing creditor to set-off all amounts owing under 2000 arrangement would be manifestly unjust — 2000 arrangement was nothing more than successor arrangement to accomplish what had been done under 1998 contract — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Rosenberg J.A.*:

Cam-Net Communications v. Vancouver Telephone Co., 182 D.L.R. (4th) 436, 1999 BCCA 751, 1999 CarswellBC 2808, 71 B.C.L.R. (3d) 226, 132 B.C.A.C. 52, 215 W.A.C. 52, 2 B.L.R. (3d) 118, 17 C.B.R. (4th) 26 (B.C. C.A.) — considered

Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd., 36 R.P.R. 259, 20 D.L.R. (4th) 689, 65 B.C.L.R. 31, [1985] 6 W.W.R. 14, 1985 CarswellBC 214 (B.C. C.A.) — followed

Equity Waste Management of Canada Corp. v. Halton Hills (Town), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — considered

Federal Commerce & Navigation Co. v. Molena Alpha Inc., [1978] Q.B. 927, [1978] 3 All E.R. 1066, [1978] 3 W.L.R. 309, [1978] 2 Lloyd's Rep. 132 (Eng. Q.B.) — followed

Federal Commerce & Navigation Co. v. Molena Alpha Inc. (1978), [1979] A.C. 757, [1979] 1 All E.R. 307, [1979] 1 Lloyd's Rep. 201 (U.K. H.L.) — referred to

Housen v. Nikolaisen, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1 (S.C.C.) — considered

Telford v. Holt, 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, (sub nom. *Holt v. Telford)* [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234, 1987 CarswellAlta 188, 1987 CarswellAlta 583 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 13 — referred to

s. 18.1 [en. 1997, c. 12, s. 125] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 111 — considered

s. 111(1) — referred to

s. 111(2) — referred to

APPEAL by creditor from judgment reported at 2001 CarswellOnt 4518, 30 C.B.R. (4th) 163 (Ont. S.C.J. [Commercial List]), refusing to allow legal set-off and limiting scope of equitable set-off.

***Rosenberg J.A.*:**

1 This appeal from an Order of Farley J. concerns the application of legal and equitable set-off in the context of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. On April 23, 2001, the respondent Algoma Steel Inc. obtained an initial order under the *CCAA*. At that time, Algoma was indebted to the appellant Union Gas Limited under two contracts (the 2000 contracts) for gas services in March and April of 2001 amounting to just under $2 million. At the same time, Algoma was entitled to a rebate from Union of approximately $2.2 million plus interest as a result of an overpayment for gas services in 1999. Union sought to set off amounts owed to it by Algoma against the 1999 rebate. The motions judge held that Union had not established a claim for legal set-off. He held that Union had made out a claim for an equitable set-off but only in relation to one of the contracts in the amount of $461,244. Because of various orders made in the *CCAA* proceedings this means that Union must pay the entire amount of the 1999 rebate less the $461,244 and is not entitled to payment of $1,265,934 owed to it under the 2000 contract. Union submits that the motions judge erred in refusing to allow legal set-off and, in the alternative, erred in limiting the scope of equitable set-off.

2 In my view, the motions judge did not err with respect to legal set-off but did err with respect to equitable set-off. Accordingly, I would allow the appeal with costs.

The Facts

The relationship between Algoma and Union

3 The facts are based entirely upon affidavits filed by two employees of Union. Algoma filed no affidavits and did not cross-examine the Union employees. I begin with a summary of the facts that lead to Algoma's entitlement to the $2.2 million rebate. In 1999, Algoma obtained gas on a buy/sell arrangement under which Algoma bought natural gas from a resource supplier (presumably in Western Canada) and sold the gas to Union. Union arranged for the transportation of the gas on its own account and then sold the gas back to Algoma in Ontario when it was needed. In 1999, the relationship between Union and Algoma was governed by a contract commen-

cing November 1, 1998 and terminating on October 31, 1999. This contract was subject to automatic renewal for successive one-year periods.[FN1]

4 Under the 1998 contract, Algoma was required to pay for the gas services in accordance with Union's rate schedule as approved by the Ontario Energy Board. These rates are based on many factors including projected costs of gas. If those projections are found to be either too high or too low following the end of a calendar year, Algoma may have either overpaid or underpaid Union. To track actual costs with projected costs, Union established deferral accounts for the various classes of customers. Algoma is in a Rate 100 class. As it happened, in 1999, Algoma and the other Rate 100 customers overpaid and were entitled to a rebate. However, Union could not repay its customers without approval from the Board. Union therefore made an application to the Board in which it proposed to pay the rebates to the customers. The total rebate for the Rate 100 class is just under $4 million. According to the affidavit of the Union employee, Algoma's share of the rebate "approximates $2.2 million". Algoma is also entitled to interest on the rebate accruing from January 1, 2000 at a rate set by the Board.

5 In its July 21, 2001 decision, the Board approved Union's proposal. But instead of authorizing immediate payment, the Board directed Union to bring forward the balances in all of the year 2000 deferral accounts for review. In a further decision dated October 16, 2001, the Board directed Union to continue to hold the balances in the deferral accounts until the 2001 and 2002 rates are implemented and 2000 and 2001 deferral balances are disposed of. According to the Union employee's affidavit, this will not affect Algoma's rebate because it is not entitled to share in the 2000 and 2001 deferral accounts. By the time of the hearing before the motions judge, the Board had not yet indicated when Union could pay the rebate to its customers, including Algoma.

6 I will now deal with the contracts that governed the Union/Algoma relationship when the *CCAA* orders were made. In 2000, Algoma changed its relationship with Union so that it no longer had a buy-sell arrangement. In October 2000, the parties entered into two new contracts. These contracts may conveniently be referred to as the 2000 gas services contract and the assignment agreement. Both contracts covered almost the same period; from November 1, 2000 to October 31, 2001 for the 2000 gas services contract and November 1, 2000 to November 1, 2001 for the assignment agreement. As a result of the new arrangement, Algoma no longer sold the gas to Union and repurchased it from Union in Ontario. Rather, Union assigned its right to access gas transportation capacity directly from TransCanada Pipelines Limited ("TCPL") through Union's contract with TCPL. Algoma thus paid TCPL directly. Importantly, however, if Algoma failed to pay TCPL for use of gas transportation capacity being accessed by it, Union was required to pay TCPL. Algoma was then required to indemnify Union.

7 Under the 2000 gas services contract, Union continued to transport the gas from Union's metering station at the TCPL pipeline to the Algoma plant. That contract included this term:

> This agreement is contingent upon the TCPL Assignment Agreement which is attached as Schedule D and forms an integral part of this arrangement. In the event either of these agreements terminate, the other agreement shall also terminate, unless agreed to otherwise by the parties.

8 As of the April 23, 2001 *CCAA* order, Algoma owed Union $461,244 under the 2000 gas services contract. Further, because Algoma failed to pay TCPL for gas transportation services obtained by Algoma under the assignment agreement, Union was obliged to indemnify TCPL in the amount of $1,265,934. It is these two amounts that Union seeks to set off against the 1999 rebate. As indicated, the motions judge only allowed Union to set off the former amount.

The CCAA Proceedings

9 On April 23, 2001, Algoma obtained an initial order under the *CCAA*. As part of that order, the right of any claimant to assert, enforce or exercise any right of set-off or consolidation of accounts was stayed during the stay period. On November 9, 2001, while the stay period was still in force, Algoma obtained an order to authorize meetings of its creditors to consider its Plan of Arrangement, to establish a process for proving claims and for the subsequent barring of those claims in return for participating in the Plan. Under this order, an unsecured creditor that had not filed a proof of claim was deemed to have filed one in the amount as valued by Algoma. The creditor was then barred from making or enforcing any such deemed claim after December 12, 2001. Union did not file a proof of claim since it took the view that there was no net balance due from Algoma to Union once the 1999 rebate was factored in. Algoma denied that Union was entitled to a set-off and deemed Union's claim to be in the amounts of $461,244 and $1,265,934.

10 As a result, on November 27, 2001, Union moved before Farley J. for a declaration that its rights of set-off referable to its dealings with Algoma up to April 23, 2001 were not affected by the *CCAA* proceedings. In this way, it sought to prevent its claims from being deemed to have been the subject of a proof of claim and then deemed to have been barred after December 12, 2001. Union relied upon s. 18.1 of the *CCAA*, which preserves rights of set-off. I will set out that section in full below.

The Reasons of the Motions Judge

11 The motions judge noted that a condition for application of legal set-off is that the obligations must be debts, in the sense that they are liquidated amounts. After reviewing the Board rulings and various letters by Union to Algoma, the motions judge concluded that the 1999 rebate was not a liquidated amount. He noted that in the Union employee's affidavit the rebate "approximates $2.2 million". Further communications between Union and its Rate 100 customers suggested that there might not even be a rebate, depending on the decision of the Board. He therefore held that legal set-off had not been made out.

12 As to equitable set-off, the motions judge held that the 2000 gas services contract was in substance a continuation of the 1998 contract. He concluded that there was a "close connection sufficient to ground equitable set-off as to the gas supply portion of the October 15, 2000 Agreement vis-à-vis any rebate which is authorized by the Board, but not any monies owing by Algoma to Union as a result of the November 1, 2000 Transportation Agreement." He therefore limited the equitable set-off as indicated above.

Analysis

General Principles

13 Algoma does not dispute that the law of set-off applies notwithstanding the *CCAA* proceedings. Section 18.1 of the Act makes this clear:

> The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

14 Algoma does, however, submit that set-off claims should be carefully scrutinized where *CCAA* proceedings are underway because the effect is to give preference to certain creditors. As Rowles J.A. said in *Cam-Net*

Communications v. Vancouver Telephone Co. (1999), 71 B.C.L.R. (3d) 226 (B.C. C.A.), at 235:

> Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the CCAA compromise. A party claiming set-off ... realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the CCAA proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the CCAA reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context.

15 I accept this principle, but I do not see it as a concern in this case. Union operates within a highly regulated regime and the disposition of the rebate is subject to scrutiny by a specialized tribunal. The amounts owing by Algoma to Union are not in doubt.

16 There was some dispute between the parties about the standard of review by this court of the decision of the motions judge. Counsel for Union seemed to suggest that because there is no right of appeal in *CCAA* proceedings and appeals are relatively rare, it was open to this court to review the decision of the motions judge on a standard of correctness even where that decision turned on findings of fact and inferences to be drawn from those facts. In my view, the usual standard of review in appeal proceedings applies and this court is required to give deference to the findings of the motions judge even where, as here, the decision is based on a paper record. The fact that there is no right of appeal and the appeal is only with leave under s. 13 of the Act only reinforces that conclusion. Decisions in the *CCAA* context must often be made quickly. They are, as in this case, usually made by a judge with considerable expertise in the area who has been managing the *CCAA* proceedings and is intimately familiar with the context and the issues at stake.

17 This court and the Supreme Court of Canada have variously described the standard of appellate review. In *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.), at 336, Laskin J.A. wrote as follows:

> Therefore, although the entire record before a trial judge or a motion judge consists of documentary or written evidence, as it does in this case, the judge's factual findings are entitled to deference on appeal. What standard of deference applies in such a case? It is not easy to articulate a standard less deferential than "manifest error" but falling short of "correctness". I suggest that it may simply be a matter of weight or emphasis, or that, plausibly, a uniform standard of appellate review should be applied to a trial judge's findings of fact, whether the evidence is entirely oral, entirely documentary or, more typically, a combination of the two.
>
> What is important for this appeal is the kind of error that justifies intervention by an appellate court. An error of law obviously justifies intervention. An appellate court may interfere with a finding of fact if the trial judge or motion judge disregarded, misapprehended, or failed to appreciate relevant evidence, made a finding not reasonably supported by the evidence, or drew an unreasonable inference from the evidence.

18 More recently the Supreme Court in *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.), discussed at some length the standard of appellate review where the appellate court is called upon to review inferences from facts. The court concluded that the standard is one of considerable deference. Iacobucci and Major JJ. described the standard at para. 23 as follows:

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. *If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is*

> *palpably in error that an appellate court can interfere with the factual conclusion.* The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts [emphasis added].

19 On the other hand, where the issue concerns application of a legal standard to a set of facts the question is one of mixed fact and law and a somewhat less deferential standard may be appropriate, although not the standard of correctness required for questions of law. This was described as follows at para. 28:

> However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, supra, at para. 37:
>
> > ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. *In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact.* See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future [emphasis added].

20 It seems to me that this appeal concerns both inferences from facts and a question of mixed fact and law. The motions judge's decision about the application of legal set-off turned exclusively on the inferences to be drawn from the undisputed facts in the affidavits. His decision that Union had not shown the rebate as a debt was fact specific. Although Union argues that the motions judge overlooked important facts and misapprehended certain facts, I am not persuaded that the motions judge made any palpable or overriding error. To the contrary, I am satisfied that his decision is supported by the evidence.

21 The decision about equitable set-off is somewhat different since it involves application of a legal standard to a set of facts. As such, it is a question of mixed law and fact. While the assessment by the motions judge is entitled to deference, I am nevertheless of the view that the motions judge erred in his application of the test for equitable set-off to these particular facts.

Legal Set-Off

22 Section 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides the statutory framework for legal set-off. Subsections (1) and (2) provide:

> (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

(2) Mutual debts may be set off against each other even if they are of a different nature.

23 The only question on the application of legal set-off in this case was whether the rebate was a debt for the purpose of s. 111. Union accepts that debt means a liquidated sum and argues that the rebate is a liquidated sum because the amount is ascertainable and, save for interest, can neither increase nor decrease. Union submits that the amount is ascertainable and fixed because the Board has accepted its proposal for calculating the amount of the rebate. It also relies on the affidavit evidence that Algoma's share of the rebate for Rate 100 customers will be unaffected by the adjustments for the years 2000 and 2001 deferral accounts.

24 The motions judge, however, was not prepared to draw that inference from the affidavit evidence. He relied upon the fact that Union only provided an estimate of the rebate and his reading of the Board decisions that did not explicitly state that Algoma or any of the other customers would receive a rebate. He also relied upon Union's own communications to its Rate 100 customers that suggested the amount of the rebate was not fixed. In his submissions, counsel for Algoma pointed out a number of facts upon which the decision by the motions judge could rest and that could support the inferences drawn. Counsel pointed out that to overturn the decision of the motions judge, this court would have to be satisfied of the following:

(1) That it was appropriate to sever off the interest part of the rebate, since the rate had not yet been set by the Board.

(2) That no significance should be attached to the use of the term "approximate" in the Union employee's description of the amount of the rebate.

(3) That no significance should be attached to the fact that Union had not provided an exact figure for the amount of the rebate.

(4) That the communications by Union to Algoma and its other customers concerning the uncertainty of the amount of the rebate had no significance.

(5) That there is no significance to the fact that the Board continues to prevent Union from releasing the rebate to Algoma; put another way, that the Board has no good reason for holding up disposition of the rebate.

(6) That the amounts of the rebates cannot change as a result of events in 2002.

25 I am not prepared to say that the motions judge's decision disclosed a palpable and overriding error. Since his decision is supported by the evidence, the evidence supplied by Union itself, this aspect of the appeal must be dismissed.

Equitable Set-Off

26 Equitable set-off is available where there is a claim for a sum whether liquidated or unliquidated. In *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.) at 398-99, Wilson J., speaking for the court, approved a statement of the applicable principles for equitable set-off found in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C. C.A.) at 696-97. Those principles can be summarized as fol- lows:

1. The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.

2. The equitable ground must go to the very root of the plaintiff's claim.

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.

4. The plaintiff's claim and the cross-claim need not arise out of the same contract.

5. Unliquidated claims are on the same footing as liquidated claims.

27 In one way or another the first three principles, but particularly the third, are in issue in this case. Put shortly, is the 1999 rebate from the 1998 gas services contract so clearly connected with the amounts owing under the 2000 assignment agreement that it would be manifestly unjust to enforce payment of the rebate without taking into account the amounts owing under the assignment agreement? The motions judge recognized that the assignment agreement was integral to the 2000 gas services agreement, but he refused equitable set-off for the amounts owing under the assignment agreement because it was not the same type of contract as the supply of gas by Union. In my view, this was not a sufficient reason to refuse equitable set-off given the interrelationship between the two 2000 agreements.

28 Kelly R. Palmer in *The Law of Set-Off in Canada* (1993) traces the evolution of the doctrine of equitable set-off from a very strict test in which the "claim raised in set-off had to impeach the title of the plaintiff's claim" [at p. 89] to a somewhat more flexible approach based upon fairness. The leading cases describing, in some fashion, the more modern test are *Coba Industries*; *Telford* and *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (Eng. Q.B.) [affirmed on other grounds at (1978), [1979] A.C. 757 (U.K. H.L.)].

29 It seems to me that a very helpful test is set out in a passage from the reasons of Lord Denning in *Federal Commerce* at p. 1078 and which was quoted with apparent approval by Wilson J. in *Telford* at p. 400:

> *We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?* ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. *It is only cross-claims that arise out of the same transaction or are closely connected with it.* And it is only cross-claims which go directly to impeach the plaintiff's demands, *that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim* [emphasis added].

30 In my view, there is such a close connection between the 2000 gas services contract and the 2000 assignment agreement, that the amounts owing on them cannot be severed for the purposes of equitable set-off. The assignment agreement is attached as a schedule to the 2000 gas services contract and in the event either of the agreements terminates, the other terminates, unless otherwise agreed to by the parties. The parties agreed in the 2000 gas services contract that it was "contingent upon" the assignment agreement and that the latter formed an integral part of the latter. Accepting the correctness of the motion judge's determination that the 1998 and 2000 gas services contracts exhibit a sufficient degree of connection to justify equitable set-off, it seems to me that it would be manifestly unjust to allow Algoma to insist on payment of the rebate arising under the former without allowing Union to set-off all the amounts owing under the 2000 arrangement.

31 The relationship between the parties under the 2000 contracts is different than the relationship under the

1998 contract but they are in a sense nothing more than a successor arrangement to accomplish what had been done under the 1998 contract. Admittedly, under the 2000 assignment agreement, the underlying relationship was between TCPL and Union. Union only became entitled to collect from Algoma because Algoma failed to pay the charges that TCPL was entitled to collect from Union. Under the agreement, Algoma agreed to indemnify Union in those circumstances. However, there is a close connection between the 1998 contract and both of the 2000 contracts because they all, in one way or another, facilitate the supply of gas to Algoma.

32 A helpful example is *Coba Industries*, which was approved by Wilson J. in *Telford*. Palmer describes the facts of *Coba Industries* at p. 133 of his text:

> Hp entered a sale and leaseback of property with the defendant, in the course of which Hp obtained a second mortgage over the property and granted a lease to the defendant. The lease payments were calculated to be sufficient to cover the mortgage payments. Hp assigned the mortgage to the plaintiff who notified the assignment to the defendant. When Hp fell into arrears on the lease, the defendant ceased making mortgage payments. The plaintiff sued for foreclosure, and was met with a claim for set-off.

33 Macfarlane J.A., writing for the court in *Coba Industries*, found several facts that established the close connection necessary for equitable set-off. He wrote at p. 700:

> I think this evidence demonstrates that, from the outset, it was at the heart of any liability on the part of [the defendant] that [Hp] provide and assure payments under the leases sufficient to satisfy payments from time to time under both mortgages.

34 The 1998 contract and 2000 agreements exhibit this kind of connection. Given that the motions judge found that it would be manifestly unjust not to permit Union to set off the amounts owing on the 2000 gas services contract, I conclude that it would be manifestly unjust to allow Algoma to enforce payment of the 2000 rebate without taking into account its liability to Union under the assignment agreement, which formed an integral part of the arrangement between the parties.

Disposition

35 Accordingly, I would allow the appeal with costs on a partial indemnity basis. In accordance with the written submissions of the parties, costs are fixed at $33,111.29.

Appeal allowed in part.

FN1 Although not stated explicitly in the affidavits, it appears that the contract did renew for a further year.

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1971 CarswellMan 78, [1972] 2 W.W.R. 178, 23 D.L.R. (3d) 301, **16 C.B.R.** (**N.S.**) **158**

Churchill Forest Industries (Man.) Ltd., Re

Re **Churchill Forest** Industries (Manitoba) Limited

Manitoba Court of Queen's Bench (In Bankruptcy)

Nitikman J.

Judgment: December 2, 1971

Counsel: *J. T. Weir, Q.C., A. K. Twaddle, Q.C.* and *B. D. Newton* , for Churchill Forest Industries (Manitoba) Ltd.

J. F. R. Taylor, Q.C., C. R. Huband and *W. S. Wright, Q.C.* , for Receiver (watching brief).

M. J. Arpin, Q.C. , for Metropolitan Investigation & Security (Canada) Ltd.

J. S. Lamont , for Dominion Catering Co. Ltd. and Pile Foundations Ltd.

T. Sturgeon , for Superintendent of Bankruptcy (watching brief).

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Within 6 months prior to petition

Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences

Bankruptcy --- Receiving order — Effect of receiving order

Acts of bankruptcy subsequent to appointment of Receiver.

The appointment of a receiver and manager does not alter the position of a debtor insofar as its liability for debts is concerned, particularly vis-à-vis acts of bankruptcy; it follows that petitioning creditors are entitled to rely on any requests for payment addressed after his appointment, on non-payment by him, on any consents to judgment given by him and on any other acts of the debtor which would normally come within the definition of s. 24 (1)(*j*) of the Bankruptcy Act, R.S.C. 1970, c. B-3, in support of their claims that an act of bankruptcy occurred within six months prior to the filing of the petitions. The appointment of a receiver does not dissolve or annihilate the company: *Moss SS. Co. Ltd. v. Whinney*, [1912] A.C. 254 ; *Re Newdigate Colliery Ltd.; Newdegate v. Newdigate*

Colliery Ltd., [1912] 1 Ch. 468 ; *Re Raitblat*, 28 O.W.N. 237, 5 C.B.R. 714, [1925] 2 D.L.R. 1219 , affirmed 28 O.W.N. 292, 5 C.B.R. 765, [1925] 3 D.L.R. 446 (C.A.) ; *Re Rayner*, 8 M.P.R. 369, 16 C.B.R. 411, [1935] 2 D.L.R. 542 (P.E.I.) applied.

***Nitikman J.* :**

1 On 14th September 1971 two bankruptcy petitions were filed in this Court against Churchill Forest Industries (Manitoba) Limited (hereafter referred to as "CFI" or "debtor") asking it be adjudged a bankrupt and that a receiving order be made in respect of its estate on the ground that the debtor, within six months next preceding the filing of the said petitions, committed the following act of bankruptcy, namely, that it had ceased to meet its liabilities generally as they became due.

2 One petition — by Metropolitan Investigation & Security (Canada) Limited ("Metropolitan") alleges an indebtedness to it by the debtor of $26,218.21. The other is by Pile Foundations Ltd. ("Pile") and Dominion Catering Company Limited ("Dominion"). Pile and Dominion allege indebtedness to them by the debtor of $10,532.12 and $241,547.55 respectively.

3 CFI opposes being adjudged bankrupt and the making of a receiving order against it as requested in the two petitions and alleges, inter alia:

1. That it did not cease to meet its liabilities generally as they became due within the six months next preceding the filing of the petitions.

2. That during the aforesaid period of six months its assets have been in the custody and control of the interim Receiver and Manager appointed by the Court of Queen's Bench of Manitoba with the duty to preserve the same for the benefit of the plaintiffs in the action.

3. That CFI has no immediately available property but has a claim to have the action brought in the Court of Queen's Bench of Manitoba, in which the interim Receiver and Manager above mentioned was appointed, dismissed, a claim to have the debenture given by it to the Montreal Trust Company reinstated, and a claim for damages for the mismanagement of its undertaking by the interim Receiver and Manager.

4. That CFI is not insolvent.

5. That if CFI is successful in its action against the Montreal Trust Company and the Manitoba Development Corporation, then CFI will be in a position to operate to the benefit of creditors, shareholders and CFI alike.

6. That the granting of a receiving order would be oppressive and in the discretion of the Court should be refused.

4 The order appointing the interim Receiver and Manager referred to in CFI's notice of dispute was made by Tritschler C.J.Q.B. on 7th January 1971, upon motion by Montreal Trust Company and Manitoba Development Corporation in a proceeding in the Court of Queen's Bench, wherein Montreal Trust Company and Manitoba Development Corporation were plaintiffs and CFI was defendant.

5 This order, as amended on 28th April 1971, provides, in part, as follows:

> 1. This Court doth order that Leifur Hallgrimson be and is hereby appointed until the trial or other final disposition of this action as Receiver and Manager of all the undertaking, property and assets of the Defendant, wheresoever situate, and that are subject to the security or charges created by a certain Indenture made as of the 27th day of February, 1969, between the Defendant and the Montreal Trust Company for the purpose of preserving and protecting the same and to carry on and manage the said undertaking ...
>
> 3. AND THIS COURT DOTH FURTHER ORDER that the Defendant do forthwith deliver over to the said LEIFUR HALLGRIMSON, as Receiver and Manager as aforesaid, all the undertaking, property and assets of every kind and wheresoever situate comprised in and subject to the security or charge created by the said Indenture (subject only to the rights of the bankers of the Defendant that may have arisen prior to the making of this Order under Section 88 of The Bank Act or other security pursuant to the terms of the said Indenture) and all books, documents, papers and records of every kind relating thereto.
>
> 4. AND THIS COURT DOTH FURTHER ORDER AND DECLARE that the Receiver and Manager be and he is hereby fully authorized and empowered to institute and prosecute all suits, proceedings and actions at law as may in his judgment be necessary for the proper protection of the said undertaking, property and assets of the Defendant, and likewise to defend all suits and proceedings instituted against him as such Receiver and Manager and to appear in and conduct the prosecution or defence of any such proceedings and actions now pending in any court for the benefit of or against the Defendant, the prosecution or defence of which will, in the judgment of the said Receiver and Manager, be necessary for the proper protection of the said property, assets, business and undertaking of the Defendant, and the authority hereby conferred shall extend to such appeals as the said Receiver and Manager shall deem proper and advisable in respect of any Order or judgment produced in such suit or actions; PROVIDED ALWAYS that no suit, proceedings or action shall be instituted against the Defendant or the said Receiver or Manager, in his capacity as aforesaid unless the leave of this Honourable Court shall first have been had and obtained.
>
> 5. THIS COURT DOTH FURTHER ORDER that no proceedings, actions or suits, respecting or in any way pertaining to or affecting the lands in which the Plaintiffs have any interest by virtue of said Indenture, shall howsoever be taken or instituted, unless the leave of this Honourable Court shall first have been had and obtained.

6 On 14th September 1971, by separate orders, Tritschler C.J.Q.B. gave leave to Metropolitan and Dominion and Pile to institute bankruptcy proceedings against CFI.

7 By my order dated 27th September 1971 the two petitions were consolidated and were subsequently heard together.

8 Under s. 24(1)(*j*) of the Bankruptcy Act, R.S.C. 1970, c. B-3, a debtor commits an act of bankruptcy if he ceases to meet his liabilities generally as they become due, and s. 25(1) (*a*) and (*b*) provides:

> (1) Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,
>
> > (*a*) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars, and
> >
> > (*b*) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

9 It is not in dispute that the petitions were filed in the court having jurisdiction in the locality of the debtor and that all necessary services of the petition were properly made.

10 At the hearing counsel for CFI acknowledged that it was indebted to Metropolitan in the amount claimed, namely, $26,218.21, and to Dominion in a very substantial amount.

11 I deal now with the allegation that the debtor had ceased to meet its liabilities generally as they became due and relate myself first to the period up to 7th January 1971, the date of the receiving order made by Tritschler C.J.Q.B.

12 The evidence is overwhelming that as of that date the debtor had, indeed, ceased to meet its liabilities generally as they became due.

13 A statement of lien claimants against CFI as a primary debtor and a statement of other creditors against the debtor, prepared by Price Waterhouse & Co., chartered accountants, was filed as Ex. 76. According to Price Waterhouse & Co., this exhibit was prepared on the following basis:

1. Amounts are shown as claimed by the respective creditors and do not necessarily represent validated

2. In instances where settlement has been agreed between the parties the amount is included at what we are informed has been agreed.

3. Amounts are included which represent expenses and the costs of acquisition of spare parts, however the great majority is to the account of fixed assets.

4. Lien claims have been allocated among the companies generally on the basis of primary debtor as determined from review of particulars of claim by counsel for C.F.I.

14 A. Kerr Twaddle, Esq., Q.C., counsel for the debtor, in conjunction with J. Keith Knox, Esq., a member of the lien claimants' committee, prepared a list of lien claimants (Ex. 74) with the exception of three or four claimants added later. This list shows the lien claimants, counsel, the contract number, the primary debtor, owner of the land against which the lien was filed, the lien number, the amount claimed in each lien, the date on which the lien was filed, and the amount finally claimed in the particulars of each case.

15 Exhibit 76 lists 202 unsecured creditors, claiming from the debtor a total of $926,082.06. This amount, all owing and unpaid, is not disputed by the debtor and is shown as a current liability on the interim balance sheet filed by the debtor as Ex. 100. I shall make further reference to this exhibit later.

16 Additionally, Ex. 76 lists 13 unsecured creditors claiming a total of $98,671.21 against CFI common service account, that is, claims which involve CFI and other owners and participants in the project at The Pas.

17 Exhibit 76 shows 29 lien claimants with claims totalling $3,725,692.27. In Ex. 74 the amount claimed in the liens is shown as $3,976,038.32. The debtor's evaluation of these lien claims is $2,280,616.63 (Ex. 97). At this point it is not necessary for me to decide which of the amounts is correct. Suffice to say that as of 7th January 1971 the amount owing and unpaid under these liens was substantial, and again referring to Ex. 100, I point out that it is there shown as a current liability in the sum of $2,280,616.

18 The above lien claims do not include lien claims against CFI common service account. Exhibit 76 shows these claims at $1,912,783.59. The debtor's evaluation of them is $1,036,162.67 (Ex. 97).

19 While several liens were filed in the latter part of November 1969, the great majority were filed in the months com mencing with February 1970 and continuing up to and including December of the same year. Others were filed as late as 26th February 1971.

20 Claims for payment by lien claimants and other creditors continued to be made without success and at least two creditors, Beamer & Lathrop Limited and H. D. Booth & Associates Ltd., were forced into bankruptcy.

21 The account of Pile was incurred in September 1970. W. C. Harris, its president and director, testified that he made numerous requests for payment by letter and telephone. He received promises of payment but none was made.

22 Robert Arthur Pollard, an officer of Dominion and its district manager for Manitoba and Saskatchewan, testified that as of September 1970 there was due Dominion from the debtor approximately $250,000, including about $12,000 in respect of food and lodging supplied the debtor's own men on site. Pollard made numerous telephone calls to Derek Betts, comptroller of the debtor, and to one B. Chobotar, a chartered accountant with the debtor. As in the case of Pile promises of payment were made but not kept. In September 1970 Pollard flew to The Pas in an effort to effect settlement. On requesting payment he was told the debtor was not getting advances from certain parties who were financing the company and, therefore, could not make payment to Dominion. Pollard made further trips to The Pas in October and demanded, without success, payment of Dominion's account, which then exceeded $200,000. About 5th January 1971 he again flew to The Pas. Dominion's account was then approximately $235,000 and after efforts to collect extending over 1 $^1/_2$ days he finally obtained a cheque for just under $22,000, post-dated to the following day. The reason given for the post-dating was that the debtor was awaiting a transfer of funds to cover. This cheque was not honoured as the bank account was frozen pursuant to the receiving order granted on 7th January 1971.

23 Lloyd Wendell Hale, president of the debtor, was questioned about indebtedness owing by it prior to 7th January 1971. He attributed the delays in payment and the non-payment to disputed invoices, disputes on progress reports, extras and slowness in processing invoices. As I listened to his testimony and reasons advanced by him for non-payment I was minded of the adage, "The poorer the payer, the better the excuse". A review of his evidence confirms my respect for that old saying.

24 When confronted with admitted unpaid accounts Hale's evidence became more revealing. An indebtedness to Metropolitan covered by invoices of 15th and 30th November, 12th, 15th and 31st December, all in 1971, and a further invoice of 1st January 1971, is not disputed by the debtor but remains unpaid.

25 Questioned on this indebtedness Hale gave the following answers:

> Q. ... Why, if the account is not disputed and you were solvent at the time and you were able to meet your obligations as they became due, why were these invoices left unpaid? A. I don't know.
>
> Q. Is that the best you can do? A. That is the best I can do. I don't know.

26 Further questioning of Hale as to why the Metropolitan claim — undisputed and due before the date of the receiving order — was not paid, brought out the answer: "I have no excuse. I guess we were slow payers."

27 I conclude accordingly that the debtor had ceased to meet its liabilities generally as they became due prior to 7th January 1971, and consider next what occurred subsequent to that date and up to the filing of the petitions herein.

28 It is agreed that neither the debtor nor anyone on its behalf made any payments to the creditors in respect of these liabilities save a payment for insurance premiums approved by Hallgrimson. I should here point out that while Hallgrimson was appointed interim Receiver and Manager I shall, for convenience, refer to him simply as "Receiver".

29 The debtor contended that the appointment of the Receiver effectively blocked any payments to creditors except on his authority and, accordingly, no act of bankruptcy could be committed by the debtor after 7th January 1971. It further contended that, assuming but not admitting that the debtor had committed an act of bankruptcy prior to 7th January 1971, any effective bankruptcy petition would require to have been filed within six months of that date and, as the petitions were not filed until 14th September 1971, they must be dismissed.

30 I do not accept the contention that, because of the receiving order of 7th January 1971, the debtor could not commit an act of bankruptcy after that date.

31 The true nature and effect of the receiving order was simply the appointment of an interim Receiver and Manager. What, then, is his position and what are his duties and responsibilities? How is the status of CFI affected by them? In *Parsons et al. v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 , Viscount Haldane L.C. put it this way at p. 167:

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; the duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs.

32 In *Re Newdigate Colliery Ltd.; Newdegate v. Newdigate Colliery Ltd.*, [1912] 1 Ch. 468 , a receiver and manager of the property and undertaking of the company had been appointed in a debenture holders' action against it. At p. 472 Cozens-Hardy M.R. said:

> ... it is just as much the duty and the business of the receiver and manager to protect the goodwill and to guard against the destruction of the business or injury to the goodwill, as it is the duty of the receiver of mortgaged property, not being manager also, to take care that the property is preserved so far as it reasonably may be for the benefit of all whom it may concern — the mortgages and the mortgagor,

and at p. 477 Buckley L.J. said:

> The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business.

33 It is clear, and I agree with counsel for the petitioners, that the appointment of the Receiver did not freeze the obligations of the debtor nor did it create a new entity for the purpose of receiving or dealing with

claims against the debtor. All that happened was the substitution of Hallgrimson in management for Hale, with this difference, that while Hale could be removed from his position by majority action of the board of directors, Hallgrimson could be removed only by order of the court appointing him.

34 It was and continues to be the Receiver's duty and responsibility to properly manage and oversee, either personally or by direction, the operations of the company under his management and, as was said in *Newdigate* , supra, "to guard against the destruction of the business or injury to the goodwill". His appointment "does not dissolve or annihilate the company": *Moss SS. Co. Ltd. v. Whinney*, [1912] A.C. 254 at 263 .

35 It is not for the Court to speculate why the manager made no payments on account of liabilities falling due prior to his appointment and, while it is a reasonable inference that it was because of insufficient available current or liquid assets, it really is of no consequence, insofar as the bankruptcy petitions are concerned, why the payments were not made. The issue is the ceasing to meet liabilities generally as they became due, not the reasons therefor. Assuming, for example, that the Receiver, after a careful canvass of the company's position, became convinced that it was expedient that all available funds be paid to debenture holders, and other creditors should, in the mean time, receive nothing, with the result that these creditors, despite continued demands by them, received no payments over an extended period, that, surely, would be an act of bankruptcy as contemplated by the Act.

36 I hold, therefore, that the position of the debtor insofar as its liability for debts is concerned, particularly vis-à-vis acts of bankruptcy, was not altered merely by reason of the appointment of the Receiver on 7th January 1971. It naturally follows that the petitioners are entitled to rely on any requests for payment addressed to the Receiver after his appointment, on non-payment by him, on any consents to judgment given by or on his behalf, and on any other acts of CFI which would normally come within the definition of s. 24(1) (*j*) of the Act, in support of their claims that an act of bankruptcy occurred within six months prior to the filing of the petitions.

37 I have already pointed out that no payments save the insurance premiums were made in respect of the liabilities which fell due prior to 7th January 1971, but the matter does not end there. The six-month period prior to the presentation of the petition on 14th September 1971 commenced on 15th March 1971, and the act of bankruptcy must have been committed between those dates to meet the requirements of s. 25(1)(*b*).

38 The evidence is that during this period between 15th March and 14th September numerous demands for payment were made by and on behalf of CFI creditors. To mention but a few: on 29th March 1971 Arpin & Company, barristers, acting on behalf of Metropolitan, wrote the Receiver demanding payment of $26,399.26 owing to Metropolitan by the debtor as of 7th January 1971, and threatened that if payment were not made within one week application would be made to the court for leave to bring appropriate action.

39 On 6th April the Receiver wrote Arpin & Company in reply and stated, in part:

> With respect to amounts owing to your client at the date of the receivership, I wish to advise that I am not in a position to make any commitments as to payment of such claims. You are, of course, free to take whatever action you may deem advisable in the interests of your client.

40 On 18th June 1971 Arpin & Company wrote Richardson & Company, solicitors for the Receiver, relative to further negotiations for a new contract between Metropolitan and the debtor in receivership and stated at the end of their letter:

> Somehow it does not seem right to be entering into a formal agreement with a party against whom one is about to petition in bankruptcy.

41 A further demand for payment by Arpin & Company was addressed to the Receiver on 13th September 1971.

42 Under date of 24th August 1971 Smith & Kirby, solicitors for Pile, wrote the Receiver with regard to their client's claim and under date of 10th September 1971 the Receiver replied, stating:

> With reference to your letter dated August 24th, 1971, I wish to advise there have been no new developments in connection with creditors' claims since my letter to you dated February 25th, 1971. I am not in a position to make any commitment with respect to the payment of accounts incurred prior to the receivership, namely January 7th, 1971. When there is any change in this position, I will advise you.

43 In addition, a considerable number of statements of claim were issued by lien claimants during said period. In some cases the Court has given judgment for varying amounts in favour of claimants, in some the debtor has consented to judgment, some claims are still in the negotiating stages, and trial dates have been set for oth- ers.

44 Two cases in which consents to judgment were given were in respect of the claims of Pioneer Electric Manitoba Limited and V. K. Mason Construction Ltd. In the Pioneer claim the debtor consented to judgment against it for $54,000 and a further $46,000 against CFI common services. This consent, dated 17th September 1971, was executed on behalf of the debtor by its solicitor. In the claim of V. K. Mason Construction Ltd. the debtor consented to judgment against it in the amount of $90,000. This consent is dated 9th August 1971 and was also executed on behalf of the debtor by its solicitor.

45 Evidence was also led on behalf of the petitioners that certain indebtedness fell due in part within the six-month period in question, two of these being claims by Taylor Instrument Companies of Canada Limited and Combustion Engineering Superheater Ltd.

46 Taylor's claim is for installation of instruments. Its contract provided that the final payment of five per cent of the invoice value, $86,423.40, was to be retained 12 months after completion of installation or 15th August 1971, whichever is sooner. 15th August is admittedly the earlier date. Five per cent, which amounts to $4,321.17, became due at that time but remains unpaid.

47 The Combustion Engineering claim relates to a purchase order in the sum of $2,221,740 for supply and erection of a recovery boiler. Under its terms a final payment of five per cent fell due 90 days after successful continuous operation start-up, but not later than 12 months after a payment due on completion of acceptance tests. It appears from the evidence that the final payment fell due on or about 15th May 1971. This amount, $111,087, remains unpaid.

48 In summary, then, there were in the six-month period immediately prior to the filing of the bankruptcy petitions repeated demands by lien claimants and other creditors for payment of the debts due them. Statements of claim were issued. In some cases, judgments were recovered, and there were at least two cases of indebtedness which, in part, became due after 15th March 1971, and are still unpaid.

49 It is of no moment that practically all the debts were incurred before 7th January 1971 and more than six

months prior to the presentation of the petition. The further and continuous demands by the creditors for payment of these debts within the six months and the failure of the debtor to make payment as demanded, the statements of claim issued and judgments recovered — whether by consent or otherwise — constitute an available act of bankruptcy under s. 25(1)(*b*).

50 In *Re Raitblat*, 28 O.W.N. 237, 5 C.B.R. 714, [1925] 2 D.L.R. 1219 , affirmed 28 O.W.N. 292, 5 C.B.R. 765, [1925] 3 D.L.R. 446 (C.A.) , the petitioner was a single creditor and the amount owing him was $3,800. The debtor consistently defaulted in his payments but these defaults were all more than six months prior to the date of the presentation of the petition. The creditor, during the six-month period, made numerous demands for payment and the debtor admitted his liability. In finding there was an available act of bankruptcy and that the petitioner was entitled to a receiving order, Fisher J. said at p. 717:

> In the present case there were demands within six months and numerous admissions by the debtor that he was unable to meet his liabilities, so that in this case it must be held that there were continuing freshly occurring defaults within the six months.

51 The same principle was stated in *Re Rayner*, 8 M.P.R. 369, 16 C.B.R. 411, [1935] 2 D.L.R. 542 . There it was contended that no specific act of bankruptcy was shown to have occurred within six months immediately preceding the presentation of the petition. Dealing with that contention Mathieson C.J. of the Supreme Court of Prince Edward Island, who heard the petition, said at p. 414:

> The object of that limitation clearly is to prevent the filing of a petition for a stale default or isolated act of bankruptcy. It cannot, without disregarding the fundamental purpose of the Act, be held to apply to such a case as the present where a state of bankruptcy is shown to have continued without interruption from a time long prior to and down to the time of presentation of the petition and to be still subsisting; in other words a chronic state of bankruptcy existing for a period more than six months anterior to and down to the time of the presentation of the petition herein.

52 After pointing out that the claim was founded on a judgment in the Supreme Court of that province for $5,000 damages and costs for personal injuries sustained in a motor car accident, followed by appeals by the debtor to the Court of Appeal and the Supreme Court of Canada, all of which were dismissed with costs, and reviewing the evidence of the efforts made by the petitioner to obtain payment, the Chief Justice continued, on the same page:

> In my opinion the evidence shows the equivalent of a continuous demand for payment by the petitioner and a continuous refusal on the part of the debtor to pay the judgment debt and costs of suit owed by the debtor to the petitioner,

and on p. 415:

> From the evidence adduced on the part of the petitioner and in particular from the testimony of the debtor himself I find that within six months before the presentation of the petition herein the said Benjamin I. Rayner had ceased to meet his liabilities as they became due.

53 The receiving order was made.

54 The reasoning in *Rayner* applies with equal force to the facts in the within case. Here, too, we have neither a stale default nor an isolated act of bankruptcy and here, too, just as in *Rayner* , the evidence is clear that for a long time prior and up to the time of the filing of the petitions, the debtor had ceased to meet his liabilities generally as they became due, and, to quote *Raitblat* , there were "continuing freshly occurring defaults within the six months".

55 I find, accordingly, that within six months before the presentation of the petitions herein the debtor had ceased to meet his liabilities generally as they fell due.

56 It remains for me to consider s. 25(7) of the Act which provides, in part:

> Where the court ... 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.

57 With regard to the debtor's ability to pay, the onus is on it to satisfy the Court that such is the case. This it has completely failed to do. The preponderance of credible evidence is all to the contrary and establishes beyond doubt that the debtor is insolvent.

58 An interim balance sheet (Ex. 75), showing the debtor's assets and liabilities as of 8th January 1971, was prepared by Touche, Ross & Co., chartered accountants, under the direction of Frederick Geoffrey Patrick, a chartered accountant for 30 years and associated with that firm for 14 years, and now one of its partners. Patrick has acted as assistant to the Receiver since 8th January 1971 and has had access to the financial books and records of the debtor to the extent that they were available.

59 Exhibit 75 shows current liabilities of $8,850,464 as against current assets of $5,661,757.

60 In considering the balance sheet I have not overlooked an amount of approximately $200,000 re federal sales tax rebates which should be added to the current assets, nor have I overlooked the other conditions set out in cls. 1, 2 and 3 on p. 2 of Ex. 75. Dealing only with the application for grant under the A.D.I. Act referred to in cl. 1, it suffices to say that this item is of such contingent character that it cannot, in my opinion, be considered a current asset; whether it will ever become an available asset I am not in this proceeding required to decide.

61 Patrick was, on examination, referred to the debtor's current asset and liability position, as of 8th January 1971, as set out in Ex. 75. Asked if its current position had improved, he answered "No". He was also asked:

> Q. Between the period January 8, 1971 and September 14, 1971, you already told us C.F.I. was able to carry on business at The Pas. Has it been carrying on business profitably? What I have in mind, has it generated such net income that its position or its ability to pay accounts outstanding as at January the 8th been improved in any way? A. The companies were not in operation when they were placed under receivership as at January 8th and it was part of the duties of the Receiver to complete the construction and to get the companies into an opening position. You will appreciate in the case of pulp and paper mill this is no simple matter and a considerable period of time is required in what is generally referred to as the start-up period when engineering refinements and production problems are being ironed out and production balanced to reach optimum levels. The costs or the loss incurred in the operation during this period is generally referred to as

start-up cost. The results of the operation including the start-up costs to date show a loss on operations.

62 I attach little value to the balance sheet prepared by Stanley John Haughey, a chartered accountant with the firm of Clarkson, Gordon & Co. and filed as Ex. 100. The possible grant under the A.D.I. Act, to which I have already referred, is in this exhibit listed as a current asset in the amount of $3,450,000. Without repeating my earlier reasons, I simply say that the inclusion of this item as a current asset is clearly incorrect. Also included in the current assets under accounts receivable is cash, "common services" $1,865,167, and an account receivable from shareholders in the sum of $764,352. Neither of these items are so shown on Ex. 75 and, in my opinion, are of questionable validity, if indeed they have any validity at all, and should certainly not be included in current assets. The current liabilities are shown in Ex. 100 in lesser amounts than in Ex. 75. Save for the $200,000 federal sales tax rebate I have no hesitation in saying that where there is a conflict I accept the figures in Ex. 75 in preference to those in Ex. 100.

63 I come now to the final point — and this was strongly urged by counsel for the debtor — that in any event I should exercise my discretion under s. 25(7) and dismiss the petition.

64 The exercise of that discretion must be for "other sufficient cause" and, as is basic to every exercise of discretion by the court, must be founded on sound judicial reasoning arrived at from the credible evidence adduced, and "must be exercised judicially according to common sense and justice, and in a manner which does not occasion a miscarriage of justice": McFarlane J.A. in *Approving Officer of Corpn. of District of Burnaby v. Mutual Development Corpn. Ltd.*, [1971] 5 W.W.R. 97 at 100, 20 D.L.R. (3d) 505 (B.C. C.A.) , quoting *Murdoch v. Attorney General for British Columbia*, 54 B.C.R. 496 at 501, [1940] 1 W.W.R. 267, 73 C.C.C. 222, [1940] 2 D.L.R. 74 (C.A.) .

65 Having carefully reviewed the pertinent credible evidence and given due weight to all relevant considerations, I am satisfied that no cause exists to justify that I exercise the discretion requested and dismiss the petition, and I refuse to do so.

66 I am of the firm opinion that it is not only expedient but necessary that the receiving order be made.

67 There will be a receiving order in the usual terms. Sydney John Down, chartered accountant associated with the firm of Thorne, Gunn, Helliwell and Christenson, will be appointed trustee.

68 Counsel may speak to me with reference to the costs of the petitioners.

END OF DOCUMENT

2005 CarswellOnt 3445, **12 C.B.R.** (**5th) 213**, [2005] W.D.F.L. 3789, 47 C.C.P.B. 62

Ivaco Inc., Re

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 OR PLANS OF COMPROMISE OR ARRANGEMENT OF **IVACO** INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: June 13-15, 2005
Judgment: July 18, 2005
Docket: 03-CL-5145

Counsel: Andrew J. Hatnay (Ontario Agent) for Quebec Pension Committee of Ivaco Inc.

Fred Mayers, Susan Rowland for Superintendent of Financial Services

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

Jeffrey S. Leon, Sheryl E. Seigel, Richard B. Swan for National Bank of Canada

Daniel V. MacDonald for Bank of Nova Scotia

Robert W. Staley, Kevin J. Zych, Evangelia Kriaris for Informal Committee of Noteholders

Stephanie Fraser for Pension Benefit Guaranty Company

Peter F.C. Howard, Ashley John Taylor for Ernst & Young Inc., the Court-Appointed Monitor

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial

Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles

Pension funds — I Inc. had established various registered pension plans for their employees — I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. — Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which subjected assets to deemed trust in favour of pension beneficiaries — Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease — Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans — Motion dismissed — After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

I Inc. had established various registered pension plans for their employees — I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. — Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which subjected assets to deemed trust in favour of pension beneficiaries — Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease — Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans — Motion dismissed — After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

Cases considered by *Farley J.*:

ABN Amro Bank N.V. v. BCE Inc. (2003), 44 C.B.R. (4th) 1, 2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List]) — considered

AEVO Co. v. D & A Macleod Co. (1991), 7 C.B.R. (3d) 33, 4 O.R. (3d) 368, 1991 CarswellOnt 206 (Ont. Bktcy.) — referred to

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.) — referred to

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)*) 216 A.R. 328, (sub nom. *Bossano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)*) 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199 (Alta. C.A.) — referred to

Beverley Bedding Corp., Re (1982), 40 C.B.R. (N.S.) 95, 1982 CarswellOnt 147 (Ont. Bktcy.) — referred to

Black Brothers (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163, 1982 CarswellBC 480 (B.C. S.C.) — referred to

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

British Columbia v. National Bank of Canada (1994), 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 52 B.C.A.C. 180, 86 W.A.C. 180, 1994 CarswellBC 639, 2 G.T.C. 7348 (B.C. C.A.) — referred to

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

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

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

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

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) — referred to

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) — considered

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

I.B.L. Industries Ltd., Re (1991), 76 D.L.R. (4th) 439, 2 O.R. (3d) 140, 4 C.B.R. (3d) 301, 1991 CarswellOnt 180 (Ont. Bktcy.) — referred to

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) — referred to

New Brunswick v. Peat Marwick Thorne Inc. (1995), 37 C.B.R. (3d) 268, 170 N.B.R. (2d) 373, 435 A.P.R. 373, 1995 CarswellNB 114 (N.B. C.A.) — referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — distinguished

Unisource Canada Inc. v. Hongkong Bank of Canada (1998), 1998 CarswellOnt 5122, 43 B.L.R. (2d) 226, 14 P.P.S.A.C. (2d) 112 (Ont. Gen. Div.) — referred to

Unisource Canada Inc. v. Hongkong Bank of Canada (2000), 2000 CarswellOnt 893, 15 P.P.S.A.C. (2d) 95, 131 O.A.C. 24 (Ont. C.A.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

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

Generally — considered

s. 2(1) — considered

s. 42 — referred to

s. 43(7) — considered

s. 136(1) — considered

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

Generally — considered

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

Generally — referred to

s. 57(3) — considered

s. 57(4) — referred to

s. 57(5) — considered

Régimes complémentaires de retraite, Loi sur les, L.R.Q. 1989, c. 38

Generally — referred to

s. 11 — referred to

MOTION by superintendent of financial services for order directing that portion of sale of insolvent business be distributed to its pension plans.

***Farley J.*:**

1 As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the interests of a vulnerable group of persons — the pension beneficiaries.
>
> Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.

87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order

(a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;

. . .

(b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;

(c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

2 The Superintendent's factum also stated at para. 2:

2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent — and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

3 The November 28, 2003 order provided:

Pension Payments

3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.

4. THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

5. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated Order.

6. Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

4 The overstatement would appear to me to be that other stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

5 Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

6 While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

7 The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans (but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

8 It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assump-

tions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14 $^{1}/_{2}$ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

9 The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

10 The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT — Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108 (Ont. C.A.); *Christian Brothers of Ireland in Canada, Re* (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]). See also *Unisource Canada Inc. v. Hongkong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Ont. Bktcy.).

11 While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia v. National Bank of Canada* (1994), 119 D.L.R. (4th) 669 (B.C. C.A.); *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *I.B.L. Industries Ltd., Re* (1991), 2 O.R. (3d) 140 (Ont. Bktcy.); *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

12 An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick v. Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B. C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

13 The Superintendent relies on my earlier decision of *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition

outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition ... it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith — and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Black Brothers (1978) Ltd., Re* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.); *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 73 C.B.R. (N.S.) 273 (B.C. C.A.); *Beverley Bedding Corp., Re* (1982), 40 C.B.R. (N.S.) 95 (Ont. Bktcy.); *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this — see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, *only* relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

14 Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is this type of situation of the nature envisaged at para. 12 of *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to pre-

> serve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

15 The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

16 Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

17 Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *I.B.L. Industries Ltd., Re* at pp. 143-4.

18 In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

19 However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

20 While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper — but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be

appropriate to determine with finality the priorities of various claims on the record before me at this time.

21 With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

22 In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

23 This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction — and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.) where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:
>
>> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.
>
> Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case,

> most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

24 The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank N.V. v. BCE Inc.* [2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List])] (April 30, 2003) a decision of mine at para. 26. This motion is dismissed.

25 Orders accordingly.

Motion dismissed.

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2009 CarswellOnt 374, 50 C.B.R. (5th) 58, [2009] G.S.T.C. 12, 176 A.C.W.S. (3d) 31

Bank of Nova Scotia v. **Huronia** Precision Plastics Inc.

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

Ontario Superior Court of Justice [Commercial List]

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

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.

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:

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 be-

half 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 pur- pose.

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.

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2009 CarswellOnt 7383, 2009 ONCA 833, 77 C.C.P.B. 161, **59 C.B.R.** (**5th**) **23**, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 99 O.R. (3d) 708, 184 A.C.W.S. (3d) 300

Nortel Networks Corp., Re

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 **Nortel** Networks Corporation, **Nortel** Networks Limited, **Nortel** Networks Global Corporation, **Nortel** Networks International Corporation and **Nortel** Networks Technology Corporation

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of **Nortel** Networks Corporation, **Nortel** Networks Limited, **Nortel** Networks Global Corporation, **Nortel** Networks International Corporation and **Nortel** Networks Technology Corporation (Appellants) and **Nortel** Networks Corporation, **Nortel** Networks Limited, **Nortel** Networks Global Corporation, **Nortel** Networks International Corporation and **Nortel** Networks Technology Corporation, the Board of Directors of **Nortel** Networks Corporation and **Nortel** Networks Limited, the Informal **Nortel** Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of **Nortel** Networks Corporation, **Nortel** Networks Limited, **Nortel** Networks Global Corporation, **Nortel** Networks International Corporation and **Nortel** Networks Technology Corporation (Appellants) and **Nortel** Networks Corporation, **Nortel** Networks Limited, **Nortel** Networks Global Corporation, **Nortel** Networks International Corporation and **Nortel** Networks Technology Corporation, the Board of Directors of **Nortel** Networks Corporation and **Nortel** Networks Limited, the Informal **Nortel** Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

Ontario Court of Appeal

S.T. Goudge, K.N. Feldman, R.A. Blair JJ.A.

Heard: October 1, 2009
Judgment: November 26, 2009[FN*]
Docket: CA C50986, C50988

Proceedings: affirming *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List])

Counsel: Mark Zigler, Andrew Hatnay, Andrea McKinnon for Appellants, Nortel Networks Former Employees

Barry E. Wadsworth for Appellant, CAW-Canada

Suzanne Wood, Alan Mersky for Respondents, Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation

Lyndon A.J. Barnes, Adam Hirsh for Respondents, Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Benjamin Zarnett for Monitor, Ernst & Young Inc.

Gavin H. Finlayson for Informal Nortel Noteholder Group

Thomas McRae for Nortel Canadian Continuing Employees

Massimo Starnino for Superintendent of Financial Services

Alex MacFarlane, Jane Dietrich for Official Committee of Unsecured Creditors

Subject: Insolvency; Constitutional; Employment; Public; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — Stay provisions are important part of restructuring process under Act — Periodic payments were not for services rendered, and were not excluded by s. 11.3(a) of Act — Fact that rights to payment were vested and could be enforced under earlier collective agreements indicated they were not for current services — Fact that at time of hearing business was likely to be sold rather than restructured did not affect order.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — Statutes governing labour and employment — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found key factor was not payment obligation arose but rather when services performed — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — CCAA overrides provincial Employment Standards Act which requires immediate payment of termination and severance obligations — Paramountcy doctrine dictated that intent of parliament to freeze debt obligations through Act would be frustrated if stay order did not apply to statutory termination and severance payments regarding past services.

Cases considered:

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 184 O.A.C. 33, 16 R.P.R. (4th) 1, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1 (S.C.C.) — referred to

Dayco (Canada) Ltd. v. C.A.W. (1993), 1993 CarswellOnt 883, 1993 CarswellOnt 978, 14 Admin. L.R. (2d) 1, (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada)* [1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada)* 102 D.L.R. (4th) 609, 63 O.A.C. 1, 152 N.R. 1, 13 O.R. (3d) 164 (note), (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032 (S.C.C.) — referred to

Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board) (1999), 178 D.L.R. (4th) 440, 45 O.R. (3d) 622, 22 C.C.P.B. 1, 123 O.A.C. 384, 1999 CarswellOnt 2669 (Ont. C.A.) — considered

Mirant Canada Energy Marketing Ltd., Re (2004), 1 C.B.R. (5th) 252, 2004 CarswellAlta 352, 2004 ABQB 218, 36 Alta. L.R. (4th) 87 (Alta. Q.B.) — referred to

Multiple Access Ltd. v. McCutcheon (1982), 1982 CarswellOnt 128, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 738 (S.C.C.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Windsor Machine & Stamping Ltd., Re (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]) — referred to

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

s. 11 — referred to

s. 11(3) — considered

s. 11(4) — referred to

s. 11(5) — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — referred to

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

APPEALS by union and former employees from judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]), dismissing motion for continued payments under collective agreement.

S.T. Goudge, K.N. Feldman JJ.A.:

1 On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

2 In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

3 The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

4 The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

5 We will address each of the two appeals in turn.

The Union Appeal

Background

6 The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to unionized employees who have been terminated or who have severed their employment at Nortel.

7 Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

8 The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[FN1]

> 11.3 No order made under section 11 shall have the effect of
>
> > (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

9 The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the *CCAA*.

10 The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

11 The Union challenges this conclusion.

12 In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

13 Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

14 Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

15 In our opinion, this argument must fail.

Analysis

16 Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

17 Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

18 Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Mirant Canada Energy Marketing Ltd., Re* (2004), 36 Alta. L.R. (4th) 87 (Alta. Q.B.).

20 Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

21 The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board)* (1999), 45 O.R. (3d) 622

(Ont. C.A.), at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

22 Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.), at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

23 In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

24 The Union's appeal must be dismissed.

The Former Employees' Appeal

Background

25 The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (" *ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

26 After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

27 For the purposes of the appeal, the former employees narrowed their claim only to statutory termination

and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

28 Neither the provincial nor the federal governments responded to the notice on this appeal.

29 Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> > (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> . . .
>
> > (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court.*
>
> . . .
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.
>
> [Emphasis added.]

30 Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

31 As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

32 Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1; [the Bankruptcy and Insolvency Act and the Winding Up Act]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

33 As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

34 Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[FN2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

35 As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.) at para. 43.

36 The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.):

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

37 However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in , [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

38 Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

39 The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

40 The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

41 In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

42 While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

43 The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

44 However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

45 Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

46 Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the *CCAA* process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

47 The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

48 We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

49 The appeal by the former employees is also dismissed.

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

I agree.

Appeals dismissed.

FN* A corrigendum issued by the court on December 8, 2009 has been incorporated herein.

FN1 The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

FN2 The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd., Re*, [2009] O.J. No. 3195 (Ont. S.C.J. [Commercial List]), decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

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2013 CarswellQue 11632, EYB 2013-229504, 2013 QCCS 5762, J.E. 2013-2145, 8 C.B.R. (6th) 1, 236 A.C.W.S. (3d) 116, 2013 C.E.B. & P.G.R. 8065, 9 C.C.P.B. (2nd) 186, **2 P.P.S.A.C. (4th) 60**

Aveos Fleet Performance Inc./ **Aveos** Performance aéronautique inc., Re

In the matter of the proposed plan of compromise or arrangement of **Aveos** Fleet Performance Inc./ **Aveos** Performance aéronautique inc. and Aero Technical US, Inc. (Insolvent Debtors) and FTI Consulting Canada Inc. Monitor, and The Superintendent of Financial Institutions (Applicant) and Wells Fargo Bank National Association, as holder of a power of attorney, and Crédit Suisse AG, Cayman Island Branch, as fondé de pouvoir and administrative agent and collateral agent for the Second Lien Lenders, and **Aveos** Holding Company, as holder of a power of attorney and Breof/Belmont Ban L.P. (Respondents) and Aon Hewitt, as administrator of the pension plans of **Aveos** Fleet Performance Inc./ **Aveos** Performance Aéronautique Inc. and the former and retired employees of **Aveos** Fleet Performance Inc. (Impleaded Party)

Quebec Superior Court

Mark Schrager J.C.S.

Heard: October 21-22, 2013
Judgment: November 20, 2013
Docket: C.S. Montréal 500-11-042345-120

Counsel: Me Roger Simard, Me Ari Y. Sorek for Aveos Fleet Performance Inc.

Me Bernard Boucher, Me Katherine McEachern for Crédit Suisse AG, Cayman Islands Branch and Wells Fargo Bank National Association

Me Sylvain Rigaud for FTI Consulting Canada Inc.

Me Pierre Lecavalier, Me Antoine Lippé for Superintendent of Financial Institutions

Me Claude Tardif for Aon Hewitt

Subject: Insolvency; Corporate and Commercial; Employment

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Former employees of debtor now worked for employer — Deficit under pension plan at time of transfer amounted to $1,700,00.00, and debtor agreed to pay that sum in quarterly instalments of $75,036.00 — It was later agreed that balance due by debtor with respect to pension deficit amounted to $600,288.00 — Secured creditors were granted security over property of employer — Employer experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act (CCAA) — Initial order provided that employer could interrupt pension plan payments — After pension plan was terminated, employer owed $2,804,450.00 to pension plan — Deemed trust was created pursuant to s. 8(2) of Pension Benefits Standards Act — Employer received sum of $5,361,499.00 from debtor — Superintendent of Financial Institutions brought motion for declaration that amount of $2,804,450.00 due by employer was protected by deemed trust and ranked in priority to secured creditors' security — Motion dismissed — Secured creditors' security was created before creation of deemed trust — Deemed trust was not effective in CCAA proceeding, at least where secured creditors with prior perfected security had not yet been paid in full — Hence, rights of secured creditors in respect of amount of $2,804,450.00 ranked in priority to deemed trust — Purpose of superintendent's application to modify initial order, which was brought at trial, was to retroactively reverse power of employer to interrupt pension payments — Initial order had been renewed six times and superintendent failed to exercise its rights earlier — Superintendent's delay was unreasonable, given that secured creditors had relied on that initial order in good faith — However, under art. 1569 of Civil Code of Quebec, employer could impute payment to debt it intended to pay — Therefore, employer had right to use sum of $600,288.00 of amount of $5,361,499.00 received from debtor to pay pension fund.

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

Former employees of debtor now worked for employer — Deficit under pension plan at time of transfer amounted to $1,700,00.00, and debtor agreed to pay that sum in quarterly instalments of $75,036.00 — It was later agreed that balance due by debtor with respect to pension deficit amounted to $600,288.00 — Secured creditors were granted security over property of employer — Employer experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act (CCAA) — Initial order provided that employer could interrupt pension plan payments — After pension plan was terminated, employer owed $2,804,450.00 to pension plan — Deemed trust was created pursuant to s. 8(2) of Pension Benefits Standards Act — Employer received sum of $5,361,499.00 from debtor — Superintendent of Financial Institutions brought motion for declaration that amount of $2,804,450.00 due by employer was protected by deemed trust and ranked in priority to secured creditors' security — Motion dismissed — Secured creditors' security was created before creation of deemed trust — Deemed trust was not effective in CCAA proceeding, at least where secured creditors with prior perfected security had not yet been paid in full — Hence, rights of secured creditors in respect of amount of $2,804,450.00 ranked in priority to deemed trust — Purpose of superintendent's application to modify initial order, which was brought at trial, was to retroactively reverse power of employer to interrupt pension payments — Initial order had been renewed six times and superintendent failed to exercise its rights earlier — Superintendent's delay was unreasonable, given that secured creditors had relied on that initial order in good faith — However, under art. 1569 of Civil Code of Quebec, employer could impute payment to debt it intended to pay — Therefore, employer had right to use sum of $600,288.00 of amount of $5,361,499.00 received from debtor to pay pension fund.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Principes généraux — Application de la Loi — Divers

Ex-employés de la débitrice étaient désormais à l'emploi de l'employeur — Déficit accumulé dans le régime de retraite au moment du transfert s'élevait à 1 700 000,00 $, et la débitrice a accepté de rembourser cette somme à raison de paiements trimestriels de 75 036,00 $ — On s'est par la suite entendu pour fixer le solde dû par la débitrice en regard du déficit accumulé dans le régime de retraite à 600 288,00 $ — Créanciers garantis ont obtenu une sûreté grevant les biens de l'employeur — Employeur a éprouvé des ennuis financiers et s'est placé sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Ordonnance initiale prévoyait que l'employeur pouvait interrompre ses paiements au régime de retraite — Après que l'on a mis fin au régime de retraite, l'employeur devait la somme de 2 804 450,00 $ au régime de retraite — Fiducie présumée a été créée en vertu de l'art. 8(2) de la Loi sur les normes de prestation de pension — Employeur a reçu la somme de 5 361 499,00 $ de la débitrice — Surintendant des institutions financières a déposé une requête en vue de faire déclarer que le montant de 2 804 450,00 $ dû par l'employeur était protégé par la fiducie présumée et que cette réclamation prenait rang avant la sûreté accordée aux créanciers garantis — Requête rejetée — Sûreté des créanciers garantis avait été consentie avant la création de la fiducie présumée — Fiducie présumée n'était pas opposable dans le cadre d'une procédure entreprise sous la LACC, du moins tant que la créance des créanciers garantis détenant une sûreté opposable n'a pas été entièrement payée — Ainsi, les droits des créanciers garantis relativement au montant de 2 804 450,00 $ avaient priorité sur la fiducie présumée — Demande du surintendant, déposée lors du procès, visant à faire modifier l'ordonnance initiale, avait pour but d'empêcher rétroactivement l'employeur de suspendre ses paiements au régime de retraite — Ordonnance initiale avait été renouvelée six fois et le surintendant n'avait pas exercé ses droits plus tôt — Retard du surintendant était déraisonnable, considérant que les créanciers garantis avaient respecté cette ordonnance initiale de bonne foi — Toutefois, en vertu de l'art. 1569 du Code civil du Québec, l'employeur pouvait indiquer quelle dette il entendait acquitter — Par conséquent, l'employeur avait le droit d'utiliser les 600 288,00 $ du 5 361 499,00 $ reçu de la débitrice pour payer le fond de retraite.

Régimes de retraite --- Régimes de retraite privés — Paiement de la rente — Faillite ou insolvabilité de l'employeur — Divers

Ex-employés de la débitrice étaient désormais à l'emploi de l'employeur — Déficit accumulé dans le régime de retraite au moment du transfert s'élevait à 1 700 000,00 $, et la débitrice a accepté de rembourser cette somme à raison de paiements trimestriels de 75 036,00 $ — On s'est par la suite entendu pour fixer le solde dû par la débitrice en regard du déficit accumulé dans le régime de retraite à 600 288,00 $ — Créanciers garantis ont obtenu une sûreté grevant les biens de l'employeur — Employeur a éprouvé des ennuis financiers et s'est placé sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Ordonnance initiale prévoyait que l'employeur pouvait interrompre ses paiements au régime de retraite — Après que l'on a mis fin au régime de retraite, l'employeur devait la somme de 2 804 450,00 $ au régime de retraite — Fiducie présumée a été créée en vertu de l'art. 8(2) de la Loi sur les normes de prestation de pension — Employeur a reçu la somme de 5 361 499,00 $ de la débitrice — Surintendant des institutions financières a déposé une requête en vue de faire déclarer que le montant de 2 804 450,00 $ dû par l'employeur était protégé par la fiducie présumée et que cette réclamation prenait rang avant la sûreté accordée aux créanciers garantis — Requête rejetée — Sûreté des créanciers garantis avait été consentie avant la création de la fiducie présumée — Fiducie présumée n'était pas opposable dans le cadre d'une procédure entreprise sous la LACC, du moins tant que la créance des créanciers garantis détenant une sûreté opposable n'a pas été entièrement payée — Ainsi, les droits des créanciers garantis relativement au montant de 2 804 450,00 $ avaient priorité sur la fiducie présumée — Demande du surintendant, déposée lors du procès, visant à faire modifier l'ordonnance initiale, avait pour but d'empêcher rétroactivement l'employeur de suspendre ses paiements au régime de retraite — Ordonnance initiale avait été renouvelée six fois et le surintendant n'avait pas exercé ses droits plus tôt — Retard du surintendant était déraisonnable, considérant que les créanciers garantis avaient respecté cette ordonnance initiale de bonne foi — Toutefois, en vertu de l'art. 1569 du Code civil du Québec, l'employeur pouvait indiquer quelle dette il entendait acquitter — Par conséquent, l'employeur avait le droit d'utiliser les 600 288,00 $ du 5 361 499,00 $ reçu de la débitrice pour payer le fond de retraite.

Cases considered by *Mark Schrager J.C.S.*:

AbitibiBowater inc., Re (2009), 74 C.C.P.B. 254, D.T.E. 2009T-434, 57 C.B.R. (5th) 285, 2009 QCCS 2028, 2009 CarswellQue 4329, [2009] R.J.Q. 1415 (Que. S.C.) — referred to

Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec (2005), 2005 QCCA 304, 2005 CarswellQue 661, 45 C.C.P.B. 1, [2005] R.J.Q. 927, 2005 CarswellQue 13745 (Que. C.A.) — referred to

Banque canadienne nationale c. Soucisse (1981), 1981 CarswellQue 110, [1981] 2 S.C.R. 339, 43 N.R. 283, 1981 CarswellQue 110F (S.C.C.) — referred to

Baronet inc., Re (2008), 2008 QCCS 288, 2008 CarswellQue 699 (Que. S.C.) — considered

Buschau v. Rogers Communications Inc. (2006), 2006 SCC 28, 2006 CarswellBC 1530, 2006 CarswellBC 1531, 54 B.C.L.R. (4th) 1, [2006] 8 W.W.R. 583, 349 N.R. 324, [2006] 1 S.C.R. 973, 226 B.C.A.C. 25, 269 D.L.R. (4th) 1, 26 E.T.R. (3d) 1, 373 W.A.C. 25, 52 C.C.P.B. 161 (S.C.C.) — referred to

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 4469, 55 C.B.R. (5th) 217, 2009 C.E.B. & P.G.R. 8350, 76 C.C.P.B. 254 (Ont. S.C.J. [Commercial List]) — referred to

Grant Forest Products Inc. v. GE Canada Leasing Services Co. (2013), 2013 CarswellOnt 14057, 2013 ONSC 5933, 6 C.B.R. (6th) 1, 7 C.C.P.B. (2nd) 239 (Ont. S.C.J. [Commercial List]) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 354 D.L.R. (4th) 581, 2 C.C.P.B. (2nd) 1, 96 C.B.R. (5th) 171, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, D.T.E. 2013T-97, 301 O.A.C. 1, 8 B.L.R. (5th) 1 (S.C.C.) — distinguished

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 2004 C.E.B. & P.G.R. 8112, 242 D.L.R. (4th) 193, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, [2004] 3 S.C.R. 152, 75 O.R. (3d) 479 (note), 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54 (S.C.C.) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

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

White Birch Paper Holding Co., Re (2012), [2012] R.J.Q. 1063, 2012 QCCS 1679, 98 C.C.P.B. 13, 2012 CarswellQue 3901 (Que. S.C.) — referred to

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1

s. 178 — referred to

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

Generally — referred to

s. 81.5 [en. 2005, c. 47, s. 67] — referred to

s. 81.6 [en. 2005, c. 47, s. 67] — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 1260 — considered

art. 1278 — considered

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

Generally — referred to

s. 6(6) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 36(7) — considered

s. 37 — referred to

s. 38 — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

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

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

s. 22(3) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(5) — considered

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

Generally — referred to

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)

Generally — referred to

s. 5(1) — considered

s. 8(1) — considered

s. 8(2) — considered

s. 29(2) — referred to

s. 29(6) — considered

s. 29(6.2) [en. 2010, c. 12, s. 1816(5)] — referred to

s. 29(6.5) [en. 2010, c. 12, s. 1816(5)] — referred to

s. 33.2(1) [en. 1998, c. 12, s. 22] — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

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

s. 30(7) — considered

MOTION by Superintendent of Financial Institutions for declaration that deemed trust created in favour of pension plan ranked in priority to security created in favour of secured creditors.

***Mark Schrager J.C.S.*:**

INTRODUCTION

1 Aveos Fleet Performance Inc. (« Aveos ») and its related entity Aero Technical US, Inc. applied for and this Court issued an initial order (« Initial Order ») under the *Companies' Creditors Arrangement Act* [FN1] (« C.C.A.A. ») on March 19, 2012.

2 Aveos' operations had largely had been shutdown prior to the C.C.A.A. filing. The remainder of its normal operations were shutdown following the C.C.A.A. filing and most of the remaining employees were laid off.

3 The present litigation pits the rights of a pension fund to obtain priority for the payment of its deficit against the rights of the Respondent secured lenders (« Secured Lenders ») to recover their loans and advances.

4 The Superintendent of Financial Institutions (the « Superintendent ») has filed a motion seeking a declaratory judgment which has been contested by the Secured Lenders. The Superintendent is supported by the pension plan administrator, Aon Hewitt (« Aon »).

5 Aveos has maintained neutrality on the aforementioned issue. However, Aveos has made representations on a secondary issue arising from a recent payment received from Air Canada which, according to the manner in which this payment is applied, could reduce the quantum of the priority treatment sought by the Superintendent.

6 The Monitor has filed a report but also maintained neutrality.

FACTS

7 With a view to using court time efficiently and focusing on legal issues, the parties have agreed on the essential facts in a document entitled « Agreed Statement of Facts », the first section of which reads as follows:

I. FACTS RELATING TO THE NON-UNION PENSION PLAN:

1. The Retirement Plan for Employees of Aveos that is the object of the motion (the "**Plan**") is a defined benefit pension plan. It was established by Aveos Fleet Performance Inc. (the "**Company**" or "**Aveos**") effective October 16, 2007;

2. An initial application for registration of a defined benefit plan was filed with the Office of the Superintendent of Financial Institutions ("**OSFI**") on September 5, 2008 and an amended application was filed on December 4, 2008, as appears from the September 5, 2008 cover letter to OSFI, the initial Application for Registration of a Pension Plan, and the revised Application for Registration of a Pension Plan attached en liasse as **Exhibit R-1;**

3. Thereafter, OSFI registered and assigned the Plan federal registration number 57573 and the Plan is governed by the *Pensions Benefits Standards Act* ("**PBSA**") and regulations thereunder;

4. The Plan covers all non-unionized employees of the Company who were employed by Air Canada as of October 15, 2007, who participated in the Air Canada Pension Plan or the Pension Plan for Air Canada Management Employees Formerly Employed by Canadian Airlines International Limited (the "**Air Canada Plans**"), and who became employed by the Company effective October 16, 2007;

5. Thereafter, assets and liabilities of the Air Canada Plans in respect of these employees were transferred from the Air Canada Plans to the Plan;

6. The Plan also provides pension benefits to former non-unionized employees of the Company who were hired after October 16, 2007 and who met the eligibility criteria under the Plan terms;

7. Contributions from both the Company and employees were required to be made to the Plan;

8. The Company was the sponsor and administrator of the Plan from inception until April 5, 2012, as detailed below, when OSFI removed the Company as administrator and named Aon Hewitt as the replacement Plan administrator;

9. As required by the PBSA, actuarial valuation reports for the Plan were prepared by an actuary and filed with OSFI annually;

10. The actuarial valuation report for the Plan as at December 31, 2010, dated June 2011 was prepared by Aon Hewitt Inc. and filed with OSFI in June, 2011 (the "**2010 Valuation Report**") filed as **Exhibit R-2;**

11. The 2010 Valuation Report revealed that as at December 31, 2010 the Plan was 79.4% funded on a solvency basis, and had an adjusted solvency deficiency of $15,297,000. As a result, annual special payments totaling $3,059,400 were required to be paid into the Plan fund in monthly installments in the amount of $254,950;

12. Until the 2010 Valuation Report was filed, Aveos continued to fund in accordance with the report filed the preceding year with respect to the Plan. Aveos made in September 2011 a catch up payment for the deficiency in payments made to the Plan for the first six months of 2011 in accordance with the 2010 Valuation Report. Aveos also made the special payment owed for that month. The 2011 Valuation Report that valued the Plan as at December 31, 2011 was due to be filed by June 30, 2012;

13. Special payments in the amount of $254,950 continued to be paid by the Company to the Plan fund in accordance with the 2010 Valuation Report until the last payment made on March 1, 2012 for the month of January, 2012;

14. In the days leading up to the Initial Order, Aveos employed approximately 2,620 employees working from approximately ten facilities across Canada and operated three main divisions, namely the Airframe, Engine and Component Divisions;

15. Approximately 88% of its workforce in Canada was unionized and represented by the International Association of Machinists and Aerospace Workers (the "**Union**");

16. On the eve of the Initial Order, Aveos ceased the operations of its Airframe Division and notified all other of its employees not to report to work as of March 19, 2012;

17. On March 19, 2012, Aveos and Aero Technical US, Inc. ("**Aero US**" and together with Aveos, the "**Debtors** ") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an Initial Order (the "**Initial Order**") was made by the Honourable Mr. Justice Schrager of the Superior Court of Quebec (Commercial Division) (the "**Court**"), granting, inter alia, a stay of proceedings against the Debtors until April 5, 2012, (as extended from time to time thereafter, the "**Stay Period**") and appointing FTI Consulting Canada Inc. as monitor of the Debtors (the "**Monitor**");

18. According to the Initial Order, a charge of $5,000,000.00 was granted in favour of the Debtors' directors, which was reduced to $2,000,000.00 by the Order of May 8, 2012. Paragraph 19 of the Initial Order suspended

the making of special payments to the Debtors pension plans, including the Plan, but allowed for the making of normal cost contributions;

19. On March 19 and 20, 2012, all of the Debtors' directors resigned from their positions;

20. On the day following the issuance of the Initial Order, Aveos ceased the operations of its two other divisions, the Engine and Component Divisions, and terminated the employment of its remaining workforce save for a very limited number of key employees;

21. On March 20, 2012, the Court approved the appointment of Jonathan Solursh to act as Chief Restructuring Officer of the Debtors (collectively with R.e.I. Group Inc., the "**CRO**"), who developed and implemented, with the support of the Union and the Secured Lenders (defined below), a Court approved divestiture process (the " **Divestiture Process**");

22. By letter dated April 5, 2012, OSFI appointed Aon Hewitt Inc. as the replacement administrator of the Plan effective April 5, 2012, as appears from a letter produced under Exhibit R-3;

23. The Divestiture Process was approved by this Court on April 20, 2012 and has already resulted in numerous Court approved transactions; practically all if not all of the Debtors' assets have now been sold;

24. By way of letters dated May 10, 2012, the CRO informed OSFI that accruals would cease in respect of the Plan and another Aveos pension plan, being a Defined Contribution Plan ("**DC Plan**") effective May 19, 2012, as appears from said letters produced en liasse under **Exhibit R-4**. The letter respecting the Plan informed OSFI that the Plan had no future;

25. Aveos also had a defined benefit pension plan for union members ("**DB Union Plan**");

26. On May 14, 2012, legal representative for IAMAW informed legal counsel for OSFI that "that there are no longer any active IAMAW members in the (DB Union) Plan. In light of the circumstances, the IAMAW hereby requests that the (DB Union) Plan for IAMAW members be terminated and wound-up." This request was reaffirmed on May 23, 2012 following OSFI's receipt of information that two union employees were still engaged by Aveos;

27. OSFI terminated both the Plan and the DC Plan effective May 19, 2012 and terminated the DB Union Plan effective May 25, 2012, as appears from the letters issued by the OSFI on May 25, 2012 and produced en liasse under **Exhibit R-5**;

28. The following table summarizes the amounts owed in respect of the Plan per month :

Aveos Non Union Pension Plan

Monthly Period covered	Accrued on	Special payment required	Received amount	Outstanding
January 2012	January 1. 2012	254,950.00 $	254,950.00 $	- $
February 2012	February 1, 2012	254,950.00 $		254,950.00 $
March 2012	March 1, 2012	254,950.00 $		254,950.00 $
April 2012	April 1, 2012	254,950.00 $		254,950.00 $

May 2012	May 1, 2012	254,950.00 $		254,950.00 $
June to December 2012	May 19, 2012	1,784,650.00 $		1,784,650.00 $
		3,059,400.00 $	254,950.00 $	2,804,450.00 $

29. In respect of the Plan, the outstanding amount owed by the employer on the date of the Initial Order is $509,900. An additional amount of $2,294,550.00 is also owed by the employer upon termination of the Plan for a total of $2,804,450.00 representing amounts owed before and at the date of termination of the Plan for outstanding special payments owing to the Plan for the period ending December 31, 2012. This amount was confirmed by Aveos' counsel, as appears from a letter dated July 13, 2012, produced as **Exhibit R-6**;

30. An actuarial termination report for the Plan as at May 19, 2012 has been prepared by Aon Hewitt and is dated December 19, 2012, filed as **Exhibit R-7**. This report confirms that $2,804,450 in special payments is owing to the Plan in respect of amounts owed during the period January to December, 2012;

31. The termination report for the Plan shows that the Plan has a deficit (i.e., liabilities exceeds the assets of the Plan) of $29,748,200. This report has not yet been approved by OSFI;

32. While a deemed trust attaches to normal cost, special payments and other amounts owed or accrued to a pension plan as at the date of termination, the amount required to be paid by an employer in respect of the remaining deficit is an unsecured claim;

33. Aveos has not deposited the amounts which represent the special contributions owing in a separate bank account;

34. In the event that it is determined that such amounts are payable to the Plan in priority to the security of the Respondents, including the security of the Third Party Secured Lenders detailed below, Aveos does have sufficient funds to pay these special contributions as well as all CCAA Charges;

35. All Company normal cost and employee contributions owed to the Plan have been paid into the Plan fund.

8 The balance of the Agreed Statement of Facts relates to the Secured Lenders security interests. The Agreed Statement of Facts document contains a summary of the security consisting of fixed charges perfected in favour of the Secured Lenders in Québec, as a hypothec under the Québec Civil Code and in Ontario, Alberta, British Columbia, Nova-Scotia, Manitoba and the Northwest Territories as a security interest under the relevant provincial personal property security legislation.

9 Registration dates confirm the initial perfection of the security in March 2010, except for the Northwest Territories where security was perfected in August 2011.

10 Copies of the deed of hypothec and the general security agreement were filed in evidence also by consent. These documents confirm the existence of a hypothec and security interest in all present and future movable and personal property.

11 The parties also agreed to further facts germaine to the submissions concerning the imputation of certain payments made or about to be made by Aveos with funds received from Air Canada, as mentioned above. Also, Aveos' chief

restructuring officer, Jonathan Solursh, testified briefly on this subject.

12 The deficit under the pension plan for non-unionized employees at the time of their transfer from employment with Air Canada to Aveos was approximately $1.7 million.

13 It was agreed in 2007 that Air Canada would pay this sum to Aveos by way of equal consecutive quarterly instalments of $75,036.00 each on October 30, January 30, April 30 and July 30 of each year until the final payment on January 30, 2014.

14 Air Canada made no further payment after January 2012 at which time the balance due was $600,288.00 (or 8 x $75,036.00).

15 Air Canada and Aveos agreed on October 4, 2013 that Air Canada would pay $5,361,499.00 to be held in trust to be distributed to Aveos employees. This sum includes the $600,288.00. The agreement was approved by this Court by order issued on October 11, 2013. The agreement resolved outstanding matters between Air Canada and Aveos with respect to the payments to be made by Air Canada to Aveos regarding the former's pension obligations towards its former employees transferred to Aveos.

16 While not wishing to admit that the $5,361,499.00 is not subject to its security, the Secured Lenders did not assert any rights that would impede Aveos directing these funds to/or for the benefit of the former employees.

POSITIONS OF THE PARTIES

The Superintendent of Financial Institutions

17 Though not a creditor of Aveos, the Superintendent maintains that it has sufficient interest or standing to bring this matter before the Court and more specifically to seek relief regarding the deemed trust.

18 Sections 5(1) and 33.2(1) of the *Pension Benefits Standards Act*[FN2] (« P.B.S.A. ») provide as follows:

> 5(1) The Superintendent, under the direction of the Minister, has the control and supervision of the administration of this Act and has the powers conferred by this Act.
>
> In addition to any other action that the Superintendent may take in respect of a pension plan, the Superintendent may bring against the administrator, employer or any other person any cause of action that a member, former member or any other person entitled to a benefit from the plan could bring.

19 These enactments provide the standing for the Superintendent regarding the matter before this Court.

20 None of the other parties involved have contested the Superintendent's standing.

21 The Superintendent claims that the deemed trust created by Section 8 P.B.S.A. obliges Aveos to pay to the pension plan, or to Aon, the administrator of the pension plan, in priority to Crédit Suisse, the total of the prescribed special payments due to the plan for the period February to December 2012 or, $2,804,450.00.

22 The relevant sections of the P.B.S.A. regarding the deemed trust are as follows:

> 8(1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a)

to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

(a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the following payments that have accrued to date:

(i) the prescribed payments, and

(ii) the payments that are required to be made under a workout agreement; and

(c) all of the following amounts that have not been remitted to the pension fund:

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

8(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

29(6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund:

(a) an amount equal to the normal cost that has accrued to the date of the termination;

(b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;

(d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:

(i) the amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer; and

(e) the amounts of all of the payments that are required to be made under subsection 9.14(2).

23 Once the plan was terminated on May 19, 2012, the balance of the prescribed special payments for 2012 became due pursuant to Section 29(6) P.B.S.A. The last payment made by Aveos was in January 2012. Thus, the payments for February to December 2012 totalling $2,804,450.00 are due and subject to the deemed trust.

24 The Superintendent submits that this sum is protected by the deemed trust and as such ranks in priority to or is not charged or subject to the security in favour of the Secured Lenders.

25 According to the Superintendent, the distribution of an employer's assets or the fact that an employer company has become subject to the C.C.A.A. or the *Bankruptcy and Insolvency Act*[FN3] (« B.I.A. »), does not override the effect of the deemed trust. The divestiture process put in place by Aveos and the sale of all or almost all of its assets triggered Section 8(2) P.B.S.A. since there has been a « liquidation ».

26 Since the C.C.A.A. provides no scheme of collocation, the deemed trust in Section 8(2) P.B.S.A. continues to apply. Nothing in the C.C.A.A. says that it does not apply. The only specific provisions addressing the deemed trust are found in Sections 6(6) and 36(7) C.C.A.A., which provide, respectively, that no arrangement can be sanctioned nor any asset sale approved unless adequate measures are taken for the payment of « defined contribution provisions » under the P.B.S.A. These provisions are silent on the deemed trust and on prescribed special payments such as the $2,804,450.00 in this case. Given this silence and the fact that Section 8(2) P.B.S.A. is valid federal legislation, it continues to have its effect alongside the C.C.A.A. The Superintendent submits that there is no need to have specific recognition in the C.C.A.A. of the operation of the deemed trust. There is no incompatibility nor any issue of federal paramountcy as in the case of *Indalex*[FN4]. (In *Indalex*, the provincial law (specifically Section 30(7) of the *Personal Property Security Act* [FN5] provided that a security interest is subordinate to the deemed trust existing under the equivalent Ontario statute

27 Thus, the Superintendent submits that the deemed trust has full effect to withdraw or to subtract the $2,804,450.00 (sometimes hereinafter « $2.8 million ») from the ambit of the security of the Secured Lenders.

28 The fact that the C.C.A.A. does not specifically recognize the priority of the Section 8(2) P.B.S.A. deemed trust is not relevant according to the Superintendent. The cases dealing with deemed trusts in favour of the Crown (particularly *Sparrow*[FN7] and *Century*[FN8]) do not apply or must be read with caution. The legislator caused the Crown to become an ordinary (unsecured) creditor from the amendments in 2005 (see Section 38 C.C.A.A.). By the same token, the legislator also stated that deemed trusts *in favour of the Crown* would have no effect except where specifically acknowledged, which is the case for deductions at source of taxes, unemployment insurance premiums and government pension contributions (see Section 37 C.C.A.A.). This legislative scheme and the case law interpreting and applying it is not applicable when considering Section 8(2) P.B.S.A., because the Section 8(2) deemed trust is not in favour of the Crown whose claims under the C.C.A.A. are stated to be ordinary, unless a Crown deemed trust is specifically acknowledged (see Section 37(2) C.C.A.A.).

29 The Superintendent refutes that the granting of security in favour of the Secured Lenders prior in time to the deemed trust arising, makes it such that the property has already been encumbered, and thus not subject to the deemed trust. According to the Superintendent; the deemed trust's priority exists independently of the date of its creation or the date of perfection of the security held by the Secured Lenders.

30 The intent of the legislator is to protect the pension plan for the benefit of the employees. Secured creditors should not be in an advantageous position where a company is liquidated under the C.C.A.A. and no plan of arrangement is proposed. On the other hand, the legislator with a view to balancing competing interests limited the deemed trust to actual payments due in a year of winding up and not to the entire actuarial deficit (in this case $29,748,200.00). This is the effect of the amendments in 2010 to the P.B.S.A. [FN9]

31 Aside from considerations of rank, the Superintendent also submits that since the monthly payments of $254,950.00 (at least after the Initial Order) were discontinued based on paragraph 19 of the Initial Order. Such order can

be amended according to the circumstances.

32 The underlying rationale of such an order is to enhance a company's liquidity to allow it « breathing room » with a view to helping it move toward a restructuring of its business[FN10]. It was decided shortly after the Initial Order that none of the employees of Aveos (all of whom had been laid off) would be recalled, and that a process to sell the assets would be put in place. This « divestiture process » was approved by this Court on April 20, 2012. Accordingly, it was a matter of record that Aveos would not continue as the employer even if units of the business enterprise were sold on a going concern basis. In view of the foregoing on May 25, 2012, the Superintendent terminated the pension plan as it was empowered to do under Section 29(2) P.B.S.A.

33 The Superintendent now submits that the undersigned should amend the Initial Order by eliminating Aveos' right to interrupt the monthly payments of $254,950.00 (at least post-filing) and order Aveos to pay the amount due to the pension fund. Sufficient funds are available to make the payment given the cessation of normal business activity and the asset sales. The rationale for permitting Aveos to cease or interrupt the special payments no longer obtains because of the cessation of normal business activities. Accordingly, the Initial Order should be amended and Aveos should be ordered to pay, independent of any consideration of the rank of security.

34 To allow for this outcome, the Superintendent sought and was granted permission to amend the conclusions of its proceedings so as to ask this Court to « issue any other order deemed necessary in the circumstances » with a view to having the undersigned conclude in amending the Initial Order and ordering Aveos to pay the $2,804,450.00 as outlined hereinabove.

Aon Hewitt

35 Aon is the plan administrator appointed in April 2012 to replace Aveos following the C.C.A.A. filing.

36 Aon supports the representations of the Superintendent emphasizing that the Section 8(2) P.B.S.A. deemed trust applies to « any » liquidation, thus including a C.C.A.A. liquidation.

37 Aon adds that the pension legislation is remedial and seeks to protect the employees whose entitlement to the pension proceeds is part of the remuneration for their labour[FN11]. They are the vulnerable party entitled to protection [FN12].

Secured Lenders

38 The Secured Lenders take the position that any deemed trust for the pension special payments is subordinated to their secured rights. In other words, since all of the property of Aveos was, at the time the deemed trust came into existence, charged by the Secured Lenders security, there were no assets that could be subject to the deemed trust or at least any such assets are subject to a prior charge in favour of the Secured Lenders.

39 The Secured Lenders rely on the Supreme Court of Canada decision in the matter of *Sparrow*[FN13]. Counsel underlines that the dissenting reasons in *Sparrow* do not differ from the majority on this point, i.e. that property subject to a fixed charge cannot be thereafter impressed with a deemed trust. The minority reasons of Justice Gonthier differed from the majority in that he relied on the license theory to the effect that the security documents in *Sparrow* permitted inventory to be sold in order that deductions at source be paid, so that if they were not paid there was room, notionally for the deemed trust to charge the proceeds of the inventory sales.

40 *Sparrow* dealt with a deemed trust in favour of the Crown. The legislative amendments to the tax statutes since

Sparrow underscore that Section 8(2) P.B.S.A. (which reflects pre-*Sparrow* amendment language) does not create priority rights *vis-à-vis* secured fixed charges. Also, these amendments are the basis for the Secured Lenders' second argument that the deemed trust of Section 8(2) P.B.S.A. does not survive the C.C.A.A. filing.

41 In this regard, the Secured Lenders submit that the statutory structure is such that certain limited payment obligations under the P.B.S.A. are protected under the C.C.A.A. (and the B.I.A.). Reference is made to Sections 6(6) as well as 37(6) C.C.A.A. (and Sections 81.5 and 81.6 of the B.I.A.). Given this protection following the history of the deemed trust legislation, it is clear, both structurally in the C.C.A.A. (and the B.I.A.) and in terms of the policy intent of the legislator that in the event of insolvency, the deemed trust of Section 8(2) P.B.S.A., for the special payments, will not be given effect, or at least will not trump the rights of secured creditors. The Secured Lenders submit that the Supreme Court has clearly stated that a deemed trust will be given effect in an insolvency estate only to the extent that it is recognized in the applicable insolvency legislation[FN14].

42 Lastly, in reply to the Superintendent's argument that, the suspension of special payments in virtue of Section 19 of the Initial Order herein simply be reversed, the Secured Lenders submit that it is not open to the Court at this point to order payment, in effect, retroactively, of the pension special payments. The Secured Lenders invoke three (3) arguments in this regard.

43 Firstly, the Secured Lenders submit that the special payments due after the March 19, 2012 C.C.A.A. filing represent a pre-filing obligation *albeit* payable in instalments which continued from the pre to the post-C.C.A.A. filing peri- od.

44 The special payments represent compensation for past services rendered. The services were rendered pre-filing and so was the obligation to remunerate the employee for such service. The crystallization of the obligation after filing does not change this. The Secured Lenders rely on the judgment in *Nortel* of the Ontario Court of Appeal[FN15].

45 Secondly, the Secured Lenders say that the Superintendent's argument is based on a false premise that it is unfair to give more protection to Secured Lenders in a liquidation under the C.C.A.A. than they would have if an arrangement was filed under the C.C.A.A. (Section 6(6)) or upon the sale of assets under the C.C.A.A. (37(6)) or in a bankruptcy or receivership (Sections 81.5 and 81.6 B.I.A.).

46 Here, the Secured Lenders' argument rejoins its principal argument in that the text of the statutes and the intention of the federal legislator in the evolution of the statutory scheme is such that special payments to make good the deficit in the pension plan are not given priority in an insolvency. In this regard, the Secured Lenders rely on dicta of the minority of the Supreme Court of Canada in *Indalex*[FN16] to postulate that equity should not be used to move the law to where Parliament has clearly refused to move it[FN17].

47 Thirdly, the Secured Lenders submit that it is unfair to them at least at this stage to amend the Initial Order and oblige Aveos to make the special payments due for the period February to December 2012.

48 The Initial Order providing *inter alia* a stay of proceedings and the ability to interrupt the payments to the pension plan has been extended six (6) times since March 19, 2012. This does not include various amendments which have been incorporated into the Initial Order following motions and hearings. There have been twelve (12) asset sales according to the submissions of the Secured Lenders. There have been four (4) distributions of funds produced by these asset sales which distributions have taken place on order of this Court between October 24, 2012 and October 21, 2013. All of the process was public and the Superintendent received notices of all motions. However, neither the Superintendent nor Aon have made any application to change the Initial Order until this time. The last special payment was due on Decem-

ber 2012. The present motion was filed in April 2013.

49 The Secured Lenders submit that faced with a timely application to amend the Initial Order to oblige Aveos to continue making special payments, they might have strategized differently if faced with an effective subordination of their position to a monthly payment of $250,000.00. The Secured Lenders submit by way of example that in such a scenario that they might have provoked a bankruptcy or a receivership.

Aveos

50 As indicated, Aveos has taken no position on the principal debate concerning the priority as between the Secured Lenders' security and the deemed trust, over the sum of $2,804,450.00.

51 Aveos has however taken the position that with respect to the sum received from Air Canada, it has the right to use these funds for the benefit of the employees in accordance with its agreement with Air Canada but more significantly to impute payment against specific amounts as it wishes. Accordingly, Aveos has made it known that it intends to use $600,288.00 of the $5,361,499.00 (i.e. the remaining sum Air Canada was contributing to its October 2007 pension deficit) to pay the Aveos special payments for Aveos' pension deficit which were due and unpaid for February and March 2012 in the amount of $254,950.00 each and an additional $90,388.00 on account of the special payment that was due for the month of April 2012. Such payments would operate to reduce the amount of $2,804,450.00 claimed by the Superintendent to be protected by the deemed trust. Accordingly, with such imputation and if the Superintendent is given priority for such sum, it will be reduced to $2,204,162.00.

52 The Superintendent and Aon contest this imputation so as to preserve their deemed trust for the full amount of $2.8 million.

53 The Superintendent and Aon submit that Aveos received the fund from Air Canada in trust (for the former employees of Air Canada). In Québec law, absent agreement, it is the debtor that has the right to impute payment. However, the Superintendent and Aon submit that the debtor of the sum of $600,288.00 is Air Canada and not Aveos since this sum represents the balance of special payments due to defray the deficit for the pension plan with regard to former Air Canada employees.

DISCUSSION

54 One purpose of insolvency law is to provide for a fair distribution of a debtor's assets given that there is not enough money to pay all creditors[FN18]. The preferences accorded certain types of claim created by the laws passed by Parliament reflect policy decisions of the legislator. Parliamant decides what is fair.

55 The statutory mechanism of the deemed trust to protect sums due to the Crown has been given much attention before the courts. While the law appears settled regarding deemed trusts in favour of the Crown, questions remain concerning deemed trust claims of pension funds.

56 An understanding of the state of the law and the policy reflected in this law requires a survey of the decisions of the courts considering such laws.

57 The Superintendent did not urge that Section 8(2) P.B.S.A. creates a true trust. In similar circumstances, analyzing similar statutory language, the Supreme Court of Canada in *Sparrow*[FN19] stated that the deemed trust is not a real one as the subject matter cannot be identified from the date of the creation of the trust.

58 Clearly, then, either at common law or in virtue of Article 1260 of the Civil Code of Québec (« C.C.Q. »), no real trust exists in the present case since the property subject to the trust is not readily identifiable as funds were not segregated as required by Article 8(1) P.B.S.A., but rather, commingled. This situation is common; thus, the need for the legislator to create the deemed trust in Section 8(2) P.B.S.A. to protect sums due to pension plans.

59 In *Sparrow*, the Supreme Court of Canada was faced with the deemed trust created by Section 227(4) and 227(5) of the *Income Tax Act* (« I.T.A. »)[FN20] in effect in 1997 which read as follows:

> (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (a) deemed by subsection 9(4) to be held in trust for Her Majesty [. . .]
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

60 The text is similar to Section 8 P.B.S.A. It should be noted that Section 8(2) P.B.S.A. has not been amended since 1997.

61 In *Sparrow*, the secured creditor held perfected security interests over the debtors' inventory in virtue of the *Alberta Personal Property Security Act*[FN21] and Section 178 (now 427) of the *Bank Act*[FN22].

62 Gonthier, J. while in dissent agreed with the basic analysis of Iacobucci, J. writing for the majority, that property validly encumbered by security was not attachable by the deemed trust under the I.T.A.[FN23].

63 Iacobucci, J. for the majority was explicit on the competition of the deemed trust with the security interests:

> The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.**[FN24]**

64 Following *Sparrow*, Sections 227(4) and 227(5) I.T.A. were replaced by 227(4) and 227(4.1)[FN25] wherein language was added which was subsequently characterized by the Supreme Court as follows:

> It is apparent from these changes that the intent of Parliament when drafting Section 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect.[FN26]

65 Similar amendments were brought in 1998 to the *Canada Pension Plan Act*[FN27] and the *Employment Insurance Act*[FN28] and in 2000 to the *Excise Tax Act*[FN29]. What is noteworthy in this legislative evolution, is that no similar amendments to overcome *Sparrow* were ever brought to Section 8(2) P.B.S.A.

66 In the present case, when the deemed trust for the special payments arose, the property of Aveos was encumbered by fixed charges in favour of the Secured Lenders. Those fixed charges were created in 2010, except for the security in the Northwest Territories which was perfected in 2011. The deemed trust arose either upon the liquidation of Aveos (which would not have been before the C.C.A.A. filing on March 19, 2012) or at the earliest when a special payment became due following the actuarial valuation report filed in June 2011. Even if the obligation to make the special payments was somehow retroactive to December 31, 2010 (which was not argued by the Superintendent), the fixed charges in favour of the Secured Lenders were already perfected at such date. Moreover, Aveos made the special payments up to and including January 2012 so it is difficult to deem the trust prior to any payments being in default.

67 Consequently, this Court agrees with the Secured Lenders first position that their security was created before any deemed trust for the $2.8 million could have existed. Since the assets were already charged, any deemed trust under Section (8)(2) P.B.S.A. is at best subordinate to the security of the Secured Lenders.

68 This Court also agrees with the Secured Lenders second position, that is that the deemed trust to protect or give preferential treatment to the pension special payments is not effective in a C.C.A.A. proceeding at least where secured creditors with prior perfected security are not paid in full, for the reasons which follow.

69 In the *Century*[FN30] case, the Supreme Court was called upon to consider whether a statutory deemed trust created under the *Excise Tax Act*[FN31] would be given effect in a C.C.A.A. matter.

70 The deemed trust created under Section 222(3) of the *Excise Tax Act* operated « despite (. . .) any other enactment of Canada (except the Bankruptcy and Insolvency Act) ». Section 18.3(1) C.C.A.A. (as it then read) negated the effect of any deemed trust in favour of the Crown except those created under the I.T.A., the *Canada Pension Plan Act* and the *Employment Insurance Act* all for source deductions.

71 After examining the legislative history, Deschamps, J. writing for the majority, held that Parliament did not intend for the C.C.A.A. to protect the Crown's deemed trust priority for GST claims payable under the *Excise Tax Act.* Deschamps, J. stated that where Parliament's intent is to protect deemed trust claims in insolvency matters, Parliament clearly states so. Absent an express statutory basis for concluding that GST claims enjoy preferred treatment under the C.C.A.A. (or the B.I.A.), no such protection exists[FN32]. Fish, J. writing minority reasons was even more explicit that the protection of a deemed trust claim in an insolvency requires a statutory provision creating the trust and a provision in the B.I.A. or C.C.A.A. explicitly preserving the effective operation of the deemed trust[FN33].

72 In the present case, while Section 8(2) P.B.S.A. creates the deemed trust, there is no provision of the C.C.A.A. that confirms or preserves it.

73 Parliament has enacted such « preserving » provisions for deductions at source in Section 37(2) C.C.A.A. (see also Section 86(2) B.I.A.). This is a *Sparrow* legacy amendment. There is no such preservation for the Section 8(2) P.B.S.A. deemed trust.

74 The Superintendent seeks to distinguish *Century* because there, the confirming provisions recognizing the deemed trust were necessary given that Parliament made the Crown an ordinary creditor in insolvencies in 2005. This is now reflected in Section 37(1) C.C.A.A. Thus, it was necessary for Parliament to specifically recognize the Crown deemed trusts for source deductions in Section 37(2) C.C.A.A. lest they be subsumed by Section 37(1) C.C.A.A. and treated as ordinary claims. Since the Section 8(2) P.B.S.A. deemed trust was never rendered ineffective by insolvency legislation (such as Section 37(1) C.C.A.A.) than there is no need for specific confirmation in the C.C.A.A., argues the Superintendent.

75 Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in *Century* does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the « general rule that deemed trusts are ineffective in insolvency »[FN34].

76 More significantly, however, to indicate the intention of the legislator not to preserve the Section 8(2) P.B.S.A. deemed trust, are the 2009 amendments to the C.C.A.A. (and the B.I.A.). Sections 6(6) and 36(7) C.C.A.A. provide that an arrangement may only be sanctioned or an asset sale approved by the court, if provision is made for the payment of certain enumerated pension obligations including obligations under the P.B.S.A. These obligations do not however include special payments but rather are limited to deductions from employee salaries and normal cost contributions of the employer (neither of which is in issue in the present case). Similar protection was given in the B.I.A. for bankruptcy liquidations and receivership sales (see Sections 81.5 and 81.6 B.I.A.).

77 The protection of Section 6(6) C.C.A.A. is not extended specifically to Section 8(2) P.B.S.A. or generally to special payments for actuarial deficits. Moreover, in the next seminal case of the Supreme Court of Canada dealing with deemed trusts in insolvency, Deschamps, J., in the matter of *Indalex*[FN35], quotes from the report of Parliament's Standing Committee on Banking, Trading and Commerce to conclude that Parliament considered giving special protection to pension plan members in matters of insolvency but chose not to[FN36].

78 The deemed trust in Indalex was a deemed trust under the *Pension Benefits Act* (Ontario)[FN37] which is legislation similar to the P.B.S.A.

79 Given that the liquidation of Aveos took place in a C.C.A.A. context and that this statute provides no order of collocation or preference, provincial priorities continue to apply[FN38].

80 In Ontario, as disclosed in the *Indalex* case, Section 30(7) of the *Personal Property Security Act*[FN39], subordinates security interests to the deemed trust created by the *Pension Benefits Act*[FN40]. Counsel for the Superintendent conceded that there is no equivalent provision in Québec provincial law that would give priority to the deemed trust in the present case. Accordingly, there is no basis for a priority claim for the Section 8(2) deemed trust based on Québec law.

81 The Superintendent argues that it is unfair that Secured Lenders have a better rank in a C.C.A.A. liquidation *vis-à-vis* the pension than they would have otherwise. This however is not the case. Section 6(6) C.C.A.A. and Sections 81.5 and 81.6 B.I.A. are in harmony. The special payments are not protected and would not have priority over the rights of a secured lender in any scenario: bankruptcy, receivership or C.C.A.A. regime.

82 The Superintendent also submits that Parliament's intent should also be gleaned from the amendments to the P.B.S.A. in 2009 limiting the deemed trust to the actual payment deficit and not to the whole actuarial deficiency (see Sections 29(6.2) and 29(6.5) P.B.S.A.) The actuarial deficit of the Aveos non-unionized pension plan is approximately $29,748,200.00. This argument is not however logically helpful to extend the protection of Section 8(2) P.B.S.A. to special payments due by a company under C.C.A.A protection. It is plausible that such an amendment was motivated by Parliament's desire not to subordinate or dilute ordinary creditors by a mutli-million dollar pension claim. In any event, the argument does not bolster the position *vis-à-vis* secured claims.

83 The Superintendent legitimately poses the rhetorical question of what use is the deemed trust? Certainly it is useful for the protection of special payments but only *vis-à-vis* creditors who do not hold security over the assets of the debtor company which was perfected prior to the deemed trust attaching to the assets.

84 The beneficiaries of the pension plan may be vulnerable as the Superintendent and Aon submit and as such merit protection for their pension entitlements as a matter of public policy[FN41]. However, the balance of competing policies is a matter for Parliament whose task is to define policy priorities and to reflect such choices in statutes. As Fish, J. stated in *Century,* legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary[FN42].

85 Finally, the Superintendent submitted that paragraph 19 of the Initial Order of March 19, 2011, permitting Aveos to interrupt the payments of the pension plan should be abrogated and that Aveos should be ordered to pay the $2,804,450.00 to the pension fund.

86 In this regard, an issue arises as to whether the special payments constitute pre or post-filing obligations. Of course, if the obligation is a pre-filing obligation (*albeit* payable in instalments after filing) then it is arguable such amounts be the subject of a proof of claim in an arrangement and not be paid after the C.C.A.A. filing.

87 The reason advanced that the obligation is pre-filing is that pension entitlement is part of the consideration or remuneration for labour services rendered by employees which in this case were all rendered pre-filing. The undersigned does not think it is necessary to characterize the special payments as pre or post-filing to decide this point in the circumstances of this case.

88 The interruption of payments to the pension plan has been allowed by C.C.A.A. courts when necessary to enhance liquidity to promote the survival of a company in financial distress[FN43]. In *Nortel*[FN44], the company was being put through a sales process and did not appear to be able to continue its normal business operations.

89 The situation in the present case was not essentially different on March 19, 2012. However, the unfolding of the facts made it clear in short order that Aveos would not continue in business. Employees were not recalled to continue anything akin to normal business activity. The sales or divestiture process was approved by this Court on April 20, 2012. There were a number of sales and four (4) distributions of funds to the Secured Lenders between October 24, 2012 and October 21, 2013. The Superintendent was or should have been fully aware of the situation. However, no application was brought by the Superintendent or by Aon to vary the Initial Order as sought herein.

90 Had an application been brought, the Secured Lenders could have decided on a course of action which may have included provoking a bankruptcy or a receivership.

91 While the undersigned would not go so far as to say that priorities cannot be revisited following a sale, vesting order and distribution as did Campbell, J. recently in *Grant Forest*[FN45], I do believe that the Court should be extremely hesitant to alter the Initial Order, retroactively, after such a long period of time has elapsed and salient events in the C.C.A.A. process have occurred. As Farley, J. said :

> Come back relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question.[FN46]

92 The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights, may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of « fin de non-recevoir »[FN47] in civil law.

93 It should also be noted that even in its petition for declaratory relief filed in April 2013, the Superintendent did not seek a modification of the Initial Order. The issue arose at the hearing.

94 In the circumstance described above, the Superintendent's delay in seeking a modification to the Initial Order appears unreasonable given that the other parties, particularly the Secured Lenders have relied on that Initial Order, in good faith.

95 Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.

96 Given the conclusion on the priorities over the special payment of $2.8 million it is not strictly necessary to decide whether Aveos may impute $600,288.00 against the $2.8 million.

97 However, should it become necessary for the parties, the Court will adjudicate on the question.

98 In Québec law the general principle set out by Article 1569 C.C.Q. is that a debtor has the right to impute payment. Various exceptions and qualifications set out in the C.C.Q. do not apply to the present circumstances.

99 Here it is agreed that Aveos received the $5.3 million from Air Canada in trust. The Superintendent and Aon plead that if the debtor is not Aveos, but rather Air Canada (who was liable to make the special payments to defray its pension deficit) then it is Air Canada and not Aveos that may impute the payment.

100 In the opinion of the undersigned, though Air Canada may have been the debtor *vis-à-vis* Aveos in virtue of the agreement of 2007 (or even the October 2013 agreement), once in receipt of the funds, Aveos is the debtor *vis-à-vis* the former employees and thus has the right to impute payment.

101 Even if Aveos holds the funds in trust, Aveos nevertheless has the right to impute payment of these funds since in Québec law, the trustee has « the control and exclusive administration of the trust patrimony » and « has the exercise of all of the rights pertaining to the patrimony » (Article 1278 C.C.Q). The undersigned would include in those rights, the right to impute payment as foreseen by Article 1569 C.C.Q.

102 Accordingly this Court will declare as such in the conclusions of this judgment.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE COURT :

103 *DISMISSES* the Motion for a Declaratory Judgment of the Superintendent of Financial Institutions;

104 *DECLARES* that the rights of the Respondent secured lenders in virtue of their security rank in priority to the deemed trust created by Section 8(2) of the *Pension Benefits Standards Act* for the special payments due by Aveos Fleet Performance Inc. and aggregating $2,804,450.00.

105 *DECLARES* that Aveos Fleet Performance Inc. has the right to impute payment of the sum of $600,288.00 forming part of the funds received or to be received from Air Canada in the amount of $5,361,499.00 as follows:

> 105.1. To the instalments for special payments to the Superintendent of Financial Institutions with respect to the pension plan for non-unionized employees of Aveos Fleet Performance Inc. for February 2012 ($254,950.00), March 2012 ($254,950.00) and April 2012 ($90,388.00);

106 *THE WHOLE*, with costs against the Superintendent of Financial Institutions and Aon Hewitt.

Motion dismissed.

FN1 R.S.C., 1985, c. C-36.

FN2 R.S.C. , 1985, c. 32 (2nd Supp.).

FN3 R.S.C., 1985, c. B-3.

FN4 *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.).

FN5 R.S.O., 1990 c. P.10.

FN6 *Pension Benefits Act*, R.S.O. 1990 c. P.8.

FN7 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.).

FN8 *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.).

FN9 Statutes of Canada, Chapter 12, 59 Elizabeth II, 2010 (July 12, 2010).

FN10 *AbitibiBowater inc., Re*, 2009 QCCS 2028 (Que. S.C.) (Mayrand, J.); *Fraser Papers Inc., Re* [2009 CarswellOnt 4469 (Ont. S.C.J. [Commercial List])], 2009 Can LII 39776 (Pepall, J.); *United Air Lines Inc., Re* (2005), 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]) (Farley, J.).

FN11 *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 (S.C.C.) at p. 987; *Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec*, 2005 QCCA 304 (Que. C.A.) , para. 40 and 41.

FN12 *Sun Indalex Finance, op.cit.*, para. 268, LeBel and Abella (dissenting).

FN13 *Royal Bank of Canada vs. Sparrow Electric Corporation, op.cit.*

FN14 *Century Services Inc. vs. Canada (P.G.), op.cit.*

FN15 *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.), para. 20 and 21; see also, *Fraser Papers Inc. (Re), op.cit* .

FN16 *Sun Indalex Finance, LLC vs. United Steelworkers*, *Op.cit.*

FN17 *Sun Indalex Finance, LLC vs. United Steelworkers*, *Op. cit.*, (Deschamps, J. and Moldaver, J.), para. 81 and 82.

FN18 Houlden, Morawetz and Sarra, « *The 2012-2013 Annoted Bankruptcy and Insolvency Act* », Toronto, 2012, p. 2.

FN19 *Royal Bank of Canada vs. Sparrow Electric Corporation, op.cit.*, para. 31.

FN20 R.S.C. , 1985, c. 1 (5th Supp.).

FN21 S.A. 1988 c. P-4.05.

FN22 R.S.C. 1985 c. B-1.

FN23 Gonthier, J. at para. 39 and Iacobucci, J. at para. 98 to 99.

FN24 *Ibid.*

FN25 S.C. 1998, c.19.

FN26 *First Vancouver Finance v. Minister of National Revenue*, [2002] 2 S.C.R. 720 (S.C.C.), para. 28.

FN27 R.S.C. , 1985, c. C-8; amendments at S.C. 1998 c. 19.

FN28 S.C. 1996, c. 23; amendments at S.C. 1998 c. 19.

FN29 R.S.C. , 1985, c. E-15; amendments at S.C. 2000 c. 30.

FN30 *Century Services Inc. vs. Canada (P.G.), op.cit.*

FN31 *Op.cit.*

FN32 *Century Services Inc. vs. Canada (P.G.), op.cit.*, para. 45.

FN33 *Ibid*, para. 96.

FN34 *Ibid*, para. 45.

FN35 *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit.*

FN36 *Sun Indalex Finance, LLC vs. United Steelworkers*, *op.cit.*, para. 81 and 82.

FN37 R.S.O. 1990, Chapter P-8.

FN38 *Sun Indalex Finance, LLC vs. United Steelworkers, op.cit*, para. 51 and 52.

FN39 *Op.cit.*

FN40 Nevertheless, it was held in *Indalex* that any deemed trust would be superseded by the priority accorded to the interim (debtor in possession) lender by the C.C.A.A. judge because of the doctrine of federal paramountcy.

FN41 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.).

FN42 *Century Services Inc. vs. Canada (P.G.), op.cit.*, para. 95.

FN43 *Sproule vs. Nortel Networks Corporation, op. cit.*, para. 45 and 46; *AbitibiBowaters, op.cit.*, para. 49 and 50.

FN44 *Sproule vs. Nortel Networks Corporation, op. cit.*

FN45 *Grant Forest Products Inc. v. GE Canada Leasing Services Co.*, 2013 ONSC 5933 (Ont. S.C.J. [Commercial List]).

FN46 *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]); see also *White Birch Paper Holding Co., Re*, 2012 QCCS 1679 (Que. S.C.), para. 245.

FN47 *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); see also *Baronet inc., Re*, 2008 QCCS 288 (Que. S.C.) (Parent, J.) where a three-month delay in a comeback motion was not considered unreasonable.

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Court of Appeal No. C58638
Court of Appeal File No. M42978
Court File No.: CV-09-8247-00CL

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., et al (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)

COURT OF APPEAL FOR ONTARIO

BOOK OF AUTHORITIESOF THE RESPONDENT WEST FACE CAPITAL INC.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Craig J. Hill
Tel: 416-367-6156
Fax: 416-361-7301
LSUC No. 31888K

Roger Jaipargas
Tel: (416) 367-6266
Fax: (416) 361-7067
LSUC No. 43275C

Lawyers for the Respondent,
West Face Capital Inc.
TOR01: 5646652: v1